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INTRODUCTION

"Out here, due process is a bullet."[1]

The issue of punitive damages[2] reform has recently occupied a prominent position in our courtrooms and houses of legislation.[3] Even the United States Supreme Court has lamented that punitive damage awards have "run wild."[4] While the debate over reforming the permitted size and amount of punitive awards rages on,[5] the concern over whether such

* J.D., Benjamin N. Cardozo School of Law; B.A., Political Science, Queens College of The City University of New York. Mr. Boyarsky is currently a staff attorney at Paul, Weiss, Rifkind, Wharton and Garrison LLP. The author would like to thank his wife, Yael, for her ceaseless encouragement. The views expressed are solely those of the author.

1. THE GREEN BERETS (Warner Brothers 1968).

2. Punitive damages is a monetary award determined after a finding that a defendant has acted intentionally, maliciously or with a conscious, reckless, willful or wanton disregard for a plaintiff's interests. RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1979). Punitive damages involve a peculiar combination of criminal law's desire for retribution and civil law's compensation to the injured party which has led some scholars to label punitive damages as being "quasi-criminal." *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 365-66 (1994) (explaining that the "quasi-criminal" nature of punitive damages "assures that controversy and debate follow such assessments wherever they may roam, as surely as summer follows spring.").

3. *See, e.g.*, Marguerite Higgins, *Medical Malpractice Award Bill Passes in House*, WASH. TIMES, July 29, 2005, *available at* http://washingtontimes.com/business/20050728-100748-7205r.htm (stating that the House of Representatives recently passed a bill which "limits punitive damages [for plaintiffs in medical malpractice cases] to no more than twice the amount a plaintiff would receive for economic damages, which include lost wages and medical bills.").

4. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

5. *See, e.g.*, Mike McKee, *Drawing the Line on Punitive Awards*, THE RECORDER, Apr. 4, 2005, *available at* http://media.gibsondunn.com/fstore/documents/pubs/040405-Recorder-DrawingLinePunitives.pdf ("Defense lawyers . . . argue that arbitrary and unlimited punitive damages have a chilling effect on state commerce, discourage innovation and increase consumer

damages may be awarded outside the courtroom venue has been settled for nearly a decade.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the United States Supreme Court held that when contracting parties agree to include claims for punitive damages in the scope of issues to be arbitrated, the Federal Arbitration Act[6] ("FAA") requires that their agreement be enforced.[7] This is true even if state law would bar such a claim from arbitration.[8] Writing for the majority, Justice Stevens rejected the argument that the agreement at issue, which was governed by New York law, incorporated New York's prohibition of an arbitrator awarding punitive damages,[9] and wrote that "if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."[10] Although this decision clearly allows for the award of punitive damages by an arbitrator, the Court did not address how the awards should be reviewed.[11] What if an arbitrator imposes sizeable punitive damages that a party believes to be improper?[12] The Supreme Court held in *Honda Motor Co. v. Oberg* that a state which does not provide judicial review of a jury's award of punitive damages violates

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costs. Their opponents, including Duke University's Erwin Chemerinsky, argue that large punitive awards keep companies honest and deter further wrongdoing.").

6. The FAA was enacted in 1925 and signed into law by President Coolidge. Its purpose was "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc., 857 F.2d 742, 745 (11th Cir. 1988). In order to accomplish this, the Act was designed "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate" and to place such agreements "upon the same footing as other contracts . . . ." Volt Info. Scis, Inc. v. Bd of Trs of the Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (citations omitted).

7. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

8. *Id.* at 56-64.

9. The court in *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (1976) ruled that under New York law an arbitrator could not award punitive damages regardless of the fact that the contracting parties had agreed to allow the arbitrator to do so.

10. *Mastrobuono*, 514 U.S. at 58.

11. *See* Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1193 (11th Cir. 1995) (stating that "the Supreme Court did not discuss the due process issue in *Mastrobuono*.").

12. Unlike the arbitration situation, the Supreme Court has dealt with whether a trial court's improper award of excessive punitive damages violates a party's Fourteenth Amendment Due Process rights. In *BMW v. Gore*, 517 U.S. 559, (1996), the Court explained that the Fourteenth Amendment's due process clause prohibits states from imposing grossly excessive punishments on tort-feasors. In that case, the punitive damages awarded to the plaintiff were excessive as demonstrated by the 500 to 1 ratio between the jury's punitive and actual damage awards, the fairly insignificant amount of damage, and the lack of statutory fines that remotely parallel the jury award's level. *Id.* at 578, 582-85. In addition, the Court held that defendant's due process rights were also violated because it could not have possibly anticipated, nor did it receive fair notice, that it might face such a severe punishment. *Id.* at 574-75, 584.

due process.[13] As the Court in *Oberg* explained, "[p]unitive damages pose an acute danger of arbitrary deprivation of property . . . ."[14] While that opinion dealt solely with a jury award, the question arises whether the reasoning in *Oberg* can be applied to punitive damages awarded in arbitration.

Although the Supreme Court has yet to address this issue,[15] the lower courts have consistently rejected the argument that an arbitrator's award of punitive damages violates the Due Process Clauses[16] of the constitution.[17] This is due to the fact that constitutional due process[18] protections restrict only "the State or . . . those acting under color of its authority,"[19] and does not extend "to private conduct abridging individual rights" such as arbitration.[20] However, there are exceptions where private conduct must comply with the Constitution. These exceptions fall into two categories: (1) the public functions exception: when the action involves a task that has

13. Honda Motor Co. v. Oberg, 512 U.S. 415 (1994). The Court in *Oberg* held that an amendment to the Oregon Constitution limiting judicial review of the size of punitive damage awards violated the Due Process Clause. *Id.* at 418. The Court explained that judicial review of punitive damage awards is one of the few procedural safeguards against the danger of arbitrary deprivation of property via excessive damage awards. *Id.* at 416.

14. *Id.*

15. Interestingly, among the cases recently denied review by the Supreme Court without comment was *EMC Mortgage Corp. v. Stark*, challenging on due process grounds an arbitrator's award and a court's confirmation of punitive damages in a mortgage collection case. EMC Mortgage Corp. v. Stark, 125 S. Ct. 1973 (2005). The punitive award was 3,000 times higher than the award of ordinary damages—$6 million compared to $2,000. *See* Stark v. Sandberg, Phoenix & von Gontard, P.C., 381 F.3d 793, 798 (8th Cir. 2004).

