BECAUSE ARBITRATION CAN BE BENEFICIAL, IT SHOULD NEVER HAVE TO BE MANDATORY: MAKING A CASE AGAINST COMPELLED ARBITRATION BASED UPON PRE-DISPUTE AGREEMENTS TO ARBITRATE IN CONSUMER AND EMPLOYEE ADHESION CONTRACTS

I. INTRODUCTION

> *[T]he purpose of these hearings is not to suggest that there is a constitutional problem with mandatory arbitration or to suggest that they are not at least technically legal, it is whether it is good policy and whether it is fair, and that is our job here.*[1]

By checking a box next to the phrase "I agree to the terms and conditions," or providing a signature at the end of a multi-page standard form contract, today's consumers and employees often inadvertently bind themselves to some form of alternative dispute resolution (ADR).[2] Without fully understanding the consequences of their so-called agreement, these individuals effectively relinquish their right to access state and federal courts. Even when employees and consumers fully understand the impact of their decision, they may have no opportunity to do anything but sign the contract. This is not merely a theoretical issue. In addition to this voluntariness problem,[3] mandatory

1. *Overview of Contractual Mandatory Binding Arbitration: Hearing on S. 1020 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 99 (2000) [hereinafter *Hearing on S. 1020*] (statement of Sen. Russell Feingold). As compelled arbitration became increasingly prevalent during the past several decades, many commentators repeatedly asked why, if arbitration works so well, it has to be mandatory. *See* Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1625 (2005) (citing Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 792 (2002)); *Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?, Hearing before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 69 (2007) [hereinafter *Mandatory Binding Arbitration Agreements*] (statement of Jordan Fogal, Political Activist).

2. For purposes of this Comment, references to alternative dispute resolution should be understood as references to binding arbitration, rather than mediation, non-binding arbitration, negotiations, or any other forms of alternative dispute resolution.

3. In this Comment, the "voluntariness problem," refers to the fact that consumers and employees, who often do not understand the terms associated with an arbitration provision, sign binding agreements to arbitrate without fully comprehending that provision or in situations in which they do not have the

arbitration sometimes has devastating real-life implications, as evidenced by the following exchange before the Senate Subcommittee on the Constitution in 2007.

> Chairman Feingold: Can you tell us more about why you did not want to sign the arbitration agreement?
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> Mrs. Luke: Well, I did not want to sign it because . . . the way they explained it, I would be signing away my rights. I would not be able to go to court if anything happened.
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> Chairman Feingold: And you had been working for your employer for many years already when you were asked to sign the arbitration agreement. Did the employer offer you anything in return for giving up your rights to go to court?
>
> Mrs. Luke: They offered me nothing for giving up my rights, but they offered to terminate my position if I did not sign it.
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> Chairman Feingold: Some offer. You said you thought you would have had a fairer hearing on your case in a court of law than you did in arbitration. Why do you think that?
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> Mrs. Luke: Well, because the arbitrator was paid by [my employer], and I was not allowed to bring any of the evidence I had. I first went to the EEOC, who investigated for months and ruled in my favor. The arbitrator told me I could not bring this up, nor could I bring any evidence from this. And I felt that that was unfair, that if I had gone to court, I would have been able to use all of this information, and that they would have looked at it objectively and possibly ruled in my favor.[4]

Even though mandatory pre-dispute clauses to arbitrate in

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bargaining power to demand a different form of dispute resolution. It is a problem, not only because the party drafting the provision has the power to dictate the process, but because alternative dispute resolution, at its core, is intended to be a wholly voluntary process. For a brief discussion on the meaning of consent in both the commercial and consumer contract contexts, see Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1072–73 (1999). *See also* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 452 (1995–96) (discussing the validity of executory arbitration agreements between employers, repeat players, and employees, one-shot players).

4. *The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 20 (2007) [hereinafter *Hearing on S. 1782*] (conversation between Sen. Russell Feingold, Chairman, S. Subcomm. on the Constitution, and Mrs. Fonza Luke).

adhesion contracts undermine the voluntary nature of ADR, courts seem to prefer to hold individuals to the terms to which they have agreed. Plus, proponents of these clauses argue the process of arbitration itself is overwhelmingly beneficial in most circumstances.

So, courts continue to compel arbitration. In balancing party autonomy against the public interest, however, courts are getting it wrong. When courts compel parties to arbitrate disputes based on agreements in consumer and employee adhesion contracts, they undermine the supposedly voluntary nature of ADR, often resulting in an unfair process. Perhaps judicial compulsion is the result of the judiciary's failure to recognize the absence of consent in adhesion contracts; a desire to promote an alternative to the judicial system; or an overly broad interpretation of a congressional statute. Whatever the ultimate source, the willingness of today's courts to compel arbitration in all circumstances, despite the objections of the weaker party, has a direct and adverse impact on consumers and employees.

Cognizant of the issues involved, Congress has repeatedly attempted to provide a solution. However, it has been unable to propose legislation simultaneously broad enough to address the underlying problem of voluntariness, yet narrow enough to avoid offending advocates of arbitration. Consequently, in order to directly address the voluntariness problem, this Comment proposes a legislative solution prohibiting the enforcement of arbitration clauses in consumer and employee adhesion contracts. Alternatively, Congress could pass legislation providing that any arbitration agreement in a consumer or employment contract allow the consumer or employee the opportunity to select the arbitration provider and the processes to be used by that provider. If these agreements are to be upheld, requiring them to allow consumers and employees a choice as to provider and process would help to ensure that these parties have some control over the mechanisms used to settle their disputes.

Section II of this Comment provides the necessary background information. Specifically, it describes the advantages of binding arbitration and the rise of arbitration in the U.S. in subsection A. The difficulties posed by compelling arbitration based on pre-dispute agreements to arbitrate in consumer and employee adhesion contracts are addressed in subsection B. Critical analysis of the legislative history of the Federal Arbitration Act (FAA), which clearly indicates that the statute

was not intended to address consumer and employee adhesion contracts, is provided in subsection C. Next, in subsection D, this Comment explores potential market incentives that may encourage corporations and arbitration providers to avoid mandatory arbitration clauses in adhesion contracts. Section III outlines some of the many attempts to redress the unfairness of compelled arbitration. Subsection A discusses the judicial steps that have been taken, subsection B reviews the legislative attempts, and subsection C briefly describes some of the solutions proposed by academics and some possible solutions that should be investigated further. Finally, Section IV recommends two distinct legislative solutions that address, at least partially, the problems of consent and unfair processes.

II. THE BASICS OF ARBITRATION

> *I support arbitration . . . it works because of its informality, because of its simplicity, because different people can serve as arbitrators, because it is not a court. To try and make arbitration more like a court will not work, and the question is very simply: Should consumers be forced into arbitration? Should consumers be forced to forfeit their right to sue as a condition of obtaining the necessities of life?*[5]

This Comment assumes that arbitration can be advantageous in certain circumstances and in various ways. The problem, then, becomes balancing the societal benefit of having a potentially effective alternative to judicial resolution against the need for informed consent when relinquishing one's right of access to the courts.[6] The latter consideration of voluntariness is

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5. *Hearing on S. 1782*, *supra* note 4 (statement of Richard M. Alderman, Associate Dean for Academic Affairs, Director of the Center for Consumer Law, Univ. of Houston Law Center). The purpose of this section is to introduce the reader to alternative dispute resolution, how it has the potential to benefit various parties, when it should not be compelled, and how it became so prevalent in the United States. Along those same lines, Dean Alderman recognized that arbitration has a place alongside the judicial process. *See id.* The problem, therefore, is not whether arbitration should be an available alternative, but whether it should be compelled in all circumstances.

6. Of course, this is not an absolute right. It is one that can be waived and limited. Nevertheless, the opportunity to settle disputes in a courtroom is a hallmark of modern democracy. It is central to the efficient functioning of a free society. In essence, its importance should not be underestimated. *See generally* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PA. ST. L. REV. 165 (2003–04) (discussing the development of ADR by focusing on the historical movement away from litigation toward arbitration and discussing how a country so focused on one's right to justice

important because it helps to ensure that arbitration remains fair for both parties. The goal, therefore, should not be to eliminate the use of arbitration, but rather to create narrowly tailored laws to ensure that arbitration is fair.

A. ARBITRATION

Arbitration is a legal alternative to the judicial process.[7] While parties generally use it to resolve contractual and business-related disputes, it can be used in a variety of contexts,[8] and its popularity has grown significantly over the course of the past several decades.[9] In addition to recognizing its growing prevalence, it is important to acknowledge the benefits of the arbitral process, particularly in contrast to judicial litigation, in order to understand why measures to outlaw it entirely in the consumer and employment contexts are unwise. Additionally, outlining the development of arbitration in the U.S., with a specific focus on the reaction of the courts to its increasing pervasiveness, will help to explain why corporations and other business organizations routinely subject modern consumers and employees to ADR.

1. THE BENEFITS OF ARBITRATION

Without regard to the lack of voluntariness in most modern adhesion contracts, and the negative outcomes that often result from mandatory arbitration clauses, the arbitral process can produce positive outcomes. Among the most frequently cited benefits of arbitration are efficiency, low cost, privacy, the availability of neutral and expert decision makers, finality, and

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could have wholeheartedly embraced ADR).

7. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 469 ("Arbitration is a voluntary method of alternative dispute resolution that most frequently is used to settle contract and related disputes . . . .").

8. Even though parties can agree to arbitrate after a dispute has arisen, it is common for them to sign a pre-dispute clause to arbitrate. A typical pre-dispute agreement is included as a single provision or clause in a contract. *See id.* at 479 ("Negotiations over pre-printed terms—those that are not added to the form, in contrast to items such as the price term—are not allowed . . . . Sometimes, important terms are in fine print or obscure language that discourages understanding.").

9. *See id.* (citing W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971)) ("Adhesion Contracts [containing forced arbitration clauses] are ubiquitous in the American economy. One scholar suggests that ninety-nine percent of contracts entered into in the United States are adhesion contracts.").

party autonomy.[10] Each of these suggested advantages will be briefly examined in turn.

As state and federal courts became increasingly overbooked and frustratingly slow to settle disputes, litigants started to view arbitration as a more efficient alternative.[11] A report compiled by the Administrative Office of the U.S. Courts for the fiscal year ending in September 2013 revealed that 375,870 cases were filed in U.S. district courts, 56,475 cases were filed in U.S. courts of appeals, and 1,107,699 cases were filed in U.S. bankruptcy courts.[12] This means that, annually, each of the 677 district court judges was responsible for hearing an average of 420 civil cases and presiding over an average of 135 criminal cases,[13] while each appellate panel was responsible for 1,015 cases.[14] Put simply, federal courts are overwhelmed, such that arbitration is considered an attractive substitute by both litigants and overworked courthouses.

In addition to these "packed dockets," courts are bound by cumbersome rules of civil procedure and evidence.[15] ADR providers, like the American Arbitration Association (AAA), on the other hand, often use more flexible rules and procedures,

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10. *See, e.g.,* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011) (citations omitted); Jean R. Stearnlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635 (2005); Burton, *supra* note 7, at 475, 482 (citations omitted); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1599 (2005) (citations omitted); 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, 70 (1997).

11. In fact, Federal Rule of Civil Procedure 16 encourages federal district courts to adopt "processes to facilitate and speed settlements to conclusion." *See* Joseph C. Wilkinson, Jr., *The Long Road Home: Mass Settlement of Katrina Homeowners Insurance Claims in Federal Court*, 62 LOY. L. REV. 373, 402 (citing Fed. R. Civ. P. 16(a)(1), (2), and (5); 16(c)(2)(I), and (P); 23(d)).

12. *Judicial Business 2013*, ADMIN. OFF. OF THE U.S. CTS. (2013), http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx (last visited Sept. 20, 2016).

13. *U.S. District Courts – Judicial Business 2013*, ADMIN. OFF. OF THE U.S. CTS. (2013), http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2013 (last visited Sept. 20, 2016) ("[C]ivil filings per authorized judgeship [climbed] from 411 to 420.").

14. *U.S. Courts of Appeals – Judicial Business 2013*, ADMIN. OFF. OF THE U.S. CTS. (2013), http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2013 (last visited Sept. 20, 2016).

