Notes

Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*

Introduction

According to her congressional testimony, when Jamie Leigh Jones arrived in Baghdad to work for Halliburton, she was housed in a barracks with four hundred male coworkers[1] and was almost immediately sexually harassed.[2] When she complained to managers, she was told to "go to the spa."[3] The very next evening, she was "drugged, beaten, and gang-raped by several [Halliburton] employees."[4] After the incident, Halliburton kept her in a container under armed guard.[5] When she finally returned to the United States, Jones was initially denied her day in court because her employment contract included an arbitration clause.[6] Although the jury found against Ms. Jones in her civil trial,[7] her story and a recent Supreme Court decision[8] have cast the public spotlight on arbitration, and arbitration is under siege.[9]

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1. *Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec.*, 110th Cong. 35 (2007), *available at* http://judiciary.house.gov/hearings/printers/110th/39709.PDF [hereinafter Jones Statement] (prepared statement of Jamie Leigh Jones) ("Upon arrival at Camp Hope, I was assigned to a barracks which was . . . approximately 25 women to more than 400 men.").

2. Jones v. Halliburton Co., 583 F.3d 228, 231 (5th Cir. 2009); *see also* Jones Statement, *supra* note 1, at 33 ("I was subject to repeated catcalls and men who were partially dressed in their underwear while I was walking to the restroom on a separate floor from me.").

3. *Jones*, 583 F.3d at 231.

4. *Id.*

5. *Id.* at 232.

6. *Id.* at 232–33.

7. Associated Press, *Texas: Jury Rejects Assertion of Rape Against Military Contractor in Iraq*, N.Y. TIMES, July 8, 2011, http://www.nytimes.com/2011/07/09/us/09brfs-Kbr.html.

8. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

9. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 1028, 12 U.S.C. § 5518 (Supp. IV 2011) ("The [Consumer Financial Protection] Bureau shall 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."); Editorial, *Gutting Class Action*, N.Y. TIMES, May 12, 2011, http://www.nytimes.com/2011/05/13/opinion/13fri1.html?_r=0 [hereinafter *Gutting Class Action*] (characterizing the 5-to-4 *Concepcion* decision as "a devastating

At the center of the controversy is a fundamental question that has divided scholars for the past decade: Should arbitration clauses in employment and consumer contracts be enforced despite the risk of unequal bargaining?[10]

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blow to consumer rights," and noting that "[i]n a welcome effort to protect consumers, employees and others, Senators Al Franken and Richard Blumenthal and Representative Hank Johnson have just introduced the Arbitration Fairness Act. It would make required arbitration clauses unenforceable . . . ."); *see also* Kimberly Atkins, *Future and Authority of New Consumer Agency in Doubt*, LAW. USA, July 21, 2011, http://lawyersusaonline.com/blog/2011/07/21/consumer-financial-protection-bureau-a-bureau-born-into-controversy/ (noting that the Consumer Financial Protection Bureau "could be the only hope of essentially overturning [*Concepcion*]"); Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUSINESSWEEK, June 5, 2008, http://www.businessweek.com/stories/2008-06-04/banks-vs-dot-consumers-guess-who-wins ("What if a judge solicited cases from big corporations by offering them a business-friendly venue in which to pursue consumers who are behind on their bills? What if the judge tried to make this pitch more appealing by teaming up with the corporations' outside lawyers? And what if the same corporations helped pay the judge's salary? . . . [T]hat's essentially how one of the country's largest private arbitration firms [the National Arbitration Forum] operates.").

10. *See, e.g.*, Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 771–72 (evaluating the merits of arbitration clauses); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Claims*, 72 N.Y.U. L. REV. 1344, 1349–59 (1997) (proposing guidelines for and discussing the merits of predispute arbitration agreements); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (arguing that the arbitration system can be better for the average claimant than a litigation-based system); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 418–42 (2000) (arguing that arbitration is disadvantageous for large employers); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 54–71 (2000) [hereinafter Sternlight, *Will the Class Action Survive?*] (evaluating the impact of predispute arbitration agreements on class actions); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648–58 (2005) [hereinafter Sternlight, *Creeping Mandatory Arbitration*] (discussing the impact of mandatory arbitration on individuals); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 701–02 (1996) [hereinafter Sternlight, *Panacea or Corporate Tool?*] (arguing that consumers should not be forced to unknowingly waive their rights to a jury trial); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) [hereinafter Sternlight, *Tsunami*] ("*Concepcion* is proving to be a tsunami that is wiping out existing and potential consumer and employment class actions."); Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL'Y ANALYSIS, Apr. 18, 2002, at 8 [hereinafter Ware, *Arbitration Under Assault*] ("What opponents of . . . mandatory arbitration really oppose is freedom of contract."); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 253 (2006) [hereinafter Ware, *Enforcing Adhesive Arbitration*] (arguing that "general enforcement" of arbitration clauses "is socially desirable and . . . benefits most consumers [and] employees"); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 138–45 (1996) (discussing the insufficiency of voluntary consent); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 [hereinafter Ware, *Paying the Price*] (arguing that businesses will, over time, pass on any cost savings derived from arbitration to consumers); Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1716–18 (2005) (viewing arbitration of class actions as violating the due process rights of absentee class members).

Scholars have mostly divided into two camps on this complicated question.[11] In one camp, supporters of binding arbitration argue that the problem of unfair bargaining is overstated, and that arbitration has significant benefits for employees and consumers that increase overall social welfare.[12] The other camp opposes the enforcement of binding arbitration agreements, pointing to the *Jones* case and other arbitration horror stories that demonstrate that binding arbitration for consumers and employees can lead to disastrous and inequitable results.[13] After *Jones* and *Concepcion*, this academic debate has spilled over into the political arena with potentially meaningful and lasting consequences. And (as is often the case) the entry into the political debate has done little to moderate either camp; if anything, it has crystalized and polarized the sides further.[14]

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11. For examples of scholars who have advocated for a position between those two poles, see Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 470 (2011) (proposing congressional reform to simply abolish arbitration clauses that act as class action waivers in consumer contracts); Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 311–13 (2012) (proposing legislation with basic procedural guarantees in employment arbitration); Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 268, 280–81 (2008) (opposing the prohibition of predispute arbitration clauses but recognizing a need to improve the current system). *See also* Bradley Dillon-Coffman, Comment, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1099 (2010) (proposing "procedural rules to balance arbitral mechanisms between businesses and their consumers or employees").

12. *See, e.g.*, Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 859 (2006) (arguing that arbitration clauses in consumer form contracts "offer a form of endgame dispute resolution that allows firms to focus more on business value and less on litigation risk in negotiating the terms of their ongoing consumer relationships"); Ware, *Enforcing Adhesive Arbitration*, *supra* note 10, at 253 (arguing that "general enforcement" of arbitration clauses "is socially desirable and . . . benefits most consumers [and] employees"); Ware, *Paying the Price*, *supra* note 10, at 91 (arguing that mandatory arbitration lowers consumer prices because competition forces firms to pass savings to consumers).

13. *See, e.g.*, Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap "Sophisticated Parties" Too*, 2010 J. DISP. RESOL. 235, 257–58 (lauding the "Franken Amendment" to the defense appropriation bill—which prohibits defense contractors from including arbitration clauses of Title VII or tort claims arising out of sexual harassment or assault in their employment agreements—as a "small, specific step"); Sternlight, *Tsunami*, *supra* note 10, at 704 (arguing that "*Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued").

14. *See* Sternlight, *Tsunami*, *supra* note 10, at 727 (calling for "Congress to take corrective action and to ensure that all persons continue to have access to justice"); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 665 (1999) (finding strong correlation between campaign contributions from plaintiffs' lawyers on the one hand and business groups on the other, and votes on arbitration law cases: "Business-funded justices cast 71 percent of their votes for the holding that an arbitration agreement was formed, while plaintiffs'-lawyer-funded justices cast only 9 percent of their votes for that holding" (footnote omitted)); *see also* Erwin Chemerinsky, Op-Ed., *Supreme Court: Class (Action) Dismissed*, L.A. TIMES, May 10, 2011, http://articles.latimes.com/2011/may/10/opinion/la-oe-chemerinsky-class-action-20110510 ("The Supreme Court's recent 5-4 decision preventing consumers from bringing

In addition to the divide in the scholarship, a divide has emerged between two branches of government. The Supreme Court has expanded the enforcement of arbitration clauses, under increasingly broad interpretations of the Federal Arbitration Act. As a result of decisions like *AT&T Mobility LLC v. Concepcion*,[15] the doctrinal distinctions between labor–management and international arbitration on the one hand, and consumer and employment arbitration on the other, have been whittled away in favor of a broad federal policy favoring arbitration in troubling contexts—particularly consumer and employment contexts, where expanding arbitration presents problems. In response, proposed reforms from Congress such as the Arbitration Fairness Act would broadly abolish all arbitration in consumer and employment agreements, Title VII disputes, and franchise agreements.

This Note argues that the optimal solution is in the middle ground. Binding arbitration clauses in consumer and employment contracts should continue to be enforced because arbitration provides employees and consumers important advantages; however, consumer and employment arbitration must be seriously reformed. The reform should be sensitive to the different concerns that arise from different types of disputes, instead of the blunderbuss approaches that have emerged out of Congress and the Supreme Court.

The main thrust of this Note is to propose meaningful reform that balances the competing social interests. This Note argues three main points. First, arbitration clauses in employment and consumer contracts are not per se the problem—the real problem is *unfair* arbitration as a result of inadequate procedural guarantees that result from disparities not only in bargaining power (as other scholars have argued), but in access to information about disputes (commonly formulated as a "repeat-player problem")[16] that causes procedural difficulties for third-party verification and review. The repeat-player problem is not in and of itself problematic,[17] but it renders the procedural guarantees of unconscionability review inadequate. Second, certain types of arbitration undermine the deterrence component of consumer- and employment-protection statutes. Therefore, the Supreme

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class-action suits against corporations is part of a disturbing trend of the five most conservative justices closing the courthouse doors to injured individuals. This is nothing other than a conservative majority favoring the interests of businesses over consumers, employees and others suffering injuries.").

15. 131 S. Ct. 1740 (2011).

16. *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 191 (1997) ("[T]his study documents that the repeat player effect exists.").

17. *E.g.*, David B. Lipsky et al., *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986–2008*, DISP. RESOL. J., Feb.–Apr. 2010, at 12, 58 ("[W]hen we conducted a multivariate regression analysis, . . . we found that the repeat player variable had no significant effect on the size of the award.").

Court's broad federal policy favoring arbitration in all contexts and all circumstances should be reconsidered.

Third, arbitration has real benefits to consumers and employees. Some evidence strongly suggests that arbitration increases access to justice, and that most plaintiff-employees and plaintiff-consumers do *better* in arbitration than in litigation. Therefore, making arbitration nonbinding for employees and consumers (as Congress would do with proposed legislation like the Arbitration Fairness Act) would have the negative consequence of less arbitration. From these three points, this Note argues that binding arbitration[18] in consumer and employment[19] contracts should be reformed but not abolished.

This Note argues for important reform: regulations that provide procedural guarantees to consumers and employees, and that provide safe harbors to companies through regulations promulgated by the nascent Consumer Financial Protection Bureau (CFPB) (for consumer arbitration) and the Equal Employment Opportunity Commission (EEOC) (for employment arbitration).[20] Under the current law, a consumer or employee bringing a dispute is precluded from litigating if she entered into a binding agreement to arbitrate.[21] The consumer is compelled to arbitrate and his case is dismissed unless he can show that the agreement to arbitrate is

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18. Binding arbitration is defined (for the purposes of this Note) as the specific enforcement, through a motion to compel arbitration, of a predispute agreement to arbitrate.

19. Employment arbitration is defined (for the purposes of this Note) as the predispute agreement that the employer and employee will arbitrate disputes arising from the employment relationship. This is not to be confused with labor arbitration (often referred to in the literature as "interest arbitration"), where the arbitrator resolves disputes between labor and management arising from a collective bargaining agreement. These types of disputes are beyond the scope of this Note, and they enjoy special judicial treatment. *See, e.g.*, United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances . . . ." (citation omitted)); David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 744 (1973) (describing the grievance dispute-resolution procedure in labor arbitration).

20. Often, franchise agreements are lumped together with employment agreements and consumer contracts as problematic areas of adhesive bargaining, because franchisees are often small businesses dealing with large corporations, and thus lack the bargaining strength to negotiate arbitration clauses in advance. *See, e.g.*, Sternlight, *Panacea or Corporate Tool?*, *supra* note 10, at 637–39 & n.5 (describing franchisees together with consumers and employees as "little guys" in the context of arbitration). Franchise agreements present a special problem, *see, e.g.*, Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 402(a) (2011) (leaving out franchise agreements in proposed reform), that is outside the scope of this Note and will not be discussed further. *See* Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielson, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 402–03 (2011) (criticizing the categorical prohibition of arbitration agreements in franchise agreements).

21. *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148, 1150 (7th Cir. 1997) (enforcing an arbitration agreement included in a form "inside the box," reasoning that the customer assented "[b]y keeping the computer beyond 30 days").

unconscionable.[22] As the plaintiff, the consumer bears the burden in these cases to show that the contract is unconscionable because, for example, it was obtained through oppression or surprise due to unequal bargaining power.[23] To the extent that the claim is statutory, any claim that arbitration does not effectively vindicate statutory rights must be evaluated on a case-by-case basis with the burden on the party resisting arbitration.[24]

This Note's proposal is to flip that burden: place the burden on the proponent of the motion to compel arbitration to show that the arbitration provides sufficient procedural guarantees. Importantly, the burden only shifts if the company seeking to compel arbitration is large enough that repeat participation, information asymmetry, and sophistication is a fair presumption: fifty employees or more.[25] But—most importantly—the burden would be satisfied if the company meets an industry-specific regulation that would provide a safe harbor and set specific criteria for specific categories of disputes.

This proposal is superior to the two currently competing models of reform. On the one side, the Supreme Court in recent terms has judicially adopted a blunderbuss solution: broader enforcement of arbitration clauses for *all* types of disputes.[26] On the other side, the Arbitration Fairness Act proposes to make an overly broad array of arbitration clauses unenforceable—specifically, the Act would render unenforceable arbitration clauses as they apply to contracts for employment, consumer goods, and disputes under civil rights statutes.[27]

These competing models are overly broad and do not sensitively weigh the conflicting policy concerns of different types of disputes, an error that this Note's proposal strives to address.