16. The Fifth and Fourteenth Amendments, respectively, provide that neither the United States nor state governments can deprive an individual "of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

17. *See* Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1064 (9th Cir. 1991) (having voluntarily entered into arbitration, "Cunard cannot now argue that its due process was denied."); Sawtelle v. Waddell & Reed, Inc., 754 N.Y.S.2d 264, 271 (N.Y. App. Div. 2003) (stating that "there is ample authority for the proposition that a private arbitration does not implicate due process concerns . . . .").

18. The Due Process Clause of the Constitution is based on a similar clause in the Magna Carta (June 15, 1215 A.D.) guaranteeing that

> No Freeman shall be taken, or imprisoned, or be disseized of his Freehold, or liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his peers, or by the Law of the Land.

See Wikipedia, *available at* http://en.wikipedia.org/wiki/Due_process (last visited July 31, 2005).

19. District of Columbia v. Carter, 409 U.S. 418, 423 (1973).

20. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)).

traditionally been done exclusively by the government; or (2) the entanglement exception: when the government affirmatively authorizes, encourages or facilitates the conduct of a private actor.[21] Although these exceptions seem clear-cut, there has been much confusion as to when they apply, leading Justice O'Connor to opine that "cases deciding when private action might be deemed that of the state have not been a model of consistency."[22] These cases raise the argument that although arbitration is a private action, a court's enforcement of an arbitration award transforms the arbitration into a state action and therefore due process protections should apply.[23] However, as Judge Connor of the Southern District of New York explained, if the mere approval by a court of an arbitration award created state action then "all arbitrations could be subject to due process limitations through the simple act of appealing the arbitrators' decision to the court system."[24]

Nevertheless, there are opinions which argue that although the confirmation of an arbitration decision does not require constitutional protections, the confirmation of an arbitor's award of punitive damages is an entirely different matter. In fact, the Supreme Court has addressed the importance of due process limitations in the assessment of punitive damages, stating that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[25] In *Pacific Mutual Life Insurance Co. v. Haslip*, the Court held that the common-law method of assessing punitive damages did not violate procedural due process.[26] In reaching this decision, the Court stressed that both the trial court and appellate court could review the jury's award, making "certain that the punitive damages are

21. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 6.4.1, 6.4.4 (1997).

22. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1990) (O'Connor, J., dissenting).

23. *See* Rifkind & Sterling, Inc. v. Rifkind, 33 Cal. Rptr. 2d 828 (Cal. Ct. App. 1994).

24. United States v. Am. Soc'y of Composers, Authors and Publishers, 708 F. Supp. 95, 97 (S.D.N.Y. 1989). However, it should be noted that state action may occur and constitutional protections may apply when a court orders that the party must engage in arbitration, rather than the party entering into the arbitration voluntarily. *See, e.g.*, Mount St. Mary's Hospital v. Catherwood, 260 N.E.2d 508, 511 (1970) ("The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration are fundamentally different if only because one may, under our system, consent to almost any restriction upon or deprivation of right, but similar restrictions or deprivations, if compelled by government, must accord with procedural and substantive due process").

25. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

26. *Id. Haslip* involved a punitive damages award of approximately $800,000 to a group of insureds against a life insurance agent who had continued to collect premiums after their policies had been cancelled. Although the ratio of punitive to compensatory damages was approximately four to one, the Court upheld the award. *Id.* at 7, 23.

reasonable . . . and rational . . . ."[27] However, this form of appellate review and due process protection does not exist in arbitration, where the confirmation of an arbitor's award is almost always a certainty. It can therefore be argued that by confirming an arbitral award of punitive damages (and thereby transforming that award into a state action), it is the confirming court *itself* that is denying the party's right to due process.

When recently faced with the differing positions on whether confirmation of punitive awards would constitute state action, the Superior Court of Connecticut noted that "these divergent views provide interesting fodder for law review articles and footnotes in judicial opinions . . . ."[28] Seizing upon the excess of "fodder," this article will attempt to alleviate the confusion by addressing the conflicting opinions on this topic.

Part I of this article provides a brief overview of the reasoning behind the limited judicial review of an arbitral award. Part II describes the state action doctrine and explains how several courts have used the doctrine in order to apply due process protection to proceedings involving private actors. In particular, this section discusses several significant decisions that involve the issue of whether a court's confirmation of an arbitrator's award of punitive damages creates state action and requires the application of constitutional protections such as due process. This Note concludes that due to a leading decision by the Eleventh Circuit, it appears that confirmation is not enough to transform an arbitration award into state action. However, it is important to note that several courts who have reluctantly followed this decision have opined that it appears that state action does in fact occur in these situations. Therefore, this debate will likely continue until the Supreme Court settles the matter.

27. *Id.* at 21. Two years later in *TXO Prod. Corp. v. Alliance Res. Corp.*, the Supreme Court again upheld a jury's award of punitive damages. In his concurring opinion, Justice Scalia wrote that that since the jury's award of punitive damages was reviewed by both the trial court and Court of Appeals, the "'procedural due process' require[ment of] judicial review of punitive damages awards for reasonableness" was satisfied. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 471 (1993) (Scalia, J., concurring).

28. MedValUSA Health Programs, Inc. v. Memberworks, Inc., 2003 WL 21322298, at *4 n.5 (Conn. Super. Ct. May 22, 2003).

1. Judicial Review of Arbitration: An Overview

Over the last fifty years, arbitration has increasingly become the prevalent form of alternate dispute resolution.[29] This is due to the attractiveness arbitration has to parties who realize that they can obtain a quick resolution without incurring the costs, delays and publicity that are intrinsic to litigation.[30] Participants are able to choose the arbitrator(s) and decide which procedural rules will apply to the proceeding.[31] However, this convenience comes at a price: not only do arbitrants sacrifice their statutory and common law procedural and evidentiary rights,[32] but courts (pursuant to the FAA) will treat an arbitral award as a final judgment.[33] Courts and commentators alike have long agreed that had this finality not existed, arbitration would become a prelude to litigation instead of a substitute.[34] It is for this reason that, under the FAA, judicial review of an arbitration award is narrowly limited and a court reviewing an award must use an exceedingly deferential standard.[35] As one court has explained, the FAA "does not allow

29. Bradley T. Kling, *"Through Fault of Their Own" – Applying Bonner Mall's Extraordinary Circumstances Test to Heightened Standard of Review Clauses*, 45 B.C. L. REV. 943, 944-45 (2004).