15. Burton, *supra* note 7, at 482 ("Among the criticisms [of the American litigation system] are those aimed at lengthy delays due to crowded dockets, discovery wars, arcane rules of evidence, and the obsolescence of jury trials in civil cases.").

allowing for a faster and more efficient process.[16]

With regard to cost, arbitration advocates frequently insist it is a cheaper alternative to the judicial process. Arguably, without extensive discovery and pretrial motions, a shorter process inevitably results in lower attorneys' fees and expenses.[17] Of course, there is no comprehensive empirical data to either support or negate this contention. By examining only the published fees associated with arbitration, it becomes questionable whether or not the process is necessarily cheaper. For example, in a typical claim, the AAA charges the consumer a filing fee of $200 and the business a filing fee ranging from $1,500 to $2,000, depending on the number of arbitrators designated to hear the case.[18] Additionally, the business is responsible for compensating the arbitrator—at a cost of $750 per case in a desk arbitration and $1,500 per arbitrator per hearing day for in-person arbitration.[19] Of course, the listed AAA expenses do not account for the other fees arising in any given case, including costs associated with attorneys' fees, conducting discovery, filing motions, postponing deadlines or hearing dates, objecting to evidence, or filing appeals in court.[20] Reliable data comparing the actual costs of arbitration to the costs of judicial litigation is unavailable and should be further studied before spectators and

16. For links to the AAA rules and procedures, see *AAA Court-and Time-Tested Rules and Procedures,* AM. ARB. ASSOC., https://www.adr.org/aaa/faces/rules?_afrLoop=1531153894722314&_afrWindowMode=0&_afrWindowId=rnq4vszv7_42#%40%3F_afrWindowId%3Drnq4vszs7_42%26_afrLoop%3D1531153894722314%26_afrWindowMode%3D0%26_adf.ctrl-state%3Drnq4vszs7_94.

17. Burton, *supra* note 7, at 493. Of course, not all arbitration proceedings dispense with discovery and pretrial motions. Nonetheless, arbitration proponents also suggest the efficiency of arbitration allows companies to pass the money saved from extensive litigation on to consumers. *See Federal Arbitration Act: Is the Credit Card Industry Using it to Quash Legal Claims?, Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 169 (2009) [hereinafter *FAA Hearing*] (statement of Rep. Franks, Member, H. Comm. on the Judiciary) ("There is nothing that forces arbitration on anyone that they do not agree to say, 'Yes, I agree that I will subject myself to arbitration'; and to take that tool away from business is not only to clog the courts, but to make credit harder and more difficult to make available for the very people who need it most."). In this way, it supposedly reduces the cost to the consumer, without imposing that cost on the producer. *See* Burton, *supra* note 7, at 475 (citations omitted).

18. CONSUMER ARBITRATION RULES: COSTS OF ARBITRATION, AM. ARB. ASSOC. (2016) *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2026862.

19. *Id.*

20. *See* Mitchell L. Marinello, *Protecting the Natural Cost Advantages of Arbitration*, *Litigation News*, AM. BAR ASSOC., https://apps.americanbar.org/litigation/litigationnews/practice_areas/corporate_naturalcost.html (last visited Sept. 9, 2016).

participants positively declare one method less expensive than the other.

Nonetheless, it is clear that the savings supposedly offered by arbitration are not always recognized by the individual consumers and employees compelled to arbitrate. For example, in testifying before the House of Representatives, one consumer subjected to mandatory arbitration lamented:

> [F]irst, you have the arbitration costs paid to the arbitration company itself, and then you have costs of arbitration, which is like being on a trial. So you have the same trial costs of getting witnesses, testimony. You even have to send out your own subpoenas for $50. You have all the costs of a trial and you better put on a good one, or it really didn't matter. You have all the same costs. Sometimes it is worse.[21]

Thus, the most that can be said on this point is that arbitration may or may not be more cost-effective for individual litigants, depending on the circumstances.

Distinctly unlike the judicial process, arbitral proceedings can, and often do, remain anonymous and confidential. Arbitral tribunals are neither required, nor encouraged, to disclose filings, decisions, or arguments to the public. This is considered an incredible advantage for businesses that would rather keep their disputes private. The effect on the consumer or employee, however, may be more difficult to ascertain.[22]

Another advantageous characteristic of arbitration is the availability of expert decision makers. While a single judge is expected to hear cases on countless issues, despite his or her qualifications in a particular area, parties to an arbitral proceeding generally have the opportunity to nominate arbitrators who are experts in a particular field. This process arguably better serves the pursuit of justice in cases involving technical or industry-related disputes, or, at the very least,

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21. *Mandatory Binding Arbitration Agreements*, *supra* note 1, at 106 (statement of Jordan Fogal, Political Activist).

22. It may be that the individual litigant is left feeling dissatisfied by the lack of public vindication or by the inability to share an unfair loss with the masses. Given the anonymity of such proceedings, commentators may never have the opportunity to gather reliable statistics or information on such issues. For more information on the issues surrounding confidential ADR, see generally Laurie Kratky Dore, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463 (2006); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255 (2006).

creates that impression.[23]

Furthermore, arbitration incontrovertibly provides finality to the resolution of many disputes by prohibiting any sort of appeals process.[24] Parties can effectively avoid litigation that lasts years after the initial claim is filed. Still, some arbitration providers have introduced provisions allowing for interlocutory hearings and appeal processes. For example, the International Court of Arbitration, an organization associated with the International Chamber of Commerce (ICC), added Emergency Arbitrator Provisions to its rules in 2012.[25] Significantly, the organization did so despite mild criticism that the arbitral process is designed to be more streamlined than the judicial process. Proponents of the changes noted that the cornerstone of arbitration is its trust in party autonomy. Theoretically, this means the parties to the dispute could agree to incorporate an appellate process if dissatisfied with the arbitral tribunal's decision. Plus, the ability to appeal is traditionally considered integral to any dispute resolution process.

Perhaps most importantly, party autonomy allows the disputants to determine their own processes and preferences. In an ad hoc proceeding, the parties can, presumably, create their own rules and procedures for the entirety of the arbitration. Most parties, however, elect to arbitrate with a recognized institution. These ADR providers have established procedures automatically adopted by parties who voluntarily select the institution in their arbitration clause. Some of these institutions, however, allow the parties to expressly opt-in or out of some of their provisions.[26] In

23. In fact, the AAA has a set of arbitration rules specifically designed to address construction industry disputes. *See* AM. ARB. ASSOC., CONSTRUCTION INDUSTRY ARBITRATION RULES & MEDIATION PROCEDURES: INCLUDING PROCEDURES FOR LARGE, COMPLEX CONSTRUCTION DISPUTES, (2015) *available at* adr.org/construction (follow "Construction Industry Arbitration Rules and Mediation Procedures" hyperlink).

24. Notably, though, the enforceability of the award is generally subject to review by a court under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), commonly referred to as the New York Convention.

25. For ICC Rules, see *ICC Rules of Arbitration*, INT'L CHAMBER OF COM., http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ (last visited Sept. 7, 2016). The Emergency Arbitrator Provisions are listed in Article 29.

26. For example, prior to the adoption of the 2012 Rules, the ICC required parties to opt-in to the Emergency Arbitrator Provisions. The Rules, however, now require parties to expressly opt-out of those provisions in order to avoid being bound by them. *See id.* at Article 29(6)(b).

that way, parties are able to "balance accuracy of results, procedural fairness, and adjudicative efficiency differently from the way the courts do it in civil litigation."[27] The theoretical respect for party autonomy is commendable, but may pose peculiar problems when an agreement to arbitrate is included in a consumer or employee adhesion contract, because only the party drafting the language (presumably the seller or employer) has the opportunity to make these choices.[28]

In sum, the advantage of arbitration is that it allows those who desire to formally settle their disputes in their own way to do so without judicial intervention.[29] This is an incredible benefit for parties who are aware of the stakes, familiar with the process, and are capable of negotiating the procedures to be used. On the other hand, for those parties in a weaker position, unfamiliar with litigation, and incapable of negotiating specific terms with the other party, arbitration may not always be so advantageous.

2. ARBITRATION AGREEMENTS IN CONSUMER AND EMPLOYEE ADHESION CONTRACTS

This subsection briefly introduces adhesion contracts by defining the term, providing examples of such contracts, and describing their increasing prevalence. It also discusses whether or not such contracts truly represent a "meeting of the minds," which is traditionally required for a contract to be enforceable. Next, this subsection suggests that adhesion contracts with an arbitration clause may pose unique problems for the weaker party, because they are routinely upheld by courts. Specifically, it submits that the economic incentive to arbitration providers, combined with the ability of the stronger party to include any term it desires, results in a process inherently unfair for the weaker party—even without regard to the issue of voluntariness.

An adhesion contract is a type of standard form contract drafted by the stronger party and imposed on the weaker party, often on a take-it-or-leave-it basis.[30] It is the type of contract

27. Burton, *supra* note 7, at 478.

28. These concerns will be addressed more directly in Section II(3).

29. Landsman, *supra* note 10, at 1599 (citing Schwartz, *supra* note 10, at 70–72).

30. *See* Burton, *supra* note 7, at 479. ("Adhesion contracts are standard form contracts drafted and 'imposed' by a strong party on another with less bargaining power."); Michael D. Donovan & David A. Searles, *Preserving Judicial Recourse for Consumers: How to Combat Overreaching Arbitration Clauses*, 10 LOY. CONSUMER L. REV. 269, 270 (1998).

individuals encounter on a daily basis. For example, it is the agreement signed before purchasing a service plan from cell phone, internet, and cable providers; it is often included in purchase contracts for larger or more expensive goods; and it is frequently the form handed to potential employees before they begin working.[31] They are so prevalent that at least one academic maintains that 99% of the contracts executed in the U.S. are adhesion contracts.[32]

For better or worse, these contracts essentially prohibit negotiation over the pre-printed terms.[33] Yet, academic lamentation over the lack of an opportunity to negotiate presupposes that the weaker party would have even read and understood the various provisions. Most consumers and employees, however, neither read nor fully comprehend the terms included in an adhesion contract.[34] Unfortunately, some of these contracts are drafted using such fine print or obscure, contradictory language, that it can only be assumed that the drafter wanted to discourage full understanding.[35] It is for these reasons that "[a]dhesion contracts are subject to a higher level of judicial scrutiny," such that enforcement will, theoretically, be denied if a contract or term therein is outside the reasonable expectations of the weaker party.[36]

In reality, however, courts largely enforce the terms in adhesion contracts, including those found in the fine print.[37] Nonetheless, one scholar has suggested "the relevant subjective assent is present because the weaker party that signs the contract normally knows that it contains terms that they do not

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31. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1638–40 (2005).

32. *See* Burton, *supra* note 7, at 479 (citations omitted).

33. *See id*. (citations omitted); Sternlight, *supra* note 31, at 1641.

34. *See* Burton, *supra* note 7, at 471–72, 479.

35. *See id.* at 479; Donovan & Searles, *supra* note 30, at 272.

36. Donovan & Searles, *supra* note 30, at 277 (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 599 (1991) ("Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that this consent, or even an objective manifestation of his consent, was ever given to all of the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.")).

37. *See* Burton, *supra* note 7, at 479 (citations omitted).

understand. Those parties nonetheless intend to be bound by all of the terms of the contract."[38] In other words, these contracts are substantially similar to any contract, such that party autonomy must be respected. Critics respond, however, that consumers and employees have no freedom of choice, i.e., that alternative contracts without an arbitration clause are non-existent.[39] Thus, even if they "intend to be bound by all of the terms," they cannot be said to have freely chosen those terms.[40]

Today, an overwhelming number of adhesion contracts contain an ADR clause. A few independent studies suggest that the number of arbitration clauses in adhesion contracts rose significantly during the past several decades. For example, in 1971, 23% of franchise contracts contained an arbitration clause, while in 1999, approximately 45% of such contracts required arbitration.[41] These clauses have even been included in healthcare adhesion contracts,[42] which pose exaggerated voluntariness concerns because people are far more likely to sign any document presented to them in order to receive necessary medical treatment. For example, during a 2007 Congressional hearing, Congresswoman Linda Sanchez related the following

38. Burton, *supra* note 7, at 479 (citations omitted) ("[T]he law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms.")).

