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REGULATING MANDATORY ARBITRATION

Thomas V. Burch*

I. INTRODUCTION

Mandatory arbitration is a recent phenomenon, and it poses a seemingly intractable problem. After the Supreme Court's *Southland Corp. v. Keating* decision in 1984,¹ companies increasingly began adding arbitration provisions to their consumer, employee, and franchisee agreements—often using those provisions to restrict or eliminate the nondrafting parties' rights. While these provisions usually lacked bilateral consent, the Court instructed lower courts to allow their use, claiming that parties should have autonomy to negotiate the manner in which they resolve disputes.² At the same time, the Court steadily expanded the Federal Arbitration Act's scope, thereby increasing the number of mandatory arbitration agreements governed by the Act.³ The Court took these steps despite the evidence of mandatory arbitration's negative effects on nondrafting parties' rights.⁴

Starting in the mid-1990s, however, consumers, employees, and franchisees began fighting the Court's pro-arbitration mandate. In particular, they began asking lower courts to strike arbitration provisions under the unconscionability doctrine, and they began asking Congress to pass laws prohibiting mandatory arbitration for certain categories of disputes.⁵ While they achieved some early successes, the results of their efforts, overall, have been mixed.⁶ For example, when a number of lower courts began using the unconscionability doctrine to strike egregious arbitration provisions, the Supreme Court began limiting the doctrine's use by shifting decision-making authority to arbitrators.⁷ And when Congress finally passed bills prohibiting mandatory arbitration, the bills applied to very narrow

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¹ 465 U.S. 1 (1984).

² *See id.* at 7–8.

³ *See* discussion *infra* Part II.C.

⁴ *See infra* notes 234–236, 251 and accompanying text.

⁵ *See* discussion *infra* Part III.B.

⁶ *See* discussion *infra* Part III.A–B.

⁷ *See, e.g., Rent-a-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010) (limiting parties' abilities to challenge arbitration clauses in court by finding that if parties assign the arbitrability question to the arbitrator through a delegation clause, arbitrators have the exclusive right to determine whether the agreement is unconscionable).

categories of disputes, providing little relief for the parties most frequently subjected to the mandatory-arbitration process.⁸

Because of these mixed results, the mandatory arbitration debate has intensified over the last several years. Companies and courts are increasingly fighting to preserve it, claiming that mandatory arbitration lowers dispute-resolution costs and reduces judicial caseloads.⁹ Consumers, employees, and franchisees, on the other hand, are increasingly fighting to eliminate it, claiming that it is an unfair process that restricts or eliminates fundamental individual rights.¹⁰ Both sides have compelling arguments, but neither side seems willing to acknowledge the merit of the other side's argument and to compromise¹¹—even though compromise seems to be the only workable approach.

This Article proposes such a compromise: allow companies to mandate arbitration, but regulate the process to increase its fairness for the parties subjected to it. This will allow us to study mandatory arbitration over time while examining regulatory effects on its overall fairness, which is a goal-oriented, pragmatic approach to dealing with the mandatory arbitration problem. Accordingly, Part II begins by highlighting the Federal Arbitration Act's history, both before and after Congress passed it in 1925.¹² This history demonstrates how the Supreme Court has used formalistic reasoning to expand the Act beyond Congress's original intent and indicates that the Act's historical genesis justifies (at least partially) the end this Article seeks to achieve: improving mandatory arbitration's fairness through regulation.¹³ In particular, the Act's legislative history demonstrates that Congress wanted to protect individual rights against abuse from parties with greater

⁸ See, e.g., Department of Defense Appropriations Act, 2010, H.R. 3326, 111th Cong. § 8116 (2009) (prohibiting the government from contracting with employers that require arbitration of "any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment"); John Warner National Defense Authorization Act for Fiscal Year 2007, H.R. 5122, 109th Cong. § 670 (2006) (exempting military personnel and their dependents from having to arbitrate consumer-credit disputes).

⁹ See *infra* notes 23, 132, 216 and accompanying text.

¹⁰ See *infra* notes 241–243 and accompanying text.

¹¹ Compare TAYLOR LINCOLN & DAVID ARKUSH, PUBLIC CITIZEN, THE ARBITRATION DEBATE TRAP: HOW OPPONENTS OF CORPORATE ACCOUNTABILITY DISTORT THE DEBATE ON ARBITRATION (2008), and JOHN O'DONNELL, PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), with PETER B. RUTLEDGE, CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, ARBITRATION – A GOOD DEAL FOR CONSUMERS: A RESPONSE TO PUBLIC CITIZEN (2008).

¹² When Congress passed the Act in 1925, it was known as the United States Arbitration Act. It became the Federal Arbitration Act in 1947 when Congress reenacted and codified it as Title 9 of the U.S. Code. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). For simplicity's sake, I refer to it throughout as the Federal Arbitration Act.

¹³ See Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 703–04 (2003) ("Guiding ideals such as 'fairness,' 'justice,' and 'freedom' must be critically examined by looking to past experience.").

bargaining power,¹⁴ which, at the very least, is worth considering when deciding how to proceed in the mandatory arbitration debate.

Part III explains the consumers', employees', and franchisees' response to the Supreme Court's expansion of the Act.¹⁵ Specifically, it addresses these groups' use of the unconscionability doctrine, the Court's recent limitation of that defense, and how that limitation leaves Congress as these groups' last hope against mandatory arbitration. Part III also summarizes an original survey of the 139 anti-arbitration bills introduced in Congress since 1995—the majority of which have proposed eliminating mandatory arbitration. Overall, this survey shows that the consumers, employees, and franchisees pushing these bills have taken a shortsighted approach that disregards mandatory arbitration's public benefits and makes arbitration itself seem like the problem.

Finally, Part IV critiques both the Supreme Court's and the reform groups' approaches to mandatory arbitration, finding that both are, among other things, too rigid. Part IV then offers a pragmatic, regulatory approach—one that rejects the Supreme Court's idea that the Act is grounded in permanent, immutable principles as well as the reform groups' position that eliminating mandatory arbitration is justified by a moral consensus regarding the enforcement of rights. This new approach attempts to balance companies' needs against individuals' rights, which is the best way to resolve the current discord surrounding the mandatory-arbitration debate.

II. THE SUPREME COURT'S ARBITRATION FORMALISM

Common law develops largely through judgments in litigated cases—even for laws founded in legislation.¹⁶ The result, too often, is bureaucratic formalism in

¹⁴ See, e.g., *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 14–15 (1924) [hereinafter *1924 Joint Hearings*] (statements of Sen. Thomas Sterling, Chairman, Subcomm. of the Comm. on the Judiciary and Julius H. Cohen, General Counsel, New York State Chamber of Commerce); *A Bill Relating to Sales and Contracts to Sell in Interstate Commerce; and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 9–10 (1923) [hereinafter *1923 Hearings*] (statements of Sen. Thomas J. Walsh and W.H.H. Piatt, Chairman, Committee of Commerce, Trade and Commercial Law, American Bar Association).

¹⁵ For the sake of simplicity, I will sometimes refer to these consumers, employees, and franchisees (and the advocacy groups working on their behalves) as the “reform groups” or the “reform advocates.” Specific examples of the advocacy groups include the National Association of Consumer Advocates, Public Citizen, Trial Lawyers for Public Justice, and the National Consumer Law Center, to name a few.

¹⁶ IAN R. MACNEIL, *AMERICAN ARBITRATION LAW*, at vii (1992).

judicial decisions.¹⁷ Courts choose a position and stick with it regardless of facts, circumstances, or events that might otherwise lead to a different outcome. And their written decisions “run in deductive form with an air or expression of single-line inevitability.”¹⁸

Such has been the case with the Supreme Court and the Federal Arbitration Act. Starting in the 1980s, the Court adopted a “national policy favoring arbitration,”¹⁹ and it has since used that policy, coupled with the idea of party autonomy, to expand the Act’s scope beyond Congress’s original intent. Now the Act is applicable in both state and federal courts, it encompasses statutory and employment claims, and it applies to disputes between parties with unequal bargaining power—even if one party hasn’t truly consented to arbitrate.²⁰ Congress intended none of these.²¹ In other words, the Court’s formalism has crafted a Federal Arbitration Act that bears little resemblance to the Act that Congress originally passed.²²

The Court stretched the Act so far by routinely distorting its legislative history. The following sections address the Act’s development before 1925, Congress’s intentions in passing it that year, and the Supreme Court’s subsequent, consistent refusal to heed Congress’s intent when interpreting it. Together, these sections illustrate the lengths to which the Court has gone to expand the Act and, correspondingly, aid in reducing judicial caseloads.²³

¹⁷ *See id.*

¹⁸ KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 38 (1960) (describing formalism’s ideology as follows: “the rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law”). “Single-line inevitability” refers to failure of courts to provide reasoning for their decisions.

¹⁹ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”).

²⁰ Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 99–100 (2006) (stating that the Act “has been construed to preempt state law, eliminate the requirement of consent to arbitration, permit arbitration of statutory rights, and remove the jury trial right from citizens without their knowledge or consent”).

²¹ *See infra* notes 52–72 and accompanying text.

²² Moses, *supra* note 20, at 99–100 (stating that the Act as interpreted today by the Supreme Court probably would not have commanded any votes in the 1925 Congress).

²³ *See* MACNEIL, *supra* note 16, at 172 (“One cannot immerse oneself in the arbitration cases without coming to the conclusion that a major force driving the Court is docket-clearing pure and simple.”); *see also* Moses, *supra* note 20, at 156 (“These judicial policy choices appear to reflect the interest of the courts in reducing the judicial caseload.”).

A. The Federal Arbitration Act's Development

Arbitration was not integral to early social or economic development in the United States.²⁴ In fact, although the first arbitration tribunal convened in 1786 in New York,²⁵ another 134 years passed before the practice gained widespread acceptance. That began when New York passed the first modern arbitration statute in 1920.²⁶

New York, not surprisingly, figured prominently in arbitration's development.²⁷ It was the country's largest commercial center and its courts were backlogged with business disputes.²⁸ Those businesses wanted a more efficient, less-expensive method for resolving their differences—one that would help preserve business relationships by avoiding protracted, expensive delays in courts.²⁹ Arbitration met those needs, but the original system wasn't perfect. Specifically, neither the common law nor any of the states' early arbitration statutes would enforce predispute arbitration agreements.³⁰ Either party to a dispute could opt out of arbitration and compel the other to litigate the claim.³¹

²⁴ FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 6 (1948) (“It did not become an integral part of the early social and economic development of the country nor a recognized institution of any consequence and its impact was negligible upon the growth of justice in the country.”).

²⁵ *Id.* at 4.

²⁶ *Id.* at 9–11 (calling the New York statute a “revolutionary step”); CAMERON K. WEHRINGER, *ARBITRATION PRECEPTS AND PRINCIPLES* 5 (1969).

²⁷ See generally KELLOR, *supra* note 24 at 3–21; see also MACNEIL, *supra* note 16, at 15, 25 (stating that arbitration was “neither a new nor an uncommon practice in the United States” at the turn of the twentieth century and that “New York had long been a center of arbitration activity”).

²⁸ In 1923, for example, the New York Supreme Court was three years behind on its docket. See *1924 Joint Hearings*, *supra* note 14, at 26 (statement of Alexander Rose, Representative, Arbitration Society of America).

²⁹ Moses, *supra* note 20, at 103 (“Businessmen needed solutions that were simpler, faster, and cheaper.”). In fact, it appears that arbitration advocates at the time did not see arbitration as a form of litigation. See JULIUS H. COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 10–23 (1918) (explaining arbitration as a way to avoid “unnecessary litigation”).

³⁰ Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) (“By this Act there is reversed the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable, and in the language of the statute itself, they are made ‘valid, enforceable and irrevocable’ within the limits of Federal jurisdiction.”). There were some exceptions to this general rule, but the problems the rule created were big enough to lead to the reform movement, which led to Congress passing the FAA, which made all pre-dispute arbitration agreements presumptively valid. See also MACNEIL, *supra* note 16, at 20–21.

³¹ A party could opt out even after the arbitration had started. And while opting out would be considered a breach of contract, for which damages were available, suits to collect such damages were ineffective. MACNEIL, *supra* note 16, at 20; see also WESLEY A. STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* 82 (1930) (“Statements . . . frequently appear to the effect that a party who is aggrieved by the breach of such an

Courts allowed this “opting out” for two reasons. First, they wanted to protect parties with little bargaining power.³² Second, it was a holdover from English common law when courts zealously protected their jurisdiction.³³ The American courts tended to follow suit, apparently feeling constrained by the English courts’ longstanding decisions.³⁴ This resulted in decreased certainty over where disputes would be resolved.³⁵ If either party believed it had a technical advantage in avoiding arbitration (e.g., the expected delay in court, the application of a particular procedural rule, or the right to greater discovery), that party was free to ignore the arbitration agreement and litigate the claim in court.³⁶

These problems led to the arbitration reform movement that started shortly after the turn of the twentieth century.³⁷ Julius Cohen and Charles Bernheimer shepherded the movement,³⁸ and passing New York’s modern arbitration statute

agreement can maintain an action for damages. So few cases, however, have involved such an action that if there is such a rule of law it rests upon this popular acclaim.”).

³² 1924 *Joint Hearings*, *supra* note 14, at 15 (statement of Julius H. Cohen, General Counsel, New York State Chamber of Commerce) (“[A]t the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them”).

³³ Cohen & Dayton, *supra* note 30, at 283 (“The explanation is to be found in our English system of jurisprudence. For many centuries there has been established a rule, rooted originally in the jealousy of courts for their jurisdiction, that parties might not, by their agreement, oust the jurisdiction of the courts.”).

³⁴ *Id.* at 270; *see also* H.R. REP. NO. 68-96, at 2 (1924) (“The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it.”). Apparently there were English courts questioning the soundness of this rule, but American courts either glossed over or ignored those decisions. *See* COHEN, *supra* note 29, at 226–241 (explaining how the English rule of revocability was adopted by American courts).

³⁵ Cohen & Dayton, *supra* note 30, at 270.

³⁶ *Id.* (“The result is that this party is usually loath to surrender his supposed advantage.”).

³⁷ MACNEIL, *supra* note 16, at 25, 28–30, 38 (describing the elimination of the rule of revocability as the reformers’ “quest” and calling Cohen’s 1918 book the “kickoff” of the campaign to educate the public on arbitration); COHEN, *supra* note 29, at 53–252 (dedicating the majority of the book to explaining why the doctrine of revocability was a “judicial error”).

³⁸ *See* MACNEIL, *supra* note 16, at 28 (recognizing Bernheimer and Cohen as the founders of the reform movement); Moses, *supra* note 20, at 101–11 (calling Cohen and Bernheimer “instrumental” in passing New York’s modern statute and then detailing their involvement in passing the Federal Arbitration Act). Although Cohen and Bernheimer shepherded the movement, several others were influential in the movement as well. For example, W.H.H. Piatt, chairman of an ABA committee on arbitration, lobbied for the FAA. MACNEIL, *supra* note 16, at 88. Also, the Arbitration Society of America was instrumental in pushing for federal reform. KELLOR, *supra* note 24, at 13.

was their first major success.³⁹ They used this success to lobby Congress for a federal law that would make arbitration agreements enforceable in federal court.⁴⁰ They wanted to ensure that New York parties, for example, could compel parties from other states to arbitrate (assuming they had a valid agreement).⁴¹

Cohen wrote the first draft of the Federal Arbitration Act in 1921, basing it largely on New York's 1920 statute.⁴² He submitted it to the American Bar Association (ABA) for approval, but it lacked certain procedural provisions (which New York provided in its civil procedure code) so the ABA did not approve it.⁴³ Cohen fixed the problem and submitted a second draft in 1922, which the ABA approved. Senator Sterling and Congressman Mills then introduced it in each house of Congress,⁴⁴ but their bills went no further than the Senate and House judiciary committees.⁴⁵ So the ABA approved another draft in 1923 that incorporated Congressional comments from the previous session.⁴⁶ Sterling and Mills introduced this draft to Congress in December 1923,⁴⁷ subcommittees from each house's judiciary committee held a joint hearing in January 1924,⁴⁸ and Congress ultimately approved this draft (with minor changes) in February 1925.⁴⁹ President Coolidge signed it shortly thereafter,⁵⁰ and it became effective on January 1, 1926.⁵¹

³⁹ MACNEIL, *supra* note 16, at 28–31. New York's new law led to the creation of the Arbitration Society of America in 1922, which was the "first permanent independent institution of arbitration." KELLOR, *supra* note 24, at 11. It later merged (in 1926) with the Arbitration Foundation to become the American Arbitration Association. *Id.* at 15–17. The American Arbitration Association institutionalized arbitration "by giving it a central administrative organization, facilities for research and education, a laboratory for experiment, and a national system of tribunals." *Id.* at 25.

⁴⁰ See Moses, *supra* note 20, at 101–02.

⁴¹ *Id.*

⁴² MACNEIL, *supra* note 16, at 85–86. One of the main differences was that the proposed Federal Arbitration Act appeared to allow oral agreements to arbitrate future disputes. *Id.* at 85. The fact that this provision was later stricken shows that the drafters and legislators were concerned about parties' consent to arbitrate.

⁴³ *Id.* at 85–87.

⁴⁴ *Id.* at 88.

⁴⁵ *Id.* at 88–91. The House Judiciary Committee never held a hearing. *Id.* at 91. The Senate Judiciary Committee held a hearing in January 1923. See 1923 Hearings, *supra* note 14, at 1.

⁴⁶ MACNEIL, *supra* note 16, at 91.

⁴⁷ *Id.* at 92.

⁴⁸ See 1924 Joint Hearings, *supra* note 14, at 1.

⁴⁹ The House passed the Act on June 6, 1924. The Senate passed it on January 31, 1925. The House then considered and passed the Senate's amendments on February 4, 1925. MACNEIL, *supra* note 16, at 100–01. For a copy of the Act as passed by Congress in 1925, see STURGES, *supra* note 31, at 983.

⁵⁰ Coolidge signed the Act on February 12, 1925. MACNEIL, *supra* note 16, at 101.

⁵¹ Moses, *supra* note 20, at 110.

B. Congress's Intentions in Passing the Federal Arbitration Act

When asked in 1923 to state the Federal Arbitration Act's purpose, Bernheimer said it would: (1) reduce consumer costs; (2) reduce court delays; (3) save time and money for the disputants; (4) preserve business relationships; and (5) simply enforce voluntary agreements to arbitrate disputes.⁵² Similar comments between 1921 and 1926 on the Act's purposes were common from legislators and other reform advocates,⁵³ and they provide great insight into what Congress intended in passing the Act.⁵⁴

First, the comments demonstrate that Congress passed the Act as a procedural mechanism for enforcing arbitration agreements in federal, not state, courts. Cohen, for example, submitted a brief at the 1924 joint hearings supporting this idea: "The statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."⁵⁵ Although there was little testimony on this topic during the hearing,⁵⁶ the House Committee Report confirmed Cohen's position by stating:

The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of

⁵² MACNEIL, *supra* note 16, at 29–30 (citing *Report of the Standing Committee on Commerce, Trade, and Commercial Law*, 47 ANN. REP. ABA 279 app. b at 300 (1924)). I want to emphasize the portion of Bernheimer's comments on the voluntary nature of arbitration. Specifically, he said: "It is voluntary. No one need agree to arbitrate unless it is his wish." *Id.* at 30.

⁵³ *See, e.g.*, Bernheimer himself reiterated the same basic comments at the Joint Hearings in 1924. *1924 Joint Hearings, supra* note 14, at 7 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, New York State Chamber of Commerce) ("It raises business standards. It maintains business honor, prevents unnecessary litigation, and eliminates the law's delay by relieving our courts.").

⁵⁴ Part of the reason that comments from the reform advocates are so important in interpreting the intent of the Act is that much of the debate over the Act took place between those advocates before the ABA, not before Congress. Congress basically adopted the Act as provided to it by the ABA. *See* MACNEIL, *supra* note 16, at 107–09.

⁵⁵ *1924 Joint Hearings, supra* note 14, at 37 (brief submitted by Julius H. Cohen, General Counsel, New York State Chamber of Commerce). Senator Sterling accepted the brief into the record without objection. *Id.* at 33. Cohen reiterated this intent in his 1926 article in the *Virginia Law Review*. *See* Cohen & Dayton, *supra* note 30, at 275–76 ("[The statute] rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. . . . The statute as drawn establishes a procedure in the Federal courts for the enforcement of certain arbitration agreements.").