The Note proceeds as follows. Part I analyzes the path of arbitration in the U.S. Supreme Court up to *Concepcion*: from the original interpretation—commercial contracts between businesses[28]—toward the modern

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22. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011).

23. *Id.*

24. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91–92 (2000).

25. Fifty is selected because it is a focal point for a variety of legislation. *E.g.*, Patient Protection and Affordable Care Act of 2010 § 4980H(d)(2), 26 U.S.C. § 4980H(d)(2) (Supp. 2011) (defining "applicable large employer" as "an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year"); *see also* HEALTH REFORM FOR SMALL BUSINESSES: THE AFFORDABLE CARE ACT INCREASES CHOICE AND SAVING MONEY FOR SMALL BUSINESSES 1, *available at* http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (noting that the Affordable Care Act "specifically exempts all firms that have fewer than 50 employees—96 percent of all firms in the United States or 5.8 million out of 6 million total firms—from any employer responsibility requirements").

26. *See infra* subparts I(C)–(E) (detailing the recent pro-arbitration trend in Supreme Court jurisprudence).

27. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 402(a) (2011).

28. *See infra* note 34 and accompanying text.

enforceability in all employment and consumer contracts that can in some cases preclude consumer class actions. Part II discusses the horror-story cases, such as *Jones v. Halliburton*, and the subsequent reaction in Congress—the Arbitration Fairness Act. This Part argues that the problem is not arbitration per se; the real problem is *unfair* arbitration as a result of institutional and structural differences between different types of disputes. Part III proposes a solution—dispute-specific regulations which provide procedural guarantees for plaintiffs and safe harbors for companies. Finally, the Note offers a brief conclusion.

I. The Establishment of the Federal Policy Favoring Arbitration

Arbitration has a long and storied history both in the United States and abroad. In specific industries and for certain categories of disputes, arbitration was (and remains) practically the exclusive forum for dispute resolution;[29] further, studies of arbitration before the Federal Arbitration Act (FAA) also indicated that arbitration was appropriate for some, but not all disputes.[30] But in the nineteenth and early twentieth centuries, U.S. common law judges scrutinized all predispute arbitration agreements, refusing to specifically enforce predispute agreements to arbitrate.[31]

In 1925, at the behest of lobbying from business groups and the American Bar Association (ABA),[32] Congress enacted the FAA to displace judicial hostility to the enforcement of predispute arbitration agreements.[33]

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29. *See* Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 852 (1961) (discussing the results of a survey and noting that in exchanges of grain and livestock, "100 percent of those responding reported the use of institutionalized arbitration"); *see also* MARTIN DOMKE, 1 DOMKE ON COMMERCIAL ARBITRATION § 2:6 (Larry E. Edmonson ed., 2012) (quoting the preamble of a West New Jersey law from 1682 as stating that in "'certain cases suits at law are needless and frivolous and . . . arbitration offers a far more preferable means of settling such disputes'").

30. *See* Mentschikoff, *supra* note 29, at 848–54 (discussing the factors that cause industries to prefer, or not prefer, arbitration).

31. *See, e.g.*, Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) ("'I consider it to be quite settled, that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration; nor will it, in such a case, substitute the master for the arbitrators, which would be to bind the parties contrary to their agreement.'" (quoting Sir John Leach in Agar v. Macklew, 2 Sim. & S. 418 and collecting cases)); Chicago M. & St. P. Ry. Co. v. Stewart, 19 F. 5, 12 (C.C.D. Minn. 1883) (collecting sources); DOMKE, *supra* note 29, at § 2:8 ("From the mid 1800's [sic] through the early 20th century American judicial disfavor adopted as its rationale an unquestioning adoption of the English theory that arbitration agreements 'ousted the jurisdiction of the courts' complimented by self-serving 'public policy' assertions.").

32. Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 125–26 (2002) ("The ABA Committee on Commerce, Trade and Commercial Law prepared the original draft of the bill, and Congress enacted it into law with only minor amendments." (citing IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 84–91 (1992))).

33. *E.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270–71 (1995); Gilmer v. Interstate/Johnson Lane Corp.,

While, arguably, the FAA's original purpose was to secure enforcement of predispute arbitration in merchant–commercial contracts,[34] because of a combination of history,[35] new scholarly focus on freedom of contract,[36] path dependence,[37] and the then-recent trend toward textualist statutory interpretation to the exclusion of legislative history,[38] in the late 1980s and 1990s, a federal policy in favor of broad enforcement of arbitration emerged.[39] The development of this federal policy began in particular areas (labor–management relations and international commerce), but has since expanded to overwhelm the prior doctrinal distinctions.

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500 U.S. 20, 24 (1991)) (stating that the FAA was passed as a response to judicial hostility to enforcing arbitration agreements).

34. The FAA was drafted by the ABA Committee on Commerce, Trade and Commercial Law and enacted with few revisions. Drahozal, *supra* note 32, at 125–26.

35. The unfortunate inclusion of "commerce" in the FAA before the expansion of Commerce Clause jurisprudence arising from the New Deal, and (ironically) the Civil Rights eras gave "commerce" a much broader definition than mere commercial or merchant transactions.

36. The proliferation of the law and economics movement, and its influence on the federal judiciary through the appointment of its scholars as judges, contributed to the promulgation of freedom-of-contract principles during this time period. *See, e.g.*, William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 235–40 (1979) (proposing a "purely private market in judicial services," and arguing that the resulting "competition among judges would yield the optimum amount and quality of judicial services at minimum social cost"); *see also* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 4–5, 11 (1984) (noting that "[t]he Justices today are more sophisticated in economic reasoning, and they apply it in a more thoroughgoing way, than at any other time in our history," and arguing that "[w]hen a court declines to enforce the arbitration agreement, it makes others situated similarly to the one who avoided arbitration worse off"). The now-Judges Posner and Easterbrook were then faculty members at the University of Chicago School of Law. Landes & Posner, *supra* at 235; Easterbrook, *supra* at 4.

37. Path dependence is how the path of precedent shapes the current law in "specific and systemic ways." Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001). Hathaway identifies three strands of path dependence theory: (1) increasing returns, where because it is less costly to continue down the same path than to change, there are increasing returns from an initial decision; (2) evolutionary path dependence, where law changes gradually but is slowly punctuated by periods of rapid adaptation; and (3) sequencing path dependence, where the order in which choices are considered shapes the outcome. *Id.* at 606–08.

38. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483–84 (1989) (reversing established precedent based on the text of § 2 of the FAA); *cf. id.* at 487 (Stevens, J., dissenting) (criticizing the majority for making "textual arguments on both sides regarding the interrelation of federal securities and arbitration Acts. None of these arguments, however, carries sufficient weight to tip the balance between judicial and legislative authority and overturn an interpretation of an Act of Congress that has been settled for many years" (footnote omitted) (citation omitted)).

39. *See infra* subpart I(C).

A. The Federal Arbitration Act—Original Intent and Early Interpretations

There is a robust scholarly debate over the original interpretation of the FAA,[40] but scholars and jurists agree that the central purpose of the Act was to displace judicial hostility toward arbitration.[41] The FAA states, "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[42]

Initially courts interpreted the FAA narrowly. For example, it was originally presumed that the FAA applied to federal courts only, not state courts, as the Act preceded *Erie*[43] by more than a decade.[44] Employment disputes were presumed to be beyond the scope of the arbitration agreement,[45] as were antitrust claims,[46] and investor securities fraud claims under the Securities Exchange Act of 1934.[47] Some commentators

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40. *See* Chistopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 395–96 n.17 (2004) (collecting sources and summarizing the debate in the scholarship in relation to federal preemption of the FAA).

41. DOMKE, *supra* note 29, at § 2:9. The main divide in the scholarship (and between the Justices of the Supreme Court) is whether the Act was intended to preempt state law. *Compare* Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) ("To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope . . . ."), *with id.* at 30 (O'Connor, J., dissenting) ("Today's decision . . . gives the FAA a reach far broader than Congress intended.").

42. Federal Arbitration Act, 9 U.S.C. § 2 (2006). Sections three and seven provide for enforcement mechanisms, mandating the "courts of the United States" to stay trial or compel arbitration. *Id.* §§ 3, 7.

43. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

44. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 286 (1995) (Thomas, J., dissenting) (noting that it was not until 1984 that the Court concluded that the FAA § 2 extended to the states, and arguing that "[t]he explanation for this delay is simple: The statute that Congress enacted actually applies only in federal courts." (collecting sources)).

45. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 47–50 (1974) (holding that an employee's right to trial under the Civil Rights Act was not precluded by submission to final arbitration under a collective bargaining agreement); Peabody Galion v. Dollar, 666 F.2d 1309, 1320 (10th Cir. 1981) (collecting cases).

46. *See, e.g.*, Applied Digital Tech., Inc. v. Cont'l Cas. Co., 576 F.2d 116, 117–19 (7th Cir. 1978) (affirming an order to enjoin arbitration on the basis that antitrust claims permeated the case, making it inappropriate to arbitrate); Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827–28 (2d Cir. 1968) (holding that antitrust claims are inappropriate for arbitration).

47. *E.g.*, Wilko v. Swan, 346 U.S. 427, 438 (1953) ("Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Mayaja, Inc. v. Bodkin, 803 F.2d 157, 162 (5th Cir. 1986) (holding that the district court properly refused to compel arbitration of 1934 Act claims), *vacated and remanded by* Shearson Lehman Brothers v. Mayaja, Inc., 482 U.S. 923 (1987); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 536 (3d Cir. 1976) ("It is enough to say that the Supreme Court found prospective waivers of the right to judicial trial and review to be inconsistent with Congress' overriding concern for the protection of investors.").

characterized these interpretations as enunciations of a "public policy" exception.[48] But that all began to change in the early 1970s in the Supreme Court.[49]

B. Expanding Arbitration in Labor and International Disputes.

The first step in the expansion of interpretations of the FAA occurred as a result of the labor strife of the 1930s–1950s. Prior to 1935, courts struggled with how to enforce collective bargaining agreements negotiated between unions and management. The issue was mainly whether a *union* could sue for negotiated rights, even though the agreement flowed from rights of individual workers, and "[n]one of the prevailing theories of collective agreements provided a basis for a union to enforce an agreement on behalf of and yet independently of individual members."[50]

In establishing the broad policy favoring labor arbitration, Justice Douglas (writing for the majority) adopted an approach sensitive to the specific characteristics of the dispute and the underlying policies: "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife."[51] Reasoning that arbitration of labor disputes has "quite different functions" from commercial arbitration,[52] and is "part and parcel of the collective bargaining process itself,"[53] the Court established for the first time a broad policy favoring arbitration: in interpreting "[a]n order to arbitrate the particular grievance," the Court held, "[d]oubts should be resolved in favor of coverage."[54]

The Court in *Steelworkers* was persuaded that the usual problems associated with private adjudication did not apply in labor arbitration. The Court distinguished cases (namely *Wilko v. Swan*,[55] interpreting the Securities Act) that had narrowly interpreted the FAA; because labor arbitration is different, "the run of arbitration cases . . . becomes irrelevant to

48. Ware, *Arbitration Under Assault*, *supra* note 10, at 4 ("[C]ourts often refused to enforce agreements to arbitrate claims created by 'public interest' statutes in such areas as employment . . . , antitrust, and securities. Courts did that on the ground that it would violate 'public policy' to enforce such agreements.").

49. *See id.* at 4–5 (describing the Court's post-1975 decisions as "fidelity to the contractual approach"); *see also* Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1637 ("[T]he Supreme Court's attitude toward commercial arbitration changed dramatically beginning in the 1970s and 1980s."); *cf.* Hathaway, *supra* note 37, at 607 (discussing evolutionary path dependence as marked by dramatic rapid shifts).

50. Katherine V.W. Stone, *The* Steelworkers' Trilogy*: The Evolution of Labor Arbitration*, *in* LABOR LAW STORIES 149, 155 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

51. United Steelworkers of Am. v. Warrior & Gulf Navigation Co. (*Steelworkers*), 363 U.S. 574, 578 (1960).

52. *Id.*

53. *Id.*

54. *Id.* at 582–83.

55. 346 U.S. 427 (1953).

our problem. [In commercial arbitration,] the choice is between the adjudication . . . in courts with *established procedures* or even *special statutory safeguards* on the one hand and the settlement of them in the more informal arbitration tribunal on the other."[56] Even though the reasoning in *Steelworkers* was limited to the collective-bargaining context by *Alexander v. Gardner-Denver Co.*,[57] *Steelworkers* paved the way for the subsequent decade's expansion of arbitration agreements.[58]

In *Scherk v. Alberto-Culver Co.*,[59] the Supreme Court expanded the interpretation of § 2 of the FAA in the arena of international commerce. In *Scherk*, the Court reasoned that international business concerns supported enforcement of an agreement to arbitrate in one specific type of dispute—international commercial disputes:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . .
>
> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.[60]

The Court in *Scherk* placed great emphasis on issues of comity and party expectations at stake in international commerce, and the international nature of the transaction, and the Court enforced the agreement to arbitrate.[61] Once again, as in the case of labor arbitration, this was a dispute-specific holding sensitive to the underlying nature of the *type* of dispute and the policies at issue; in this case, facilitating the increasingly international economy by protecting party expectations and assuring the enforceability of judgments. But even though the expansion of arbitration was grounded in specific areas of the law—labor and international disputes—*Scherk* and *Steelworkers* would later enable the Court to expand the reach of the FAA beyond these contexts.

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56. *Steelworkers*, 363 U.S. at 578 (emphasis added).

57. 415 U.S. 36 (1974); *id.* at 51 ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true . . . that a *union* may waive certain statutory rights related to collective activity . . . ." (emphasis added)); *see id.* at 46 n.6, 50–51, 59–60.

58. And, as shall be discussed more at length below, *Steelworkers* inadvertently provided precedent for expansive interpretations of the FAA beyond the labor–management context. *See infra* note 66 and accompanying text.

59. 417 U.S. 506 (1974).

60. *Id.* at 516–17.

61. *Id.* This closely followed the then-emerging trend towards the enforcement of international agreements by their terms, reversing judicial scrutiny of forum-selection clauses and the like. *See, e.g.*, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (enforcing a forum-selection clause while noting the "present-day commercial realities and expanding international trade").

