

2013

## Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges

Edward C. Dawson

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Law Commons](#)

---

### Recommended Citation

Dawson, Edward C. "Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges." *American University Law Review* 63, no.2 (2013): 307-355.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

---

# Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges

## **Keywords**

Waiver, Parties to actions, Waiver of arbitration clauses, Arbitrators -- Legal status, laws, etc., Courts, Arbitration & award -- United States, Uncertainty -- Social aspects, Courts -- United States, Actions & defenses (Law) -- United States

## ARTICLES

### SPEAK NOW OR HOLD YOUR PEACE: PREARBITRATION EXPRESS WAIVERS OF EVIDENT-PARTIALITY CHALLENGES

EDWARD C. DAWSON\*

*This Article proposes that parties and arbitrators should use, and courts should enforce, express prearbitration waivers of certain evident-partiality challenges as a way to avoid uncertainty and expense caused by widely-acknowledged disarray in the doctrine of evident partiality. Courts considering evident-partiality cases mainly have focused on (and disagreed about) the content of the doctrine and the circumstances in which a party can constructively waive an evident-partiality challenge by failing to object to an arbitrator despite knowing about a particular relationship. Similarly, the academic literature examining evident partiality has focused on the appropriate judicial test for assessing partiality, rules for defining the scope of an arbitrator's duty to disclose, and proposals for reconciling the division in the courts. This Article takes a different approach. It is the first examination of the use of party waivers to cut off judicial evident-partiality challenges and avoid the uncertainties in the doctrine. The solution proposed in this Article is that parties can consensually avoid the current uncertainty over evident-partiality doctrine through express prearbitration agreements to waive certain judicial challenges. This Article explains why using express evident-partiality waivers should be attractive to parties. It also argues that courts should be willing to enforce such waivers under the Federal Arbitration Act. Enforcing them is theoretically consistent with arbitration's fundamental policies of*

---

\* Teaching Fellow and Assistant Professor of Professional Practice, Paul M. Hebert LSU Law Center. Thanks to Ben Aguiñaga for his excellent research assistance, to Professor Bradley Areheart and to participants in a faculty workshop at Paul M. Hebert Law Center for helpful comments, and to the editors and staff of the *American University Law Review* for their work and constructive improvements.

*resolving disputes based on the parties' consent and allowing the parties to choose for themselves the most efficient procedures to resolve their dispute. These policies are strongly reinforced by recent Supreme Court opinions in other areas of arbitration law.*

TABLE OF CONTENTS

Introduction.....	309
I. Evident-Partiality Doctrine: Background and Problem.....	311
A. Evident Partiality and the Arbitration Disclosure Process.....	311
1. Evident-Partiality doctrine: Origins and core content .....	311
2. Evident-partiality process: Arbitrators' disclosures and judicial challenges .....	314
B. Problem: Evident-Partiality Doctrine Is Fractured and Under Increasing Pressure.....	318
1. Disarray in evident-partiality doctrine .....	318
2. Increased pressure on fractured evident-partiality doctrine .....	325
II. Express Waivers of Evident-Partiality Challenges .....	329
A. Proposal and Procedure for Express Prearbitration Waivers of Evident-Partiality Challenges .....	329
B. Express Waivers of Evident-Partiality Challenges Will Be of Great Practical Use and Attractiveness to Parties to Arbitrations.....	332
C. Enforcing Express Waivers Is Theoretically Consistent With Arbitration's Fundamental Policies .....	335
III. Objections and Responses .....	340
A. Waivers Would Thwart the Policy of Full and Fair Disclosure.....	340
B. Waivers Would Sanction Fraud by Arbitrators and Parties.....	343
C. Waivers Would or Should Be Unenforceable Under Statute or Arbitral Rules.....	344
1. Use of express waivers of partiality challenges does not contradict the FAA .....	344
2. Use of express waivers is supported by arbitral rules allowing parties to modify procedures by consent....	347
D. Narrow Waivers Would Not Do Enough and Broad Waivers Would Do Too Much.....	348
E. Narrowing Avenues for Challenging Arbitration Awards Is Generally Undesirable.....	351
Conclusion .....	354

## INTRODUCTION

One of the few ways a losing party can challenge the result of an arbitration in an American court<sup>1</sup> is to argue that the arbitrator displayed “evident partiality” that tainted the arbitration.<sup>2</sup> Evident partiality essentially means that either the arbitrator was actually biased in favor of a party, or there were facts unknown to the parties that could make an objective observer think the arbitrator was biased.<sup>3</sup>

Beyond that essence, however, courts and theorists are and have long been deeply divided about the content and the application of the doctrine of evident partiality, offering different formulations of the evident-partiality test and reaching conflicting results in similar cases.<sup>4</sup> At the same time, judicial reduction of alternative avenues to challenge arbitration awards, such as “manifest disregard” of law or

---

1. This Article focuses on the confirmation of arbitration awards in U.S. federal and state courts, primarily under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2012), and analogous state statutes. Most state arbitration acts are modeled on the FAA, including their evident-partiality provisions. See, e.g., Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit: Round IV*, 35 TEX. TECH L. REV. 463, 501 (2004) (discussing the resolution of arbitration cases through federal and state law). Also, many state courts look to federal jurisprudence, especially U.S. Supreme Court decisions, to interpret their statutes. See e.g., Daiichi Haw. Real Estate Corp. v. Lichter, 82 P.3d 411, 425–34 (Haw. 2003) (surveying Supreme Court jurisprudence to define statutory terms); Burlington N. R.R. v. TUCO Inc., 960 S.W.2d 629, 632–37 (Tex. 1997) (examining Supreme Court jurisprudence and circuit court precedent regarding issues that commonly arise in disputes centered on the arbitrator himself); Richco Structures v. Parkside Vill., Inc., 263 N.W.2d 204, 211–12 (Wis. 1978) (same).

In particular, state courts often interpret evident-partiality doctrine under state statutes by reference to the FAA and federal cases, particularly the Supreme Court’s seminal decision in *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145 (1968). See e.g., *Gonzales v. Interinsurance Exch.*, 148 Cal. Rptr. 282, 285 (Ct. App. 1978) (looking to *Commonwealth Coatings* for guidance on interpretation of California’s arbitrator-bias standard); *Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp.*, 751 A.2d 426, 432 (Del. Ch. 1999) (looking to the FAA and *Commonwealth Coatings* decision for guidance in interpreting meaning of evident partiality under Delaware Uniform Arbitration Act); *Drinane v. State Farm Mut. Auto. Ins. Co.*, 606 N.E.2d 1181, 1184 (Ill. 1992) (applying *Commonwealth Coatings* to interpretation of bias standard under Illinois Uniform Arbitration Act); *TUCO*, 960 S.W.2d at 632–37 (relying upon federal jurisprudence interpreting the FAA and noting how divisions in the federal case law have confused and divided state courts interpreting state statutes). Therefore, this Article analyzes the current divisions in evident-partiality doctrine, and proposes an express-waiver solution, in terms of the generalized doctrine as applied both in federal and state American courts.

2. 9 U.S.C. § 10(a)(2) (allowing judicial vacatur of an arbitration award “where there was evident partiality or corruption in the arbitrators, or either of them”).

3. See *Commonwealth Coatings*, 393 U.S. at 147 (explaining that in addition to meaning actual bias, it also means concealed material information). Evident partiality also includes actual bias, but because most of the litigation and uncertainty in this area involves challenges based on claims of objective impressions or appearances of bias. This Article uses “evident partiality” to refer to those types of challenges. See *infra* note 16 and accompanying text.

4. See *infra* Part I.B.

facts,<sup>5</sup> has increased pressure on the fractured evident-partiality doctrine. “Manifest disregard” refers to the judicially-crafted doctrine allowing vacatur of an award based on the “manifest disregard” of facts or law by the arbitral panel.<sup>6</sup> With greater frequency, disappointed losing parties mount evident-partiality challenges as their best hope for overturning an award. As a result, before an arbitration, parties face significant uncertainty and the unattractive possibility of extended, expensive post-arbitration litigation of an evident-partiality challenge.

While courts and scholars wrestle with defining and rationalizing evident partiality, this Article recommends a different approach: Parties can use express, prearbitration<sup>7</sup> waivers of evident-partiality objections to reduce uncertainty and increase efficiency by foreclosing a large number of the most inefficient type of evident-partiality challenges. The Article’s core argument is that concerned parties can use waivers to avoid the muddle of current evident-partiality doctrine. At the same time, courts should enforce these waivers as consistent with arbitration’s fundamental principles of consensual dispute resolution and procedural efficiency.<sup>8</sup>

After this introduction, Part II gives background about the doctrine of evident partiality, explaining its origins and purposes, and describing the workings of the pre-arbitration disclosure process and post-award judicial evident-partiality challenges. It then introduces the problem caused by current and enduring uncertainties about the content and application of the evident-partiality doctrine, combined with the increased pressure placed on the doctrine’s disuniformities by the judicial elimination or narrowing of other avenues to challenge arbitral awards, such as “manifest disregard.”

---

5. See *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991) (explaining that a finding of manifest disregard requires more than a minor error in the application of law; instead manifest disregard requires, for example, that an arbitrator correctly state the law and then proceed by failing to apply it).

6. See *infra* Part I.B.2.

7. “Prearbitration” is used in this Article to mean “after the arbitration process has begun but before the arbitration hearing,” and not “prior to any arbitration proceedings being initiated.”

8. I encountered the idea for a prearbitration express waiver of evident-partiality while working on one of the cases discussed in this Article, *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, 376 S.W.3d 358 (Tex. App. 2012). In that case, the arbitral panel—specifically, the chief arbitrator, Justice Baker—issued an order stating that the parties had agreed to waive any conflicts. *Id.* at 362. Ultimately, the appellate court reversed the district court’s decision to invalidate the award based upon the theory of “constructive waiver,” see *infra* notes 67–69 and accompanying text, rather than analyzing the waiver order in the arbitral record. *Ponderosa Pine*, 376 S.W.3d at 376. In the interest of full disclosure, I have no financial interest in the outcome of that case, which is now pending before the Texas Supreme Court.

Part III argues that litigants ought to use, and judges ought to enforce, express waivers of evident-partiality objections as a way to avoid the problems created by the current disarray in and pressure on the doctrine. This Part first explains how an express-waiver procedure would work, and focuses on express waivers that would bar evident-partiality challenges based on relationships that are somehow disclosed by the arbitrator prior to the arbitration. It then explains the practical virtues of express waivers to parties by showing how they can greatly reduce the problems and uncertainties created by the current fractures in evident-partiality doctrine. Finally, it offers a theoretical argument for judicial enforcement of these waivers that is rooted in arbitration's fundamental principles of mutual consent and procedural efficiency. This argument is connected to recent Supreme Court jurisprudence in other areas of arbitration law that emphasizes parties' ability and flexibility to determine by consent the procedures that will govern their arbitration.

Part IV addresses potential objections to the use and enforcement of express, pre-arbitration waivers of evident partiality challenges. Among the objections addressed are arguments that enforcing express waivers would create bad incentives for arbitrators to be less than forthcoming in their disclosures, conflict with arbitration statutes or arbitral rules, and worsen the unfairness caused by binding arbitration agreements in consumer and employment law. This Article argues that the proposal is consistent with arbitration statutes and rules. If properly limited to challenges based on disclosed relationships, the proposal has minimal potential for sanctioning fraud or unfairness and would allow the parties a fair amount of flexibility to determine the scope of waivers for themselves. Furthermore, general concerns about the unfairness of certain kinds of arbitration are not a good reason to refuse to enforce the proposed waivers because the current disorder in evident-partiality doctrine is not a good safety valve for unfairness in particular types of arbitration agreements.

## I. EVIDENT-PARTIALITY DOCTRINE: BACKGROUND AND PROBLEM

### A. *Evident Partiality and the Arbitration Disclosure Process*

#### 1. *Evident partiality-doctrine: Origins and core content*

Under most domestic arbitration statutes, including the Federal Arbitration Act, there are only a few prescribed avenues to oppose judicial confirmation of an arbitration award issued by an arbitral

panel.<sup>9</sup> The avenues are limited by design because one of arbitration's most important purposes as an alternative dispute resolution mechanism is to increase efficiency<sup>10</sup>, in part by avoiding, or at least limiting, collateral judicial proceedings to confirm the award.<sup>11</sup>

One of the few available statutory bases for opposing award confirmation in court is a challenge based on "evident partiality," which is the focus of this Article.<sup>12</sup> The statutory evident-partiality doctrine allows a challenger to vacate an award by showing that the arbitrator was biased or was unfit to serve based on facts<sup>13</sup> that would indicate that he might be biased. Since *Commonwealth Coatings Corp. v. Continental Casualty Corp.*,<sup>14</sup> the Supreme Court's first and only

---

9. See, e.g., 9 U.S.C. § 11 (2012) (discussing the procedure for modifying and challenging awards).

10. See, e.g., *Allied-Bruce Terminix Cos., v. Dobson*, 513 U.S. 265, 280 (1995) (describing arbitration as "usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules . . . it is often more flexible in regard to scheduling of times and places of hearings and discovery devices" (quoting H.R. REP. NO. 97-542, at 13 (1982))); R. Wilson Freyer, *Foreclosure by Arbitration?*, 37 PEPP. L. REV. 459, 477 (2010) ("By allowing the parties to select their own decision maker, procedural rules and timetables, and substantive rules of decision, and by according finality to the award, arbitration ostensibly permits parties to create a dispute resolution process that can produce a final result much more rapidly than public adjudication."). But see Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 434 (2000) (arguing that "arbitration's technical advantages" are "seriously eroded"); Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 8 (2010) (noting that it is now common to speak of arbitration as judicialized, formal, costly, time-consuming, and subject to hardball advocacy).

11. See, e.g., *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) ("Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances. That limited judicial review, we have explained, maintain[s] arbitration's essential virtue of resolving disputes straightaway. If parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process." (alteration in original) (citations omitted) (internal quotation marks omitted)); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010) (describing the "high hurdle" challengers must cross to vacate an arbitral award).

12. 9 U.S.C. § 10(a)(2). The other statutory bases for vacatur under the FAA are (1) "where the award was procured by corruption, fraud, or undue means," (2) "where the arbitrators were guilty of misconduct," and (3) "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award on the subject was not made". *Id.* § 10(a)(1), (3)-(4).

13. In theory, the facts must have been unknown to the challenging party until after the arbitration, but in practice there is much division and uncertainty about exactly when an evident-partiality challenge will fail because it is based on "known" facts. *Infra* Part II.B.

14. 393 U.S. 145, 149-50 (1968) ("We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. . . . [A]ny tribunal . . . not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to



decision interpreting this provision, it is clear that evident partiality includes not only actual bias but also an objective “impression of possible bias.” Further, since an “impression of bias” is easier to show than actual bias, most parties raising “evident partiality” challenges focus on trying to show facts that create an impression of bias.<sup>15</sup> This Article similarly focuses primarily on these “objective” evident partiality challenges.

In broad terms, the essential components of an objective evident-partiality challenge are 1) that the arbitrator had a significant relationship with a party or party counsel 2) that could or would have caused an objective observer to think she was biased, and 3) that she did not sufficiently disclose that relationship to allow the other party to make an informed decision to proceed despite the conflict.<sup>16</sup> So, for example, a core case of evident partiality might be one where the arbitrator was a close personal friend of counsel for one of the parties to the arbitration, and entirely failed to disclose that relationship to the opposing party.<sup>17</sup> Beyond these broad terms and the core of factually easy cases, however, there is extensive and longstanding uncertainty as to what suffices to show evident partiality.<sup>18</sup>

---

another.”). For an explanation of the difference between actual bias and impression of bias, see, for example, Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 455 n.47 (1998), which discusses the different standards of proof between “impression of bias” and “actual bias” cases. See also Roger J. Perlstadt, Comment, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 1983, 1996–97 (2002) (noting that although “[t]he text of Section 10 [of the FAA] implies that ‘evident partiality’ must be shown by proof of actual bias,” courts have adopted less stringent standards).