⁵⁶ Senator Sterling and Representative Dyer had a brief exchange on "the authority of Congress to legislate on this subject" with Sterling agreeing that Congress had "ample" authority and jurisdiction. *See 1924 Joint Hearings, supra* note 14, at 24 (statements of Sen. Thomas Sterling, Chairman, Subcomm. of the Comm. on the Judiciary, and Rep. Leonidas C. Dyer, Chairman, Subcomm. of the Comm. on the Judiciary).

procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential.⁵⁷

Further confirming this limit on the Act's scope, Cohen, Bernheimer, and others were pushing the National Conference of Commissioners on Uniform State Laws (NCCUSL) for an arbitration act that states could adopt to make predispute arbitration agreements enforceable in state courts.⁵⁸ If the reformers believed that the Federal Arbitration Act would be applicable in state courts, their efforts before the NCCUSL would have been unnecessary.⁵⁹

Second, the legislators' and reform advocates' comments during this period reveal that Congress intended the Federal Arbitration Act to apply to arbitration agreements between businesses with relatively equal bargaining power—not agreements between businesses and their employees or consumers. For example, take Bernheimer's 1923 comments to the ABA where he said that the Act would "preserve business friendships" and that it would apply only to "voluntary" agreements.⁶⁰ While these comments do not explicitly limit the Act to arbitration

⁵⁷ H.R. REP. NO. 68-96, at 1 (1924). While the report says that the Act "is founded also upon the Federal control over interstate commerce and over admiralty," this justification was secondary, at best. *Id.*; see also Moses, *supra* note 20, at 110 ("By use of the word 'also,' the reference to the commerce and admiralty power appears to be a fall-back position, a secondary basis of power."). Cohen seemed to think that Congress's power over federal courts was the main, if not the sole, authority for passing the Act. See Cohen & Dayton, *supra* note 30, at 275 ("It has been suggested that the proposed law depends entirely for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress. This is not the fact. . . . It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."); 1924 *Joint Hearings*, *supra* note 14, at 37 (brief submitted by Julius H. Cohen, General Counsel, New York State Chamber of Commerce).

⁵⁸ See Moses, *supra* note 20, at 102. The NCCUSL passed the Uniform Arbitration Act in 1925. See STURGES, *supra* note 31, at 957.

⁵⁹ Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 649-50 (1996) ("The fact that the same groups that sought passage of the FAA were working simultaneously on state laws that would have been superfluous if the FAA were truly intended to govern the state forum as well as the federal bolsters this conclusion."). The idea that the Act was intended to apply in federal courts is further supported by its repeated references to "federal courts." MACNEIL, *supra* note 16, at 106-07 ("Either the ABA and Congress were being extraordinarily dense in failing to recognize that those references should be to all courts, or they meant exactly what they said when they referred only to federal courts.").

⁶⁰ See MACNEIL, *supra* note 16, at 30 (citing *Report of the Standing Committee on Commerce, Trade, and Commercial Law*, 47 ANN. REP. ABA 279 app. b at 300 (1924)); see also 1924 *Joint Hearings*, *supra* note 14, at 7 (statement of Charles L. Bernheimer, Chairman, Committee on Arbitration, New York State Chamber of Commerce) ("It preserves business relationships.").

agreements covering business-to-business disputes,⁶¹ they strongly imply as much because they responded to existing and anticipated questions over whether the Act would apply to adhesive contracts.⁶² Also, at the 1923 Hearing before the Senate Subcommittee of the Committee on the Judiciary, Senator Walsh expressed concerns over take-it-or-leave-it arbitration agreements,⁶³ and Senator Sterling expressed similar concerns at the 1924 Joint Hearings.⁶⁴ On both occasions, the persons being questioned assured the senators that the reformers did not intend to apply the Act to adhesive agreements.⁶⁵ Their statements, along with similar statements made by other reform advocates,⁶⁶ show that the reformers drafted, and

⁶¹ One could argue, for example, that a relationship between a business and a customer is a “business friendship” and that customers “voluntarily” sign binding arbitration agreements despite any disparity in bargaining power or lack of choice. I would disagree with such an argument, of course, but I recognize that it could be made.

⁶² This issue was raised perhaps most fervently in arguments before the NCCUSL and the ABA over whether the proposed Uniform Arbitration Act that would apply in state courts should cover pre-dispute arbitration agreements. *See* MACNEIL, *supra* note 16, at 49–54 (quoting statements made by Joseph Francis O’Connell, who, in summarizing the feelings of the NCCUSL’s arbitration committee, expressed concern over individuals “giving up rights that the American people really regard as sacred” by signing adhesive agreements to arbitrate disputes). Because of this concern, the NCCUSL excluded pre-dispute agreements from UAA coverage and the ABA subsequently approved this non-modern version of that Act. *Id.* at 54.

⁶³ *1923 Hearings*, *supra* note 14, at 9 (statement of Sen. Thomas J. Walsh). Prior to Senator Walsh’s comments, W.H.H. Piatt raised the issue on his own with regard to employment agreements. To alleviate any concerns that the Act would allow employers to force employees into arbitration, Mr. Piatt said: “It is not intended that this shall be an act referring to labor disputes, at all.” *Id.* (statements of W.H.H. Piatt, Chairman, Committee of Commerce, Trade, and Commercial Law, American Bar Association).

⁶⁴ *1924 Joint Hearings*, *supra* note 14, at 15 (statement of Sen. Thomas Sterling, Chairman, Subcomm. of the Comm. on the Judiciary).

⁶⁵ *Id.* (statement of Julius H. Cohen, General Counsel, New York State Chamber of Commerce) (attempting to assure Senator Sterling that the Act was not intended to apply to adhesive contracts); *1923 Hearings*, *supra* note 14, at 10 (statement of W.H.H. Piatt, Chairman, Committee of Commerce, Trade and Commercial Law, American Bar Association) (“Speaking for myself, personally, I would say I would not favor any kind of legislation that would permit the forcing a man to sign that kind of a contract.”).

⁶⁶ *See, e.g., 1924 Joint Hearings*, *supra* note 14, at 26 (statement of Alexander Rose, Representative, Arbitration Society of America) (“It is only the idea that arbitration may now have the aid of the court to enforce these provisions which men voluntarily enter into.”); Cohen & Dayton, *supra* note 30, at 279 (“No one is required to make an agreement to arbitrate. Such action by a party is entirely voluntary.”). In the early years of the Federal Arbitration Act, arbitration under the Act remained a voluntary process. *See* KELLOR, *supra* note 24, at 168 (“The voluntary nature of arbitration as an American policy has been steadily maintained.”).

that Congress intended to pass, an Act that applied to arbitration agreements between merchants with relatively equal bargaining power.⁶⁷

Finally, the reform advocates' comments demonstrate that they did not intend for the Act to apply to statutory or employment disputes. Cohen, for example, stated that arbitration "is not the proper method for deciding points of law of major importance involving . . . the application of statutes."⁶⁸ According to Cohen, those questions were better reserved for "skilled judges" and "established systems of law."⁶⁹ And W. H. H. Piatt stated that the Act was not intended to apply to employment disputes "at all."⁷⁰ In fact, the reformers envisioned the Act applying only to "trade disputes" between merchants involving factual questions and "simpler questions of law."⁷¹ This meshed with their view of the Act's limited scope and with how courts applied the Act in the early years after Congress passed it.⁷² But this view would not survive very long. The Supreme Court soon began expanding the Act far beyond its original scope—ignoring Congressional intent, and the reform advocates' intent, along the way.

C. *The Court's Steady Expansion of the Federal Arbitration Act's Scope*

Although the Federal Arbitration Act started as a procedural statute applicable in federal courts to agreements between merchants, the Supreme Court eventually transformed it into a substantive law statute that applied in both federal and state courts and to agreements between merchants and individuals. The process started in 1938 with *Erie Railroad Co. v. Tompkins*, a case that on its surface had nothing to do with arbitration.⁷³ And it has continued over the last seventy-plus years

⁶⁷ See Cohen & Dayton, *supra* note 30, at 281 ("[Arbitration] is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like."); Moses, *supra* note 20, at 108 ("The new law was not intended to permit a party with greater economic strength to compel a weaker party to arbitrate."); Sternlight, *supra* note 59, at 641 ("When Congress passed the FAA in 1925, it intended only to require federal courts to *accept* arbitration agreements that had been voluntarily entered into by two parties of relatively equal bargaining power in arms' length transactions.").

⁶⁸ Cohen & Dayton, *supra* note 30, at 281.

⁶⁹ *Id.* Although Cohen did not make this argument before Congress, it is consistent with his position before Congress that the Act was limited in scope, applying mainly to factual disputes between merchants. See Moses, *supra* note 20, at 111.

⁷⁰ 1923 Hearings, *supra* note 14, at 9 (statements of W.H.H. Piatt, Chairman, Committee of Commerce, Trade, and Commercial Law, American Bar Association).

⁷¹ See 1924 Joint Hearings, *supra* note 14, at 7 (statement of Charles L. Bernheimer, Chairman, Committee on Arbitration, New York State Chamber of Commerce); Cohen & Dayton, *supra* note 30, at 281.

⁷² See MACNEIL, *supra* note 16, at 122–33.

⁷³ 304 U.S. 64 (1938).

through a series of Supreme Court decisions that, collectively, show how the Court has legislated a new Act—one that Congress did not envision.⁷⁴

In *Erie* the Court overturned *Swift v. Tyson*⁷⁵ and held that federal courts must apply state substantive law in diversity cases.⁷⁶ Because the Act was intended to be procedural, at first *Erie* had no effect on it.⁷⁷ But that began to change in 1945 with the Court's decision in *Guaranty Trust Co. v. York*.⁷⁸ There, the Court found that in determining whether to apply state or federal law in diversity cases, courts should focus less on whether a law is substantive or procedural and more on whether applying federal law would lead to a different outcome.⁷⁹ Under this "outcome determinative" test, state law applied if the federal law would lead to a different result.⁸⁰ This raised the question of whether compelling arbitration under the Act could be outcome determinative.

The Court first faced this question in 1956 in *Bernhardt v. Polygraphic Co. of America*,⁸¹ a case involving the breach of an employment contract made in New York and carried out in Vermont.⁸² The contract required the parties to arbitrate their disputes before the American Arbitration Association in New York, but Bernhardt sued in a Vermont state court.⁸³ At the time, Vermont did not enforce predispute arbitration agreements,⁸⁴ so Polygraphic removed the case to federal court in Vermont, asking it to stay the litigation and compel arbitration. The district court denied the stay; the court of appeals reversed; and the Supreme Court granted certiorari because of the court of appeals' "doubtful application" of *Erie*.⁸⁵

Bernhardt held that the Act did not apply in diversity cases involving intrastate commerce.⁸⁶ And because the Court found that this case did, in fact, involve intrastate commerce, it could have stopped its opinion there.⁸⁷ But it

⁷⁴ See Moses, *supra* note 20, at 114–54; see also MACNEIL, *supra* note 16, at 144 (describing Justice Stevens' opinion in *Southland* as "an unusually frank recognition of the ongoing legislative role of the Court in amending legislation over time").

⁷⁵ 41 U.S. (16 Pet.) 1 (1842).

⁷⁶ *Erie R.R. Co.*, 304 U.S. at 77–78.

⁷⁷ MACNEIL, *supra* note 16, at 134 ("The [FAA] was a statute aimed at governing the procedure in federal courts, not the substantive law those courts applied. The act did not therefore depend upon the continuing validity of *Swift*.").

⁷⁸ 326 U.S. 99 (1945).

⁷⁹ *Id.* at 110.

⁸⁰ *Id.* at 109–11.

⁸¹ 350 U.S. 198 (1956).

⁸² *Id.* at 199.

⁸³ *Id.*

⁸⁴ *Id.* at 199–200.

⁸⁵ *Id.* at 200.

⁸⁶ *Id.* at 202 ("We conclude that the stay provided in § 3 reaches only those contracts covered by §§ 1 and 2.").

⁸⁷ *Id.* at 200–01 ("There is no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.").

continued, in dicta, to address whether compelling arbitration could be outcome-determinative, ultimately finding that it could.⁸⁸ Specifically, the Court said “If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State.”⁸⁹ Put differently, the Act was more than just a procedural statute to be applied in federal court; it was a substantive measure that could affect a dispute’s outcome.⁹⁰ Reaching this conclusion increased the chances that the Court might, in a future case, find that the Act was “substantive in the full-blown regulatory sense that would lead to invocation of the Supremacy Clause.”⁹¹ And that was what began to happen in 1967 with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁹²

In *Prima Paint*, a diversity case involving interstate commerce, the Court had to decide whether a court or an arbitrator should hear a fraudulent inducement claim.⁹³ This presented a dilemma under *Guaranty Trust Co.*’s outcome-determinative test: if the Court accepted *Bernhardt*’s reasoning that arbitration “substantially affects the cause of action created by the State,”⁹⁴ then it would have to find that the Act did not apply in diversity cases because it was “substantive” under *Erie*. This would directly contradict Congress’s original reason for passing the Act.⁹⁵ So, without deciding whether applying state law would lead to a different outcome,⁹⁶ the Court simply applied the Act and allowed the arbitrator to resolve the claim.⁹⁷ To support its conclusion, the Court said: “[I]t is clear beyond

⁸⁸ *Id.* at 203. The Court cited the following as reasons why arbitration might lead to a different result: (1) no right to trial by jury; (2) arbitrators not having “the benefit of judicial instruction on the law”; (3) no reasoned opinions; (4) limited record; and (5) limited review of awards. *Id.*

⁸⁹ *Id.* This conclusion appeared to mean that when state arbitration law and the Act conflicted in diversity cases, federal courts would have to apply state law under the *Guaranty Trust Co.* test, thus possibly limiting the Act to federal question cases. Such a limitation would have been problematic given that the Act was passed to enforce arbitration agreements in diversity cases. See *Moses*, *supra* note 20, at 115–16. But because this discussion was dicta, the question would be reserved for a future case. Also, I should note that Justice Frankfurter, in his concurring opinion, actually called for the Act not to be applicable in diversity cases. See *Bernhardt*, 350 U.S. at 207–08 (Frankfurter, J., concurring).

⁹⁰ See *Bernhardt*, 350 U.S. at 203.

⁹¹ MACNEIL, *supra* note 16, at 137.

⁹² 388 U.S. 395 (1967).

⁹³ *Id.* at 402.

⁹⁴ *Bernhardt*, 350 U.S. at 203.

⁹⁵ *Moses*, *supra* note 20, at 117.

⁹⁶ *Prima Paint*, 388 U.S. at 400 n.3.

⁹⁷ *Id.* at 403–04. In doing so the Court eliminated any doubt over whether the Act applied in diversity cases involving interstate commerce. See MACNEIL, *supra* note 16, at 138. The *Prima Paint* decision created what is known as the “separability rule.” Under this rule, challenges to agreements as a whole are for the arbitrator to decide. And specific

dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’”⁹⁸ But nothing in the Act’s legislative history supports this.⁹⁹ And, because the Court didn’t specify that Congress never intended the Act to apply in state courts, its reliance on the Commerce Clause¹⁰⁰ invented a basis for arguing that the Act created substantive rights that would preempt conflicting state laws.¹⁰¹ This made it “logically inescapable” that the Act would eventually apply in state, not just federal, court.¹⁰² And that is precisely what the Court did in *Southland Corp. v. Keating* in 1984.¹⁰³

In *Southland*, the Court finally (and erroneously) described the Act as a substantive federal law that would trump conflicting state laws in state court.¹⁰⁴ *Southland* thus divorced the Act from its legislative history and freed the Court to create an Act of its choosing.¹⁰⁵ To help in that creation, the Court relied on its recently created “national policy favoring arbitration.”¹⁰⁶ This soon became one of the Court’s key justifications for further expanding the Act to (1) cover statutory disputes and employment agreements, (2) preempt state consumer-protection laws, and (3) eliminate arbitration’s consent requirement.¹⁰⁷

For example, the following year in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,¹⁰⁸ the Court cited its national policy and found that

challenges to arbitration clauses are reserved for the courts. *See Prima Paint*, 388 U.S. at 403–04.

⁹⁸ *Prima Paint*, 388 U.S. at 405. The Court also said that the admiralty and commerce powers “formed the principal bases of the legislation” and that Congress’s power over federal courts, if relied on at all, was “supplementary.” *Id.* at 405 n.13.

⁹⁹ *See supra* Part I.B.

¹⁰⁰ *Prima Paint*, 388 U.S. at 405; *see also* *Moses*, *supra* note 20, at 121–22.

¹⁰¹ *Moses*, *supra* note 20, at 121–22.

¹⁰² MACNEIL, *supra* note 16, at 138.

¹⁰³ 465 U.S. 1, 14–15 (1984). The Court foreshadowed this result one year earlier in *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). There, in dicta, the Court said: (1) that Congress, through the Act, created a body of substantive federal law that governed in either state or federal court; and (2) that Congress, through the Act, created a liberal federal policy in favor of arbitration. *Id.* at 24. Neither statement is supported by legislative history.

¹⁰⁴ 465 U.S. at 11–12 (stating that the Act “rests on the authority of Congress to enact substantive rules under the Commerce Clause” and that passing the Act under the Commerce Clause “clearly implied that the substantive rules of the Act were to apply in state as well as federal courts”).

¹⁰⁵ *Moses*, *supra* note 20, at 130, 149.

¹⁰⁶ *Southland Corp.*, 465 U.S. at 10. The Court first announced this policy one year earlier in dicta in *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24. The national policy had no basis in the Act’s legislative history. *Moses*, *supra* note 20, at 123 (“The 1925 Congress never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes.”).

¹⁰⁷ *Moses*, *supra* note 20, at 99–100.

¹⁰⁸ 473 U.S. 614 (1985).

arbitration was an appropriate forum for resolving statutory disputes.¹⁰⁹ To support its decision, it said: “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”¹¹⁰ But this statement directly contradicted Julius Cohen’s earlier limiting statements¹¹¹ and the *Bernhardt* Court’s skepticism toward arbitration.¹¹² The Court swept aside these concerns, stating simply, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”¹¹³

The Court then continued its proarbitration trend in *Gilmer v. Interstate/Johnson Lane Corp.*,¹¹⁴ a 1991 decision where it held that ADEA claims are arbitrable.¹¹⁵ It did so despite its prior statement in *Alexander v. Gardner-Denver Co.*¹¹⁶ that “[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.”¹¹⁷ The *Gilmer* Court also addressed, in a footnote, whether employment disputes can be arbitrated.¹¹⁸ The Court

¹⁰⁹ *Id.* at 626–27. The claims in *Mitsubishi Motors Corp.* arose under the Sherman Act. *Id.* at 616. The Court would later expand the Act to cover other statutory disputes as well. *See, e.g.,* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (finding that ADEA claims are subject to mandatory arbitration).

¹¹⁰ *Mitsubishi Motors Corp.*, 473 U.S. at 628.

¹¹¹ Cohen & Dayton, *supra* note 30, at 281 (stating that arbitration “is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes” and that such questions are better reserved for “skilled judges”). Cohen admittedly was not a member of Congress when Congress passed the Act, but he did *draft* the Act and testify about its meaning before Congress, which is why I place importance on his statements.

¹¹² *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (“[T]he remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State.”).

¹¹³ *Mitsubishi Motors Corp.*, 473 U.S. at 626–27. The Court confirmed this view in 1987 in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (“This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.”). The Court also said that the party trying to avoid arbitration has the burden of showing that Congress did not intend for the statutory claims in question to be arbitrated. *Id.* at 226–27.

¹¹⁴ 500 U.S. 20 (1991).

¹¹⁵ *Id.* at 35.

¹¹⁶ 415 U.S. 36 (1974).

¹¹⁷ *Id.* at 56.

¹¹⁸ Specifically, it asked whether *Gilmer* could avoid arbitration under the Act because of Section 1’s exclusion of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” *Gilmer*, 500 U.S. at 25 n.2; *see also* 9 U.S.C. § 1 (2006). *Gilmer* had signed an industry-wide “securities registration application” that mandated arbitration of any disputes between himself and his employer, *Interstate*. *Id.* at 25 n.2. After being fired, *Gilmer* sued *Interstate*

ultimately sidestepped the question with thin reasoning,¹¹⁹ which foreshadowed its subsequent decision in *Circuit City Stores, Inc. v. Adams*.¹²⁰ There, it explicitly held that the Act covers disputes between employers and employees,¹²¹ despite W. H. H. Piatt's assurance at the 1923 hearing that it was not "an act referring to labor disputes at all."¹²²

Cases like *Mitsubishi Motors* and *Gilmer* exhibited the Court's belief that arbitration was an appropriate forum for resolving most disputes. Its next major step was to increase the number of disputes potentially falling within the Federal Arbitration Act's scope. In 1995, in *Allied-Bruce Terminix Cos. v. Dobson*,¹²³ the Court found that Section 2's coverage of contracts "evidencing a transaction involving commerce" reached the limits of Congress's Commerce Clause powers.¹²⁴ In other words, the Court adopted the broadest possible definition of "involving commerce," meaning that the Act would apply to all "commerce in fact."¹²⁵ This reading of the phrase reduced the likelihood that disputes would be covered by state arbitration acts instead of the Federal Arbitration Act, thus pushing the Act "further into the realm of state court jurisprudence."¹²⁶

Then, the following year in *Doctor's Associates v. Casarotto*,¹²⁷ the Court severely restricted states' abilities to pass laws regulating arbitration covered by the Act.¹²⁸ Specifically, the Court found that lower courts could not "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."¹²⁹ This meant that state legislatures could protect consumers and others from mandatory arbitration only through laws dealing with purely local

for age discrimination in a federal district court. *Id.* at 23. Interstate then moved to compel arbitration under the "application." *Id.* at 23–24.