C. Expanding the Protection of Arbitration

In the 1980s and 1990s, the Supreme Court expanded the protection of arbitration agreements beyond labor and international contexts. In 1983, the Court in *Moses H. Cone Memorial Hospital*[62] extended the reasoning from the labor context articulated in *Steelworkers*[63]—adopting for the first time a federal policy in favor of arbitration (outside the labor–collective-bargaining arena).[64] The Court articulated the holding in broad sweeping language: "Section 2 [of the FAA] is a congressional declaration of *a liberal federal policy favoring arbitration agreements*, notwithstanding any state substantive or procedural policies to the contrary."[65] Some commentators have argued that this enunciation of a federal policy in favor of arbitration was an inappropriate application of case law from labor arbitration, which was built on the inapposite policy of favoring amicable resolutions of labor–management disputes through arbitration to avoid labor strife.[66] But this broad language would lead to the broad expansion of arbitration.

Soon thereafter, the Court held that the FAA preempted state statutes that prohibited arbitration of specific types of agreements in *Southland Corp. v. Keating*.[67] Beginning with *Mitsubishi*,[68] which extended *Sherk*'s international rationale[69] to enable arbitration of antitrust claims—over the

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62. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

63. *See Steelworkers*, 363 U.S. 574, 582–83 (1960) (stating that when interpreting "[a]n order to arbitrate the particular grievance[, d]oubts should be resolved in favor of coverage").

64. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

65. *Id.* at 24 (emphasis added).

66. *See, e.g.*, Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers *Trilogy to* Gilmer, 44 HASTINGS L.J. 1187, 1192 (1993) (stating that labor arbitration does not function as a "litigation alternative" but is instead "an alternative to the strike. Courts regard the arbitration provision as a quid pro quo for a no strike clause"); Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1637 n.28 (arguing that the Court in *Moses H. Cone Memorial Hospital* inappropriately borrowed from the labor arbitration decisions of collective bargaining, where there is "an entirely different policy concern[] . . . [because] in the collective bargaining context 'arbitration is the substitute for industrial strife'" (quoting *Steelworkers*, 363 U.S. 574, 578 (1960)).

67. 465 U.S. 1, 16 & n.10 (1984).

68. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

69. Yves Dezalay and Bryant Garth argued that the international character of the arbitration agreement was critical to the decision, as was the elite status of the International Chamber of Commerce (ICC). *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 158–59 (1996) (noting that the ICC amicus brief listed former Supreme Court Justice Potter Stewart as among the ICC's arbitrators); *accord Mitsubishi*, 473 U.S. at 629 (concluding that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [to arbitrate], even assuming that a contrary result would be forthcoming in a domestic context").

public-law concerns voiced by the Court in *Gardner-Denver*[70]—each of the so-called public policy exceptions were whittled away.[71] Eventually, in *Allied-Bruce Terminex v. Dobson*,[72] the Court relied on the "involving commerce" text of § 2 of the FAA to interpret it as implementing Congress's intent to "exercise [its] commerce power to the full."[73]

1. The Employment Context.—This federal policy favoring arbitration has had a pronounced effect in the employment context. Before the Court's shift, many employers and employees presumed that substantive law concerns would prevent the Court from compelling arbitration of employment discrimination claims.[74] *Alexander v. Gardner-Denver Co.*[75] is representative of the Court's prior view of employment arbitration before the pendulum began to swing toward the modern policy. The Court hesitated to enforce an arbitration clause where there were competing concerns of public policy.[76] But the federal policy favoring arbitration would later render *Gardner-Denver* and its public-law rationale a dead letter.

The process began with *Gilmer v. Interstate/Johnson Lane Corp.*[77] In *Gilmer*, an employee brought a claim under the ADEA for age discrimination.[78] The Supreme Court held that arbitration should be

70. *See Mitsubishi*, 473 U.S. at 628–29 (recognizing and overruling the "'pervasive public interest in enforcement of the antitrust laws . . . [that] make . . . antitrust claims . . . inappropriate for arbitration'" (quoting Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827–28 (2d Cir. 1968)).

71. *See, e.g.*, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89–91 (2000) (holding that statutory claims under the Truth in Lending Act were arbitrable because "federal statutory claims can be appropriately resolved through arbitration" and pointing to cases that demonstrate that even claims arising under statutes designed to further important public policies may be arbitrated). In so doing, the Court relied heavily on *Mitsubishi* in domestic contexts, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting *Mitsubishi*, 473 U.S. at 628), even though the Court in *Mitsubishi* reasoned from the international context and expressly reserved the domestic issue. *See Mitsubishi*, 473 U.S. at 629 (reasoning from "concerns of international comity" but noting that "a contrary result would be forthcoming in a domestic context"); *see also* Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 564–65 (2005) (asserting that by 1991 the Supreme Court had made clear that, absent a clearly expressed congressional intent to the contrary, predispute arbitration agreements were enforceable "even when statutory, public law rights were at stake").

72. 513 U.S. 265 (1995).

73. *Id.* at 277.

74. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1637–38 & n.31.

75. 415 U.S. 36 (1974).

76. *See id.* at 59–60 (recognizing the federal policy favoring arbitration of labor disputes but holding that the competing federal policy against discriminatory employment practices could be best accommodated by permitting an employee to pursue his remedy under both the arbitration clause of a collective-bargaining agreement and his cause of action under Title VII).

77. 500 U.S. 20 (1991).

78. *Id.* at 23–24.

compelled.[79] The Court reasoned that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights . . . ; it only submits to their resolution in an arbitral, rather than a judicial, forum."[80] Eventually, in *Circuit City Stores, Inc. v. Adams*,[81] the Court considered the employment-exception text of § 1 of the FAA and held that the exception only applied to employment contracts of transportation because the "text of § 1 precludes interpreting the exclusion provision to defeat the language of § 2."[82] Thus, the Court relied on *Gilmer* in remanding the case to compel arbitration.[83] Employment disputes, even over statutory claims, were now arbitrable.

2. The Consumer Context.—The recognition of a federal policy in favor of arbitration had a pronounced effect on consumer-contract jurisprudence as well, but in a more circumspect fashion—through the Commerce Clause's federal preemption jurisprudence. Many states had consumer protection statutes that prohibited the enforcement of predispute arbitration agreements.[84] Under preemption doctrine, these statutes were enforceable to the extent that they did not "involve interstate commerce."[85] In *Allied-Bruce Terminex v. Dobson*, however, the Supreme Court held that in applying the FAA to a termite-control consumer agreement § 2 of the FAA is to be given the broadest possible scope.[86] The Court reasoned that the language "involving commerce" is the "functional equivalent of 'affecting [commerce],' . . . . words [that] normally mean a full exercise of constitutional power."[87] One glance at the Court's Commerce Clause jurisprudence would lead any reasonable general counsel to believe that virtually no contract was beyond the reach of the FAA and the liberal federal

79. *Id.* at 35.

80. *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (deciding an international arbitration case)).

81. 532 U.S. 105 (2001).

82. *Id.* at 119.

83. *Id.* at 123–24.

84. *See, e.g.*, ALA. CODE § 8-1-41(3) (2009) (mandating that a court cannot specifically enforce "[a]n agreement to submit a controversy to arbitration"); CAL. LAB. CODE § 229 (West 2011) ("Actions . . . for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate.").

85. *See* 9 U.S.C. §§ 1–2 (2006) (enforcing arbitration clauses if there is "a contract evidencing a transaction involving commerce," and defining "commerce" as "commerce among the several States or with foreign nations"); Allied-Bruce Terminex Cos. v. Dobson, 628 So.2d 354, 355–57 (Ala. 1993) (holding that because the parties did not contemplate "substantial interstate activity when they entered the termite bond" the company could not enforce the agreement to arbitrate under Alabama law), *rev'd*, 513 U.S. 265 (1995).

86. 513 U.S. at 276–77.

87. *Id.* at 273–74, 277.

policy favoring arbitration.[88] *Allied-Bruce Terminex* not unexpectedly led to the dramatic proliferation of arbitration clauses in consumer contracts.

The FAA reversed the common law hostility to arbitration. Initially, the Court retained a restrictive approach to the Act's interpretation—applying the FAA to commercial contracts, recognizing a public law distinction, and allowing states to regulate their contract law of arbitration. But beginning in the international context and spreading to consumer and employment contracts, a strong federal policy favoring arbitration gained a foothold, and agreements to arbitrate would soon proliferate.

D. Arbitration Agreements Proliferate

A brief summary of the empirical data confirms what is intuitively true for most readers—in the last decade, arbitration agreements have become practically ubiquitous. In 1979, five years after *Scherk*, the Bureau of National Affairs found that only about one-and-a-half percent of employers surveyed used arbitration clauses.[89] By 1995, the year of the *Allied-Bruce Terminex* opinion, the U.S. General Accounting Office (GAO) found that 10% of employers were using arbitration for employment disputes.[90] In just two years, that number rose to 19%.[91] In the consumer contract context, the growth has been even more pronounced. One survey indicated that 35.4% of sampled businesses used arbitration clauses in their consumer contracts.[92] This is particularly prevalent in the financial industry, rising to 69.2%.[93] The scope of the arbitration clauses in this survey varied, but 30.8% precluded class actions[94]—a provision whose enforceability was an open question up until 2011.

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88. *See, e.g.*, Daniel v. Paul, 395 U.S. 298, 305–08 (1969) (reasoning that the Lady Nixon Club snack bar affected commerce in part because "[t]he snack bar serves a limited fare—hot dogs and hamburgers on buns, soft drinks, and milk," which presumably moved in interstate commerce); Wickard v. Filburn, 317 U.S. 111, 128–30 (1942) (upholding under the Commerce Clause a federal statute prohibiting the growing of wheat for home consumption). *But see* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587 (2012) (suggesting that Congress's power to act under the Commerce Clause may be limited where individuals are not participating in commerce, for such a power "would open a new and potentially vast domain to congressional authority").

89. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 31 & n.6 (1998) (citing BUREAU OF NAT'L AFFAIRS, PERSONNEL POLICIES FORUM SURVEY NO. 125, POLICIES FOR UNORGANIZED EMPLOYEES (1979)).

90. *Id.* at 31 & n.7 (citing U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 7 (1995)).

91. *Id.* at 31 & n.8 (citing U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 2 (1997)).

92. Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62–64 (2004).

93. *Id.*

94. *Id.* at 65. For a collection of the different types of consumer arbitration agreements challenged in court, see Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1638–39.

More recently, in 2008, an empirical study found mandatory arbitration clauses in 92.9% of employment contracts and 76.9% of consumer contracts.[95] This study also found that, in contrast, these same companies provided for mandatory arbitration in less than 10% of their negotiated, nonconsumer, nonemployment contracts.[96]

E. Class Actions and Arbitration

The expanding federal policy in favor of arbitration brought an increasing number of employment and consumer disputes within the scope of arbitration. As arbitration agreements were continually enforced,[97] arbitration agreements spilled over into the class action arena—purporting to waive consumers' and employees' class action rights. As discussed below, state courts responded, in some cases attempting to hold these clauses unenforceable. For a time, the enforceability of (what amounted to) class action waivers was an open question until the Supreme Court settled the law in 2011. In *Concepcion*, the Court upheld the use of an arbitration clause as a class action waiver.[98]

If the impetus behind corporations' rapid adoption of arbitration clauses was a desire to reduce legal expenses and potential liability,[99] then avoiding class actions would be of paramount importance. After all, broad consumer or employment class actions are quintessential "bet-the-company" litigation designed primarily to deter wrongful corporate conduct.[100] As the federal policy favoring arbitration agreements emerged, arbitration agreements were upheld under increasingly egregious facts,[101] and defense counsel

95. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 886 (2008).

96. *Id.* at 876.

97. *See supra* notes 77–83 and accompanying text.

98. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (striking down the *Discover Bank* rule as preempted because it stood as an obstacle to the purposes of the FAA).

99. *See, e.g.*, Maltby, *supra* note 89, at 31 ("The primary motivation of employers for creating [arbitration] systems appears to be reducing legal expenses.").

100. *See, e.g.*, Heather A. Pigman & Martin C. Calhoun, *Unsettling the Settled: Is There a Re-emerging Debate Regarding the Role of Choice-of-Law in Class Certification Proceedings*, 77 DEF. COUNS. J. 465, 465 (2010) (observing that class actions can potentially "turn small value individual actions into 'bet the company' litigation").

101. *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997) (Easterbrook, J.) (enforcing an arbitration agreement included in a form in the box, reasoning that the customer assented "[b]y keeping the computer beyond 30 days"); Am. Gen. Fin. Servs., Inc. v. Griffin, 327 F. Supp. 2d 678, 682–83 (N.D. Miss. 2004) (enforcing an arbitration clause in an insurance contract against a blind plaintiff even though defendant's employees failed to explain the terms of the arbitration clause); Marsh v. First USA Bank, 103 F. Supp. 2d 909, 918–19 (N.D. Tex. 2000) (holding that a consumer carries the burden to prove a negative—nonreceipt of the arbitration clause—once the bank has presented evidence that the clause was mailed). *But see* Broemmer v. Abortion Servs. of Phx., Ltd., 840 P.2d 1013, 1014–15, 1017 (Ariz. 1992) (en banc) (holding unenforceable a predispute arbitration agreement in a form signed before receiving an abortion).

increasingly advised corporate clients to use arbitration clauses to avoid class action lawsuits.[102] It is noteworthy that these clauses were *not* intended to implement arbitration as much as to *avoid* class actions.[103] Some companies attempted to apply these clauses retroactively to avoid class actions already filed.[104]

The effectiveness of these clauses for the most part remained an open question prior to 1990, and for good reason: prior to the wave of decisions recognizing a federal policy in favor of arbitration,[105] considerations of public policy often trumped agreements to arbitrate.[106] Class actions are generally thought to further the public interest by deterring wrongful conduct.[107]

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102. *See, e.g.*, Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997) ("[S]trict enforcement of an arbitration clause should enable the franchisor to dramatically reduce its aggregate exposure"); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, but Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May/June 1998, at 24, 26 ("All of the dangers inherent in an individual consumer lawsuit . . . are magnified exponentially when a class of hundreds or thousands of consumers is certified. . . . Arbitration is a powerful deterrent to class action lawsuits against lenders because the great weight of authority holds that arbitrations cannot be conducted on a class basis unless the parties have agreed to do so."); Caroline E. Mayer, *Hidden in Fine Print: "You Can't Sue Us"; Arbitration Clauses Block Consumers from Taking Companies to Court*, WASH. POST, May 22, 1999, at A1 (quoting a National Arbitration Forum official as saying, "The only thing which will prevent 'Year 2000' class actions is an arbitration clause in every contract, note and security agreement."). The National Arbitration Forum was exposed by *Businessweek* as suffering from egregious conflicts of interest. *See* Berner & Grow, *supra* note 9 (observing that Harvard Law School Professor Elizabeth Bartholet revealed in an interview that after she awarded a consumer $48,000 in damages, the National Arbitration Forum (NAF) removed her from eleven other cases, about which she said, "NAF ran a process that systematically serviced the interests of credit-card companies").

