COMMENT

REDRESSING THE ARBITRATION PROCESS: AN ALTERNATIVE TO THE ARBITRATION FAIRNESS ACT OF 2009

INTRODUCTION

Over the past twenty-five years, the proliferation of arbitration agreements used by corporations has resulted in a system of dispute resolution that disadvantages employee and consumer plaintiffs. In response to developments both in the law of arbitration and in common business practices, Congress is considering the Arbitration Fairness Act of 2009 ("AFA"). If passed, the AFA will void all predispute arbitration agreements in employment, consumer, franchise, and civil-rights actions.[1] Rather than nullify countless private agreements and virtually eliminate arbitration as an option in these disputes, Congress could ameliorate problems with the current arbitration system by adopting an alternative, more measured approach to redressing the arbitration process in employment and consumer cases.[2]

In 1925, Congress passed the United States Arbitration Act, now known as the Federal Arbitration Act ("FAA"),[3] to address courts' "hostility" toward mandatory, binding arbitration.[4] The purpose of the Act was to make agreements for arbitration valid and enforceable,[5] as they were unenforceable at common law.[6] At the

1. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009).

2. Although the AFA addresses predispute arbitration agreements in the employment, consumer, franchise, and civil-rights actions, this Comment's scope and proposed solution address only employment and consumer disputes. Franchise and civil-rights disputes involve dynamics sufficiently different that they are beyond the scope of this Comment.

3. Federal Arbitration Act, ch. 213, Pub. L. No. 401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2006)) (originally known as the United States Arbitration Act).

4. Rebecca Hanner White, *Arbitration and the Administrative State*, 38 WAKE FOREST L. REV. 1283, 1290 (2003) ("Congress enacted the FAA in 1925 as a 'response to hostility of American courts to the enforcement of arbitration agreements.'" (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001))).

5. H.R. REP. NO. 68-96, at 1 (1924) ("The purpose of this bill is to make valid and enforcible [sic] agreements for arbitration . . . .").

time, the FAA received very strong support from "commercial and legal bodies."[7] In fact, no one who testified at the congressional hearing in 1924 opposed the bill.[8] The FAA has since led the Supreme Court to proclaim a "national policy favoring arbitration."[9]

Over eighty years later, the conversation has changed. As a result of judicial expansion of the FAA since the 1980s,[10] "[a]rbitration agreements are now ubiquitous in American society"[11] and continue to proliferate.[12] Critics point to substantial problems with the current arbitration system.[13] Problems originate when corporate employers or manufacturers insert arbitration agreements into contracts, and the individual employee or consumer has little or no influence on the terms.[14] In these agreements, often referred to

6. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 (1985) (noting "the judiciary's longstanding refusal to enforce agreements to arbitrate").

7. *See* H.R. REP. NO. 68-96, at 2 (referencing the "strong support" for the FAA).

8. *See id.* (referencing "the entire lack of opposition before the committee"); *see also Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. (1924) (statements of all people testifying at the hearing in support of the FAA, originally known as the United States Arbitration Act).

9. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); *accord* Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 176 (2002).

10. *See* Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983–1995: A Sea Change*, 31 WAKE FOREST L. REV. 1, 1–2 (1996) ("One of the most striking recent developments in the civil justice arena is the emergence of commercial arbitration as a viable alternative to traditional litigation. In substantial part, that phenomenon is the result of a series of opinions by the United States Supreme Court arising under the [FAA] beginning in 1983 and continuing through the Court's 1994–95 term. The thirteen opinions represented in this body of case law signal a broad embrace of the commercial arbitration process by the Supreme Court and a concomitant rejection of several of the legal doctrines that have traditionally limited its scope and relative importance." (footnote call numbers omitted)); *infra* note 67.

11. Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 321 (2007).

12. Kenneth A. Deville, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims*, 28 J. LEGAL MED. 333, 343 (2007) ("A series of United States Supreme Court rulings would dramatically limit the reach of state court jurisdiction over private arbitration agreements . . . . These judicial changes sparked the explosive proliferation of pre-dispute arbitration agreements in a virtually unlimited number of settings.").

13. *See infra* Part II.A. (discussing criticism of the current arbitration system).

14. *See* Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225, 225 (1998) (arguing that the Supreme Court, in its interpretation of the FAA, has "disregarded principles of contract and conflicts of law developed to protect weaker parties from predation at the hands of stronger parties positioned to dictate the terms of standard contracts").

as contracts of adhesion,[15] inequalities in bargaining power regularly prohibit any meaningful choice on the part of employees or consumers,[16] especially when such agreements are adopted by all corporations in a particular market. Not only are individuals unable to influence or avoid agreeing to these arbitration clauses, most consumers and employees are unaware that they have waived the right to bring a future claim in a court of law.[17]

The proliferation of arbitration agreements has generated new problems in the arbitration process. Corporate defendants benefit from being both "repeat players" and "repeat payers."[18] First, as "repeat players," the corporate defendant will likely engage in many arbitrations, whereas the consumer or employee plaintiff will likely only arbitrate his or her single dispute. Thus, corporate defendants are more familiar with the arbitration rules and procedures.[19] Second, as a "repeat payer," the corporation's ability to supply future business to an arbitrator can influence an arbitrator to lean toward decisions much more favorable to the corporation.[20] This influence

15. 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, 36 (1997) ("The Supreme Court has created a monster. With the Court's enthusiastic approval, pre-dispute arbitration clauses—agreements to submit *future* disputes to binding arbitration—have increasingly found their way into contracts of adhesion.").

16. John F. Griffee, *Against the Grain: The Arkansas Supreme Court Resists the Judicial Movement to Enforce Mandatory-Arbitration Provisions in Employment Contracts in* Arkansas Diagnostic Center, P.A. v. Tahiri, 62 ARK. L. REV. 381, 382 (2009) ("Further, because of the great inequality in bargaining power, critics argue that arbitration provisions are essentially a condition for employment because they are offered on a take-it-or-leave-it basis.").

17. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(3) (2009); S. 931, 111th Cong. § 2(3).

18. *See, e.g.*, David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1309–12 (2009); Joshua T. Mandelbaum, Note, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075, 1102 (2009). Although most authors conflate the use of "repeat-player" and "repeat-payer" biases, this Comment argues that the two are conceptually distinct. Whereas "repeat player" refers to the advantage of experience with arbitration procedure, "repeat payer" connotes the financial incentive the arbitrator has to ensure that the corporate defendant is satisfied by the award to secure the defendant's business in the future. Mandelbaum's note refers to the "repeat-payer" bias as the "repeat-provider" bias, but he accurately characterizes the distinction between the procedural advantage and the financial incentive. *See id.* at 1102. This Comment will use the terms "repeat player" and "repeat payer."

19. *See Mandatory Binding Arbitration: Is it Fair and Voluntary?: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 29–30 (2009), *available at* http://judiciary.house.gov/hearings/printers/111th/111-57_52199.PDF [hereinafter *Hearing: Mandatory Binding Arbitration*] (statement of Stuart T. Rossman, Director of Litigation, National Consumer Law Center, Inc.).

20. *See id.*

"sets up conditions for a 'race to the bottom,'" where arbitrators compete against one another to reach the "most corporation-friendly" result.[21] Furthermore, some evidence reveals that arbitrators who give plaintiffs large awards are "blacklisted" from future arbitrations with that or any other corporation.[22]

The overwhelming power of the corporation in writing and enforcing arbitration agreements has led to debate concerning the value versus the validity of arbitration as an alternative to litigation. Supporters argue that arbitration provides value because it saves time and expenses associated with "full-blown litigation."[23] Critics counter that the process has no validity if the arbitration agreement is procured through a contract of adhesion with fundamentally unfair results.[24]

In order to remedy these problems, supporters of arbitration reform have proposed the AFA.[25] If passed, the AFA will mandate, "No predispute arbitration agreement shall be valid" if it requires the arbitration of an employment, consumer, franchise, or civil-rights dispute.[26] The bill currently has 111 sponsors in the House[27]

21. *Id.* at 2 ("There are a number of private arbitration companies who compete to be selected by corporations in their standard form contracts with consumers and employees. Arbitration companies perceived as less favorable to corporations will not receive any business. This sets up conditions for a 'race to the bottom' among arbitration companies to be the most corporation-friendly. The marketing materials of arbitration companies—touting the advantages to businesses of using arbitration—bear this out.").

