

Summer 8-10-2021

## Opt-In Arbitration: A Functional Alternative to the FAIR Act

Garrett Meisman

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Garrett Meisman, *Opt-In Arbitration: A Functional Alternative to the FAIR Act*, 46 *BYU L. Rev.* 1647 (2021).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol46/iss6/9>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in *BYU Law Review* by an authorized editor of *BYU Law Digital Commons*. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# Opt-In Arbitration: A Functional Alternative to the FAIR Act

*Garrett Meisman\**

## CONTENTS

INTRODUCTION .....	1648
I. THE STATE OF ARBITRATION IN AMERICA.....	1649
A. The Federal Arbitration Act.....	1649
B. Interpretation by American Courts .....	1651
1. Preemption by the FAA generally.....	1651
2. Class action waivers.....	1653
3. Adhesive contracts.....	1654
C. Practical Impact of Arbitration Policy .....	1655
II. ADVANTAGES AND DISADVANTAGES OF ARBITRATION .....	1656
A. Efficiency.....	1656
B. Lower Costs.....	1657
C. Confidentiality.....	1658
D. Arbitrator Expertise .....	1658
E. Potential for Bias .....	1659
F. Jury Trial Waivers.....	1660
G. Class Action Waivers.....	1661
H. Finality.....	1662
III. VALUES UNDERLYING ARBITRATION REGULATION .....	1664
A. Autonomy and Voluntary Consent .....	1664
B. Economic Considerations .....	1665
C. Individual Rights.....	1666
IV. MOVING TOWARD A MORE FUNCTIONAL FRAMEWORK.....	1667
A. Opt-In Arbitration Clauses .....	1667
B. Precedent in Contract Law .....	1667
C. Legislation Over Rulemaking.....	1668
D. Opt-Out Clauses Are Not Enough.....	1669
E. Advantages Over a Blanket Prohibition .....	1671
CONCLUSION .....	1673

---

\* J. Reuben Clark Law School, J.D. Candidate 2021. Brigham Young University, B.S. 2018. Thanks to Professor Gladriel Shobe for her assistance in formulating and reviewing this Note.

## INTRODUCTION

In 2019, the United States House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act.<sup>1</sup> The Act purports to safeguard the interests of consumers and employees by invalidating all predispute arbitration agreements and predispute joint-action waivers in the context of employment, consumer, antitrust, and civil rights disputes.<sup>2</sup> The FAIR Act was sponsored almost exclusively by Democrats<sup>3</sup> and was passed along mostly partisan lines.<sup>4</sup> Although the bill was stalled in a Republican-controlled Senate, the new Democrat majority will likely view it more favorably. President Biden has shown interest in banning at least some predispute arbitration agreements,<sup>5</sup> so the bill's fate will likely depend on its reception in committee and its proponents' ability to circumvent the filibuster.

The FAIR Act may be well intended, but a blanket ban on predispute arbitration agreements could bar access to efficient means of dispute resolution and unnecessarily bog down the traditional litigation system. Even accepting the prevailing criticisms of predispute arbitration agreements, a more moderate solution would likely be more palatable to differing ideologies, protect individuals<sup>6</sup> from predatory corporate behavior, and allow parties to craft the dispute resolution process to suit their needs. This Note proposes such a solution in the form of an "opt-in" framework for enforcing arbitration agreements. Under this framework, predispute arbitration clauses would be enforced only if they were separately signed or clicked by the individual on an elective basis.

---

1. Forced Arbitration Injustice Repeal (FAIR) Act, H.R. 1423, 116th Cong. (2019).

2. *Id.* § 402(a).

3. *Cosponsors: H.R. 1423 – 116th Congress (2019–2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1423/cosponsors> (last visited Mar. 24, 2021).

4. 165 CONG. REC. 7,852 (2019).

5. *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, BIDEN FOR PRESIDENT, <https://joebiden.com/empowerworkers/> (last visited Mar. 24, 2021) (describing then-Candidate Biden's plan to "ensure workers can have their day in court by ending mandatory arbitration clauses imposed by employers on workers").

6. For purposes of this Note, the smaller parties to arbitration agreements (such as employees and consumers) will be referred to as "individuals" while larger parties (such as employers, banks, and consumer goods businesses) will generally be referred to as "companies."

This Note first examines the rise and widespread adoption of arbitration in American law and commerce to illustrate why such clauses have become a focus of reform advocates. It will then consider some of the policy values behind arbitration law, as well as the benefits and disadvantages that might affect parties' decision to arbitrate. Finally, it will propose, analyze, and respond to potential critiques of an "opt-in" framework as a preferable alternative to both the status quo and the blanket ban proposed by the FAIR Act.

## I. THE STATE OF ARBITRATION IN AMERICA

To understand the firmly established position of arbitration in the United States, it is necessary to examine the history of the Federal Arbitration Act and its interpretation by the United States Supreme Court.

### A. *The Federal Arbitration Act*

The Federal Arbitration Act (FAA), enacted in 1925, made predispute arbitration agreements enforceable in the United States.<sup>7</sup> In enacting this law, Congress was motivated at least partly by the widespread "agitation against the costliness and delays of litigation."<sup>8</sup> The FAA was also "designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate'"<sup>9</sup> by placing those agreements "upon the same footing as other contracts."<sup>10</sup> Section 2 of the FAA, which forms part of the "core" of its fifteen sections,<sup>11</sup> provides the following:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon

---

7. Federal Arbitration Act, 9 U.S.C. §§ 1-16.

8. H.R. REP. NO. 96, at 2 (1924).

9. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)).

10. H.R. REP. NO. 96, at 1 (1924).

11. Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 335 (1996).

such grounds as exist at law or in equity for the revocation of any contract.<sup>12</sup>

Section 1 clarifies that “commerce” refers to interstate and international commerce.<sup>13</sup> It further limits the scope of the statute by clarifying that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>14</sup>

The history surrounding the FAA’s enactment suggests that Congress may have intended it to apply primarily to disputes between experienced merchants.<sup>15</sup> But even if this was the intent of the legislature, it failed to clearly incorporate that intent into the statutory text.<sup>16</sup> Any attempt to construe the FAA as only applying to agreements between sophisticated commercial actors is thus bound to meet little success.

The extent to which the FAA preempts state law is another question. The final clause of § 2, known as the “Savings Clause,”<sup>17</sup> exempts state contract law from preemption.<sup>18</sup> Thus, courts must

---

12. 9 U.S.C. § 2.

13. 9 U.S.C. § 1.