30. *Id.* at 945. However, the growing popularity of arbitration has led at least one court to lament that "[i]n the final analysis, arbitration amounts to the privatization of our judicial system." Knepp v. Credit Acceptance Corp. (In Re Knepp), 229 B.R. 821, 828 (Bankr. N.D. Ala. 1999).

31. LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 1:01 (3d ed. 2003).

32. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

33. The concept of an arbitration award being the equivalent to a final judgment pre-dates the FAA by more than a century. In the 1817 case, *Underhill v. Van Cortlandt*, the New York Court of Chancery explained that:

> If every award must be made conformable to what would have been the judgment of [the] Court in the case, it would render arbitrations useless and vexatious, and a source of great litigation; for it very rarely happens that both parties are satisfied. The decision by arbitration is the decision of a tribunal of the parties' own choice and election. It is a popular, cheap, convenient, and domestic mode of trial, which the courts have always regarded with liberal indulgence; they have never exacted from these unlettered tribunals, this *rusticum forum*, the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators.

Underhill v. Van Cortlandt, 2 Johns Ch. 339, 1 N.Y. Ch. Ann. 400 (1817).

34. *See* Burchell v. Marsh, 58 U.S. 344 (1854) (stating that if an arbitral award was not a final judgment then the award would be "the commencement, not the end, of litigation."); *see also* Office of Supply, Republic of Korea v. N.Y. Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972) (holding that the limited review of arbitration awards maintains the viability of arbitration as an alternative to litigation); EDMONSON, *supra* note 31, at § 39:1 (stating that the key to effectuating the strong federal policy in favor of arbitration "is by limiting judicial review of arbitration awards.").

35. *See* Davis v. Prudential Sec. Inc., 59 F.3d 1186, 1190 (11th Cir. 1995); *see also* United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987); Mantle v. Upper Deck Co., 956 F. Supp. 719, 726 (N.D. Tex. 1997); ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995).

courts to 'roam unbridled' in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specified ways."[36] In fact, even clear "factual or legal errors by [an arbitrator] . . . 'do not authorize courts to annul awards'"[37] without some form of misconduct[38] pertaining to the proceedings by the arbitrator or the parties.[39] The rationale behind this strict standard of review is the idea that the parties, in their desire to experience the expediency of arbitration, have agreed to a *quasi-quid pro quo*: in exchange for the simplicity of arbitration, they have given up the procedures and opportunity for review that would have been available in a court proceeding.[40] Because of this, the FAA does not allow the courts to have complete *de novo* review of the arbitral result.[41] Indeed, in an effort to further effectuate the public policy in favor of the enforcement of arbitral awards, §10(a) of the FAA provides only four grounds for a court to vacate an arbitration award:[42]

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36. Robbins v. Day, 954 F.2d 679, 683 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992).

37. Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 333 (7th Cir. 1995) (quoting Widell v. Wolf, 43 F.3d 1150, 1151 (7th Cir. 1994)).

38. The Eighth Circuit has explained that "'[b]eyond the grounds for vacation provided in the FAA, an award will only be set aside where it is completely irrational or evidences a manifest disregard for the law.'" Hoffman v. Cargill Inc., 236 F.3d 458, 461 (8th Cir. 2001) (quoting Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 578 (8th Cir. 1998)). Furthermore, "an arbitration decision only manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it." *Id.* at 462 (citing Stroh Container Co. v. Delphi Indus., 783 F.2d 743, 749-50 (8th Cir. 1986)).

39. *Robbins*, 954 F.2d at 683. *See also* Bureau of Engraving, Inc. v. Graphic Commc'n Int'l Union, Local 1B, 284 F.3d 821, 824 (8th Cir. 2002) (stating that the award will be confirmed even if the arbitrator did commit a serious error, so "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority. . . ."); Antwine v. Prudential Bache Secs., Inc., 899 F.2d 410, 413 (5th Cir. 1990).

40. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 628 (1985). *But see* John G. Poles et al., *New York Arbitration at the Millennium: The Dynamism of a Flexible Forum*, NAFTIKA CHRONIKA (June 1999), *available at* http://www.smany.org/sma/Arbitrat_April 2000.html (stating an alternative theory that "courts tend not to disturb awards, because they like to see that alternative legal forums are viable in order to relieve the growing pressures on the court system.").

41. Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) ("Arbitration does not provide a system of 'junior varsity trial courts' offering the losing party complete and rigorous *de novo* review . . . . A restrictive standard of review is necessary to preserve these benefits and to prevent arbitration from becoming a 'preliminary step to judicial resolution.'").

42. *See also* EDMONSON, *supra* note 31, at § 39:01 ("The public policy underlying the Act is intended to give effect to the arbitration agreement of the parties by limiting the grounds on which to secure judicial vacatur of objectionable arbitration awards.").

(1) Where the award was produced by corruption, fraud, or undue means;
(2) Where there was evident partiality or corruption in the arbitrators, or either of them;
(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[43]

For the most part, these grounds for vacating an award involve instances of bias or procedural unfairness. In fact, only the provision involving an arbitrator exceeding his or her powers seems to possibly involve errors of substantive law.[44] However, that provision "has been narrowly construed to apply only when arbitrators decide issues not presented to them or grant relief not authorized in the arbitration agreement."[45] It should therefore come as no surprise that the vast majority of arbitration awards are easily confirmed.[46] Although the quick confirmation of an arbitration award, even when the proceedings involved obvious errors, is nothing new,[47] the occasional harsh result has become an increasing concern as arbitration continues to become more commonplace.[48]

The parties at the short end of excessive awards find themselves in an unfortunate predicament. Since arbitration is a form of private contract, the constitutional protections regularly found in a court proceeding are not

43. 9 U.S.C. § 10(a) (2005). However, parties may opt out of the FAA's strict vacatur standards and adopt some review standards under a state law. *See* Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 289 (3d Cir. 2001). Section 11 of the FAA similarly allows modification of an arbitrator's award only in limited instances. *See* 9 U.S.C. § 11 (2005).

44. EDMONSON, *supra* note 31, at § 39:2.

45. *Id.*

46. As one commentator has succinctly written, "If there is but one realistic, post-award probability, it is – think confirmation." THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION § 133:1 (3d ed. 2004). *But see* Matteson v. Ryder Sys. Inc., 99 F.3d 108, 113 (3d Cir. 1996) ("courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators.").

47. Soon after the birth of this nation, the Supreme Court explained that the confirmation of an arbitrator's award is necessary in order to give the judgment validity. *See* Williams v. Craig, 1 U.S. 313, 314-15 (July Term, 1788) ("since the Revolution . . . the approbation of the Court is made a necessary ingredient in the confirmation of reports . . . .").