22. *See* Michael A. Satz, *Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform*, 44 IDAHO L. REV. 19, 41 (2007) ("[T]here is some evidence that an arbitration provider will blacklist an arbitrator who renders a decision unfavorable to the credit card company."); *see also Hearing: Mandatory Binding Arbitration*, *supra* note 19, at 2 ("At the level of individual arbitrators, corporations can 'blackball' arbitrators who rule against them. This is possible because the corporations are repeat players, with access to the previous decisions of particular arbitrators.").

23. *See, e.g.*, Schwartz, *supra* note 18, at 1258–59 (assessing the merits of mandatory arbitration).

24. *See, e.g.*, Carrington, *supra* note 14, at 225–26 (discussing "contracts of adhesion" between "predators" and "vulnerable parties"); Schwartz, *supra* note 18, at 1255 n.17 ("Critics of mandatory arbitration have argued vigorously that forcing cases out of the courts and into a private dispute resolution system chosen by the corporate defendant is procedurally unfair, nonconsensual, wholly at odds with the regulation of the contracting relationships, and probably unconstitutional.").

25. Arbitration Fairness Act, H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009).

26. S. 931 § 3; *see also* H.R. 1020 § 4 ("No 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.").

27. THOMAS (Library of Congress), H.R. 1020 Cosponsors, http://www.thomas.gov/cgi-bin/bdquery/z?d111:HR01020:@@@P (last visited Apr. 3, 2010).

and 11 in the Senate.[28] The Senate version of the bill is currently in the Senate Committee on the Judiciary.[29] The House version is currently in the House Subcommittee on Commercial and Administrative Law.[30]

This Comment seeks to reframe the debate regarding arbitration reform. Arbitration reform could address two variables: (1) the enforceability of the agreement to arbitrate, or (2) the ability to have an arbitrator's award reviewed by a court of law. Congress, scholars, and proponents of arbitration reform are focusing only on the issue of the enforceability of the agreements. In contrast, this Comment contends that focusing on the ability of a plaintiff to seek meaningful judicial review would be more effective. Whereas the effect of the AFA would essentially eliminate arbitration in consumer and employment disputes, this Comment's proposal to give consumer and employee plaintiffs the right to seek judicial review would provide a more measured approach in addressing the underlying problem of unequal positions of power while preserving the potential benefits of reduced time and expense provided by the arbitration process.[31]

By closely examining common-law traditions, current and pending legislation, and problems with the current system, this Comment argues that the dialogue surrounding arbitration reform, although well intentioned, is misguided. The problems with the arbitration system result not from an inherent unfairness of arbitrations, but rather from the uneven positions of power of the parties to the dispute and the absence of meaningful judicial review of the arbitrator's decisions. Providing the right of the consumer or employee plaintiff to appeal a decision would remedy both of these problems by granting the plaintiff more power and by providing oversight to the arbitrator's decisions.

First, this Comment examines the proliferation of arbitration agreements by examining the common-law approach to arbitration, the FAA, and the U.S. Supreme Court's subsequent expansion of the effect of the FAA. Second, this Comment will identify the problems with the current state of the FAA (which have led to the movement to propose the AFA), by surveying criticism, significant cases involving arbitration, and the Minnesota Attorney General's

28. THOMAS (Library of Congress), S. 931 Cosponsors, http://www.thomas.gov/cgi-bin/bdquery/z?d111:SN00931:@@@P (last visited Apr. 3, 2010).

29. THOMAS (Library of Congress), S. 931 All Actions, http://www.thomas.gov/cgi-bin/bdquery/z?d111:SN00931:@@@X (last visited Apr. 3, 2010).

30. THOMAS (Library of Congress), H.R. 1020 All Actions, http://www.thomas.gov/cgi-bin/bdquery/z?d111:HR01020:@@@X (last visited Apr. 3, 2010).

31. *See infra* Part IV.B. (arguing that this proposal will preserve the benefits of arbitration).

investigation into fraudulent practices in arbitration. Third, this Comment will identify problems with the AFA and will propose a new solution to the arbitration problem: expanded judicial review of arbitration awards. Finally, this Comment will explain why focusing on judicial review of arbitration awards will better solve existing problems without creating new problems that would inevitably flow from the passage of the AFA.

I. THE PROLIFERATION OF ARBITRATION

A. Common Law

1. Unenforceability of Arbitration Agreements

Prior to the adoption of the FAA in 1925, an agreement to arbitrate a dispute was generally unenforceable.[32] Courts relied on two related grounds to invalidate arbitration agreements, both to which Congress responded when it passed the FAA.

First, courts relied on the doctrine of revocability to invalidate arbitration agreements.[33] Although "common law judges seldom articulated the policy reasons underlying" the application of the doctrine of revocability to arbitration agreements,[34] some legal scholars have recently contended "that the purpose underlying [the] revocability doctrine was that the rule served to insure the disinterest of arbitrators."[35] Even at common law, "[t]he power that arbitrators were granted made them unaccountable to anyone or any entity for their fidelity to the terms of the contract or the controlling law."[36] Permitting parties to revoke the agreement to arbitrate "assured that the arbitrator knew at the moment of undertaking his duty that he was acting on the trust of both parties."[37]

Second, courts relied on their own jurisdiction to invalidate arbitration agreements. In 1746, an English common-law court

32. *See* N.P. Sloan Co. v. Standard Chem. & Oil Co., 256 F. 451, 454–55 (5th Cir. 1918) ("It may be assumed that the pleaded arbitration agreement was not a binding or enforceable one, and that its existence prior to the award constituted no obstacle to a resort to the courts by either of the parties to it for the settlement of any difference or dispute arising between them."); *supra* note 6 and accompanying text.

33. *See, e.g.*, *N.P. Sloan Co*., 256 F. at 454–55; *see also* Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 212 (2004) (citing Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874), and Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065), as illustrative cases in which courts held that the parties had the ability to revoke predispute arbitration agreements).

34. Carrington & Castle, *supra* note 33, at 209.

35. *Id.* at 209–10.

36. *Id.*

37. *Id.*

ruled that "the agreement of the parties [to arbitrate their dispute] cannot oust this Court."[38] Although several scholars have criticized the legitimacy of that court's reasoning,[39] similar jurisdictional "jealousy" succeeded in infiltrating American courts' jurisprudence.[40]

2. Judicial Review of Arbitration Awards at Common Law

Some commentators have misinterpreted the history of judicial review of arbitration awards. Commentators often make the mistake of extending the hostility common-law courts showed to the enforcement of arbitration agreements to common-law courts' treatment of arbitration awards.

For example, some recent scholarship expresses the view that arbitration awards in America "were subject to virtually unlimited judicial review" prior to the FAA.[41] To support this conclusion, authors cite other law review articles rather than actual case law.[42] In his dissenting opinion in *Hall Street Associates v. Mattel*, Justice Stevens made this same error when he noted that "[i]n the years before the passage of the FAA, arbitration awards were subject to thorough and broad judicial review . . . . [With the FAA,] Congress significantly limited the grounds for judicial vacatur or modification of such awards in order to protect arbitration awards from hostile and meddlesome courts."[43]

38. Kill v. Hollister, (1746) 1 Wils. K.B. 129, 129, 95 Eng. Rep. 532, 532.

39. Carrington & Castle argue that, despite other existing reasons that courts could invalidate arbitration agreements, the court in *Kill* erroneously "attributed the doctrine of revocability to jurisdiction envy. Although the court uttering it offered no grounds and no authority for that interpretation, once asserted, it continued to be repeated by others." *See* Carrington & Castle, *supra* note 33, at 210; *see also* Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 604 (1928) ("[T]his theory of ousting the jurisdiction of the court is not referred to in any of the early cases . . . . The doctrine appears in *Kill v. Hollister* for the first time without the citation of any authority. Once asserted in that case, however, it is constantly quoted in subsequent cases." (footnote call numbers omitted)).