¹¹⁹ The Court sidestepped the question by finding that the industry-wide "securities registration application" signed by Gilmer was neither an employment contract nor part of an employment contract. *Id.* at 25 n.2.

¹²⁰ 532 U.S. 105 (2001).

¹²¹ *Id.* at 123–24.

¹²² *Id.* at 127; see also *1923 Hearings*, *supra* note 14, at 9 (statement of W.H.H. Piatt, Chairman, Committee of Commerce, Trade, and Commercial Law, American Bar Association). The Court explicitly refused to consider the Act's legislative history. *Circuit City Stores, Inc.*, 532 U.S. at 119. It based its decision on the text of Section 1, stating that the text was clear. *Id.* at 114–15. Never mind that it applied the principle of *ejusdem generis*, which typically is used only if the text doesn't give a direct answer.

¹²³ 513 U.S. 265 (1995).

¹²⁴ *Id.* at 268 (emphasis omitted) (quoting 9 U.S.C. § 2).

¹²⁵ *Id.* at 281 ("[W]e accept the 'commerce in fact' interpretation, reading the Act's language as insisting that the 'transaction' in fact 'involv[e]' interstate commerce, even if the parties did not contemplate an interstate commerce connection.").

¹²⁶ Sternlight, *supra* note 59, at 665.

¹²⁷ 517 U.S. 681 (1996).

¹²⁸ *Id.* at 687.

¹²⁹ *Id.*

transactions or through laws dealing with contracts generally.¹³⁰ In other words, the Court had further frustrated states' abilities to protect consumers from overreaching arbitration agreements because *Allied-Bruce* left relatively few arbitration disputes outside the scope of the Act.

Overall, the Court's opinions—including some of its more recent ones¹³¹—demonstrate that it will compel arbitration despite conflicting precedent, contrary legislative history, or other concerns about arbitration in any particular case (e.g., disparities in bargaining power¹³²). Its reasoning appears to be based on a desire to reduce judicial caseloads—a worthy goal no doubt.¹³³ But whether that goal should trump concerns over the loss of individual rights through mandatory arbitration remains an open question—one that consumers, employees, and franchisees are increasingly urging lower courts and Congress to address.

III. THE RISING LIBERAL RESPONSE TO MANDATORY ARBITRATION

As the Supreme Court expanded the Federal Arbitration Act's scope and simultaneously required lower courts to grant greater deference to parties' arbitration agreements, the parties drafting these agreements increasingly included unfair and overreaching terms. State legislatures could do little about this after *Doctor's Associates*.¹³⁴ This left parties with two basic methods to seek relief from unfair agreements: (1) through the unconscionability doctrine in lower courts and (2) through Congress.

The unconscionability doctrine, when applied, allows parties to avoid the most oppressive mandatory arbitration agreements. But it does not provide wide-scale relief; it simply allows courts to review agreements on a case-by-case basis.¹³⁵ That is why advocates for eliminating mandatory arbitration have asked

¹³⁰ See Sternlight, *supra* note 59, at 668. After *Allied-Bruce*, fewer arbitration disputes were considered local disputes. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 256, 281 (1995).

¹³¹ See, e.g., *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (upholding a class action waiver in an arbitration agreement); *Rent-a-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2781 (2010) (limiting nondrafting parties' ability to have the arbitrability question decided by courts instead of arbitrators).

¹³² See, e.g., *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987) (finding the voluntariness of an agreement irrelevant to the enforceability of arbitration agreements).

¹³³ MACNEIL, *supra* note 16, at 172 (“[T]he Court is motivated to reduce the cases having to be tried by the judicial system, particularly the federal judicial system.”).

¹³⁴ See *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996) (holding that arbitration agreements could not be invalidated by state laws applicable only to arbitration provisions).

¹³⁵ Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1442 (2008) (“[U]nconscionability does not completely address the problem: Many of the features of arbitration clauses that are often challenged as unconscionable really do not strike one as a gross imposition on the particular person at issue but rather strike at more broadly based considerations of public policy.”).

Congress for protection.¹³⁶ They want Congress to preclude companies from requiring their customers, employees, and franchisees to arbitrate disputes.

This section explores those parties' increased reliance on the unconscionability doctrine after *Doctor's Associates* and the Supreme Court's most recent attempts to limit the doctrine's use. It also addresses these parties' efforts in Congress during this period, showing that their efforts have increased in lockstep with their reliance on the unconscionability doctrine. So far neither Congress nor the unconscionability doctrine has produced the results that these reform advocates want—mandatory arbitration's wholesale elimination. But that could change as they continue pressing for relief.

A. *The Rise (and Ultimate Fall) of Unconscionability*

Section 2 of the Act allows courts to invalidate arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract.”¹³⁷ Put differently, courts may invalidate arbitration agreements under general state laws that would make any contract unenforceable.¹³⁸ “Unconscionability” is one such law.

Although the unconscionability doctrine is at least two and a half centuries old, courts have not yet agreed on how to define it.¹³⁹ In part, this is because it requires a fact-based inquiry, the results of which will vary from case to case.¹⁴⁰ Nevertheless, courts have developed a two-part test for applying the doctrine. First, the party challenging the arbitration agreement must prove that the manner in which it was asked to arbitrate was somehow unfair (e.g., through an adhesion

¹³⁶ See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 748(n)(1)–(2) (2010) (giving a proposed agency the power to prohibit or impose limitations of mandatory arbitration by rule if the agency decides such a rule would benefit the public interest).

¹³⁷ 9 U.S.C. § 2 (2006).

¹³⁸ See Bruhl, *supra* note 135, at 1422.

¹³⁹ See Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 792–94 (2004) (citing *Earl of Chesterfield v. Janssen*, (1750) 28 Eng. Rep. 82, 100).

¹⁴⁰ Take, for example, the UCC's definition of unconscionability. It recognizes that whether unconscionability exists depends on the circumstances existing at the time of the contract. See U.C.C. § 2-302 cmt. 1 (2010) (“The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”); see also Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years after Doctor's Associate's, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 264 (2006) (“[T]he unconscionability defense may be predicated upon a variety of factors and is a case sensitive analysis.”).

contract).¹⁴¹ This is known as procedural unconscionability.¹⁴² Second, the party challenging the agreement must demonstrate that the agreement's terms are too unreasonable to warrant judicial enforcement.¹⁴³ This is known as substantive unconscionability.¹⁴⁴ Some courts require parties to satisfy both tests before invalidating an agreement.¹⁴⁵ Others find that substantive unconscionability is enough.¹⁴⁶

As one might imagine, this fact-based inquiry makes it relatively easy for courts to invalidate arbitration agreements with little chance of being reversed on appeal.¹⁴⁷ While they are not supposed to interpret arbitration agreements any differently than other contracts under state law,¹⁴⁸ reviewing courts find it difficult to tell if lower courts did so.¹⁴⁹ Thus, lower courts have been able to use the

¹⁴¹ See *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (recognizing that procedural unconscionability, or “unfair surprise,” occurs where an agreement is reached but the language is “convoluted or unclear” creating contractual terms not typically expected by the party who is asked to assent).

¹⁴² See Stempel, *supra* note 139, at 794 (stating that procedural unconscionability “involves unfair contracting practices”).

¹⁴³ See *Harris*, 183 F.3d at 181 (recognizing that substantive unconscionability occurs where contractual terms are “unreasonably or grossly favorable to one side and to which the disfavored party does not assent”).

¹⁴⁴ See Stempel, *supra* note 139, at 794 (“Substantive unconscionability involved terms that—no matter how openly set forth or voluntarily accepted—are simply too unfair to merit judicial enforcement.”). Here are a few provisions that courts may find substantively unconscionable: limitations on damages; imposition of excessive fees; selection of an inconvenient forum; unreasonably short deadlines for filing claims, etc. *Id.* at 804–07.

¹⁴⁵ See, e.g., *Harris*, 183 F.3d at 181 (stating that “unconscionability” requires both procedural and substantive unconscionability); see also Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL’Y 477, 490 (2009) (“The arbitration clause contestant must prove that the clause was either procedurally unconscionable or substantively unconscionable, and in most states, both.”).

¹⁴⁶ See, e.g., *Dale v. Comcast Corp.*, 498 F.3d 1216, 1220 n.5 (11th Cir. 2007) (“The subscribers also argue on appeal that the class action waiver is procedurally unconscionable. We do not address this argument since we conclude *infra* that the clause is substantively unconscionable and thus unenforceable as a matter of law.”).

¹⁴⁷ See Bruhl, *supra* note 135, at 1422.

¹⁴⁸ See *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.”). Otherwise courts could do what state legislatures could not after *Doctor’s Associates*. *Id.* (“Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.”).

¹⁴⁹ Bruhl, *supra* note 135, at 1422 (“This difficulty creates opportunities for lower courts to misapply, or perhaps even manipulate, state contract doctrines so as to nullify

unconscionability doctrine to avoid the Supreme Court's arbitration mandate.¹⁵⁰ In fact, it has been the main method for invalidating awards under Section 2 for "courts skeptical of the increasingly pervasive use of arbitration."¹⁵¹

But there was a lag between when the Supreme Court created the "national policy favoring arbitration" and when lower courts began employing unconscionability as a ground for invalidating awards. In the two years before *Southland*, for example, a study by Susan Randall found only fifty-four unconscionability cases, eight of which involved arbitration agreements.¹⁵² And only one of those eight unconscionability challenges succeeded.¹⁵³ After *Southland*, this general trend continued as courts mostly followed the Supreme Court's proarbitration rulings.¹⁵⁴ But as the Court became more aggressively proarbitration—for example, when it eliminated state legislatures' ability to regulate arbitration agreements in *Doctor's Associates*—unconscionability challenges became much more common.¹⁵⁵ Consider the following chart¹⁵⁶ created by Aaron-Andrew Bruhl:

arbitration agreements while simultaneously frustrating the ability of reviewing courts to reverse.").

¹⁵⁰ See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 40 (2006) ("Although ostensibly applying the 'generally applicable' contract defense of unconscionability, in cases involving the validity of arbitration agreements the California courts routinely apply an entirely different test, requiring less of parties seeking to avoid arbitration."); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 470–71 (stating that lower courts, through the unconscionability doctrine, have "gone too far" in failing to follow Supreme Court precedent); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 198 (2004) ("An examination of the application of unconscionability to similar issues in arbitration and nonarbitration contexts supports the conclusion that judges are avoiding arbitration through arbitration-specific expansions of the doctrine of unconscionability.").

¹⁵¹ Bruhl, *supra* note 135, at 1422. It is a form of strategic judging that allows the lower courts to "insulate their rulings from reversal by ideologically adverse reviewing courts." *Id.* at 1425.

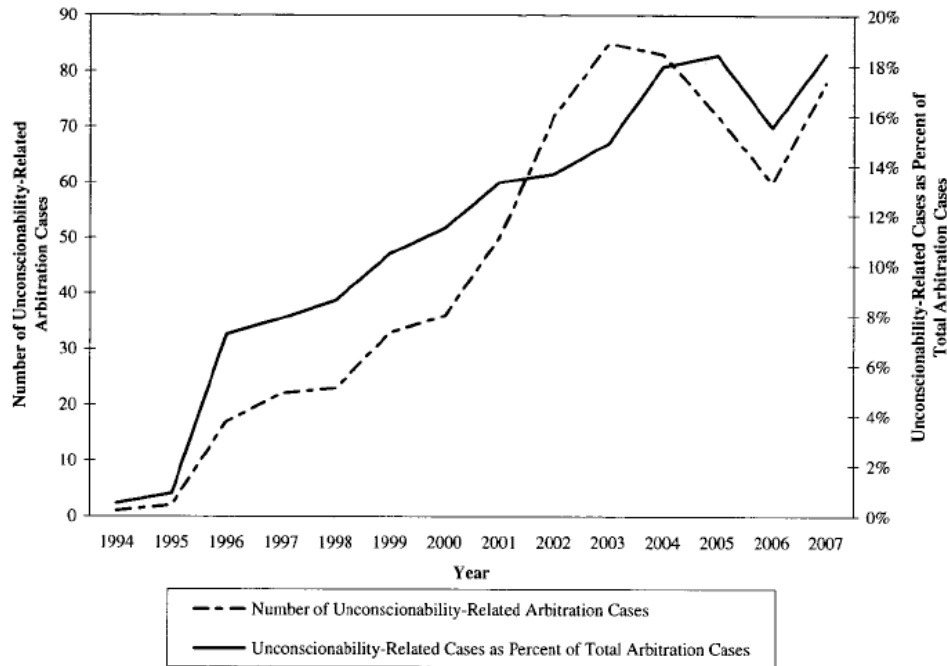
¹⁵² Randall, *supra* note 150, at 196.

¹⁵³ *Id.*

¹⁵⁴ See Stempel, *supra* note 139, at 798.

¹⁵⁵ See *id.* at 761–62 (stating that the use of unconscionability "accelerated in the late 1990s"). Because the Court had finally cut off state legislatures' ability to regulate arbitration agreements, state courts tried to implement the legislatures' policy wishes through judicial measures. See Bruhl, *supra* note 135, at 1434–35 ("State courts that resist the Supreme Court's federal policy favoring arbitration are in many cases trying to effectuate not their own preferences but fundamental state legislative policies that restrict arbitration or apply heightened procedural safeguards.").

¹⁵⁶ Bruhl, *supra* note 135, at 1440.



Bruhl's chart shows that unconscionability challenges began increasing around 1995 and that the upward trend more or less continued through 2007, when the challenges constituted approximately 19 percent of all arbitration cases.¹⁵⁷ And while this shows only the increased *use* of the unconscionability defense, some evidence exists that the defense's success rate also increased during this period. For example, Randall's study showed that parties succeeded in approximately 50 percent of their unconscionability challenges from 2002 to 2003, compared to a 12.5 percent success rate from 1982 to 1983.¹⁵⁸ So, in addition to unconscionability

¹⁵⁷ *Id.* To see if parties are still using the unconscionability defense as frequently today, I ran a search using Bruhl's parameters and found 76 cases involving unconscionability challenges between July 1, 2009 and July 1, 2010. As Bruhl noted in his article, this search method isn't flawless, but at the very least it provides a general idea of the prevalence of the unconscionability doctrine today.

¹⁵⁸ Randall, *supra* note 150, at 194–96. In 1982–83, parties successfully used the unconscionability doctrine to invalidate arbitration agreements in 12.5 percent of the cases in Randall's study. *Id.* at 196. And they succeeded at a rate of 15.2 percent in unconscionability challenges to other types of agreements. *Id.* By 2002–03, the numbers were 50.3 percent and 25.6 percent, respectively. *Id.* at 194. In other words, by 2002–03, courts appeared to be twice as willing to use the unconscionability doctrine in the context of arbitration, which is a pretty significant change from the parity that existed in 1982–83. See *id.* at 194–96; see also Broome, *supra* note 150, at 48 (studying California appellate court decisions and finding that “as a purely empirical matter, unconscionability challenges succeed with far greater frequency when the contractual provision at issue is an arbitration agreement”). While this increased success rate could be due to an increase in the

challenges becoming more prevalent, it appears that lower courts have become more receptive to those challenges as well.¹⁵⁹

This upswing in the unconscionability doctrine's use and success occurred despite several movements at the end of the twentieth century that sought to limit judicial power, such as the rise of law and economics analysis, strong academic criticisms of the unconscionability doctrine generally, and a push for greater judicial restraint.¹⁶⁰ It was the best remaining defense that lower courts had against the Supreme Court's arbitration mandate, so they used it regardless of contrary intellectual and political trends.¹⁶¹ In response, the Supreme Court began shifting decision making authority away from courts and toward arbitrators, thus reducing lower courts' ability to use the unconscionability doctrine to nullify unreasonable arbitration agreements.¹⁶²

In *Buckeye Check Cashing, Inc. v. Cardegna*,¹⁶³ for example, the Florida Supreme Court had refused to compel arbitration because it found the underlying contract "void for illegality."¹⁶⁴ The Supreme Court reversed, relying on

prevalence of unconscionable arbitration clauses, the sheer size of the increase, along with an examination of the case law, indicates that courts are subjecting arbitration agreements to increased scrutiny under the unconscionability doctrine. See Bruhl, *supra* note 135, at 1441–42, 1455–64.

¹⁵⁹ On a related note, the overall hostility toward the Supreme Court's arbitration mandate appears to be increasing. Take two anecdotal examples. First, twenty state attorneys general joined the respondents in *Allied-Bruce* in asking the Court to overturn *Southland*. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). And, forty states, along with Puerto Rico and the District of Columbia, asked the Court to overturn *Southland* in *Buckeye Check Cashing*. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 441 (2006) (listing the attorneys general who submitted an Amici Curiae brief in support of respondents); Brief of Florida et al., as Amici Curiae Supporting Respondents, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (No. 04-1264), 2005 WL 2477361. Second, lower courts are vocalizing their displeasure with the Supreme Court's proarbitration rulings. Two judges on the Minnesota Supreme Court, for example, refused to sign an order compelling arbitration after the *Doctor's Associates* case was remanded to it by the Supreme Court. They said: "[w]e cannot in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the U.S. Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." Richard C. Reuben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16; see also Randall, *supra* note 150, at 220–21 (referencing Montana Supreme Court's refusal to sign an order pending arbitration).

¹⁶⁰ See Stempel, *supra* note 139, at 812–40.

¹⁶¹ See *id.*

¹⁶² Bruhl, *supra* note 135, at 1470–86. Part of what no doubt caught the Court's attention was the increased number of certiorari petitions received in recent years that raised the unconscionability issue. *Id.* at 1466.

¹⁶³ 546 U.S. 440 (2006).

¹⁶⁴ *Id.* at 442–43. The underlying contract was a "Deferred Deposit and Disclosure Agreement" that charged, according to the lower court, usurious interest rates. *Id.*

*Southland*¹⁶⁵ and *Prima Paint*.¹⁶⁶ Specifically, the Court said that *Southland* made the Federal Arbitration Act applicable in state courts and that *Prima Paint* required arbitrators, not courts, to decide challenges to the contract as a whole.¹⁶⁷ The Florida Supreme Court thought it could avoid *Prima Paint*'s severability rule by finding the contract *void ab initio*¹⁶⁸ rather than voidable, as in *Prima Paint*.¹⁶⁹ The Supreme Court found this distinction irrelevant and ordered the parties to arbitrate.¹⁷⁰ Overall, the case reminded lower courts of the Supreme Court's ability to shift decision making authority to arbitrators and thereby reduce their roles in monitoring arbitration agreements.¹⁷¹

In fact, *Buckeye Check Cashing* foreshadowed the Court's most recent decision in *Rent-a-Center, West, Inc. v. Jackson*.¹⁷² *Rent-a-Center* involved an arbitration agreement with a delegation clause that assigned disputes over the agreement's enforceability to the arbitrator.¹⁷³ Jackson challenged the agreement, claiming that some of its provisions (e.g., a provision requiring the parties to split arbitration fees) were unconscionable.¹⁷⁴ By specifically challenging the arbitration provisions, it appeared that Jackson had complied with *Prima Paint* and *Buckeye Check Cashing*. But the Supreme Court disagreed, finding that Jackson's challenge to the arbitration agreement must be decided by the arbitrator under the delegation clause.¹⁷⁵ This appears to mean that any time an arbitration agreement has a delegation clause similar to Jackson's, the only way to raise an unconscionability

¹⁶⁵ *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984).

¹⁶⁶ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406–07 (1967). Recall that the separability rule from *Prima Paint* requires (a) arbitrators to review challenges to an agreement as a whole and (b) courts to review challenges to the arbitration clause. *Id.* at 403–04. In other words, the separability rule is a rule for determining who decides.

¹⁶⁷ *Buckeye Check Cashing*, 546 U.S. at 445–46.

¹⁶⁸ *Void ab initio* means “[n]ull from the beginning, as from the first moment when a contract is entered into.” BLACK’S LAW DICTIONARY 5 (9th ed. 2009).

¹⁶⁹ *Buckeye Check Cashing*, 546 U.S. at 446 (“In declining to apply *Prima Paint*'s rule of severability, the Florida Supreme Court relied on the distinction between void and voidable contracts.”).

¹⁷⁰ *Id.* at 446, 449.

¹⁷¹ See Bruhl, *supra* note 135, at 1474–75 (noting that the allocation rule “greatly facilitates federal monitoring of the enforcement of arbitration agreements.”).