39. *Arbitration Reform: Hearings Before the H. Subcomm. on Telecomm. and Fin. of the H. Comm. on Energy and Commerce*, 100th Cong. 125 (1988) (statement of Theodore G. Eppenstein) ("I know for a fact that I have one client who . . . trades to the tune of $200 million a year of commissions. He wanted to change brokerage firms and the new brokerage firm gave him their standard which had an arbitration agreement . . . and my advice to him was to cross it out . . . . Then I suggested to him that he try and negotiate . . . and the brokerage firm told him, 'You sign this or you can go somewhere else' but he had no where else he could go because everything was the same.").

40. Burton, *supra* note 7, at 479 (citations omitted).

41. *See* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 726–27 (2001) (examining three different studies, two conducted by the same people, and reporting that 23% of franchise contracts in 1971 contained an arbitration clause, 31% in 1993, and 45% in 1999); *see also* Landsman, *supra* note 10, at 1604 ("While it is hard to determine how much the use of such clauses has grown, some numbers gathered by Christopher Drahozal are suggestive. In 1971, one study reported the appearance of arbitration clauses in 23% of the franchise contracts it sampled. In 1993, in an arguably similar group of franchise contracts, Robert Emerson found that 31% had such clauses. In Drahozal's own 1999 sample, the percentage had risen to 45%.").

42. Though, some authors suggest that such contracts are not particularly widespread. *See* ELIZABETH ROLPH ET AL., LAW & CONTEMPORARY PROBLEMS, ARBITRATION AGREEMENTS IN HEALTH CARE: MYTHS AND REALITY (1997) *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1036&context=lcp.

anecdote:

> I do remember one time I broke a tooth and went to the dentist. And before I got service from the dentist, I was asked to sign a binding arbitration agreement. It seemed to me that I was in so much pain that had I even really thought about it, because I will quite honestly tell you I was in so much pain that I signed it. I would have signed anything in order to get the services that I needed in order to not feel that pain.[43]

Nonetheless, the problems generally associated with adhesion contracts also impact the content and nature of arbitration clauses. For example, one commentator examined an arbitration clause in a consumer loan agreement and noted that it was in small font and upside down on the back of a multi-copy standard form contract.[44] Moreover, it allowed the lender to choose the arbitrator and included provisions that allowed the lender, but not the consumer, to resort to a judicial forum for some claims without waiving its right to pursue arbitration for other matters.[45]

The rise in arbitration provisions in adhesion contracts may be the result of the fact that arbitration providers have an economic incentive to persuade drafters of adhesion contracts to include arbitration clauses in order to secure "a steady flow of business."[46] To convince drafters that arbitration would be in

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43. *Mandatory Binding Arbitration Agreements*, *supra* note 1 (statement of Rep. Linda Sanchez, Chairwoman, H. Subcomm. on Commercial and Admin. Law).

44. Donovan & Searles, *supra* note 30, at 272.

45. *Id.* It should be noted that, while the FAA requires an arbitration agreement to be in writing, it does not require that agreement to be signed. *See* Sternlight, *supra* note 31, at 1640 (citations omitted). Consequently, businesses can bind consumers and employees by including an arbitration clause in a document that is merely received, and not necessarily read or signed, by their consumers and employees. *Id.* Such documents may include small print notices, envelope stuffers, warranties, web sites, and e-mails. *Id.*

46. *See* Landsman, *supra* note 10, at 1615; *see also Arbitration Fairness Act of 2007, Hearing Before the H. Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 58–59 (2007) (conversation between Rep. Hank Johnson, Member, H. Subcomm. on Commercial and Admin. Law, and Richard Naimark, Senior Vice President of the Am. Arb. Assoc.). Rep. Johnson asked, "How does AAA get the bulk of its business?" Mr. Naimark responded, "How do we get the bulk of it?" Rep. Johnson clarified, "Isn't it through referrals from businesses that either are instituting arbitration proceedings against a consumer, or a consumer that is limited in the choice of the arbitration panel that he or she can employ to pursue a dispute against a commercial interest?" Eventually, Mr. Naimark stated that the majority of AAA's business came from "Unions and businesses primarily, yes." *Id.*

their best interest, providers may "include a 'track record' that displays sympathy with the drafter's point of view, rules of procedure that address salient drafter goals like limiting exposure to class action claims, and a willingness to alter standard practices to accommodate special drafter demands."[47]

This economic incentive, along with the weaker party's inability to negotiate the terms of the arbitration clause, including which arbitration provider should be used, can result in blatantly unfair outcomes. In a rather striking example of the foul play that may arise, the Washington Post reported that First USA N.A., a credit card provider, paid $5.3 million to the National Arbitration Forum (NAF), an arbitration provider, between 1998 and 1999.[48] Coincidentally, First USA won 99.6% of the cases heard by their arbitrators.[49] The Post also reported that the NAF, after actively convincing companies to include an arbitration clause in their contracts, helped to write those clauses and file claims against the consumers bound by them.[50]

Additionally, including mandatory arbitration clauses in adhesion contracts may pose significant problems because they inherently limit access to the courts. For example, some businesses have included provisions in their arbitration clauses that "shorten statutes of limitations, limit or eliminate discovery, require a claimant to file in a distant forum, prevent consumers from joining together in a class action, or bar consumers from recovering particular forms of relief (injunctive relief, compensatory damages, punitive damages, or attorney fees)."[51] If these terms were voluntarily agreed to, they may not be problematic. Because, however, they are included in small-print adhesion contracts, the weaker party is often completely unaware that he has sacrificed certain legal rights traditionally available to the general public.

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47. Landsman, *supra* note 10, at 1615 (citing Schwartz, *supra* note 10, at 60–61; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?,* 42 WM. & MARY L. REV. 1, at 72 n.278).

48. *See id*. at 1615 (citing Caroline E. Mayer, *Win Some, Lose Rarely?: Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1).

49. *See id.*

50. *Arbitration: Is it Fair When Forced? Hearing Before the S. Committee on the Judiciary*, 112th Cong. 21 (2011) [hereinafter *Arbitration: Is it Fair When Forced?*] (statement of the Hon. Lori Swanson, Att'y Gen. of Minnesota) ("In 2009, our office filed a lawsuit against the National Arbitration Forum . . . [which], despite its public comments to the contrary, worked behind the scenes alongside companies and creditors against the interests of ordinary consumers . . . .").

51. Sternlight, *supra* note 31, at 1641–42 (citations omitted).

There is one final distinguishing characteristic of consumer and employee adhesion arbitration clauses, as compared to freely-negotiated arbitration clauses. Pre-dispute agreements to arbitrate in contracts between commercial actors are presumptively made between relatively well-educated individuals. Less educated lay consumers and employees, on the other hand, may not be as familiar with their rights.[52] In contrast to sophisticated businesses, binding those members of the general public to waivers of statutory rights seems inherently inequitable.

Thus, with regard to voluntariness, the problem with including an arbitration agreement in consumer and employee adhesion contracts is that arbitration is supposed to be "a matter of informed consent, not hidden coercion or blind acquiescence."[53] In other words, "It is perhaps the central irony of the recent success of [ADR] that it is built on the sort of mandatory approach that [ADR] rejected throughout most of its history."[54] Thus, even though U.S. courts historically respected the rights of parties to voluntarily choose to arbitrate *after* a dispute had arisen, they were skeptical of *pre*-dispute agreements to arbitrate.[55]

3. FROM SUSPICION TO ACCEPTANCE TO ENCOURAGEMENT

At the end of the nineteenth century, adjudicators fervently believed contractual provisions to arbitrate future disputes

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52. *See* Sternlight, *supra* note 31, at 1641 ("[T]he broad expansion of consumer arbitration has likely meant that a less educated cadre of persons is now covered by arbitration clauses.").

53. Donovan & Searles, *supra* note 30, at 271.

54. Landsman, *supra* note 10, at 1600. Another concern that may warrant examination is that, as arbitration becomes more prevalent and an increasing number of consumers and employees are forced into non-judicial proceedings, the courts will have fewer opportunities to develop precedent. Indeed, the private nature of alternative dispute resolution necessarily entails a lack of developing precedent. In a 2007 Senate hearing, Richard M. Alderman, Director of the Center for Consumer Law at the University of Houston, explained, "Consumer law is not a statute. . . . [T]he United States is different in how we regulate, protect consumers, and deal with the marketplace. We use private litigation. Our statutes are enacted on the assumption that lawyers will bring the lawsuits. . . . And we are talking about completely closing and privatizing that court system when it comes to consumers . . . ." *Hearing on S.1782*, *supra* note 4.

55. *See* Sternlight, *supra* note 31, at 1636. As the following discussion proceeds, remember that this Comment is focused primarily on pre-dispute contracts to arbitrate and the unique difficulties such clauses may pose.

should be unenforceable.[56] Thus, in *Home Insurance Company v. Morse*, the Supreme Court held unequivocally "that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."[57] Lower courts reiterated this sentiment during the next several decades.[58]

Proponents of arbitration, discouraged by the judicial hostility to pre-dispute arbitration clauses, sought legislative reform in state courts. In 1920, reformers in New York passed a state statute providing that pre-dispute arbitration agreements were to be treated as "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[59] Five years later, Congress passed the Federal Arbitration Act (FAA).[60] The language of the relevant section is substantially similar to that which the reformers in New York adopted. Specifically, § 2 states in relevant part that a pre-dispute agreement to arbitrate in "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[61]

Congress, like the New York legislature, enacted the FAA in direct response to judicial hostility toward pre-dispute arbitration agreements.[62] Therefore, its intended effect was to ensure

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56. Burton, *supra* note 7, at 474.

57. 87 U.S. 445, 451 (1874) (acknowledging that an individual could "submit his particular suit by his own consent to an arbitration . . . . He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented").

58. *See, e.g.*, Thompson v. St. Louis Ins. Co., 43 Wis. 459, 461 (1877); Grant v. Langstaff, 52 Ill. App. 128, 130 (1893); Mitchell v. Dougherty, 90 F. 639, 642–43 (3d Cir. 1898); Buel v. Balt. & Ohio Sw. Ry. Co., 24 Misc. 646, 662 (N.Y. 1898); Bales v. Gilbert, 80 Mo. App. 675, 677 (1900); Healy v. E. Bldg. & Loan Ass'n, 17 Pa. Super. 385, 390–91 (1901).

59. *See* Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 474 n.4 (1990).

60. 9 U.S.C. § 2 (2012).

61. *Id.* ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

62. *See In re* D. R. Horton, Inc., 357 N.L.R.B. 2277, 2284 (2012) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The general purpose of the FAA] was to 'reverse the longstanding judicial hostility to arbitration agreements' and to place private arbitration agreements 'upon the same footing as other contracts.'")).

enforcement of arbitration agreements according to their terms,[63] while simultaneously ensuring those agreements would remain subject to traditional contract defenses.[64]

Despite the newfound legislative acceptance of such agreements, many courts remained skeptical. For example, in *Wilko v. Swan* the Supreme Court criticized arbitration and found it an inappropriate forum to decide cases involving statutory rights.[65]

Nevertheless, courts eventually became more willing to enforce arbitration agreements—even when the validity of the arbitration agreement itself was in dispute.[66] In *Prima Paint Corp. v. Flood and Conklin Manufacturing Co.*, the Court had to determine whether a claim of fraud in inducing the contract would also invalidate the arbitration clause included in the contract; i.e., whether the arbitration clause was severable from the other provisions of the agreement.[67] At that time, the circuits were split on this issue. The Second Circuit determined these clauses were severable, such that "a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud."[68] Therefore, if one party maintained that the contract was fraudulently induced, that party was still bound by the arbitration clause in the contract. The First Circuit,

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63. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) ("The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their own terms.") (citations and internal quotations omitted); *see also* Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 664 (2010) (citations omitted).

64. *In re D. R. Horton, Inc.*, 357 N.L.R.B. at 2284 ("The FAA permits the enforcement of private arbitration agreements, but those agreements remain subject to the same defenses against enforcement to which other contracts are subject.").