40. *See, e.g.*, Hunter v. Colfax Consol. Coal Co., 154 N.W. 1037, 1063 (Iowa 1915); Pa. Co. v. Reager's Adm'r, 154 S.W. 412, 414 (Ky. 1913); Gray v. Wilson, 4 Watts 39, 41 (Pa. 1835) ("General clauses providing for the settlement, by arbitration, of disputes that may arise between the contracting parties . . . do not take away the jurisdiction of the courts. . . . It is not to be supposed that parties, by such agreements, waive the jurisdiction of the ordinary tribunals of the country, unless they expressly exclude them.").

41. Tom Cullinan, Note, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 409 (1998); *see also, e.g.*, James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 756 (2009) (arguing that "[c]ompared to the [common-law period], the FAA greatly narrowed the scope of judicial review for an arbitration award").

42. *See, e.g.*, Cullinan, *supra* note 41, at 409 & n.92.

43. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 595 n.3 (2008) (Stevens, J., dissenting) (citations omitted); *see also* Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State*

In reality, courts at common law were "quite receptive to actions that sought enforcement . . . of arbitration awards."[44] Once parties arbitrated the dispute and the arbitrator issued an award, the ability to challenge that award was very limited. In 1790, the Supreme Court of Judicature of New Jersey, in *Smith v. Minor*, denied a defendant's motion to set aside the award of an arbitrator.[45] The court in *Minor* reasoned that "the consent of parties" to arbitrate a dispute operates as "a release of errors," which would bar challenge of an award.[46] In 1796, the Superior Court of Connecticut, in *Miller v. Wetmore*, refused to review the award of an arbitrator, reasoning that it would not "judge over the head of arbitrators, in any matters which lay properly before them."[47]

Throughout the 1800s, the general rule in most jurisdictions was that an arbitrator's award would not be set aside for error in the arbitrator's judgment and that a party would have to show "fraud, corruption, partiality, or misconduct on the part of the arbitrators, or some fraud on the part of the party relying upon the award, or a material mistake which entered into it"[48] in order to have the award set aside. Further, "[e]very presumption comes to the support of an award in arbitration proceedings. . . . The award will not be lightly set aside."[49]

As demonstrated by these cases, the assumption that courts prior to the passage of the FAA were hostile to arbitration

Courts, 10 CARDOZO J. CONFLICT RESOL. 509, 518–19 (2009) (characterizing this statement by Justice Stevens in *Hall Street Associates* as "patently wrong").

44. Huber, *supra* note 43, at 516.

45. Smith v. Minor, 1 N.J.L. 19, 28–29 (Sup. Ct. 1790).

46. *Id.* at 28.

47. Miller v. Wetmore, 2 Root 488, 490 (Conn. Super. Ct. 1796).

48. Thornton v. McCormick, 39 N.W. 502, 503 (Iowa 1888); *see also, e.g.*, Burchell v. Marsh, 58 U.S. (17 How.) 344, 349–50 (1854) ("In order . . . to induce the court to interfere, there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence . . . ."); N.P. Sloan Co. v. Standard Chem. & Oil Co., 256 F. 451, 455 (5th Cir. 1918) ("Where parties submit matters in controversy to arbitration, and an award is made pursuant to the agreement of submission, such award is final and binding on the parties, unless the arbitrators are guilty of fraud, partiality, or other improper conduct in making it."); Boston Water Power Co. v. Gray, 47 Mass. (6 Met.) 131, 181 (1843) ("[An award . . . may be impeached and avoided by proof of fraud practiced upon referees, or some accident or mistake, by which they were deceived and misled, so that the award is not, in fact, the result of their judgment."); Sch. Dist. No. 5 of Snohomish County v. Sage, 43 P. 341, 343 (Wash. 1896) ("[W]here it is not shown that the arbitrators were deceived and misled by some error or mistake, so that the award is not really the result of their judgment, but where it appears that their decision was fairly and honestly made, upon due consideration of all the evidence before them, the award ought to be held conclusive and binding on the parties.").

49. McQuaid Mkt. House Co. v. Home Ins. Co., 180 N.W. 97, 98 (Minn. 1920).

agreements and arbitration awards is only partially true. Courts did hold agreements to arbitrate unenforceable; however, once parties submitted their dispute to an arbitrator, courts were hesitant to overturn the arbitrator's award decision.

B. The Legislative Response: The Federal Arbitration Act of 1925

1. Guarantee of Enforceability of Arbitration Agreements

In 1925, Congress responded to the perceived hostility of courts to arbitration agreements by passing the FAA.[50] The operative section of the FAA made an agreement to arbitrate "valid, irrevocable, and enforceable."[51]

The legislative history of the FAA reveals that Congress responded to two theories of invalidating arbitration agreements. First, the House Report that accompanied the FAA "ma[de] clear that its purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs,'" indicating that Congress addressed the revocability theory of invalidating arbitration agreements.[52] Because other contracts are not freely revocable by either party, Congress reasoned that arbitration agreements should be similarly irrevocable.

Second, the House Report demonstrates a repudiation of courts' "jealousy . . . for their own jurisdiction" theory of invalidating arbitration agreements.[53] The House Report expressly observed, "Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate on the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived . . . and was adopted . . . by the American courts."[54] Congress characterized this justification as an "anachronism" of law and described it as "illogical" and resulting in "injustice."[55]

2. Limits on Judicial Review of Arbitration Awards

The FAA provides for very limited review of arbitrators' awards. In fact, judicial review of an arbitration award under the FAA has

50. *See* H.R. REP. NO. 68-96, at 2 (1924) ("The courts have felt that the [common-law rule that arbitration agreements would not be enforced] was too strongly fixed to be overturned without legislative enactment . . . . The [FAA] declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.").

51. 9 U.S.C. § 2 (2006).

52. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (quoting H.R. REP. NO. 68-96, at 1).

53. *See* H.R. REP. NO. 68-96, at 1–2 ("[Courts] have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.").

54. *Id.*

55. *Id.*

been described as "among the narrowest known to the law."[56]

In § 9 of the FAA, Congress declares that when parties submit the award to the court for enforcement, "the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11."[57] In § 10, the FAA provides the reasons that an award may be vacated: "corruption, fraud, or undue means," "partiality," "misconduct . . . by which the rights of any party have been prejudiced," or an arbitrator exceeding his or her powers.[58] In § 11, the FAA provides the reasons that an award may be modified or corrected: arbitrators have made a "material miscalculation . . . or [a] material mistake," "arbitrators have awarded upon a matter not submitted to them," or "the award is imperfect in matter of form."[59] These standards are so high that, "[a]s a practical matter, the determination that an agreement to arbitrate a claim is enforceable is likely to be the final effective judicial review of the matter."[60]

C. Subsequent Judicial Expansion of the FAA

In the 1980s, the Supreme Court began to substantially expand the reach of the FAA. First, in 1983, the Supreme Court held that "the [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[61] Second, in 1984, the Supreme Court determined that the FAA preempted any "state legislative attempts to undercut the enforceability of arbitration agreements."[62] Third, in 1985, the Supreme Court extended the FAA to claims arising under statutory rights in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[63]

The Court's reasoning in *Mitsubishi* is significant to this Comment's proposal, because that ruling underpins the judiciary's emphatic endorsement of arbitration agreements and creates an environment for arbitration abuse.[64] In *Mitsubishi*, the Court wrote, "By agreeing to arbitrate . . . a party does not forgo . . . substantive

56. Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1057 (1998). Additionally, although some scholars contend that the FAA limited the level of judicial review courts applied prior to its passage, the FAA actually codifies the standard of review that courts were already applying. *See supra* Part I.A.2.