14. *Id.*

15. Shortly after the FAA was passed, Julius Cohen, one of its primary drafters, co-authored a law review article emphasizing the exclusive utility of arbitration for esoteric commercial transactions:

[Arbitration] is a remedy peculiarly suited to the disposition of the ordinary disputes *between merchants* as to questions of fact . . . . It has a place also in the determination of the simpler questions of law . . . which arise out of these daily relations *between merchants* . . . . It is not a proper remedy for what we may call casual questions—questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges with a background of legal experience and established systems of law.

Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (emphasis added). This focus on transactions between merchants seems to be further supported by the testimony of the FAA’s proponents in congressional hearings. *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 6* (1924) (statement of Charles Bernheimer, Chairman, Committee on Arbitration, Chamber of Commerce of the State of New York) (discussing the value of arbitration for businesspeople and merchants); see also Margaret L. Moses, *Arbitration Law: Who’s in Charge?*, 40 SETON HALL L. REV. 147, 170 (2010) (discussing the historical use of arbitration as a means for businesspeople to seek adjudication through someone with greater industry expertise than a regular jurist).

16. The text of § 2 requires courts to enforce arbitration agreements connected to maritime transactions or those “involving commerce.” Although this language places emphasis on commercial bargains, it never explicitly limits itself to transactions between merchants or those parties with relatively equally bargaining power.

17. Brafford, *supra* note 11, at 336.

18. 9 U.S.C. § 2.

apply state law to determine whether an arbitration agreement is enforceable and to resolve such questions as unconscionability and fraud in the inducement.<sup>19</sup> But the text of the FAA does not state to what extent it preempts *other* state law.<sup>20</sup> This issue has been the subject of evolving analysis by the United States Supreme Court, as will be discussed below.<sup>21</sup>

### B. Interpretation by American Courts

#### 1. Preemption by the FAA generally

Since its enactment, the FAA has been the subject of a series of interpretive decisions by American courts which have gradually but dramatically expanded its scope to reflect a “national policy favoring arbitration.”<sup>22</sup> At first, the FAA was treated as only applying to federal courts.<sup>23</sup> But in a chain of cases<sup>24</sup> culminating in *Prima Paint Corp. v. Flood & Conklin Manufacturing*, the Supreme Court characterized the FAA as substantive, rather than procedural law, and held that the FAA would replace state law in determining the enforceability of arbitration agreements in federal diversity cases.<sup>25</sup>

Then the Court took the dramatic step of determining that the FAA applied to state courts so long as the contract involved interstate commerce.<sup>26</sup> In *Southland Corp. v. Keating*, the Court stated that, “[i]n enacting § 2 . . . Congress . . . withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>27</sup> The Court further determined that “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”<sup>28</sup> Thus, under the Constitution’s

---

19. Brafford, *supra* note 11, at 336.

20. See 9 U.S.C. § 2.

21. See *infra* Section I.B.

22. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

23. Thomas Burch, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 FLA. ST. U. L. REV. 1005, 1012 (2004).

24. See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

25. See *Prima Paint Corp. v. Flood & Conklin Mfg.* 388 U.S. 395, 405 (1967).

26. *Southland Corp.*, 465 U.S. at 10-11.

27. *Id.* at 10.

28. *Id.* at 16.

Supremacy Clause,<sup>29</sup> state laws that conflicted with the FAA were implicitly preempted.<sup>30</sup>

The Court continued extending its preemption jurisprudence when defining the phrase “involving commerce” in § 2.<sup>31</sup> The Court had interpreted Congress’s power to regulate interstate commerce extremely broadly,<sup>32</sup> and in *Allied-Bruce Terminix Cos. v. Dobson*, the Supreme Court extended that reasoning to the FAA’s “involving commerce” language.<sup>33</sup> This phrase, the Court reasoned, “normally signals Congress’ [sic] intent to exercise its Commerce Clause powers to the full.”<sup>34</sup> Thus, although not every agreement might appear to involve interstate commerce, those with even a remotely commercial component fall under the FAA’s broad coverage.<sup>35</sup>

The Court later held that any state-law requirement for arbitration agreements is valid only if it applies to contracts generally.<sup>36</sup> In *Doctor’s Associates, Inc. v. Casarotto*, the Court addressed a Montana law which required contracts containing arbitration provisions to provide notice “in underlined capital letters on the first page of the contract” that the agreement was “subject to arbitration.”<sup>37</sup> The Court held that the FAA preempts state laws insofar as they place arbitration agreements in “a class apart” from other contracts.<sup>38</sup> In other words, the Savings Clause of § 2 does not exempt state laws that “singl[e] out arbitration

---

29. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

30. See *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (explaining that a state law is preempted when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

31. 9 U.S.C. § 2.

32. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)) (“The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.”).

33. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74 (1995).

34. *Id.* at 273 (citing *Russell v. United States*, 471 U.S. 858, 859 (1985)).

35. See *id.*; *Wickard*, 317 U.S. at 124.

36. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996).

37. *Id.* at 683 (quoting MONT. CODE ANN. § 27-5-114(4) (1995)).

38. *Id.* at 688.

provisions for suspect status.”<sup>39</sup> Because the Montana law specifically targeted arbitration agreements with heightened notice requirements, the FAA overrode the state law and the arbitration provision was enforceable.<sup>40</sup>

Consistent with this favorable stance toward arbitration, the Court has narrowly construed the § 1 exemption for employment contracts of “workers engaged in foreign or interstate commerce”<sup>41</sup> by determining that it only applies to transportation workers.<sup>42</sup> Employment arbitration agreements in virtually every other industry are therefore enforceable under the FAA.

## 2. Class action waivers

The Supreme Court has also liberally enforced waivers of the right to join in class actions found in many predispute arbitration agreements.<sup>43</sup> In *AT&T Mobility LLC v. Concepcion*, consumers argued that the class arbitration waiver in their cell phone contract was unconscionable.<sup>44</sup> In finding for the consumers, the Ninth Circuit had used generally applicable state contract law,<sup>45</sup> which would seemingly be exempt from preemption under the FAA’s Savings Clause.<sup>46</sup> Even so, the Supreme Court reversed, holding that the Savings Clause does not “preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>47</sup> Because, among other things, class arbitration is “slower” and “more costly” than bilateral arbitration,<sup>48</sup> it hindered the FAA’s objective of “facilitat[ing] streamlined proceedings” and was therefore preempted.<sup>49</sup>

The Court resolved a similar issue in an employment context in *Epic Systems Corp. v. Lewis*.<sup>50</sup> There, employees argued that class action waivers violated their right under the National Labor

---

39. *Id.* at 682 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

40. *Id.* at 687.

41. 9 U.S.C. § 1.

42. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

43. *See infra* Section II.G.

44. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337–38 (2011).

45. *Id.* at 338.

46. *See* 9 U.S.C. § 2; *Doctor’s Ass’ns., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996).

47. *Concepcion*, 563 U.S. at 343.

48. *Id.* at 348.