¹⁷² 130 S. Ct. 2772 (2010).

¹⁷³ *Id.* at 2775. Specifically, the delegation clause stated that the arbitrator “shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.” *Id.*

¹⁷⁴ *Id.* at 2775–76.

¹⁷⁵ *Id.* at 2779. To reach this conclusion, the Court had to use some pretty tortured logic. Namely, it said that the arbitration agreement in this case was the entire agreement and, therefore, that Jackson's claim had to be arbitrated under *Prima Paint*. *Id.* at 2778–81.

challenge in court is to challenge the delegation clause itself.¹⁷⁶ Only then will the court be able to hear unconscionability challenges to the arbitration agreement as a whole.¹⁷⁷ Thus, inserting these delegation clauses in arbitration agreements will make it more difficult—if not impossible—for nondrafting parties to challenge the agreements’ substantive provisions in court. In effect, the court’s role may be limited “to little more than rubber-stamping motions to compel arbitration.”¹⁷⁸

B. Reform Advocates Seek Congressional Relief

Even before the Court’s recent *Rent-a-Center* decision, reform advocates had started seeking Congressional relief against companies that mandated arbitration. Using the unconscionability doctrine didn’t fully resolve the mandatory-arbitration problem—it worked only on a case-by-case basis.¹⁷⁹ Plus, parties subjected to mandatory arbitration generally found the process fundamentally unfair. They believed they were being subjected to a biased process that limited their substantive and procedural rights,¹⁸⁰ and they wanted Congress to preclude its use.

Between 1995 and 2010, members of Congress introduced 139 bills that sought either to (a) eliminate mandatory arbitration for certain categories of disputes or (b) restrict the ways in which companies can use it. Nineteen ninety-five was the year before *Doctor’s Associates*, and using it as a start date for surveying Congress’s activity provides helpful perspective for determining whether there is a congressional trend that mirrors the unconscionability trend in

¹⁷⁶ *Id.* at 2781 (Stevens, J., dissenting) (“Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator – the so-called ‘delegation clause.’”).

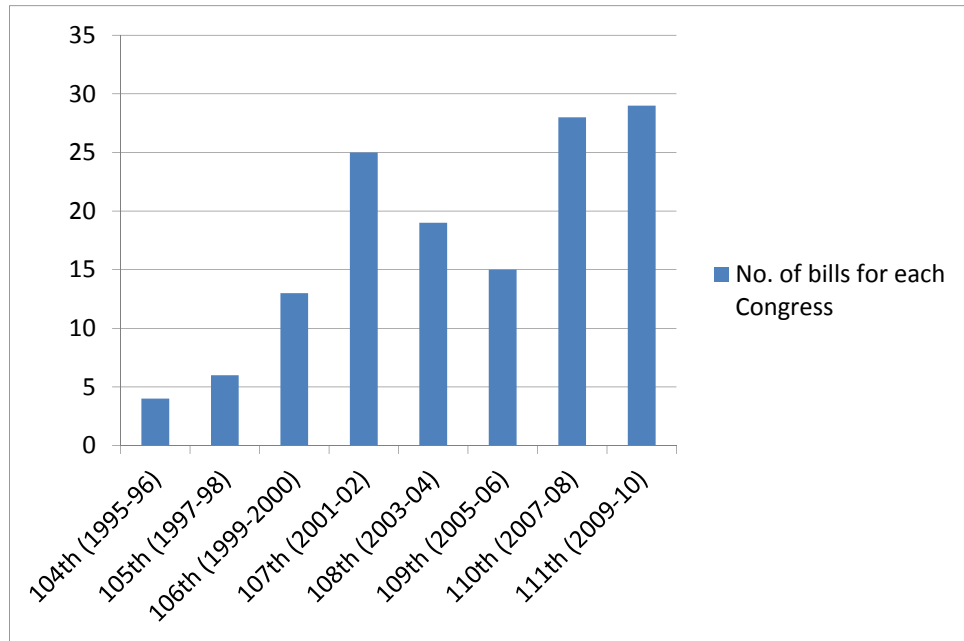
¹⁷⁷ *Id.* Put differently, parties may waive their right to challenge an arbitration clause in court, which is problematic because courts traditionally have protected individuals from substantively unfair arbitration clauses through the unconscionability doctrine. See David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. IN BRIEF 1, 5–6 (2010), <http://www.virginialawreview.org/inbrief/2010/04/02/horton.pdf>. In fact, Section 4 says that courts “shall hear the parties” and that courts should compel arbitration only “upon being satisfied that the making of the agreement for arbitration . . . is not in issue.” 9 U.S.C. § 4 (2006). Also, Julius Cohen assured Congress at the 1924 Joint Hearings that the Act provided protections against forcing parties to arbitrate without some measure of judicial review. See *1924 Joint Hearings*, *supra* note 14, at 35 (brief submitted by Julius H. Cohen, General Counsel, New York State Chamber of Commerce) (stating that a party who in good faith refuses to arbitrate because she believes she is not bound by the agreement “is protected by the provision of the law which requires the court to examine into the merits of such a claim”).

¹⁷⁸ See Horton, *supra* note 177, at 2.

¹⁷⁹ See Bruhl, *supra* note 135, at 1441–43.

¹⁸⁰ See NAT’L CONSUMER LAW CTR., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS 4–9 (5th ed. 2007).

lower courts.¹⁸¹ Not surprisingly, there is. While individual parties were increasing their challenges to arbitration provisions in the courts,¹⁸² advocacy groups increasingly challenged them in Congress. Here's a breakdown of the number of bills introduced during this period:



As the list in the Appendix¹⁸³ explains, some of these bills were arbitration specific,¹⁸⁴ and others suggested changes to arbitration laws as a small part of a larger act.¹⁸⁵ In either case, most bills died in committee; many were reintroduced in following years only to meet the same fate; and the few that ultimately passed applied only to relatively narrow categories of disputes.

In fact, of the 139 Congressional antiarbitration bills, only five passed both houses and became law during this period. The first was the Motor Vehicle

¹⁸¹ What I mean, specifically, is that I wanted to see if members of Congress began introducing more anti-arbitration bills post-*Doctor's Associates*, just as the use of the unconscionability doctrine increased in lower courts post-*Doctor's Associates*. See Bruhl, *supra* note 135, at 1440.

¹⁸² See *id.*

¹⁸³ See *infra* Part VI.

¹⁸⁴ See, e.g., A Bill to Amend Title 9, United States Code, to Allow Employees the Right to Accept or Reject the Use of Arbitration to Resolve an Employment Controversy, H.R. 613, 106th Cong. (1999) (allowing arbitration only where one party requests it and the other party consents in writing within 60 days).

¹⁸⁵ See, e.g., Anti-Predatory Lending Act of 2000, H.R. 3901, 106th Cong. (2000) (including a provision that high-cost mortgages may not include a mandatory arbitration clause that limits a borrower's right to seek relief through judicial review).

Franchise Contract Arbitration Fairness Act, which failed in the 105th and 106th Congresses before finally passing in the 107th.¹⁸⁶ It was limited to prohibiting motor vehicle manufacturers, importers, and distributors from mandating arbitration under their franchise agreements.¹⁸⁷ The second was the John Warner National Defense Authorization Act for Fiscal Year 2007, which passed the 109th Congress.¹⁸⁸ It contained a provision exempting military personnel and their dependents from having to arbitrate consumer-credit disputes.¹⁸⁹ The third was the Food, Conservation, and Energy Act of 2008, which contained a provision allowing parties to opt out of arbitration under livestock and poultry contracts.¹⁹⁰

Senators Feingold and Grassley introduced bills with comparable provisions in three prior Congresses before finally passing this one in the 110th.¹⁹¹ The fourth was the Department of Defense Appropriations Act of 2010, which contained a provision prohibiting the government from contracting with employers that require arbitration of “any claim under [T]itle VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.”¹⁹² Popularly known as the Franken Anti-Rape Amendment, this provision passed the 111th Congress after the uproar over the dispute between Jamie Leigh Jones and KBR.¹⁹³ Finally, the 111th

¹⁸⁶ See Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. (2001); Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, H.R. 1296, 107th Cong. (2001); Motor Vehicle Franchise Contract Arbitration Fairness Act of 2000, H.R. 534, 106th Cong. (2000); Motor Vehicle Franchise Contract Arbitration Fairness Act of 1999, S. 1020, 106th Cong. (1999); Motor Vehicle Franchise Contract Arbitration Fairness Act of 1998, S. 2434, 105th Cong. (1998).

¹⁸⁷ Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. (2001). The bill defined motor vehicle franchise contracts as contracts “under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer’s motor vehicles.” *Id.* § 2. The bill said that if a motor vehicle franchise contract called for arbitration of disputes, then the parties to the contract would be able to opt out of that provision after any dispute arose. *Id.* If the parties chose to proceed with arbitration, then the bill required the arbitrator to provide a written explanation of the basis for the award. *Id.*

¹⁸⁸ John Warner National Defense Authorization Act for Fiscal Year 2007, H.R. 5122, 109th Cong. (2006).

¹⁸⁹ See *id.* § 670.

¹⁹⁰ Food, Conservation, and Energy Act of 2008, H.R. 2419, 110th Cong. § 210 (2008).

¹⁹¹ See Fair Contracts for Growers Act of 2005, S. 2131, 109th Cong. (2005); Fair Contracts for Growers Act of 2003, S. 91, 108th Cong. (2003); Fair Contracts for Growers Act of 2002, S. 2943, 107th Cong. (2002).

¹⁹² Department of Defense Appropriations Act of 2010, H.R. 3326, 111th Cong. § 8116(a)(1) (2009).

¹⁹³ See Amanda Terkel, *Obama Signs Franken’s Anti-rape Amendment into Law*, THINK PROGRESS (Dec. 21, 2009, 1:50 PM), <http://thinkprogress.org/2009/12/21/obama->

Congress also passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹⁹⁴ Among other things, this Act gave the SEC authority to restrict or prohibit mandatory arbitration under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940.¹⁹⁵ It also created a Consumer Protection Financial Bureau that will have the same power over arbitration provisions in “consumer financial products and services” agreements.¹⁹⁶ It is the only bill of the five that even considered regulation as a means for dealing with mandatory arbitration.¹⁹⁷

In fact, the overwhelming majority of the 139 bills introduced since 1995 proposed eliminating, rather than regulating, mandatory arbitration. And the bills that proposed regulating mandatory arbitration generally received little, if any, widespread support. Consider, for example, two bills Senator Sessions introduced in the 106th, 107th, and 110th Congresses, respectively: the Consumer and Employee Arbitration Bill of Rights; the Arbitration Fairness Act of 2002; and the Fair Arbitration Act of 2007.¹⁹⁸ Each applied to “consumer” and “employment” agreements, which were broadly defined.¹⁹⁹ Also, each bill’s substance was the same—they all sought to regulate the circumstances under which parties could mandate arbitration.²⁰⁰ In other words, they did not seek to eliminate mandatory

franken/ (noting that many republicans faced “intense political blowback” because of their opposition to the legislation and referring to it as an “unnecessary attack on their allies in the private contracting business”).

¹⁹⁴ See Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).

¹⁹⁵ *Id.* § 921. It also exempted certain Truth in Lending Act claims and certain whistleblower retaliation claims from mandatory arbitration. *Id.* §§ 748, 922, 1057.

¹⁹⁶ See *id.* § 1028. The new Bureau will be part of the Federal Reserve, but the Reserve will have little oversight over it. Basically, the Reserve will simply fund its operations. See *id.* § 1012.

¹⁹⁷ See *id.* § 1028.

¹⁹⁸ Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007); Arbitration Fairness Act of 2002, S. 3026, 107th Cong. (2002); Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000).

¹⁹⁹ “Consumer” agreements included “the sale or rental of goods, services, or real property, including an extension of credit or the provision of any other financial product or service, to an individual in a transaction entered into primarily for personal, family, or household purposes.” See, e.g., S. 3210 § 2(a). “Employment” agreements meant “a uniform, employer promulgated plan that covers all employees in a company, facility, or work grade, and that may cover legally protected rights or statutory rights” and did “not include any individually negotiated executive employment agreements.” *Id.*

²⁰⁰ Each bill would have required arbitration clauses: (1) to have their headings in bold, capital letters; (2) to state whether arbitration is mandatory or optional; (3) to provide contact information for a source where contracting parties can get more information on the arbitration process; and (4) to allow parties to have the option of resolving disputes under \$50,000 in small claims court. The bills also would have entitled parties: (1) to competent and neutral arbitrators; (2) to representation and a fair hearing; (3) to present evidence, cross-examine witnesses, and have a record of the proceedings; and (4) to timely resolution

arbitration, as most other bills during this period did. Instead, they sought to control how it could be carried out.²⁰¹ None of Sessions's bills had cosponsors, and all three died without hearings in the Senate Judiciary Committee.²⁰²

In contrast, the Arbitration Fairness Acts of 2007 and 2009 were two of the more widely publicized reform bills introduced during this period. The 2007 Act applied to employment, consumer, and franchise disputes, as well as disputes under statutes intended to (1) protect civil rights or (2) regulate contracts between parties with unequal bargaining power.²⁰³ The 2009 Act covers the same disputes, except that it does not include the unequal bargaining power provision.²⁰⁴ Both Acts would eliminate, rather than regulate, mandatory arbitration for the covered disputes.²⁰⁵ Although both ultimately died in committee, they have received far greater attention and support in Congress than Sessions's bills did.²⁰⁶ For example, the 2007 Act had a total of 110 cosponsors in both houses and the 2009 Act had 127.²⁰⁷ Also, unlike any of Sessions's bills, subcommittees of the Senate Judiciary Committee and the House Judiciary Committee held hearings on the 2007 Act.²⁰⁸

and a written award. *See* S. 1135 § 2; S. 3026 § 2; S. 3210 § 2. These bills were unique in that they did not try to eliminate mandatory arbitration outright.

²⁰¹ S. 3026 § 2; S. 3210 § 2.

²⁰² S. 3026; S. 3210. To clarify Sessions's role in mandatory-arbitration reform, I do not believe he falls within my definition of "reform groups" or "reform advocates." As one anecdotal, but telling, example, he opposed the Franken Amendment to the Department of Defense Appropriations Act of 2010, saying that it "would impose the will of Congress on private individuals and companies in a retroactive fashion, invalidating employment contracts without due process of law." *See* Ryan Grim, *Defense Department Opposed Franken's Anti-Rape Amendment*, HUFFINGTON POST (Oct. 19, 2009, 7:14 PM), http://www.huffingtonpost.com/2009/10/19/defense-department-oppose_n_326569.html (last visited on Nov. 7, 2011).

²⁰³ Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4 (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4 (2007).

²⁰⁴ Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3 (2009); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009).

²⁰⁵ *See* S. 931 § 3; H.R. 1020 § 4; S. 1782 § 4. And both would have a court, rather than an arbitrator, decide initial challenges to an arbitration agreement, thus eliminating *Prima Paint's* severability rule. *Id.*; S. 1782 § 4.

²⁰⁶ The Arbitration Fairness Acts have also received greater academic attention. *See, e.g.,* Bradley Dillon-Coffman, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095 (2010); Joshua T. Mandelbaum, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075 (2010); Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT. RESOL. 267 (2008).

²⁰⁷ *Bill Summary & Status, 111th Congress (2009–2010) S. 93*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s931>: (last visited Nov. 13, 2011); *Bill Summary & Status, 111th Congress (2009–2010) H.R. 1020*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h1020>: (last visited Nov. 13, 2011); *Bill Summary & Status, 110th Congress (2007–2008) S. 1792*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s1782>: (last visited Nov. 13, 2011); *Bill*

In short, it appears that reform groups have been pushing Congress to eliminate, rather than to regulate, mandatory arbitration—a short-sighted approach that disregards mandatory arbitration’s public benefits (e.g., reducing judicial caseloads and lowering companies’ dispute-resolution costs) and makes arbitration itself seem like the problem. The problem is not arbitration itself; rather, the problem is that companies have abused mandatory arbitration because the Supreme Court has allowed them to do so. The solution, then, is not to eliminate mandatory arbitration but to keep it in place (at least for now) and to regulate it to prevent its past abuses from continuing. This pragmatic approach gives companies a cheaper, alternative method for resolving disputes while also protecting individual rights previously lost in mandatory arbitration.

IV. EMBRACING REGULATION IN MANDATORY ARBITRATION

So far I’ve addressed the Supreme Court’s success with arbitration formalism and the mixed accomplishments of the reform advocates’ liberal response. In other words, I’ve addressed whether these two movements have, in fact, worked. Separate from the question of whether the movements *have* worked is the question of whether they *should* work. This Part demonstrates that both movements are flawed and that adopting a goal-oriented pragmatic approach, one that regulates mandatory arbitration’s use to improve its overall fairness, makes more sense.

A. *The Problems with Supreme Court Formalism*

Defining formalism is complicated because numerous conflicting versions exist.²⁰⁹ One common definition, however, explains formalism as “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative.”²¹⁰ And because formalism restricts or eliminates courts’ discretion to make exceptions to a given rule, it is sometimes referred to as “mechanical

Summary & Status, 110th Congress (2007–2008) H.R. 3010, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h3010>: (last visited Nov. 13, 2011).

²⁰⁸ See *Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. (2007); *Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007).

²⁰⁹ See Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1449–50 (2008); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 609 n.6 (1999).

²¹⁰ Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1987); see also Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 959 (1997) (“The decisions were formalistic in that they reasoned deductively from minimally justified premises and expressly eschewed consideration of what result would be best from a policy perspective.”).

jurisprudence.”²¹¹ Courts simply look at the rule, decide what conclusion would further that rule given the facts, and then reach that conclusion without considering policies that might justify a different outcome.²¹²

The Supreme Court’s arbitration decisions fall within this general description of formalism.²¹³ The Court uses the “national policy favoring arbitration” and “party autonomy” as its major premises for deriving case outcomes. Given these premises’ nature, and given the Court’s general refusal to consider policy concerns regarding arbitration’s potential for abuse,²¹⁴ the outcome of any given case seems pre-ordained. In fact, over the last twenty-five years, the Court has mechanically relied on the “national policy” and “party autonomy” to expand the Federal Arbitration Act’s scope beyond Congress’s original intent.²¹⁵ Consequently,

²¹¹ See Bridgeman, *supra* note 209, at 1449 (“The traditional definition offered is the familiar caricature of classical formalism as ‘mechanical jurisprudence.’”); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999) (stating that formalism is an attempt to make the law deductive “in the sense that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases”).

²¹² See Sunstein, *supra* note 211, at 638–39.

²¹³ MACNEIL, *supra* note 16, at viii (describing the reasoning in the Court’s arbitration decisions over the last twenty-five years as “bureaucratic formalism”). The Court sometimes claims to base its decisions in textualist terms. See, e.g., 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1472 (2009) (“We cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text.”); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (“As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision.”). But this is really a form of “no-text textualism.” Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 826 (2010) (explaining that the Court uses “no-text textualism” to “reinvent statutes, abandon precedent, and create its own norms in the field of arbitration”). Thus, I believe formalism is a better descriptive term than textualism for the Court’s decision making in the arbitration context. See MACNEIL, *supra* note 16, at viii; see also Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1418, 1428 (1996) (explaining how the Court uses “wooden formalism” to reach its arbitration decisions).

²¹⁴ For example, the Court has disregarded legitimate concerns regarding parties’ lack of consent and arbitration’s unsuitability for certain disputes. See, e.g., Shearson/Am. Express v. McMahon, 482 U.S. 220, 229–31 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626–28 (1984).

²¹⁵ See, e.g., Rent-a-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (stating that the Act “reflects the fundamental principle that arbitration is a matter of contract,” and enforcing a contractual provision that made the parties submit arbitrability issues to the arbitrator); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (compelling arbitration of a statutory claim and stating that sections 2, 3, and 4 of the Act reflect the “liberal federal policy favoring arbitration agreements”).

mandatory arbitration has increased significantly.²¹⁶ But the Court has shown little concern; its goal, after all, has been to reduce judicial caseloads, and using these premises allows it to achieve that goal.²¹⁷

The Court's arbitration formalism is subject to at least three criticisms: rigidity; overdependence on deductive reasoning; and reliance on false premises. First, formalism is too rigid. The Court treats the "national policy" and "party autonomy" as immutable rules that demand arbitration's expansion. It refuses to make policy-based exceptions to those rules.²¹⁸ And it has shown little willingness to reshape those rules as parties' use of arbitration has changed over time.²¹⁹ For example, as businesses increasingly required arbitration in response to the Court's proarbitration decisions, they simultaneously began limiting nondrafting parties' procedural rights during those arbitrations.²²⁰ The Court has done little to correct this behavior, relying on formal logic instead of experience to continue expanding the Act.²²¹ This failure to respond is why consumers, employees, and franchisees increasingly have asked Congress for relief, and it is why their requests have become more successful.²²²

The second criticism of the Court's arbitration formalism is that it emphasizes the deductive process over the choice of premises.²²³ Put differently, the Court

²¹⁶ See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632–33 (2005) (explaining how the "federal policy" spawned an increase in mandatory arbitration).