65. 346 U.S. 427, 435–37 (1953) ("[W]e think the right to select the judicial forum is the kind of 'provision' that cannot be waived under s 14 of the Securities Act . . . . When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary."); *see* Landsman, *supra* note 10, at 1602–03.

66. It's difficult to explain this attitudinal shift, but it may have been the result of business pressures, economic considerations, or efficiency concerns.

67. 388 U.S. 395, 396–97 (1967) (considering the respective roles of arbitrators and federal courts in assessing one party's claim of "fraud in the inducement"). The contract at issue was between two businesses and included a broad arbitration clause requiring any ensuing dispute to be settled by a New York arbitral tribunal. *See id.* at 398.

68. *Id.* at 402.

on the other hand, held that the issue of severability must necessarily depend upon state law.[69] The majority of the Supreme Court agreed with the Second Circuit, concluding that a claim of fraud in the inducement applied only to the contract, not to the arbitration clause.[70] Thus, because the Court was satisfied that the making of the arbitration agreement was not an issue, arbitration was compelled according to the FAA.[71]

Before making this determination, however, the Court undertook analysis to determine if the contract at issue fell within §§ 1 and 2 of the FAA. Specifically, the Justices examined whether the agreement was a maritime contract or a contract evidencing a transaction in commerce.[72] *Prima Paint* involved a consulting agreement between interstate manufacturing and wholesaling businesses, so the Court readily found that it fell within the FAA's purview.[73] What is significant is that the Court during the 1960s felt compelled to ensure that the contract at issue was protected by the FAA before assuming that the agreement required or deserved federal protection. Given the expansive modern interpretation of "commerce," however, it is substantially unlikely that any such analysis would significantly impact a court's decision today. So, today's courts generally assume, without examination, that the contract at issue falls under the FAA.

Nevertheless, the dissent filed by Justice Black, and joined by Justices Douglas and Stewart, expressed reservations about the Court's holding. The dissenting Justices criticized the majority's creation of a federal substantive rule of severability, which "elevate[d] arbitration provisions above all other contractual provisions,"[74] even though the express purpose of the FAA was "to place arbitration agreements 'upon the same footing as other contracts.'"[75] According to Justice Black, Congress intended the courts, not arbitrators, to determine if an arbitration

69. *Prima Paint Corp*., 388 U.S. at 402–03.

70. *Id.* at 404.

71. *Id.* at 402–04 ("[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

72. *Id.* at 401.

73. *Id.*

74. *Prima Paint Corp*., 388 U.S. at 409–11 (Black, J., dissenting).

75. *Id*. at 423 (citations omitted).

clause could be rescinded on a claim of fraud.[76]

Theirs, however, was only the minority opinion and the questions they asked were lost in the pro-arbitration wave of precedent that followed. In 1983, despite offering no "historical or policy justification,"[77] a majority of the Supreme Court interpreted *Prima Paint*, in a footnote, to be representative of a federal policy requiring "a liberal reading of arbitration agreements . . . ."[78] The following year, the Court reiterated this interpretation, finding that "Congress declared a national policy favoring arbitration [for disputes falling under the Commerce Clause] . . . ."[79]

Then, in 1985, the Supreme Court moved even further from the conservative position taken by the *Wilko* Court, enforcing an arbitration clause in a case that involved a statutory antitrust claim.[80] The Court's willingness to compel arbitration in cases involving statutory claims was solidified in 1991 by *Gilmer v. Interstate/Johnson Lane Corporation*.[81] As further evidence of its determination to enforce all arbitration clauses, the Supreme Court appeared to preempt state laws that discouraged arbitration in the years that followed *Gilmer*.[82]

The result is that, today, courts readily and consistently uphold pre-dispute arbitration provisions. As a consequence of this pro-arbitration precedent, there was an increase in the number of contracts containing mandatory arbitration clauses.[83]

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76. *Prima Paint Corp*., 388 U.S. at 425 (Black, J., dissenting) ("Congress also plainly said that whether a contract containing an arbitration clause can be rescinded on the ground of fraud is to be decided by the courts and not by the arbitrators.").

77. *See* Donovan & Searles, *supra* note 30, at 270.

78. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 n.27 (1983).

79. Burton, *supra* note 7, at 477 (citing Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).

80. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 617–20, 640 (1985).

81. 500 U.S. 20, 35 (1991) ("We conclude that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act.").

82. *See* Burton, *supra* note 7, at 483 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996)).

83. *See* Sternlight, *supra* note 31, at 1638; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0.

Businesses now freely include pre-dispute arbitration provisions in various form agreements, hoping to avoid the "publicity, jury awards, punitive damages, extensive discovery, and class actions" associated with judicial litigation.[84] Accordingly, consumers are regularly required to submit to arbitration based on clauses found in contracts with financial institutions, service providers, sellers of goods, healthcare providers, and educational institutions.[85] Employees have also been bombarded with pre-dispute arbitration clauses, as the number of employees bound to arbitrate rose from three to seven million between 1998 and 2003.[86]

Given the staggering rise of mandatory arbitration, the supposed federal "policy favoring arbitration" must be taken seriously.[87] At the same time, it is important for commentators, legislators, and adjudicators to remember that this policy is a result of judicial interpretation, not necessarily legislative intent, and that enforcement of contractual provisions should not be made at the expense of fairness.

B. LEGISLATIVE INTENT

Given the inadequate bargaining power, lack of consent, and adverse economic incentives, inequities often result from compelling arbitration. For these reasons, it is unlikely that the legislators who passed the FAA intended for the statute to apply to consumer and employee adhesion contracts. Even a cursory review of the legislative history reveals that the drafters of the statute recognized the inequity of enforcing pre-dispute clauses to arbitrate in all contracts.[88]

One commentator argued that the federal policy favoring arbitration, encompassed in the FAA, was intended to reach "by far the lion's share of contractual transactions within the United States, so long as they affect interstate commerce."[89] This argument fails, however, when one examines the legislative history and the express language of the statute, as interpreted by some early courts.

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84. *See* Sternlight, *supra* note 31, at 1638.

85. *Id.* at 1638–39.

86. *See id.* at 1640 (citations omitted).

87. Burton, *supra* note 7, at 478.

88. Jean R. Sternlight, *Panacea or Corporate Tool: Debunking The Supreme Court's Preference for Binding Arbitration*, 74 Wash. U.L.Q. 637, 644–52 (1996).

89. Burton, *supra* note 7, at 478.

First, the legislative history indicates that many members of Congress had reservations about court enforcement of pre-dispute agreements to arbitrate in adhesion contracts. Legislators at the time explicitly voiced fears that consumer and employee adhesion contracts would fall under the FAA.[90]

Proponents of the FAA testified before the Senate that the law was intended to encompass agreements "between people in different States who produced, shipped, bought, or sold commodities,"[91] and made it a point to assure those who had reservations that "it was not their intention to cover cases" involving consumers or employees.[92]

Second, § 2 of the FAA provides that the statute is to apply to any "contract evidencing a transaction involving commerce . . . ." When Congress intends to exercise all of the power available to it under the Commerce Clause, it generally refers to any transaction "affecting" commerce.[93] This linguistic distinction, far from semantic, has been recognized by courts in other contexts. For example, the California district court in *Zoslaw v. MCA Distributing Corp.*, recognized that the phrase "in commerce" used in a particular section of the Sherman Antitrust Act is not as broad as the "affecting commerce" language used in other sections of the statute.[94]

In his dissenting opinion in *Prima Paint*, Justice Black noted the difference between transactions "involving" and those

90. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (Black, J., dissenting) (citing *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 3, 7, 9, 10 (1923)) ("Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take it or leave it basis to captive customers ore employees. He noted that such contracts 'are not voluntarily [sic] things at all' because 'there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court . . . .'").

91. *Id.* at 398 n.2 (citations omitted).

92. *Id.* at 414 (Black, J., dissenting).

93. *See, e.g.,* 29 U.S.C. § 142(1) (2012) (defining the term "industry affecting commerce" as referring to "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce"). For examples of the use of "affecting commerce," see 29 U.S.C. § 174(a) (2012) ("In order to prevent or minimize interruptions to the free flow of commerce growing out of labor disputes, employers and employees . . . in any industry affecting commerce . . . ."); 30 U.S.C. § 803 (2012) ("Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce . . . shall be subject to the provisions of this chapter.").

94. 594 F. Supp. 1022, 1026 (N.D. Cal. 1984).

"affecting" commerce.[95] He stated that he was not sure the FAA was intended to apply to the consulting agreement at issue in the case—something which, in his opinion, did not necessarily involve commerce.[96] At the very least, the language Congress chose to use is persuasive evidence of the fact that the drafters did not intend the statute to apply to all contracts regardless of their nexus to interstate commerce.

As a result of the legislative history and text of the statute, most of today's scholars agree that the drafters of the FAA never intended the law to apply to consumer and employee adhesion contracts.[97] David Schwartz, a prominent legal scholar who has devoted years to this topic, explained to Congress in 2007:

> The FAA was not intended by Congress to apply to consumer or employment claims. It was not intended to preempt or nullify any State laws. We are in this mess because of a seri[es] of legally incorrect and misguided court interpretations of the FAA.[98]

This legislative history, text, and academic analysis convincingly suggest that the legislature did not intend the FAA to govern consumer and employee adhesion contracts. What may be less apparent is that application of the FAA to these contracts is not

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95. *Prima Paint Corp*., 388 U.S. at 409–10 (Black, J., dissenting).

96. *Id.*

97. *See, e.g.,* Sternlight, *supra* note 88, at 646 n.43 (citing *Prima Paint Corp.*, 388 U.S. at 409 (Black, J., dissenting)) ("[M]ost commentators have concluded that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power, and not necessarily to transactions between a large merchant and a much weaker and less knowledgeable consumer."); Donovan & Searles, *supra* note 30, at 270 (citations omitted) ("The legislative history of the FAA shows that he purpose of the FAA was to settle disputes between businesses in the context of commercial disputes involving entities with relatively equal bargaining power and working knowledge of the kinds of disputes likely to arise in that context."); *see also Prima Paint Corp*., 388 U.S. at 409–10 (Black, J., dissenting) ("[I]n light of the legislative history which indicates that the Act was to have a limited application to contracts between merchants for the interstate shipment of goods . . . ."); *Mandatory Binding Arbitration: Is It Fair and Voluntary?, Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 154 (2009) [hereinafter *Mandatory Binding Arbitration: Is It Fair and Voluntary?*] (statement of Cliff Palefsky, National Employment Lawyers Association) ("The FAA was passed in 1925 to permit Federal courts to once again be able to enforce arbitration clauses between merchants. It was never intended to apply in the adhesion context. It was specifically never intended to apply to employment claims.").

98. *Mandatory Binding Arbitration Agreements*, *supra* note 1, at 83 (statement of David S. Schwartz, Law Professor, University of Wisconsin Law School).

always in the best interests of arbitration proponents.

C. IN THE BEST INTERESTS OF ARBITRATION PROVIDERS AND THE COMPANIES SEEKING TO USE THEIR SERVICES

There are two ways in which mandatory arbitration of consumer and employee disputes may harm the use and promotion of arbitration. First, it makes arbitration, and those who provide and use it, appear to be driven solely by economic concerns. Second, it substantially undermines the purposes and advantages of ADR.

It may be for these precise reasons that the AAA already rejects these clauses in certain situations. Specifically, the national arbitration provider has chosen not to accept such clauses in the healthcare field and has indicated that employment arbitration should be wholly voluntary.[99] Because of strong economic incentives, the provider has not declined to enforce arbitration clauses in employment and consumer adhesion contracts, however. Yet, as the Senior Vice President of the AAA, Richard Naimark, suggested to Congress in 2007, this is more than a business problem; it is a public policy issue.[100] Furthermore, it is an issue that must be redressed by Congress.