49. *Id.* at 344.

50. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

Relations Act (NLRA) “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>51</sup> The NLRA classifies it as an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise” of this right.<sup>52</sup> All the same, the Court held that this language does not show “a clear and manifest congressional command to displace the Arbitration Act.”<sup>53</sup> Therefore, this landmark case established that class action waivers were fully enforceable in employment settings as well.<sup>54</sup>

### 3. *Adhesive contracts*

Arbitration provisions are often found in boilerplate contracts provided by businesses to consumers and employees. These contracts are adhesive, meaning that they are offered on a take-it-or-leave-it basis in transactions with sizable disparities in bargaining power between the parties.<sup>55</sup> Although these power disparities make adhesive predispute agreements susceptible to criticism, existing law provides little basis for invalidating them on that basis alone. The Restatement (Second) of Contracts explains that “[a] bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party.”<sup>56</sup> Along with most of the cases already discussed, in which the relevant contracts were likely adhesive, the Supreme Court specifically rejected an argument to invalidate an arbitration agreement based on the mere risk of unequal bargaining power in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>57</sup> This decision was based on the absence of “the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’”<sup>58</sup> So courts will generally enforce adhesive agreements unless there is a finding of actual coercion.<sup>59</sup>

---

51. *Id.* at 1625 (quoting 29 U.S.C. § 157).

52. 29 U.S.C. § 158.

53. *Epic Sys. Corp.*, 138 S. Ct. at 1624.

54. *See id.*

55. *Adhesion Contract*, BLACK’S LAW DICTIONARY (11th ed. 2019).

56. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981).

57. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

58. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)).

59. *Id.*

In view of this long line of cases overwhelmingly favoring arbitration in the United States, any attempts to curb arbitration agreements based on interpretation of the FAA are likely to face insurmountable obstacles.

### *C. Practical Impact of Arbitration Policy*

As a result of the consistently favorable approach that American courts have taken toward arbitration, the use of predispute agreements has steadily grown. The share of workers who have entered such agreements has doubled since the early 2000s and now exceeds 55%, or around 60 million American employees.<sup>60</sup> Companies with 1,000 or more employees use predispute arbitration agreements more often than other employers, as do low-wage workplaces and those with disproportionately large populations of women and African American workers.<sup>61</sup>

These agreements are even more prevalent in consumer settings.<sup>62</sup> A 2015 study by the Consumer Financial Protection Bureau (CFPB) found that 53% of outstanding credit card loans were attributed to issuers that used predispute arbitration agreements.<sup>63</sup> For prepaid cards, which are usually used by lower-income individuals,<sup>64</sup> more than 82.9% of the market required arbitration.<sup>65</sup> It is likewise required by 85.7% of student loan contracts and 98.5% of the storefront payday loan market<sup>66</sup>—both of which disproportionately affect low-income and minority

---

60. ALEXANDER J.S. COLVIN, ECON. POL'Y INST., *THE GROWING USE OF MANDATORY ARBITRATION 1* (2018), <https://files.epi.org/pdf/144131.pdf>.

61. *Id.*

62. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., *THE ARBITRATION EPIDEMIC 16* (2015), <https://files.epi.org/2015/arbitration-epidemic.pdf>.

63. CONSUMER FIN. PROT. BUREAU, *ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) § 2*, at 7 (2015).

64. STONE & COLVIN, *supra* note 62, at 16.

65. CONSUMER FIN. PROT. BUREAU, *supra* note 63, § 2, at 7.

66. *Id.*

demographics<sup>67</sup> – along with 99.9% of the mobile wireless market.<sup>68</sup> Considering both the widespread use of these agreements and the judiciary’s expansive interpretation of the FAA, it makes sense that reform efforts are being directed at the legislature.

## II. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

Next, it is useful to examine the considerations that might affect parties entering predispute arbitration agreements. Although such agreements tend to favor larger parties, they still present some potential advantages for individuals. A consumer or employee could therefore have enough incentives to consent rationally to arbitration under the right terms.

### A. Efficiency

The arbitration process is generally much more streamlined than classic litigation.<sup>69</sup> For instance, arbitration excludes such steps as motions to dismiss, motions for summary judgment, interrogatories, depositions, and appeals.<sup>70</sup> Parties can contractually tailor the dispute resolution process by including or excluding steps according to their needs.<sup>71</sup> The average arbitration process thus takes a little more than a year, while litigation sometimes lasts more than five years.<sup>72</sup> This increased efficiency not only has positive implications for the parties themselves, but for the

---

67. See Judith Scott-Clayton & Jing Li, *Black-White Disparity in Student Loan Debt More than Triples After Graduation*, EVIDENCE SPEAKS REPS., Oct. 20, 2016, [https://www.brookings.edu/wp-content/uploads/2016/10/es\\_20161020\\_scott-clayton\\_evidence-speaks.pdf](https://www.brookings.edu/wp-content/uploads/2016/10/es_20161020_scott-clayton_evidence-speaks.pdf); S. ILAN GUEJ, BATES WHITE ECON. CONSULTING, REPORT REVIEWING RESEARCH ON PAYDAY, VEHICLE TITLE, AND HIGH-COST INSTALLMENT LOANS 6-7 (2019), <https://lawyerscommittee.org/wp-content/uploads/2019/05/Report-reviewing-research-on-payday-vehicle-title-and-high-cost-installment-loans.pdf>.

68. CONSUMER FIN. PROT. BUREAU, *supra* note 63, § 2, at 7.

69. Seth E. Lipner, *Is Arbitration Really Cheaper?*, FORBES (July 14, 2009), <https://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost.html>.

70. *Id.*

71. See John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 CARDOZO L. REV. 187, 210-11 (2018) (“Parties can further agree on rules that strictly constrain or eliminate expensive discovery, that substitute depositions with parties’ advance presentation of their witnesses’ direct testimony by written affidavit . . . , and that set strict timetables for written submissions and hearings . . . . The terms of the resulting ADR provisions . . . can be as customized and idiosyncratic as the parties’ imaginations and preferences may dictate.”).

72. Lipner, *supra* note 69.

judicial system more broadly. Arbitration diverts cases from already overwhelmed judicial dockets,<sup>73</sup> thereby shortening wait times and directing disputes toward forums better suited for their procedural needs.