103. For example, professors Issacharoff and Delaney argue that credit card companies are "even less enthusiastic about classwide arbitration than about class action litigation." Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 179 (2006); *see also* Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 779–80 (2004) ("[I]f Discover can't compel individual arbitration, it doesn't want to be in arbitration at all.").

104. In one case, a credit card company already in a consumer class action lawsuit attempted to distribute a class action waiver to potential plaintiffs; in court, the defendant argued that the plaintiffs consented to arbitrate by "failing to reject the arbitration clause." In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237, 249, 251 (S.D.N.Y. 2005). The court, however, did not enforce the arbitration agreement, reasoning that "when a defendant contacts putative class members for the purpose of altering the status of a pending litigation, such communication is improper without judicial authorization." *Id.* at 253.

105. *See supra* notes 62–88 and accompanying text.

106. *See supra* notes 45–48 and accompanying text.

107. *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1105–06 (Cal. 2005) (recognizing "the role of the class action in deterring and redressing wrongdoing" (internal quotation marks omitted)), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 514 (1996) ("The class action . . . represents a potentially effective mechanism for privately enforcing the law [and] deterring wrongful conduct . . . .").

The two tracks of the federal policy favoring arbitration—enforceability in spite of public policy implications[108] and expansive preemption[109]—came to a head in *Concepcion*. The Supreme Court in *Concepcion* struck down California's *Discover Bank* rule.[110] The *Discover Bank* rule provided that clauses were per se unconscionable and unenforceable under California law if (1) the agreement "predictably involve[s] small amounts of damages," (2) "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," (3) and "the waiver becomes in practice the exemption of the party from responsibility."[111] In striking down this rule that, at least on its face, applied equally to litigation and arbitration contracts containing class action waivers, the Court not only invoked the specter of the former "judicial hostility towards arbitration," but implied that California was a likely culprit of its resurgence.[112] The Court reasoned that the *Discover Bank* "rule would have a disproportionate impact on arbitration agreements" even though it purported to apply to contracts generally.[113] Thus, the Court reasoned that the *Discover Bank* rule frustrated the purpose of the FAA[114] and held that the FAA preempted the *Discover Bank* rule—5 to 4.[115]

In addition to the early interpretations of the FAA (reversing former judicial hostility to arbitration in commercial contracts), the case law has since recognized (1) a federal policy favoring broad enforceability of arbitration clauses and (2) a rule of construction favoring the arbitration of claims related to the scope of the agreement to arbitrate.[116] *Concepcion*

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108. *See supra* notes 50–73 and accompanying text.

109. *See supra* notes 85–88 and accompanying text.

110. *Concepcion*, 131 S. Ct. at 1753.

111. *Discover Bank*, 113 P.3d at 1110 (internal quotation marks omitted).

112. *See Concepcion*, 131 S. Ct. at 1747 ("[I]t is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." (citing Steven 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, 54, 66 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFFALO L. REV. 185, 186–87 (2004))).

113. *Concepcion*, 131 S. Ct. at 1747.

114. *Id.* at 1758 (Breyer, J., dissenting) ("[W]e have also cautioned against thinking that Congress' primary objective was to guarantee . . . procedural advantages [such as expeditious resolution of disputes]."). *Dean Witter* supports Justice Breyer's argument here. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("We therefore reject the suggestion that the overriding goal of the [Federal] Arbitration Act was to promote the expeditious resolution of claims."). Unlike the majority, Justice Thomas, concurring, argued that the text, not the "purpose," of the FAA mandated the result in *Concepcion*. *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring).

115. *Id.* at 1753 (majority opinion).

116. *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 673 (2012) (requiring a clear statement of statutory intent to counter the FAA's policy favoring arbitration, and holding that "[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms").

established that arbitration clauses that waive class action rights will be generally enforceable.[117] This extension of the FAA has infuriated arbitration critics in the academy[118] and Congress, as will be discussed in the next Part.[119] As Part II argues, the problem is *not* the expansion of arbitration per se. Instead, the problem is that this expanding policy is sweeping in disputes that may not belong in arbitration. Part III will later propose a model for reform.

II. Concerns over Arbitration in the Academy and Congress

The case law firmly recognizing a broad federal policy favoring arbitration has only served to amplify the concerns from arbitration's critics. These concerns include the adhesive quality of the agreement to arbitrate, the lack of precedent, and the privacy of the proceeding—precluding deterrence. These concerns are of even greater importance in the class action context, because where the amounts are small, agreements to arbitrate practically foreclose both compensation for many claimants and substantive deterrence for society. Nonetheless, arbitration offers significant advantages for employees and consumers as well as companies. This Part analyzes these issues and Congress's response and concludes that the problem is not

117. However, this is not the only reading of *Concepcion*. For example, a two-judge panel in the Second Circuit in *In re American Express Merchants' Litigation* interpreted *Concepcion* narrowly as offering "a path for analyzing whether a state contract law is preempted by the FAA," separate and apart from so-called "vindication of statutory rights analysis, which is part of the federal substantive law of arbitratibility." 667 F.3d 204, 213 (2d Cir. 2012) (internal quotation marks omitted). This interpretation of the FAA is likely in conflict with the Supreme Court's view. After all, the Supreme Court itself granted American Express's petition for a writ of certiorari, vacated the judgment, and remanded for reconsideration in light of a recent decision that narrowed the availability of class arbitration where the agreement was silent on the matter. Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010) (citing Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1770 (2010)). As the Ninth Circuit recently observed in *Coneff v. AT&T Corp.*, "*Concepcion* is broadly written," and the court in *Coneff* expressly rejected the Second Circuit's distinction between *Concepcion* and statutory-rights cases. 673 F.3d 1155, 1158–59 (9th Cir. 2012) (interpreting *Concepcion* in light of a state statutory scheme). When this Note went to print, the Supreme Court had recently granted American Express's petition for certiorari, and set oral argument for February 27, 2013. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (Nov. 9, 2012) (granting petition for certiorari); Supreme Court of the U.S. Oct. Term 2012: For the Session Beginning Feb. 19, 2013 (Dec. 17, 2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_calendars/monthlyargumentcalfeb2013.pdf. Further, it remains to be seen how the Court would evaluate a class action waiver in the face of a federal statute, like the Truth in Lending Act, that implicitly provides for class actions. *See* Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1412 & nn.16–17 (1974) (detailing the situations where class action lawsuits have been allowed under the Truth in Lending Act).

118. *E.g.*, Chemerinsky, *supra* note 14 ("The notion that an injured person has a right to his or her day in court is deeply ingrained in American culture. But the proliferation of arbitration agreements, and the Supreme Court's aggressive enforcement of them, means that it is increasingly a myth that an injured person can sue.").

119. *See infra* Part II.

arbitration itself, but rather unfair arbitration caused by unequal bargaining at the outset. This Part will inform the proposal for reform of Part III.

A. Concerns of Adhesion and the Unconscionability Doctrine: Summarizing and Critiquing the Unconscionability Arguments

Perhaps the most salient (or at least most discussed) perceived problem in employment and consumer arbitration is the "adhesive" quality of the agreement to arbitrate.[120] In most modern consumer and employee contracts, the corporation offers the terms in a standard form on a take-it-or-leave-it basis,[121] and the employee or consumer has little opportunity to engage in arm's-length bargaining over terms either because the corporation has a practical monopoly or all competitor corporations use essentially the same terms.[122] Often called "superior bargaining power" or procedural unconscionability,[123] this striking power differential may undermine the enforceability of the agreement to arbitrate, especially in the presence of a substantively oppressive term.[124]

Also, modern social science (or "behavioral economics") has argued that bounded rationality may lead to inefficient agreements.[125] This literature is more important in dispute resolution because a dispute is an event that is

120. *See generally* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (recognizing and articulating, for perhaps the first time, the special problem of standard form contracts in mass-marketed consumer products).

121. *See, e.g.*, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 676 (2012) (Ginsburg, J., dissenting) ("The Court today holds that credit repair organizations can escape suit by providing in their take-it-or-leave-it contracts that arbitration will serve as the parties' sole dispute-resolution mechanism. . . . But Congress enacted the CROA with vulnerable consumers in mind—consumers likely to read the words 'right to sue' to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration.").

122. Kessler, *supra* note 120, at 632.

123. *See* Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 461, 470–71 (1995) (arguing that courts have incorporated the unconscionability doctrine into § 2-302 of the Uniform Commercial Code (U.C.C.) because of an alarming unfairness in bargaining power); *see also* U.C.C. § 2-302 cmt.1 (2003) (stating that "[c]ourts have been particularly vigilant when the contract at issue is set forth in a standard form").

124. U.C.C. § 2-302 cmt.1; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.").

125. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) (arguing that consumers are "boundedly rational decisionmakers who will normally price only a limited number of product attributes as part of their purchase decision" and that "[w]hen contract terms are not among these attributes, drafting parties will have a market incentive to include terms in their standard forms that favor themselves, whether or not such terms are efficient").

for most employees and consumers uncertain (subject to the salience effect) and in the future (subject to hyperbolic discounting).[126]

Anti-arbitration scholars often argue that by waiving their day in court, consumers and employees surrender important procedural safeguards.[127] For example, discovery is often extremely limited.[128] For a consumer in a dispute with a large corporation, this may eliminate a tool necessary to prove a product liability claim.[129] Further, the plaintiff loses the jury trial and with it the perceived possibility of a large judgment.[130] And a plaintiff may lose an opportunity for public vindication or retribution; after all, some plaintiffs want more than money.[131]

These scholars also argue that arbitration does not create precedent. In a common law system, this deprives the public of opportunities for the clarification of rules and the shaping of policy.[132] Also, the privacy of arbitration prevents a public outing of a corporate bad actor and discourages other lawsuits. Further, privacy precludes the deterrent effect on other corporations of a public judgment, especially important in the context of consumer class actions.[133]

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126. For a description and analysis of hyperbolic discounting, see Benjamin A. Malin, *Hyperbolic Discounting and Uniform Savings Floors*, 92 J. PUB. ECON. 1986, 1986 (2008).

127. *E.g.*, Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1648–53 (discussing various procedural and rights protections that plaintiffs sacrifice in arbitration).

128. *See, e.g.*, Ware, *Arbitration Under Assault*, *supra* note 10, at 3 ("[A]rbitration typically reduces costs . . . by streamlining discovery.").

129. *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 46–47 & n.34 (stating that in an arbitration, the only way to "unearth . . . information [is by] finding a witness"); Sternlight, *Panacea or Corporate Tool?*, *supra* note 10, at 683–84 (contending that even seemingly neutral discovery rules harm consumers because the corporation is the party with all the records, and the consumer is the one that needs access to them); *see also* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 683 (Cal. 2000) (Mosk, J.) ("[E]mployers typically have in their possession many of the documents relevant for bringing an employment discrimination case, as well as having in their employ many of the relevant witnesses. The denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the employee's statutory rights. . . . We agree that adequate discovery is indispensable for the vindication of FEHA claims.").

130. *See* Jean R. Sternlight, *In Defense of Mandatory Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82, 85 (2007) (suggesting that plaintiffs would not voluntarily arbitrate large claims, which implies they perceive a larger payout through litigation).

131. For an example of a particularly egregious case where the plaintiff may have wanted the psychological vindication of a jury trial, which may explain the new attorney and the refiling in district court, see Jones v. Halliburton Co., 583 F.3d 228, 232 (5th Cir. 2009).

132. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1661–62.

133. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 431 (1999). But arbitrations are not always private. Arbitrators or counsel can make a particularly egregious case public; after all, the Erin Brockovich case was an arbitration. ERIN BROCKOVICH (Universal Studios 2000). *But see* Kathleen Sharp, "*Erin Brockovich": The Real Story*, SALON.COM (Apr. 14, 2000, 4:00 PM), http://www.salon.com/2000/04/14/sharp/ (arguing that, in the real story, many victims "are wondering where the money went—and they're mad at their lawyers").

Pro-arbitration scholars often respond that while most of the terms in employment and consumer contracts could be considered adhesive, they should nonetheless be enforceable. The savings from these contracts are passed along to consumers and employees in the form of lower prices and higher wages.[134] For the egregious cases, these scholars (and jurists) point to contract law's unconscionability doctrine and the "savings" clause of the FAA—a point Justice Scalia expressly carved out in *Concepcion*—as a means for judges to police the adequacy of the bargain.[135]

I offer three responses to the argument that the unconscionability doctrine adequately polices the process. First, recent scholarship not only argues that judicial and scholarly skepticism of adhesion contracts is misplaced,[136] but also suggests that the unconscionability doctrine itself polices the wrong types of negotiating behavior and structure that typically lead to inefficient nonprice terms.[137] Traditional contract law of unconscionability has two elements: procedural unconscionability, relating to disparities in bargaining power, and substantive unconscionability, which evaluates the terms of the agreement.[138] Rarely will procedural unconscionability in and of itself invalidate an agreement without some substantively unreasonable terms.[139] But Professors Choi and Triantis persuasively argue that sellers with oppressive bargaining power *alone* can impose inefficiently one-sided terms even between sophisticated parties, because sellers with superior bargaining power can screen buyers to reduce

134. Ware, *Arbitration Under Assault*, *supra* note 10, at 10; *cf.* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) ("[P]assengers who purchase [form contract cruise tickets] containing a forum[-selection] clause . . . benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").

135. *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEXAS L. REV. 1329, 1367 n.157 (2012) ("[C]ourts use the unconscionability doctrine to invalidate oppressive arbitration agreements.").

136. Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1731 (2012) ("This result underscores the current judicial and scholarly skepticism as to the earlier concern over adhesion and the lack of meaningful choice is exaggerated.").