15. See, e.g., Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 548 (2009) (“Proof of actual bias is all but impossible, short of a string of incriminating e-mails, so apparent bias is the only realistic option for establishing that vacatur is warranted.”); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1061–62 (2000) (describing proof of actual bias as “both rare and difficult” as juxtaposed with proof of “evident” bias); see also Eric Lucentini, Comment, *Taking a Fresh Look at Vacatur of Awards Under the Federal Arbitration Act*, 7 AM. REV. INT’L ARB. 359, 362 (1996) (“[I]f a party can show ‘evident partiality’ under the FAA merely by identifying a relationship between an arbitrator and an opposing party, her task will be far easier than if she must show that an arbitrator actually behaved in a partial manner.”).

16. See, e.g., *Commonwealth Coatings*, 393 U.S. at 146–50 (comparing corrupt arbitration proceedings to rulings from a partial court).

17. See, e.g., *Karlseng v. Cooke*, 346 S.W.3d 85, 87–93 (Tex. App. 2011) (holding that the arbitrator was required to disclose his social relationship with an attorney who represented a party to the arbitration).

18. Indeed, almost every component just described is a subject of division and uncertainty, including what is a sufficiently significant relationship to create the impression of partiality, how strong the objective impression has to be to establish evident partiality, and when the arbitrator has disclosed enough about a relationship to prevent it being the basis of a post-award evident-partiality challenge. See *infra* Part I.B.

## 2. *Evident partiality-process: Arbitrators' disclosures and judicial challenges*

The success of any judicial evident-partiality challenge heavily depends on, and is often determined by, the pre-arbitration process for arbitrators to fulfill their duty to disclose any potential conflicts. Arbitrators have a continuing ethical duty to disclose any potential conflicts: material relationships that might give an impression of partiality.<sup>19</sup> Evident-partiality doctrine operates, in part, as a way to police the arbitrator's fulfillment of this duty, since an arbitrator who fails to disclose a significant relationship or fails to disclose it in sufficient detail risks vacatur of the award.<sup>20</sup>

To allow arbitrators to fulfill their duty to disclose, many arbitral rules provide a process for the arbitrator to make these disclosures.<sup>21</sup> They also often provide a process for parties to object to an arbitrator based on information in the disclosures, and for resolving that

---

19. See, e.g., THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II.C, available at [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf) (listing the types of relationships and interests arbitrators must disclose and stating that "[t]he obligation to disclose [these] interests or relationships . . . is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration any such interests or relationships which may arise, or which are recalled or discovered"); see also UNCITRAL ARBITRATION RULES Art. 11 (United Nations Comm'n on Int'l Trade Law 2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> ("An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances."); COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R. 16(a) (Am. Arbitration Ass'n 2009), available at [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004103&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased) ("Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration."); JAMS STREAMLINED ARBITRATION RULES & PROCEDURES R. 12(i) (Judicial Arbitration & Mediation Servs., Inc. 2009), available at <http://www.jamsadr.com/rules-streamlined-arbitration/#Rule12> ("The obligation of the Arbitrator to make all required disclosures continues throughout the Arbitration process.").

20. See, e.g., *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994) (describing how arbitrators' obligations under the evident-partiality doctrine "gives arbitrators an incentive to be forthright with the parties, honestly disclosing what arbitrators might otherwise have an incentive to hide").

21. The disclosure process varies only slightly under various arbitral rules. Compare COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 16 (obligating disclosure to the AAA, which then communicates the information to the parties), with UNCITRAL ARBITRATION RULES Art. 11 (requiring disclosure to the parties and the other arbitrators). Both the AAA and UNCITRAL rules require disclosure of anything that might give rise to "justifiable doubt about the arbitrator's impartiality or dependence" throughout the entire arbitral proceeding. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 16; see also UNCITRAL ARBITRATION RULES Art. 11 (requiring disclosure of "justifiable doubts" of an arbitrator's impartiality).

objection.<sup>22</sup> While there are variations, often the way the disclosure process works is that the arbitrators<sup>23</sup> disclose, and the parties may ask follow-up questions.<sup>24</sup> Then, if neither party objects to any arbitrator's serving, or if a party unsuccessfully challenges one of the panelists, the arbitration proceeds.<sup>25</sup>

In particular, the disclosure process (and the flexibility of that process) may vary depending on whether the arbitration is ad hoc or institutional, a decision made by the parties in their arbitration agreement—that is, the initial contract or contractual clause under which the parties agree to use arbitration to resolve dispute, and specify the rules that will govern any arbitration.<sup>26</sup> Institutional

---

22. See, e.g., UNCITRAL ARBITRATION RULES Art. 12 (detailing the avenues for challenging and removing an arbitrator and explaining reasons for such challenges, including if there are justifiable doubts about the arbitrator's partiality or an arbitrator's failure to act).

23. This supposes that there is a three-arbitrator panel, with two party-nominated arbitrators and a third chosen jointly by the party nominees. See, e.g., *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 146 (1968) (involving an arbitration agreement with this type of procedure). In that scenario, each party will scrutinize the disclosures of its opponent's nominee and the jointly-chosen third. Party-proposed arbitrators may either be neutral or partial, but this Article focuses only on neutrals since evident-partiality challenges can only be made against neutral arbitrators. See, e.g., *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82 (2d Cir. 1984) (discussing the history of evident partiality in the "neutral arbitrator" context established by *Commonwealth Coatings*); Deseriee A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749, 776 (1995) (noting that most courts "refuse to find a non-neutral arbitrator capable of evident partiality as . . . non-neutral arbitrators are permitted to be predisposed toward their nominating party"). There also may be a sole arbitrator (who must always be neutral), in which case both parties will scrutinize his disclosures. See generally Toby Landau, *Composition and Establishment of the Tribunal*, 9 AM. REV. INT'L ARB. 45, 48–58 (1998) (describing the selection and retention of a sole arbitrator).

24. See e.g., *Stone v. Bear, Stearns & Co.*, 872 F. Supp. 2d 435, 440–41 (E.D. Pa. 2012) (noting FINRA instruction to arbitrators to invite questions after disclosure); *McKinney Drilling Co. v. Mach I Ltd. P'ship*, 359 A.2d 100, 102 (Md. Ct. Spec. App. 1976) (demonstrating the court's ability to allow parties to ask further questions about an arbitrator's disclosure); *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, 376 S.W.3d 358, 372 (Tex. App. 2012) (noting parties' ability to ask questions); Ruth V. Glick, *Arbitrator Disclosure: Recommendation for a New UAA Standard*, 13 OHIO ST. J. ON DISP. RESOL. 89, 101 (1997) ("[P]arties may waive objections to the appearance of bias, request more information about the relationship from the arbitrator, or challenge the arbitrator for cause.").

25. Since this Article is about express pre-arbitration waivers of evident-partiality challenges, scenarios in which a party does raise a challenge are not relevant. It is worth noting, however, that raising a prearbitration challenge preserves its challenge for judicial review, and that prearbitration challenges are made and resolved under the applicable arbitral rules. See, e.g., UNCITRAL ARBITRATION RULES Art. 12 (providing procedure for challenging arbitrator).

26. See, e.g., Maya Ganguly, *Tribunals and Taxation: An Investigation of Arbitration in Recent U.S. Tax Conventions*, 29 WIS. INT'L L.J. 735, 740–43 (2011) (explaining this distinction); Llewellyn Joseph Gibbons, *Creating a Market for Justice: A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration*, 23 NW. J. INT'L L. & BUS. 1, 19 (2002) (same).

arbitrations are conducted by organizations (like the American Arbitration Association) that administer the arbitration's procedures, including arbitrator selection, disclosure, and the arbitration itself.<sup>27</sup> They then proceed under the arbitral rules of the administering tribunal.<sup>28</sup> In an ad hoc arbitration, there is no administering organization, and the arbitration is conducted either based on rules specified in the parties' arbitration agreement or by rules agreed to by consent.<sup>29</sup> Ad hoc arbitrations generally allow more procedural flexibility, including in the disclosure process.<sup>30</sup> This Article therefore focuses initially on the more flexible ad hoc arbitration, because this makes it easier to explain the general idea of an express waiver of evident-partiality challenges without bogging down discussing the details of how a waiver might work under various sets of arbitral rules.

After the arbitration is concluded, the losing party may raise an evident-partiality challenge and attempt to persuade a court to vacate the award by showing facts demonstrating the arbitrator's evident partiality.<sup>31</sup> The essence of the challenge will be that the arbitrator had an undisclosed or insufficiently disclosed relationship with a

---

27. See Ganguly, *supra* note 26, at 740 n.26 (citing the American Arbitration Association and London Court of International Arbitration as examples of arbitral institutions); see also William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41, 47 (1996) (including the ICC International Court of Arbitration and the China International Economic and Trade Arbitration Commission as "leading institutions").

28. Ganguly, *supra* note 26, at 740.

29. E.g., Slate, *supra* note 27, at 52–53. The parties may specify free-standing arbitral rules, such as the UNCITRAL rules, see Ganguly, *supra* note 26, at 743, or rules promulgated by an institutional arbitrator, such as the AAA rules. See Slate, *supra* note 26, at 52–53 (explaining preference for institutional rather than ad hoc arbitration). But see Ganguly, *supra* note 26, at 743 ("Because each institution's rules refer to the institution, these rules are not a good choice to use as a model for ad hoc arbitration.").

30. See Ganguly, *supra* note 26, at 740–43 (advantages of an institutional arbitration include administrative execution and oversight by the tribunal, while advantages of an ad hoc arbitration are that is cheaper and more flexible); see also Slate, *supra* note 27, at 52–53 (arguing that institutional arbitration is superior to ad hoc arbitration). Many arbitral rule sets allow parties to modify or supersede procedures by agreement, which would permit use of the waiver procedure described in this Article. See, e.g., JAMS STREAMLINED ARBITRATION RULES & PROCEDURES R. 2 (Judicial Arbitration & Mediation Servs., Inc. 2009) ("The Parties may agree on any procedures not specified herein or in lieu of these Rules . . . . The Party-agreed procedures shall be enforceable as if contained in these Rules.").

31. 9 U.S.C. § 10(a) (2012). See generally Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 78–81 (2005) (describing evident partiality as an avenue for vacatur of an arbitral award).

party or their lawyer (*e.g.*, financial, friendly, or familial) that creates a perception of partiality.<sup>32</sup>

Judicial evident-partiality challenges can be further divided into two broad groups: challenges based on claims that an arbitrator entirely failed to disclose a significant relationship,<sup>33</sup> and challenges based on claims that the arbitrator failed to disclose sufficient facts about a disclosed relationship to apprise the parties of its true significance.<sup>34</sup> As to the latter sort of challenge, most courts hold that a party constructively waives evident-partiality challenges based on relationships or facts it knew about, but did not object to, at the time of the arbitration.<sup>35</sup> Ideally, then, evident-partiality challenges should be about only relationships that the arbitrator should have disclosed, *but did not disclose*, that create the appearance of partiality.<sup>36</sup> However, the content and application of this doctrine of constructive waiver,<sup>37</sup> like the parent doctrine of evident partiality, is unclear, and there are many court cases litigated over whether the arbitrator's disclosure of a relationship was sufficient to trigger a waiver.<sup>38</sup>

When an evident-partiality challenge is raised, there is often significant discovery and litigation inquiring into the sufficiency of the arbitrator's disclosures.<sup>39</sup> The trial court that considers the evident-partiality challenge will decide whether the award should be vacated after weighing the arbitrator's duty to disclose, the scope,

---

32. See, *e.g.*, *Karlseng v. Cooke*, 346 S.W.3d 85, 96 (Tex. App. 2011) (arbitrator had social relationship with attorney who represented a party to the arbitration).

33. See, *e.g.*, *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012) ("Among the circumstances under which the evident-partiality standard is likely to be met are those in which an arbitrator fails to disclose a relationship or interest that is strongly suggestive of bias in favor of one of the parties.").

34. This distinction becomes important when considering the possible scope of an express waiver of evident-partiality objections. See *infra* Parts II.A, III.D-E.

35. See, *e.g.*, *JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 52 (1st Cir. 2003) (holding that a party "which was put on notice of the risk when it signed the contract [and] chose not to inquire about the backgrounds of the Committee members either before or during the hearing" waived the right to challenge the decision based on evident partiality); *Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 593 (8th Cir. 1998) ("While they did not have full knowledge of all the relationships to which they now object, they did have concerns about [the arbitrator's] impartiality and yet chose to have her remain on the panel rather than spend time and money investigating further until losing the arbitration.").

36. See, *e.g.*, *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968) (focusing on an "undisclosed business relationship").

37. Courts discussing this sort of waiver usually simply refer to it as waiver, see, for example, *JCI Commc'ns*, 325 F.3d at 52, but this Article uses the phrase "constructive waiver" to distinguish it from the express waiver endorsed by this Article.

38. See *infra* Part I.B.

39. *E.g.*, *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007) (*en banc*) (decrying the "[e]xpensive satellite litigation" over non-disclosures that stems from evident-partiality objections).

timing, and sufficiency of the disclosure, and the materiality of the undisclosed information.<sup>40</sup> Different courts strike this balance in different ways, resulting in significant divisions in evident-partiality doctrine.<sup>41</sup> The next part examines the divisions in the application of evident partiality and the sub-doctrine of constructive waiver, and the increased pressure placed on these uncertain doctrines by the Supreme Court's reduction in alternative avenues to challenge arbitral awards.

*B. Problem: Evident-Partiality Doctrine Is Fractured and Under Increasing Pressure*

Evident partiality-doctrine is currently both uncertain—with courts widely divided over the content and application of the doctrine—and under increasing pressure. This means that prior to arbitration parties may have well-justified fears that any award they win may be subjected to an extended evident-partiality challenge where the result is unpredictable, and at best there will be expensive, protracted, and intrusive litigation to confirm the award.

*1. Disarray in evident-partiality doctrine*

Evident-partiality doctrine is currently in disarray, with courts disagreeing on how to phrase the evident-partiality standard, among many other subsidiary questions. The confusion over the meaning of evident partiality stems from the Supreme Court first (and only) decision attempting to define the term—the 1968 opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*

There were two leading opinions in *Commonwealth Coatings*, which is one source of the current confusion. Justice Black's "majority"<sup>42</sup> opinion adopted an exacting standard of disclosure that allowed vacatur of an award based on showing a mere "impression of possible bias" and required arbitrators to "avoid even the appearance of bias."<sup>43</sup> Justice White, however, wrote a concurrence that advocated what has been interpreted as a stricter standard requiring not just an

---

40. See e.g., *Scandinavian Reinsurance Co. v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 73–74 (2d Cir. 2012) (weighing these factors); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999) (same).

41. See *infra* Part I.B.

42. Or plurality opinion, depending on whom you ask. See *infra* note 46.

43. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149–50 (1968) ("We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. . . . [A]ny tribunal . . . not only must be unbiased but also must avoid even the appearance of bias.").

appearance of bias, but a reasonable impression of it.<sup>44</sup> His concurrence has grown in influence as courts (particularly federal courts) have become friendlier to arbitration.<sup>45</sup> Lower courts, both federal and state, have disagreed over which opinion to follow and even over whether Justice Black's opinion is actually a majority opinion.<sup>46</sup> They have also differed widely in their interpretation and application of the tests laid out by both opinions.<sup>47</sup> Thus, while there is a core of agreement that evident partiality requires a challenger to prove facts showing some sort of appearance of partiality by the arbitrator,<sup>48</sup> courts do not agree about what formulation of the evident-partiality doctrine will best accomplish its goals.