### B. Lower Costs

On a similar note, arbitration is usually cheaper than litigation.<sup>74</sup> Although taxpayers subsidize certain aspects of litigation,<sup>75</sup> arbitration entails fewer “process costs” such as “forum fees, litigation expenses, out-of-pocket attorneys’ fees, time, and energy devoted by the parties.”<sup>76</sup> Since arbitration offers less room for complexity than litigation does, process costs are often lower.<sup>77</sup>

As with efficiency, this aspect of arbitration can benefit both parties. For a hypothetical construction dispute, one group of experts estimated that a claimant would incur 27% lower total costs in arbitration than in litigation.<sup>78</sup> Of course, these numbers vary widely depending on the complexity and cost of a dispute,<sup>79</sup> but arbitration is generally the more cost-effective alternative for both parties.<sup>80</sup>

---

73. See *Federal Judicial Caseload Statistics 2018*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018>; see also Dominick T. Gattuso, *The U.S. District Court: Managing A Busy Docket*, DEL. LAW., Summer 2013, at 8 (examining the caseload of the United States District Court for the District of Delaware).

74. Susan Zuckerman, *Comparing Cost in Construction Arbitration & Litigation*, 62 DISP. RESOL. J. 42 (2007) (comparing costs of arbitration and litigation in hypothetical construction dispute).

75. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 435-36 (2010) (“[T]he fact that a contract does not include an arbitration clause does not indicate that litigation is more efficient than arbitration, but only that parties prefer a subsidized dispute resolution process to an unsubsidized one.”).

76. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1267 (2009).

77. *Id.* at 1268.

78. Zuckerman, *supra* note 74, at 44. Mediation, on the other hand, would save ninety-two percent of the total costs of litigation. See *id.*

79. *Id.* at 48.

80. Lipner, *supra* note 70.

### C. Confidentiality

Arbitration is also generally confidential: there is no public record of the arbitration proceedings or of the ultimate settlement.<sup>81</sup> Additionally, contracts sometimes contain express provisions requiring parties to keep documents, awards, and even the names of the parties confidential.<sup>82</sup>

This characteristic offers advantages to companies over individuals. By keeping arbitration proceedings behind closed doors, defendants can shield the subject matter of the dispute—which is often unfavorable to the company—from the public eye. Granted, this privacy might sometimes be desirable for plaintiffs as well, especially in cases of sexual harassment or other matters that deal with delicate facts. But victims of discrimination, physical injury, or other harms must seek remedies without the publicity that might otherwise give them leverage in the dispute. Confidentiality also hinders other potential claimants from learning about the pending dispute.<sup>83</sup> This ignorance, combined with the class action waivers typically found in predispute agreements, suppresses the likelihood that similar actions will be brought. More broadly, confidentiality also increases the likelihood of inconsistent outcomes because arbitrators cannot compare the facts to previously arbitrated cases.<sup>84</sup>

### D. Arbitrator Expertise

In traditional state courts, judges have general jurisdiction, meaning that they might handle a divorce one day and an insurance dispute the next.<sup>85</sup> Naturally, no jurist can develop knowledge in every subject area with as much depth as a specialist

---

81. Craig Smith & Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 297 (2012).

82. See Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT'L ARB. 479, 495–96 (2005). However, American courts do not always enforce such agreements in the presence of unequal bargaining power. *Id.*

83. See Smith & Moyé, *supra* note 81, at 297 (“[T]he secrecy of the arbitration proceedings leaves other parties injured by similar actions unaware of the availability of relief.”).

84. *Id.*; see also Raymond, *supra* note 82, at 502–03 (explaining the limited precedential value of arbitration decisions except in subsequent disputes between the same parties).

85. LEE HUGH GOODMAN, NICHOLS ILLINOIS CIVIL PRACTICE WITH FORMS ALTERNATIVE DISPUTE RESOLUTION HANDBOOK § 1:37 (2020).

might. Furthermore, out of concerns for due process, parties cannot select judges in these public forums.<sup>86</sup> The arbitral forum, on the other hand, allows parties to select arbitrators based on their relevant subject-matter expertise.<sup>87</sup> For instance, in a patent dispute over an electronic device, “the parties might want an arbitrator who has experience with intellectual property. The parties might be more interested in an arbitrator who is familiar with electronics, and might even want an arbitrator who has expertise in licensing electronic devices.”<sup>88</sup> Subject-matter expertise is also particularly useful in construction and securities disputes.<sup>89</sup> While specialized knowledge is not necessary in every case, it can enhance both the efficiency of the dispute’s resolution and the confidence of the parties in the outcome.<sup>90</sup>

#### *E. Potential for Bias*

On the other hand, there may be a higher risk of bias among third-party neutrals in an arbitration setting. Larger parties are often “repeat players” to the arbitration process. In other words, they arbitrate repeatedly and are therefore more familiar with both the forum and the arbitrators themselves.<sup>91</sup> Such parties are statistically more likely to win disputes in arbitration than those who are one-shot users, and the remedies tend to be smaller.<sup>92</sup> For instance, the American Arbitration Association (AAA) released data from 2012–17 on employment cases against Macy’s, which represented nearly 47% of AAA’s employment arbitrations.<sup>93</sup> While non-Macy’s cases had a 7.5% rate of dismissal, Macy’s cases had a 93% rate of dismissal.<sup>94</sup> Similarly, awards from successful non-Macy’s claims averaged \$328,000, while those against Macy’s

---

86. *Id.*

87. *Id.*

88. *Id.*

89. Robert S. Brandt, *Dispute Resolution Clauses in Contracts*, 38 TENN. BAR J. 28, 29 (2002).

90. See GOODMAN, *supra* note 85.

91. Smith & Moyé, *supra* note 81, at 298.

92. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 205–12 (1997).

93. Genie Harrison, *Insight: Forced Arbitration is Bad News for Employees, California Stats Show*, BLOOMBERG L. DAILY LAB. REP. (Aug. 15, 2019, 2:01 AM), <https://news.bloomberglaw.com/daily-labor-report/insight-forced-arbitration-is-bad-news-for-employees-california-stats-show>.

94. *Id.*

averaged \$87,000.<sup>95</sup> Such outcomes may result partly from bias on the part of arbitrators. As Judge Michelle Friedland of the Ninth Circuit put it:

By nature of the fact that arbitrators are hired and paid by the parties for whom they conduct private arbitrations, arbitrators have an economic stake in cultivating repeat customers for their services. In addition, arbitrators affiliated with an arbitration firm have an interest in not causing the firm to lose its top clients. At least to some extent, this means arbitrators have incentives to make decisions that are viewed favorably by parties who frequently engage in arbitrations. This feature of private arbitration, even if distressing, is an inevitable result of the structure of the industry.<sup>96</sup>

No empirical study has conclusively attributed repeat-player outcomes to arbitrator bias rather than, say, the expertise of the advocates.<sup>97</sup> Indeed, parties in classic litigation might also experience a home court advantage in courts where they regularly appear, but this isn't necessarily the result of judicial bias.<sup>98</sup> But there is intuitive appeal in the idea that, in the words of Justice Black, "it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation."<sup>99</sup>

#### *F. Jury Trial Waivers*

Arbitration agreements also act as a waiver of one's right to a jury trial. The Seventh Amendment of the United States Constitution states, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."<sup>100</sup> This amendment notably has not been

---

95. *Id.*

96. *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1139 (9th Cir. 2019) (Friedland, J., dissenting) (footnote omitted).

97. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 *EMP. RTS. & EMP. POL'Y J.* 405, 427-29 (2007).

98. Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 *HARV. NEGOT. L. REV.* 29, 68 (2017) ("[T]he repeat-player effect may be at least as prevalent in litigation as in arbitration. As Horton and Chandrasekher write, parties 'who are regularly embroiled in litigation,' have long exploited a 'variety of ways' to 'capitalize on their experience to gain the upper hand over one-shotters.' So litigation may have a 'repeat-player effect' that equals or even exceeds arbitration's." (footnotes omitted)).

99. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 416 (1967) (Black, J., dissenting) (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

100. U.S. CONST. amend. VII.

incorporated to state courts,<sup>101</sup> and it does not cover all litigation brought in federal courts—although some state law does grant additional protections of the right to a jury.<sup>102</sup> But courts ordinarily view waivers of the right to a jury with some level of suspicion, and such waivers must satisfy high standards before they are enforced.<sup>103</sup> In contrast, the Supreme Court has stated, “The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .”<sup>104</sup> While some courts recognize the disparity in these two standards, most enforce jury trial waivers liberally as long as they are wrapped up in arbitration agreements.<sup>105</sup> As a result, many individuals sign away the right to be heard by a jury of their peers without the level of knowing consent that would ordinarily be required.<sup>106</sup>

### G. Class Action Waivers

Many arbitration agreements also prevent individuals from joining in class actions. Compared to individual litigation, class actions are much more cost effective for individuals because the costs of the action are spread over many claimants.<sup>107</sup> For companies, on the other hand, class actions threaten massive costs because of the potential magnitude of the aggregated claims.<sup>108</sup> Corporate legal spending on class actions has steadily increased in

---

101. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (holding that the Seventh Amendment only applies to disputes brought in federal courts).

102. Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669, 672–73 (2001).

103. *Id.* at 673 (“While jury trial rights under the Seventh Amendment are admittedly subject to waiver, waiver is tightly constrained by the following principles: (1) jury trial waivers may not be lightly implied; (2) courts look at a whole host of factors to determine whether the waiver was voluntary, knowing, and intentional; (3) many courts provide that the party seeking waiver bears the burden of proof; (4) courts’ holdings render suspect the use of unsigned or uninitialed documents to support the finding of a jury trial waiver; (5) in interpreting purported jury trial waivers, courts have stated that they must be narrowly construed.”).

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

105. Sternlight, *supra* note 102, at 711–16 (comparing the approaches taken by various jurisdictions in addressing this dichotomy).

106. *See id.*

107. *See, e.g.*, Janet Cooper Alexander, Presentation at Comparative Perspective Conference at Geneva, Switzerland: An Introduction to Class Action Procedure in the United States 1 (July 21–22, 2000).

108. *See id.*

recent years. In 2018 alone, spending increased nearly 10% to \$2.46 billion.<sup>109</sup> Almost half of that spending was on labor and employment or consumer fraud disputes.<sup>110</sup> Preventing such actions is obviously an appealing prospect for businesses. According to the CFPB, over 90% of arbitration clauses in consumer financial contracts contained class actions waivers.<sup>111</sup> As discussed in section I.B.2 above, the United States Supreme Court has treated such waivers as broadly enforceable.<sup>112</sup>

Not only do these waivers increase the costs for potential class members, but in some cases they might decrease the likelihood that some actions will be brought at all.<sup>113</sup> This is because many claims can only feasibly be pursued when aggregated among a large group of plaintiffs, since their monetary value is so small.<sup>114</sup> Some critics therefore argue that class action waivers “undermine[] challenges to practices such as predatory lending and wage theft.”<sup>115</sup> On the other hand, many disputes—particularly employment actions—are often too individualized to meet the commonality requirements for class formation and are thus inappropriate for collective action anyway.<sup>116</sup> At any rate, this characteristic of many arbitration agreements seems to weigh much more heavily in favor of companies than individuals.

#### *H. Finality*

Unlike in traditional litigation, arbitration awards are immediately final because there is no classic right to an appeal.<sup>117</sup> Instead, the FAA provides some limited means for modifying,

---

109. CARLTON FIELDS, 2019 CARLTON FIELDS CLASS ACTION SURVEY 7 (2019).

110. *Id.* at 11.

111. CONSUMER FIN. PROT. BUREAU, *supra* note 63, § 2, at 46.

112. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

113. *See Smith & Moyé*, *supra* note 81, at 297–98.

114. *Id.*

115. *See* JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 12 (2017).

116. *Id.*

117. AM. ARBITRATION ASS’N, WHAT HAPPENS AFTER THE ARBITRATOR ISSUES AN AWARD 2, [https://www.adr.org/sites/default/files/document\\_repository/AAA229\\_After\\_Award\\_Issued.pdf](https://www.adr.org/sites/default/files/document_repository/AAA229_After_Award_Issued.pdf) (last visited Mar. 24, 2021).

correcting, or vacating an award in court.<sup>118</sup> Common law has created some additional bases for courts refusing to enforce arbitration awards.<sup>119</sup> The arbitration agreement itself can further call for “unrestricted” or “general” submissions, removing the obligation for the arbitrator to apply the law correctly at all.<sup>120</sup> So while some avenues exist for resolving defects in arbitration awards, the standards are deferential and provide much more constricted options than the typical appeals process.

The finality of arbitration can be an advantage for both parties, especially given the considerable time and expense required in the appeals process.<sup>121</sup> Yet the finality of an arbitration decision can also present significant risks when the value of a dispute is high or where error on the part of the arbitrator is likely.<sup>122</sup> When there is perceived arbitrator bias in favor of the larger party, the inability to appeal might seem particularly oppressive for individuals. To address these concerns, several major arbitration providers offer internal, extra-judicial appeals processes, but parties must elect to use these processes in the original arbitration agreement or in a post-dispute agreement.<sup>123</sup> For those who do not, the same risks and benefits still exist.<sup>124</sup>

Clearly, most of the above-referenced features of arbitration tend to favor companies. But these benefits are not exclusive – the efficiency, cost effectiveness, privacy, and specialization offered by

---

118. Section 11 allows modification or correction of an award in cases of miscalculation or mistake, awards made outside the scope of the matter, or imperfection in form. 9 U.S.C. § 11. Section 10 states that an award may be vacated for such causes as corruption or misbehavior by the arbitrators, fraud, or the arbitrators exceeding their powers. *Id.* § 10.