137. *See id.* at 1730 (noting that "[c]ourts do not interfere with commercial contracts based solely on a procedural concern with unequal bargaining power," even though the model showed "inefficiently one-sided terms can persist even between sophisticated parties when the seller engages in screening or the buyer engages in signaling, particularly when bargaining power is unequal").

138. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L.J. 485, 487 (1967) (distinguishing "procedural unconscionability" from "substantive unconscionability" because "[t]he law may legitimately be interested both in the way agreements come about and in what they provide").

139. Choi & Triantis, *supra* note 136, at 48.

the quality of nonprice terms to maximize profit in a way that is not socially optimal.[140]

Second, assuming that the legal standard does adequately police nonprice terms, there remains an epistemological problem perhaps unique to arbitration. How exactly does a plaintiff employee or consumer *show* that the contract is substantively unconscionable? If the arbitration procedure is unfair and the agreeement is substantively unconscionable—which is especially likely when one party has no real opportunity to bargain over the process—then the employee is practically without remedy, unless he can prove the arbitration clause itself was adhesive and unconscionable.[141] For these reasons, arbitration is facing serious and warranted criticism.[142]

Third, courts are arguably no longer in the position to adequately police unconscionability. After *Rent-A-Center, West, Inc. v. Jackson*,[143] decisions about whether the arbitration clause is itself unconscionable are for the *arbitrator* at least in the first instance—provided that the arbitration agreement authorized the arbitrator to make that decision.[144] While this only delays judicial review of unconscionability until after the arbitrator initially decides the question, if a potential plaintiff has a small-dollar dispute, this delay can impose sufficient costs to deter at least the marginal plaintiffs.

Also, in class actions, it is not at all clear that consent is the real issue. After all, unlike in *Garner-Denver* where the parties consented to arbitrate and the Court wrestled with substantive public policies on the one hand and private autonomy on the other,[145] private autonomy is of diminished importance in class actions.

Even though consent may not be the real issue, concerns over adhesiveness have certainly animated the critics, as have the arbitration horror stories that have inspired recently enacted and proposed legislation.

B. Arbitration Horror Stories—The Jamie Leigh Jones Saga

Perhaps no case has received more attention than *Jones v. Halliburton*, which has been used as a rallying cry against arbitration.[146] The facts were

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140. *Id.* at 49.

141. *See* 9 U.S.C. § 2 (2006) ("[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

142. *See* Sternlight, *supra* note 130, at 106 (advocating against private mandatory arbitration and supporting the Arbitration Fairness Act introduced in 2007).

143. 130 S. Ct. 2772 (2010).

144. *Id.* at 2779.

145. *See* notes 71–77 and accompanying text.

146. *See, e.g.*, HOT COFFEE (HBO 2011) (documenting tort reform and featuring Jamie Leigh Jones and Senator Al Franken prominently).

summarized at the beginning of this Note,[147] and the legal issue was whether the arbitration clause of an employment agreement provided for the resolution of civil claims arising from an alleged sexual assault at the employer's barracks.[148] This is often described as "arbitrability."[149] Jones challenged the enforceability of her arbitration clause, which provided for arbitration of all disputes arising from her employment.

Because of the presumption in favor of arbitrability (which was established as part of the broad policy favoring arbitration),[150] arbitration agreements were increasingly enforced.[151] And as arbitration agreements proliferated into consumer and employment contracts,[152] new questions of arbitrability arose. Suddenly, it became an open question whether claims arising from a sexual assault were within the scope of an arbitration clause of an employment agreement.[153]

Although intuitively a sexual assault claim seems outside the scope of an employment agreement,[154] this was a difficult issue for the Fifth Circuit to resolve due to the emergence of a federal policy in favor of arbitration. The Supreme Court has adopted a presumptive rule of construction: "[t]he [Federal] Arbitration Act establishes that . . . any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[155] Nonetheless, over a dissent citing this very rule,[156] the Fifth Circuit in *Jones* held that the sexual-assault-related claims were not arbitrable.[157] But in denying arbitration of the claims in *Jones*, the court was careful to note that

147. *See supra* notes 1–6 and accompanying text.

148. Jones v. Halliburton Co., 583 F.3d 228, 230 (5th Cir. 2009).

149. Arbitrability is perhaps best understood as the subject matter jurisdiction of the arbitrator. ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 707 (4th ed. 2006).

150. *See supra* Part I.

151. *See supra* subparts I(C)–(D).

152. *See supra* subparts I(C)–(D).

153. *Compare Jones*, 583 F.3d at 239 (concluding that the scope of the clause "stops at Jones' bedroom door," suggesting that an open question remains in other employment situations), *with id.* at 242 (DeMoss, J., dissenting) (relying on the federal policy resolving ambiguities in favor of arbitrability and arguing the issue before this court "should be resolved in favor of arbitration"); Oravetz v. Halliburton Co., No. 07-20285-CIV, 2007 WL 7067475, at *4 (S.D. Fla. July 24, 2007) (compelling arbitration under a similar arbitration agreement of claims that arose from an alleged sexual assault because the plaintiff's "claims arise from an alleged assault that took place while she was being housed in an apartment provided to her as an employee of [Halliburton]").

154. *See, e.g.*, Nathan Koppel, *When Suing Your Boss Is Not an Option: More Companies Are Requiring Employees to Settle Disputes by Going into Arbitration*, WALL ST. J., Dec. 18, 2007, http://online.wsj.com/article/SB119794297960335675.html (describing "outrage and media attention" at the absence of criminal charges stemming from Jamie Leigh Jones's assault).

155. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

156. *Jones*, 583 F.3d at 242 (DeMoss, J., dissenting).

157. *Id.* at 242 (majority opinion).

the inquiry is "fact-specific,"[158] leading at least one court to explicitly distinguish *Jones* in ordering arbitration of sexual-assault-related claims.[159]

Even though Jones had the opportunity to litigate her claim, the jury ruled against her at the subsequent civil trial.[160] But Jones achieved lasting victory in Congress. Her congressional testimony helped lead to a rider on an appropriations bill that prohibited government defense contractors from including arbitration clauses in their employment agreements.[161] Jones's unfortunate story helped put a public face on what was previously an arcane procedural issue.[162] Combined with outrage over the *Concepcion* decision, horror stories like *Jones*—including the National Arbitration Forum,[163] the *Hooters* case,[164] and *American Apparel*[165]—are prompting serious congressional inquiries and possible reform.

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158. *Id.* at 240.

159. Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1220–21 (11th Cir. 2011) (distinguishing *Jones* and compelling arbitration "[a]lthough the rape and its aftermath led to these five claims against the cruise line"). American Apparel has also succeeded in compelling arbitration of allegations of sexual harassment and assault. *See, e.g.*, Jose Martinez, *$260M Sex Slave Suit Against Dov Charney Tossed*, N.Y. POST, Mar. 21, 2012, http://www.nypost.com/p/news/local/manhattan/sex_slave_lawsuit_against_dov_charney_QbbaVC6MhDVo13Fz4yTBuL ("A Brooklyn court won't have to deal with the X-rated claims made against American Apparel chief Dov Charney, who was accused . . . of turning a teen-age girl into his sex slave. The racy allegations made by Irene Morales should instead be heard behind closed doors in arbitration [the court ruled] . . . .").

160. Daniel Gilbert, *Jury Favors KBR in Iraq Rape Trial*, WALL ST. J., July 9, 2011, http://online.wsj.com/article/SB10001424052702303365804576434301221391760.html; *see also* Stephanie Mencimer, *Why Jamie Leigh Jones Lost Her KBR Rape Case*, MOTHER JONES, July 8, 2011, http://motherjones.com/politics/2011/07/kbr-could-win-jamie-leigh-jones-rape-trial? (explaining how a Houston jury found Jamie Leigh Jones was not raped).

161. The rider provides:

> None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to: (1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration 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.

Department of Defense Appropriations Act, 2010, Pub. L. 111-118, § 8116(a), 123 Stat. 3409 (2009).

162. HOT COFFEE, *supra* note 146.

163. *See* Berner & Grow, *supra* note 9 (questioning the National Arbitration Forum's fairness to consumers).

164. *See* Hooters of Am., Inc. v. Phillips 173 F.3d 933, 940 (4th Cir. 1999) (holding agreement to arbitrate unenforceable because the procedures established "a sham system unworthy even of the name of arbitration").

165. *See* Nelson v. Am. Apparel, Inc., No. B205937, 2008 WL 4713262, at *1, *7–8 (Cal. Ct. App. Oct. 28, 2008) (compelling arbitration even though the agreement stated, "The Arbitrator shall be selected by American Apparel at its sole and unfettered discretion. . . . The Arbitrator's decision will state only the following: 'Mary Nelson was not subjected to unlawful sexual harassment in

C. Congress's Response

In addition to the rider to the defense appropriations bill championed by Senator Franken in 2009, there are several legislative actions pending in Congress. Congress has considered amending the FAA in the recent past, and Senator Feingold, in response to Supreme Court decisions expansively interpreting the FAA, proposed an initial Arbitration Fairness Act in 2007.[166] The findings section stated,

> A series of United States Supreme Court decisions have changed the meaning of the [FAA] so that it now extends to disputes between parties of greatly disparate economic power, such as a consumer . . . and employment disputes. As a result, . . . corporations are requiring millions . . . to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.[167]

While the initial Arbitration Fairness Act failed to make it out of committee,[168] the Arbitration Fairness Act was re-proposed after the *Jones* case[169] and again in 2011.[170] Several commentators have suggested that the most recent iteration of the Arbitration Fairness Act will fare better.[171]

There are several bills that have been enacted, authorize action, or are pending. First, Congress enacted the previously mentioned defense rider. Second, Congress has empowered the Consumer Financial Protection Bureau under Dodd-Frank to evaluate consumer arbitration. Third, the Arbitration Fairness Act proposes to abolish mandatory arbitration clauses in consumer and employment agreements. Let's take these one at a time.

The Fiscal Year 2010 Defense Appropriations rider states,

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violation of the California Fair Employment & Housing Act. Dov Charney never sexualized, propositioned or made any sexual advances of any nature whatsoever towards Mary Nelson,'" because "the potential illegality of the 'arbitration' clause in paragraph 7 with its goal of issuing a press release for the purpose of misleading journalists and the public is severable from the remainder of the settlement agreement" (emphasis omitted)).

166. S. 1782, 110th Cong. (2007).

167. *Id.* § 2.

168. Cole, *supra* note 11, at 458 n.1 (noting the 2007 Arbitration Fairness Act among a number of proposals, "[a]lmost none of [which] were reported out of committee, and those that survived the committee step . . . were not voted on by the House or Senate").

169. H.R. 1020, 111th Cong. (2009) (finding that the Supreme Court has "changed the meaning" of the FAA).

170. *See Gutting Class Action*, *supra* note 9 (noting that "[i]n a welcome effort to protect consumers, employees and others, Senators Al Franken and Richard Blumenthal and Representative Hank Johnson have just [re]introduced the Arbitration Fairness Act[, ... which] would make required arbitration clauses unenforceable").

171. *See* Cole, *supra* note 11, at 459–60 ("This reintroduction comes at a good time . . . . With adverse Supreme Court decisions and a Democratic president, successful adoption of the AFA would appear more likely."); Malin, *supra* note 11, at 289 (observing that the re-introduced Arbitration Fairness Act "had a reasonable chance of passage," at least until the 2010 mid-term elections).

> None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to:
>
> (1) enter into any agreement with any of its employees or independent contractors that requires as a condition of employment, that the employee or independent contractor agree to resolve through arbitration 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.[172]

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 provides that,

> The [Consumer Financial Protection] Bureau shall 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 . . . .[173]
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> . . .
>
> The Commission, by rule, *may prohibit, or impose conditions* or limitations on the use of, agreements that require customers or clients of any investment adviser dealer to arbitrate any future dispute . . . .[174]

The Arbitration Fairness Act proposes that, "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute."[175]

As will be discussed in detail later, in light of the benefits of many applications of arbitration banned by these proposals, these proposals are overly broad.

D. The Benefits of Binding Arbitration for Consumers and Employees

Arbitration has significant advantages for consumers and employees. Arbitrators are (for the most part) neither bound by precedent, nor required to issue opinions;[176] so they have the freedom to craft equitable relief that

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172. Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409 (2009).

173. Pub. L. No. 111-203, § 1028, 124 Stat. 1376 (codified at 12 U.S.C. § 5518(a)).

174. *Id.* at § 921 (codified at 15 U.S.C. § 78(o)) (emphasis added).

175. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 402(a) (2011).

176. RAU ET AL., *supra* note 149, at 612 (noting that "outside the field of labor arbitration[,] arbitrators (unlike judges) commonly do not write reasoned opinions" and that the AAA "actively discourages arbitrators from doing so").

benefits the two parties, even to the detriment of the third-party public, because no precedent is set. The majority of consumers and employees achieve better outcomes through arbitration because of faster adjudication, minimized litigation costs, and increased access to justice. This holds true even for quintessentially statutory claims such as Title VII disputes over employment discrimination.

1. Lack of Public Policy Consideration and Rules.—Arbitrators are not bound by legal rules and may craft awards without a concern for precedent, which can be positive for employees and consumers.[177] Consider, for example, the following hypothetical to illustrate how this can benefit consumers and employees.[178] Suppose that a patient undergoes treatment for a rare disease at a research hospital, and part of his liver is removed. While the patient is undergoing treatment, the doctors at the research hospital realize that tissue from his liver potentially could be very valuable for medical research. So the doctors make plans to conduct research on the liver with the hope of eventually benefiting financially, but the doctors conceal this from the patient to make sure he abandons the tissue. The doctors eventually develop a life-saving (and lucrative) medical treatment using the patient's tissue. When the patient discovers this—and notices the doctors' treatment has become quite profitable—he sues in court.

A court confronting this issue faces a dilemma. On the one hand, what the doctors did seems wrong—the tissue belonged to the patient in a very real and personal way. The only reason he discarded the tissue was that he was unaware of its potential value—a fact the doctors purposefully concealed. But on the other hand, the precedent of finding for the patient could greatly chill medical research in future cases. After all, patients might be unwilling to part with tissue based on the potential of future value. Thus, this decision might deter or prevent the development of other life-saving medical treatments.[179] The court must choose between compensating this one

177. *Cf. id.* at 628, 636 (noting that unlike domestic arbitration, which mostly "dispense[s] with reasoned opinions," labor arbitration and "parties in international cases *do* usually expect arbitrators to provide a written opinion," and observing that "international arbitrators have been moving towards a 'common law of international arbitration'" (citing W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 638 (3d ed. 2000)).