Part of the reason for this confusion is that there are conflicting goals, or policies, behind evident-partiality doctrine. This tension is reflected in the original *Commonwealth Coatings* division of opinion and the deepening, and increasingly complicated, divisions in lower courts. Policies supporting extensive disclosure (and a correspondingly robust judicial role in invalidating awards for insufficient disclosure) include the basic need for fairness,<sup>49</sup> the

---

44. *Id.* at 150–52 (White, J., concurring); see Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What Is Sufficient to Vacate Award*, 81 ST. JOHN'S L. REV. 203, 209 (2007) (“Because it is generally accepted as a plurality opinion, *Commonwealth Coatings* has left courts free to reject ‘evident partiality’ as the broad ‘appearance of bias’ standard in favor of (what has been interpreted as) Justice White’s more narrow standard requiring disclosure of relationships such that a ‘reasonable person would . . . conclude that an arbitrator was partial.’” (alteration in original) (quoting *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 647 (6th Cir. 2005))).

45. *Commonwealth Coatings*, 393 U.S. at 150–52 (White, J., concurring); *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281–83 (5th Cir. 2007) (analyzing Justice White’s concurrence and other courts’ interpretations of the effect of the concurrence on the majority opinion’s holding); Rogers, *supra* note 31, at 79 (“Judicial fallout from this supreme confusion [over the effect of Justice White’s concurrence on the majority opinion] has been, predictably, even more confused.”). For a general discussion of the broader trend from judicial hostility towards judicial friendliness to arbitration, see Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 553–65 (2005) (describing the change from judicial hostility to a “new, more generous view” of arbitration).

46. *Compare Positive Software Solutions*, 476 F.3d at 282 (“A majority of circuit courts have concluded that Justice White’s [concurring] opinion did not lend majority status to the plurality opinion.”), with *Burlington N. R.R. v. TUCO Inc.*, 960 S.W.2d 629, 633 (Tex. 1997) (criticizing “some lower federal courts” for “treating Justice Black’s opinion as a mere plurality” and rejecting its “suggestion that ‘evident partiality’ is met by an ‘appearance of bias’”).

47. See *infra* notes 61–69 (describing the many judicial points of disagreement about how to interpret and apply evident-partiality doctrine).

48. See *e.g.*, Perlstadt, *supra* note 14, at 1997 (noting that “several circuit courts have adopted a standard somewhere between an ‘appearance of bias’ standard and the ‘actual bias’ standard that the text of Section 10 [of the FAA] implies”).

49. See, *e.g.*, *Barcon Assocs., Inc. v. Tri-Cnty. Asphalt Corp.*, 430 A.2d 214, 218–19 (N.J. 1981) (noting, in vacating the award that “[a] necessary corollary of the fact that arbitrators function with the support, encouragement and enforcement power

desire to have parties prospectively rather than courts retrospectively evaluate the significance of potential conflicts,<sup>50</sup> and the recognition that the perception of fairness is particularly important in arbitration precisely because judicial review is so constrained.<sup>51</sup> Policies supporting a more demanding standard for showing evident partiality include the inefficiency of requiring every arbitrator to disclose her “complete and unexpurgated business biography,”<sup>52</sup> the need for finality,<sup>53</sup> the loss of arbitration’s efficiency advantages if awards are routinely subject to protracted judicial challenges,<sup>54</sup> the desire to limit sandbagging and trumped-up challenges,<sup>55</sup> and the recognition that not all relationships are sufficiently material to create an impression of partiality.<sup>56</sup>

---

of the state is the requirement that they adhere to high standards of honest, fairness and impartiality. . . . [I]t is our strongly held view that honest, fair and impartial arbitration is as important as the finality of arbitration”).

50. See, e.g., *TUCO*, 960 S.W.2d at 635.

51. See *Commonwealth Coatings*, 393 U.S. at 149 (“[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.”). But see *id.* at 150 (White, J., concurring) (“The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges.”).

52. *Id.* at 151 (White, J., concurring).

53. See, e.g., *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007) (warning that awarding vacatur even in cases involving full disclosure might “seriously jeopardize the finality of arbitration”); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir. 1983) (“We do not want to encourage the losing party to every arbitration to conduct a background investigation of each of the arbitrators in an effort to uncover evidence of a former relationship with the adversary. This would only increase the cost and undermine the finality of arbitration, contrary to the purpose of the U.S. Arbitration Act of making arbitration a swift, inexpensive, and effective substitute for judicial dispute resolution.”); see also Rogers, *supra* note 31, at 117 (“Proponents of broadened disclosure obligations emphasize the need for ‘impartiality’ or ‘fairness,’ while opponents emphasize the potential to undercut finality . . .”).

54. E.g., *Merit Ins. Co.*, 714 F.2d at 683 (describing vacatur as “open[ing] a new and, we fear, an interminable chapter in the efforts of people who have chosen arbitration and been disappointed in their choice”).

55. See, e.g., *Positive Software Solutions*, 476 F.3d at 285 (“Just as happened here, losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made.”); *Nat’l Wrecking Co. v. Int’l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993) (“Parties . . . cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in federal court. We will not tolerate such sandbagging.”).

56. E.g., *Scandinavian Reinsurance Co. v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 75 (2d Cir. 2012) (encouraging focus on “how strongly th[e] relationship tends to indicate the possibility of bias in favor of or against one party, and not on how closely that relationship appears to relate to the facts of the arbitration”).



Courts attempting to balance these goals,<sup>57</sup> with the confused guidance of *Commonwealth Coatings* as their lodestar, have struck the balance in different ways. Some emphasize keeping arbitrators honest through searching judicial inquiry into the sufficiency of disclosures, and a rule requiring arbitrators to err on the side of disclosure.<sup>58</sup> Others emphasize preserving finality, recognizing that the losing party has different incentives than prior to the arbitration and will often seize on facts or potential conflicts that seemed (or would have seemed) insignificant pre-arbitration in hopes of overturning the award.<sup>59</sup> There is some agreement at the core, but at the margins (and they are fairly wide margins), courts disagree.

The result is that the doctrine of evident partiality is inconsistent and divided by multiple splits among courts, which the Supreme Court has not yet resolved or granted certiorari to resolve. The federal circuits have an acknowledged split over how to phrase the basic evident-partiality test, specifically a disagreement about whether evident partiality requires a mere appearance of bias or a more robust reasonableness standard.<sup>60</sup> They also vary on both sides of the

---

57. See, e.g., *Burlington N. R.R. v. TUCO Inc.*, 960 S.W.2d 629, 632–37 (Tex. 1997) (undertaking a broad survey of cases concerning arbitrators' duty to disclose and noting that "the competing goals of expertise and impartiality must be balanced").

58. See, e.g., *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1111 (9th Cir. 2007) (quoting favorably Justice White's concurrence in *Commonwealth Coatings* encouraging arbitrators to err on the side of disclosure); *U.S. Wrestling Fed'n v. Wrestling Div. of AAU, Inc.*, 605 F.2d 313, 319 (7th Cir. 1979) (same); see also Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit: Round IV*, 39 TEX. TECH L. REV. 463, 487 (2007) ("Disclosure solves the problem of the incentive for losing parties to engage in 20-20 hindsight after an arbitration award by investigating arbitrators' backgrounds to uncover evidence of conflicts of interest.").

59. See, e.g., *Hobet Mining, Inc. v. Int'l Union, United Mine Workers*, 877 F. Supp. 1011, 1019 (S.D.W. Va. 1994) (characterizing a post-award challenge as an "inappropriate attempt to seek a 'second bite at the apple' because of dissatisfaction with the outcome"); *Daiichi Haw. Real Estate Corp. v. Lichter*, 82 P.3d 411, 434 (Haw. 2003) (refusing to endorse a "wait and see" approach to challenging the arbitration decision).

60. Compare *Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994) (requiring only a mere appearance of bias for vacatur of award), and *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982) (same), with *Health Servs Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992) (citing *Florasynt, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984)) (requiring more than a mere appearance of bias for vacatur of award), *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989) (same), and *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir. 1996) (describing the standard as "[a] reasonable impression of bias"). See generally *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995) (noting, understatedly, that "there is some uncertainty among the courts of appeals about the holding of *Commonwealth Coatings*"); *Rossein & Hope*, *supra* note 44, at 212–13 (noting the federal circuit split between "appearance or impression of bias" and "a more narrow reasonableness standard, requiring 'more than a mere appearance of bias'").

split in how they apply the standard.<sup>61</sup> State courts similarly differ with one another, and with federal courts (including sometimes federal courts in the state's own circuit), about what is necessary to show evident partiality.<sup>62</sup>

Beyond the basic disagreement over how to phrase the standard, numerous other points of disagreement or confusion infect evident-partiality doctrine. Courts disagree about whether an evident-partiality challenge can be sustained based on facts not known by the arbitrator, and correspondingly whether arbitrators have any duty to search for unknown conflicts such that an award can be vacated if they fail to discover one.<sup>63</sup> Courts disagree about whether there is independent significance to facts indicating that an arbitrator intended to mislead through her disclosures.<sup>64</sup> They disagree whether the fact of nondisclosure itself suffices to establish evident partiality without reference to the materiality of the information.<sup>65</sup>

---

61. *Compare* *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013) (defining evident partiality as a situation in which a reasonable person "would have to conclude" that an arbitrator was partial to one party to an arbitration), *CI Commc'ns, Inc. v. Int'l Bhd. of Electrical Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003) (same), *and* *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (same), *with* *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283 (5th Cir. 2007) (advocating a "reasonable impression of bias" standard that is "interpreted practically rather than with utmost rigor"), *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 750 (8th Cir. 2003) (defining evident partiality as a situation where a reasonable person "could assume" that the arbitrator had improper motives (quoting *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 501 (4th Cir. 1999))), *and* *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002) (defining evident partiality as information which "would lead" a reasonable person to believe that a potential conflict exists).

62. *See, e.g.*, *Amoco D.T. Co. v. Occidental Petrol. Corp.*, 343 S.W.3d 837, 842–44 (Tex. App. 2011) (explicitly rejecting the Fifth Circuit's interpretation of "evident partiality" in *Positive Software Solutions* in favor of the Texas Supreme Court's interpretation in *TUCO*).

63. *Compare* *Schmitz*, 20 F.3d at 1049 (holding that an award may be vacated for nondisclosure if those facts create a "reasonable impression of partiality" even where such facts are unknown to the arbitrator), *with* *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996) ("[W]e explicitly hold that there is no duty on an arbitrator to make any such investigation."), *and* *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312–13 (D.C. Cir. 1998) (holding that there is no independent duty to investigate under the FAA where the arbitrator is unaware of the undisclosed facts).

64. *Compare* *Craig v. Barber*, 524 So. 2d 974, 978 (Miss. 1988) ("Evident partiality has objective and subjective components."), *with* *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 139 (2d Cir. 2007) (stating that "subjective good faith is not the test").

65. *Compare* *Burlington N. R.R. v. TUCO Inc.*, 960 S.W.2d 629, 636 (Tex. 1997) ("We emphasize that this evident partiality is established from the *nondisclosure itself*, regardless of whether the nondisclosed information necessarily establishes partiality or bias."), *with* *Scandinavian Reinsurance Co. v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 77 (2d Cir. 2012) ("The nondisclosure does not by itself constitute evident partiality.").

They also disagree about what kind of relationship between arbitrator and party or counsel is sufficiently material or significant to show evident partiality.<sup>66</sup>

In addition to the primary uncertainty over what the evident-partiality standard should be, there is also significant uncertainty about the ancillary doctrine of constructive waiver. That is, they disagree about how much knowledge is sufficient to put a party “on notice” of a relationship such that any post-award evident partiality objection based on that relationship will be constructively waived.<sup>67</sup> Courts generally agree that a party can waive an evident-partiality objection by failing to object to a conflict that the arbitrator disclosed, but they differ widely as to what counts as “knowing” about the relationship. They take different positions about how much information a party must have about a potential conflict before it will constructively waive judicial challenge based on that conflict by proceeding with the arbitration without objecting.<sup>68</sup> This means that after the arbitration, a winning party may face a challenge based on a relationship that was in some way disclosed before the arbitration. The winning party may then have to defend against arguments that the arbitrator failed to disclose sufficient details about the relationship to apprise the losing party of its significance or materiality.<sup>69</sup>

---

66. See Lee Korland, Comment, *What An Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act*, 53 CASE W. RES. L. REV. 815, 826–27 (2003) (noting that “courts have also struggled to generate guidelines for determining what types of relationships and how proximate connections must be to warrant vacating an arbitration award”).

67. See, e.g., *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) (holding that the waiver doctrine applies where a party has constructive knowledge of a potential conflict, yet fails to object prior to the arbitration decision).

68. Compare *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1359 (6th Cir. 1989) (holding that the successful party may not rely on the failure to object for bias unless “[a]ll the facts now argued as to [the] alleged bias were known . . . at the time the joint committee heard their grievances” (alterations in original) (quoting *Early v. E. Transfer*, 699 F.2d 552, 558 (1st Cir. 1983))), with *JCI Commc’ns, Inc. v. Int’l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 52 (1st Cir. 2003) (holding that a party “which was put on notice of the risk when it signed the contract [and] chose not to inquire about the backgrounds of the Committee members either before or during the hearing” waived the right to challenge the decision based on evident partiality), and *Kiernan v. Piper Jaffray Cos., Inc.*, 137 F.3d 588, 593 (8th Cir. 1998) (“While they did not have full knowledge of all the relationships to which they now object, they did have concerns about [the arbitrator’s] impartiality and yet chose to have her remain on the panel rather than spend time and money investigating further until losing the arbitration.”).

69. See, e.g., *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, 376 S.W.3d 358, 362–63 (Tex. App. 2012) (considering a losing party’s challenge to the sufficiency of the details of the relationships the arbitrator disclosed); *Applied Indus. Materials Corp. v. Ovular Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 135 (2d Cir. 2007) (same); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 496 (4th Cir. 1999) (same).

Given the longstanding, wide-ranging, and intractable judicial division over evident-partiality doctrine, scholars have also weighed in, cataloging these divisions and attempting to resolve them by rationalizing or reforming the doctrine.<sup>70</sup> Proposals have included a reasonableness standard requiring more than a mere appearance of bias,<sup>71</sup> a standard requiring disclosure of “any facts that would lead a person to entertain a reasonable doubt of the arbitrator’s neutrality,”<sup>72</sup> and a complete restructuring of the doctrine to abandon “value-laden, yet indeterminate terms such as ‘impartial’ or ‘independent.’”<sup>73</sup> None of these proposals, however, has carried the day in the courts, and so the meaning of evident partiality remains in judicial and theoretical disarray.<sup>74</sup> While there have been efforts to convince the U.S. Supreme Court to take up a case to resolve these confusions,<sup>75</sup> the Court has so far declined.

---

70. See, e.g., David J. Branson, *American Party-Appointed Arbitrators—Not the Three Monkeys*, 30 U. DAYTON L. REV. 1 (2004) (suggesting a balance between the international arbitration model of appointing “sympathetic” arbitrators and the American arbitration model of appointing “partisan” arbitrators); Glick, *supra* note 24, at 100 (proposing the adoption of a “basic standard of pre-arbitration disclosure” modeled after the ABA/AAA code of ethics); David Allen Larson, *Conflicts of Interest and Disclosures: Are We Making a Mountain Out of a Molehill?*, 49 S. TEX. L. REV. 879 (2008) (analyzing how Federal Arbitration Act standards can be applied when a neutral arbitrator fails to make an adequate disclosure of evident partiality); David J. McLean & Sean-Patrick Wilson, *Is There a Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 PEPP. DISP. RESOL. L.J. 167, 176–77 (2008) (addressing factors parties should consider when examining the role of neutral and party-appointed arbitrators); Rogers, *supra* note 31 (suggesting that current standards governing arbitrator conduct are insufficient and arbitral institutions should adopt and enforce a code of ethics against arbitrators); Rossein & Hope, *supra* note 44 (advocating a shift from onerous disclosure requirements to a reasonableness standard for disclosure); Kirill Kan, Note, *The Importance of FINRA’s Arbitrator Selection Process and Clarity in the “Evident Partiality” Standard in the Wake of Morgan Keegan*, 18 FORDHAM J. CORP. & FIN. L. 167 (2012) (suggesting mechanisms such as a screening process that FINRA could implement to eliminate arbitrators who have presided over similar product or firm cases); Korland, *supra* note 66 (proposing that a party able to demonstrate that an arbitrator “made a reasonable investigation of potential conflicts” would have an affirmative defense to preserve an arbitral award); Kathryn A. Windsor, Comment, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 SETON HALL CIR. REV. 191 (2009) (indicating that an arbitrator should have an affirmative duty to investigate any potential conflicts before the arbitration to avoid lengthy processes to examining the adequacy of the disclosure).