Nevertheless, even if they are not financially harmed, ADR providers likely suffer harm to their reputation as a result of enforcing mandatory arbitration clauses in adhesion contracts. With regard to this harm, compelling arbitration through an adhesion contract may negatively influence how the public perceives ADR by denying access to the judicial process to those who want it, depriving individuals of the assistance of counsel, and limiting opportunities for discovery and interrogation.[101] By forcing an unwilling weaker party to arbitrate, courts create the appearance that large, untrustworthy corporations are able, and

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99. *See Mandatory Binding Arbitration: Is It Fair and Voluntary?*, *supra* note 97, at 149–50 (statement of Cliff Palefsky, National Employment Lawyers Association) ("[T]he American Arbitration Association refuses to accept pre-dispute clauses in the health care field and the American Arbitration Association issued a press release in 1997 saying that employment arbitration should be voluntary.").

100. *Arbitration Fairness Act of 2007*, *supra* note 46, at 55 (statement of Richard Naimark, Senior Vice President of the American Arbitration Association) ("[T]his is a public policy issue, whether mandatory clauses in the consumer and employment context are acceptable or not. The courts in fact are very split on this. . . . So it really is not an issue that AAA necessarily supports or defends. It is an issue that we have to deal with.").

101. *See* Landsman, *supra* note 10, at 1624.

willing, to disregard the best interests and desires of consumers and employees. Plus, the arbitration providers who assist in this process may be viewed simply as greedy, rather than fair. Put simply, mandatory arbitration makes companies and providers look bad.

Essentially, this means members of the public are going to resent the corporations that force arbitration upon them, as well as the institutions responsible for providing arbitration. In turn, this will breed a distrust of the arbitral process itself. If arbitration is going to be a successful alternative to the judicial process, both companies and arbitration providers should seek to "win over" the public.[102]

Second, at least one purported advantage of arbitration has arguably been eroded by mandatory arbitration clauses. Specifically, the proponents of the FAA believed arbitration provided a unique benefit to businesses: the ability to continue performance under the contract, while maintaining a mutually beneficial business relationship.[103] The drafters of the FAA and early proponents of arbitration were particularly concerned about allowing "the parties to continue performance under the contracts."[104] This is a legitimate concern when a dispute arises between two corporations with future contractual obligations who hope to continue their relationship. However, it makes little sense when a dispute involves a one-time buyer or former employee. Naturally, there are contexts in which the consumer or employee may hope to continue a relationship with the offending corporation, but such circumstances are more difficult to imagine and probably less common. Thus, by enforcing mandatory pre-dispute arbitration clauses in consumer and employee contracts, courts have eroded the purpose of "pure" arbitration and undermined the intent of the drafters of the FAA.

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102. Unfortunately, a legislative solution remains necessary. This abstract benefit—maintaining a positive reputation among academics and the public—is unlikely to be strong enough to influence all of the businesses and arbitration providers that use and enforce mandatory arbitration clauses in adhesion contracts. Thus, those providers that recognize the long-run interests of the arbitral process should advocate for a legislative solution that would reach the entire market.

103. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 415 (1967) (Black, J., dissenting) ("(1) [T]he expertise of an arbitrator to decide factual questions in regard to the day-to-day performance of contractual obligations, and (2) the speed with which arbitration, as contrasted to litigation, could resolve disputes over performance of contracts and thus mitigate the damages and allow the parties to continue performance under the contracts.").

104. *Id.*

An additional aspect of this harm to arbitration is that adhesion contracts undermine the voluntariness of arbitration. ADR was designed to be a voluntary alternative to the overburdened judicial process. Although voluntariness is not a compelling interest to businesses, whose primary concern is their bottom line, it should cause arbitration proponents, including providers, to hesitate.[105] In the long-run, it is better for ADR organizations if the process is not only fair in practice, but also publicly perceived to be so. That way, academics who believe in the process will research it, teach it, and support it, while those individuals who are subjected to it will respect the outcomes and recommend the process to others. The world of arbitration will benefit if it is perceived to be just as fair as the judicial process; if businesses continue to impose it on unsuspecting consumers and employees, however, it may inevitably face public backlash.

Despite the economic incentives to the contrary, these are a few of the reasons why it may be in the best interests of businesses, arbitration providers, and arbitration proponents, to limit the use of pre-dispute agreements to arbitrate in consumer and employee adhesion contracts.

III. REPEATED ATTEMPTS TO ADDRESS THE PROBLEM: JUDICIAL, LEGISLATIVE, AND ACADEMIC

> *[T]he Supreme Court and the Federal judiciary have almost uniformly held that it is legal for an employer to insist upon an arbitration agreement as a condition of employment. However . . . the Supreme Court has not said that these contracts of adhesion are a good thing. All it said is that they are allowable by the FAA.*[106]

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105. In addition to the harm about to be discussed, it's also worth acknowledging that consumers and employees are not experts and are unlikely to develop hyper-technical disputes with the drafter of an adhesion contract. Thus, the availability of expert decisionmakers, something the proponents of the FAA valued highly, is irrelevant in these disputes. Furthermore, as more consumers and employees become embroiled in the arbitral process, the more they will demand processes similar to those offered by the courts. Thus, ADR providers will have to ensure their discovery and evidentiary processes are infused with a substantially similar level of protection. In this way, arbitration is likely to become less efficient over time. *See Hearing on S.* 1782, *supra* note 1, at 22 (statement of Richard M. Alderman, Associate Dean for Academic Affairs, Director, Center for Consumer Law, University of Houston Law Center) ("I support arbitration . . . and it works because of its informality, because of its simplicity, because different people can serve as arbitrators, because it is not a court. To try and make arbitration more like a court will not work . . . .").

106. *Hearing on S. 1020*, supra note 1, at 84 (statement of Lewis Maltby, President, National Workrights Institute, Director, ACLU National Task Force on

Recognizing the injustices associated with enforcing arbitration agreements in consumer and employee adhesion contracts, champions of reform have attempted to challenge the judicial policy favoring arbitration in the courts, in Congress, and in the classroom. In this section, subsection A reviews the judicial challenges, subsection B explores Congress's various attempts to address the problem, and subsection C analyzes some of the academic recommendations that have been made and a few suggestions that may be worth exploring further.

A. JUDICIAL

First, this subsection outlines the argument that enforcement of mandatory pre-dispute arbitration clauses is unconscionable. Second, it considers the more focused challenges to judicial enforcement of class action waivers in such clauses.

1. CLAIMS OF UNCONSCIONABILITY

Section 2 of the FAA, commonly referred to as the savings clause, requires enforcement of arbitration agreements, "save upon such grounds as exist at law or in equity for the revocation of any contract."[107] It allows individuals to challenge an arbitration clause using common contract defenses, like unconscionability.

A claim of unconscionability includes both procedural and substantive elements. Procedurally, a party challenging the agreement must prove that there was a lack of meaningful choice for one of the parties; substantively, he or she must show that the specific terms of the agreement were unreasonably favorable to the other party.[108]

At the turn of the twenty-first century, California courts appeared to accept the notion that arbitration clauses in adhesion contracts are necessarily procedurally unconscionable for several

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Civil Liberties in the Workplace).

107. 9 U.S.C. § 2 (2012).

108. *See* Donovan & Searles, *supra* note 30, at 276 (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)). Initially, some criticized an unconscionability challenge in the mandatory arbitration clause context, because such a challenge appears to be singling out adhesion contracts containing arbitration clauses despite the federal law requiring arbitration agreements to be treated "on the same footing as other contracts." *See* Burton, *supra* note 7, at 491. Nevertheless, some state courts willingly entertained the arguments.

reasons.[109] For example, courts have readily admitted that consumers and employees are generally less sophisticated than corporations and are provided no opportunity to negotiate the terms of the agreement.[110] Some courts have also recognized that drafters regularly hide important clauses by using confusing language in fine print that was neither pointed out nor explained to the consumer or employee.[111] Furthermore, in some cases, the courts found that the corporation deceptively obscured the terms of the contract or offered it on a take-it-or-leave-it basis.[112] It is in these ways that consumers and employees lack a meaningful choice when they sign a mandatory pre-dispute arbitration clause in an adhesion contract.

Additionally, a lack of mutuality may also be considered procedurally unconscionable. For example, in *Hull v. Norcom*, the Eleventh Circuit concluded that the arbitration clause was invalid because the employer reserved the right to bring claims in a judicial forum, while requiring the employee to resort solely to arbitration.[113] Yet, in a substantially similar case, a South Carolina court nevertheless compelled arbitration.[114] Thus, what truly amounts to a procedurally unconscionable arbitration clause may depend upon the precedent of the court hearing the case.

Where many challengers failed, however, was in proving that the clause was also substantively unconscionable, which requires evidence that the terms of the agreement are unreasonably favorable to one side. Like procedural unconscionability, there are numerous factors a court may consider. For example, it may be substantively unfair to include provisions imposing a majority of the costs of arbitration on the consumer or employee,[115] limiting the choice of venue, restricting limitations periods, prohibiting consolidation, forbidding or limiting discovery, or

109. *See* Burton, *supra* note 7, at 490 (citing Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 669 (Ct. App. 2004); Flores v. Transamerica Homefirst, Inc., 113 Cal. Rptr. 2d 376, 382 (Ct. App. 2001); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 145–46 (Ct. App. 1997)).

110. Donovan & Searles, *supra* note 30, at 278–79.

111. *Id.*

112. *Id.*

113. *Id.* at 283 (citing 750 F.2d 1547 (11th Cir. 1985)).

114. *Id.* (citations omitted).

115. *See* Burton, *supra* note 7, at 493 (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000); Gutierrez v. Autowest, Inc., 7 Cal. Rptr. 3d 267, 277–78 (Ct. App. 2003)).

imposing substantive limitations on the arbitrators.[116] However, not all arbitration clauses include such provisions.

One contract term routinely included in arbitration clauses that many challengers believed to be substantively unconscionable was a waiver of class actions, discussed below.

2. UNCONSCIONABILITY CHALLENGES TO MORE SPECIFIC PROVISIONS AND OTHER NARROWER CHALLENGES: A RECENT FOCUS ON CLASS ACTION WAIVERS

In response to criticisms of the unconscionability challenges and unfavorable court decisions, reformers began to focus their claims on specific provisions within the arbitration clause. Namely, litigators and scholars argued that class action waivers in consumer and employee adhesion arbitration clauses were both procedurally and substantively unconscionable.

Significantly, class actions have two societal benefits: they allow the courts to redress small harms imposed on numerous actors, who may not otherwise have an incentive to pursue a claim,[117] and they serve as a deterrent, a strong disincentive, of illegal and unjust corporate behavior.[118] Although lower courts initially accepted the argument that class action waivers were unconscionable, the Supreme Court ultimately dismissed it. With its decision in *AT&T Mobility LLC v. Concepcion*, the Court essentially ensured that virtually every provision in a pre-dispute arbitration clause would be upheld under the FAA.

Concepcion addressed the constitutionality of a California rule that classified the majority of class action waivers in consumer contracts as unconscionable.[119] Relying on the federal policy favoring arbitration, the majority found that guaranteeing access to class action arbitration "interferes with fundamental

116. *See* Burton, *supra* note 7, at 496–98.

117. *See Mandatory Binding Arbitration: Is It Fair and Voluntary?*, *supra* note 97, at 154 (statement of Cliff Palefsky, National Employment Lawyers Association) ("It simply is not economical to bring a claim for $100 either in arbitration or in court, so the only way your consumer protection laws and the only way justice will ever be reached in certain small claims is through the class action procedure.").

118. *See FAA Hearing*, *supra* note 17, at 172 (statement of Rep. William Delahunt, Member, H. Subcomm. on Commercial and Admin. Law) ("In terms of class actions, one aspect of the rational[e] for class action suits is to serve as a deterrent to bad practices. In other words, it is not just simply about compensating or redressing those members of the class, but it is preventing bad behavior post the ruling, the decision in the case.").

119. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1749, 1746 (2011).

attributes of arbitration and thus creates a scheme inconsistent with the FAA."[120] In other words, the procedures involved in class actions necessarily undermine the advantages of arbitration. For example, the Court noted that class actions pose significant procedural problems, like absent parties and maintaining confidentiality, that would destroy the efficiency of arbitration.[121] In the end, the Supreme Court vehemently maintained that "[a]rbitration is poorly suited to the higher stakes of class litigation."[122]

Following *Concepcion*, most courts have uniformly enforced arbitration clauses, despite various challenges, and supported their holdings by citing the majority's reasoning. For example, in *Jasso v. Money Mart Express, Inc.* a federal district court in California held that a class action waiver in an employment contract did not render the arbitration clause unconscionable, notwithstanding the employee's contention that the waiver violated the National Labor Relations Act (NLRA).[123] The court reasoned that it could not read a provision of congressional intent into the NLRA and was therefore "constrained by *Concepcion*" to enforce all terms of the agreement.[124] In the court's view, *Concepcion* held that "collective arbitration is contrary to the purposes of the FAA and thus the FAA requires not just

120. *Concepcion*, 131 S. Ct. at 1748.

121. *See id.* at 1751; *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010) ("We think that the differences between bilateral and class-action arbitration are far too great for arbitrators to presume . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."). Furthermore, the majority in *Concepcion* was concerned that arbitrators would be unfamiliar with how to resolve these inevitable procedural problems. *Concepcion*, 131 S. Ct. at 1751.

122. *Concepcion*, 131 S. Ct. at 1752. The dissent, however, challenged the idea that bilateral arbitration, rather than class arbitration, is fundamental to the procedure. *Id.* at 1759 (Breyer, J., dissenting) ("The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself. When Congress enacted the [FAA], arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power."). It is also interesting to note that, even though the Supreme Court found that "[a]rbitration is poorly suited to the higher stakes of class litigation," it chose to uphold class action waivers, rather than to hold that any claim susceptible of resolution by class action could not be arbitrated.

123. 879 F. Supp. 2d 1038, 1048–49 (N.D. Cal. 2012) (holding that invalidating the agreement would violate the FAA).

124. *Id.* at 1049.

compelling arbitration, but compelling arbitration *on an individual basis* in the absence of a clear agreement to proceed on a class basis."[125]

Litigators before the Fifth Circuit in *D.R. Horton, Inc. v. National Labor Relations Board* again attempted to challenge the enforceability of a class action waiver in an employee adhesion contract.[126] The challengers there, however, relied primarily upon the guarantees provided by the NLRA, rather than an unconscionability defense.[127] Specifically, they argued that the NLRA expressly protects the right of employees to proceed collectively, such that an arbitration clause with a class action waiver was in violation of the NLRA.[128] Even though the challengers were successful before the National Labor Relations Board,[129] the Fifth Circuit dismissed their arguments.[130] The majority found that the use of class procedures is not a substantive right guaranteed by the NLRA,[131] and any argument that the class waiver was contrary to public policy or unconscionable was invalidated by *Concepcion*.[132] In essence, the

125. *See Jasso*, 879 F. Supp. 2d at 1048–49 (emphasis in original); *see also* Coleman v. Jenny Craig, Inc., No. 11-cv-1301, 2012 WL 3140299, at *3 (S.D. Cal. May 15, 2012) (citing *Jasso*, 879 F. Supp. 2d at 1049) ("Since the *Concepcion* decision, courts in California have uniformly concluded that 'unless the agreement is otherwise unenforceable for unconscionability in its other terms, the inclusion of a class action waiver provides no basis for denying [a] . . . motion [to compel arbitration].'"); LaVoice v. UBS Fin. Servs., Inc., No. 11-Civ-2308(BSJ)(JLC), 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (finding that the court was compelled to interpret *Concepcion* as requiring enforcement of a class action waiver in an employment arbitration agreement, given that the purpose of the FAA is to ensure enforcement "so as to facilitate streamlined proceedings").

126. D.R. Horton, Inc. v. Nat'l Labor Relations Bd., 737 F.3d 344, 348 (5th Cir. 2013).

127. *See* Brief of Amici Curiae Nat'l Emp't Lawyers Assoc. at 17, *D.R. Horton Inc.*, 737 F.3d 344 (No. 12-60031) ("This Court should enforce the Board's determination that D.R. Horton's 'Mutual Arbitration Agreement' violates sections 7 and 8(a)(1) of the NLRA and dismiss the petition for review.").

128. *See id.*; *see also* 29 U.S.C. § 157 (2012) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.").

129. *In re* D.R. Horton, Inc., 357 N.L.R.B. 2277, 2278 (2012).

130. *D.R. Horton, Inc.*, 737 F.3d at 348.

131. *See id.* at 357.

132. *See id.* at 359.

court stated that the NLRA did not preclude arbitration of claims arising under it and that it did not guarantee the ability to arbitrate those claims collectively.[133]

These cases demonstrate that the Supreme Court's approach to class action waivers in consumer and employment contracts has significantly impacted lower courts. Its decision has also impacted everyday citizens. For example, during one of the numerous hearings before Congress, F. Paul Bland, a Senior Attorney at Public Justice, provided an intriguing anecdote. He recalled representing a highly intelligent accountant who discovered, through extensive investigation into his personal account and contract, that American Express routinely lied about its money-back rebate formula.[134] Specifically, the company promised 5% back, but the formula they used essentially ensured customers would receive substantially less.[135] On behalf of the accountant and the hundreds of other customers cheated by the company, Mr. Bland and his colleagues brought a class action.[136] Before the court, the attorneys explained that very few of the company's customers would have the math skills necessary to discover the lie and that, even if those peopled existed and made such a discovery, they would not be able to secure individual legal representation for such small sums.[137] He continued:

> But the point is that American Express is doing this to millions of people, and we have a Federal district judge in New Jersey who says it does not matter if nobody will ever get their money back from being cheated here, that the point of arbitration clauses is supposedly in 1925 Congress loved arbitration so much that it loved it way more than contract law, which does not let you have exculpatory clauses, and loved it way more than consumer protection laws, and that the Arbitration Act just wipes this all away. That is the way that Court reads *Concepcion*.[138]

Essentially, today's courts feel bound to enforce arbitration clauses in adhesion contracts, including those with a class action waiver, simply because enforcement is consistent with the

133. *See D.R. Horton, Inc.*, 737 F.3d at 360 (citations omitted).

134. *See Arbitration: Is it Fair When Forced?*, *supra* note 50, 33–34 (statement of F. Paul Bland, Senior Attorney, Public Justice).

135. *See id.*

136. *See id.* at 33.

137. *See id.* at 33–34.

138. *Id.*

decisions of all the other courts to consider the issue and "more than two decades of pro-arbitration Supreme Court precedent."[139]

B. LEGISLATIVE ATTEMPTS TO ADDRESS THE PROBLEM

Following these judicial challenges to enforcement, Congress became increasingly cognizant of some of the problems associated with compelled arbitration. Consequently, Representatives and Senators proposed numerous bills and scheduled several hearings. Yet, as of today, Congress has been unable to agree on a solution.

After passing the FAA in 1925, the legislature first reconsidered pre-dispute arbitration clauses in 1988, after the Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*.[140] There, the Court found arbitration clauses were enforceable regardless of the anti-waiver provisions of the Securities and Exchange Act (SEA) of 1934.[141] As a result, the House of Representatives considered a bill to reform the federal approach to arbitration.[142] In particular, it proposed adding language to the SEA that would make any pre-dispute clause to arbitrate between the securities broker and customer invalid *unless* that agreement was on a separate page, signed separately, not made a condition for transacting business, and informed the customer in clear language of the consequences of the agreement.[143] Therefore, by the proposed bill's terms, such an

139. Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054–55 (8th Cir. 2013).

140. 482 U.S. 220, 238 (1987).

141. *See id.* at 238.

142. H.R. 4960, 100th Cong. § 7 (1988). The bill was referred to as "A Bill to Amend the Securities Exchange Act of 1934 to Provide for the Fair, Equitable, and Voluntary Arbitration of Customer-Broker Disputes, and for Other Purposes."

143. *Id.* Section 7 of the bill read:

> (7)(A) No broker, dealer, or municipal securities dealer shall enter into any agreement with a customer to arbitrate future disputes that may arise between the broker, dealer, or municipal securities dealer and the customer unless such agreement is entered into in accordance with procedures prescribed by the Commission to afford the customer the opportunity to make an informed and voluntary decision to enter into such agreement. (B) The Commission shall, by rules, prescribe procedures to carry out . . . (A) . . . Such rules shall, at a minimum, require the following: (i) Any agreement to arbitrate future disputes shall be on a separate page and shall be separately signed. (ii) Any agreement to arbitrate future disputes shall not be made a condition for entry into a customer account agreement, or be used as a basis for any fee differential, or for granting, denying, conditioning, or limiting access to any privilege, benefit, or service to the customer. (iii) Any agreement to arbitrate future disputes shall clearly and prominently disclose to the customer, in a form prescribed by the Commission, such information concerning the consequences of entering into the agreement as the Commission considers necessary or appropriate to the exercise of an

agreement would be valid only if it was not part of an adhesion contract. Unfortunately, the legislation ultimately died in committee.[144]

Nevertheless, more than a decade later in 2000, Congress again considered the wisdom of upholding mandatory arbitration clauses in standard form contracts. This time, the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2000 proposed to allow both parties to an arbitration clause in a motor vehicle franchise contract, the dealer and the manufacturer, the option to reject arbitration after a dispute arose.[145] The bill was originally passed by the House and then referred to the Senate for review.[146]

A Senate subcommittee simultaneously considered another bill about arbitration that would have amended numerous federal statutes by adding language that would provide for federal jurisdiction, unless the parties to a dispute voluntarily elected to arbitrate the claim after the controversy had arisen.[147] In other

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informed and voluntary decision by the customer to enter into such an agreement. (C) Any such agreement that has not been entered into in accordance with procedures prescribed by the Commission pursuant to this paragraph shall be void.

144. *See H.R. 4960 (100th): Securities Arbitration Reform Act of 1988,* GOVTRACK, https://www.govtrack.us/congress/bills/100/hr4960 (last visited Sept. 09, 2016). It is interesting to consider one remark made during the subcommittee hearing. Stephen Brobeck, the executive director of the Consumer Federation of America, who testified in support of the bill, rhetorically asked, "How would the public react to proposals that when consumers purchase cars or appliances they give up the right to sue the manufacturer or seller? Not favorable, I can assure you." *Id.* at 15.

145. S. 1020, 106th Cong. § 2(a) (1st Sess. 1999) *available at* https://www.congress.gov/bill/106th-congress/senate-bill/1020/text ("Whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to the contract, each party to the contract shall have the option, after the controversy arises and before both parties commence an arbitration proceeding, to reject arbitration as the means of settling the controversy. Any such rejection shall be in writing.").

146. H.R. 534, 106th Cong. § 2(a) (1st Sess. 1999) *available at* https://www.congress.gov/106/bills/hr534/BILLS-106hr534ih.pdf ("[T]he term 'sales and service contract' means a contract under which any person (including any manufacturer, importer or distributor) sells any product to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service such product. (b) Whenever a sales and service contract provides for the use of arbitration to resolve a controversy arising out of or relating to the contract, each party to the contract shall have the option, after the controversy arises and before both parties commence an arbitration proceeding, to reject arbitration as the means of settling the controversy. Any such rejection shall be in writing.").

147. Specifically, the Senate Subcommittee on Administrative Oversight and the courts considered amending the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Revised Statutes, the Fair Labor Standards Act, and the Family and Medical Leave Act. *See* S. 121, 106th Cong.

words, the bill would invalidate pre-dispute clauses to arbitrate in certain situations. Raising a familiar point, some members of Congress recognized that the advantages of arbitration could, and perhaps should, be invoked just as easily through an arbitration agreement entered into *after* a dispute arises.[148] Nonetheless, both of these bills died in committee.[149]

Critics of the broad 2000 bills maintained that such amendments would be the first to the FAA, would violate the principles of privity of contract and party autonomy, and would discourage arbitration.[150] The language and effect of the proposals was simply too broad to be adopted by a majority of Congress.

In June 2007, the House again held a hearing to discuss the wisdom of enforcing mandatory arbitration clauses in adhesion contracts.[151] Later that year, members of Congress proposed the

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§ 2 (1st Sess. 1999) *available at* https://www.congress.gov/106/bills/s121/BILLS-106s121is.pdf ("Notwithstanding any Federal law . . . that would otherwise modify any of the powers and procedures expressly applicable to a right or claim arising under this title, such powers and procedures shall be the exclusive powers and procedures applicable to such right or such claim unless after such right or such claim arises the claimant voluntarily enters into an agreement to enforce such right or resolve such claim through arbitration or another procedure.").