57. 9 U.S.C. § 9 (2006) (emphasis added).

58. *Id.* § 10(a)(1)–(4).

59. *Id.* § 11.

60. Haagen, *supra* note 56, at 1057.

61. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983); *see also* Hayford, *supra* note 10, at 2–4 (discussing the Court's holding in *Moses H. Cone*).

62. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984); *see also* Hayford, *supra* note 10, at 5–6 (discussing the Court's decision in *Southland Corp.*).

63. 473 U.S. 614, 636–40 (1985); *see also* Hayford, *supra* note 9, at 7–10.

64. *See* Hayford, *supra* note 10, at 36 (referencing "the Supreme Court's recent uniform and very strong endorsement of commercial arbitration").

rights . . .; it only submits to their resolution in an arbitral, rather than a judicial, forum."[65] The Court's reasoning, however, neglects the fact that, unlike the ability of a party to appeal a trial court's decision, a party submitting to arbitration has virtually no ability to seek judicial review of an arbitrator's award.[66] This inability to pursue judicial review contradicts the Court's declaration that a party "does not forgo . . . substantive rights" when relegated to an arbitral forum.

Between 1983 and 1995, the Supreme Court, in a long line of cases, rejected any legal doctrine that had historically limited the use of arbitration, and it "freed arbitration from judicial supervision."[67] Then, in 2008, the Supreme Court held that "the

65. *Mitsubishi*, 473 U.S. at 628.

66. *See* Schwartz, *supra* note 18, at 1281 ("[O]ne of the main hallmarks of arbitration, along with restricted discovery, is severely limited appeals. Arbitration's 'final and binding' quality is buttressed by rules that limit the grounds for appeal and restrict the scope of appellate review to a deferential standard.").

67. Hayford, *supra* note 10, at 1; *see* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541 (1995) (holding that the Carriage of Goods by Sea Act does not invalidate foreign arbitration clauses in bills of lading); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (holding that when a court finds that the parties agreed to submit "the arbitrability question itself" to arbitration, it should apply a deferential standard of review to the arbitrator's decision as to that matter); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995) (holding that a challenged arbitral award of punitive damages should have been enforced as within the scope of the parties' contract); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272–73 (1995) (holding that § 2 of the FAA does not carve out a "statutory niche in which a State remains free to apply its antiarbitration law or policy"); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–27 (1991) (holding that arbitration of a claim of illegal age discrimination is not inconsistent with the Age Discrimination in Employment Act); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480–81 (1989) (holding that agreements to arbitrate under the Securities Act of 1933 are enforceable and that the right to select a judicial forum is not an essential feature of the Act); Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 470 (1989) (holding that parties to an arbitration agreement could expressly agree to conduct their arbitration under state-law rules); Perry v. Thomas, 482 U.S. 483, 491 (1987) (holding that § 2 of the FAA preempted a provision of the California Labor Code "requir[ing] that litigants be provided with a judicial forum for resolving labor disputes"); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987) (holding that agreements to arbitrate claims arising under the Racketeer and Corrupt Influenced Organizations Act are enforceable); *Mitsubishi*, 473 U.S. at 638–40 (holding that agreements to resolve antitrust claims by arbitration are enforceable when the agreement arises out of an international transaction); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985) (holding that the FAA requires federal courts "to compel arbitration of pendant arbitrable [state-law] claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums"); *Southland Corp.*, 465 U.S. at 16 (holding that the California Franchise Investment Law is preempted by the FAA); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 4 (1982) (holding that a federal

statutory grounds [for vacating or modifying an award] are exclusive."[68] Therefore, parties cannot contract to expand the reasons for judicial review of an arbitration award beyond the very high standards prescribed in §§ 10 and 11 of the FAA.[69] This holding has left some commentators to question whether an award can be vacated on the basis of "'manifest disregard' of the law," a theory recognized by the Court in 1953.[70] If a manifest disregard of law is an insufficient ground for vacatur, the exclusive statutory reasons for vacating an award are essentially meaningless.

As a result, the congressional findings accompanying the AFA include the following observation: "[T]here 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."[71] Despite this recognition that the lack of judicial review is a problem, the AFA fails to augment judicial review of arbitration awards.

II. THE NEED FOR FEDERAL CONGRESSIONAL ARBITRATION REFORM

A. Criticism of the Current System

This Part discusses three criticisms that proponents of reform identify as reasons the current arbitration system is not working. These three criticisms, the repeat-player bias, the repeat-payer bias, and the stagnation of common law, will be discussed in turn.

court may not properly abstain from deciding a petition for enforcement of a commercial arbitration agreement and instead defer to a parallel state court action brought by the party resisting the arbitration).

68. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 578 (2008).

69. *See id.* at 1400, 1405–06. The Court did note, however, that there may be a "more searching review [of an arbitration award] based on authority outside the [FAA]." *Id.* at 1406 ("The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law . . . ."). Although this question was left open, some commentators have considered whether the FAA preempts state law. *See, e.g.*, Berger & Sun, *supra* note 41, at 786–92 (concluding that "[g]iven the lack of any definitive holding that the FAA is preemptive, states are still entitled to employ their own standards for vacatur under state arbitration statutes" but noting that "[t]he breadth of the FAA's preemptive sweep . . . remains unsettled"); *see also id.* at 787 ("Where the FAA applies, it will preempt conflicting state arbitration laws by virtue of the Supremacy Clause. However, the FAA contains no express provision, nor does it reflect a congressional intent to control the entire field of arbitration." (footnote call numbers omitted)). *See also* 9 U.S.C. §§ 10–11 (2006).

70. Nicholas R. Weiskopf & Matthew S. Mulqueen, Hall Street*, Judicial Review of Arbitral Awards, and Federal Preemption*, 29 REV. LITIG. 361, 367–70 (2010) (explaining that the Supreme Court's 1953 statement that "manifest disregard" is a grounds for vacating an arbitration award is now questionable because it is not listed in the now "exclusive" reasons for vacating an award).

71. H.R. 1020, 111th Cong. § 2(5) (2009); S. 931, 111th Cong. § 2(5) (2009).

1. Repeat-Player Bias

As repeat players,[72] defendant employers and manufacturers are more knowledgeable of the rules and may also set the rules of the arbitration process. The congressional findings accompanying the AFA assert that "[m]any 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."[73] During the House Judiciary Committee hearing on the AFA, Stuart T. Rossman, the Director of Litigation at the National Consumer Law Center, contended that "[c]onsumers who are unaware that they agreed to arbitration may fail to respond to notices, resulting in default judgments."[74] Additionally, the "high fees and 'loser pays' rules typical of arbitrations" disadvantage the one-shot plaintiff.[75] Further, employees and consumers "are at a disadvantage to the repeat players, who understand the process, know what information to submit and how to do so, and have often selected an arbitration company geographically distant from [the plaintiff]."[76]

2. Repeat-Payer Bias

Arbitrators are private businesspeople who earn income by arbitrating disputes.[77] Because the defendant corporation will likely engage in many arbitrations and the plaintiff is probably not a source of future income,[78] the arbitrator has a financial incentive to ensure the defendant corporation is satisfied with the award. Scholars allege that "[t]he neutrality of the arbitrators is suspect because many companies retain a single company to provide arbitrators who will resolve all disputes involving that company."[79] These conditions create a situation in which "[e]ven the most scrupulous arbitrators and arbitral organization may find themselves unconsciously influenced to make findings that favor their valued client."[80] Evidence that corporate defendants will

72. *See supra* notes 18–19 and accompanying text.
73. H.R. 1020 § 2(7); S. 931 § 2(7).
74. *Hearing: Mandatory Binding Arbitration*, *supra* note 19, at 30.
75. *Id.*
76. *Id.*
77. *Cf.* Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 163 n.71 (2009) ("Arbitrators generally are well compensated, and many rely upon being selected as an arbitrator as their sole means of income.").
78. *See* Mandelbaum, *supra* note 18, at 1090.
79. Jean R. Sternlight, *Is the U.S. out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 838–39 (2002).
80. *Id.* at 839.