71. Rossein & Hope, *supra* note 44, at 253–55.

72. Glick, *supra* note 24, at 101.

73. Rogers, *supra* note 31, at 81.

74. See, e.g., McLean & Wilson, *supra* note 70, at 176–77 (“Much to the frustration of arbitrators and practitioners everywhere, the vague ‘impression of possible bias’ test that the Court adopted in *Commonwealth Coatings* has been found difficult to define in practice.”).

75. E.g., *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278 (5th Cir.), *cert. denied*, 551 U.S. 1114 (2007).

In short, evident-partiality doctrine is quite confused, as courts and scholars acknowledge.<sup>76</sup> As a result, a party preparing to arbitrate faces serious uncertainty about how courts might resolve an evident-partiality challenge to the arbitral award, with the outcome of the challenge depending heavily on the jurisdiction where it is heard, as well as on the competence of the trial court in understanding and applying the confused body of evident-partiality law.<sup>77</sup>

## 2. *Increased pressure on fractured evident-partiality doctrine*

While evident-partiality doctrine has long been divided, the narrowing or elimination of alternative avenues to challenge arbitral awards has placed increased pressure on the fractures in the doctrine. As alternative avenues narrow or disappear, losing parties increasingly focus on evident partiality (and its uncertainty) as their best hope for challenging undesired results.<sup>78</sup>

---

76. See, e.g., *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 251–54 (3d Cir. 2013) (noting the “confusion” stemming from the *Commonwealth Coatings* decision and choosing to follow a line of cases applying a “reasonable person” standard); *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 983 (8th Cir. 2001) (“The absence of a consensus on the meaning of evident partiality is evidenced by the approaches adopted by the different circuits.”).

77. Some of this uncertainty might be reduced by the inclusion of venue provisions in parties’ arbitration agreements that specify a court or jurisdiction in which any challenge to an arbitral award must be heard. Not all (or even most) agreements have venue provisions. Without a venue provision, confirmation/vacatur proceedings can be brought anywhere venue is otherwise proper under the federal rules. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 199–200, 202–04 (2000) (holding that the FAA’s venue provisions are permissive; therefore, a subsequent motion can be brought in the district where award was given or in any district according to the federal venue state). Thus, prearbitration, parties cannot know which federal court, in what circuit, with which evident-partiality standard, will adjudicate award confirmation. Furthermore, in many situations, confirmation/vacatur proceedings can be brought in state court with no possibility of removal. See, e.g., *Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp.*, 27 F.3d 911, 915 (3d Cir. 1994) (“[T]he Arbitration Act does not supply federal jurisdiction where it does not otherwise exist.”); Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 169 (2002) (“[W]hile the ‘primary purpose’ of the FAA was to make arbitration agreements enforceable in federal court, a secondary purpose was to make arbitration agreements enforceable in state court.”). Thus, parties also face uncertainty about the version of the evident-partiality standard that will be applied to their award when state and federal courts in a single state apply different versions of the evident-partiality doctrine. Compare *Positive Software Solutions*, 476 F.3d at 283 (adopting more lenient standard that overlooks “a trivial or insubstantial prior relationship” and interprets the “reasonable impression of bias” standard . . . practically rather than with utmost rigor”), with *Burlington N. R.R. v. TUCO Inc.*, 960 S.W.2d 629, 636 (Tex. 1997) (adopting a stricter standard that allows evident partiality to be established “from the nondisclosure itself, regardless of whether the nondisclosed information necessarily establishes partiality”).

78. See, e.g., Will Pryor, *Alternative Dispute Resolution*, 65 SMU L. REV. 247, 252 (2012) (noting evident partiality-based motions to vacate arbitration awards have been rising in recent years); see also Aaron-Andrew P. Bruhl, *The Unconscionability*

Courts, led by the U.S. Supreme Court, have steadily reduced other avenues to challenge arbitral awards.<sup>79</sup> Most notably, the Supreme Court recently cast severe doubt on, and nearly eliminated, the judicially-crafted doctrine allowing vacatur of an award based on the “manifest disregard” of facts or law by the arbitral panel.<sup>80</sup> Manifest disregard allowed overturning arbitration decisions on substantive grounds, though the standard was high.<sup>81</sup> But, in *Hall Street Associates v. Mattel*,<sup>82</sup> the Court held that parties may not contractually agree to expand the judicial scope of review of arbitration awards beyond that provided in the FAA.<sup>83</sup> In doing so, the opinion casts serious doubt on the viability of the judicially-crafted “manifest disregard” ground for challenging an arbitral award.<sup>84</sup>

---

*Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1422 (2008) (“Because the Supreme Court has embraced arbitration much more firmly than have some other parts of the judicial system, there is a sort of hydraulic pressure in the system that will seek release through whatever channel still exists for invalidating, or at least limiting, arbitration agreements.”).

79. See, e.g., *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (contracting the manifest disregard doctrine as grounds for vacatur); *Taylor v. Univ. of Phoenix/Apollo Grp.*, 487 F. App’x 942 (5th Cir. 2012) (requiring a nexus between the alleged fraud and the arbitrator’s decision—not just the existence of fraud—to justify vacatur under the FAA); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 819–20 (D.C. Cir. 2007) (requiring that the objecting party show it was deprived of a fundamentally fair hearing for vacatur under the FAA). The decisions narrowing avenues to challenge arbitral awards are part of a broader trend led by the Supreme Court to restrict attempts to escape or avoid arbitration. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (enforcing class-arbitration waiver); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (same); see also Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL’Y 1187, 1222 (2013) (highlighting the current Supreme Court’s “consistent decisions in favor of the FAA’s broad pro-arbitration policy”).

80. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 584–85 (2008).

81. See e.g., *Kurke v. Oscar Gruss and Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006) (emphasizing that manifest disregard is a demanding standard requiring proof that arbitrators blatantly disregarded facts or law applicable to the case); *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 799, 802 (8th Cir. 2004) (same); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003) (same); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001) (same).

82. 552 U.S. 576 (2008).

83. *Id.* at 586.

84. See, e.g., MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S.C. L. REV. 407, 424–33 (2010) (describing the circuit split concerning whether manifest disregard lives after *Hall Street* and suggesting that even though the doctrine survives, it remains unworkable and should be replaced); Karen A. Lorang, Comment, *Mitigating Arbitration’s Externalities: A Call for Tailored Judicial Review*, 59 UCLA L. REV. 218, 228–29 (2011) (“The Fifth, Eighth, and Eleventh Circuits have read *Hall Street* to completely eliminate judicially created grounds for vacatur, including manifest disregard. In contrast, the Second, Seventh, and Ninth (and perhaps the Tenth) Circuits have held that the doctrine survives.” (footnotes omitted)).

In addition to the decline of manifest disregard, other decisions have tightened statutory avenues for vacatur other than evident partiality.<sup>85</sup> Disappointed losing parties are left with fewer options, and in many jurisdictions, no options at all, to challenge awards based on substantive disagreement with the decision.<sup>86</sup> At the same time, evident-partiality doctrine has not yet been subjected to this same sort of clarification and constriction by the Supreme Court, and instead is in great disarray.<sup>87</sup> These pressures appear to be resulting in an increasing number of evident partiality challenges in court.<sup>88</sup>

Because of the reduction in other avenues to challenge arbitral awards, and the uncertainty about the content and application of the doctrine of evident partiality, losing parties have a strong incentive to raise evident-partiality challenges to awards in hopes of uncovering undisclosed relationships or additional facts about disclosed

---

85. See, e.g., Stanley A. Leasure, *Vacatur of Arbitration Awards: The Poor Loser Problem or Loser Pays?*, 29 U. ARK. LITTLE ROCK L. REV. 489, 506–09 (2007) (discussing the available grounds for vacatur under the FAA, and noting that “federal courts have taken a narrow view in interpreting ‘undue means,’” “most courts have been reluctant to vacate an arbitration award on the statutory basis of fraud,” and that vacatur due to arbitrator misconduct is typically only possible upon clear proof of “bad faith or gross error”); see also Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1108–16 (2009) (detailing the increasing difficulty of successfully vacating an award under statutory and non-statutory grounds for vacatur).

86. The trend towards limiting ways to challenge arbitral awards has become more common: courts have slowly eliminated or narrowed doctrines that held that parties could not waive access to a judicial forum to pursue certain types of claims. See, e.g., Bruhl, *supra* note 78, at 1431–32 (tracing expansion of arbitration to include statutory causes of action). Together, these trends comprise a broader movement of increasing judicial friendliness towards arbitration, or sweeping more claims into arbitration and reducing ways to challenge the results); David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 KAN. L. REV. 723, 724–25 (2012) (explaining and critiquing the increased burden on plaintiffs to demonstrate that “they cannot vindicate their federal statutory rights in arbitration” before seeking judicial review); see also, *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (reading the FAA, in an opinion by Justice Brennan, to embody “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary”); Bruhl, *supra* note 78, at 1426–29 (describing the Supreme Court’s transformation of the FAA into “the broadly sweeping, muscular statute we know today”); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. L. REV. 91, 93–94 (2012) (discussing the judiciary’s shift from hostility to arbitration towards a “judicial policy favoring arbitration”).

87. See *supra* Part I.B.

88. Westlaw searches for all cases mentioning the phrase “evident partiality (a crude way to measure how often the issue is litigated) turn up 3,517 cases overall. Of these, 1,371 were in the 2000s, as compared to 736 in the 1990s and 398 in the 1980s—roughly doubling every decade. Moreover, the trend seems to be accelerating: in the three years from 2010-2013, there were 604 such cases, which is on pace to reach over 2000 cases by the conclusion of the decade.

relationships.<sup>89</sup> Winning parties face the prospect of litigation to preserve the award that will be costly and protracted at best.<sup>90</sup> At worst, an evident-partiality challenge may result in invalidation of the award, even in circumstances where many other courts would have confirmed it. Losing parties face the long-shot prospect of spending a great deal of time and money to try to escape an award. Moreover, arbitrators face the prospect of time-consuming and unpleasant investigations into their dealings and background, which may have a broader chilling effect on arbitrators' willingness to serve.<sup>91</sup> Further, this effect will be most pronounced for arbitrators with the most expertise in the area of the dispute, because these arbitrators will be more likely to have material connections in the area or industry. This means that the "best" (defined as most experienced) arbitrators will be the ones most dissuaded from serving.<sup>92</sup>

In short, the uncertainty and division over evident partiality presents a serious practical problem for parties to arbitrations and for arbitrators. Courts and scholars have recognized this confusion, but they have yet to provide a satisfying and reassuring resolution.<sup>93</sup> Instead of offering another attempt to rationalize or conform the evident-partiality doctrine, this Article suggests an alternative approach that should have great practical attractiveness to parties and does have sound theoretical justifications. Parties can make

---

89. See Pryor, *supra* note 78, at 252 (noting that challenging the adequacy of arbitrator disclosures is the most popular means for challenging arbitrator partiality).

90. See, e.g., Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 780–81 (2003) ("Because the FAA specifically allows federal court challenges to arbitration awards where the arbitrator was not impartial, any actual or apparent bias leads to costly litigation—the very result both parties are seeking to avoid. An arbitration award tainted by evident partiality will be overturned in post-award litigation, further increasing dispute resolution costs to the parties." (footnote omitted)). Costs can include litigation and discovery in the trial court as well as one or more rounds of appellate litigation to overturn the initial judicial ruling.

91. See, e.g., *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285–86 (5th Cir. 2007) (concluding that holding arbitrators to a "higher ethical standard than federal Article III judges" would deter the "best lawyers and professionals" from serving as arbitrators, thus eliminating the expertise demanded in arbitrations).

92. *Id.* at 285–86 ("Arbitration would lose the benefit of specialized knowledge, because the best lawyers and professionals, who normally have the longest lists of potential connections to disclose, have no need to risk blemishes on their reputations from post-arbitration lawsuits attacking them as biased.").

93. See, e.g., *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 251 (3d Cir. 2013) (stating that "[t]he first order of business is to define 'evident partiality' under the Federal Arbitration Act" which is plagued with "confusion"); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 97–98 (1992) ("The *Commonwealth Coatings* decision is confusing. . . . Lower courts have struggled with the 'less than clear [evident partiality] standard' of *Commonwealth Coatings*." (footnote omitted)).



express waivers of evident-partiality objections before arbitration begins, which courts can and should enforce, to cut off evident-partiality objections in ensuing litigation to confirm the award. In the next part, I explain how express waivers of evident-partiality objections would work, and argue for their practical advantages and theoretical justifications.

## II. EXPRESS WAIVERS OF EVIDENT-PARTIALITY CHALLENGES

### A. *Proposal and Procedure for Express Prearbitration Waivers of Evident-Partiality Challenges*

The basic idea is straightforward: after the arbitrators have made disclosures, and the parties have been given the opportunity to ask follow-up questions,<sup>94</sup> the parties can agree to an express, binding waiver of evident-partiality challenges in any ensuing judicial proceeding to confirm or vacate the award.<sup>95</sup> The details of the

---

94. See, e.g., *Stone v. Bear, Stearns & Co.*, 872 F. Supp. 2d 435, 440–41 (E.D. Pa. 2012) (finding that FINRA instructed its arbitrator to “disclose [a] potential conflict as broadly as you can and then invite . . . questions” (internal quotation marks omitted)); *McKinney Drilling Co. v. Mach I Ltd. P’ship*, 359 A.2d 100, 102 (Md. Ct. Spec. App. 1976) (evaluating a party’s objection to an AAA arbitrator, the AAA’s subsequent decision to overrule the objection, and the party’s request for and the court’s granting of an order permitting the parties to ask questions of the arbitrator concerning a prior relationship); *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, 376 S.W.3d 358, 372 (Tex. App. 2012) (holding that “a few basic and obvious questions posed to [the arbitrator] when the disclosure was received would have added the very information that they are now complaining about”).

95. The express-waiver idea is not analyzed at any length in either academic literature or case law. The idea of a waiver is mentioned in one article recommending new guidelines for arbitrator disclosures, but the focus in that article (as in other articles) is on rethinking or adjusting the disclosure standard. Glick, *supra* note 24, at 101 (“If these disclosures are made at the time of appointment, parties may waive objections to the appearance of bias, request more information, . . . or challenge the arbitrator for cause. This should eliminate many post-arbitration challenges for arbitrator nondisclosure.”). Another article addresses and endorses the idea of parties agreeing to limit judicial review and notes specifically that such “exclusion agreements” are enforceable under British law, but that “this trend is yet to cross the Atlantic into the United States.” Kenneth M. Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. ON DISP. RES. 337, 357–60 (2000). There is also some indication in court decisions that arbitral panels are attempting to use such waivers in practice, but there are no decisions specifically analyzing the enforceability of such a waiver. See, e.g., *Ponderosa Pine Energy*, 376 S.W.3d at 362 (“Additionally, at the urging of [arbitrator] Justice Baker, the order contained a waiver of conflicts provision in which the parties and the arbitrators confirmed that they . . . knowingly waive any and all conflicts of interest and/or potential conflicts of interest . . . .”); see also *Cozzolino v. Cozzolino*, No. L-10417-10, 2012 WL 6097090, at \*6 (N.J. Super. Ct. App. Div. Dec. 10, 2012) (holding that the parties’ signature to “the pre-hearing arbitration order, which stated that ‘[t]he parties waive any and all rights of appeal or to in any way challenge the Arbitrator’s decision, which shall be conclusive and final in all respect[s]’” constituted a waiver of appeal (alterations in original) (emphasis added)). Nor are there any judicial decisions specifically considering the

waiver and waiver process may vary based on the procedures the parties have agreed to (in an *ad hoc* arbitration), or on the governing arbitral rules. The basic proposal is that arbitrators and parties can and should use express waivers to cut off some or all judicial evident-partiality challenges.