48. *See In re Knepp*, 229 B.R. at 828. (stating that "[a]rbitration was innocuous when limited to negotiated commercial contracts, but it developed sinister characteristics when it became ubiquitous."); *But cf. Stroh Container Co.*, 783 F.2d at 751 ("Although this result may seem draconian, the rules of law limiting judicial review and the judicial process in the arbitration context are well established and the parties . . . can be presumed to have been well versed in the consequences of their decision to resolve their disputes in this manner.").

applicable.[49] Still, it can be argued that if the arbitration was somehow transformed from a private agreement into a state action, then constitutional protections would certainly apply.

2. Due Process & The State Action Doctrine

a. *Shelley v. Kraemer*

The state action doctrine maintains that the protections of individual rights and liberties afforded by the Constitution apply only to governmental action.[50] The importance of this doctrine cannot be understated, for "it assures the maintenance of the public/private dichotomy that lies at the very heart of liberal democratic theory."[51] Courts must be wary of extending constitutional restraints designed to limit governmental power to private actors, while simultaneously making sure that private actors who are acting on behalf of the state do not infringe upon the rights of others.[52] By maintaining this dichotomy, both individual liberty and state sovereignty are protected.[53] Although the importance of enforcing the state action doctrine is apparent, determining when state action truly exists is not so clear.

In *National Collegiate Athletic Association v. Tarkanian*, the Supreme Court established a test to determine whether the state action requisite to a due process claim has been met:

> In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct . . . if it delegates its authority to the private actor . . . or sometimes if it knowingly accepts the benefit derived from unconstitutional

49. *See, e.g.*, Elmore v. Chicago & Illinois Midland Ry. Co., 782 F.2d 94, 96 (7th Cir.1986) ("[T]he fact that a private arbitrator denies the procedural safeguards that are encompassed by the term 'due process of law' cannot give rise to a constitutional complaint.").

50. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991). The text of the Constitution itself is the source for limiting its application to only the government. For example, the First Amendment states that "Congress" shall make no law abridging freedom of speech or the press. In fact, with the exception of "the Thirteenth Amendment, none of the Constitution's provisions are directed at private actors." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.4.2 (1997).

51. Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1163 (Summer 2004).

52. *See id.* at 1164.

53. *See* ERWIN CHEMERINSKY, RETHINKING STATE ACTION, 80 NW. U. L. REV. 503, 535-36 (Fall 1985).

> behavior. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.[54]

Applying this test in one form or another, courts have consistently held that no state action can be found when parties voluntarily contract to arbitrate their claims.[55] The use of the arbitration forum is "intended to provide a simple, final dispute resolution mechanism," which would be independent "of compulsory reliance on either procedural or substantive law imposed by statutes and judicial interpretations."[56] Constitutional restrictions intended to protect private actors from governmental intrusions are therefore inapplicable. However, situations may arise where a private action, such as an arbitration proceeding, is transformed into a state action via the actions of a court.[57] Quite possibly the most famous illustration of a private contract being transformed into a state action due to a court's enforcement occurred in *Shelley v. Kraemer*.[58]

Shelley involved an African-American family who purchased a parcel of land which, unbeknownst to them, was subject to a restrictive covenant that permitted only whites to purchase the property.[59] The owners of other parcels of land subject to the same restrictive agreement brought suit to enforce the covenant and divest Shelley of the property.[60] The trial court denied the requested relief stating that the restrictive covenant had never been finalized since the parties to the agreement had intended that all property owners in the district sign the agreement, and all signatures had never been obtained.[61] The Supreme Court of Missouri reversed, holding that the agreement was effective and did not violate any rights guaranteed by the Constitution.[62] Shelley then petitioned the United States Supreme Court,

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54. *Tarkanian*, 488 U.S. at 192.

55. *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 940 (10th Cir. 2001) (stating that arbitration is a private, voluntary proceeding that does not constitute state action); Davis v. Prudential Sec. Inc., 59 F.3d 1186, 1190-91 (11th Cir. 1995); Rifkind & Sterling, Inc. v. Rifkind, 33 Cal. Rptr. 2d 828 (Cal. Ct. App. 1994) (arbitration is a "private proceeding, arranged by contract, without legal compulsion.").

56. *Rifkind*, 33 Cal. Rptr. 2d at 833.

57. It has been explained, and with good reason, that the cases which deal with these exceptions are a "conceptual disaster area." Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

58. Shelley v. Kraemer, 334 U.S. 1 (1948).

59. *Id.* at 4. The restrictive covenant stated that the property shall not be "occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." *Id.* at 10.

60. *Id.* at 6.

61. *Id.*

62. *Id.*

arguing that the judicial enforcement of the restrictive covenants violated his Fourteenth Amendment rights by denying him equal protection of the laws, depriving him of property without due process, and depriving him of the privileges and immunities of citizens of the United States.[63]

Chief Justice Vinson began his opinion by explaining that "the principle has become firmly embedded in our constitutional law" that the Fourteenth Amendment's due process protection only applies to actions of the State and does not govern private conduct, no matter how discriminatory or wrongful.[64] The Court therefore concluded that the restrictive covenant alone could not be regarded as violating petitioner's Fourteenth Amendment rights.[65]

The Court then addressed whether judicial enforcement of the covenant transformed an otherwise private agreement into a state action.[66] Justice Vinson explained that "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."[67] If not for the active intervention of the Supreme Court of Missouri, Shelley would have been free to occupy the property. Therefore, the Court held that by the lower court's enforcement of the restrictive agreement, the State violated Shelley's rights pursuant to the Fourteenth Amendment.[68]

Although it is generally accepted that judges are state actors, *Shelley* is a controversial decision given that it can now be argued that any decision by a state court regarding a private action can transform the private action into a state action. Possibly with this in mind, courts have rarely used *Shelley* as a basis for finding state action.[69] Nevertheless, in the years following its decision in *Shelley*, the Supreme Court has found the existence of state action in several cases where judges have exercised their statutory or common law powers in what would otherwise have been actions by private

63. *Kraemer*, 334 U.S. at 7-8.

64. *Id.* at 13.

65. *Id.*

66. *Id.* at 14.

67. *Id.* at 14.

68. *Kraemer*, 334 U.S. at 20.

69. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.4.4.3 (1997) (explaining that "[t]he Court, of course, never has taken *Shelley* this far, but nor has it articulated any clear limiting principles.").

parties where the restrictions of the Constitution would not apply. One such case is *New York Times Co. v. Sullivan.*[70]

New York Times involved a libel suit brought by an elected official in Montgomery, Alabama against The New York Times and four African-American clergymen for an advertisement that had been published in the newspaper criticizing the way the Montgomery police had treated civil rights demonstrators.[71] It was admitted that the ad contained several false statements: that the demonstrators sang "My Country, 'Tis of Thee" when they had actually sung the Star Spangled Banner; that nine students were expelled for attending the demonstration when their suspension was really due to a separate protest at a lunch counter; that the campus dinning hall had been padlocked; that Dr. Martin Luther King had been arrested seven times when he had actually been arrested four.[72] The trial court submitted the case to the jury and instructed them that since the statements were libelous per se, the state law assumed legal injury from the mere publication of the ad and malice was to be presumed.[73] The judge rejected the petitioners' contention that his ruling violated "the freedoms of speech and press that are guaranteed by the First and Fourteenth Amendment,"[74] curtly stating that "[t]he First Amendment of the U.S. Constitution does not protect libelous publications" and "[t]he Fourteenth Amendment is directed against State action and not private action."[75]

The Court disagreed and in finding state action, explained that although the case was a civil suit between private parties, the Alabama courts had applied a state law which the petitioners claimed imposed an invalid restriction on their constitutional freedoms of speech and press.[76] "It matters not that that law has been applied in a civil action and that it is common law only . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[77]

Similarly, in *Lugar v. Edmondson Oil Co.* the Supreme Court found the existence of state action when the clerk of the state court issued a writ of attachment which was executed by the County Sheriff.[78] At issue in *Lugar* was the Virginia statute which allowed the prejudgment attachment of the petitioner's property as long as the respondent alleged, in an *ex parte*

70. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
71. *Id.*
72. *Id.* at 258-59.
73. *Id.* at 262.
74. *Id.* at 262-63.
75. *Sullivan*, 376 U.S. at 264.
76. *Id.* at 285.
77. *Id.*
78. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

petition, that he believed that the petitioner might dispose of his property in order to defeat his creditors.[79] Thirty-four days after the attachment, a state trial judge ordered the attachment dismissed because the respondent had failed to establish the statutory grounds for the attachment that he had alleged in his petition.[80] Petitioner then brought suit alleging that by attaching his property, respondents had acted together with the state in depriving him of his property without due process of law.[81] The district court held that the respondent's actions did not constitute state action as required by the Fourteenth Amendment, and Court of Appeals for the Fourth Circuit affirmed.[82] The petitioner then appealed to the United States Supreme Court, which reversed, holding that all that is required to find state action is the "invoking [of] the aid of state officials to take advantage of state-created attachment procedures."[83] The Court, therefore, found the Clerk's issuance of the writ of attachment to be a form of state action and remanded the case for further proceedings.[84]

The holdings of *Shelley*, *New York Times*, and *Lugar* clearly demonstrate how private action, as innocent-looking as restrictive covenants or attachments, can be transformed into state action upon the aid of state officials. Based upon this line of reasoning, the question arises whether an award in private arbitration, when confirmed by a court, is transformed into a state action and therefore requires adherence to due process requirements.[85]

b. Confirmation: The Argument Against State Action

Although the Supreme Court has yet to address this issue, the Eleventh Circuit rejected a constitutional challenge to the confirmation of an arbitrator's award of punitive damages in a decision that would become the foundation for future anti-state action arguments.[86] In *Davis v. Prudential Securities, Inc.*, the district court had confirmed an award to an investor by

79. *Id.* at 924.

80. *Id.* at 925.

81. *Id.*

82. *Id.*

83. *Lugar*, 457 U.S. at 942.

84. *Id.*

85. The purpose of an action for confirmation is to transform the arbitral award into a judgment which can then be judicially enforced as if it were an ordinary civil judgment. THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION § 1331:1 (3d ed. 2004) (stating that "[t]he reality in most cases is that the default standard is to confirm an award, while vacatur is the rare exception.").

86. *See* Davis v. Prudential Sec. Inc., 59 F.3d 1186 (11th Cir. 1995).

the American Arbitration Association of $483,684 in compensatory damages and $300,000 in punitive damages against Prudential Securities.[87] Prudential appealed, arguing that the award of punitive damages was unconstitutional "because arbitration lacks the procedural protections and meaningful judicial review required for the imposition of punitive damages."[88] Not surprisingly, the court rejected the argument, explaining that arbitration was a private agreement entered into voluntarily via contractual agreement and therefore lacked the "state action element of a due process claim . . . ."[89]

Prudential, "apparently relying on a *Shelley v. Kraemer* theory," further argued that the district court's confirmation of the arbitration award constitutes state action.[90] The Eleventh Circuit disagreed, stating that the holding of *Shelley* had "not been extended beyond the context of race discrimination" and therefore did not apply to the confirmation of an arbitrator's award of punitive damages.[91] As the court explained, "[t]o decide otherwise would constitutionalize private arbitration proceedings and diminish both the effectiveness and the appeal of the arbitral forum as an alternative means for resolving disputes."[92] Therefore, the Eleventh Circuit affirmed the district court's confirmation of punitive damages.[93]

The principle that *Shelley* should not be extended beyond cases involving racial discrimination is not unique to the holding in *Davis*, and in fact was explicitly stated by Justice Black in his dissenting opinion in *Bell v. Maryland*.[94] *Bell* involved the arrest and conviction of nine African-American students for trespass due to their participation in a sit-in at a Maryland restaurant that refused to serve black customers. The Court remanded the case to state court because of the then-recent passage of new city and state public accommodation laws that addressed the issue. However, Justice Black viewed *Bell* as an opportunity to clarify the limits of the *Shelly* doctrine and therefore explained in his dissenting opinion that:

> It seems pretty clear that the reason judicial enforcement of restrictive covenants in [Shelley] was deemed state action was not merely the fact that a state court had acted, but rather that it had acted 'to deny petitioners, on the grounds of race or color, the enjoyment

87. *Id.* at 1187-88.
88. *Id.* at 1190.
89. *Id.* at 1191.
90. *Davis*, 59 F.3d at 1191.
91. *Id.*
92. *Id.* at 1193-94.
93. *Id.* at 1196.
94. Bell v. Maryland, 378 U.S. 226 (1964).