"blacklist"[81] arbitrators who render a too plaintiff-friendly award further supports the "repeat payer" theory.[82]

3. Stagnation of United States Common Law

The prevalence of arbitration with no judicial review of awards has "frozen the law."[83] During hearings before the Senate Subcommittee on the Constitution on the Arbitration Fairness Act of 2007,[84] a bill almost identical to the 2009 version, Richard M. Alderman, a dean at the University of Houston Law Center, testified about the effect of ubiquitous arbitration agreements.[85] As Dean Alderman explained,

> the common law tradition of this country empowers our courts to create and modify legal doctrine. Consumer doctrines such as unconscionability, strict products liability, habitability, good and workmanlike performance have all been created, modified, extended, and limited by our courts to protect consumers and ensure a fair bargain. Arbitrators cannot create the common law; arbitrators cannot modify the common law. . . . Essentially, we have frozen the law by submitting everything to arbitration, denying the courts the ability to develop and adapt the law as society and business changes.[86]

Dean Alderman explained how this stagnation of common law is injurious to both plaintiffs and defendants.[87] To illustrate, he explained that the Supreme Court of Texas established, during the "heyday of consumerism," "a doctrine of good and workmanlike performance" to protect consumers.[88] Over approximately the next twenty years, Texas courts "dealt with [the] doctrine about 180 times."[89] Then, the Texas Supreme Court determined that this doctrine provided too much protection for the consumer and that the doctrine needed to be limited.[90] This example seeks to counter an assumption that limiting arbitration would be beneficial to consumer plaintiffs at the expense of corporate defendants.

81. *See* Satz, *supra* note 22, at 41; *see also Hearing: Mandatory Binding Arbitration*, *supra* note 19, at 29.

82. *See supra* note 20 and accompanying text; *see also Hearing: Mandatory Binding Arbitration*, *supra* note 19, at 29.

83. *S. 1782, Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 10 (2007), *available at* http://purl.access.gpo.gov/GPO/LPS97553 [hereinafter *AFA Hearing*] (statement of Richard M. Alderman, Director, Center for Consumer Law, University of Houston Law Center).

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

85. *AFA Hearing*, *supra* note 83, at 9–10.

86. *Id.* at 10.

87. *Id.* at 10, 29.

88. *Id.* at 29.

89. *Id.*

90. *See id.*

According to Dean Alderman, if arbitration had been as ubiquitous then as it is now, the Texas Supreme Court would not have had an opportunity to limit this consumer-protection doctrine. Arbitrators would have been applying law that, "had the Texas Supreme Court been given an opportunity to review," the court "actually would have made . . . more favorable to businesses."[91] As a result, mandatory binding arbitration can be harmful to both plaintiffs and defendants because it freezes the law while society continues to progress.

B. Cases Motivating the Arbitration Fairness Act of 2009

On April 29, 2009, Senator Russ Feingold introduced the AFA in the Senate and asserted that "the [proposed bill would reverse] the Supreme Court's April 2009 decision in *14 [Penn] Plaza [LLC] v. Pyett*."[92] That same day, at a press conference, Senator Feingold referred to Jamie Leigh Jones's experience with mandatory arbitration as another case motivating Congress to pass the AFA.[93] Identifying the issues and holdings of these cases helps to determine exactly how the AFA responds to the cases. Interestingly, the Senate version of the AFA, but not the House version, would reverse *14 Penn Plaza*. Additionally, neither the House version nor the Senate version would reverse the holding of *Jones v. Halliburton Co*.

1. 14 Penn Plaza LLC v. Pyett[94]

In *14 Penn Plaza*, the Supreme Court determined that collective-bargaining agreements that clearly and unmistakably require union members to arbitrate claims arising under the federal Age Discrimination in Employment Act ("ADEA") are enforceable under the FAA.[95]

The House version of the AFA would have no effect on *14 Penn Plaza* because the House version states that "[n]othing in this chapter shall apply to any arbitration provision in a collective bargaining agreement."[96] Presumably, the idea behind this provision is that employees represented by labor unions have more bargaining power than individual employees. Similarly, the Senate version provides that "[n]othing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations."[97] However, the Senate version qualifies that language by providing that "no such

91. *Id.*
92. 155 CONG. REC. 4897–98 (2009) (statement of Sen. Feingold).
93. Senator Russ Feingold, Press Conference: Feingold on Protecting the Right of Americans to Have Their Day in Court (Apr. 29, 2009), *available at* http://feingold.senate.gov/record.cfm?id=312222 [hereinafter Feingold Press Conference]; *see also* Jones v. Halliburton Co., 583 F.3d 228 (5th Cir. 2009).
94. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009).
95. *Id.* at 1461.
96. H.R. 1020, 111th Cong. § 4 (2009).
97. S. 931, 111th Cong. § 3 (2009).

arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom."[98] The Senate version of the AFA, therefore, would overturn *14 Penn Plaza*, because claims under the ADEA would fall under the bill's qualifying language. Because the House version does not contain the same qualifying language, the House version would not overturn *14 Penn Plaza*, and an agreement to arbitrate claims arising under a federal statute, such as the ADEA, would remain enforceable.

2. Jones v. Halliburton Co.[99]

Jones v. Halliburton Co. exemplifies the compelling need for reform of the current arbitration law because litigating the arbitrability of claims can result in an enormous waste of time and money for both clients and the courts. The particularly egregious facts alleged by Jones have garnered public attention to the issue of mandatory binding arbitration and has contributed to the rising demand for reform in this area of the law. Although the AFA will not overrule *Jones*, because the arbitration agreement was *not* enforced, the case does inform the current discussion. The issue regarded the arbitrability of claims arising from an alleged rape that took place in employment housing.

Jones signed an employment contract that contained an arbitration agreement with Overseas Administrative Services, "a foreign, wholly-owned subsidiary of Halliburton/KBR."[100] Jones was sent to work in Iraq as a clerical worker for the company, and she was housed in company barracks "occupied predominantly by male employees."[101] Two days after arriving in Iraq, she complained to several managers about being subjected to unwanted sexual harassment in the barracks.[102] The next day, Jones alleges she was "drugged, beaten, and gang-raped by several Halliburton/KBR employees in her barracks bedroom."[103] Then, Jones contends she "was placed under armed guard . . . and not permitted to leave; and, despite repeated requests, she was denied access to a telephone to contact her family."[104]

Jones filed a complaint in federal district court in Texas.[105] Her complaint included the following causes of action: (1) negligence, (2)

98. *Id.*
99. 583 F.3d 228 (5th Cir. 2009).
100. *Id.* at 231.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. Jones v. Halliburton Co., 625 F. Supp. 2d 339 (S.D. Tex. 2008).

negligent undertaking, (3) sexual harassment and hostile work environment under Title VII, (4) retaliation, (5) breach of contract, (6) fraud in the inducement to enter the employment contract, (7) fraud in the inducement to enter the arbitration agreement, (8) assault and battery, (9) false imprisonment, (10) negligent hiring, supervision, and retention of employees involved in the alleged assault, and (11) intentional infliction of emotional distress.[106] The district court determined that all of these claims were arbitrable, except numbers (8)–(11).[107]

Halliburton appealed, contending that assault and battery, false imprisonment, negligent hiring, supervision, retention, and intentional infliction of emotional distress were arbitrable.[108] The Fifth Circuit Court of Appeals affirmed, holding that these four claims fell outside the scope of the arbitration provision because they were not "related to her employment."[109]

Again, the AFA will not affect the Fifth Circuit ruling in the case, because the court held that the four causes of action at issue *were not* arbitrable. Nonetheless, the case does demonstrate a significant problem that employees, consumers, and other plaintiffs face: protracted litigation regarding the arbitrability of claims. Jones filed her complaint in district court during May 2007[110] and litigated the arbitrability of the claims until the Fifth Circuit issued its opinion on September 15, 2009.[111] The arbitration clause led to litigation lasting twenty-eight months before beginning to address the merits of the dispute. Any arbitration reform Congress finally enacts should seek to remedy this enormous waste of client and judicial resources.