Procedurally, the waiver process would take place at the conclusion of the arbitral disclosure process, but before the beginning of the hearing.<sup>96</sup> The waiver could take several forms. The parties themselves could each sign a joint filing indicating that they waive any evident-partiality objection. Or, the arbitrators might issue a prehearing order declaring that the parties have confirmed they have no objections based on evident partiality, and have the parties sign this order to demonstrate their consent to the waiver.<sup>97</sup> In a “live” arbitration, the arbitrators might simply ask the parties on the record whether they agree to waive any objections based on evident partiality, and secure verbal responses for the transcript.

In general, implementing the waiver through the parties’ express written consent is more desirable because it more firmly grounds the waiver (like the arbitration itself) in the mutual written agreement (contract) of the parties.<sup>98</sup> Although the formality of the waiver perhaps should not matter,<sup>99</sup> a court might well disagree. Instead, a court may be more likely to enforce a signed party waiver as opposed to a mere verbal indication in the transcript of proceedings before

---

enforceability of such a waiver in the evident-partiality context. *But see* Westinghouse Elec. Corp. v. N.Y.C. Transit Auth., 14 F.3d 818, 822–23 (2d Cir. 1994) (upholding arbitral clause that limited judicial review to an “arbitrary and capricious” standard).

96. *See* Rossein and Hope, *supra* note 44, at 204–06 (explaining arbitrators’ disclosure obligations and how the arbitration disclosure process works).

97. *See, e.g.,* Cozzolino, 2012 WL 6097090, at \*6 (upholding a prehearing arbitration order drafted by the plaintiff’s attorney stating that the parties waive their rights to appeal or challenge the arbitrator’s decision). The arbitrators probably could not and should not simply issue an order stating that evident-partiality challenges will be waived because parties have not raised any objections. Such a waiver would likely be unenforceable because it would be untethered from the principle of party consent that is the root of the theoretical justification for enforcing express waivers, as well as the theoretical justification for binding arbitration in general. Instead, the case would likely be analyzed as a constructive-waiver case, which is exactly what the express-waiver proposal seeks to give parties a way to avoid. *See* ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 496–502 (4th Cir. 1999) (ignoring institutional arbitrator’s pre-arbitration opinion that an evident-partiality challenge to a particular, disclosed relationship would be waived); *see also infra* Part II.C.

98. *See infra* Part III.C (discussing the importance of the parties’ consent in providing the theoretical justification for enforcing the waiver).

99. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011) (“[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”).

the panel, or (especially) a unilateral statement by the arbitrator(s) that the parties agreed to a waiver.<sup>100</sup> In particular, since the jurisprudence upholding arbitration agreements focuses not just on the parties' consent, but on the parties' contract,<sup>101</sup> the more the waiver looks like a contract, the likelier it is that courts would be untroubled about enforcing it.<sup>102</sup>

As to the scope of the waiver, it could take narrower or broader forms. Parties could narrowly agree to waive an evident-partiality objection only as to relationships revealed in the arbitrator's disclosures.<sup>103</sup> Alternatively, parties could broadly agree to waive *all* evident-partiality objections, including any based on relationships completely undisclosed by the arbitrator. While both forms of waiver might be enforceable, the narrower form will likely be more attractive to parties, and more likely to be enforced by courts. It is less likely and more problematic that parties would want to forego evident-partiality objections based on relationships that the arbitrator entirely failed to disclose, or especially actively concealed.<sup>104</sup> Further, courts would likely be more reluctant to enforce such a waiver, even if the parties' consent was plain, when a party was entirely unaware of a potentially relevant relationship. This Article therefore focuses primarily on the practical attractions and theoretical justifications for this narrower form of waiver.<sup>105</sup>

---

100. See, e.g., *ANR Coal Co.*, 173 F.3d at 496–502 (analyzing waiver based on constructive waiver doctrine when there was not a signed party writing confirming the waiver).

101. See, e.g., *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring) (noting that “arbitration is a creature of contract”); *infra* Part III.C (discussing the Supreme Court's recent arbitration jurisprudence and its emphasis on enforcing the parties' contract).

102. While it would be necessary to secure the parties' express consent to the waiver, arbitrators might persuade the parties to agree to the waiver by asking the parties to either raise a challenge or agree to a waiver before the arbitration can proceed. Indeed, it is the arbitrator's duty to “conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.” THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon I(F). Of course, “an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes.” *Id.* at Canon IV(F). However, the Code of Ethics explicitly provides “it is not improper for an arbitrator to suggest . . . other dispute resolution processes.” *Id.* While caution would be necessary, arbitrators could at least encourage parties to agree to waive partiality objections.

103. See *infra* Part III.D (addressing the argument that this narrow type of waiver would not do much to reduce collateral evident-partiality litigation).

104. See *id.* (considering the implications and analysis of a broader, blanket waiver of evident-partiality challenges, and recommending against such an approach).

105. See *id.* (discussing the potential for flexibility in the scope of the waiver, based on the parties' mutual agreement).

B. *Express Waivers of Evident-Partiality Challenges Will Be of Great Practical Use and Attractiveness to Parties to Arbitrations.*

Express waivers of evident-partiality challenges based on relationships somehow disclosed (i.e., “narrow” waivers) would have significant usefulness and value to parties. They would eliminate challenges to a relationship disclosed by the arbitrator based on arguments that the arbitrator failed to provide enough details of the relationship or sufficiently disclose facts indicating its materiality.<sup>106</sup> It would require parties to speak up or hold their peace—i.e., object, or waive—as to any problems they have with relationships that have been disclosed by the arbitrator, balancing their desire to complete arbitration and the general perceived desirability of the panel against any concerns they might have based on the disclosures. It would foreclose collateral litigation during the award-confirmation process over whether the objecting party constructively waived the objection, and dispel uncertainty due to courts’ division over what constitutes a constructive waiver.<sup>107</sup> Instead, the reviewing court could simply review the arbitrator’s disclosure and the express waiver, and if the relationship that is the basis of the evident partiality challenge is one that was present in the arbitrator’s disclosure, it can reject the evident-partiality challenge without more inquiry. Instead of being adrift in the “murky waters” of evident-partiality doctrine,<sup>108</sup> parties will be in the clear safe harbor of mutual waiver.<sup>109</sup>

---

106. These sorts of challenges are a fairly common type of evident-partiality litigation. *See, e.g.*, *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, 376 S.W.3d 358, 361 (Tex. App. 2012) (losing party challenged the sufficiency of the arbitrator’s disclosure of details about the challenged relationship); *see also* *Applied Indus. Materials Corp. v. Ovular Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 136, 139 (2d Cir. 2007) (same); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 496 (4th Cir. 1999) (same); Will Pryor, *Alternative Dispute Resolution*, 65 SMU L. REV. 247, 252 (2012) (“The most popular means of proving evident partiality is to challenge the adequacy of the disclosures made by the arbitrator prior to confirmation.”).

107. *See, e.g.*, *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) (holding that the waiver doctrine applies where a party has constructive knowledge of a potential conflict, yet fails to object prior to the arbitration decision); *JCI Commc’ns, Inc. v. Int’l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 52 (1st Cir. 2003) (concluding that a party waived its evident partiality complaint when it “was put on notice of the risk” when it signed a contract providing for an industry-represented arbitration panel and “chose not to inquire about the backgrounds of the Committee members either before or during the hearing”); *see also supra* notes 67–69 and accompanying text (examining courts’ divisions over the doctrine of constructive waiver).

108. Perlstadt, *supra* note 14, at 1997 (“In navigating these murky waters, several circuit courts have adopted a standard [of evident partiality] somewhere between an ‘appearance of bias’ standard and the ‘actual bias’ standard . . .”).

109. Of course, the parties after the fact will have very different degrees of happiness about being in that safe harbor, but this is a “feature, not a bug.” *See generally* John A. Robertson, “Paying the Alligator”: *Precommitment in Law, Bioethics, and*

An express waiver will allow the parties, *ex ante*, to greatly reduce the potential for costly and time-consuming post-award litigation before the award is finally confirmed. Arbitrators can be reassured that if they mention a relationship in their disclosure, and truthfully answer any follow-up questions, they will not be subjected to a post-award investigation designed to make them look at best professionally negligent and at worst dishonest and partial.<sup>110</sup>

Further, there is actually a significant practical likelihood that parties would agree to such a waiver. In general, before arbitration, the parties have significantly different incentives than afterwards, when the losing party will usually want to overturn the award by any means available.<sup>111</sup> After a loss, facts or potential conflicts that were insignificant and untroubling before the arbitration began become reeds to clutch in hopes of overturning the award.<sup>112</sup> Conversely, before an arbitration hearing, a party will have a much stronger incentive to forego post-award collateral challenges for the sake of efficiency, and for the sake of allowing the arbitration to proceed.<sup>113</sup> This is especially true as to disclosed relationships about which the party might not have all the details, but about which it feels relatively untroubled at the time the arbitration begins; that is, relationships covered by the narrower type of waiver mentioned above.<sup>114</sup>

Thus, the waiver would operate to foreclose challenges in precisely the cases where cutting off challenges is most desirable. In other words, a party will more likely agree to the waiver in cases when, *ex ante*, it has fewer “real” concerns about a relationship disclosed by the arbitrator before the arbitration. Waivers will thus greatly reduce challenges that are manufactured after the arbitration by a party that

---

*Constitutions*, 81 TEX. L. REV. 1729, 1729–38 (2003) (analyzing the advantages and limits of precommitment behavior—whose “hallmark” is “the intention to restrict future options”—across a variety of legal disciplines); *see also infra* notes 115–118, 148 and accompanying text.

110. *See, e.g.*, *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285–86 (5th Cir. 2007) (noting the potential for chilling effects on arbitrators from routine judicial evident-partiality challenges).

111. *See, e.g.*, Huber, *supra* note 59, at 487 (describing the *ex post* “incentive for losing parties to engage in 20-20 hindsight after an arbitration award by investigating arbitrators’ backgrounds to uncover evidence of conflicts of interest”).

112. *See, e.g.*, *Positive Software Solutions*, 476 F.3d at 285 (“Just as happened here, losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made.”).

113. *See generally* Reuben, *supra* note 15, at 962–64 (suggesting that arbitration’s strengths as a flexible, efficient alternative to dispute resolution focused on finality may contribute to arbitration’s drawbacks as a private process that leads parties to forego some “public law rights”).

114. *See supra* Part III.A.

is casting about for a way to escape an undesirable award.<sup>115</sup> This solution will reduce, if not eliminate, the common practice of a party keeping an evident-partiality challenge in its back pocket for later judicial proceedings rather than raising or investigating it further before the arbitration begins.<sup>116</sup> Conversely, a party with legitimate qualms about a disclosed relationship will be highly motivated to ask any follow-up questions it has before agreeing to a waiver, to find out whether there is anything to be truly concerned about before it proceeds.

Thus, using narrow express waivers of evident-partiality challenges will be an effective way to cull the most undesirable and inefficient evident-partiality challenges from the judicial system.<sup>117</sup> Parties will be spared having to await a court decision about whether the relationship was significant, whether additional details about the relationship were necessary to accurately convey its significance, whether it matters if the arbitrator knew all the details, and whether the relationship in all of its detail would create a mere appearance or a reasonable impression of bias. These are all questions whose resolution would be uncertain because of the fractures and divisions of evident-partiality doctrine.<sup>118</sup>

Further, parties may have other incentives to agree to such a waiver. The arbitrators might make moving forward with the arbitration conditional on agreement to a waiver. Parties would be placed under pressure to either agree to the waiver, ask any further questions about the arbitrator's disclosures it desires, challenge the arbitrator (with the delay and risk<sup>119</sup> that entails), or go through the trouble, time, and expense of finding a different panel. Parties might

---

115. See, e.g., *Positive Software Solutions*, 476 F.3d at 284–85 (holding that an undisclosed “slender connection” between the arbitrator and one of the parties in the case did not warrant dismissal of the award).

116. See, e.g., *id.*; *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993) (“Parties . . . cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in federal court. We will not tolerate such sandbagging.”).

117. See *Positive Software Solutions*, 476 F.3d at 285 (criticizing evident-partiality challenges in which the challenger likely would not have found the information objectionable if it had asked questions to elicit it).

118. See *supra* Part II.B (detailing the current judicial division on each of these points).

119. See *ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 496 (4th Cir. 1999) (noting party's argument that it had declined to raise a challenge because “a failed challenge could potentially offend the ‘neutral’ arbitrator as a challenge to his integrity.”; see also John G. Keolit & John S. Jiernan, *THE LITIGATION MANUAL: PRETRIAL 19* (ABA 1999) (“If you fail, after having challenged a judge on the basis of bias, the judge would indeed need to be a saint not to harbor some abiding ill will. . . . [S]urely the recusal motion is a risky way of achieving an uncertain end.”); Omar Little, *The Wire, Lessons* (HBO 2002) (“You come at the king, you best not miss.”)).

choose to agree to such a waiver as a precommitment strategy to signal to their opponent (or themselves) their confidence or seriousness about winning the arbitration.<sup>120</sup>

In sum, the *ex ante* pressures, incentives, and circumstances parties face will often induce them to agree to a waiver, which is enforceable *ex post* after the losing party's incentives have changed and the party looks for a way to escape the award. The parties will thus be spared time and expense litigating evident partiality in an award-confirmation proceeding. In addition, courts will be spared having to preside over proceedings that amount to an extended postmortem on the arbitral disclosure process.<sup>121</sup> At a minimum, courts may be able to dispose of these challenges more quickly, a goal that courts on different sides of the evident partiality division have proclaimed they share.<sup>122</sup>

*C. Enforcing Express Waivers Is Theoretically Consistent With Arbitration's Fundamental Policies*

Express-partiality waivers are not only practically attractive, but there is a strong theoretical basis for courts enforcing them rooted in the underlying policies supporting arbitration itself. The fundamental theoretical policy justification for arbitration is that it allows parties to consensually choose an alternative dispute resolution mechanism that is more efficient, flexible, and final than court proceedings.<sup>123</sup> While the efficiency of arbitration is disputed,<sup>124</sup> it is clear that the fundamental justification for enforcing arbitration agreements is that parties may choose arbitration for themselves based on that belief.<sup>125</sup> At the most basic level, the essential

---

120. See, e.g., Robertson, *supra* note 109, at 1731 ("Cortés burned his boats in Mexico to prevent his or his soldiers own cowardice at the same time that he signaled to the Aztecs that his men would not back down.").

121. *Positive Software Solutions*, 476 F.3d at 285.

122. Compare *id.* (justifying its approach to evident partiality on the grounds of not wanting to encourage judicial evident-partiality challenges), with *Burlington N. R.R. v. TUCO Inc.*, 960 S.W.2d 629, 637 (Tex. 1997) (justifying its full-disclosure/err-towards-disclosure approach on the grounds that it will keep courts from having to decide disclosure challenges).

123. E.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

124. See *supra* note 10 (contrasting the perceived benefits and perceived pitfalls of arbitration to show that there is a lack of consensus on arbitration's appeal).

125. See, e.g., *Concepcion*, 131 S. Ct. at 1748 ("The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) ("In bilateral arbitration, parties forgo the

justification for arbitration is consent—the parties’ agreement to resolve their disputes in an arbitral forum.<sup>126</sup> The corollary of this policy is that, once the parties have chosen to arbitrate, they can and should be bound by that choice, and its accompanying consequence of foregoing the process and procedure of a judicial forum.<sup>127</sup>

Further, as recent Supreme Court decisions have made clear, this principle of agreement/consent extends to the enforcement of party agreements about certain procedural rights or vehicles in the arbitration, most notably class arbitration.<sup>128</sup> The Court has not addressed evident partiality since 1968, but it has been very active in resolving other arbitration-related issues, and the Roberts Court in particular has taken a strong interest in arbitration.<sup>129</sup> Thus, it is worth looking to these decisions to see how they support the proposal to use express waivers to avoid protracted collateral evident-partiality litigation.<sup>130</sup>

---

procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”); Freyermuth, *supra* note 10, at 477 (“The most evident objective sought by parties in choosing arbitration is efficiency.”).