²¹⁷ See MACNEIL, *supra* note 16, at 172 ("One cannot immerse oneself in the arbitration cases without coming to the conclusion that a major force driving the Court is docket-clearing pure and simple. That is, the Court is motivated to reduce the cases having to be tried by the judicial system, particularly the federal judicial system.").

²¹⁸ See, e.g., *McMahon*, 482 U.S. at 226; *Mitsubishi Motors Corp.*, 473 U.S. at 626.

²¹⁹ This is a central problem with formalism. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 41 (1990) (explaining that "[f]ormalism contains a built-in bias against legal change").

²²⁰ For example, some mandatory arbitration agreements contain provisions that severely limit discovery, eliminate the right to class actions, forbid cross-examination of witnesses, and impose biased arbitrators. See Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253, 262–63 (2004).

²²¹ See OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (49th prtg. 1949) ("The life of the law has not been logic: it has been experience."). This is problematic given that many of these changes resulted from the Court's own decisions. This is what I mean by saying that the Court's stance is too rigid. See generally Steven M. Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119, 121–22 (1985) (stating that a formalist court will rely "on existing legal rules and logical deduction to decide any and all cases presented to it," and that, as a result, legal rules become "rigidly unchangeable").

²²² For example, the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act gives the proposed agency the power to either eliminate or regulate mandatory arbitration in certain categories of disputes. See Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1028(b) (2010).

²²³ See POSNER, *supra* note 219, at 38–42.

gives the impression that its premises (“party autonomy” and the “national policy”) are self-evident and then deduces an outcome that is inevitable given the premises used.²²⁴ This makes it appear that the Court’s decision making abilities are limited—that it has no other choice but to rule a certain way.²²⁵ Correctly choosing premises is more difficult than correctly deriving an outcome from given premises.²²⁶ So instead of focusing on the premises’ validity, the Court simply selects premises and then focuses on deriving an outcome, which allows it to deny that it is making any political or moral judgments.²²⁷ The problem is that these denials are false.²²⁸ The Court makes political judgments when choosing premises for its arbitration decisions. Specifically, it wants to reduce judicial caseloads.²²⁹ Choosing “party autonomy” and the “national policy favoring arbitration” as its premises furthers that end.

Finally, the Court’s two premises are false.²³⁰ Congress did not create a “national policy favoring arbitration” when it passed the Federal Arbitration Act.²³¹ It simply created a procedural law that directed federal courts to enforce merchants’ arbitration agreements.²³² In fact, the Act’s legislative history makes plain Congress’s intent,²³³ which likely explains why the Court failed to cite any

²²⁴ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 33 (1991); *Southland Corp. v. Keating*, 465 U.S. 1, 7, 10 (1984); see also Posner, *supra* note 210, at 182 (stating that formalists want “to give the impression that the premises [are] self-evident—meanwhile packing as much into the major premises as possible, to shorten the chain of deductions.”). The Court’s basic logic looks something like this: Congress created a “national policy favoring arbitration” when it passed the Federal Arbitration Act. And arbitration is a matter of contract, i.e., party autonomy. Accordingly, it makes logical sense to broadly interpret the Act and vigorously enforce parties’ arbitration agreements.

²²⁵ See ROY L. BROOKS, *STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY* 32, 57 (2d ed. 2005) (“In treating judicial decision making like mathematics, legal formalism creates the appearance that it is an apolitical process.”).

²²⁶ See Posner, *supra* note 210, at 181–82.

²²⁷ See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 24 (1996) (“There is a pervasive impulse to formalism within the legal culture, though the impulse moves to the fore in particular periods, when judges find it especially necessary to say that their judgments about ‘what the law is’ do not rest on political and moral claims.”).

²²⁸ *Id.* (“The vice of formalism is found whenever people in law *falsely* deny that they are making political and moral judgments.”).

²²⁹ See MACNEIL, *supra* note 16, at 172; Moses, *supra* note 20, at 156.

²³⁰ This is problematic because the truth of an outcome depends on the truth of its premises. See POSNER, *supra* note 219, at 38.

²³¹ Moses, *supra* note 20, at 123 (“The 1925 Congress never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes. It simply made arbitration of commercial and maritime agreements enforceable in federal court because, until 1925, such agreements had essentially been revocable at will by the parties.”).

²³² See *supra* Part I.

²³³ See *supra* Part I; see also *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O’Connor, J., dissenting) (“One rarely finds a legislative history as unambiguous as the FAA’s. That history establishes conclusively that the 1925 Congress viewed the FAA as a

authority when announcing the “national policy” in *Southland*.²³⁴ Also, the Court gives too much credence to “party autonomy.” Saying that parties should be free to negotiate the manner in which they resolve their disputes oversimplifies the issue.²³⁵ Certain parties have little or no bargaining power, which means they have no true choice in deciding whether to arbitrate.²³⁶ Thus, while arbitration may be a “matter of contract,” certain contracts deserve greater scrutiny than others. Yet the Court treats all arbitration agreements alike, citing “party autonomy” regardless of the circumstances under which an agreement was signed.²³⁷

Together, these three criticisms illustrate the flaws in the Court’s arbitration formalism and help explain why parties subjected to mandatory arbitration have been advocating for reform. But whether these criticisms justify eliminating mandatory arbitration—which is the most common reform being requested²³⁸—is questionable because eliminating mandatory arbitration has its problems, too.

B. The Limitations of the Reform Advocates’ Liberal Response

Liberalism, like formalism, is hard to define. For starters, political liberalism differs from legal liberalism. Oversimplified, the former involves a conception of rights and public goods and a debate over how to take public goods into account, if at all, when deciding how to enforce rights.²³⁹ Also oversimplified, the latter distrusts large organizations and views the law’s fundamental concern as attending

procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.”)

²³⁴ See *Southland*, 465 U.S. at 10; *Moses H. Cone Mem’l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

²³⁵ See Sternlight, *supra* note 59, at 688–93.

²³⁶ EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 7 (2006) (“A consumer who is forced to arbitrate a dispute without having knowingly consented to arbitration loses both the freedom to use the court system and the freedom to contract in a knowing fashion.”).

²³⁷ See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 962–69 (1999) (“The problem with understanding the FAA cases as primarily about enforcing private agreements to arbitrate is that, in many recent cases, courts have applied attenuated notions of consent, compelling arbitration when consent is thin, if not outright fictitious.”). Paternalism is one common argument against the unconscionability doctrine. But it is not paternalistic because courts have an interest in refusing to put their stamp of approval on agreements that are “harmful, exploitative, or immoral.” Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 224 (2000).

²³⁸ See *supra* Part III.

²³⁹ See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 184–95 (2d ed. 1998) [hereinafter SANDEL, *LIBERALISM*] (describing political liberalism). Generally, liberalism insists on fair procedures and respect for individual rights. MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT* 7–8 (1996).

the needs of the vulnerable.²⁴⁰ For the purposes of this Article, I use “liberalism” to mean reform advocates’ attempts to protect consumers, employees, franchisees, and others from large (or more powerful) organizations by eliminating mandatory arbitration—a form of legal liberalism. But because political liberalism and legal liberalism often overlap, I address their actions from a political-liberalism perspective as well, principally because the reform advocates want to protect individual rights without accounting for any public good that mandatory arbitration may create.²⁴¹ In doing so, I show that the reform advocates’ attempts to eliminate mandatory arbitration are premature. Regulating, rather than eliminating, mandatory arbitration as an alternative method for resolving disputes is the best course of action—at least for now.

Most of the reform advocates’ criticisms of mandatory arbitration focus on how it affects individual rights, including the right to a fair hearing, the right to a transparent decision-making process, and the right to make autonomous decisions.²⁴² They believe arbitration should be governed by principles that promote these rights and that these rights cannot be sacrificed for the public good.²⁴³ In other words, they believe these rights trump considerations of what might be best for the public at large.²⁴⁴ However, the reform advocates’ criticisms ignore mandatory arbitration’s larger effect on society—specifically, its potential effect on the public good.²⁴⁵ Although this is a common criticism of liberalism

²⁴⁰ William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 135 (2004). Professor Simon explains that legal liberalism is based on three background premises (the victim perspective, populism, and the priority of rights) and three strategic premises (a preference for controlling information, choosing between rules and standards, and structuring procedure). *Id.* at 133.

²⁴¹ Legal liberalism and political liberalism have been linked since the Warren Court. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996).

²⁴² See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong., § 2 (2009) (listing the bill’s Congressional “findings”).

²⁴³ See generally STEPHEN MULHALL & ADAM SWIFT, *LIBERALS & COMMUNITARIANS* 42 (1992) (stating that liberalism asserts that “the rights of individual citizens cannot be sacrificed for the sake of other goods or goals”); SANDEL, *LIBERALISM*, *supra* note, 239, at 185 (explaining that, according to political liberalism, “individual rights . . . outweigh . . . consideration of the common good”).

²⁴⁴ See *id.*

²⁴⁵ The reform advocates do, sometimes, reference negative effects that mandatory arbitration has on the public. For example, the Congressional “findings” in the Arbitration Fairness Act of 2009 state that mandatory arbitration “undermines the development of public law for civil rights and consumer rights.” See H.R. 1020 § 2. But they neglect any positive contributions that mandatory arbitration has made. To be clear, I’m not saying that mandatory arbitration is a public good or that its benefits outweigh its costs. I honestly don’t know for certain whether such statements are true. And I’m not sure that anyone else does either. Also, I’m not advocating that the question can be fully answered by a cost-benefit analysis. All I’m saying is that we somehow need to take mandatory arbitration’s

generally,²⁴⁶ and although this general criticism can be rebutted,²⁴⁷ it has particular merit in the mandatory-arbitration context for three reasons.

First, mandatory arbitration is a relatively new phenomenon. It emerged only over the last twenty-five years, which means that courts and policy makers have not had a great deal of time to study its use.²⁴⁸ In fact, empirical data related to its use is limited, so the question of whether mandatory arbitration is a public good is difficult to answer.²⁴⁹ Accordingly, we should continue to study its use to determine its overall effect on society (while taking steps to improve its fairness). But the reform advocates prefer to ignore mandatory arbitration's potential benefits and focus instead on recognizing consumers', employees', and franchisees' "rights."²⁵⁰ In particular, they disregard mandatory arbitration's tendency to reduce judicial caseloads and lower companies' dispute-resolution costs, while concentrating on their right to a fair hearing and their right to make autonomous decisions.²⁵¹ Ignoring these factors is a short-sighted approach. Mandatory arbitration is too new, and the laws surrounding it have changed too fast, to say with absolute certainty that it should be eliminated at this point.²⁵²

This leads to the second criticism of the reform advocates' liberal position. Reform advocates would likely respond that their rights should be considered prior to and separate from the public good, and that their rights should therefore

effect on the public good into account. I believe adopting a more pragmatic approach to mandatory arbitration can help achieve this goal.

²⁴⁶ See STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM*, at xii–xiii, 6 (1993).

²⁴⁷ See *id.* at 198–200.

²⁴⁸ Sternlight, *supra* note 216, at 1631–32 (“The involuntary imposition of arbitration in lieu of open court procedures is a new and most controversial phenomenon.”).

²⁴⁹ *Id.* at 1634 (“Although the question of whether mandatory arbitration positively or negatively impacts most individuals has been widely debated among academics and practitioners, empirical data is scant and not likely to resolve this question in the near future.”). For competing empirical studies, compare O’DONNELL, *supra* note 11, with Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051 (2009).

²⁵⁰ Simon, *supra* note 240, at 148 (stating that legal liberalism has “a Utopian tendency to ignore the costs of the recognition of entitlements”).

²⁵¹ Take, for example, the Congressional “findings” in the Arbitration Fairness Acts of 2007 and 2009. Neither set of findings mentions mandatory arbitration’s tendency to reduce judicial caseloads and lower companies’ dispute resolution costs. Instead, both focus on mandatory arbitration’s negative effects. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).

²⁵² To be clear, I agree that the current mandatory-arbitration framework is not entirely fair and that it needs to be changed. All I’m saying here is that it’s too soon to eliminate mandatory arbitration because we don’t yet know enough about it. See Simon, *supra* note 240, at 177–78 (“The Pragmatist objects to the liberal idea of rights enforcement as the elaboration of a pre-existing moral consensus. She sides with the Legal Realist in insisting that whatever normative consensus exists in the society is too incomplete and ambiguous to play the role Legal Liberalism expects.”).

prevail.²⁵³ But the validity of their rights-oriented claims is sometimes debatable. For instance, Stephen Ware argues that mandatory arbitration does not interfere with autonomy.²⁵⁴ Specifically, he disputes the reform advocates' claim that individuals should not be forced to arbitrate unless they "knowingly" consented to an arbitration agreement, stating that arbitration law does not apply "subjective knowing-consent standards."²⁵⁵ Also, Bo Rutledge disputes all of the congressional "findings" that appear in the Arbitration Fairness Acts of 2007 and 2009.²⁵⁶ He says the findings—which lay out the individual rights that are lost through mandatory arbitration—are based on underdeveloped normative and empirical claims and that arbitration has improved the average individual's access to justice.²⁵⁷ Rutledge's and Ware's opinions on these topics are well-stated, and they are not espousing fringe views. In other words, at least some of the reform advocates "rights" are debatable, which reduces the validity of their rights-oriented, liberal position.

Finally, the reform advocates assert that the judiciary is more capable of protecting individual rights—even though the judiciary isn't perfect in this regard²⁵⁸—and most fail to consider whether regulating arbitration could make it a more rights-oriented process.²⁵⁹ In fact, the majority of bills submitted to Congress over the last fifteen years called for eliminating mandatory arbitration, thereby implicitly assuming that the court system will protect individual rights lost in arbitration.²⁶⁰ Also, the few bills that did suggest regulating mandatory arbitration—thus attempting to improve its fairness for individuals subjected to it—received little congressional support.²⁶¹ In other words, the reform advocates

²⁵³ See SANDEL, *LIBERALISM*, *supra* note, 239, at 185.

²⁵⁴ BRUNET ET AL., *supra* note 236, at 335 (“[T]he value of autonomy requires that people be bound by agreements they formed even when they did not know or understand, in any meaningful way, what they were agreeing to.”).

²⁵⁵ *Id.* at 334–35; see also Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 201 (1998) (“There is no duress in the typical ‘adhesion’ contract. A consumer who contracts in such circumstances does so voluntarily.”).

²⁵⁶ Rutledge, *supra* note 206, at 268–79.

²⁵⁷ *Id.* at 277 (“In sum, the findings that underpin the most radical overhaul of federal arbitration law in over eighty years are scientifically unproven, normatively debatable or demonstrably wrong.”).

²⁵⁸ Simon, *supra* note 240, at 180 (“The American judiciary appears to be doing a very poor job of enforcing a broad range of rights.”).

²⁵⁹ Very few bills actually suggested changes to current arbitration laws to make the process fairer for individuals subjected to mandatory arbitration. See, e.g., Fair Arbitration Act of 2007, S. 1135, 110th Cong. § 2 (2007); Arbitration Fairness Act of 2002, S. 3026, 107th Cong. § 2 (2002); Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. § 2 (2000).

²⁶⁰ See, e.g., Arbitration Fairness Act of 2009, S. 931 111th Cong. § 2 (2009); Arbitration Fairness Act of 2009, H.R. 1020 111th Cong. § 2 (2009).

²⁶¹ For example, the three bills introduced by Senator Jeff Sessions, which proposed certain regulations for the mandatory-arbitration process, had no co-sponsors. *Bill*

have been fixated on eliminating, rather than regulating, mandatory arbitration, even if it means being subjected to a court system that has its own issues with protecting individual rights.

In sum, the reform advocates' liberal position is too rigid. They want to eliminate a relatively new process without fully studying its effects; they describe debatable rights as being absolute; and they refuse to concede that arbitration can be, with some changes, a more rights-oriented process. Instead of this rigid position, reform advocates should adopt a more pragmatic approach to mandatory arbitration, one that focuses on regulating, rather than eliminating, the process. Regulating mandatory arbitration would increase fairness for the parties subjected to it while allowing everyone to study it over time to determine its overall effect on the public good.

C. Proposing a Goal-Oriented, Pragmatic Approach

So far I've examined the problems with the Supreme Court's arbitration formalism, including the resulting increase in mandatory arbitration, and the limits of the reform advocates' liberal response, including its rigidity. Now I want to propose an alternative approach for dealing with mandatory arbitration, one that continues its use while improving its overall fairness through legislative or agency regulation. In doing so, I hope to show that regulating mandatory arbitration is consistent with pragmatic principles and that a goal-oriented version of pragmatism is superior to formalism and liberalism in this context.

The goal-oriented version of pragmatism I propose considers consequences; it is anti-dogmatic; it acknowledges that other perspectives exist; and it values experimentation.²⁶² In that sense, it is consistent with the everyday use of the word "pragmatic"²⁶³ because it focuses on figuring out what works and finding solutions

Summary & Status, 110th Congress (2007–2008) S. 1135, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s1135>: (last visited Nov. 13, 2011); *Bill Summary & Status, 107th Congress (2001–2002) S. 3026*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:s3026>: (last visited Nov. 13, 2011); *Bill Summary & Status, 106th Congress (1999–2000) S. 3210*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:s3210>: (last visited Nov. 13, 2011).

²⁶² See Sullivan & Solove, *supra* note 13, at 706, 734, 738. The description that I give here of pragmatism is pieced together from several sources. These sources show there are three basic types: philosophical, legal, and everyday. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 49–56 (2003) (explaining everyday pragmatism); Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 *CARDOZO L. REV.* 21, 21 (1996) (discussing legal pragmatism and philosophical pragmatism and stating that the former should stand free from the latter). I borrow mostly from descriptions of legal pragmatism and everyday pragmatism, and the goal-oriented pragmatism I propose is similar to the "radical pragmatism" described by Sullivan & Solove, *supra* note 13, at 691–92.

²⁶³ See POSNER, *supra* note 262, at 49–50 (describing everyday pragmatism as "the mindset denoted by the popular usage of the word 'pragmatic'"); see also RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 227 (1999) [hereinafter POSNER, *MORAL AND LEGAL THEORY*] ("I am interested in pragmatism as a disposition to

to problems.²⁶⁴ It also rejects the formalist idea that law is grounded in permanent, immutable principles and the liberal idea that rights enforcement is the elaboration of a moral consensus.²⁶⁵

For example, both the Supreme Court's arbitration formalism and the reform advocates' arbitration liberalism are too absolute. The former mechanically enforces arbitration agreements based on flawed deductive reasoning, allowing companies to mandate arbitration with individuals on terms that aren't always fair.²⁶⁶ The latter characterizes sometimes-debatable rights as indisputable and demands mandatory arbitration's elimination, disregarding any public benefits that mandatory arbitration may have.²⁶⁷

Pragmatism, on the other hand, recognizes that we cannot analytically derive solutions to problems like mandatory arbitration and that any existing moral consensus regarding the rights lost in mandatory arbitration is too ambiguous to play the role that the reform advocates expect.²⁶⁸ It is a more circumspect, flexible doctrine. In fact, it recognizes that the less certainty we have regarding problems like mandatory arbitration, the more incentive we have to experiment.²⁶⁹

To say that pragmatism is flexible and that it values experimentation, however, does not mean that it has to be value-neutral, which is one of the most frequent criticisms against pragmatism generally.²⁷⁰ To avoid this general criticism, I propose a goal-oriented version of pragmatism that seeks to improve

ground policy judgments on facts and consequences rather than on conceptualisms and generalities.”). I recognize that Posner discusses pragmatism mostly in the context of judicial decision-making, and that he would disagree with some, if not much, of what I propose, but I like his basic definition of pragmatism, so I am hijacking parts of it and applying it in the context of regulating mandatory arbitration.

²⁶⁴ See POSNER, *supra* note 262, at 50 (stating that pragmatism is an “attitude that predisposes Americans to judge proposals by the criterion of what works”); see also Simon, *supra* note 240, at 177 (“Pragmatist practice is problem solving.”).

²⁶⁵ RICHARD A. POSNER, *OVERCOMING LAW* 405 (1995); Simon, *supra* note 240, at 177; see also Steven D. Smith, *The Pursuit of Pragmatism*, 100 *YALE L.J.* 409, 424 (1990) (stating that pragmatism “expresses a deep distrust for” formalism).

²⁶⁶ See *supra* Part III.

²⁶⁷ See *supra* Part IV.

²⁶⁸ See Simon, *supra* note 240, at 177–78.