C. The Minnesota Suit and Settlement

After a year-long investigation,[112] the State of Minnesota, through its Attorney General Lori Swanson, filed a complaint in federal district court on July 14, 2009, against the National Arbitration Forum ("NAF"), "the nation's largest provider of consumer debt collection arbitrations."[113] The complaint alleged violations of Minnesota's Consumer Fraud Act, Deceptive Trade Practices Act, and False Statements in Advertising Act.[114] The

106. *Jones*, 583 F.3d at 232.
107. *See id.* at 233.
108. *Id.* at 230.
109. *Id.* at 241.
110. *Id.* at 232.
111. *Id.* at 228.
112. Letter from Lori Swanson, Minn. Att'y Gen., to President of the Am. Arbitration Assoc. 1 (July 19, 2009), *reprinted in Hearing: Mandatory Binding Arbitration*, *supra* note 19, at 41.
113. Complaint at 5, Swanson v. Nat'l Arbitration Forum, Inc., No. 27-CV-0918550 (Minn. Dist. Ct. July 14, 2009), 2009 WL 2029918.
114. *Id.* at 39–41.

complaint explained that NAF made representations of its neutrality to the public, but contemporaneously was "financially affiliated with a . . . hedge fund . . . that owns one of the country's major debt collection enterprises."[115] Additionally, the complaint alleged that NAF was "work[ing] alongside creditors behind the scenes—against the interests of consumers—to convince creditors to place mandatory pre-dispute arbitration clauses in their consumer agreements and to appoint the Forum as the arbitrator of any disputes that may arise in the future."[116] Through "extensive affirmative [mis]representations, material omissions, and layers of complex and opaque corporate structuring," NAF "conceal[ed] its affiliations with the collections industry."[117]

Just three days after the Minnesota Attorney General filed the complaint, NAF agreed to a settlement: the organization and its subsidiaries would dissolve all business in Minnesota, none would ever do "any business related to the arbitration of consumer disputes" in the state of Minnesota again, and the companies would reimburse the state for the costs of the investigation.[118]

The strong "national policy favoring arbitration"[119] facilitates a system of dispute resolution akin to the law of the jungle. The strongest party is further empowered, while the weakest party is easily overtaken. In seeking arbitration reform, Congress must determine if it is more beneficial to attack the enforceability of arbitration agreements or to enhance the power of the weaker party by allowing consumer and employee plaintiffs to seek judicial review of biased arbitration awards.

III. CONGRESS'S PROPOSED ARBITRATION REFORM AND ITS PROBLEMS

A. The Proposed Bill: The Arbitration Fairness Act of 2009

The AFA states that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute."[120] This approach to remedying the arbitration problem will invalidate countless agreements between private parties. Because parties must have an arbitration agreement in order to arbitrate, the AFA will prevent parties from arbitrating disputes and will compel disputes to be resolved through full-blown litigation.

115. *Id.* at 1–2.
116. *Id.*
117. *Id.* at 2–3.
118. Consent Judgment, *Swanson*, No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), *reprinted in Hearing: Mandatory Binding Arbitration*, *supra* note 19, at 37.
119. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).
120. S. 931, 111th Cong. § 3 (2009); *see also* H.R. 1020, 111th Cong. § 4 (2009).

B. The Myth of Postdispute Arbitration Agreements

Senator Feingold and others who advocate for the adoption of the AFA claim that they are "pro-arbitration," that arbitration can be a good thing, and that all the AFA will do is void *predispute* arbitration agreements.[121] They further contend that consumers and employees have the opportunity to enter into arbitration agreements with manufacturers and employers after the dispute arises.[122] As a theoretical matter, Senator Feingold and others are correct—this bill does not invalidate postdispute arbitration agreements. But, as a practical matter, parties in a consumer or employment dispute almost never agree to arbitrate after the dispute has arisen.[123]

During the Senate Judiciary Committee hearing on the Arbitration Fairness Act of 2007, a bill almost identical to the current bill, Senator Feingold addressed the argument that parties almost never agree to arbitrate a dispute after the dispute has arisen.[124] He asked whether "this argument seems to assume that no rational employee would ever choose arbitration voluntarily or that, when they do, employers would refuse to agree to arbitration? And if that is so, isn't that a pretty scathing indictment of the fairness of the current arbitration system?"[125] His retort to the argument, however, results from a failure to appreciate how each party's incentives change over time.

"[P]arties' incentives in the post-dispute [arbitration] context are fundamentally different" than in the predispute context.[126] Both parties obviously have "superior information about the details of the dispute" after it has arisen than before the dispute. The superior information permits each party "to make a more strategic calculation that better advances their interest."[127] For example, after the dispute arises, the parties can more accurately predict the potential value of the claim.[128] If the defendant knows the claim is not above a monetary threshold, the defendant also knows that the

121. Feingold Press Conference, *supra* note 93; 155 CONG. REC. 4898 (2009) (statement of Sen. Feingold) ("I strongly support voluntary, alternative dispute resolution methods, and I believe we ought to encourage their use. But I also believe that arbitration is a fair way to settle disputes between consumers and lenders only when it is entered into knowingly and voluntarily by both parties to the dispute after the dispute has arisen.").

122. *See* Feingold Press Conference, *supra* note 93.

123. *See* Griffee, *supra* note 16, at 410 ("The AAA emphasized that 'based on many years of experience . . . very few parties will agree to arbitration post-dispute.'" (citation omitted)).

124. *See S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 27 (2007) [hereinafter *Hearing on S. 1782*] (statement by Sen. Feingold).

125. *Id.*

126. Griffee*, supra* note 16, at 410.

127. *Id.*

128. *Id.*

plaintiff will likely not be able to retain an attorney on a contingency-fee basis.[129] As a result, the defendant may refuse to arbitrate, "because it has calculated that 'its holdout will prevent the [plaintiff] from pursuing her claim.'"[130] Therefore, the AFA would have the effect of keeping small claims both out of arbitration and out of court.

This strategic calculation works the opposite way when a plaintiff has a high-value claim.[131] If the plaintiff has a high-value claim, she will likely obtain attorney representation easily.[132] The plaintiff is also "unlikely to forgo the possibility of high-level recover[y]" from a jury.[133] Parties are usually willing to enter into predispute arbitration agreements because, prior to obtaining this information about the value of the claim, they assume that, on balance, arbitration will provide a quicker and more cost-effective forum for the adjudication of a potential future dispute.[134]

C. Problems Left Unsolved or Created by the Proposed Arbitration Fairness Act of 2009

First, voiding predispute arbitration agreements will result in less access to a remedy for plaintiffs with small claims. As just explained, when employers or manufacturers are not bound by a predispute arbitration agreement, they can refuse to agree to arbitrate small claims with the knowledge that the high cost of litigation will prohibit the plaintiff from obtaining counsel.[135] The AFA, although purporting to help consumers and employees receive an effective remedy, actually limits their ability to be heard in either a judicial or arbitral forum. Any solution Congress adopts should preserve arbitration as an alternative forum and focus on measures that will restore it as an unbiased option.

Second, the AFA does not remedy the repeat-player or repeat-payer biases that plague the arbitrations that actually do occur.[136] Although far fewer arbitrations will occur, the defendant remains the party that engages in arbitration repeatedly. Without any meaningful oversight or review of an arbitrator's award, the arbitrator can continue to issue corporate-biased decisions that are motivated by the arbitrator's desire to retain future business. In fact, the decrease in supply of arbitration business provides an increase in demand, causing arbitrators to have a stronger incentive

129. *Id.*
130. *Id.* (quoting *Hearing on S. 1782*, *supra* note 124, at 205 (statement by Peter B. Rutledge, Associate Professor, Columbus School of Law, Catholic University of America)).
131. *Id.*
132. *Id.*
133. *Id.*
134. *See id.*
135. *Id.*
136. *See* Mandelbaum, *supra* note 18, at 1102.

to secure current clients' business by reaching more favorable outcomes. As a result, the AFA increases the repeat-payer bias and accelerates the "race to the bottom."[137] A better reform of the arbitration system would seek to ensure arbitrators are accountable and not subject to these biases, rather than merely limit the occurrence of arbitration.