126. See *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (upholding the Circuit Court’s decision that the parties were bound to their arbitration agreement because Congress did not “preclude a waiver of judicial remedies for the statutory rights at issue”); *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 803 (Tex. App. 2004) (“Arbitration is founded upon the consent of parties to forego their right to litigate disputes in our court system and instead submit them to a private decisionmaker.”).

127. See, *e.g.*, *Stolt-Nielsen*, 130 S. Ct. at 1773–74 (“Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. . . . In this endeavor, as with any other contract, the parties’ intentions control.” (internal quotation marks omitted)).

128. See, *e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (enforcing class-arbitration waiver); *Concepcion*, 131 S. Ct. at 1748, 1752 (2011) (holding that class-wide arbitration contradicts the purposes of the FAA); *Stolt-Nielsen*, 130 S. Ct. at 1775 (holding that a party may not be compelled to submit to class arbitration if there is no contractual basis for concluding that the party agreed to do so).

129. See, *e.g.*, Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 KAN. L. REV. 795, 796–99 (arguing that the Supreme Court’s “love affair” with arbitration over the past three decades has led to a series of crucial decisions that began in 1983 and has accelerated under the Roberts Court).

130. The Roberts Court’s arbitration cases have been heavily criticized for misreading the FAA and creating unfairness for consumers. See generally, *e.g.*, George A. Bermann, *Arbitration in the Roberts Supreme Court*, 27 AM. U. INT’L L. REV. 893 (2012) (criticizing the Roberts Court’s recent arbitration decisions as detrimental to consumers); Jean R. Sternlight, *Tsunami: ATT Mobility LLC v. Concepcion Impedes Access To Justice*, 90 OR. L. REV. 703 (2012) (describing how the Court’s *Concepcion* decision would “provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued”). For a brief discussion of whether the use and enforcement of express waivers is undesirable in



While the consent principle has long been a bedrock of the modern Court's arbitration jurisprudence,<sup>131</sup> the Court's recent decisions in cases addressing class arbitration have been particularly emphatic about grounding arbitration in the parties' mutual consent, and binding the parties to the terms of their agreements.<sup>132</sup> In that line of recent decisions, the Court has held that parties may not be forced to submit to class arbitration unless they agree to it,<sup>133</sup> and that when they agree in the arbitration contract to forego class arbitration, they will be held to that agreement,<sup>134</sup> but that when they agree to let the arbitrator decide whether the arbitration agreement allows class arbitration, they will be held to that agreement as well.<sup>135</sup> Taken together, then, these decisions confirm the Supreme Court's guidance that the parties' agreement controls—courts should enforce arbitral parties' agreements about the procedures that will be used in the arbitration, including agreements to waive procedural rights,<sup>136</sup> but parties must expressly agree to the use of a disputed procedural vehicle before they will be held to it.<sup>137</sup> These decisions support this Article's argument that courts should enforce parties' agreements to use a waiver procedure and forego evident-partiality challenges, as well as this Article's argument that express waivers are a better alternative to the currently more common constructive-waiver doctrine and analysis.

While most of these decisions focus on the terms of the parties' arbitration agreement itself,<sup>138</sup> the important distinction for purposes of this Article is between the parties' prior consent to terms

---

light of these broader critiques of the trend towards making arbitration harder to escape and awards harder to challenge, see *infra* Part III.E.

131. See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion . . ."); but see Reuben *supra* note 15, at 1003–06 (arguing that since arbitration is enabled by state action, it should be subject to due process constraints).

132. See, e.g., *Stolt-Nielsen*, 130 S. Ct. at 1774–75 ("It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.")

133. *Id.* at 687 (2010).

134. *Am Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013).

135. *Oxford Health Plans*, 133 S. Ct. at 2071.

136. This would include both the right to class arbitration in *Italian Colors Restaurant*, 133 S. Ct. at 2309, and the right to object to the arbitrator's determination that the contract allows class arbitration in *Oxford Health Plans*, 133 S. Ct. at 2071.

137. *Stolt-Nielsen*, 588 U.S. at 684.

138. The exception is *Oxford Health Plans*, which enforced the parties' agreement after arbitration had begun to let the arbitrator decide whether the arbitration contract allowed class arbitration. 133 S. Ct. at 2071.

governing the arbitration, and one party's attempt to escape those terms after the fact.<sup>139</sup> The Court's recent decisions rejecting such attempts strongly support the idea that courts should similarly enforce the parties' mutual consent, before the arbitration, to forego certain evident-partiality challenges in subsequent judicial proceedings to confirm the award.<sup>140</sup>

Using and judicially enforcing express waivers of evident partiality objections to disclose relationships furthers these fundamental theoretical justifications and policy goals, as explained in the Supreme Court's decisions. Like arbitration itself, evident-partiality waivers are consent-based. The parties can mutually agree to prospectively forego uncertain and expensive evident-partiality challenges, just as they can choose by their arbitration agreement to forego more elaborate judicial process, to adopt a particular arbitral rule set to govern their dispute, to exclude certain sorts of procedures in the arbitration,<sup>141</sup> to designate an institution (or none) to conduct the arbitration, and so on. Further, the principle extends to the enforcement of agreements made by the parties not only in the arbitration agreement itself, but also after an arbitration is initiated under the agreement.<sup>142</sup> Among the Court's recent decisions, *Oxford Health Plans* makes this most clear. This case held that when the parties consented after the arbitration had started to let the arbitrator decide whether class arbitration was allowed under the agreement, they could and should be held to that consent and bound to the arbitrator's ruling that it was allowed.<sup>143</sup> Similarly, courts can and should enforce evident-partiality waivers agreed to after arbitration proceedings begin, but before the arbitration hearing occurs.

---

139. It is possible that the express-waiver procedure could be specified in the parties' arbitration agreement itself, though I believe that would be less desirable than a waiver agreed to after disclosures but before the arbitration begins, because the consent to the waiver would be more informed and meaningful. *See infra* Part III.E (suggesting that consent between parties is more meaningful when agreed upon before arbitration has begun).

140. *See generally* Curtin, *supra* note 95, at 367 (arguing that "the contractual limitation of judicial review tends to promote the overall goals of both the FAA and the New York Convention").

141. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) (enforcing parties' agreement disallowing class arbitration). *But see generally* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 493–96 (arguing that courts' interpretation of FAA to allow parties to create their own procedural regimes violates Constitution's nondelegation doctrine).

142. *See, e.g.*, *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2066 (2013) (holding that class arbitration is allowed when arbitration agreement was silent on the question but the parties agreed to let the arbitrator decide whether class arbitration was allowed).

143. *Id.*

The express-waiver concept is not only supported by the jurisprudence, but also finds support in many arbitral rules, which allow the parties to modify the arbitral procedures by mutual consent.<sup>144</sup> These general provisions allowing for modification by consent would on their face allow parties to adopt this Article's proposal for a prearbitration procedure to agree to a waiver. They also implicitly support the idea that the waiver should be enforced in court, as part of the broader judicial willingness to allow parties to choose their own arbitration procedures, and enforce those choices in court.<sup>145</sup>

In addition, the use of waivers also promotes efficiency, flexibility and finality—all among the principal policy justifications for arbitration.<sup>146</sup> Using express waivers allows parties to opt out of the judicial disarray over evident-partiality doctrine, and the associated costs of protracted, expensive, and uncertain evident-partiality challenges in much the same way that arbitration doctrine writ large allows parties to opt out of the costs and inefficiencies of litigation.

Further, since the waiver would be agreed to only after the parties were satisfied that they had no objections to the arbitrator's serving based on anything disclosed by the arbitrator, there would be correspondingly little loss in the way of fairness or fullness of disclosure.<sup>147</sup> Put another way, the parties would get the disclosure they want, and save a great deal of anguish and expense on the back end after the award is issued.<sup>148</sup>

---

144. See, e.g., JAMS STREAMLINED ARBITRATION RULES & PROCEDURES R. 2 (Judicial Arbitration & Mediation Servs., Inc. 2009); UNCITRAL ARBITRATION RULES Art. 1 (United Nations Comm'n on Int'l Trade Law 2010), (“[D]isputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.”); UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION art. 19(1) (United Nations Comm'n on Int'l Trade Law 2006), *available at* [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (“Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”).

145. See, e.g., *Am. Express Co.*, 133 S. Ct. at 2308 (rejecting the notion that courts may invalidate arbitration agreements on the grounds that they do not permit class arbitration of a federal-law claim); *Oxford Health Plans*, 133 S. Ct. at 2066 (explaining that class arbitration is a matter of consent with limited judicial review). *But see* Horton, *supra* note 141, at 495 (criticizing this phenomenon).

146. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (listing “lower costs, greater efficiency and speed” as the purposes of arbitration); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir. 1983) (describing the FAA's purpose as “making arbitration a swift, inexpensive, and effective substitute for judicial dispute resolution.”); Freyermuth, *supra* note 10, at 477 (“The most evident objective sought by parties in choosing arbitration is efficiency.”).

147. See *infra* Part III.A (discussing that parties would have an opportunity to ask questions regarding an arbitrator's partiality).

148. Of course, after the fact, the losing party will likely regret having given away the right to mount an evident partiality challenge. See generally Robertson, *supra* note

## III. OBJECTIONS AND RESPONSES

A. *Waivers Would Thwart the Policy of Full and Fair Disclosure*

One likely objection to the use of express waivers is that allowing waivers will thwart the policy of full and fair disclosure by arbitrators, which is the most important aspect of the doctrine of evident partiality.<sup>149</sup> Some courts, particularly those invalidating an award for evident partiality, emphasize that a policy of full disclosure is the most important rationale for the evident-partiality doctrine.<sup>150</sup> Often, these courts state that under a proper reading of evident partiality, and the underlying full-disclosure policy, arbitrators should err on the side of the disclosure rather than nondisclosure.<sup>151</sup>

This policy is the counterweight to the policies of efficiency and finality that support limiting the avenues for arbitral challenge and for imposing a high bar on arbitration challenges,<sup>152</sup> including evident partiality.<sup>153</sup> Many full-disclosure courts argue that

---

109, at 1735 (“At Time 2 one must ‘pay the alligator,’ even if one has second thoughts about the earlier choice and wishes a different commitment had been made.”). But the main point is that much like arbitration itself, using express waivers can harness the parties’ ex ante eagerness for a final and efficient resolution of their dispute to limit the ex post availability of means to challenge the result, with an overall increase in efficiency in dispute resolution. In addition, the losing party will save itself, in a way, from the expense and time spent pursuing an evident-partiality challenge. *Id.*

149. *See, e.g.*, *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 78 (2d Cir. 2012) (acknowledging “the importance of timely and full disclosure by arbitrators”); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1111 (9th Cir. 2007) (“[T]he ‘arbitration process functions best’ where early and full arbitrator disclosure fosters ‘an amicable and trusting atmosphere’ conducive to ‘voluntary compliance with the decree.’” (quoting *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 151 (1968) (White, J., concurring))).

150. *See, e.g.*, *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994) (overturning an award, and holding that “[r]equiring arbitrators to make investigations in certain circumstances gives arbitrators an incentive to be forthright with the parties, honestly disclosing what arbitrators might otherwise have an incentive to hide”).

151. *See, e.g.*, *Burlington N. R.R. v. TUCO Inc.*, 960 S.W.2d 629, 637 (Tex. 1997) (“While a neutral arbitrator need not disclose relationships or connections that are trivial, the conscientious arbitrator should err in favor of disclosure.”).

152. *See, e.g.*, *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (“Under the FAA, courts may vacate an arbitrator’s decision only in very unusual circumstances. That limited judicial review, we have explained, maintain[s] arbitration’s essential virtue of resolving disputes straightaway. If parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process.” (alterations in original) (citations omitted) (internal quotation marks omitted)); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767 (2010) (“Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle.”).

153. *See, e.g.*, *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir. 1983) (discussing the narrow standards for judicial intervention of the arbitration process even when losing parties bring evident-partiality challenges).

requiring robust up-front disclosure (with vigorous policing of that disclosure in court) is not only fairest but also most efficient. They argue that the best way to reduce inefficient judicial evident-partiality challenges is a pro-disclosure rule, on the theory that if arbitrators understand that they should err on the side of disclosure, they will consistently do so and courts will have to do less post-award policing of the disclosure line.<sup>154</sup>

Based on these policies, it might be argued that allowing or encouraging express waivers is counter-productive insofar as these waivers undermine the policies of full, fair, and up-front disclosure. If waivers were common, arbitrators could withhold relevant information in their disclosures, safe in the knowledge that the parties will have waived any ability to challenge their service for evident partiality based on the withheld information.

There are a few satisfactory responses to this objection, however. One is that arbitrators already have an independent ethical duty to make full and fair disclosures,<sup>155</sup> which they would be violating by withholding information from their disclosures to parties to an arbitration. In addition, arbitrators also have strong reputational incentives to be forthcoming in their disclosures. An arbitrator who is thought of as partial, and especially one who is perceived to be dishonest in disclosure, is unlikely to be a very popular arbitrator.<sup>156</sup>

Further, the waiver procedure described above actually would increase the fullness and fairness of disclosures, in a way specifically targeted to the parties' actual concerns.<sup>157</sup> That is, routine use of an express-waiver procedure in arbitrations would focus the parties' attention more intently on the arbitrator's disclosures, and lead them to elicit follow-up information about relationships that might bother them, precisely because they know that failure to investigate will mean giving up their opportunity to challenge the arbitrator based on the relationship. Express waivers would focus the parties'

---

154. See, e.g., *TUCO*, 960 S.W.2d at 637 (“The rule of full disclosure minimizes the role of the judiciary, vesting greater control in the parties who have chosen the arbitration process. If faithfully adhered to, it will ultimately lead to fewer post-decision challenges to awards based on bias or prejudice.”).

155. See *supra* note 19 (finding examples of ethical rules or canons prescribing this duty from various different arbitration rules).

156. See, e.g., *Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994) (“[A]rbitrators [are] selected because of their reputations for truth and fairness and for their expertise.”).

157. See *supra* Part II.A (suggesting that waivers would incentivize parties to look into arbitrator's potential partiality prior to arbitration); see also *TUCO*, 960 S.W.2d at 637 (implying that the goal of the disclosure rule should be to “vest[] greater control in the parties who have chosen the arbitration process”).

attention on the disclosure process in a way the currently muddled doctrine of constructive waiver cannot.<sup>158</sup>

Express waivers will also increase efficiency in a way that a full-disclosure rule will not. Despite what some courts have said, the idea that erring on the side of disclosure will reduce judicial evident-partiality challenges seems to simply be incorrect, as even jurisdictions endorsing a “full disclosure” standard experience a great deal of litigation and uncertain results.<sup>159</sup>

Finally, in addition to noting that using express waivers will not thwart the policy of fair disclosure, it is important to note that there are other policy goals to be served besides simply requiring absolute disclosure, as some versions of the evident-partiality doctrine seem to encourage.<sup>160</sup> Disclosure takes time and has costs<sup>161</sup>, and policies of efficiency and finality argue against a disclosure standard that requires close judicial scrutiny or whether the arbitrator disclosed as much as possible.<sup>162</sup> A rule that requires total and fulsome disclosure opens the door to evident-partiality challenges that are merely arguments about whether the arbitrator gave enough details about a relationship, and originate from disappointment with the result.<sup>163</sup>

In contrast, a procedure of disclosure, follow-up, and sealing the disclosure process with a waiver allows the parties to choose their own

---

158. See *supra* notes 67–69 and accompanying text (noting current uncertainty in constructive waiver doctrine).

159. For example, the Texas Supreme Court’s assertion that a “rule of full disclosure minimizes the role of the judiciary,” *TUCO*, 960 S.W.2d at 637, seems to be belied by the amount of evident-partiality litigation brought in Texas courts (and reaching Texas’s appellate courts) under *TUCO*’s rule. See, e.g., *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, 376 S.W.3d 358 (Tex. App. 2012) (entertaining an evident-partiality challenge even after full disclosure by an arbitrator); *Karlseng v. Cooke*, 346 S.W.3d 85, 87–93 (Tex. App. 2011) (remanding arbitration award after finding of evident-partiality); *Skidmore Energy, Inc. v. Maxus (U.S.) Exploration Co.*, 345 S.W.3d 672 (Tex. App. 2011) (accepting an arbitration award as valid and binding over objections by the losing party); *Amoco D.T. Co. v. Occidental Petrol. Corp.*, 343 S.W.3d 837 (Tex. App. 2011) (overturning a binding arbitration award based on evident-partiality).