> of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.'[95]

As Justice Black explained, in *Shelly* both the seller and the buyer wanted to complete the transaction and it was the Court's enforcement of the restrictive covenant which prevented them from doing so.[96] Conversely, although the students in *Bell* wanted to be in the restaurant, the owner didn't want the protest occurring on his property.[97] Therefore the "mere judicial enforcement of the trespass law is not sufficient" to convert what had occurred into a state action.[98] If this limitation was not so, then state action would occur whenever an owner of private property, such as a bar or supermarket, enlists the help of law enforcement to prosecute a trespasser who entered the property in order to make a speech to the customers regarding his personal political beliefs.[99]

The decision in *Davis* has been cited in numerous decisions which hold that no state action is found when a court confirms an arbitrator's award of punitive damages.[100] For instance, in *Sawtelle v. Waddell & Reed, Inc.*, an arbitration panel by the National Association of Securities Dealers (NASD) had awarded the plaintiff punitive damages against his former employer due to the employer's "reprehensible conduct in orchestrating a campaign of deception that included giving the impression that [plaintiff] had mishandled

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95. *Id.* at 330 (Black, J., dissenting) (citations omitted).

96. *Id.* at 330-31.

97. *Id.*

98. *Id.* at 332.

99. Similarly, the Supreme Court of Connecticut has recently explained that:

> At first glance, judicial confirmation of an arbitration award fits the *Shelley* pattern perfectly. Judicial confirmation is indisputably an exercise of government authority. Furthermore, just as with the restrictive covenant in *Shelley*, the arbitration award at issue in the present case would have had no effect without the active intervention of the courts, "supported by the full panoply of state power . . . ." Therefore, the same "but for" reasoning that guided the analysis of the Supreme Court in *Shelley* would seem to compel the conclusion that the judicial confirmation of an arbitration award constitutes state action. *Shelley's* precedential authority for this proposition, however, at least outside the context of racially restrictive covenants, is at best questionable. Although praised as a landmark civil rights decision, *Shelley* has also been the subject of much controversy and criticism. Indeed, many commentators speculate that the holding of *Shelley* has been effectively confined to its facts.

MedValUSA Health Programs, Inc. v. MemberWorks, Inc., 872 A.2d 423, 430-31 (Sup. Ct. Conn. 2005).

100. *E.g.*, Daniels v. Clear Channel Broad., Inc., No. 00-7225-CIV-ZLOCH, 2002 WL 31938885, *2 (S.D. Fla. Nov. 18, 2002).

his clients' investments, was untrustworthy, was not authorized to do business and, in some way, had been involved in the embezzlement of clients' funds."[101] The Supreme Court of New York County reduced the award and confirmed it as modified.[102] Upon appeal, the appellate court cited *Davis* and held that "there is ample authority for the proposition that a private arbitration does not implicate due process concerns since, where the parties have voluntarily participated in the arbitration process, there is no state action involved, not even in the judicial confirmation of the punitive damages award."[103]

Lastly, there is the train of thought that by voluntarily entering into an arbitration proceeding, a party waives the right to claim due process violations altogether. The Supreme Court has explained that the "due process rights to notice and hearing prior to a civil judgment are subject to a waiver."[104] This concept has been applied in at least one case involving a claim of due process violation arising out of the limited judicial review of an arbitrator's award of punitive damages. In *Bowen v. Amoco Pipeline Company*, a landowner brought an action against the owner of an oil pipeline to recover damages to his property arising from a leak in the pipeline.[105] The panel of three arbitrators ruled in favor of the plaintiff and the district court confirmed the arbitration.[106] The defendant appealed the decision, arguing in part that the limited judicial review of punitive damages awarded by the arbitrator violates the Constitution's due process protections.[107] The Tenth Circuit responded that since the defendant had voluntarily entered into arbitration, had petitioned the district court to compel arbitration, and had agreed to be governed by the broad language in the arbitration rules allowing "any remedy or relief," he may not now "oppose the very process [he] advocated and to which [he] voluntarily submitted . . . . [He] is essentially

101. Sawtelle v. Waddell & Reed, Inc., 754 N.Y.S.2d 264, 268 (N.Y. App. Div. 2003).

102. Sawtelle v. Waddell & Reed, Inc., 801 N.Y.S.2d 286, 287-89 (N.Y. App. Div. 2005).

103. *Id.* at 271 (citations omitted). *See also* MemberWorks, 872 A.2d at 428-29 ("We conclude that, because an arbitration award does not constitute state action and is not converted into state action by the trial court's confirmation of that award, an arbitration panel's award of punitive damages does not implicate the due process clause, regardless of how excessive the award may be."); *But cf.* Glennon v. Dean Witter Reynolds, Inc., 1994 WL 757709, *13-14 (M.D. Tenn. 1994) (the question of whether judicial confirmation constitutes state action is moot because a court will only confirm if it finds that the arbitrator's award does not violate constitutional rights).

104. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (1972).

105. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 927 (10th Cir. 2001).

106. *Id.* at 930.

107. *Id.* at 939.

foreclosed from arguing a due process violation. . . ."[108] Therefore, it may be argued that even if there was a requirement of due process protection in the award of punitive damages, the parties waive such protection when they enter into an arbitration agreement.[109]

c. Confirmation: The Argument In Favor of State Action

Although the fear of "constitutionalizing" private arbitration proceedings is a valid concern, the principle set forth in *Davis*, that a court's confirmation of a punitive award does not constitute state action, is not universally accepted. Regarding the award of punitive damages in arbitration, in remains true that:

> [W]e have almost none of the protections that fundamental fairness and due process require for the imposition of this sort of punishment. Discovery is abbreviated if available at all. The rules of evidence are employed, if at all, in a very relaxed manner. The factfinders (here the panel) operate with almost [no] . . . controls and safeguards. . . .[110]

Furthermore, a logical extension of the plain reading of *Shelley*, *New York Times*, and *Lugar* would appear to be that a court's confirmation of an arbitration award of punitive damages constitutes a clear case of state action. Numerous courts have therefore grappled with the task of reconciling the

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108. *Bowen*, 254 F.3d at 940. Similarly, the Ninth Circuit in *Todd Shipyards Corp v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991) held that by agreeing to arbitrate, the defendant waived any potential due process challenge regarding the award of punitive damages by the arbitrators.