119. These include an award being arbitrary and capricious, failing to draw its essence from the underlying contract, showing manifest disregard for the law, or being contrary to well-defined public policy. *The Basics of Confirming, Vacating, Modifying, and Correcting an Arbitration Award Under the Federal Arbitration Act and the Texas Arbitration Act*, FINDLAW (Mar. 26, 2008), <https://corporate.findlaw.com/litigation-disputes/the-basics-of-confirming-vacating-modifying-and-correcting-an.html>.

120. Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 60–61 (2014) (“Unrestricted submissions give the arbitrator discretion whether to decide the case according to law or according to some other source of norms, such as the customs in the parties’ industry or the arbitrator’s own sense of equity.”).

121. See Joan C. Grafstein, *Yes, You Can Appeal an Arbitration Award*, LAW360 (Jan. 28, 2015, 10:01 AM), [https://www.jamsadr.com/files/uploads/documents/grafstein\\_appeal-arbitration-award\\_law360\\_2015-01-28.pdf](https://www.jamsadr.com/files/uploads/documents/grafstein_appeal-arbitration-award_law360_2015-01-28.pdf).

122. *Id.*

123. *Id.*

124. *Id.*

arbitration can often benefit individuals. Because these advantages can be shared, arbitration is sometimes desirable for both parties.

### III. VALUES UNDERLYING ARBITRATION REGULATION

#### A. *Autonomy and Voluntary Consent*

As some commentators suggest, party autonomy should be “the highest priority in the pantheon of arbitration values.”<sup>125</sup> This idea is based on individual liberty and self-determination being fundamental values in organized democracy.<sup>126</sup> Voluntary consent is an important corollary of this autonomy principle. That is, parties must enter contracts voluntarily, and personal autonomy is offended where one party seeks to impose the agreement at another’s expense.<sup>127</sup> Instead, the parties must accept the terms bilaterally.

But the practical application of these principles is a subject of dispute. Proponents of predispute arbitration agreements contend that autonomy is best preserved by enforcing customized arbitration agreements and with minimal regulation.<sup>128</sup> Individuals should be free to enter transactions, to choose the terms of their agreements, and to waive their own rights as they wish. Similarly, they should reasonably be able to expect to have such agreements enforced against the other party. On the other hand, individuals who agree to mandatory arbitration rarely do so from such a theoretical position of autonomous decision-making. Rather, parties often enter transactions with significantly unbalanced bargaining power. When the alternative to accepting a predispute arbitration agreement is losing a job opportunity or being denied access to desirable—and sometimes indispensable—goods and services, personal autonomy might be constricted rather than enhanced.<sup>129</sup>

---

125. EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 5 (2006).

126. *Id.* at 4–5.

127. *Id.* at 6–7.

128. *Id.* at 5.

129. See, e.g., Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 48 (2005).

### B. Economic Considerations

Proponents of arbitration further contend that it lowers business costs, which, under competitive conditions, means that savings are passed on to consumers.<sup>130</sup> These reduced costs could result from smaller jury awards, reduced adverse publicity, more streamlined procedural rules, fewer claims (especially class actions), limited discovery, or fewer appeals.<sup>131</sup> The assumption that the savings from these advantages will be passed on to consumers is based on a principle of economics called the “rate-of-return equalization principle.”<sup>132</sup> That is, “whatever increases an industry’s profits ultimately attracts additional capital to that industry, causing an increase in that industry’s output and therefore a reduction in its price.”<sup>133</sup> The reverse is also true: things that cut into an industry’s profits ultimately raise prices. Arbitration advocates thus argue that laws restricting arbitration work against the advantages described in Part II above and therefore drive up business costs and therefore prices for consumers.<sup>134</sup>

That said, this argument has not been empirically supported. The CFPB study, for example, “did not find statistically significant empirical support for the theory that companies pass savings from their use of arbitration clauses onto consumers.”<sup>135</sup> Opponents of arbitration further point out that savings are passed on to consumers only under conditions of perfect competition.<sup>136</sup> This requires that there be so many small buyers and sellers that no single party can influence the market price, that the goods and services be homogenous, that market entry and exit be easy, and that there be free access to relevant information.<sup>137</sup> Unless these conditions are met – which, in the world of predispute arbitration

---

130. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89–90 (2001) (emphasis omitted).

131. *Id.* at 90.

132. *Id.* at 91.

133. *Id.* at 92.

134. *Id.* at 93–99.

135. CONSUMER FIN. PROT. BUREAU, *supra* note 63, § 10, at 15.

136. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 93 (2004).

137. *Id.* at 93–94 (citing WALTER NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS 401–02 (7th ed. 1998); ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 252–53 (5th ed. 2001)).

agreements, is highly unlikely<sup>138</sup>—then companies will only partially pass the savings on to consumers. Moreover, these marginal savings are likely to be diffuse over a broad set of consumers while the negative ramifications are concentrated among those individuals bound by the agreements.<sup>139</sup> Thus, the beneficiaries of these savings are much less likely to feel their effect than those bearing the costs.

Another economic argument against mandatory arbitration is that confidentiality removes an important deterrent from committing bad acts. Although the threat of arbitration with its associated costs might itself do something to discourage this behavior, confidentiality protects the company's behavior against broader scrutiny. As discussed previously,<sup>140</sup> predispute agreements therefore insulate companies against the likelihood of similar litigation by other parties. Thus, in a consumer setting, companies lose incentives for providing quality goods and services, potentially imposing additional costs on consumers in the form of defects and decreased value.

### C. Individual Rights

Even given these considerations, however, legislators must weigh economic value against other important concerns underlying regulation. Many regulations—such as those involving the manufacture of drugs, tires, and cars—increase costs for companies and sometimes prices for consumers, but factors like public health and safety counterbalance these costs.<sup>141</sup> Legislation also requires businesses to employ ethical accounting practices.<sup>142</sup> Such regulation might impose higher costs on companies, but lawmakers have recognized that these costs are outweighed by the interest of the public in preventing unscrupulous corporate behavior.<sup>143</sup> Similarly, preserving individuals' right to a public forum might have sufficient intrinsic value to warrant special protection irrespective of economic considerations.

---

138. *Id.* at 94–95 (discussing how each element of perfect competition fails in most mandatory arbitration contexts).

139. *See id.* at 95–96 (discussing the “distributive aspects” of proponents' economic argument).

140. *See supra* Section II.A.

141. Sternlight & Jensen, *supra* note 136, at 95.

142. *Id.* (citing Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002)).