Third, "companies cannot rely on or pass along cost-savings based on hopes that consumers will agree to arbitrate after claims develop."[138] As a corollary, in the employment context, employers cannot pass along cost savings to employees in the form of salaries based on the hopes that the employees will agree to arbitrate after claims develop.

IV. AN ALTERNATIVE SOLUTION

A. Judicial Review at the Election of the Plaintiff

Rather than enacting the AFA, which will invalidate countless arbitration agreements between private parties, substantially reduce the number of arbitrations that occur, fail to remedy the biases in those that do occur, and result in litigation expenses that are passed on to consumers and employees, Congress should take a different approach to the arbitration problems. Instead, Congress should pursue legislative reform to address the uneven balance of power between individual plaintiffs and corporate defendants in consumer and employment disputes and address the inherent bias of the arbitrator toward his source of future income. By enacting reform that allows a plaintiff to have the award of an arbitrator reviewed by a judge, these current problems would be substantially alleviated.

According to current Supreme Court jurisprudence on the issue, courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."[139] Instead, the FAA and the Supreme Court have severely circumscribed the role of the courts in reviewing arbitration awards. Again, a court's role in reviewing arbitration awards is "one of the narrowest known to law."[140] *This* is the "anachronism" that ought to be remedied by congressional action.[141]

137. *See supra* notes 18–22 and accompanying text.

138. Amy J. Schmitz, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness*, BANKING & FIN. SERVICES POL'Y REP., Oct. 2009, at 21.

139. United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 28, 38 (1987).

140. White, *supra* note 4, at 1298 (quoting Haagen, *supra* note 56, at 1057).

141. In the House Report for the FAA of 1925, Congress referred to the courts' unwillingness to enforce arbitration agreements as an "anachronism." H.R. REP. NO. 68-96, at 1 (1924). The same characterization is still appropriate today for this area of law.

Effective arbitration-reform legislation would provide for judicial review of arbitrators' awards, at the election of the consumer or employee plaintiff only. When parties contract for arbitration, arbitration would still be mandatory, but the result would not necessarily be binding on the plaintiff. This model would also require arbitrators to write a "reasoned award," which is an award that explains the arbitrator's reasons for a decision. Currently, parties can contract for a reasoned award prior to the appointment of the arbitrator.[142] Arbitration reform, however, should *require* arbitrators to explain their awards.

B. Implementing this Alternative Approach

1. Jurisdiction and Venue for Review

Judicial review of an award would be heard in the court that would have had jurisdiction and venue over the dispute had the parties never agreed to arbitrate. This rule would remain the same whether arbitration occurred voluntarily or compelled by court order.

2. Standard of Review

Questions of law should be reviewed de novo, because a court is in a better position to determine questions of law than an arbitrator, who may not even be an attorney. The arbitrator's findings of fact should have a presumption of accuracy, which the plaintiff could overcome by a preponderance of the evidence. This presumption serves to preserve judicial resources.

3. Type of Proceeding

The system proposed by this Comment should address the type of proceeding a trial court would use to determine whether to uphold or vacate the arbitrator's award. The type of proceeding used, however, must negotiate the tension between the need to conserve judicial resources and the desire to mitigate the repeat-player bias. Allowing litigants to only present evidence that was submitted to the arbitrator would result in spending the least amount of judicial resources. Plaintiffs in these cases, however, have often been disadvantaged because of an unfamiliarity with arbitration's evidentiary rules.[143] Thus, not allowing a plaintiff to submit any additional evidence to the reviewing court would fail to remedy the repeat-player bias that exists in the current system. The best option to resolve these two tensions would likely be a bench trial or

142. This option is provided for in Rule 42(b) of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 42(b) (2009), http://www.adr.org/sp.asp?id=22440.

143. *See supra* note 19 and accompanying text.

hearing, in which the parties have the opportunity to submit limited evidence in addition to the evidence presented to the arbitrator.

C. Explaining This Proposal's Benefits and Anticipating Criticism

1. Improving Arbitrator Accountability

The current arbitration process provides no opportunity for meaningful review of an arbitrator's award.[144] Under the proposed model, the new requirements that arbitrators write a reasoned award coupled with the plaintiff's ability to appeal an unfair award improve the accountability of the arbitrator. As arbitrator accountability increases, the effect of the repeat-payer bias will decrease. Mark Seidenfeld has written extensively on the psychological accountability of decision makers.[145] Although his research examines the dynamics of judicial review of agency rules,[146] those dynamics parallel the dynamics of judicial review of arbitrators' awards. Seidenfeld contends that "[w]hen decisionmakers are held accountable for their choices, their propensity to fall prey to psychological biases changes."[147] He explains that "[a]ccountability is a broad notion that describes any situation in which a decisionmaker believes that he must justify his decision to others and that failure to provide a satisfactory justification will cause the decisionmaker to suffer negative consequences."[148] Just as Seidenfeld contends that "[j]udicial review provides accountability" in the agency rulemaking context because "[c]ourts can express their disapproval by reversing and remanding the rule if they find the argument ill-reasoned or lacking support," judicial review can provide accountability in the arbitration context as well.[149]

Under this Comment's proposal, the arbitrator would have to justify his or her decision in a reasoned award. Failure to provide a satisfactory justification for the award would result in his or her award being overturned by the trial court. Seidenfeld clarifies that the negative consequences to remedy biases "need not be material. Disdainful looks and feelings of disappointment in one's own performance may suffice to elicit responses mediated by

144. *See supra* Part I.B.2.

145. *See, e.g.*, Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059 (2001).

146. *See id.*; *see also* Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 PACE L. REV. 73, 104–10 (2005) (recognizing that Seidenfeld's analysis of the accountability of agencies is parallel to accountability of arbitrators).

147. Seidenfeld, *supra* note 145, at 1064.

148. *Id.*

149. Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 509–10 (2002).

accountability."[150] Under this proposal, courts could reverse arbitration awards that are "ill reasoned or lacking support" and correct the arbitrator. Whereas the AFA does nothing to increase the accountability of arbitrators and may even accelerate the "race to the bottom" effect,[151] this alternative proposed model is a step in the right direction toward remedying the repeat-payer bias.

2. Redressing the Imbalance of Power in Arbitration

Currently, the plaintiff in arbitration is at a huge disadvantage of power. At some point in time, the plaintiff did agree to arbitrate future disputes; the plaintiff, however, may have been unaware of the agreement because it was buried in the fine print, such as in a consumer transaction, or may have been unable to negotiate the terms, such as in an employment agreement. As discussed earlier, the defendant drafts the arbitration agreement and decides the terms, such as the location of the arbitration.[152] The defendant enjoys an overwhelming advantage as a result of the repeat-player bias, the repeat-payer bias, and greater financial resources.[153]

Arbitration agreements are proliferating, and individuals frequently cannot avoid agreeing to arbitrate in some context. Therefore, we are all affected by the problems that flow from the unequal balance of power in resolving these consumer and employment disputes. Clearly, new legislation is necessary to correct this inequity and to prevent corporations and other powerful entities from using arbitration as an impenetrable shield for misconduct.

This Comment's proposed alternative to arbitration reform would allow the plaintiff to seek judicial review of an award, a step toward resolving the power imbalance. Under this proposal, parties would still enjoy the opportunity to settle their dispute in arbitration, which is generally more time-efficient and less costly than litigation. In those circumstances when the arbitrator fails to perform his duties in a fair and impartial manner, the plaintiff would have the opportunity to seek judicial review. This appeal would not guarantee the plaintiff success; the arbitrator's award could be upheld, increased, or reduced by the court. In situations that suggest an arbitrator's abuse or bias, this approach would provide for a judge to review the award—someone trained in the law and not subject to the economic pressure of having to rely on the defendant for personal income.