178. This hypothetical scenario is based loosely on the facts of Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990) (in bank).

179. *Cf.* Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 132 (discussing *Moore* and arguing that "[m]ost compelling to the court was the prospect that assigning ownership rights to those in Moore's situation would have a chilling effect on medical research and technological progress, endeavors that significantly outweigh any individual's right to share in the profits derived from his or her excised tissue"); *see* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CALIF. L. REV. 1413, 1511 (1992) ("The court in *Moore* worries about the classification, limitation, and relativization of property.") (emphasis omitted).

plaintiff and possibly harming numerous other people who may one day be deprived of valuable medical treatment.

But if this case arose in arbitration, precedent may not matter. The arbitrator would be free to craft an award that compensated the patient equitably without the fear that the precedent would hurt medical research in the future. This example can be extended to situations under Title VII or state consumer protection laws, where precedential opinions can impose tremendous potential liability on employers. Thus, the absence of public policy consideration in arbitration can potentially benefit consumers and employees.

2. Efficiency and Speed.—Through arbitration, more small claims are heard, benefiting the majority of consumers and a significant percentage of employees. According to the American Arbitration Association (AAA) in 1995, one-third of arbitrated disputes were under $10,000 while another third were between $10,000 and $50,000, and the average processing time was less than six months.[180] A more recent analysis of AAA arbitrations showed that, indeed, 91.5% of the AAA's arbitrated consumer disputes in 2005 were for less than $75,000.[181] In the specific employment context, one study found that the median claim was $106,151 and one-quarter of claims were for less than $36,000.[182] The average time to resolution (including settlement) was a little over one year, which compared favorably to the two to two-and-a-half years to reach trial in litigation.[183] Therefore, many plaintiffs obtain speedy relief on small claims that would be otherwise foreclosed by the cost of litigation.[184] In time-sensitive industries, such as internet technology, speed is crucial.[185] In litigation, a corporate defendant can delay to force a small settlement.

Although delivering value to the plaintiff-employee or -consumer is not why companies include arbitration clauses, neither is depriving plaintiffs of their fair recovery. Instead, corporate defendants want certainty in predicting

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180. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280–81 (1995).

181. *See* SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION, PRELIMINARY REPORT 66 n.47, 68 tbl.3 (2009) [hereinafter AAA CONSUMER ARBITRATION], *available at* http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_010205&RevisionSelectionMethod=LatestReleased (finding that 215 out of 235 consumer arbitrations in 2005 were for less than $75,000).

182. Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 10 (2011).

183. *Id.* at 8 (finding 284.4 days for settlement and 361.5 days for award).

184. Ware, *Arbitration Under Assault*, *supra* note 10, at 6, 10.

185. *Cf.* Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L.J. 5, 20–21 (2009) (describing the expedited process for Olympic disputes).

outcomes.[186] Seeking to avoid the unpredictably expensive jury verdict, corporations are willing to pay out a larger number of smaller claims in exchange.[187] Because most disputes are small, arbitration is preferable for most employees and consumers. Further, there is no evidence that plaintiffs with large claims do worse in arbitration.[188]

In fact, some empirical data suggests that employees particularly do *better* in arbitration than in federal litigation. Because most corporate defendants can remove, federal courts are often the venue for employment disputes for many employees.[189] One study of 3,419 employment discrimination cases found that 60% were disposed of by pretrial motion.[190] This resulted in employees prevailing 14.9% of the time,[191] compared with a 63% win rate among employees who arbitrated their claims.[192] While it is impossible to make any definitive inferences from data like this, mainly because of confounding variables such as the selection of cases for arbitration, the effect of settlement, and differences in representation (such as through a union), it is by no means clear that employees are worse off in arbitration.[193]

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186. Ware, *Arbitration Under Assault*, *supra* note 10, at 9.

187. *Id.* ("The consumer gets lower prices and, perhaps, better access to justice for meritorious claims that are too small for a lawyer to litigate. In exchange, the business gets lower process costs and, perhaps, reduced exposure to big-dollar jury awards and class actions.").

188. Though there is certainly that perception, especially among trial lawyers. *See id.* at 10 ("Well-organized and well-funded trial lawyers eagerly draw media attention to the drama of the large liability claim. . . . The many people who would benefit from increased access to justice do not have a political organization as focused and effective as the trial lawyers who seek to restrict access [to arbitration].").

189. *Cf.* Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 250 (2011) ("Particularly after the adoption of the Class Action Fairness Act of 2005, it is likely that most corporate defendants in public interest tort actions will be able to remove their cases to federal courts . . . ." (footnotes omitted)); Connor D. Deverell, Casenote, *Defining a Corporation's "Principal Place of Business": The United States Supreme Court's Decision in* Hertz Corp. v. Friend, 56 LOY. L. REV. 733, 741 (2010) ("Removing a state court suit to federal court also provides a tactical advantage to corporations[,] so corporate defendants will often remove cases to wear down their opponents and encourage settlement.").

190. Maltby, *supra* note 89, at 47.

191. *Id.* at 46.

192. *Id.*

193. In fact, research from Dan Kahan and, more specifically, Paul Secunda, suggests that data in employment disputes comport with notions of sensitivity and cultural cognition—that the legal decisions, particularly in labor disputes, "come[] down to a choice among conflicting cultural norms." Paul M. Secunda, Psychological Realism in Labor and Employment Law 24 (March 2011) (unpublished manuscript) *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=paul_secunda. *See also, e.g.*, Dan M. Kahan, *"Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 415–16 (2009) (discussing ways in which values influence judicial decisions); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 879–81 (2009) (arguing that an individual's resolution of a factual issue is influenced by "various sources of value-motivated cognition"); Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV.

3. Expert Adjudication.—Another advantage of arbitration is the expert decision maker. Whereas in litigation, parties hire their own experts at considerable expense to impose their interpretations on the court, in arbitration, the parties can select an expert as their arbitrator. For example, in Olympic disputes, experts in sports are selected as arbitrators.[194]

This rationale holds true even in the context of a statutory scheme, such as anti-discrimination under Title VII. Consider the Court's reasoning in *Gardner-Denver*, denying arbitration: "[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[195] Even though the Court reasoned that this creates a public policy reason for denying arbitration, I disagree.

Determining the subtle nuances of discrimination in a workplace can require more sensitivity and familiarity with an industry than familiarity with the case law. For example, in the academic community, discovering discrimination may be more subtle than evaluating simple pay disparities—including prestigious appointments or even informal consultations over hiring decisions. The same holds true for other insular industries, such as finance.[196] Provided with sufficient procedural guarantees, the parties could select an expert arbitrator. Instead of hoping they are assigned a good judge or are able to select a favorable jury, the parties could select an expert in the area with desirable cultural or gender sensitivity.

Some scholars argue that, if that were the case, why not simply have nonbinding arbitration?[197] Simply put, arbitration by expert does not work if it is not mandatory. The party with the weaker case would not want an expert, because an expert might quickly recognize that weakness. Also, perceptions and priorities often shift post-dispute.[198]

4. Venue, Jurisdiction, and Enforcement Abroad in International Contexts.—Particularly in international disputes, an appropriate venue can be difficult to determine.[199] In arbitration, jurisdiction and venue are based on

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107, 148 (2010) (asserting that cultural cognition theory provides an explanation about how judges with different cultural worldviews decide cases).

194. Weston, *supra* note 185, at 20.

195. Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

196. *See, e.g.*, SUSAN ANTILLA, TALES FROM THE BOOM-BOOM ROOM: WOMEN VS. WALL STREET (2002) (describing subtle (and not-so-subtle) stories of gender discrimination in Wall Street investment banking firms that were later arbitrated).

197. *E.g.*, Sternlight, *supra* note 130, at 85.

198. Ware, *Arbitration Under Assault*, *supra* note 10, at 9; *cf.* HOMER, THE ODYSSEY 250 (Robert Maynard Hutchins et al. eds., Samuel Butler trans., 1952) ("Therefore pass these Sirens by, and stop your men's ears with wax that none of them may hear; but if you like you can listen yourself, for you may get the men to bind you [to] . . . the mast itself . . . .").

199. *Cf.* RAU ET AL., *supra* note 149, at 627 (arguing that factors like the possibility of parallel litigation, uncertainty regarding the governing rules of decision in a foreign tribunal, and uncertainty as to the rules of conflict of laws lead parties to choose arbitration in settling disputes).

consent, so this is not a concern.[200] For example, in *Jones v. Halliburton*, had Jones chosen to arbitrate, she would have avoided the venue and jurisdictional complications that arise in disputes between an American employee and a corporation operating in a war zone overseas.[201] In fact, at trial, several of Jones's claims were tossed out for jurisdictional reasons.[202] Further, when a party tries to enforce a judgment abroad, a foreign court may scrutinize the holding skeptically. Because arbitration is based on consent, an award is as enforceable as a contract and has the force of international law.[203]

Because of the significant positive advantages of arbitration for consumers and employees, the Arbitration Fairness Act and the appropriations rider are overly broad, and for that reason inappropriate. The ideal reform must sensitively balance the underlying policies at issue in the specific types of dispute.

III. A Proposal for Reform

This Note proposes that administrative agencies promulgate rules for arbitration for companies with more than fifty employees. Because a proposal to reform arbitration must be sensitively tailored to meet the specific needs of different types of dispute, under this proposal administrative agencies would promulgate regulations for specific industries and specific categories of disputes. Instead of simply broadly enforcing arbitration clauses—as the Supreme Court has increasingly done—or, on the other hand, holding these clauses unenforceable in a broad swath of disputes—as Congress proposes—this reform balances the competing policy concerns of efficient and effective adjudication on the one hand, and deterrence and access to justice on the other.

A. The Proposal

Congress should enact legislation and the CFPB and the EEOC should promulgate rules that target only companies of a sufficient size—those with more than fifty employees—so that repeat-player concerns, sophistication,

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200. *See id.* (noting the common tendency to view an arbitral award "as 'the outcome of contractual relationships, rather than of the exercise of state powers'" (quoting Richard N. Gardner, *Economic and Political Implications of International Commercial Arbitration*, *in* INTERNATIONAL TRADE ARBITRATION 20–21 (Martin Domke ed., 1958)).

201. *See* Jones v. Halliburton Co., 791 F. Supp. 2d 567, 594–96 (S.D. Tex. 2011) (dismissing several claims for lack of subject matter jurisdiction).

202. *Id.* at 595–97 (dismissing Jones's false imprisonment and retaliation claims on the grounds that Jones had failed to exhaust her administrative remedies prior to filing suit, which resulted in her claims being barred by the TCHRA and Title VII).

203. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 330 U.N.T.S. 40; RAU ET AL., *supra* note 149, at 627.

and information asymmetry are realistic presumptions. For these companies, in disputes with a consumer or employee, the burden should shift: Instead of placing the burden on the plaintiff-employee or -consumer to prove that the agreement was unconscionable or that the process cannot effectively vindicate statutory claims, the burden would shift to the defendant company. The defendant company would then have to affirmatively show that it meets the requirements of an agency regulation—which is the heart of this proposal. This proposal is not intended to provide substantive decision rules. On the contrary, the main thrust of this proposal is to provide some examples that demonstrate that not all arbitration is the same, different categories of disputes require different rules, and the best mode of reform is one that balances the different priorities and policies—namely specific rules promulgated by an administrative agency rather than broad pronouncements by Congress or the Supreme Court.

1. Procedural Guarantees and Safe Harbors Through Administrative Regulations and Guidance.—Rather than self-governance by the private arbitration agencies,[204] or general due process rules for all consumer and employment arbitration regardless of type,[205] this Note argues for a more nuanced approach. Empowered by Congress, the Consumer Financial Protection Bureau and the Equal Employment and Opportunity Commission should promulgate procedural guarantees *specific* to each type of arbitration. If the sufficiently large company meets the requirements, then the court reviewing a motion to compel arbitration *must* compel arbitration. On the other hand, if the company fails to meet the requirements, then the reviewing court *must* deny arbitration, with one exception. If the large company can show by clear and convincing evidence that its procedures are fair—even though it fails to meet the requirements of the regulation—then the court would compel arbitration. The concern that this limited exception addresses

204. *Cf.* Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363, 396–403 (2007) (discussing self-regulation of the arbitration community). *See generally* AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (2009), *available at* http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased (providing the rules by which the AAA will administer employment disputes); JUDICIAL ARBITRATION & MEDIATION SERVS., JAMS ENGINEERING AND CONSTRUCTION ARBITRATION RULES & PROCEDURES (2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_construction_rules-2009.pdf (outlining the rules that govern construction disputes before JAMS); NAT'L ARBITRATION FORUM, CODE OF PROCEDURE (2008), *available at* http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf (providing the rules that govern most disputes before the NAF).

205. *See, e.g.*, Dillon-Coffman, *supra* note 11, at 1120 (proposing the addition of "an institutional middleman . . . to eliminate potential conflicts of interest and safeguard consumers and employees"); Malin, *supra* note 11, at 311–14 (arguing for regulation of employment arbitration through congressional amendment of the FAA and arguing that agency "tailoring" can be "inappropriate").

is that some dispute types in specific industries—such as information technology—change at a rapid pace and may require procedures that sufficiently protect the employee or consumer even though they vary from a regulation. This exception also leaves open the possibility that if a company believes it can more cheaply comply, it can depart from the regulation; but if challenged, it would have to show its cheaper procedures were nonetheless substantively conscionable by clear and convincing evidence.

To illustrate this proposal, consider the following example. An employee sues her employer for employment discrimination and files her claim in federal court. The company responds by filing a motion to compel arbitration, attaching the employment agreement which includes a dispute resolution provision that provides that discrimination disputes would be subject to binding arbitration. Under the current law, the employee could try to defeat the motion to compel arbitration by claiming that either the arbitration clause was unconscionable or that the arbitration procedure was inadequate to enforce her statutory rights—with the burden on the employee.[206] Under this proposal, the EEOC would promulgate rules and regulations that set out the procedural requirements for this category of employment discrimination disputes. The rule, for example, could require the appointment of an advocate to inform the selection of an arbitrator.[207] Then the burden would be on the defendant company—rather than the employee—to show that the arbitration process conforms to the applicable rules. If the company's arbitration procedures met the requirements of the applicable rules, then the court would compel arbitration. If the company's arbitration procedures vary from the applicable rules, then the motion to compel arbitration would be denied, and the employee could litigate her claim.[208]

This approach largely conforms to the Supreme Court's interpretation of the FAA—to essentially federalize the law of arbitration. Instead of the Supreme Court policing arbitration on an ad hoc basis—as cases percolate piecemeal through the judicial process at a rate of about seventy-five cases per year (and increasingly fewer from state courts)[209]—this proposal

206. Malin, *supra* note 11, at 302 (citing Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000)).

207. *See infra* subsection III(A)(2)(b).