160. See, e.g., *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1111 (9th Cir. 2007) (“While we are cognizant of the public interest in efficient and final arbitration, we believe that a rule encouraging arbitrators to err on the side of disclosure is consistent with that interest.” (internal quotation marks omitted)); *TUCO*, 960 S.W.2d at 637 (“While a neutral arbitrator need not disclose relationships or connections that are trivial, the conscientious arbitrator should err in favor of disclosure.”)

161. See, e.g., *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 151 (1968) (White, J., concurring) (“[The arbitrator] cannot be expected to provide the parties with his complete and unexpurgated business biography.”).

162. See *supra* notes 49–59 and accompanying text (explaining these competing policies and courts’ attempts to balance them in the evident-partiality case law).

163. See, e.g., *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999) (“The approach proposed by ANR would permit a ‘disgruntled party’ to seize upon an undisclosed relationship ‘as a pretext for invalidating the award.’”).

level of scrutiny into details, and then closes the door on judicial challenges attempting later to argue that more should have been provided. The other interests at stake, including the policies of efficiency, certainty, and finality, can outweigh the policy goal of total disclosure, or at least they should be allowed to outweigh it when the parties themselves so choose, based on the fundamental arbitral principle of consent.<sup>164</sup> That is, the express-waiver procedure allows the parties to consensually balance the competing policies for themselves, rather than being at the mercy of the courts' confused and confusing attempts to do so. This is wholly consistent with the more basic principle that arbitration should be promoted as a way for parties to similarly, by mutual consent, avoid the vagaries, expenses, and uncertainties of judicial proceedings in general.<sup>165</sup>

*B. Waivers Would Sanction Fraud by Arbitrators and Parties*

A related, and perhaps more serious objection, is that waivers would not only discourage full disclosure, they would allow and sanction fraud on the part of arbitrators. That is, if waivers were commonly used and enforced by courts, arbitrators could willfully withhold material information about their relationships with parties, or even deliberately omit them entirely, tricking unsuspecting parties who would then be stuck with the waiver even if they later discovered the fraud. While most evident-partiality cases indicate that at most an arbitrator was remiss or less than forthcoming in their disclosures, there are some cases with facts strongly suggesting that the arbitrator and one party were indeed willfully deceiving the other party.<sup>166</sup> Further, it could be argued that if waivers became more common, arbitrators would become more brazen, because they would be less likely to be caught and held to account.

There are two compelling responses to this objection. One is that fraud is itself an enumerated ground for challenging an arbitral

---

164. See *supra* Part II.C (explaining the fundamental role of consent in providing theoretical justification for the enforcement of express waivers of evident-partiality challenges).

165. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").

166. See, e.g., *Karlseng v. Cooke*, 346 S.W.3d 85, 87–93 (Tex. App. 2011) (arbitrator—a former judge—failed to disclose his relationship with one of the parties' attorneys and introduced himself to the attorney at the arbitration hearing as if he were a stranger even though the attorney and arbitrator had a close, extensive personal friendship that included the attorney giving valuable gifts to the arbitrator).

award under the FAA.<sup>167</sup> Another is that use of “narrow” waivers endorsed by this Article would be much less likely to sanction fraud, because such waivers would only waive challenges based on relationships that were disclosed by the arbitrator.<sup>168</sup> The ability to perpetrate a fraud would be much reduced, and much riskier, if the arbitrator attempted to do so by making a partial or misleading disclosure of a material relationship, because the attempt to mislead could be easily uncovered by a party’s asking questions about it.<sup>169</sup>

*C. Waivers Would or Should Be Unenforceable Under Statute  
or Arbitral Rules*

Another potential objection is that express waivers of evident-partiality objections would be forbidden or unenforceable under statute or under specific arbitral rule sets. However, the FAA does not prohibit the practice, and the statute’s purposes, as read in the most recent decisions of the Supreme Court, seem instead to encourage it. Similarly, the practice would not be at odds with most arbitral rules, and many arbitral rule sets explicitly allow or encourage express waivers.

*1. Use of express waivers of partiality challenges does not contradict the FAA*

Nothing in the FAA expressly forbids parties from agreeing to waive a challenge based on evident partiality. Nor is there any language in the statute expressly authorizing such waivers.<sup>170</sup> The question, then, is whether the statute should be read to forbid or authorize such waivers, and the better view is that it does not forbid them.<sup>171</sup>

Courts should not read into the FAA a prohibition on such waivers for the reasons of practical usefulness and theoretical soundness that are explained above.<sup>172</sup> Moreover, the constructive-waiver doctrine

---

167. 9 U.S.C. § 10(a)(1) (2012) (allowing vacatur “where the award was procured by . . . fraud”).

168. See *supra* notes 104–106 and accompanying text (discussing the difference between narrower and broader forms of waiver).

169. See, e.g., *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, 376 S.W.3d 358, 372 (Tex. App. 2012) (holding that “a few basic and obvious questions posted to [the arbitrator] when the disclosure was received would have adduced the very information that they are now complaining about”).

170. In contrast, the English Arbitration Act of 1996, c. 23, §§ 5, 6(1), 69(1) (Eng.), does have express language allowing parties to waive (in writing) the right to judicial review. See generally Curtin, *supra* note 95, at 358 (examining the use and enforcement of these “exclusion agreements” under English law).

171. See Curtin, *supra* note 95, at 367 (arguing that contractual limitation of judicial review is consistent with the purposes of the FAA).

172. See *supra* Part II.



that is already applied and enforced by most courts (albeit inconsistently) implies that courts have already concluded that parties *can* waive an objection based on evident-partiality.<sup>173</sup> There is no principled reason that parties should not be able to achieve expressly by mutual consent what they may do constructively and unilaterally by failing to timely object.<sup>174</sup>

Instead, limiting the scope of judicial challenge to arbitration awards by mutual agreement is supported by recent Supreme Court decisions interpreting the FAA. These decisions have consistently supported judicial enforcement of party agreements about what procedures and challenges should be available in and after the arbitration,<sup>175</sup> at least to the extent that these limit, rather than expand, judicial review.<sup>176</sup> The Court's class-arbitration decisions have made clear that the FAA even elevates the parties' mutual

---

173. See, e.g., *Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 593 (8th Cir. 1998) (“While they did not have full knowledge of all the relationships to which they now object, they did have concerns about Powers’ impartiality and yet chose to have her remain on the panel rather than spend time and money investigating further until losing the arbitration.”); *DT-Trak Consulting, Inc. v. Prue*, 814 N.W.2d 804, 809–10 (S.D. 2012) (“[T]he well accepted rule in arbitration cases is that a party who fails to raise a claim of partiality against an arbitrator prior to or during the arbitration proceeding is deemed to have waived the right to challenge the decision based on ‘evident partiality.’” (quoting *Daiichi Haw. Real Estate Corp. v. Lichter*, 82 P.3d 411, 431–32 (Haw. 2003))); *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 804 (Tex. App. 2004) (“[A] party can waive an otherwise valid objection to the partiality of the arbitrator by proceeding with arbitration despite knowledge of facts giving rise to such an objection.”).

174. Some courts have held that in fact there can be no waiver unless the challenging party knew all the facts about the challenged relationship. See, e.g., *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982) (“Waiver applies only where a party has acted with full knowledge of the facts.”); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1359 (6th Cir. 1989) (finding no waiver of evident-partiality challenge unless challenger knew “all the facts” supporting the alleged bias during the proceedings). However, these cases are in conflict with those recognizing that a party can waive its bias objection even if it did not know all of the operative facts, so long as it knew enough to give notice of the potentially objectionable relationship. See, e.g., *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) (holding that constructive waiver by failing to timely object “is the better approach in light of our policy favoring the finality of arbitration awards”); *JCI Commc’ns, Inc. v. Int’l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 52 (1st Cir. 2003) (finding that the party who “was put on notice of the risk when it signed the contract [and] chose not to inquire about the backgrounds of the Committee members either before or during the hearing” could not challenge on evident partiality grounds); *Kiernan*, 137 F.3d at 593 (holding that a party waives its right to an evident-partiality claim when the party “weigh[s] their options at the time of [the arbitrator’s] disclosures and chooses to go forward” with arbitration).

175. See, e.g., *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2066 (2013) (enforcing party agreement after arbitration began to let arbitrator decide whether the parties’ contract provided for class arbitration).

176. See, e.g., *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (holding that parties could not by agreement expand the available avenues for judicial review).

agreement as to the terms and procedures of the arbitration over contrary state laws, or federal statutes' policy goals.<sup>177</sup> Thus, the policy of enforcing the parties' agreement that the Court has repeatedly identified as the fundamental bedrock of the FAA would support enforcing the parties' mutual agreement to forego certain evident partiality challenges. This outcome does not contradict any statutory policies, and is in keeping with at least some sets of arbitral rules.<sup>178</sup>

Nor would it be correct to contend that, by listing certain avenues for challenging awards, the FAA itself contains an implicit policy that those avenues of challenge cannot be waived. While the Supreme Court held in *Hall Street Associates* that parties may not *increase* the scope of judicial review beyond statutory limits by mutual consent, the Court's reasoning implies that the parties may by mutual consent *limit* the scope of that review more narrowly than the statutory baseline.<sup>179</sup> In *Hall Street*, the Court read the FAA to require confirmation of an award unless one of the statute's prescribed exceptions applied; that is, the Court rejected the argument that parties to an arbitration agreement may contract for expanded judicial review of the award.<sup>180</sup> In doing so, the Court noted parties' ability to "tailor some, even many, features of arbitration,"<sup>181</sup> and warned against expanded judicial review that would "bring arbitration theory to grief in postarbitration process."<sup>182</sup> The Court's concern was expanding judicial review, not limiting it, and so *Hall Street* seems to favor a one-way ratchet that allows parties to tighten, but not to loosen, the scope for judicial review of an arbitration award.<sup>183</sup>

Indeed, to more closely follow the Supreme Court's decisions enforcing limitations on arbitration procedures, the express waiver of evident-partiality challenges could be written into the parties'

---

177. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (finding that the FAA preempted California state law that invalidated class action waivers as unconscionable); see also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013) (finding that a mutually agreed waiver of class arbitration trumped the statutory policies behind the Sherman and Clayton Acts).

178. See *infra* notes 177–80 and accompanying text.

179. *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 585–86 (2008) (rejecting Hall Street's request for general review of an arbitrator's decision).

180. *Id.* at 587.

181. *Id.*

182. *Id.* at 588.

183. *Id.*; see also Curtin, *supra* note 95, at 367 ("[W]hile the contractual limitation of judicial review tends to promote the overall goals of both the FAA and the New York Convention, contractual expansion tends to contradict, at least in part, some of the goals of the FAA and the New York Convention.").

arbitration agreement itself, through the inclusion of a clause stating that all evident-partiality challenges are waived after arbitrators are appointed and the disclosure process is completed without objection from either side. This alternative would have the advantage of making the mutual decision to forego any evident-partiality challenges part of the parties' arbitration contract, which the Supreme Court has consistently reaffirmed is paramount.<sup>184</sup> This approach, however, would commit the parties to the waiver before the disclosure process had taken place, which would have significant disadvantages.<sup>185</sup> But the broader point is that there is room for flexibility as to the timing of the waiver, and parties could tailor the procedure to fit their own specific needs.<sup>186</sup>

2. *Use of express waivers is supported by arbitral rules allowing parties to modify procedures by consent*

The provisions of various arbitral rules also support the use of express-waiver procedure to eliminate certain evident-partiality challenges. As an initial matter, in an ad hoc arbitration, parties would be free to adopt a waiver procedure, since the definition of ad hoc arbitration is that parties may adopt their own procedures.<sup>187</sup> Beyond that, many sets of arbitral rules make clear that the parties may modify the arbitration procedures by consent.<sup>188</sup> These types of

---

184. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773–74 (2010) (“Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must ‘give effect to the contractual rights and expectations of the parties.’” (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))).

185. Disadvantages include eliminating the parties' flexibility to tinker with the scope of the waiver after disclosures have been made, see *infra* Part III.D, and reducing the degree to which consent to the waiver is meaningful and informed, see *infra* Part III.E.

186. See generally *infra* Part III.D (discussing the potential for flexibility in the scope of the waiver).

187. See, e.g., *Slate*, *supra* note 27, at 52–53 (describing how parties in ad hoc arbitration must either develop their own rules or adopt standard rules such as UNCITRAL rules). Even if the article's proposal were limited to ad hoc arbitrations, however, a substantial amount of arbitrations would be covered. See, e.g., CHARTERED INST. OF ARBITRATORS, *CI Arb Costs of International Arbitration Survey 2011*, 7 (2011), available at <http://www.ciarb.org/conferences/costs/2011/09/28/CIArb%20costs%20of%20International%20Arbitration%20Survey%202011.pdf> (discussing a study undertaken by the Chartered Institute of Arbitrators in which, out of 254 international arbitrations, sixty-two percent were administered by institutions and thirty-eight percent were ad hoc).

188. See, e.g., JAMS STREAMLINED ARBITRATION RULES & PROCEDURES R. 2 (Judicial Arbitration & Mediation Servs., Inc. 2009) (“The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies . . . . The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.”);

provisions would clearly allow parties to adopt a procedure for agreeing to an express waiver of evident-partiality challenges.

Moreover, some rules, notably the UNCITRAL rules, go even further and specify that the parties may agree to waive any recourse to judicial authority to challenge the award, so far as such a waiver is consistent with applicable law.<sup>189</sup> That is, the rules specifically endorse the idea of an agreed party waiver of judicial review.<sup>190</sup>

*D. Narrow Waivers Would Not Do Enough and Broad Waivers Would Do Too Much*

Another set of objections are practical: narrow waivers would not accomplish much because they would only limit challenges that can be disposed of using constructive-waiver doctrine, while broad waivers would accomplish too much by eliminating compelling partiality challenges.

It might be argued that narrow waivers that merely forbid challenges based on disclosed relationships would not accomplish anything of value. Since constructive-waiver doctrine exists, it is already the case that any challenges based on disclosed relationships will or should fail. However, this argument ignores the fact that constructive-waiver doctrine is inconsistently applied from jurisdiction to jurisdiction, or trial court to trial court. Further, courts can and do bypass the doctrine and perform a straightforward evident-partiality analysis, even when an institutional arbitrator has

---

UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION Art. 19(1) (United Nations Comm'n on Int'l Trade Law 2006) ("Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.").

189. UNCITRAL ARBITRATION RULES Annex (Possible Waiver Statement) (United Nations Comm'n on Int'l Trade Law 2010) ("If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law."). "Applicable law" in this context would mean the law of the nation in whose courts the award would be enforced; so, in this case, American law and specifically the FAA.