109. There is a problem with this line of thinking, as explained by Stephen J. Ware in his article, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 569 (Nov. 1994). If contract law does indeed govern, then whether an arbitration agreement constitutes a waiver of due process must be decided on a case-by-case basis and classic contract defenses such as fraud and duress would apply. Furthermore:

> It is . . . important to note that unless a given arbitration agreement constitutes a waiver of due process rights, it is unenforceable under non-constitutional law. That is because Section 2 of the FAA only "make[s] arbitration agreements as enforceable as other contracts, but no more so." Either an arbitration agreement constitutes a valid waiver of due process or the Due Process Clauses are superfluous because the arbitration agreement is unenforceable anyway.

Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 569 (Nov. 1994) (quoting Prima Paint Corp v. Flood & Conklin Mfg., 388 U.S. 395, 404 n.12 (1967)).

110. *Davis*, 59 F.3d at 1190 (quoting Lee v. Chica, 983 F.2d 883, 889 (8th Cir. 1993) (Beam, J., concurring in part and dissenting in part), *cert. denied*, 510 U.S. 906 (1993).

holding of *Davis* with the fact that *Shelley* and its progeny seem to dictate that state action does indeed exist in these scenarios.

For instance, *Commonwealth Associates v. Letsos* involved an arbitrator awarding a customer actual and punitive damages against his former stock brokerage firm due to the firm's unauthorized purchases in the plaintiff's account and its failure to execute the plaintiff's sell orders resulting in over $100,000 in damages.[111] The firm moved to vacate the award arguing in part that the award of punitive damages violated the Due Process Clause due to the limited scope of judicial review of punitive damages awarded by an arbitrator.[112] The court rejected the firm's argument explaining that by its insistence that customer disputes be resolved by arbitration, the firm inherently accepted any limitations there may be concerning the judicial review of awards rendered in the arbitral forum.[113] However, the opinion went on to state that:

> [w]hile the Court does not reach the issue, the Court respectfully doubts that the rationale for this result set forth in *Davis v. Prudential* . . . that an arbitration award involves no state action—is well founded. While the procedures utilized in private arbitration do not constitute state action, the application of the coercive power of a court to confirm and enforce an arbitration award is arguably another matter.[114]

This reservation over the holding of *Davis* was likewise expressed by the bankruptcy court in *Knepp v. Credit Acceptance Corp (In re Knepp)*.[115] *In re Knepp* involved a debtor who filed a complaint against several creditors who sold, financed, and provided a service contract for an automobile he had purchased.[116] He sought to determine the validity and extent of a lien and alleged that the defendants had engaged in fraud and civil conspiracy.[117] Defendants sought to stay the proceeding and to enforce an arbitration clause contained in the debtor's contract which he had signed when he purchased the vehicle.[118] In response, the plaintiff argued that the arbitration clause violated due process since it limited or eliminated his ability to conduct extensive discovery.[119] The court disagreed and stated that arbitration is a form of private conduct and quoted *Davis*, saying that "the [state] action element of a due process claim is absent in private arbitration

111. Commonwealth Assocs. v. Letsos, 40 F. Supp. 2d 170, 172 (S.D.N.Y. 1999).
112. *Id.* at 177.
113. *Id.*
114. *Id.* at n.37 (citations omitted).
115. *In re Knepp*, 229 B.R. at 821.
116. *Id.* at 831-32.
117. *Id.*
118. *Id.*
119. *Id.* at 840.

cases."[120] Yet, the court continued to quote multiple commentators who disagreed with the holding of *Davis*. These commentators believed that contractually compelled arbitrations, as well as the confirmation of arbitration awards, constitute state action pursuant to *Lugar v. Edmonson*.[121] One such commentary discussed by the court was an article written by Jean R. Sternlight which explained that state action existed because Congress, by enacting the FAA "'restrict[ed] parties' access to litigation or other forums no less than if Congress had enacted a statute requiring private parties to take disputes to arbitration."[122] These articles persuasively argued the existence of state action and led the court to bemoan that it "believes the scholarly articles correctly address this issue. However, this Court is bound by the precedent in the Eleventh Circuit as stated in *Davis* and finds that the Due Process rights of the Plaintiff have not been denied."[123]

It appears that this is a quandary which numerous courts continue to find themselves in, attempting to balance their belief that confirming an arbitrator's award of punitive damages is a clear example of state action, against the *Davis* decision in which the Eleventh Circuit held that state action did not exist in these types of cases.[124] However, even if the *Davis*

120. *Id.* (quoting Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995)).

121. The court cited, among other commentators, Professor Richard Reuben who maintained that:

> the Supreme Court's state action decisions "seem to compel an understanding that, for constitutional purposes, ADR (i.e. arbitration) hearings can constitute state action when they are court-related or contractually enforced." Utilizing the framework established by the Supreme Court in *Lugar* . . . he concludes that contractually compelled arbitration can be state action for constitutional purposes.

In re Knepp, 229 B.R. at 840-41 (citations omitted).

122. *Id.* at 841 (quoting Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 47 (1997)).

123. *Id.* at 841 (citing Davis, 59 F.3d at 1191).

124. An example of how courts have been forced to invent imaginative solutions in order to find state action while still applying the *Davis* holding is *Birmingham News Co. v. Horn*, 901 So.2d 27 (Sup. Ct. Ala. 2004). That case involved a suit by several newspaper dealers against the Birmingham News Company, alleging that the company had wrongfully and illegally terminated their contracts. *Id.* at 30. The plaintiffs originally brought their claims in Jefferson Circuit Court, and the defendant moved to compel arbitration of the claims as provided for in the arbitration provisions in their agreements. *Id.* The trial court ordered the claims to arbitration and the Supreme Court of Alabama affirmed. The arbitrator issued an award for the plaintiff, including punitive damages, which was quickly confirmed. The defendant appealed, claiming that its due process protections had been violated. *Id.* at 66. In what can only be described as "a stretch," the Supreme Court of Alabama distinguished *Davis* and found that the confirmation of the arbitration award did indeed constitute state action requiring the protection of the defendant's constitutional rights. *Id.*

decision were to be ignored and the existence of state action deemed to exist when an arbitrator's award of punitive damages is confirmed, it is not a certainty that this would cause a party's due process rights to be violated.