148. *Hearing on S. 1020*, *supra* note 1, at 99 (statement of Sen. Chuck Grassley, Member, S. Comm. on the Judiciary) ("I hope that we can all kind of agree as a common-sense approach that arbitration is a very cost-effective way to resolve disputes. Why would providing a mechanism that allows each party to choose this clearly more efficient method after a dispute arises weaken arbitration? And if the advantages of arbitrating disputes between auto dealers and manufacturers over litigation are obvious and numerous, shouldn't these advantages be just as obvious after the dispute arises as before the dispute?").

149. *See S. 121 (106th): Civil Rights Procedures Protection Act of* 1999, GOVTRACK, https://www.govtrack.us/congress/bills/106/s1020 (last visited Sept. 9, 2016); *see also S. 1020 (106th) Motor Vehicle Franchise Contract Arbitration Fairness Act of 1999*, GOVTRACK, https://www.govtrack.us/congress/bills/106/s121 (last visited Sept. 9, 2016).

150. *See Fairness and Voluntary Arbitration Act: Hearing on H.R. 534 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 46, 59 (2000) (statement of Florence Peterson, General Counsel, Arbitration Association of America) ("H.R 534 would be the first amendment to the FAA, and it would restrict the use of arbitration as a dispute resolution mechanism for this business group. . . . What I am saying is a pre-dispute clause is the only way to get people to arbitrate."); *Id.* at 54 (statement of James Wootton, President, U.S. Chamber Institute for Legal Reform) ("First, and most important, H.R. 534 runs counter to the basic principle that parties' private contractual agreements should be enforceable . . . .").

151. *See generally Mandatory Binding Arbitration Agreements*, *supra* note 1.

Arbitration Fairness Act of 2007.[152] The bill represented the most comprehensive reform proposal to date. It would have amended the FAA by adding that "[n]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of—(1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power."[153]

Perhaps more striking, however, was the opening language of the bill. In seven succinct clauses, the drafters explained that the FAA was intended to apply to disputes between commercial entities of similar bargaining power, judicial interpretation of the FAA fundamentally changed its meaning, and the result was an unfair process marked by the stripping of substantive rights.[154] The drafters specifically recognized that consumers and

152. *See* H.R. 3010, 110th Cong. § 1 (1st Sess. 2007) *available at* https://www.congress.gov/bill/110th-congress/house-bill/3010/text?q=%7B%22search%22%3A%5B%22H.R.+3010%%22%5D%7D&resultIndex=1.

153. H.R. 3010, 110th Cong. § 4 (1st Sess. 2007).

154. *Id.* § 2 ("The Congress finds the following: (1) the [FAA] was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power. (2) A series of [] Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration. (3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. . . . They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, operating a bank account, getting a credit card, and the like. . . . (4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business. (5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules. (6) Mandatory arbitration is a poor system for protesting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features. (7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.").

employees generally do not "realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them . . . . Often times, they are not even aware that they have given up their rights."[155]

The bill was referred to the Senate, where it was generally criticized as overly broad. For example, Senator Sam Brownback noted that the "bill does not distinguish between, on the one hand, the so-called fine print arbitration agreements that supporters attack as unfair and, on the other hand, fully negotiated contracts between sophisticated parties."[156] Nonetheless, after a hearing that lasted only one hour and thirty-eight minutes,[157] this bill also died in committee. [158]

Two years later, in 2009, following the economic crisis in the U.S., the House again conducted hearings on the issue of mandatory arbitration.[159] At this point, the 2007 bill was reintroduced by the House, but again died in committee.[160]

Another two years later, in 2011, the 2007 bill was again reintroduced by the House,[161] while an identical version was introduced in the Senate.[162] The Senate again conducted hearings.[163] Much of the discussion during these hearings centered around the fact that certain proponents of arbitration believed that it is so beneficial to individual parties and society, that it is irrelevant whether arbitration is involuntarily imposed on a weaker party.[164] Again, however, the bills died in

155. H.R. 3010, 110th Cong. § 2(3) (2007).

156. *Hearing on S. 1782*, *supra note* 4, at 3 (2007) (statement of Sen. Sam Brownback, Member, S. Comm. on the Judiciary).

157. *See id.* at 1.

158. *See H.R. 3010 (110th): Arbitration Fairness Act of* 2007, GOVTRACK, https://www.govtrack.us/congress/bills/110/hr3010 (last visited Sept. 9, 2016).

159. *See generally FAA Hearing*, *supra* note 17; *Mandatory Binding Arbitration: Is It Fair and Voluntary?*, *supra* note 97.

160. *H.R. 1020 (111th): Arbitration Fairness Act of* 2009, GOVTRACK, https://www.govtrack.us/congress/bills/111/hr1020 (last visited Sept. 9, 2016).

161. *H.R. 1873 (112th): Arbitration Fairness Act of 2011*, GOVTRACK, https://www.govtrack.us/congress/bills/112/hr1873 (last visited Sept. 9, 2016).

162. *S. 987 (112th) Arbitration Fairness Act of 2011*, GOVTRACK, https://www.govtrack.us/congress/bills/112/s987 (last visited Sept. 9, 2016).

163. *See generally Arbitration: Is it Fair When Forced?*, *supra* note 50.

164. *See id*. at 20–21 (conversation between Sen. Al Franken, Chairman, S. Comm. on the Judiciary, and Sen. John Cornyn, Member, S. Comm. on the Judiciary) ("If you have a second before you leave, I just would like to bet you a steak dinner that

committee.[165]

In 2013, the House reintroduced the 2007 bill[166] and the Senate reintroduced its identical version.[167] These bills were substantially similar to their predecessors, proposing to invalidate mandatory arbitration clauses involved in employment, consumer, antitrust, and civil rights disputes.[168] It did, however, explicitly allow for the enforceability of an arbitration clause negotiated by a labor organization.[169] Ultimately, Congress failed to enact this bill. Two years later, the identical Arbitration Fairness Act of 2015 was introduced in the Senate, where it was referred to a congressional committee and apparently went nowhere.[170]

Thus, although multiple bills were introduced (and reintroduced), hearing after hearing was conducted, and some members of Congress appeared open to new legislation, a consensus remained out of reach.

C. SOLUTIONS PROPOSED BY ACADEMICS

Over the years, numerous solutions have been suggested by academic scholars, but each poses its own problems.

For example, Stephen Landsman suggested demanding that arbitration providers "assemble a more diverse group of neutrals."[171] Arguably, this would make the process fairer, but it would not address the core problem of voluntariness.

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you cannot find before 4 o'clock the mandatory arbitration clause in here." He then attempted to hand his colleague the terms and conditions for a checking and savings account. Senator Cornyn responded, "Well, my point is, Mr. Chairman, that even though consumers may not know there is an arbitration provision in the contracts, there is a positive societal good for having an expeditious and inexpensive way to have these small claims resolved without litigation. . . . We need to provide an opportunity for people to have a forum that is fair and involves efficient resolution of disputes appropriate to the nature of the dispute and subject to the existing law. That is my position.").

165. *See supra* notes 161, 162.

166. *H.R. 1844 (113th) Arbitration Fairness Act of 2013*, GOVTRACK, https://www.govtrack.us/congress/bills/113/hr1844 (last visited Sept. 9, 2016).

167. *S. 878 (113th) Arbitration Fairness Act of 2013*, GOVTRACK, https://www.govtrack.us/congress/bills/113/s878 (last visited Sept. 9, 2016).

168. *See* S. 878, 113th Cong. § 3(a) (1st Sess. 2013) *available at* https://www.govtrack.us/congress/bills/113/s878/text.

169. *See id.*

170. *See S. 1133 (114th) Arbitration Fairness Act of 2015*, GOVTRACK, https://www.govtrack.us/congress/bills/114/s1133 (last visited Sept. 9, 2016).

171. Landsman, *supra* note 10, at 1626.

Additionally, such a solution would be within the sole discretion of arbitration providers, who have little incentive, other than the long-term interests associated with ADR discussed earlier, to make any changes.

Landsman also recommended making arbitration more transparent by providing greater access to its rules and to the process itself.[172] However, most arbitration providers already publish their rules online[173] and any variation in those rules adopted by the parties would have to be expressly written in the arbitration agreement. Thus, consumers and employees arguably have complete access to the rules. Moreover, providing greater access to the process itself would defeat one of the primary advantages of arbitration: secrecy. Parties to an arbitration may not want the details of their dispute to be publicly available, let alone any of the trade secrets, confidences, or other details that may inevitably be disclosed during a suit.

Landsman concluded by suggesting any solution may require "a shift in attitude . . . [including] judicial willingness to strike down unconscionable arbitration requirements and a society-wide willingness to put pressure on drafters to behave in a more reasonable manner."[174] Unfortunately, the judiciary is either unwilling or unable to reverse its own precedent and, at this point, the general public knows too little about the topic to demand that corporations and arbitration providers behave responsibly.

Stephen Brobeck, the executive director of the Consumer Federation of America, recommended legislation that would make mandatory arbitration contracts illegal, thereby guaranteeing access to the courts. This legislation would incentivize arbitration providers to improve their systems to the point where they may be considered by consumers and employees to be "an attractive alternative to litigation."[175] This Comment, however, does not suggest that Congress pass legislation entirely prohibiting the use and enforcement of mandatory arbitration clauses in consumer and employee contracts. First, such a law is impractical. It would not be passed by the current pro-business

172. Landsman, *supra* note 10, at 1629.

173. For example, the ICC Rules and AAA rules are publicly available. *See supra* notes 16, 25.

174. Landsman, *supra* note 10, at 1629.

175. *Hearing on H.R. 4960* at 15 (statement of Stephen Brobeck, Executive Director, Consumer Federation of America).

legislature, as evidenced by their unwillingness to pass narrower legislation. Second, a complete ban would entirely undermine the rights of parties to voluntarily choose arbitration as an alternative to the judicial process.

Arbitration, like judicial litigation, is not inherently bad and may actually provide tangible advantages to some consumers and employees. The problem, which is narrower than Brobeck's proposal suggests, is that arbitration is based on the concept of party autonomy, presupposing the ability of the parties to knowingly and voluntarily choose arbitration. Adhesion contracts *generally* do not provide this opportunity. If, however, a consumer or employee *knowingly* and *voluntarily* signs a contract with a pre-dispute arbitration clause, he or she should be bound by that clause. Thus, any legislative solution, instead of prohibiting mandatory pre-dispute arbitration agreements, should focus on those individuals who do not knowingly and voluntarily waive their right of access to the courts.

D. POTENTIAL SOLUTIONS THAT REQUIRE FURTHER RESEARCH

There is more than one way to address the problems outlined in this Comment. While those solutions proposed in the following section may address these problems most directly, alternatives are available and should be researched further.

One such alternative is to amend the FAA to clarify that Congress did not intend to preempt state legislation on the issue.[176] Such legislation may be appealing to pro-business conservatives who have a soft spot for states' rights. In that way, it may be the most likely solution to be passed by the current Congress. The obvious problem is that it would allow for laws that vary by state, such that companies conducting business throughout the country would have to draft numerous contracts, while consumers located in different jurisdictions would be given

176. *See Mandatory Binding Arbitration Agreements*, *supra* note 1, at 122 (statement of Rep. William Delahunt, Member, H. Subcomm. on Commercial and Admin. Law) ("I think that what we are hearing here is an encroachment on State contract law, consumer protection laws, that I dare say Congress has a responsibility to review, to examine, to see whether it is time to review the Federal Arbitration Act itself, and start to limit its encroachment on State policy."); *see also* FAA Hearing, *supra* note 17, at 164 (statement of Michael D. Donovan, Attorney, National Association of Consumer Advocates) ("What is wrong is for the Federal Arbitration Act to basically nationalize 50 States' laws and preempt those laws when it comes to contractual doctrines like unconscionability.").

different choices and rights.[177] For these reasons, better solutions are available, but such a law could open the door to reform.