208. As discussed above, even if the company's procedures do not conform to the applicable rules, the court may still compel arbitration if, and only if, the company can show by clear and convincing evidence that its nonconforming procedures are nonetheless fair and guarantee vindication of the employee's statutory rights.

209. After discretionary certiorari was enacted in 1988 by 28 U.S.C. § 1257, the Supreme Court has reduced its caseload, and the decline has been particularly sharp in cases from state courts. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 350, 352, 353 tbl.1 (2002) ("Starting in 1990, the numbers began rapidly falling below 100, until by the late 1990s the Court was only deciding seventy or eighty cases per term. . . .

empowers agencies to weigh the various policy concerns and promulgate rules specific to each type of arbitration prospectively. Regulated entities would then participate in the rule making process through notice and comment[210] (as they arguably already do through ex parte contacts with arbitration agencies such as JAMS, AAA, and the NAF).[211] But instead of the companies holding the sword of repeat business over the heads of the arbitration organizations, the agencies would instead be politically accountable to Congress for appropriations and to the President for appointments or removal.[212]

Further, at least one federal agency has already begun moving in the direction of arbitration reform. In D.R. Horton Inc.,[213] the National Labor Relations Board (NLRB) took a novel approach to limiting the use of arbitration clauses to avoid employment class actions. Michael Cuda, a superintendent working for D.R. Horton, joined a class action asserting that he and similarly situated superintendents were misclassified as exempt from the National Labor Relations Act (NLRA).[214] When Cuda and the class's attorney filed for arbitration, D.R. Horton replied that Cuda and the class had failed to provide effective notice because their employment contracts included an arbitration clause that barred class litigation and arbitration, and Cuda filed an unfair labor practices charge.[215] The Board ruled for Cuda and interpreted Section 8(a)(1) of the NLRA to prohibit the use of an arbitration clause as a class action waiver for employment disputes over wages, hours, and other working conditions.[216] The Board reasoned that the right of employees to litigate (or arbitrate) as a class is "concerted action" within the meaning of Section 7 of the NLRA.[217] Thus, an employer like D.R. Horton

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[T]he number of cases from state courts has fallen into the twenties or teens, and the percentage of total cases has fallen as well. Indeed, it appears that the sharp decline of state court cases reviewed has significantly, and perhaps disproportionately, contributed to the decline of the overall docket."); *see also Frequently Asked Questions (FAQ)*, SUPREME COURT, http://www.supremecourt.gov/faq.aspx ("The Court grants [cert] and hears oral argument in about 75–80 cases.").

210. Administrative Procedure Act, 5 U.S.C. § 553(b) (2006).

211. Employers effectively influenced the AAA initially to exclude labor arbitrators from employment arbitrations because of the belief they would favor employees. Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671, 674 (2000). And more recently, business interests pressured JAMS into abandoning its initial refusal to administer arbitrations with class-action waivers. Adam Klein & Natiya Ruan, *Mandatory Arbitration of Employment Class Action Disputes: From the Perspective of Plaintiffs' Counsel*, *in* U.S. AND CANADIAN ARBITRATION: SAME PROBLEMS, DIFFERENT APPROACHES 142, 150 (Patrick Halter & Payl D. Staudohar eds., 2009).

212. U.S. CONST. art. II, § 2, cl. 2.

213. D.R. Horton, Inc., 357 N.L.R.B. 184 (2012).

214. *Id.* at *1.

215. *Id.*

216. *Id.* at *13.

217. *Id.* at *3 ("To be protected by Section 7, activity must be concerted," and "[w]hen multiple named-employee-plaintiffs initiate the action, their activity is clearly concerted.").

violates Section 8(a)(1) by conditioning employment on an arbitration clause that restricts the right of employees to proceed as a class—notwithstanding the mandate of the FAA and cases like *Concepcion* interpreting it.[218]

Even though the NLRB's decision could have a significant impact—allowing any "employee" within the meaning of the NLRA to bring an employment suit as a class notwithstanding a contrary arbitration clause[219]—its impact is likely to be short-lived. While the Board's contorted interpretation[220] of the NLRA is subject to judicial deference,[221] the Board's decision that the NLRA does not conflict with the FAA on this issue is not—and is instead subject to de novo review.[222] And in *CompuCredit Corp. v. Greenwood*[223] (issued one week *after* the NLRB opinion), the Supreme Court reiterated that for a federal statute like the NLRA to displace the FAA's mandate to enforce agreements to arbitrate by their terms, the text of the federal statute must indicate that displacement by clear statement.[224] Thus, nearly every district court to consider the D.R. Horton decision has declined

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218. *Id.* at *5–12.

219. *See* Delock v. Securitas Sec. Servs. USA, Inc., 4:11-CV-520-DPM, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012) ("Pick any kind of employment-related claim: race discrimination, unpaid wages, sex discrimination. Under the Horton rationale, no agreement to resolve the claim in arbitration on an individual basis can be enforced if two or more employees assert the claim in concert. That would be a *sweeping change in the law*." (emphasis added)). *But see* D.R. Horton, Inc., 357 N.L.R.B. 184, at *12–13 (2012) ("Only a small percentage of arbitration agreements are potentially implicated by the holding in this case.").

220. After all, "concerted" action is fundamentally distinct from "class" action. The concerted action protection of the NLRA was designed to protect concerted strikes and union organization from employer interference:

> [U]nder prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing . . . and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 102 (2006) (emphasis added). An arbitration clause does nothing to stop a group of employees from proceeding concertedly in separate, *parallel* individual arbitrations. A single union representative or employment attorney could *concertedly* represent each employee. Thus, a mandatory individual arbitration clause does not prohibit concerted action at all—it simply prescribes the process.

221. Pattern Makers v. NLRB, 473 U.S. 95, 114 (1985) ("Where the [NLRB's] construction of the NLRA is reasonable, it should not be rejected merely because the courts might prefer another view of the statute." (internal quotation marks omitted)).

222. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002).

223. 132 S. Ct. 665 (2012).

224. *See id.* at 669 (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

to follow it,[225] and the case is currently on appeal to the Fifth Circuit.[226] Because of the Supreme Court's clear mandate that arbitration agreements must be enforced "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command,'"[227] the Fifth Circuit will most likely reject the NLRB's view and remand to compel the case to proceed as individual arbitrations.

In addition to the reality that the NLRB's decision is unlikely to stand, the D.R. Horton case is illustrative of how this Note's proposal is superior to the current state of the law. Instead of an agency stretching the meaning of a federal statute, the agency would be authorized to weigh the competing priorities. Instead of concealing policy making and working to distinguish Supreme Court decisions,[228] under this proposal, agencies like the NLRB could instead work openly to balance priorities in a rule making—just as the CFPB is currently doing to explore arbitration's effects on consumers.[229] This process increases transparency and participation, and makes the policy decisions (thereby) more politically accountable.[230] Normal contract

225. *See, e.g.*, Carey v. 24 Hour Fitness USA, Inc., CIV.A. H-10-3009, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012) ("The *Horton* decision is neither binding nor subject to deference, and is inconsistent with . . . Supreme Court authority. On that basis, the Court declines to apply the *Horton* decision."); Delock v. Securitas Sec. Servs. USA, Inc., 4:11-CV-520-DPM, 2012 WL 3150391, at *3–4 (E.D. Ark. Aug. 1, 2012) (declining to follow D.R. Horton and collecting cases); Morvant v. P.F. Chang's China Bistro, Inc., 11-CV-05405 YGR, 2012 WL 1604851, at *8–12 (N.D. Cal. May 7, 2012) (declining to follow D.R. Horton); Jasso v. Money Mart Exp., Inc., 11-CV-5500 YGR, 2012 WL 1309171, at *7–10 (N.D. Cal. Apr. 13, 2012) (same). *But see* Herrington v. Waterstone Mortg. Corp., 11-CV-779-BBC, 2012 WL 1242318, at *6 (W.D. Wis. Mar. 16, 2012) ("[B]ecause the Board's interpretation of the NLRA in *D.R. Horton*, is 'reasonably defensible,' I am applying it in this case to invalidate the collective action waiver in the arbitration agreement." (citations omitted)).

226. The briefs are in, and the case is scheduled for oral argument on February 5, 2013. *5th Circuit Court of Appeals Calendar*, U.S. CT. APPEALS FOR FIFTH CIRCUIT, http://www.ca5.uscourts.gov/clerk/calendar/1302/25.htm.

227. *CompuCredit Corp.*, 132 S. Ct. at 669 (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

228. *See, e.g.*, D.R. Horton, Inc., 357 N.L.R.B. 184, at *9–12 (2012) (spending several pages working to distinguish *Concepcion* and other pro-arbitration Supreme Court cases).

229. *See* Consumer Fin. Prot. Bureau, *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, REGULATIONS.GOV (June 23, 2012), http://www.regulations.gov/#!docketDetail;dct=PS;rpp=25;po=0;D=CFPB-2012-0017 (listing comments from interested parties on the study of consumer arbitration); Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Launches Public Inquiry into Arbitration: Bureau to Explore Arbitration's Effects on Consumers (Apr. 24, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/ (outlining a proposed study of consumer arbitration).

230. *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 435 (1999) (arguing that agency rulemaking, as opposed to adjudication, "requires some degree of public notoriety, which fosters executive and legislative oversight of the policy the rule implements, and thereby makes rules more democratically accountable than ad hoc agency decisions"); *cf. Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981) (Wald, J.) ("The authority of the President to control and supervise executive policymaking is

defenses—such as duress, consideration, fraud in the inducement, or contrary to public policy—would remain. But the general rules of substantive unconscionability (largely gutted by *Concepcion*)[231] and vindication of federal statutory claims would be replaced by the agencies' regulations.

2. Some Examples of Possible Regulations.—Here is a non-exhaustive list of possible reforms that analyzes how these reforms fit into various different types of disputes in different industries.

a. Very Small-Claim Consumer and Employment Disputes.—This is the area central to the Court's opinion in *Concepcion*. The beneficiary of aggregated consumer actions isn't the plaintiff seeking $14; instead it is the public who benefits from deterring broad—but individually small-dollar—corporate conduct. The purpose of the class action contest is deterrence, and therefore—in a sense—consent to arbitrate is irrelevant. The primary issue in these circumstances is deterrence—a public good. But perhaps the most persuasive portion of the *Concepcion* opinion is the argument that class actions are incompatible with arbitration, at least from a consent perspective, because of the increased costs and decreased efficiency.[232]

Consent is usually policed by contract law principles, on which the Court hung its hat in *Concepcion*. But because consent is largely irrelevant where the primary issue is a public good like substantive deterrence, the requirements of a regulation would focus on the primary issues: (1) efficiency and resolution, (2) deterrence, and (3) to a lesser extent, judicial review.

In accomplishing deterrence, some of the rationales for aggregating consumer class actions could apply with equal force in arbitration without the formalities of litigation. For example, to allow individuals the economies of scale provided by class action litigation, a public record could be required. For instance, a company might be required to publish on a website information about disputes such as amounts claimed, grounds asserted, and

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derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking." (citations omitted)).

231. *See Gutting Class Action*, *supra* note 9 (characterizing the *Concepcion* decision as a "devastating blow to consumer rights" and hypothesizing that the decision may bar many consumers from enforcing their rights in court at all).

232. The Court noted,

> [T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010)).

win rates. Procedures similar to the procedures of AT&T Mobility LLC might be appropriate, such as enabling "the customer [to] choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and, presumably, punitive damages."[233] These procedures would focus on the goal of making individual litigation cheap and public by enabling free riding while keeping the process of arbitration efficient.

Some more controversial reforms could address the concerns of corporate counsel that, "[e]ven if a business defeats a class arbitration, there is no guarantee that the judgment will have the same preclusive effect that it would have in class litigation."[234] A regulation could require nonmutual issue-preclusive effect,[235] so that the arbitrator is bound to accept an interpretation that a contract term, for example, was not a deceptive or fraudulent trade practice. Since the contract term is uniform in a standard form contract, this could greatly increase efficiency because the company would simply have to show the arbitrator that the same term had been used in the specific consumer's contract. Conversely, if the term was determined to be deceptive, then a consumer could discover this on a website, over the phone show they purchased a particular product during a particular time span, and receive an award.

To the extent that corporate counsel might want expanded judicial review of a possibly claim-preclusive determination, the arbitration procedures themselves or the rules can easily provide for a second layer of arbitral oversight—an arbitral court of appeals—with added specialized expertise.

To the extent that the agency is concerned about the adequacy of "consent," the agency could promulgate federal regulations establishing that arbitration clauses appear on the first page, in 14-point, bold font if it wishes. Then, the applicable corporations would only have to comply with the regulation to have their arbitration procedures upheld.

b. Securities Consumer Disputes.—In securities consumer disputes, where there is likely to be a large disparity between the sophistication of a large securities firm and a consumer, the appointment of a consumer

233. *Concepcion*, 131 S. Ct. at 1744.

234. Brief of the U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioner, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3167313, at *14.

235. But this may raise due process concerns. *See, e.g.*, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."). But the Court in *Parklane* noted that "[t]he law of collateral estoppel, like the law in other procedural areas . . . has evolved." *Id.* at 337.

advocate might be appropriate to help with, mainly, the selection of an arbitrator. Therefore, to the extent that critics are concerned with a repeat-player problem,[236] the plaintiff-consumer would get a repeat player of her own—an employee of the agency or even a member of the plaintiffs' bar—to help inform her throughout the process, especially in the selection of the arbitrator. To the extent that an arbitrator wants repeat business, the arbitrator would have to conform to not only securities firms, but also the consumer advocate—mitigating the repeat-player problem.

c. Employment Disputes Under Statutory Schemes.—The concerns in the employment context are different from the concerns in the consumer context. While access to justice remains important in the employment context,[237] the disputes are for, on average, higher dollar amounts. For example, Professor Colvin's 2008 study found that the mean amount claimed was $844,814, the median amount claimed was $106,151, and 75% of claims were for greater than $36,000.[238] This is distinct from the consumer context, where 91.5% of the AAA's disputes in 2005 were for less than $75,000.[239] Therefore, the issues of efficiency and economies of scale are less important, and the facts may require a more probing inquiry than whether a customer purchased a particular product at a particular time according to particular terms.