²⁶⁹ See POSNER, *MORAL AND LEGAL THEORY*, *supra* note 263, at 248 (“The less one thinks one knows the answers to difficult questions of policy, the more inclined one will be to encourage learning about them through experimentation and other methods of inquiry.”); see also Simon, *supra* note 240, at 177 (stating that solutions to public problems “are best derived deliberatively and experimentally”); Sullivan & Solove, *supra* note 13, at 704 (“Pragmatists are committed to finding substantive sustenance for their guiding ideals through experiential inquiry.”). Some of the experiments might include expanding the review of awards, letting parties choose to have small claims courts handle certain matters, and prohibiting waivers of injunctive relief, consequential damages, or punitive damages, to name a few.

²⁷⁰ BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY* 41 (1997) (stating that the core problem with pragmatism is “its substantive emptiness”).

mandatory arbitration's overall fairness through regulation.²⁷¹ Stated differently, the pragmatism I propose says something about the ends we should pursue in mandatory arbitration.²⁷² It attempts to resolve the conflict between companies that wish to mandate arbitration, on the one hand, and individuals that wish to avoid it, on the other, by continuing, but regulating, mandatory-arbitration's use. In that sense, my proposal recognizes the changes that have occurred in arbitration over the last twenty-five years, but it also recognizes that Congress wanted to protect individuals from abusive practices when it passed the Federal Arbitration Act in 1925.²⁷³ Thus, it is a middle-ground approach that takes arbitration's history into account while recognizing the potential benefits of its current and future use.²⁷⁴

This approach will allow us to study mandatory arbitration before deciding whether to eliminate it entirely.²⁷⁵ Empirical study, in fact, is one of the key principles²⁷⁶ of the pragmatic approach I propose because the existing empirical data on mandatory arbitration is limited.²⁷⁷ It would be helpful to know more about how much money mandatory arbitration saves companies, the extent to which those companies pass savings along to consumers, and how much it really reduces judicial caseloads, to name a few potential benefits.²⁷⁸ It would also be helpful to

²⁷¹ I borrowed the idea that pragmatism need not be value-neutral from Sullivan & Solove, *supra* note 13, at 703 (“The pragmatist justifies her value commitments, in part, by analyzing their historical genesis.”).

²⁷² *See id.* at 703–04.

²⁷³ *See 1924 Joint Hearings, supra* note 14, at 14–15 (statements of Sen. Thomas Sterling, Chairman, Subcomm. of the Comm. on the Judiciary and Julius H. Cohen, General Counsel, N.Y. Chamber of Commerce); *1923 Hearings, supra* note 14, at 9–10 (statements of Sen. Thomas J. Walsh and W.H.H. Piatt, Chairman, Comm. of Commerce, Trade and Commercial Law, American Bar Ass’s).

²⁷⁴ Thus, the pragmatism I propose is not ahistorical. It recognizes that we must look at arbitration's history to determine what fairness and justice mean in the mandatory-arbitration context. *See Sullivan & Solove, supra* note 13, at 703–04 (“The pragmatist justifies her value commitments, in part, by analyzing their historical genesis. Guiding ideals such as ‘fairness,’ ‘justice,’ and ‘freedom’ must be critically examined by looking to past experience.”).

²⁷⁵ In other words, the pragmatism I propose is not a universalist prescription, but a suggestion for an approach that should be helpful given the political and legal climate surrounding mandatory arbitration. *See Daria Roithmayr, “Easy for You to Say”: An Essay on Outsiders, the Usefulness of Reason, and Radical Pragmatism, 57 U. MIAMI L. REV. 939, 948 (2003).* Other approaches may work better when that climate changes.

²⁷⁶ It is one of the key principles of pragmatism generally. *See POSNER, supra* note 265, at 11 (listing “empirical” as one of the adjectives Posner uses to describe pragmatism); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 188 (stating that Brandeis “would have wanted a full view of the facts before making up his mind about possible remedies” and that “much can be learned from a more empirical approach”).

²⁷⁷ Sternlight, *supra* note 216, at 1634 (explaining existing empirical data is “scant”).

²⁷⁸ Empirical data could help resolve some ongoing disagreements over these issues. For example, Jean Sternlight and Stephen Ware disagree over the extent to which

continue studying mandatory arbitration's affect on individual rights given that the end goal is to improve mandatory arbitration's procedural fairness. This "critical assessment of our ends" will allow us to re-examine, among other things, where those ends came from, what they were responding to, and what type of results they have had on parties involved with mandatory arbitration.²⁷⁹

In sum, adopting a pragmatic, regulatory approach would allow us to fill empirical gaps and continue examining our "end" goal of improving mandatory arbitration's procedural fairness. This approach will no doubt be imperfect, but the mandatory-arbitration system we have now certainly is not ideal.²⁸⁰ Besides, if companies dislike the regulations adopted under this approach, they can always make an economic decision to remove mandatory-arbitration provisions from their contracts or to lobby the regulatory body for change. And, although the approach I propose is unquestionably better than what is currently available, individuals can lobby for change if they believe the new regulations don't go far enough.²⁸¹ In the end, this approach seeks to balance companies' needs against individuals' rights, hopefully in a manner that ultimately improves the overall public good.

D. Specific Regulations to Consider

If a pragmatic, regulatory approach is the best approach for dealing with the mandatory arbitration problem, then the remaining task is to figure out what regulations to adopt. I propose five here: (1) an opt-out for small claims; (2) a new disclosure standard for arbitrators and arbitration providers aimed at reducing the repeat-player bias and increasing nondrafting parties' control over the dispute resolution process; (3) a data-collection requirement for arbitration providers; (4) a

companies pass along cost-savings to consumers. *See* BRUNET ET AL., *supra* note 236, at 329 n.68 (pointing out the lack of empirical data to support either side of the argument).

²⁷⁹ *See* Sullivan & Solove, *supra* note 13, at 704–05. A regulatory approach can encourage these questions. Consider, for example, the Dodd-Frank bill that Congress passed in 2010. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010). The bill says that the Consumer Protection Financial Bureau must "conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services." *Id.* § 1028. Hopefully the CPFEB will take time to study and experiment (through regulation) with mandatory arbitration before deciding whether it should be eliminated (which the CPFEB has the authority to do for disputes covered under the bill).

²⁸⁰ The Supreme Court has taken us too far in one direction, and the reform advocates want to overcorrect in the other. *See supra* Parts I, II.

²⁸¹ Presumably this would occur through the same organizations that have been lobbying Congress for reform over the last fifteen years. According to Professor Simon, this type of associative democracy is one of the background principles of legal pragmatism. Simon, *supra* note 240, at 173, 175 (stating that associative democracy "is the idea that citizens should participate in the design and implementation of the policies that affect them" and that citizens' "participation can take a variety of forms, but there is special emphasis on participation through nongovernmental organizations").

prohibition on class-action waivers, substantively unconscionable forum-selection clauses, shorter statutes of limitations, and waivers of injunctive relief, consequential damages, or punitive damages; and (5) a slight expansion of the available judicial review. These are not comprehensive, by any means, but they are at the very least a good starting point for addressing some of the most glaring problems in the current mandatory-arbitration system.

1. *Opt-Out for Small Claims*

First, consumers, employees, and franchisees should be able to opt-out of arbitration and have their claims heard in small claims court if their claims fall below the applicable court's jurisdictional limit.²⁸² Small claims courts generally are faster and less-expensive venues for resolving disputes.²⁸³ And they can be even less formal than arbitration, as parties often forego hiring an attorney and represent themselves.²⁸⁴ But those attributes are not the reason for providing the opt-out. The reason for providing the opt-out is that it will make the dispute-resolution process seem fairer for the parties being subjected to it. They may weigh their options and proceed in the forum most suited to their claims, no longer being forced into a specific forum.²⁸⁵ By providing this option, the opt-out will enhance the process's procedural justice because it will enhance parties' control over the procedures used to resolve their disputes.²⁸⁶

²⁸² The limit varies from state to state. See MARGARET C. JASPER, SMALL CLAIMS COURTS 39–40 (attaching an appendix showing the jurisdictional limits for each state as of 2005). The American Arbitration Association (AAA) provides this option in its Supplementary Procedures for Consumer Related Disputes. See, *Supplementary Procedures for Consumer-Related Disputes*, AM. ARB. ASS'N, at r. C-1(d), <http://www.adr.org/sp.asp?id=22014> (last visited Nov. 9, 2011). The AAA provision obviously allows parties to opt out of arbitration even after the opposing party has filed the arbitration claim, an idea I support so long as the opt-out is made before the respondent's answering statement is due under the applicable rules. Finally, Professor Blankley pointed out in her comments on this paper that "many" businesses already provide this option.

²⁸³ JASPER, *supra* note 282, at vii, 22; Bruce Zucker & Monica Herr, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315, 315–20 (2003).

²⁸⁴ JASPER, *supra* note 282, at 2. Small claims courts have drawbacks as well. For example, they generally don't allow losing plaintiffs to appeal. *Id.* at 22.

²⁸⁵ The regulation should require drafting parties to reference the opt-out right in the arbitration provision and include a warning that the nondrafting parties should research the procedures of both arbitration and small claims court before deciding where to have their claims heard. The Consumer Due Process Protocol calls for the former, but not the latter. See *Consumer Due Process Protocol*, AM. ARB. ASS'N, at princs. 5, 11, <http://www.adr.org/sp.asp?id=22019> (last visited Nov. 9, 2011).

²⁸⁶ See Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 68–71 (2008) (discussing the importance of control in procedural justice). By increasing control, the opt-out will increase parties' perceptions of how fair the process

2. *New Disclosure Standard*

Second, potential arbitrators should have to disclose to the nondrafting party basic information about the arbitrators' prior five cases²⁸⁷ and arbitration providers should have to disclose the same information about the drafting party's previous arbitrations before the provider.²⁸⁸ That information should include the following:

- a very brief description of each case;
- the prevailing party (without disclosing the party's identity, unless that party is a party to the current case);
- the relief awarded (if any);
- the time elapsed between the claim statement and the ultimate award, settlement, or other disposition;
- a copy of the written award (if any) with the parties' identities redacted (except for the identities of parties to the current case);
- a brief explanation of the type of hearing held (telephone, in-person, or a decision based on paper submissions);
- whether the case was an "appeal" from the drafting party's internal dispute-resolution system;
- and the amount of arbitrator fees ultimately assigned to the nondrafting party.²⁸⁹

is—which enhances the process's procedural justice. Although procedural justice doesn't focus solely on parties' subjective beliefs, subjective beliefs are a significant part of the procedural justice equation. *See* E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 66 (1988) ("A number of studies have found evidence of either direct or indirect enhancement of evaluations of legal outcomes when procedures are viewed as fair.").

²⁸⁷ The potential arbitrators should have to disclose this information for all cases involving the drafting party in the current case (i.e., not limited to the previous five cases).

²⁸⁸ *See generally* ASS'N FOR CONFLICT RESOLUTION, *AN EXAMINATION OF THE ARBITRATION FAIRNESS ACT OF 2009*, at 10 (2009) (recommending that "[a]ll arbitrator decisions involving a 'repeat participant' must be available upon request to all participants in a subsequent arbitration involving the repeat participant, but that information must be disclosed in such a manner that protects the privacy rights of the non-repeat participants in the prior arbitration."); *Consumer Due Process Protocol*, *supra* note 285, at princ. 3 (suggesting that parties should be provided with the names and contact information of the party representatives in each arbitrator's last six arbitrations); *Employment Due Process Protocol*, AM. ARB. ASS'N, at B(3), C(4), <http://www.adr.org/sp.asp?id=28535> (last visited Jan. 19, 2011). I prefer the objective information I call for over the party-representative contact information—called for in the Consumer and Employment Due Process Protocols. First, it will be difficult and time consuming to contact those parties and have them agree to discuss the proceedings. Second, their opinions may be colored by the outcome of the proceedings. Third, the quality of the information received from them will depend on their ability and willingness to communicate about the proceedings.

²⁸⁹ For the arbitration provider, I would also require the names of the arbitrators in the drafting party's previous cases. California requires arbitration providers to collect and

Requiring these disclosures will give nondrafting parties additional control over the arbitrator selection process and more information when deciding whether to settle disputes in arbitration or in small claims court (assuming small claims court is an option). It also may reduce the repeat-player bias by helping nondrafting parties avoid arbitrators who potentially exhibit that bias.²⁹⁰ Thus, this measure will enhance nondrafting parties' control and their perceptions of the process's overall fairness.²⁹¹

3. *Data-collection Requirement*

Third, arbitration providers should have to collect and organize the case information referenced in the previous paragraph, not only so that they can disclose it to the nondrafting party in each case, but also so that they can aggregate it and make it publicly available for additional empirical research. While the fate of mandatory arbitration should not hinge on these empirical studies—because empirical research may not be able to definitively prove whether mandatory arbitration is fair or unfair to nondrafting parties²⁹²—these studies do inform the debate on whether and how to continue modifying the process.²⁹³ Take Professor Lisa Bingham's studies from the 1990s.²⁹⁴ These were the first studies to

publicly disclose this, and some of the other information referenced above, under its civil procedure code. See CAL. CIV. PROC. CODE § 1281.96 (2010). Additionally, I would require the arbitration provider to disclose any complaints filed against the potential arbitrators.

²⁹⁰ Repeat-player employers appear to have an advantage in arbitration, but there is some question over whether that advantage comes from arbitrators favoring repeat players. See Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 427–32 (2007) (explaining that repeat-player employers fare better in arbitration than one-shot participants, but that multiple possible explanations exist for this phenomenon). Regardless, this disclosure requirement will reduce the importance of any such bias, because nondrafting parties will have a better chance of avoiding arbitrators who might exhibit it, thereby enhancing nondrafting parties' perceptions of the process's fairness.

²⁹¹ This disclosure requirement assumes the parties will be using the list selection method with each party having limited peremptory strikes and unlimited challenges for cause. Only if the parties are unable to select an arbitrator, or a panel of arbitrators, through this method should the arbitration provider complete the selection process.

²⁹² David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1336 (2009).

²⁹³ See Karen A. Jordan, *Empirical Studies of Judicial Decisions Serve an Important Role in the Cumulative Process of Policy Making*, 31 IND. L. REV. 81, 88 (1998) (explaining how empirical studies help shape healthcare policy and stating that: “[E]mpirical research is, by nature, progressive. Each study yields discrete pieces of information relevant to overarching policy concerns.”).

²⁹⁴ See, e.g., Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

empirically show evidence of the repeat-player bias,²⁹⁵ and they undoubtedly have helped prompt calls for reform. Additional studies based on information gathered after any new regulations are enacted could have the same effect, or could show that the regulations are improving the process's fairness to nondrafting parties. Either way, they will allow us to continue monitoring mandatory-arbitration outcomes from a larger sample size and compare those outcomes to the outcomes for similar cases in litigation.²⁹⁶

4. *Certain Prohibitions*

Fourth, drafting parties should not be able to include class-action waivers, substantively unconscionable forum-selection clauses, shorter statutes of limitations, or restrictions on injunctive relief, consequential damages, or punitive damages in their agreements.²⁹⁷ The purposes of these types of provisions, obviously, are to limit the remedies available in arbitration and to make nondrafting parties' claims more difficult to assert. They create economic disincentives to bringing claims, thereby increasing drafting parties' chances of escaping liability.²⁹⁸ The major problem with this in mandatory arbitration, of course, is that the nondrafting parties have little to no ability to bargain over these terms, which reduces the process's perceived and substantive fairness. Enacting these prohibitions will ensure that the remedies in arbitration are more comparable to the remedies in litigation and that drafting parties face similar liability risks in each forum.²⁹⁹

²⁹⁵ Colvin, *supra* note 290, at 427.

²⁹⁶ *Id.* at 406 (noting that this is one of the critical issues in empirical research in employment arbitration); see also Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 405 (2008) ("Regarding the key matter of quality, arbitration proponents proceed on the essentially unchallenged assumption that arbitration results are of at least equivalent quality as litigation results. The assumption should be scrutinized and tested empirically.").

²⁹⁷ See Stempel, *supra* note 296, at 413–15, 421.

²⁹⁸ See *id.*; see also ASS'N FOR CONFLICT RESOLUTION, *supra* note 288, at 13, 65 (calling for a ban on class-action waivers and stating that they fail to promote efficiency, lead to inconsistent decisions, discourage parties from filing claims, and remove public scrutiny of illegal practices); Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interests*, 21 OHIO ST. J. ON DISP. RESOL. 165, 188 (2005) (listing class action waivers and shorter statutes of limitations as two of the problems that still need to be addressed).

²⁹⁹ The Consumer Due Process Protocol addresses forum-selection clauses and the availability of remedies such as punitive damages. For the former, it says that parties should agree on a "reasonably convenient" location and that if they cannot agree on such a location then the provider should select the location for them. See *Consumer Due Process Protocol*, *supra* note 285, at princ. 7, reporter's cmts. I support this rule, but I would also give the provider explicit authority to require telephone or online arbitration if the arbitrator finds (after the parties fail to reach an agreement on location) that form of arbitration appropriate under the circumstances. As to clauses that limit remedies, the

5. *Expansion of Judicial Review*

Finally, we should expand judicial review of arbitration awards for nondrafting parties under the manifest-disregard standard.³⁰⁰ Specifically, arbitrators should be required to issue written awards in mandatory arbitrations, and nondrafting parties should be able to challenge those awards for legal error.³⁰¹ While this change would make arbitration more expensive, the benefits of expanded review in this context outweigh its costs.³⁰² In particular, expanding the manifest-disregard standard in this way would give nondrafting parties greater outcome control.³⁰³ They would finally have a viable way to correct arbitrators' mistakes, thus making the process fairer and enhancing its procedural justice.³⁰⁴

Overall, these regulations increase nondrafting parties' options, give them additional information about the arbitration process, and provide safeguards against drafting parties' overreaching. They may increase arbitration's costs, and some of them may be ineffective, but the need to improve mandatory arbitration's fairness overrides these concerns, and the benefit to regulating mandatory arbitration—instead of eliminating it—is that we can experiment with regulations until we figure out what, exactly, works. In any event, these regulations should at

Consumer Due Process Protocol says that arbitrators should “have broad authority to fashion relief appropriate to the circumstances” and that such authority “is limited only by the agreement of the parties and the scope of submission to arbitration.” *Id.* at princ. 14, reporter's cmts. Thus, it says that arbitrators should respect contractual waivers of relief. This is problematic in mandatory arbitration because the nondrafting party cannot bargain over these types of terms. I do not believe, therefore, that we should allow such terms to stand. *See* Stempel, *supra* note 296, at 413, 437; *see also* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 33–36 (1997) (arguing that waivers of punitive damages are against public policy).

³⁰⁰ *See* Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. KAN. L. REV. 47, 75–82 (2010) (calling for an expansion of this standard of review).

³⁰¹ Reasoned opinions would increase arbitration's costs, but they would also make it easier to determine if an arbitrator actually disregarded the law, which is difficult to determine under the current standard applied by most courts. *Id.* at 62–63, 81–82. This expanded-review proposal would still work without the reasoned-opinion requirement. But it would be less efficient and less likely to result in vacated awards. *Id.* at 82 n.230.

³⁰² *Id.* at 75–82. One way to stem those costs would be to explicitly make sanctions available for frivolous appeals—using an objective, not subjective standard. This should reduce the number of pro forma appeals. *Id.* at 79–80.

³⁰³ *See id.* at 76.

³⁰⁴ *Id.* at 82; *see also* Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167, 1167 (1993) (discussing the importance of control in procedural justice); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 546 (1978) (“The distribution of control among the procedural group participants is the most significant factor in characterizing a procedural system.”).

the very least be a good starting point for addressing some of the more glaring problems with the current mandatory-arbitration system and they should, if enacted, reduce calls for mandatory arbitration's elimination, thus preserving it as an alternative method of resolving disputes for drafting parties while making it fairer for the nondrafting parties subjected to it.

V. CONCLUSION

Both the Supreme Court's arbitration formalism and the reform advocates' arbitration liberalism are too rigid. One relies on flawed, deductive reasoning to mechanically enforce arbitration agreements; the other demands mandatory arbitration's elimination without considering reforms that could make it a more rights-oriented process. A pragmatic, regulatory approach, on the other hand, values experimentation and study and has an end goal of improving mandatory arbitration's overall fairness. Given the positive effect that mandatory arbitration can (possibly) have on the public good, this approach is the best way to resolve the current discord surrounding mandatory arbitration because it balances companies' needs against individuals' rights.