Another tempting solution is for Congress to pass legislation prohibiting class action waivers in mandatory arbitration agreements in adhesion contracts.[178] Following *Concepcion*, the focus among academics and litigators shifted to class action provisions, perhaps because they seem particularly egregious. This solution is narrowly focused and, therefore, more likely to be passed by a divided legislature, but it only addresses one of the problems associated with this issue and, in no way, addresses the voluntariness issue. For these reasons, again, this Comment does not directly address this possibility but instead recognizes that such a law would be a step in the right direction.

IV. (PARTIAL) SOLUTIONS THAT CONGRESS MIGHT BE WILLING TO ADOPT

> *The answer to this dilemma is actually quite simple. All we have to do is make arbitration voluntary.*[179]

Voluntary arbitration must necessarily result from federal legislation.[180] The judiciary has failed to adequately provide for

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177. *FAA Hearing*, *supra* note 17, at 165 (statement of Michael D. Donovan, Attorney, National Association of Consumer Advocates) ("What needs to be prevented is this patchwork of arbitration decisions that you are now seeing, where some States are saying that you cannot have arbitration for credit card contracts and where other States are saying that you can, so that the person in Texas gets no justice and the person in California gets all the justice."). Another problem is that parties are permitted to include forum selection clauses in their contracts. Thus, if Delaware law were to enforce mandatory pre-dispute arbitration agreements, then parties contracting in Arizona could simply adopt Delaware law as their chosen forum.

178. *See Mandatory Binding Arbitration Agreements*, *supra* note 1, at 143 (statement of Stephen J. Ware, Law Professor, University of Kansas School of Law) ("And so the question of whether consumers should be allowed to sign away their right to class action is really a separate question from whether that class action is going to proceed in litigation or arbitration.").

179. *Hearing on S. 1020, supra* note 1, at 78 (statement of Lewis Maltby, President, National Workrights Institute, Director, ACLU National Task Force on Civil Liberties in the Workplace).

180. Landsman, *supra* note 10, at 1601 (citations omitted) (taking the position that a judicial solution seems impossible, if, after considering the present status it receives in the courts, one takes into account that the increased use of arbitration and other forms of alternative dispute resolution are the result of promotion by interested judges and alternative dispute resolution providers). *See* Donovan & Searles, *supra* note 30, at 270 (recognizing that the "national policy favoring arbitration agreements . . . giving them a special and protected status in the law of contract" further suggests that a judicial solution is improbable).

the public interest,[181] while arbitration providers continue to benefit from increasing the number of parties bound to use their services. Plus, any state legislation on the issue is likely to be preempted.[182] Thus, the only possible solution is federal legislation.

The primary obstacle to any proposed congressional solution, however, is Congress itself. As was described above, Congress repeatedly attempted, and failed, to pass a law addressing these problems. Future legislation will have to balance the interests associated with voluntary arbitration against the belief that arbitration can be beneficial to consumers and employees. In essence, new legislation must be narrow and effective.

A. PROHIBITING ENFORCEMENT OF ARBITRATION PROVISIONS IN CONSUMER AND EMPLOYEE ADHESION CONTRACTS

The most obvious solution is to prohibit mandatory pre-dispute arbitration clauses in *consumer and employee adhesion* contracts. A bill prohibiting arbitration agreements in adhesion contracts would require adding to the FAA a clause providing "(b) No mandatory pre-dispute agreement to arbitrate shall be valid or enforceable if it is included in an employment or consumer adhesion contract. For purposes of this section, an adhesion contract is one imposed by a party with greater bargaining power

181. It is also worth mentioning that any judicial solution runs the risk of requiring review on a case-by-case basis, which would impose substantial financial burdens on both parties. *See Mandatory Binding Arbitration: Is It Fair and Voluntary?*, *supra* note 97 at 150 (statement of Cliff Palefsky, National Employment Lawyers Association) ("This notion that a consumer has to run to court and litigate unconscionability, which would cost you $20,000, and if you win, it goes on appeal for 2 years, it is going to cost a consumer $50,000 in 2 years to challenge an unfair arbitration clause in court . . . . That serves nobody's interest. Make it voluntary and the marketplace will ensure fairness.").

182. *See Mandatory Binding Arbitration Agreements*, *supra* note 1, at 121 (statement of F. Paul Bland, Senior Attorney, Public Justice) ("The Supreme Court has held a number of times that the Federal Arbitration Act strikes down any state law that would limit the enforcement of arbitration clauses."); s*ee also id.* at 123 (statement of David S. Schwartz, Law Professor, University of Wisconsin Law School) ("The courts have done a terrible job protecting State laws from preemption by the Federal Arbitration Act, a dismal job. So bad, in fact, that Justice O'Connor said, 'I am throwing up my hands.' She wrote an opinion that Congress has to correct a mistake we have made. She said that in a 1995 case. Things have not gotten any better."); *Arbitration: Is it Fair When Forced?*, *supra* note 50, at 7 (statement of the Honorable Lori Swanson, Attorney General of Minnesota) ("Only the U.S. Congress, because of court rulings, has authority to make meaningful reform to this area of the law . . . .").

and prohibits or substantially limits negotiation of the terms."

The company would therefore be required to include pre-dispute arbitration clauses in a separate contract that would not have to be agreed to in order to allow the consumer or employee to enter into the underlying, primary contract. If arbitration really does save the business money, and is better for the consumer, the company can spend a few minutes explaining the benefits of arbitration to the consumer or employee in an attempt to get the latter to sign the separate agreement.

Importantly, this legislative solution would not limit a party's ability to enter into a *pre-dispute* agreement to arbitrate, as long as that agreement was not contained in an adhesion contract. In other words, parties would still be allowed to bind themselves to arbitration before a dispute arose. Thus, this solution addresses the contention that parties simply do not elect to arbitrate after a dispute arises because it will always be in the interest of one party to choose judicial settlement of the dispute after the dispute has arisen.[183] This solution, however, is narrow enough to allow for the enforcement of all pre-dispute arbitration agreements that are not part of an adhesion contract.

Furthermore, prohibiting mandatory pre-dispute arbitration clauses in adhesion contracts would not prevent the drafter from including *non-mandatory* arbitration clauses in such contracts. The company could still include a provision outlining the arbitral process it would suggest or elect to use if a dispute were to arise. In this way, this solution would allow companies to address the criticism that nobody chooses arbitration post-dispute. If one party has already promised to use arbitration, and that party honestly believes the alternative forum is better for both parties, that party would have the opportunity to convince the consumer

183. *See Mandatory Binding Arbitration: Is It Fair and Voluntary?*, *supra* note 97 at 142 (statement of Stephen J. Ware, Law Professor, University of Kansas School of Law) ("[T]he fact of the matter is after a dispute arises the business can consult its lawyer and ask itself which forum would be more favorable to it for that particular dispute, arbitration and litigation, and the business can't be expected to act against its self-interest at that point and agree post-dispute to arbitration, when that would be the more favorable process for the consumer. Similarly a consumer can consult a lawyer and will choose the process that is more favorable to it post-dispute. So we don't see many post-dispute arbitration agreements. It is very rare. And this is through no fault of arbitration, but just the fact that litigation is the default. That is what happens when the parties don't both agree to arbitrate, and it is very rare that they are going to both see arbitration after the fact as more favorable to them.").

or employee of the benefits of arbitration.[184]

This solution is an alternative to the relatively common suggestion that parties be allowed to opt-out of arbitration clauses. This alternative version of an opt-out solution would address the same voluntariness concerns by allowing parties to avoid arbitration if they later discover that they did not fully understand the implications of agreeing to ADR. The problem with the traditional opt-out method is that the opt-out provision is in the fine print of a contract, is written in confusing language, and often has a rigid time limit.[185] Thus, the opt-out clause poses many of the same problems that the arbitration clause itself does. It is for these reasons that, even when an opt-out provision is available, "[n]o one opts out. The[] opt-out rate is like 1 percent or less."[186] Thus, legislation simply prohibiting enforcement of an arbitration clause in an adhesion contract, though broader in its effect, is more likely to adequately address the underlying concerns.

B. REQUIRING ARBITRATION CLAUSES IN CONSUMER AND EMPLOYEE ADHESION CONTRACTS TO PROVIDE THE EMPLOYEE OR CONSUMER THE OPPORTUNITY TO DETERMINE THE PROCESS

Alternatively, Congress could propose a bill that would require any mandatory pre-dispute arbitration clause to include a provision explicitly allowing the consumer or employee to choose the arbitration provider and accompanying processes. A bill to this effect would require amending the FAA by adding:

> (b) No mandatory pre-dispute agreement to arbitrate shall be valid or enforceable if it is included in an employment or consumer adhesion contract, unless the employee or

184. This solution is distinguishable from the Motor Vehicle Franchise Contract Arbitration Fairness bill, which would have allowed both parties the opportunity to reject arbitration after a dispute arose. *See supra* note 145. Rather, if the parties have voluntarily agreed to arbitrate before the dispute, they would be bound by that agreement. In that way, the parties are able to agree to a dispute resolution process before the dispute arises—while heads are clear and the parties are able to negotiate for the process that will most benefit both parties.

185. *FAA Hearing*, *supra* note 17, at 166 (statement of Michael D. Donovan, Attorney, National Association of Consumer Advocates) ("Now, what they are trying to do is to provide . . . a fine print opt-out. So, if the consumer receives this 25-page credit card agreement and does not opt out within 20 days of receiving it, that will be deemed consent to participate in arbitration. I mean, how is silly is that?").

186. *Mandatory Binding Arbitration Agreements*, *supra* note 1, at 110 (statement of F. Paul Bland, Senior Attorney, Public Justice).

> consumer is given a reasonable opportunity to select the arbitration provider and the processes to be used by that provider. For purposes of this section, an adhesion contract is one imposed by a party with greater bargaining power and that prohibits or substantially limits negotiation of the terms.

In this scenario, the weaker party would be able to do some forum shopping, presumably looking for the ADR provider that is the most efficient, cost-effective, and fair. It would also force providers to become more attractive to consumers. Essentially, consumer choice, competition, and market forces would ultimately work to create a system that is fairer.

Additionally, this solution would allow companies to continue to use, and courts to continue to enforce, mandatory pre-dispute arbitration agreements in consumer and employee adhesion contracts. This solution would not address the underlying voluntariness concern associated with mandatory arbitration clauses in adhesion contracts, but it would help to level the playing field between the company and the consumer or employee. Allowing the weaker party to have control over the provider and process to be used would prevent abuses like those discussed earlier. As Mr. Palefsky explained, "[I]f consumers had the ability to choose the arbitration provider, it would do wonders to improving the fairness of the system and reducing the cost."[187]

V. CONCLUSION

> *[A]rbitration is here to stay. It is real. It is the wave of the future. And it could be extremely beneficial. But it is only going to be beneficial if it is fair, and it is only going to be fair if it is voluntary*.[188]

Because arbitration without voluntary consent often results in an unfair process, mandatory pre-dispute arbitration clauses in

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187. *Mandatory Binding Arbitration: Is It Fair and Voluntary?*, *supra* note 97, at 152 (statement of Cliff Palefsky, National Employment Lawyers Association) ("It is absolutely inappropriate to allow one party to contract in advance, not only with the consumer to mandate the use of a single provider, but they work out deals with the providers themselves to get special arrangements in the administration of their case loads. It is not uncommon for these major arbitration providers to have case managers assigned to a particular company no matter where the arbitration arises. One person in that organization is charged with keeping the customer satisfied. It is an invitation to abuse.").

188. *Hearing on S. 1020*, *supra* note 1, at 78 (statement of Lewis Maltby, President, National Workrights Institute, Director, ACLU National Task Force on Civil Liberties in the Workplace).

consumer and employee adhesion contracts are inherently inequitable. Yet, the Supreme Court has (wrongly) interpreted the FAA in a way that effectively requires lower courts to enforce these clauses in all circumstances. Congress has considered numerous potential reforms, but has thus far been unable to agree on a solution. This Comment recommends introducing legislation that either (1) invalidates mandatory pre-dispute arbitration clauses in consumer and employee adhesion contracts altogether, or (2) requires any such clause to include a provision allowing the consumer or employee to choose the arbitration provider and processes.

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