Access to justice, however, remains critical. One scholar noted, "At a meeting of plaintiffs' attorneys, the estimate was that about 5% of the individuals with an employment claim are able to obtain private counsel."[240] One study concluded that while most employees under "the $60,000 income level cannot get into court, arbitration remains a realistic alternative."[241] Colvin noted, "One of the potential advantages offered by arbitration is that its relative simplicity and speediness could reduce costs to use the system and thereby enhance accessibility."[242] The average cost to litigate an employment dispute that does not proceed to trial is about $10,000.[243] If the case proceeds to trial, the cost rises to about $50,000.[244] Thus, for the

236. *E.g.*, Bingham, *supra* note 16, at 190–91.

237. *See, e.g.*, Maltby, *supra* note 89, at 56 (describing access-to-justice concerns in the employment context).

238. Colvin, *supra* note 182, at 10.

239. AAA CONSUMER ARBITRATION, *supra* note 181, at 48.

240. Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping It Lawful*, 60 CASE W. RES. L. REV. 629, 636 (2010).

241. *Id.* at 636–37.

242. Colvin, *supra* note 182, at 9.

243. Maltby, *supra* note 89, at 56.

244. *Id.*

majority of suits—under $100,000—a contingency-fee lawyer probably would not take the case.

That said, employment law is different: As Justice Marshall wrote in *Roth*, "Employment is one of the greatest, if not the greatest, benefits . . . in modern-day life."[245] Further, as the Court recognized in *Gardner-Denver*, the employment relationship is different—subject to vast arrays of protection, from OSHA to Title VII.[246] Therefore, there are two primary concerns: (1) efficiency to maintain low costs, preserving access to justice, and (2) vindication of statutory rights.

One possible requirement is that an opinion, however brief, is issued. This would facilitate an extremely limited judicial review to police—in only the most narrow and egregious cases—the statutory law. To determine whether arbitrators are even *looking at* the correct statutory provision (let alone applying it correctly), a court needs an opinion. Absent this requirement, arbitrators are unlikely to issue an opinion, as it only increases the possibility of a reversal.[247] Another possible requirement is specialization in particular categories of disputes among arbitrators with specific statutory schemes. For instance, Title VII disputes could be adjudicated by one expert decider familiar with the statute and the types of disputes. Also, employees could be provided a repeat player of their own—an employment advocate—to advise their selection of an arbitrator. Finally, because of access-to-justice concerns, there should be some way to divide arbitration fees and to bar arrangements such as loser pays.

* * *

These are simply a handful of examples of how tailored requirements would address the specific policies at issue in different types of disputes. First, these examples demonstrate that all categories of arbitration are *not* created equal—unlike the current proposals for reform in Congress and current proposals for reform in the scholarship that fail to differentiate between different categories of dispute. Second, these examples demonstrate that the determination of the socially optimal requirements of particular dispute-resolution processes depends on sensitive policy determinations that administrative agencies are in a better position to weigh than is the Supreme Court.

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245. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting).

246. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44–45 (1974).

247. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) (observing that substantive judicial review "may lead arbitrators to play it safe by writing no supporting opinions"); *cf.* Massachusetts v. EPA, 549 U.S. 497, 533 (2007) ("EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. . . . Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change.").

B. Analyzing the Merits of the Proposal

In some ways, this proposal conforms to the existing practice. Currently the Supreme Court oversees federal arbitration law, and large corporate interests participate in the Supreme Court through the extensive filing of amicus briefs.[248] Therefore, this proposal simply shifts participation of interested companies to notice-and-comment rule making.

Further, this proposal has the potential of reducing compliance costs. Instead of companies conforming arbitration agreements to the various requirements of state law,[249] a company would only have to conform to the regulation that applies to its industry. This will likely encourage investment in dispute resolution processes, as companies will finally be able to stop ping-ponging between the courts adjudicating various state attempts to regulate arbitration, even after *Concepcion*, *Stolt-Nielson*, and *Rent-A-Center*.[250]

C. Addressing Some Concerns

The primary downside of this proposal is cost. Increasing the regulatory burdens of the EEOC and the CFPB will require additional employees with different levels of expertise, and therefore increased appropriations will be needed. However, there is a market failure that warrants this expense. The status quo currently imposes untenable social costs.

Leaving arbitration to be policed by the judiciary will lead to decreased enforcement of statutory schemes designed to protect consumers and will undermine the public policy of statutes. While some small claims will proceed under the robust procedural protections of some companies'

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248. *E.g.*, Brief of DIRECTV, Inc. et al., Amicus Curiae in Support of Petitioner, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3183855; *cf.* Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEXAS L. REV. 1247 (2011) (arguing that the Supreme Court has turned to amicus briefs in setting antitrust policy to make up for its lack of technical savvy, moving from Article III adjudication towards rulemaking, and arguing for an administrative agency to take over).

249. *See, e.g.*, MO. ANN. STAT. § 435.460 (West 2010) ("Each contract [with an arbitration agrrement] shall include adjacent to, or above, the space provided for signatures a statement, in ten point capital letters: . . . 'THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION'"); TEX. CIV. PRAC. & REM. CODE ANN. § 171.002 (West 2011) ("an agreement [to arbitrate a dispute] . . . in which the total consideration to be furnished by the individual is not more than $50,000" is invalid unless "the parties to the agreement agree in writing to arbitrate; and the agreement is signed by each party and each party's attorney"). *But see* RAU ET AL., *supra* note 149, at 680 ("All such statutes are now presumably dead letters in light of the Supreme Court's . . . decision in Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).").

250. *See, e.g.*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012) (per curiam) (reversing a state supreme court holding that an arbitration clause "adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence").

arbitration protocols, such as AT&T Mobility's in *Concepcion*,[251] it is likely that after *Concepcion*, *Rent-A-Center*, and *Stolt-Nielson*, corporations will scale down their procedural protections. Corporations decreasing their procedural protections will likely cause fewer small claims to proceed because the costs will be high enough that marginal consumers will forgo investing in arbitrating suits individually.

Furthermore, the current state of federal law has generated friction with the states.[252] This has arguably created an environment where state courts do what they can to limit the holding of *Concepcion*, consumers run to state courts, and defendants attempt to seek refuge in the federal courts to enforce their agreements to arbitrate.[253]

The current trend of extending the FAA at the very least implicates important federalism and comity concerns,[254] and will probably result in significant litigation costs for private companies. As states attempt to legislate against arbitration, and state courts and lower federal courts[255]

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251. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011). The Court described the procedures at length:

> The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

Id.

252. *See, e.g.*, *id.* at 1747 (noting that California courts have held contracts to arbitrate unconscionable more often than other contracts); *see also* 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, 54 (2006) (arguing that California's "mutuality test disfavors arbitration agreements and significantly increases the ability of a party to avoid arbitration").

253. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1421 (2008) (describing the dialogue between the federal courts and state courts on arbitration under the FAA as a "game").

254. *See, e.g.*, Casarotto v. Lombardi, 886 P.2d 931, 941 (Mont. 1994) (Trieweiler, J., concurring) ("These insidious erosions of state authority and the judicial process threaten to undermine the rule of law as we know it. Nothing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as 'therapy for their crowded dockets.'").

255. *See, e.g.*, Kanbar v. O'Melveny & Myers, 849 F. Supp. 2d 902, 906, 912 (N.D. Cal. 2011) (distinguishing *Concepcion* and holding that the FAA did not preempt California law precluding the

distinguish federal preemption law, private litigants will be forced to litigate preemption case by case. This will impose significant costs on private litigants.[256] Particularly, because unconscionability and preemption doctrines are so malleable, state judges engaging in strategic behavior have virtually unlimited options at their disposal to manipulate doctrine, distinguish preemption cases, and refuse to enforce an agreement to arbitrate.[257] This proposal would eliminate, or at least largely curtail, the so-called unconscionability "game."[258]

Finally, judicial abdication from policing vindication of statutory rights in arbitration will undermine statutory policies in two ways. First, in cases where the plaintiff alleges procedural unfairness impeding effective vindication of statutory rights—such as requiring employee plaintiffs to pay arbitration fees up front—the Supreme Court has mandated that these rules be policed case by case with a heavy burden on the party resisting arbitration to prove an impediment.[259] Further, after *Rent-A-Center*, this decision is for the arbitrator where the arbitration agreement says so.[260] Second, in cases where an employee or consumer arbitrates a statutory claim, there may not be a written opinion analyzing the issue under the appropriate statutory scheme and applying the appropriate legal rules.[261] As one commentator noted, "arbitrators (unlike judges) commonly do not write reasoned opinions attempting to explain and justify their decisions. In fact the American Arbitration Association, which administers much commercial arbitration,

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enforcement of unconscionable provisions of an arbitration agreement between a law firm and its employees including a notice requirement, a confidentiality provision, and an arbitration exemption provision).

256. A less quantifiable, but not insignificant, cost is the cost to federalism, as expanding federal preemption necessarily infringes on the authority of the states. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (describing the presumption against preemption as "an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress").

257. *See* Bruhl, *supra* note 253, at 1422. Bruhl argues:

> That . . . federal law allows a court to hold an arbitration agreement unconscionable as a matter of state contract law, but only if the court is employing, evenhandedly, the same unconscionability analysis it applies to other contracts. Yet it is extremely difficult for a reviewing court to tell if a decision invalidating an arbitration agreement on unconscionability grounds obeys that rule. This difficulty creates opportunities for lower courts to misapply, or perhaps even manipulate, state contract doctrines so as to nullify arbitration agreements while simultaneously frustrating the ability of reviewing courts to reverse.

Id. (citations omitted).

258. *Id.* at 1421.

259. Malin, *supra* note 11, at 302 (citing Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000)).

260. Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2778–79 (2010).

261. RAU ET AL., *supra* note 149, at 612.

actively discourages arbitrators from doing so."[262] Meaningful judicial review requires an explanation of basis and purpose.[263] Without a written opinion, meaningful judicial review is difficult, if not impossible, and the statutory right may go underenforced without the judicial oversight.

Overall, the benefits of the agency-administered proposal—private litigants, federalism, and the social costs of reduced deterrence—likely exceed the increased costs.

D. Why This Solution Is Superior to Other Proposals

Other arbitration reform proposals will not do the job. For example, Professor Sternlight's proposal to make arbitration binding *only* on the corporation[264] will cause corporations to avoid arbitration clauses. Corporations choose arbitration to trade increased payouts for the prevention of outlier large jury verdicts. Letting plaintiffs bring large claims at trial *and* small claims in arbitration will cost too much and lead to fewer arbitration agreements and therefore less arbitration. Proposals to reform procedure make sense, but procedures should only apply to companies of a sufficient size so that the repeat-player problem and information asymmetries are a realistic presumption.

The Defense Appropriations Rider and the Arbitration Fairness Act of 2011 inappropriately bar the arbitration of claims under Title VII of the Civil Rights Act.[265] Because an expert decider may more effectively adjudicate Title VII claims, this may adversely affect employees. Further, the Defense Appropriations Rider does not go far enough because it only applies to defense contractors doing more than $1 million of business.[266]

Proposals to ban class action waivers in consumer contracts have the attractive appeal of more adequately enforcing substantive deterrence policies, but, as discussed above, such a ban may not be necessary in all contexts. Instead, it should be up to an administrative agency to determine whether the costs of reduced deterrence outweigh the benefits of efficiency. Further, innovative solutions such as a website publishing case files could

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262. *Id.* ("We do not expect that [the arbitrator] will necessarily 'follow the law'—or indeed apply . . . general rules as a guide to his decision.").

263. *Cf.* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) ("We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the 'concise general statement of . . . basis and purpose' . . . will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." (quoting Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968))).

264. *See* Sternlight, *supra* note 130, at 84 ("Here I discuss an alternative response: make arbitration mandatory for the company, but not the 'little guy.'").

265. Department of Defense Appropriations Act, 2010, Pub. L. 111-118, § 8116(a), 123 Stat. 3409 (2009).

266. *Id.*

maintain deterrence or at least mitigate concerns—without the substantial administrative and agency costs of class action litigation.[267]

Finally, any proposal that attempts to enact broad procedural guarantees that are not specifically tailored to the type of disputes fails to adequately consider the differing policies of dispute resolution in different contexts. A $14 dispute for violation of a deceptive trade practices act implicates far different concerns than a dispute for wrongful termination under Title VII for $100,000 in back pay. The Arbitration Fairness Act would require litigation in both cases. Professor Malin's proposal would treat both cases the same, impose due process constraints, and ban class actions. And Professor Cole's proposal would only ban class actions (which is not in and of itself a necessary step in all circumstances) without addressing due process concerns in other areas. These proposals are therefore both overinclusive and underinclusive. The best solution balances the competing priorities. The Consumer Financial Protection Bureau and the Equal Employment Opportunity Commission—empowered by new legislation—would be in the best positions to achieve socially optimal private adjudication.

IV. Conclusion

Arbitration is a problem in consumer and employment contracts because of a lack of procedural fairness, and in the small claim consumer class action context because of reduced substantive deterrence. The unconscionability doctrine of contract law is ill equipped and largely irrelevant to police many of these concerns, particularly substantive deterrence. Competing and multifarious state laws increase costs for national corporations and lead to conflicts with federal law. Consumer and employee arbitration should not be abolished, however, because arbitration is advantageous for a substantial percentage of consumers and employees. Therefore, new legislation and administrative regulation should ensure procedural fairness and maintain substantive deterrence, while encouraging investment. The most important point of this Note is to argue that the reforms must be tailored to the specific type of dispute by a body capable of balancing the competing policies to reach optimal dispute-specific procedural guarantees, and that the best form of governance to balance these concerns is an administrative agency.

—George Padis

267. *See, e.g.*, Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 472–74 (2000) (describing one particular agency cost where multiple class actions are filed in different jurisdictions leading to "reverse auctions").