VI. APPENDIX

Bill Name	Relevant Purpose of Bill	Final Bill Status
Federal Fair Franchise Practices Act, H.R. 1717, 104th Cong. (1995)	Section 9 of the bill would have precluded franchisors from “exclud[ing] collective action by franchisees to settle like disputes arising from violation of this Act either by civil action or arbitration.”	Referred to Judiciary Committee.
Civil Rights Procedures Protection Act of 1995, S. 366, 104th Cong. (1995).	To “amend certain Federal civil rights statutes to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, sex, national origin, age, or disability, and for other purposes.” ³⁰⁵	Referred to Committee on Labor and Human Resources.
Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong. (1996)	Same as other CRPPA bill. ³⁰⁶	Referred to (1) Judiciary Committee’s Subcommittee on Constitution, and (2) Economic and Educational Opportunities Committee’s Subcommittee on Workforce Protections.
Fairness and Voluntary Arbitration Act of 1996, H.R. 3422, 104th Cong. (1996).	To “amend chapter 1 of title 9 of the United States Code to permit each party to certain contracts to accept or reject arbitration as a means of settling disputes under the contracts.”	Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law.
Civil Rights Procedures Protection Act of 1996, H.R. 983, 105th Cong.	Same as prior CRPPA bills.	Referred to (1) Education and the Workforce Committee’s

³⁰⁵ Specifically, the bill applied to Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the Americans With Disabilities Act of 1990, the equal pay requirement under the Fair Labor Standards Act of 1938, and the Family and Medical Leave Act of 1993. *See* Civil Rights Procedures Protection Act of 1995, S. 366, 104th Cong. (1995).

³⁰⁶ By saying that this bill has the same purpose as the previous one introduced, I am not saying that the bill is completely unchanged. There may be some amendments to it from the previous version. For our purposes, I’m simply focusing on the overall purpose of the bill as it relates to arbitration.

Bill Name	Relevant Purpose of Bill	Final Bill Status
(1997).		Subcommittees on (a) Employer-Employee Relations, (b) Workforce Protections, and (c) Postsecondary Education, Training and Life-Long Learning; and (2) Judiciary Committee's Subcommittee on the Constitution.
Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997).	Same as prior CRPPA bills.	Referred to Committee on Labor and Human Resources.
Federal Fair Franchise Practices Act of 1997, H.R. 2954, 105th Cong. (1997).	Same as prior FFFPA bill.	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law.
Fairness and Voluntary Arbitration Act of 1998, H.R. 2882, 105th Cong. (1998).	Same as prior FVAA bill.	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law.
Motor Vehicle Franchise Contract Arbitration Fairness Act of 1998, S. 2434, 105th Cong. (1998).	To "amend chapter 1 of title 9, United States Code, to provide for greater fairness in the arbitration process relating to motor vehicle franchise contracts." ³⁰⁷	Referred to Judiciary Committee's Subcommittee on Oversight and Courts.
Small Business Franchise Act of 1998, H.R. 4841, 105th Cong. (1998).	Section 6 would have prohibited franchisors from preventing franchisees, either in court or in arbitration, "from participating as a member of a class permitted by Rule 23 of the Federal Rules of Civil Procedure or applicable State law."	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law.
Small Business Franchise Act of 1999, H.R. 3308, 106th Cong. (1999).	Same as prior SBFA bill.	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law.
A Bill to Amend Title 9, United States Code, to Allow Employees the Right	The title is pretty self-explanatory. Section 1 would have allowed both	Referred to Judiciary Committee's Subcommittee on Commercial and

³⁰⁷ The bill would have allowed parties to opt out of arbitration and, if parties chose to proceed with arbitration, it would have required the arbitrator to issue a written award. Motor Vehicle Franchise Control Arbitration Fairness Act of 1998, S. 2434, 105th Cong. § 2(a) (1998).

Bill Name	Relevant Purpose of Bill	Final Bill Status
to Accept or Reject the Use of Arbitration to Resolve an Employment Controversy, H.R. 613, 106th Cong. (1999).	parties to choose whether to arbitrate after the dispute arose.	Administrative Law.
Consumer Fairness Act of 1999, H.R. 2258, 106th Cong. (1999).	To “treat arbitration clauses which are unilaterally imposed on consumers as an unfair and deceptive trade practice and prohibit their use in consumer transactions.”	Referred to Committee on Banking and Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.
Civil Rights Procedures Protection Act of 1999, H.R. 872, 106th Cong. (1999).	Same as prior CRPPA bills.	Referred to (1) Judiciary Committee’s Subcommittee on the Constitution; and (2) Committee on Education and the Workforce’s Subcommittees on (a) Employer-Employee Relations, (b) Workforce Protections, and (c) Postsecondary Education, Training and Life-Long Learning.
Civil Rights Procedures Protection Act of 1999, S. 121, 106th Cong. (1999).	Same as prior CRPPA bills.	Referred to Committee on Health, Education, Labor, and Pensions.
Motor Vehicle Franchise Contract Arbitration Fairness Act of 1999, S. 1020, 106th Cong. (1999).	Same as prior MVFCAFA bill.	Referred to Judiciary Committee.
Motor Vehicle Franchise Contract Arbitration Fairness Act of 2000, H.R. 534, 106th Cong. (2000).	Same as prior MVFCAFA bills.	Passed the House.
Anti-Predatory Lending Act of 2000, H.R. 3901, 106th Cong. (2000). ³⁰⁸	Section 3(j) would have amended the Truth in Lending Act to prohibit mandatory arbitration provisions in high cost mortgages.	Referred to Banking and Financial Services Committee’s Subcommittee on Financial Institutions and Consumer Credit.
Predatory Lending Deterrence Act, S. 2405,	Section 4(j) would have amended the Truth in	Referred to Committee on Banking, Housing, and

³⁰⁸ This bill, and the multiple other bills like it that were introduced in subsequent years, may have been prompted by a HUD investigation and report on predatory lending practices. *See* OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP’T OF HOUSING & URBAN DEV., CURBING PREDATORY HOME MORTGAGE LENDING 98–99 (2000).

Bill Name	Relevant Purpose of Bill	Final Bill Status
106th Cong. (2000).	Lending Act to prohibit mandatory arbitration in mortgage agreements covered by Section 103(aa).	Urban Affairs.
Consumer Credit Fair Dispute Resolution Act of 2000, S. 2117, 106th Cong. (2000).	To “amend title 9, United States Code, with respect to consumer credit transactions.” ³⁰⁹	Referred to the Judiciary Committee.
Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000).	To “amend chapter 1 of title 9, United States Code, to provide for greater fairness in the arbitration process for consumers and employees.” ³¹⁰	Referred to the Judiciary Committee.
Financial Consumers Bill of Rights Act, H.R. 4332, 106th Cong. (2000).	Section 8 of the bill would have prohibited pre-dispute arbitration provisions in “any consumer transaction or consumer contract.”	Referred to (1) Banking and Financial Services’ Subcommittee on Financial Institutions and Consumer Credit, and (2) Commerce Committee’s Subcommittee on Finance and Hazardous Materials.
American Homebuyer’s Protection Act, H.R. 5033, 106th Cong. (2000).	To “prohibit offering homebuilding purchase contracts that contain in a single document both a mandatory arbitration agreement and other contract provisions and to prohibit requiring purchasers to consent to a mandatory arbitration agreement as a	Referred to Committee on Banking and Financial Services’ Subcommittee on Housing and Community Opportunity.

³⁰⁹ Specifically, Section 2 of the bill would have precluded parties from including arbitration provisions in consumer credit agreements. However, it would have allowed parties to agree to arbitration after the dispute arose. *See* Consumer Credit Fair Dispute Resolution Act of 2000, S. 2117, 106th Cong. § 2(b) (2000).

³¹⁰ This bill would have required arbitration clauses to: (1) have their headings in bold, capital letters; (2) state whether arbitration is mandatory or optional; (3) provide contact information for a source where contracting parties can get more information on the arbitration process; and (4) allow parties to have the option of resolving disputes under \$50,000 in small claims court. It also entitled parties to: (1) competent and neutral arbitrators; (2) representation and a fair hearing; (3) present evidence, cross-examine witnesses, and have a record of the proceedings; and (4) timely resolution and a written award. *See* Consumer and Employee Arbitration Bill of Rights, S.3210, 106th Cong. § 2(b), (c) (2000). It is the same as the Arbitration Fairness Act of 2002, S. 3026, 107th Cong. (2002) and the Fair Arbitration Act of 2007, S.1135, 110th Cong. (2007). All three were introduced by Jeff Sessions.

Bill Name	Relevant Purpose of Bill	Final Bill Status
	condition precedent to entering into a homebuilding purchase contract.” ³¹¹	
American Homebuyer’s Protection Act, H.R. 2053, 107th Cong. (2001).	Same as prior AHPA bill.	Referred to Committee on Banking and Financial Services’ Subcommittee on Housing and Community Opportunity.
A Bill to Amend Title 9, United States Code, to Allow Employees the Right to Accept or Reject the Use of Arbitration to Resolve an Employment Controversy, H.R. 815, 107th Cong. (2001).	Same as the prior version of the bill.	Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law.
Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. (2001).	Same as prior MVFCAFA bills.	House version (H.R. 1296) passed the Senate and House. Signed by President Bush. ³¹²
Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, H.R. 1296, 107th Cong. (2001).	Same as prior MVFCAFA bills.	Passed the Senate and House. Signed by President Bush. ³¹³
Civil Rights Procedures Protection Act of 2001, H.R. 1489, 107th Cong. (2001).	Same as prior CRPPA bills.	Referred to (1) Education and the Workforce Committee’s Subcommittees on (a) Employer-Employee Relations, and (b) Workforce Protections; and (2) Judiciary Committee’s Subcommittee on Constitution.
Civil Rights Procedures Protection Act of 2001, S. 163, 107th Cong. (2001).	Same as prior CRPPA bills.	Referred to Health, Education, Labor, and Pensions Committee.
Securing a Future for Independent Agriculture Act of 2001, S. 20, 107th	Section 128(b) would have prohibited mandatory arbitration of future disputes	Referred to Committee on Agriculture, Nutrition and Forestry.

³¹¹ This bill would have allowed homebuilders and their customers to arbitrate their disputes, but only if the customers signed a separate contract agreeing to arbitration that is not a condition precedent to the homebuilding contract. *See* American Homebuyer’s Protection Act, H.R. 5033, 106th Cong. § 2(a), (b) (2000).

³¹² *See* 21st Century Department of Justice Appropriations Authorization Act, 15 U.S.C. § 1226(a)(2) (2006).

³¹³ *Id.*

Bill Name	Relevant Purpose of Bill	Final Bill Status
Cong. (2001).	between producers and “covered persons or contractors.”	
Consumer Credit Fair Dispute Resolution Act of 2001, S. 192, 107th Cong. (2001).	Same as prior CCFDRA bill.	Referred to Judiciary Committee.
Save Our Homes Act, H.R. 2531, 107th Cong. (2001).	Section 3(j) of the bill would have amended the Truth in Lending Act to prohibit lenders from including in high cost mortgages a “mandatory arbitration clause [that] limits in any way the right of the borrower to seek relief through the judicial process.”	Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.
Truth in Savings Enhancement Act of 2001, H.R. 1057, 107th Cong. (2001).	Section 3(d) of the bill would have amended the Truth in Savings Act to prohibit depository institutions from requiring binding arbitration of disputes with consumers.	Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.
Truth in Lending Modernization Act of 2001, H.R. 1054, 107th Cong. (2001).	Section 6(a) of the bill would have amended the Truth in Lending Act to prohibit creditors from requiring binding arbitration of disputes with consumers.	Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.
Protecting our Communities from Predatory Lending Practices Act, H.R. 3607, 107th Cong. (2001).	Section 3(a) of the bill would have amended the Truth in Lending Act to prohibit arbitration “in any contract for the extension of consumer credit secured by the consumer’s dwelling.”	Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.
Predatory Lending Consumer Protection Act of 2001, H.R. 1051, 107th Cong. (2001).	Section 4(g) of the bill would have amended the Truth in Lending Act to prohibit arbitration provisions in high-cost mortgage contracts.	Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.
Payday Borrower Protection Act of 2001, H.R. 1319, 107th Cong. (2001).	Section 4(b)(6)(h) would have amended the Consumer Credit Protection Act to	Referred to the Committee on Financial Services’ Subcommittee on Financial

Bill Name	Relevant Purpose of Bill	Final Bill Status
	prohibit arbitration provisions in deferred deposit loans.	Institutions and Consumer Credit.
Preservation of Civil Rights Protections Act of 2001, H.R. 2282, 107th Cong. (2001).	To “amend title 9 of the United States Code to exclude all employment contracts from the arbitration provisions of chapter 1 of such title”	Referred to (1) Judiciary Committee’s Subcommittee on Commercial and Administrative Law, and (2) Education and the Workforce Committee’s Subcommittee on Employer-Employee Relations.
Preservation of Civil Rights Protections Act of 2002, S. 2435, 107th Cong. (2002).	Same as other PCRPA bill.	Referred to Health, Education, Labor, and Pensions Committee.
Genetically Engineered Crop and Animal Farmer Protection Act of 2002, H.R. 4812, 107th Cong. (2002).	Section 4(b)(5) would have prohibited mandatory arbitration between biotech companies and purchasers of genetically engineered plants, animals, or seeds.	Referred to Agriculture Committee’s Subcommittee on General Farm Commodities and Risk Management.
INFORM Act of 2002, S. 2032, 107th Cong. (2002).	Section 404 would have amended ERISA to prohibit pre-dispute mandatory arbitration clauses.	Referred to Health, Education, Labor, and Pensions Committee.
Employee Pension Freedom Act of 2002, H.R. 3657, 107th Cong. (2002).	Section 404 would have amended ERISA to prohibit pre-dispute mandatory arbitration clauses.	Referred to Education and the Workforce Committee’s Subcommittee on Employer-Employee Relations.
Retirement Security Protection Act of 2002, S. 1919, 107th Cong. (2002).	Section 405 would have amended ERISA to prohibit pre-dispute mandatory arbitration clauses.	Referred to Health, Education, Labor, and Pensions Committee’s Subcommittee on Water and Power. Hearings held.
Protecting America’s Pensions Act of 2002, S. 1992, 107th Cong. (2002).	Section 306 would have amended ERISA to prohibit pre-dispute mandatory arbitration clauses.	Referred to Health, Education, Labor, and Pensions Committee. Committee consideration and mark-up session held. Reported out favorably as amended. Placed on Senate Legislative Calendar under General Orders.
Predatory Lending Consumer Protection Act of 2002, S. 2438, 107th Cong. (2002).	Same as prior PLCPA bill.	Referred to Committee on Banking, Housing, and Urban Affairs.

Bill Name	Relevant Purpose of Bill	Final Bill Status
Consumer Fairness Act of 2002, H.R. 5162, 107th Cong. (2002).	Same as prior CFA bill.	Referred to Banking and Financial Services Committee's Subcommittee on Financial Institutions and Consumer Credit.
Arbitration Fairness Act of 2002, S. 3026, 107th Cong. (2002).	To "amend chapter 1 of title 9, United States Code, to provide for greater fairness in the arbitration process." ³¹⁴	Referred to Judiciary Committee.
Fair Contracts for Growers Act of 2002, S. 2943, 107th Cong. (2002).	To "amend title 9, United States Code, to provide for greater fairness in the arbitration process relating to livestock and poultry contracts." ³¹⁵	Referred to Judiciary Committee.
Fair Contracts for Growers Act of 2003, S. 91, 108th Cong. (2003).	Same as prior FCGA bill.	Referred to Judiciary Committee.
American Homebuyer's Protection Act, H.R. 3414, 108th Cong. (2003).	Same as prior AHPA bills.	Referred to Committee on Banking and Financial Services' Subcommittee on Housing and Community Opportunity.
A Bill to Amend Title 9, United States Code, to Allow Employees the Right to Accept or Reject the Use of Arbitration to Resolve an Employment Controversy, H.R. 540, 108th Cong. (2003).	Same as the prior versions of the bill.	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law.
Consumer Fairness Act of 2003, H.R. 1887, 108th Cong. (2003).	Same as prior CFA bills.	Referred to Committee on Banking and Financial Services' Subcommittee on Financial Institutions and Consumer Credit.
Predatory Mortgage Lending Practices Reduction Act, H.R. 1663,	Section 1003 would have amended the Consumer Credit Protection Act to	Referred to Committee on Banking and Financial Services' Subcommittee on

³¹⁴ This is basically the same bill as the Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000) and the Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007).

³¹⁵ This bill would allow arbitration under livestock and poultry contracts only if the parties agreed to arbitrate after the dispute arose. It would also require the arbitrator to issue a written award. *See* Fair Contracts for Growers Act of 2002, S. 2943, 107th Cong. § 2(b), (c) (2002).

Bill Name	Relevant Purpose of Bill	Final Bill Status
108th Cong. (2003).	prohibit “arbitration clauses imposed on consumers without their consent.”	Financial Institutions and Consumer Credit.
Responsible Lending Act, H.R. 833, 108th Cong. (2003).	Section 102(e) would have amended the Truth in Lending Act to prohibit “oppressive, unfair, [or] unconscionable” mandatory-arbitration clauses. ³¹⁶	Referred to Committee on Banking and Financial Services’ Subcommittees on (a) Housing and Community Opportunity and (b) Financial Institutions and Consumer Credit.
Predatory Lending Consumer Protection Act of 2003, S. 1928, 108th Cong. (2003).	Same as prior PLCPA bills.	Referred to Committee on Banking, Housing, and Urban Affairs.
Mutual Fund Investor Protection Act of 2003, S. 1958, 108th Cong. (2003).	Section 209 would have allowed investors to have complaints heard in “an independent arbitration forum . . .” of the investor’s choice.	Referred to Banking, Housing, and Urban Affairs Committee.
Employee Benefits Protection Act of 2003, H.R. 1397, 108th Cong. (2003).	Section 6 would have amended ERISA to prohibit pre-dispute mandatory arbitration agreements.	Referred to Education and the Workforce Committee’s Subcommittee on Employer-Employee Relations.
Payday Borrower Protection Act of 2003, H.R. 2407, 108th Cong. (2003).	Same as prior PBPA bill.	Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.
Genetically Engineered Crop and Animal Farmer Protection Act of 2003, H.R. 2918, 108th Cong. (2003).	Same as prior GECAFPA bill.	Referred to Agriculture Committee’s Subcommittee on Conservation, Credit, Rural Development and Research.
Taxpayer Abuse Prevention Act, H.R. 5340, 108th Cong. (2004).	Section 4 would have prevented mandatory arbitration provisions in loan agreements linked to anticipated tax refunds.	Referred to (1) Ways and Means Committee, and (2) Banking and Financial Services Committee’s Subcommittee on Financial Institutions and Consumer Credit.
Taxpayer Abuse Prevention	Same as other TAPA bill.	Referred to Finance

³¹⁶ Section 102 has a safe-harbor provision that exempts arbitration provisions so long as they meet the listed requirements (e.g., forum in federal judicial district where property is located).

Bill Name	Relevant Purpose of Bill	Final Bill Status
Act, S. 2947, 108th Cong. (2004).		Committee.
Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, 108th Cong. (2004).	Section 513 would have prohibited arbitration provisions in employment contracts.	Referred to Health, Education, Labor, and Pensions Committee.
Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. (2004).	Same as other FAIRNESS bill.	Referred to (1) Judiciary Committee's Subcommittee on Constitution; (2) Education and Workforce Committee's Subcommittees on (a) Employer-Employee Relations, (b) Workforce Protections, (c) 21st Century Competitiveness, and (d) Education Reform; and (3) Transportation and Infrastructure Committee's Subcommittee on Aviation.
Prohibit Predatory Lending Act, H.R. 3974, 108th Cong. (2004).	Section 4(d) of the bill would have amended the Truth in Lending Act to prohibit arbitration provisions in high-cost mortgage contracts.	Referred to Committee on Banking and Financial Services' Subcommittees on (a) Housing and Community Opportunity and (b) Financial Institutions and Consumer Credit.
Mutual Fund Reform Act of 2004, H.R. 4505, 108th Cong. (2004).	Section 404 called for a study and report on the trend in arbitration clauses and other "means to avert the filing of claims in Federal or State courts" since Dec. 31, 1995.	Referred to Committee on Banking and Financial Services' Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises.
Mutual Fund Reform Act of 2004, S. 2059, 108th Cong. (2004).	Same as other MFRA bill.	Referred to Committee on Banking, Housing, and Urban Affairs.
Save Our Homes Act, H.R. 3322, 108th Cong. (2004).	Same as prior SOHA bill.	Referred to Committee on Banking and Financial Services' Subcommittees on (1) Financial Institutions and Consumer Credit and (2) Housing and Community Opportunity.
Taxpayer Abuse Prevention Act, H.R. 969, 109th Cong. (2005).	Same as prior TAPA bills.	Referred to (1) Ways and Means Committee, and (2) Banking and Financial

Bill Name	Relevant Purpose of Bill	Final Bill Status
		Services Committee's Subcommittee on Financial Institutions and Consumer Credit.
Taxpayer Abuse Prevention Act, S. 324, 109th Cong. (2005).	Same as prior TAPA bills.	Referred to Finance Committee.
American Homebuyer's Protection Act, H.R. 4037, 109th Cong. (2005).	Same as prior AHPA bills.	Referred to Committee on Banking and Financial Services' Subcommittee on Housing and Community Opportunity.
A Bill to Amend Title 9, United States Code, to Allow Employees the Right to Accept or Reject the Use of Arbitration to Resolve an Employment Controversy, H.R. 3651, 109th Cong. (2005).	Same as the prior versions of the bill.	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law.
Fair Contracts for Growers Act of 2005, S. 2131, 109th Cong. (2005).	Same as prior FCGA bills.	Referred to Judiciary Committee.
Preservation of Civil Rights Protections Act of 2005, H.R. 2969, 109th Cong. (2005).	Same as prior PCRPA bills.	Referred to (1) Judiciary Committee's Subcommittee on Constitution, and (2) Education and the Workforce Committee's Subcommittee on Employer-Employee Relations.
Predatory Mortgage Lending Practices Reduction Act, H.R. 1994, 109th Cong. (2005).	Same as prior PMLPRA bill.	Referred to Committee on Banking and Financial Services.
Borrower's Bill of Rights Act, H.R. 1643, 109th Cong. (2005).	Section 27(b) would have prohibited pre-dispute mandatory arbitration agreements in consumer lending agreements.	Referred to (1) Committee on Banking and Financial Services, and (2) Judiciary Committee's Subcommittee on Commercial and Administrative Law.
Prohibit Predatory Lending Act, H.R. 1182, 109th Cong. (2005).	Section 7 would have amended the Truth in Lending Act to prohibit arbitration provisions in a "consumer credit transaction that is secured by the consumer's principal	Referred to Committee on Banking and Financial Services' Subcommittees on (1) Financial Institutions and Consumer Credit and (2) Housing and Community Opportunity.