The year before *Davis* was decided, a California appeals court was presented with a case in which the appellant argued that due process protections, such as the requirement for judicial review, must apply in situations where there is a punitive award assessed by an arbitrator.[125] The 1994 case *Rifkind & Sterling, Inc. v. Rifkind* involved the arbitration of a dispute between a law firm and a former partner at the firm in which the law firm was awarded punitive damages and attorney's fees.[126] The award was confirmed by the Superior Court and the former partner appealed, arguing that both the award of attorney's fees and punitive damages were improper.[127] The court began its opinion by stating that even if the due process right of judicial review is required, the appellant had waived this right by entering into the agreement, which specified that all arguments would be decided informally by arbitration and that the arbitrator's award would be "final, conclusive, and binding."[128] Nevertheless, the court went on to discuss whether due process requires the judicial review of private arbitral awards of punitive damages.[129]

The Court began by explaining how the Due Process Clauses of the Constitution only apply when there is state action and that the arbitration at issue "was a private proceeding, arranged by contract, without any legal compulsion."[130] Furthermore, by contending that the confirmation of an arbitrator's award of punitive damages requires judicial review, the appellant

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The court explained that unlike *Davis* where the action began in an arbitration hearing, in the instant case the plaintiff's action began in a court proceeding and the parties were ordered by the court to go to arbitration. *Birmingham News Co.*, 901 So.2d 27 at 66. The court further explained that "but for the court action, there would have been no arbitration at all . . . . *Id.* Accordingly, we readily perceive the requisite state action underlying these appeals sufficient to justify our review of the awards under governing federal due-process considerations. . . ." *Id.*

125. Rifkind & Sterling, Inc. v. Rifkind, 33 Cal. Rptr. 2d 828 (2d Dist. 1994).

126. *Id.* at 829-30.

127. *Id.* at 830-31. The court described the appellant's argument as follows:

> The United States Supreme Court has ruled that the due process clause requires some measure of judicial review of the size of and basis for a punitive damage award. However, in California no such review of a private arbitrator's award is available. Hence, such an award for punitive damages cannot lawfully be made, unless the defendant expressly waives the right to judicial review of it. Because [appellant] did not make such a waiver, in the agreement or otherwise, the arbitrator was not empowered to award punitive damages against him.

Rifkind, 33 Cal. Rptr. 2d at 831.

128. *Id.* at 833.

129. *Id.*

130. *Id.*

was ignoring the fact that an arbitration award is not a product of public law or state proceedings, but rather is a private arrangement that is governed by rules agreed upon by the parties.[131] Nonetheless, the court surprisingly agreed that a proceeding which confirmed an arbitration award and converted it into a judicial judgment *did* in fact constitute state action but perhaps *not enough* state action to require due process protection.[132] The court explained:

> Only a limited degree of state action is involved in confirming an arbitration award. The state does not impose the award, or mark out its criteria. It only allows the contracting contestants to secure enforcement of their own bargain. That assertion of state power does require a traditional measure of due process. But to our knowledge, neither constitutional authority nor due process tradition has ever required, in this setting, the type of judicial review here contended for.[133]

It would therefore appear that even if the holding of *Davis* is disregarded, and the confirmation of an arbitrator's award of punitive damages is held to be a form of state action, that limited form of state action would not be enough to require due process protection.

Lastly, even with the holding of *Davis,* there is an argument that the Eleventh Circuit may have arrived at a different conclusion had the arbitrator's award of punitive damages been based upon the requirements of a statute.[134] This is because statutory punitive damages are established by the state for the public's benefit by punishing bad acts with the hope to encourage appropriate behavior in the future.[135] Under this line of thinking, an arbitrator's mere award of punitive damages based upon a statute would constitute state action since, by handing out a punishment in the hope to promote proper behavior, it would be carrying out a task that has traditionally been done exclusively by the government.[136] This novel argument does not appear to have been raised in any recorded decision, and

131. *Id.*

132. *Id.* at 833.

133. *Id.* at 834 (citations omitted).

134. *See* Edward Wood Dunham, *Are There Due Process Limits on Arbitral Punitive Damage Awards*, 23 A.B.A. FRANCHISE L.J. 3, 4 (Summer 2003).

135. In *BMW v. Gore*, 517 U.S. 559 (1996), Justice Stevens, writing for the Court, explained that "punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *See also* EDMONSON, supra note 31 at § 38:9 ("Generally, punitive damages are awarded in arbitration to compensatory damages for the benefit of society in order to punish a party and to serve as an example to deter others from committing similar offenses in the future.").

136. *See* Dunham, *supra* note 134, at 4.

it therefore remains unknown how a court would address it. However, it can be assumed that even if a court agreed that an arbitrator's award of statutory punitive damages did involve state action, the award would only involve limited state action and therefore, as explained in *Rifkind & Sterling*, would not require due process protections.[137]

CONCLUSION

It is well established that the due process safeguards which are found in judicial proceedings are, for the most part, absent from arbitration.[138] The reason for this is that constitutional protections do not extend to "private conduct abridging individual rights" such as arbitration.[139] This is true even if the arbitration award contains punitive damages, regardless of the fact that the "United States Supreme Court has ruled that the due process clause requires some measure of judicial review of the size of and basis for a punitive damages award."[140] However, the question has arisen as to whether a court's confirmation of an arbitration' award of punitive damages would constitute state action, by which, similar to the situation in *Shelley v. Kraemer*, due process protections would apply.

The foremost decision on this issue is the 1995 case *Davis v. Prudential Securities, Inc.* In *Davis* the Eleventh Circuit held that the confirmation of an arbitrator's award of punitive damages did not involve state action and that due process protection therefore did not apply.[141] Although *Davis* is the leading case on this topic, numerous commentators have taken issue with the Eleventh Circuit's conclusion.[142] Furthermore, several courts have likewise stated their disapproval with the *Davis* holding but have found themselves bound by the precedent which is sets.[143] This has led to much confusion and has recently caused at least one practitioner to protest that "this chaos in the lower courts cries out for Supreme Court review."[144] However, until the Supreme Court does decide to address this issue, it would appear that courts must continue to follow the holding of *Davis*, and the victims of arbiters'

137. *See Rifkind*, 33 Cal. Rptr. 2d at 832-34.

138. *Tarkanian*, 488 U.S. at 191.

139. *Id.* at 192 (citation omitted).

140. *Rifkind*, 33 Cal. Rptr. 2d at 831. This is what the appellant unsuccessfully argued.

141. *Davis*, 59 F.3d at 1195-96.

142. *See, e.g.*, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

143. *See, e.g., In re Knepp*, 229 B.R. at 841.

144. *See supra* note 15 (Amici Curiae Brief in *EMC Mortgage Corp. v. Stark*).

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punitive awards gone awry must find solace in the knowledge that although their argument for due process protection may not succeed, there are many who feel it should.