190. Finally, to the extent any extant arbitral rules do prohibit such waivers, or prescribe procedures that would conflict with an express-waiver procedure, those rules could be revisited or revised. See, e.g., Paul D. Friedland & John M. Townsend, *Commentary on the July 2003 Revisions to the AAA Commercial Arbitration Rules*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 8 (describing revision of AAA commercial-arbitration rules by AAA); Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 LAW & BUS. REV. AM. 885, 913 (2007) (describing the rule-revision process for the UNCITRAL rules).

already expressed a view in the arbitration that any challenges based on a particular, disclosed relationship would be waived.<sup>191</sup>

Further, even if most constructive-waiver defenses were successful, using an express waiver is an excellent way to avoid the cost and expense of litigating long-shot partiality challenges at the trial and potentially appellate level. Indeed, waivers should be especially efficient if most constructive-waiver defenses are successful, since these are a particularly inefficient and wasteful form of challenge. This is because, *ex ante*, a party might well rationally decide to forego such low-probability challenges even in the event that they lose the arbitration, whereas *ex post* the incentives change and a party might bring them even though they are unlikely to succeed.<sup>192</sup>

Relatedly, it might be argued that litigation of waivers of “disclosed” relationships would simply collapse into arguing about whether the relationship was sufficiently disclosed, which is the same thing as conducting a constructive-waiver analysis. However, the existence of an agreed waiver would add significant clarity to the analysis, and leave parties less at the mercy of the conflicting jurisprudence about how much information is enough.<sup>193</sup> Using waivers would harness the gap between pre- and post-award incentives to eliminate a significant number of costly and expensive

---

191. See *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 496–502 (4th Cir. 1999) (observing the AAA stated prior to the arbitration that “[u]nless we are advised to the contrary . . . we will assume that the Parties waive any presumption of bias by the Arbitrator based on this disclosure,” the losing party filed an evident-partiality objection after the award, and the court undertook an evident-partiality analysis rather than discussing the waiver).

192. After the loss, the answer would likely be different, because a low-hope challenge is better than no hope, and also because often there is significant value to the losing party in the mere fact of being able to delay enforcement of the award through collateral litigation. But the value of delay is not one sanctioned by arbitration doctrine; instead, is very much what those policies and doctrines aim to prevent. See, e.g., *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986) (“Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited.” (citations omitted)); *Pinnacle Museum Tower Ass’n v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1231 (Cal. 2012) (noting that public policy “strongly favors” arbitration as a speedy and relatively inexpensive means of dispute resolution).

193. See, e.g., *JCI Commc’ns, Inc. v. Int’l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 45 (1st Cir. 2003) (declining to find evident-partiality when the party that lost arbitration claims disclosures beforehand were not thorough enough); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1359 (6th Cir. 1989) (same); *Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 591 (8th Cir. 1998) (same); see also *supra* notes 67–69 and accompanying text (discussing the uncertainty over constructive-waiver doctrine).

challenges, and do so in a way that is most likely to eliminate the most worthless or inefficient challenges.<sup>194</sup>

Conversely, it might be argued that if parties used the “broad” form of waiver,<sup>195</sup> waiving all evident-partiality challenges including those based on relationships entirely undisclosed by the arbitrator, waivers would go too far. As mentioned, the Article to this point has focused on narrower waivers in which the parties would agree only to waive evident-partiality challenges as to relationships disclosed by the arbitrator. And blanket, broad waivers would be more problematic because they raise the prospect of situations where the arbitrator deliberately fails to disclose a relationship with an obvious potential for partiality, for which there are no consequences on the basis of a blanket waiver.<sup>196</sup> The potential for fraud and unfairness in this situation is much greater.

Such waivers could be enforced, at least absent a showing that the waiver itself was induced by fraud,<sup>197</sup> but they would be more problematic, and therefore, should be disfavored as compared to a more limited waiver of challenges based on disclosed relationships. While express waivers of all evident-partiality challenges certainly would increase finality and efficiency, as well as arbitrator peace of mind, the trade off in terms of potential for fraud and misconduct would simply be too great.

However, while overly broad blanket waivers would be undesirable, this does raise the related point that there is room for flexibility in the scope of the waiver, which could be used to increase efficiency and finality through the parties’ mutual consent. For example, a waiver might provide for foregoing evident partiality challenges based not only on disclosed relationships but also on any relationships that were undisclosed but unknown to the arbitrator. This would reduce and clarify post-award litigation raising challenges based on relationships unknown to the arbitrator. If the defender could show the arbitrator did not know about the relationship, the challenge

---

194. See *supra* Part II.B (arguing that pre-arbitration waivers of evident-partiality claims will encourage parties to seek arbitration and discourage parties to appeal arbitration awards).

195. See *supra* notes 103–104 and accompanying text (comparing broad and narrow forms of waiver).

196. See, e.g., *Burlington N. R.R. v. TUCO Inc.*, 960 S.W.2d 629, 631 (Tex. 1997) (noting that the arbitrator knew, but did not disclose, that his acquisition of a case stemmed from a referral which involved his co-arbitrator’s law firm); see also *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995) (asserting arbitrator did not disclose his job titles nor his employer’s business relationship with Merrill Lynch).

197. See *supra* Part III.B (discussing how express waivers could be overcome in cases where the waiver can be shown to have been induced by fraud).

would fail.<sup>198</sup> By consent, parties would create clarity in advance about the significance of unknown relationships that, if otherwise left to resolution by litigation, would face numerous questions: uncertainty and judicial division over whether evident partiality can be established by showing the arbitrator's "constructive knowledge" of a material relationship or whether the arbitrator has an independent duty to investigate and discover potential conflicts.<sup>199</sup>

The broader point is that express waivers would allow the parties to tailor for themselves what kind of evident-partiality challenges to allow and forbid, rather than being at the mercy of different courts' interpretation and application of the doctrine. And that sort of flexibility through mutual consent is directly in line with arbitration's fundamental policy justifications and its mission to let the parties contract out of judicial procedures they find inefficient.<sup>200</sup>

*E. Narrowing Avenues for Challenging Arbitration Awards Is Generally Undesirable*

While mostly beyond the scope of this Article, one last objection is worth briefly addressing. It might be argued that, even if express waivers of evident partiality challenges are an effective way to reduce the volume of litigation challenging arbitral awards, such a result is undesirable. Many have criticized the Supreme Court's proarbitration trend, which includes limiting ways to challenge awards.<sup>201</sup> These critics point out that making arbitral results harder to challenge is undesirable because of unfairness in the way arbitration agreements are formed, in particular unequal bargaining power to enter arbitration agreements in consumer or employment

---

198. See, e.g., *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312–13 (D.C. Cir. 1998) (holding that there is no independent duty to investigate under the FAA where the arbitrator is unaware of the undisclosed facts).

199. Compare *Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994) (holding that "though [the arbitrator] lacked actual knowledge, he had constructive knowledge of [the undisclosed relationship]," which was enough to find evident partiality), with *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682–83 (D.C. Cir. 1996) (holding that, because the arbitrator did not have actual knowledge of the undisclosed relationship, there was no evident partiality even though the arbitrator did not conduct an investigation to uncover such a relationship).

200. See *supra* Part III.C (arguing that the purposes of arbitration are to individualize resolution and avoid the rigid procedural necessities that come with litigation).

201. But see Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-arbitration*, 77 U. CHI. L. REV. 1013, 1026 (2010) (arguing that "deferential review . . . is not always pro-arbitration").

contexts.<sup>202</sup> They also often criticize as misreadings of the FAA and prior arbitration case law the Roberts Court's recent decisions making arbitration awards harder to challenge and rigorously enforcing party agreements to forego procedures such as class arbitration, on which this Article has relied for the theoretical justifications for enforcing express waivers of evident-partiality challenges.<sup>203</sup>

If the trend towards making arbitration awards harder to challenge (and making more claims arbitrable) is undesirable, then perhaps using express waivers of evident partiality to further reduce avenues to challenge arbitral awards would simply be reinforcing that bad trend. While it is not this Article's main purpose to consider broader critiques of the Supreme Court's recent arbitration jurisprudence, a few responses can be offered to this objection.

First, to the extent critiques of the current trends in arbitration case law are based on the argument that "consent" to arbitration is a fiction, or based on coercion,<sup>204</sup> the force of this argument is reduced as applied to waivers that are agreed to *after* arbitration has begun. This is because it will be more apparent to the parties that there is a real dispute and that waiving rights will have consequences for that dispute.<sup>205</sup> That is, the consent will be more meaningful.

---

202. See, e.g., Richard M. Alderman, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001) (discussing the negative effects of binding mandatory arbitration in consumer or employment contexts); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RES. 267 (1995) (questioning mandatory binding arbitration as a matter of public policy); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1252–53 (2009) (arguing that mandatory arbitration agreements are unfair when the parties agreeing have unequal bargaining power); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005) (discussing the impact that mandatory binding arbitration has on the individual parties); Wilson, *supra* note 86, at 107–09. But see Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J. L. & PUB. POL. 549, 552 (2008) ("[T]he proper question then, is whether eliminating predispute arbitration agreements for wide swaths of the economy yields a net benefit. That is the burden confronting advocates of arbitration reform and one that, based on my review of the available empirical evidence, they have not met."); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1578 (2005) ("[T]here is no evidence that plaintiffs fare significantly better in litigation.").

203. See, e.g., Bermann *supra* note 130, at 909 (critiquing the Court for being willing to override "established understandings in the U.S. law of arbitration").

204. See generally Horton, *supra* note 141, at 487 (arguing that in consumer and employment contexts, arbitration clauses are not the product of actual consent).

205. The concern is not entirely eliminated, since the imbalances in sophistication or bargaining power at the root of some of these concerns, see, e.g., Horton, *supra* note 138, at 487, will still be present after the arbitration process has started. However, once the arbitration has begun, and especially if the claimant has counsel, the implications of agreeing to a waiver should be much more salient than the implications of agreeing to arbitration as part of a boilerplate consumer or employment agreement. This is one reason to favor a waiver process that takes place



Second, even if it is generally undesirable to reduce substantive avenues to challenge arbitral awards, expand the domain of claims that can be arbitrated, and increase parties' ability to restrict available procedural vehicles in arbitration, evident-partiality doctrine is not a good solution to these ills.<sup>206</sup> The evident-partiality doctrine is not meant to serve as a general safety valve for arbitration, and using it in that way produces significant inefficiencies. It leads to collateral litigation flyspecking the arbitrator's disclosures and second-guessing her impartiality, which has little to do with the bases of most critiques of the Court's pro-arbitration jurisprudence.<sup>207</sup> The policies served by evident-partiality and disclosure doctrine—ensuring a neutral tribunal in the most procedurally efficient way—do not directly speak to whether it is fair to arbitrate at all, to disallow certain procedures, or to force arbitration of particular types of substantive claims. Instead, these ills are best addressed legislatively, through amendment of the FAA.<sup>208</sup>

Further, the uncertainty in evident-partiality doctrine opens up this inefficient litigation in all sorts of arbitrations, including ones where arbitration was agreed to by two sophisticated parties of relatively equal bargaining power. Indeed, many evident-partiality cases are these types of cases, in part because it is often the sophisticated party that has the savvy resources, and incentive to pursue litigation to try

---

after arbitration has begun, but before the arbitration hearing starts, rather than writing waiver language into arbitration agreements themselves. See *supra* note 185 and accompanying text.

206. Cf. Bruhl, *supra* note 78, at 1422 (noting the “sort of hydraulic pressure in the system that will seek release through whatever channel still exists for invalidating, or at least limiting, arbitration agreements”).

207. Cf. *id.* at 1437–39 (analyzing the use of unconscionability doctrine as a way for arbitration-skeptical courts to police particular objectionable aspects of arbitration agreements).

208. There have been repeated legislative efforts, so far unsuccessful, to eliminate arbitration in employment, consumer, antitrust, or civil-rights disputes. See, e.g., Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. § 402(a) (2013) (“[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”); H.R. 1873, 112th Cong. (2011); S. 931, 111th Cong. (2009); H.R. 5129, 110th Cong. (2008); H.R. 3010, 110th Cong. (2007); H.R. 2969, 109th Cong. (2005); H.R. 3809, 108th Cong. (2004); S. 2435, 107th Cong. (2002); H.R. 2282, 107th Cong. (2001); H.R. 815, 107th Cong. (2001); see also Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 458 (2011) (discussing the repeated introduction of such legislation); Schwartz, *supra* note 202, at 1250 (noting that “there is a significant possibility that the FAA could be amended to make predispute arbitration clauses unenforceable in most adhesion contracts. At this important juncture, . . . academic commentators are increasingly addressing themselves to legislators rather than courts” (footnote omitted)). The enactment of this or a similar bill would not undermine this Article's arguments for using express waivers of evident-partiality challenges in contexts where arbitration was allowed.

and unearth information that can be used to support an evident partiality challenge.<sup>209</sup>

Thus, even if the criticisms of current trends in arbitration jurisprudence are well-taken as to their potential to harm parties to one-sided consumer or employment arbitration agreements, express waivers of evident-partiality objections would still be a useful tool. Express waivers are nevertheless especially valuable when sophisticated parties make a truly negotiated arbitration agreement and an informed prearbitration decision to forego potential expensive and uncertain evident-partiality litigation.<sup>210</sup>

### CONCLUSION

Someday, the Supreme Court may take a case to resolve the current disarray in the doctrine of evident partiality. When it does, it may clarify some of the pressing, vexed questions courts currently face about how to define and apply that doctrine. The solution it selects may be drawn from the extensive body of existing scholarship

---

209. See, e.g., *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60 (2d Cir. 2012) (reinsurance company versus reinsurance company); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640 (6th Cir. 2005) (insurance company versus insurance company); *Univ. Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331 (11th Cir. 2002) (construction company and insurance company versus development partnership); *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306 (9th Cir. 2004) (bank versus jewelry corporation); *Crow Constr. v. Jeffrey M. Brown Assocs. Inc.*, 264 F. Supp. 2d 217 (E.D. Pa. 2003) (construction company versus general contractor); *Lexington Ins. Co. & Chartis, Inc. v. S. Energy Homes, Inc.*, 101 So. 3d 1190 (Ala. 2012) (insurance company versus construction company); *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 958 N.E.2d 891 (N.Y. 2011) (electronics corporation versus radio corporation); *Skidmore Energy, Inc. v. Maxus (U.S.) Exploration Co.*, 345 S.W.3d 672 (Tex. App. 2011) (energy exploration corporation versus energy exploration corporation); *Amoco D.T. Co. v. Occidental Petrol. Corp.*, 343 S.W.3d 837 (Tex. App. 2011) (energy partnership versus energy company); *GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd.*, 126 S.W.3d 257 (Tex. App. 2003) (limited partnership versus construction contractor and subcontractor); *Int'l Bank of Commerce-Brownsville v. Int'l Energy Dev. Corp.*, 981 S.W.2d 38 (Tex. App. 1998) (bank versus energy development corporation). *But see, e.g., Nasca v. State Farm Mut. Auto Ins. Co.*, 12 P.3d 346 (Colo. App. 2000) (insured individual versus insurance company); *Carpenter v. Brooks*, 534 S.E.2d 641 (N.C. Ct. App. 2000) (investor versus investment corporations); *Roe v. Ladymon*, 318 S.W.3d 502 (Tex. App. 2010) (homeowner versus home renovator limited liability partnership).

210. See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 642-43 (1996) ("[I]t is critical to distinguish between commercial arbitration voluntarily agreed to by parties of approximately equal bargaining power, and commercial arbitration forced upon unknowing consumers, franchisees, employees or others through the use of form contracts."). Without taking a position on whether indeed the application of arbitration to consumer and employment contracts should be rolled back, the narrower point here is that even if it were, express waivers of evident-partiality objections would still be a useful tool for parties that courts could and should enforce.

attempting to clarify this murky area of law. But the prospect of clarification is not great, since the Court has only weighed in on evident-partiality once, over 40 years ago, and has not shown any inclination to clarify, despite the acknowledged and expanding disarray in lower courts.

Until then, parties to arbitrations are left with a muddle that can produce costly and expensive post-award litigation. Express waivers of the sort advocated for by this Article are a good way to avoid these challenges. Express agreements to forego evident-partiality challenges have great practical attractiveness and sound theoretical justifications, certainly when limited to waivers of evident partiality challenges based on any relationship present in the arbitrator's disclosures. Therefore, parties and panels should use them and courts should enforce them.