Bill Name	Relevant Purpose of Bill	Final Bill Status
	dwelling”	
Employee Benefits Protection Act of 2005, H.R. 1058, 109th Cong. (2005).	Same as prior EBPA bill.	Referred to Education and the Workforce Committee’s Subcommittee on Employer-Employee Relations.
Payday Borrower Protection Act of 2005, H.R. 1660, 109th Cong. (2005).	Same as prior PBPA bills.	Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.
Fair and Responsible Lending Act, H.R. 4471, 109th Cong. (2005).	Section 104 would have amended the Truth in Lending Act to prohibit pre-dispute mandatory arbitration agreements.	Referred to the Committee on Banking and Financial Services.
Competitive and Fair Agricultural Markets Act of 2006, S. 2307, 109th Cong. (2006).	Section 101 would have created a new section 202(b) in the Agricultural Fair Practices Act of 1967 to make pre-dispute mandatory arbitration clauses in livestock and poultry contracts unenforceable.	Referred to Agriculture, Nutrition, and Forestry Committee.
Genetically Engineered Crop and Animal Farmer Protection Act, H.R. 5266, 109th Cong. (2006).	Same as prior GECAPFA bill.	Referred to Agriculture Committee’s Subcommittee on Conservation, Credit, Rural Development and Research.
John Warner National Defense Authorization Act for Fiscal Year 2007, H.R. 5122, 109th Cong. (2006).	Section 670 made pre-dispute arbitration agreements unenforceable against military members and their dependents in consumer credit disputes. ³¹⁷	Passed in both House and Senate. Signed by President Bush.
Taxpayer Abuse Prevention Act, S. 1133, 110th Cong. (2007).	Same as other TAPA bills.	Referred to Finance Committee.
Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007).	The AFA’s broad, stated goal was to “amend chapter 1 of title 9 of United States	Referred to Judiciary Committee’s Subcommittee on the Constitution.

³¹⁷ See John Warner National Defense Authorization Act for Fiscal Year 2007, 10 U.S.C. § 987(f)(4) (2006).

Bill Name	Relevant Purpose of Bill	Final Bill Status
	Code with respect to arbitration. ³¹⁸	Hearings held.
Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).	Same as other AFA bill.	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law. Hearings held. Subcommittee consideration and mark-up. Subcommittee then forwarded it to full Committee by voice vote.
Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007).	To "amend chapter 1 of title 9, United States Code, to establish fair procedures for arbitration clauses in contracts." ³¹⁹	Referred to Judiciary Committee.
Consumer Fairness Act of 2007, H.R. 1443, 110th Cong. (2007).	Same as prior CFA bills.	Referred to Committee on Banking and Financial Services.
Predatory Mortgage Lending Practices Reduction Act, H.R. 2061, 110th Cong. (2007).	Same as prior PMLPRA bills.	Referred to Committee on Banking and Financial Services.
American Homebuyer's Protection Act, H.R. 1519, 110th Cong. (2007).	Same as prior AHPA bills.	Referred to (1) Committee on Banking and Financial Services, and (2) Energy and Commerce Committee's Subcommittee on Commerce, Trade, and Consumer Protection.
Fair Contracts for Growers Act of 2007, S. 221, 110th Cong. (2007).	Same as prior FCGA bill.	Referred to Judiciary Committee. Reported out of Committee and placed on Senate calendar under General Orders.
Reservists Access to Justice Act of 2007, H.R. 3393, 110th Cong. (2007).	Section 3 would have amended Chapter 43 of Title 38 of the U.S. Code to make Chapter 1 of Title 9 inapplicable to employment and reemployment claims	Referred to Veterans' Affairs Committee's Subcommittee on Economic Opportunity. Hearings held.

³¹⁸ More specifically, it prohibits pre-dispute arbitration agreements for employment disputes, consumer disputes, franchise disputes, disputes under statutes that protect civil rights, and disputes under contracts between parties with unequal bargaining power.

³¹⁹ This is basically the same bill as the Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000) and the Arbitration Fairness Act of 2002, S. 3026, 107th Cong. (2002).

Bill Name	Relevant Purpose of Bill	Final Bill Status
	under Chapter 43.	
Helping Families Save Their Homes in Bankruptcy Act of 2007, S. 2136, 110th Cong. (2007).	Section 203 would have amended Section 1328 of Title 28 of the U.S. Code to say: “Notwithstanding any agreement for arbitration that is subject to chapter 1 of title 9, in any core proceeding under section 157(b) . . . the court may hear and determine the proceeding, and enter appropriate orders and judgments, in lieu of referral to arbitration.”	Referred to Judiciary Committee. Hearings held. Reported out of Committee and placed on Senate calendar under General Orders.
Competitive and Fair Agricultural Markets Act of 2007, S. 622, 110th Cong. (2007).	Same as prior CFAMA bill.	Referred to Agriculture, Nutrition, and Forestry Committee.
Competitive and Fair Agricultural Markets Act of 2007, H.R. 2135, 110th Cong. (2007).	Same as prior CFAMA bills.	Referred to Agriculture Committee.
Private Sector Whistleblower Protection Streamlining Act of 2007, H.R. 4047, 110th Cong. (2007).	Section 104(b) would have made pre-dispute arbitration provisions that applied to claims between a whistleblower and his or her employer unenforceable.	Referred to Education and Workforce Committee’s Subcommittee on Workforce Protections.
Home Ownership Preservation and Protection of 2007, S. 2452, 110th Cong. (2007).	Section 706 would have amended the Truth in Lending Act to prohibit provisions in home mortgage loans that “bar a consumer from access to any judicial procedure, forum, or remedy through any court”	Referred to Banking, Housing, and Urban Affairs Committee.
Mortgage Reform and Anti-Predatory Lending Act of 2007, H.R. 3915, 110th Cong. (2007).	Section 206 would have amended the Truth in Lending Act to prohibit mandatory arbitration provisions in home mortgage loans, with the exception of reverse mortgages, or extensions of credit secured by a consumer’s principal	Referred to Committee on Banking and Financial Services. Reported out of Committee. Passed House. Referred to Senate Committee on Banking, Housing, and Urban Affairs.

Bill Name	Relevant Purpose of Bill	Final Bill Status
	dwelling.	
Food, Conservation, and Energy Act of 2008, H.R. 2419, 110th Cong. (2007).	Section 11005 amends Sec. 201 of the Packers and Stockyards Act of 1921 to require poultry and livestock contracts to contain provisions allowing growers and producers to opt out of arbitration. It also required the governing agency to establish regulations that would allow contracting parties to fully participate in the arbitration process.	Passed House and Senate. Veto overridden. ³²⁰
Credit Card Safety Star Act of 2007, S. 2411, 110th Cong. (2007).	Section 3 would have amended the Truth in Lending Act to create a point rating system for credit cards; the system awarded one point for agreements with no mandatory arbitration and that took away one point for agreements with mandatory arbitration.	Referred to Committee on Banking, Housing, and Urban Affairs.
Credit Card Safety Star Act of 2008, H.R. 6978, 110th Cong. (2008).	Same as other CCSSA bill.	Referred to Committee on Banking and Financial Services.
Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Cong. (2008).	Section 2 would have prohibited pre-dispute arbitration agreements between long-term care facilities and residents.	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law. Hearings held. Subcommittee consideration and mark-up session held. Forwarded to full committee. Committee consideration and mark-up held. Reported to the full House. Placed on the Union Calendar.
Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. (2008).	Same as other FNHAA bill.	Referred to (1) Judiciary Committee, and (2) Aging Committee. Joint hearings held in the Aging Committee and the

³²⁰ See Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 197c (2006).

Bill Name	Relevant Purpose of Bill	Final Bill Status
		Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights. Reported to the full Senate by the Judiciary Committee. Placed on Senate Legislative Calendar under General Orders.
Automobile Arbitration Fairness Act of 2008, H.R. 5312, 110th Cong. (2008).	Section 2 would have prohibited pre-dispute mandatory arbitration provisions in "motor vehicle consumer lease or sales contracts" and required any arbitration awards to "include a brief, informal discussion of the factual and legal basis for the award"	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law. Hearings held. Consideration and mark-up held. Bill forwarded to full Committee.
Alcohol Franchise Contract Arbitration Fairness Act of 2008, H.R. 7076, 110th Cong. (2008).	Section 2 would have prohibited pre-dispute mandatory arbitration provisions in "alcoholic beverage franchise contracts," required post-dispute arbitrators to follow the applicable law, and required written explanations for arbitration awards.	Referred to Judiciary Committee.
Servicemembers Access to Justice Act of 2008, S. 3432, 110th Cong. (2008).	Section 3 would have amended the Uniformed Services Employment and Reemployment Rights Act of 1994 to make mandatory arbitration provisions in employment contracts unenforceable, although section 3 includes exceptions.	Referred to Veterans' Affairs Committee.
Servicemembers Access to Justice Act of 2008, H.R. 7178, 110th Cong. (2008).	Same as other SAJA bill.	Referred to (1) Veteran Affairs Committee, and (2) Judiciary Committee.
Civil Rights Act of 2008, S. 2554, 110th Cong. (2008).	Same as prior FAIRNESS bills.	Referred to Committee on Health, Education, Labor, and Pensions.

Bill Name	Relevant Purpose of Bill	Final Bill Status
Civil Rights Act of 2008, H.R. 5129, 110th Cong. (2008).	Same as prior FAIRNESS bills.	Referred to (1) Judiciary Committee's Subcommittee on Constitution, Civil Rights and Civil Liberties, (2) Education and Labor Committee, and (3) Transportation and Infrastructure Committee's Subcommittee on Aviation.
Foreclosure Prevention and Sound Mortgage Servicing Act of 2008, H.R. 5679, 110th Cong. (2008).	Section 2 would have amended the Real Estate Settlement Procedures Act of 1974 to prohibit any mortgagee of a "covered federally related mortgage loan" from requiring a borrower to agree to arbitration as a condition of receiving loan modification services.	Referred to Committee on Banking and Financial Services' Subcommittee on Housing and Community Opportunity. Hearings held.
Foreclosure Prevention Act of 2008, S. 2636, 110th Cong. (2008).	Section 423 would have amended Section 1334 of Title 28 of the U.S. Code to say: "Notwithstanding any agreement for arbitration that is subject to chapter 1 of title 9, in any core proceeding under section 157(b) . . . the court may hear and determine the proceeding, and enter appropriate orders and judgments, in lieu of referral to arbitration." ³²¹	Introduced in Senate. Placed on calendar under General Orders.
Genetically Engineered Technology Farmer Protection Act, H.R. 6637, 110th Cong. (2008).	Section 104(b)(5) would have prohibited mandatory arbitration between biotech companies and purchasers of genetically engineered plants, animals, or seeds. ³²²	Referred to (1) Judiciary Committee, (2) Energy and Commerce Committee's Subcommittee on Health, and (3) Agriculture Committee's Subcommittees on (a) Livestock, Dairy, and

³²¹ This is the same as the provision found in the Helping Families Save Their Homes in Bankruptcy Act of 2007, S. 2136, 110th Cong. (2007).

³²² This is the same as the provision in the prior versions of the Genetically Engineered Crop and Animal Farm Protection Act. *See, e.g.*, Genetically Engineered Crop and Animal Farmer Protection Act of 2002, H.R. 4812, 107th Cong. (2002).

Bill Name	Relevant Purpose of Bill	Final Bill Status
		Poultry, (b) Horticulture and Organic Agriculture, and (c) Specialty Crops, Rural Development, and Foreign Agriculture.
Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009).	The AFA's broad, stated goal is the same as the AFA bill from 2007. But the substance of the two bills is somewhat different. This one, for example, drops "disputes under statutes regulating contracts between parties of unequal bargaining power" from its coverage.	Referred to Judiciary Committee.
Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).	Same as other 2009 AFA bill.	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law. Subcommittee discharged.
Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (2009).	Same as prior FNHAA bills.	Referred to Judiciary Committee's Subcommittee on Commercial and Administrative Law. Subcommittee discharged.
Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009).	Same as prior FNHAA bills, except in section 3.	Referred to Judiciary Committee.
Consumer Fairness Act of 2009, H.R. 991, 111th Cong. (2009).	Same as prior CFA bills.	Referred to Committee on Banking and Financial Services.
Predatory Mortgage Lending Practices Reduction Act, H.R. 2108, 111th Cong. (2009).	Same as prior PMLPRA bills.	Referred to Committee on Banking and Financial Services.
Rape Victims Act of 2009, S. 2915, 111th Cong. (2009).	Section 3 would make arbitration provisions in employment contracts unenforceable with respect to "any claim relating to a tort arising out of a rape."	Referred to Health, Education, Labor, and Pensions Committee.
Non-Federal Employee Whistleblower Protection Act of 2009, S. 1745, 111th Cong. (2009).	Section 2 would amend the Federal Property and Administrative Services Act of 1949 to make pre-dispute arbitration clauses unenforceable for disputes	Referred to Committee on Homeland Security and Governmental Affairs.

Bill Name	Relevant Purpose of Bill	Final Bill Status
	arising under the Act, with the exception of arbitration and collective bargaining agreement.	
Payday Loan Reform Act of 2009, H.R. 1214, 111th Cong. (2009).	Section 2 would amend the Truth in Lending Act to prohibit payday lenders from including mandatory arbitration provisions that are “oppressive, unfair, unconscionable, or substantially in derogation of the rights of the consumer.”	Referred to Committee on Banking and Financial Services.
Payday Lending Reform Act of 2009, H.R. 2563, 111th Cong. (2009).	Section 2 would amend the Truth in Lending Act to prohibit payday lenders from including mandatory arbitration provisions that are “oppressive, unfair, unconscionable, or substantially in derogation of the rights of the consumer.”	Referred to Committee on Banking and Financial Services.
Servicemembers Access to Justice Act of 2009, S. 263, 111th Cong. (2009).	Same as prior 2008 SAJA bills.	Referred to Veterans’ Affairs Committee. Hearings held.
Servicemembers Access to Justice Act of 2009, H.R. 1474, 111th Cong. (2009).	Same as prior 2008 SAJA bills.	Referred to (1) Veterans’ Affairs Committee’s Subcommittee on Economic Opportunity, (2) Armed Services Committee’s Subcommittee on Military Personnel, and (3) Oversight and Government Reform Committee.
Whistleblower Protection Enhancement Act of 2009, H.R. 1507, 111th Cong. (2009).	Section 11 would amend Section 315 of the Federal Property and Administrative Services Act of 1949 to make pre-dispute arbitration clauses unenforceable for disputes arising under the Act.	Referred to (1) Oversight and Government Reform Committee, and (2) Homeland Security Committee. Hearings held in Oversight and Government Reform.
Credit Card Safety Star Act of 2009, S. 900, 111th Cong. (2009).	Same as prior CCSSA bills.	Referred to Committee on Banking, Housing, and Urban Affairs.
Foreclosure Prevention and	Same as prior FPSMSA bill.	Referred to Committee on

Bill Name	Relevant Purpose of Bill	Final Bill Status
Sound Mortgage Servicing Act of 2009, H.R. 3451, 111th Cong. (2009).		Banking and Financial Services.
Investor Protection Act of 2009, H.R. 3817, 111th Cong. (2009).	Section 201 would amend the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 to give the SEC the authority to prohibit or regulate pre-dispute mandatory arbitration provisions applying to disputes arising under either Act.	Referred to Committee on Banking and Financial Services. Reported out of Committee.
Mortgage Reform and Anti-Predatory Lending Act, H.R. 1728, 111th Cong. (2009).	Relevant provision similar to prior MRAPLA bill.	Referred to Committee on Banking and Financial Services. Reported out of Committee. Passed House and referred to Senate Committee on Banking, Housing, and Urban Affairs.
Department of Defense Appropriations Act of 2010, H.R. 3326, 111th Cong. (2009).	Section 8116 of the bill prohibits the government from contracting with employers that require arbitration of “any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.”	Passed in both House and Senate. Signed by President Obama.
Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009).	Section 125 would give the proposed agency the power to prohibit or regulate mandatory arbitration provisions between “covered persons” and consumers.	(1) Referred to Committee on Banking and Financial Services. Reported to full House. (2) Referred to Energy and Commerce Committee’s Subcommittee on Commerce, Trade, and Consumer Protection. Hearings held by the Subcommittee. Subcommittee discharged. Consideration and mark-up

Bill Name	Relevant Purpose of Bill	Final Bill Status
		by full Committee. Reported to full House.
Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2010). ³²³	Sections 10208 and 7201 function similarly to the relevant provisions of the Investor Protection Act of 2009 and the Consumer Financial Protection Agency Act of 2009.	Passed both the House and the Senate. Signed by President Obama.
Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. (2010).	Same as the Wall Street Reform and Consumer Protection Act.	Referred to Banking, Housing, and Urban Affairs Committee. Reported to full Senate. Placed on Calendar under General Orders. Considered in Full Senate. Incorporated into H.R. 4173 (see above entry). Returned to Calendar.
Genetically Engineered Technology Farmer Protection Act, H.R. 5579, 111th Cong. (2010).	Same as prior GETFPA bill.	Referred to (1) Judiciary Committee, (2) Agriculture Committee, and (3) Energy and Commerce Committee.
Robert C. Bird Miner Safety and Health Act of 2010, H.R. 5663, 111th Cong. (2010).	Section 401 would amend section 105(c) of the Federal Mine Safety and Health Act of 1977 to include a provision eliminating contracting parties' ability to limit the rights and remedies of employees through pre-dispute arbitration. Section 701 would make a similar change to Section 11 of the Occupational Safety and Health Act of 1970.	Referred to (1) Committee on Education and Labor. Hearings held. Consideration and mark-up held. Reported out to full House. Referred to (2) Judiciary Committee. Judiciary Committee discharged. Placed on Union Calendar.
Robert C. Byrd Mine and Workplace Safety and Health Act of 2010, S. 3671, 111th Cong. (2010).	Same as prior MSHA bill.	Referred to Committee on Health, Education, Labor, and Pensions.
Mine Safety Accountability and Improved Protection Act, H.R. 5788, 111th Cong. (2010).	Section 401 would amend section 105(c) of the Federal Mine Safety and Health Act of 1977 to include a	Referred to Committee on Education and Labor's Subcommittee on Workforce Protections.

³²³ This is also known as the Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. (2010) and the Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).

Bill Name	Relevant Purpose of Bill	Final Bill Status
	provision eliminating contracting parties' ability to limit the rights and remedies of employees through pre-dispute arbitration.	
Mine Safety Protection Act of 2010, H.R. 6495, 111th Cong. (2010).	Section 401 would amend section 105(c) of the Federal Mine Safety and Health Act of 1977 to include a provision eliminating contracting parties' ability to limit the rights and remedies of employees through pre-dispute arbitration.	Failed on motion to suspend rules and pass the bill by vote of 214-193.
Taxpayer Abuse Prevention Act, H.R. 5693, 111th Cong. (2010).	Same as other 2004 TAPA bills.	Referred to (1) Ways and Means Committee, and (2) Financial Services Committee.
Taxpayer Abuse Prevention Act, S. 585, 111th Cong. (2009).	Same as other 2004 TAPA bills.	Referred to Finance Committee.
Department of Defense Appropriations Act of 2011, S. 3800, 111th Cong. (2010).	Section 8101 is the same as Section 8116 of the DDAA of 2010.	Placed on Senate Legislative Calendar under General Orders.