143. *Id.*

#### IV. MOVING TOWARD A MORE FUNCTIONAL FRAMEWORK

##### *A. Opt-In Arbitration Clauses*

As an alternative to both the current system and the changes proposed in the FAIR Act, this Note proposes that Congress amend the FAA to enforce predispute arbitration agreements in consumer, employment, civil rights, and antitrust disputes only when the parties accept them on an opt-in basis. In other words, the law would invalidate any adhesive arbitration clause that must be signed as a condition of employment or obtaining a good or service. This requirement would extend not only to the contract itself, but also to the absence of any coercion or unfair manipulation by either party. Some individuals might understandably feel unspoken expectations—especially from employers—that fall short of outright coercion. But due to concerns of administrability, the individual should be able to point to some overt manifestation of pressure to void the agreement.

Ideally, an enforceable agreement under this framework would be clearly distinguished from the rest of the contract to emphasize that the arbitration clause is optional. It would also contain an explanation of what rights—such as the right to a jury, the right to appeal, and the right to join a class action—the individual would waive by signing such a provision. Most importantly, the individual would have to independently sign or click the arbitration provision for it to be enforced as part of the contract.

##### *B. Precedent in Contract Law*

Precedent already exists in contract law for provisions which are valid only if independently accepted. For instance, Uniform Commercial Code § 2-209 deals with contracts providing that subsequent modification or rescission can be made only through a signed writing.<sup>144</sup> It states that, when a merchant supplies a form containing such a provision to a non-merchant, the non-merchant must separately sign the modification requirement for it to be enforceable.<sup>145</sup> The official comment to the UCC clarifies that this subsection exists to protect consumers.<sup>146</sup> Another analog

---

144. U.C.C. § 2-209(2) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

145. *Id.*

146. *Id.* at cmt. 3 (“[I]f a *consumer* is to be held to such a clause on a form supplied by a merchant it must be separately signed” (emphasis added)).

exists in the form of contract addenda, which propose additional terms to be incorporated into a contract and are enforceable only if signed by both parties.<sup>147</sup> Additionally, in a professional ethics context, a lawyer cannot require a client to prospectively waive malpractice liability unless they are independently represented by counsel in making the agreement.<sup>148</sup>

### *C. Legislation Over Rulemaking*

George H. Friedman has proposed that such reforms be made to consumer financial contracts through rulemaking by the CFPB.<sup>149</sup> However, a broader legislative solution would be superior to this approach for two principal reasons.

First, although the authority of the CFPB is expansive, it is tethered to regulating the provision of consumer financial products and services.<sup>150</sup> But the concerns over mandatory arbitration clauses extend to employment agreements, as well as non-financial consumer contracts. Unlike an agency, Congress could cover this broader subject area without running afoul of its institutional limits.

Second, agency rules are subject to greater volatility than legislation. Because the President exerts direct control over agencies,<sup>151</sup> rules can be altered by smaller shifts in the political winds.<sup>152</sup> Agency rules are also vulnerable to attack under the Congressional Review Act, whereunder Congress can invalidate a new rule using expedited procedures.<sup>153</sup> An opt-in arbitration

---

147. *Cf. Houston v. Willis*, 24 So. 3d 412, 418 (Miss. Ct. App. 2009) (treating an addendum as an extension of an original contract).

148. MODEL RULES OF PRO. CONDUCT r. 1.8(h) (AM. BAR ASS'N 2020).

149. See George H. Friedman, *What's a Regulator to Do? Mandatory Consumer Arbitration, Dodd-Frank, and the Consumer Financial Protection Bureau*, DISP. RESOL. MAG., Summer 2014, at 6.

150. 12 U.S.C. § 5491(a).

151. This is true of the CFPB, especially now that the Supreme Court has deemed the removal protections for its single director to be unconstitutional. See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203–04 (2020).

152. To be sure, the Administrative Procedure Act does provide some restraints on the Executive's discretion to change rules for policy reasons. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983).

153. See CONG. RSCH. SERV., R3992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 1 (2020). Of course, this law would likely not see much action if the proposed rules were promulgated in 2021, given that President Biden would likely veto a joint resolution.

reform could thus have greater scope and permanence if it were enacted through legislation, not CFPB rulemaking.

#### *D. Opt-Out Clauses Are Not Enough*

Some companies have sought to address concerns over mandatory arbitration by incorporating “opt-out” clauses into their contracts. Uber, for instance, uses such a provision in contracts with its drivers.<sup>154</sup> The terms guarantee that the rest of the contract will still be valid if the driver exercises the opt-out clause, and that the company will not retaliate against a driver for doing so.<sup>155</sup> But the process is cumbersome, requiring the driver to send a separate letter or email stating their name and intent to opt out within thirty days of signing the driver agreement.<sup>156</sup> Similar provisions are also present in many credit card contracts.<sup>157</sup>

The apparently voluntary nature of these provisions makes them appealing to courts.<sup>158</sup> But while they might seem to protect voluntary consent, very few individuals read the terms of form agreements they sign, much less understand them.<sup>159</sup> For example, the CFPB study found that, of credit card customers who were subject to predispute arbitration agreements, 18.4% were aware of those agreements<sup>160</sup> and only 6.8% knew that they could not sue their credit card issuer in court.<sup>161</sup> As for Uber’s arbitration agreement, an organized campaign has been necessary to facilitate many drivers’ exercise of their right to opt out and possibly even to inform them of the arbitration provision’s existence in the first

---

154. Technology Services Agreement, Uber Tech., Inc. (Dec. 11, 2015), [https://s3.amazonaws.com/uber-regulatory-documents/country/united\\_states/RASIER%20Technology%20Services%20Agreement%20December%2010%202015.pdf](https://s3.amazonaws.com/uber-regulatory-documents/country/united_states/RASIER%20Technology%20Services%20Agreement%20December%2010%202015.pdf).

155. *Id.*

156. *Id.*

157. Fred O. Williams & Caitlin Mims, *Mandatory Arbitration: Most Credit Cards Allow a Way Out*, CREDITCARDS.COM (Aug. 20, 2019), <https://www.creditcards.com/credit-card-news/avoid-arbitration-study.php>.

158. *See, e.g.,* Larsen v. Citibank FSB, 871 F.3d 1295, 1313 (11th Cir. 2017) (“[T]he existence of an opt-out provision strongly weighs against a finding of procedural unconscionability.”); Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1211 (9th Cir. 2016) (similar).

159. Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014); *see also* Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 188 (2005); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233 (2002).

160. CONSUMER FIN. PROT. BUREAU, *supra* note 63, § 3, at 23.

161. *Id.* at 19.

place.<sup>162</sup> The practical effect is that numerous individuals signing these contracts – perhaps most of them – are likely unaware of the opt-out option until a dispute arises.

Granted, the “duty to read” is a well-established principle of contract law.<sup>163</sup> That is, “failure to read an agreement before signing it does not render the agreement either invalid or unenforceable.”<sup>164</sup> This presumption has obvious practical necessity: it spares courts the odious task of line-drawing on the wide spectrum of understanding which parties may have of the contract terms. It also gives people greater confidence to enter transactions knowing that the other party will generally be held to a consistent standard of performance.