When attempting to remedy the current problems with arbitration, Congress should adopt measures that will preserve the rule of law without creating new problems. The current proposed

150. *Id.*
151. *See supra* notes 136–37 and accompanying text.
152. *See supra* notes 14–16 and accompanying text.
153. *See supra* notes 18–22, 72–80 and accompanying text.

AFA, which voids numerous current agreements, also limits the ability of private citizens to enter contracts in the future.

During the Senate Judiciary Committee hearing on the previously considered Arbitration Fairness Act of 2007, Dean Alderman stated that he thought more due process measures in arbitrations would be the "worst of both worlds."[154] This Comment's proposal, unlike the AFA, will not eliminate remedies for parties with small claims.[155] Rather than "outlawing" predispute arbitration agreements in these four important contexts, Congress should seek to bring arbitration awards "in law," or in line with what the law says, by providing for meaningful judicial review of arbitration awards.

Additionally, any argument that this reform would give plaintiffs "two bites at the apple" is no more valid than arguing that the appeals process allows "two bites at the apple." Currently, most plaintiffs have no recourse for an unfair arbitration award. Most defendants can easily insure against unfair awards with the threat of discontinuing all future business with an arbitrator. As previously noted, evidence supports the claim that defendants already employ a system of blacklisting arbitrators who issue awards favorable to plaintiffs.[156]

The ability of the plaintiff to appeal an arbitrator's decision is necessary and fair to counterbalance the overwhelming bias in favor of the defendant in the current process. If the arbitrator's decision were deemed to be reasonable, the award would be upheld. This proposed arbitration reform would be similar to the appeals process in other types of litigation.

3. Improving the Reasonableness of Awards

Economic analysis of all the permutations of arbitration is not exact. No legitimate method exists to predict all of the variables that each party may consider to accurately value the alternative methods of resolving disputes. Although it is impossible to determine the perfect method of reaching a reasonable arbitration award, the proposed reform would improve the process. Additionally, the first step toward ensuring the reasonableness of awards was addressed earlier concerning requiring arbitrators to write *reasoned* awards as a method of improving arbitrators' accountability. This Part addresses how this proposed reform would encourage the *parties* to be more reasonable.

Under the current arbitration system, the corporation is aware that that the arbitrator's award is final and the plaintiff has no

154. *AFA Hearing*, *supra* note 83, at 22 ("[Arbitration] works because of its informality, because of its simplicity, because different people can serve as arbitrators, because it is *not* a court." (emphasis added)).

155. *See supra* notes 126–34 and accompanying text.

156. *See supra* note 22 and accompanying text.

further recourse. With this knowledge, the defendant has no incentive to be reasonable. The defendant can exploit the repeat-payer bias to select an arbitrator with a loyalty to the corporation. The defendant can also exploit the repeat-player bias when crafting the arbitration agreement to impose extremely burdensome procedural requirements on the plaintiff. Under the proposed reform, the defendant would face the possibility of judicial review if the plaintiff is treated unfairly. The defendant would risk an even greater award from a court and would incur more expense through the appeal process. As a result, the defendant would have an incentive to eliminate unfair arbitration requirements in contracts and to encourage the arbitrator to reach decisions that are fair in an effort to avoid judicial review and the risk of more expense.

This proposal would also require the plaintiff to be reasonable. Even if an award were less than what the plaintiff wanted, the plaintiff would recognize that she has no guarantee that she would receive a better outcome through judicial review. In fact, the plaintiff would risk that a trial court reviewing the award could determine that the plaintiff should take nothing. The plaintiff would also incur additional expense in appealing an award. Under the proposed reform, the plaintiff would have to seriously consider the risks and costs of appealing an award in determining whether it would be reasonable to seek judicial review.

4. Decreasing Arbitrability Litigation

In *Jones v. Halliburton Co.*, the plaintiff endured over two years of litigation and appeals concerning whether her claims were arbitrable.[157] Ultimately, Jones won the appeal, in which the Fifth Circuit held that her claims were not arbitrable.[158] Arbitration reform needs to remedy this problem—extended litigation over whether a suit is arbitrable.

This Comment's proposal would reduce the amount of arbitrability litigation when compared to the status quo. Currently, plaintiffs are motivated to resist going to arbitration because they perceive arbitration as a fundamentally unfair forum and because they know the arbitrator's award is effectively non-reviewable. By requiring reasoned awards and permitting the plaintiff to seek judicial review, a plaintiff's incentive to resist going to arbitration decreases. This decrease in arbitrability litigation would balance the increased use of judicial resources in reviewing awards.

Although this Comment's proposal reduces arbitrability litigation when compared to the status quo, admittedly, the AFA would eliminate arbitrability litigation altogether. This elimination of arbitrability litigation, however, should not motivate Congress to

157. *See* Jones v. Halliburton Co., 583 F.3d 228, 228, 232 (5th Cir. 2009).
158. *See id.* at 230.

pass the AFA. In exchange for this decrease, courts would now have to hear virtually all employment and consumer disputes. The AFA merely substitutes full-blown litigation in all disputes in these contexts for the reduction of arbitrability litigation in some of the disputes in these contexts.

CONCLUSION

The use of arbitration as an alternative form of dispute resolution has been evolving since the days of common law. At common law, arbitration was a less-effective method because arbitration agreements were often invalidated. Arbitration awards, however, were generally enforced. Congress responded in 1925 with the FAA to provide more certainty to businesses and individuals attempting to utilize arbitration as an alternative to the judicial process. Arbitration's advantages, both in reduced expense and time saved, have established the process as a valuable tool in dispute resolution.

In response to the Supreme Court's increasingly broad interpretation of the FAA during the 1980s, corporations began inserting arbitration agreements into many contracts. Predispute arbitration agreements typically define the circumstances of arbitration, including the location, time, and venue of the arbitration. The plaintiff seldom has any meaningful input in the selection of an arbitrator or the rules used in arbitration. Because the corporation writes the contract, the terms almost always advantage the corporation and disadvantage the potential plaintiff. In addition to the terms of the agreement, the defendant also enjoys an advantage as a repeat player and repeat payer.

The proliferation of arbitration has also resulted in stagnation of developing case law. Without the judicial process, important cases do not reach appellate courts for consideration of new arguments or modification of existing law.

These conditions have permitted the balance of power to shift so far in favor of the defendants that the current system invites fraud. As seen in the Minnesota Attorney General's claim against the National Arbitration Forum, the opportunity for abuse and a lack of any judicial review have permitted some to abuse the system of arbitration. Some of the more egregious examples of the abuse of power have finally spurred Congress to take action to correct the situation.

Unfortunately, the arbitration reform pending before Congress will overcorrect the situation and actually harm those it seeks to help. The gravamen of the AFA will eliminate the use of predispute arbitration agreements in four important contexts. No evidence suggests that parties would adopt the postdispute arbitration agreements on which the legislation relies. Furthermore, the AFA does not address other problems, such as the repeat-payer bias.

The alternative solution proposed by this Comment includes a reasoned award by the arbitrator and judicial review of the award at the election of the plaintiff only. Explanation of the award has the obvious advantage of requiring the arbitrator, often untrained in the law, to justify the award by explaining the thought process behind the award. The arbitrator will have to issue the award with the knowledge that the plaintiff can take the award to court for review. With the awareness that a plaintiff may appeal an unfair award, the corporate defendant will recognize that reaching a more equitable result in arbitration is actually to its advantage. Defendants would likely channel their efforts to selecting the arbitrators who can best reach a final resolution with a reasoned award. Congress should reform the arbitration system to provide for the continued use of arbitration with provisions that redress the imbalance of power between the parties.

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