Yet the problem with opt-out contracts does not lie in the duty to read itself, but in how the standard for consent allocates the effects of that duty. By default, an arbitration provision containing an opt-out clause is enforceable unless the opt-out clause is exercised. This standard of consent shields the arbitration provision behind the high probability that the details of the opt-out clause will not be read.<sup>165</sup> Thus, opt-out clauses serve little more purpose than to satisfy courts that predispute arbitration agreements are not technically procedurally unconscionable. They do not mitigate the public policy concerns surrounding predispute arbitration agreements as they currently exist.

On the other hand, mandating opt-in clauses would still respect the widely accepted duty to read. Consumer and employment contracts would be enforced, regardless of either party’s failure to read them before signing. But by requiring the opt-in clause to be separately clicked or signed, this higher standard of consent would make it less likely that the arbitration provision be enforced absent an affirmative decision to accept it. Thus, the ignorance of the less sophisticated parties would work in their favor – or at least not to their detriment. These contracts would be voluntary and protect

---

162. *Don’t Let Uber Take Your Rights Away*, RIDESHARE DRIVERS UNITED, <https://drivers-united.org/uber-arbitration-opt-out> (last visited Mar. 24, 2021).

163. Charles L. Knapp, *Is There A “Duty to Read”?*, 66 HASTINGS L.J. 1083 (2015). *But see id.* at 1108–10 (denominating the “duty” instead as a “presumption of knowing assent” because the former term “is not only technically incorrect, but it also encourages judges (and others as well) to moralize or be condescending to persons who do not read everything they sign”).

164. *Kibler v. Blue Knob Recreation, Inc.*, 184 A.3d 974, 984 (Pa. Super. Ct. 2018).

165. *See supra* note 159 and accompanying text.

individuals' interests far more effectively than deceptively similar opt-out clauses.

*E. Advantages Over a Blanket Prohibition*

An opt-in arrangement is likewise preferable to banning predispute arbitration agreements altogether for two principal reasons. On one hand, it respects the autonomy of contracting parties and ensures free selection of the dispute resolution forum. As arbitration law currently stands, most individuals signing these agreements are not truly autonomous. While they may be theoretically free to abstain from a transaction, they are functionally compelled – whether by the necessity of employment or of certain goods and services – to enter that transaction, and as a result they cannot refuse arbitration for a dispute arising from it.<sup>166</sup>

The FAIR Act's blanket prohibition on predispute arbitration agreements, on the other hand, would have an opposite but still undesirable effect. Individuals would never be able to enter arbitration agreements, even when such agreements would have desirable benefits like reduced costs. Of course, the bill does not forbid anyone from arbitrating.<sup>167</sup> Rather, it invalidates arbitration agreements that are made at the predispute stage.<sup>168</sup> In theory, parties would therefore be free to resort to arbitration once a dispute has arisen. But in practice this would likely never happen. Where a smaller party has a small or weak claim, the larger party would benefit from refusing arbitration and instead forcing their opponent to undergo the substantial costs and hurdles of litigation, thereby discouraging the action from being brought.<sup>169</sup> In such instances, arbitration would be foreclosed to the smaller party, despite its potential advantages.

Contrastingly, an opt-in arrangement would maximize personal autonomy where both alternatives fail. Parties would still be free to contract, to negotiate their own terms, and to waive their rights. But they would be permitted to do so without the threat of losing employment opportunities or access to important goods and services. And unlike the FAIR Act's proposal, such an arrangement

---

166. *See supra* Section III.A.

167. Forced Arbitration Injustice Repeal (FAIR) Act, H.R. 1423, 116th Cong. § 402(a) (2019).

168. *Id.*

169. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567 (2001).

would be minimally paternalistic. This is because, although it would alter the default bargaining context, it would not ultimately foreclose any course of action by either party since each can autonomously consent to either an arbitral or classic litigation forum. This flexibility would permit parties to tailor their dispute resolution process to their idiosyncratic needs.

Second, enforcing predispute arbitration agreements on an opt-in basis would incentivize the company to sweeten the deal for the individual. If consumers, employees, and other small parties were on equal ground with larger parties to accept or reject predispute arbitration agreements, the larger parties would be pressed to craft the terms of their agreements to be more mutually palatable. For instance, they might offer to defray some or all of the costs of the arbitration process, to permit freer disclosure of information, to exempt certain types of claims from the arbitration requirements, to allow the smaller party greater input in the selection of the third-party neutral, or to allow class arbitration. Larger parties clearly have substantial benefits to gain from predispute arbitration agreements as they currently exist,<sup>170</sup> and they could cede some of the benefits of the agreement without breaking even in their cost-benefit analysis. That said, this balancing phenomenon might be dampened if individuals continue to breeze past the terms without reading them. But nothing would prevent companies from placing their opt-in arbitration clauses prominently to attract attention when it is sufficiently important to them.

Proponents of the FAIR Act might still argue that these ends can be achieved just as well by leaving arbitration-related negotiations for the post-dispute stage. After all, if arbitration is preferable to both parties, won't they choose to arbitrate anyway?

The answer is: not necessarily. . . . [T]he incentives to support arbitration change when the system becomes voluntary. . . . Once a dispute has arisen, each side will have a view about whether its claim will fare better in court or in arbitration. As a result, the parties are unlikely to agree, post-dispute, on a choice of forum.<sup>171</sup>

As another commentator put it, “[t]he comparative advantage of arbitration is that it enables both parties to enter into an

---

170. See *supra* Part II (discussing advantages and disadvantages of arbitration for parties).

171. Barbara Black, *How to Improve Retail Investor Protection After the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 13 U. PA. J. BUS. L. 59, 105 (2010).

arrangement to manage some of the *ex ante* uncertainties about disputes before they arise.”<sup>172</sup> For instance, the individual might exchange the likelihood of a higher recovery for easier access to the dispute forum, while the company might exchange the likelihood of prevailing for lower overall costs.<sup>173</sup> The mutual value of such a tradeoff “is lost once the dispute arises and its terms are better known.”<sup>174</sup> Thus, arbitration is likely not a viable option at all unless the parties agree to it before the dispute occurs.<sup>175</sup>

#### CONCLUSION

The FAIR Act deserves praise for its attempt to protect consumers and employees against predatory business practices. However, a more effective approach would allow parties to take advantage of the benefits of arbitration while ensuring that individuals can do so voluntarily. By implementing an opt-in standard for enforcement of arbitration agreements, the legislature could balance these priorities. Doing so would protect party interests more effectively than either existing arbitration law or a blanket ban on predispute arbitration agreements.

---

172. Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 279 (2008).

173. *Id.*

174. *Id.*

175. *See id.*

