PRAGMATIC LIBERALISM IN MANDATORY ARBITRATION

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Abstract

Over the last twenty-five years, the Supreme Court has relied on party autonomy and the national policy favoring arbitration to expand the Federal Arbitration Act’s scope beyond Congress’s original intent. Choosing these loaded premises has allowed the Court to reach the outcomes it desires while denying that it is making any political or moral judgments in its decisions—a type of bureaucratic formalism. One controversial outcome of the Court’s formalism, overall, has been the increased prevalence of mandatory arbitration. Although it reduces judicial caseloads and lowers companies’ dispute-resolution costs, it also restricts or eliminates individual rights and reduces public regulation of the companies that require it. The Court has supported the spread of mandatory arbitration despite these negative effects.

Reform advocates, therefore, have turned to Congress for relief, convincing its members to introduce 135 anti-arbitration bills since 1995. Some of these bills have been arbitration-specific, while others have suggested changes to arbitration laws as a small part of a larger act. Either way, the majority have proposed eliminating mandatory arbitration, thus disregarding its public benefits in favor of a rights-oriented, liberal approach that rejects regulation as a possible way to improve its overall fairness.

In this Article I show that both the Supreme Court’s formalism and the reform advocates’ liberalism are flawed. It makes more sense, at least for now, to continue mandatory arbitration’s use while improving its overall fairness through legislative or agency regulation. Regulating mandatory arbitration is consistent with pragmatic principles, and pragmatic liberalism, as a theory, is superior to formalism and liberalism in the current mandatory-arbitration context. This approach will allow us to study mandatory arbitration over time before deciding whether to eliminate it—a fair way to proceed given the importance of the rights at stake and the positive effects that mandatory arbitration can (possibly) have on the public good.

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INTRODUCTION

Mandatory arbitration is an enigma. It reduces judicial caseloads and lowers companies’ dispute-resolution costs. But it also restricts or eliminates individual rights and reduces public regulation of the companies that require it. Determining whether its benefits outweigh its costs is no easy task.1

The Supreme Court, for its part, strongly supports mandatory arbitration. Over the last twenty-five years, it has mechanically relied on party autonomy and the national policy favoring arbitration as its premises for expanding the Federal Arbitration Act’s scope beyond Congress’s original intent – a practice Ian McNeil has described as “bureaucratic formalism.”2 The result, of course, has been mandatory arbitration’s increased prevalence, which the Court has allowed despite claims about, and evidence of, its negative effects on individual rights.

Because of those negative effects, reform advocates have turned to Congress for relief. Since 1995, its members have introduced 135 anti-arbitration bills, the majority of which proposed eliminating, rather than regulating, mandatory arbitration. In other words, the reform advocates have convinced Congress to press a rights-oriented, liberal approach – one that refuses to consider regulatory reforms that might make mandatory arbitration a more rights-oriented process.

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1 See, e.g., EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 182-84, 327-34 (2006) (outlining Professor Sternlight’s recommendation for eliminating mandatory arbitration and Professor Ware’s rebuttal).

This Article, in contrast, proposes a pragmatic-liberalism approach to dealing with mandatory arbitration— one that continues its use while attempting to improve its fairness through legislative or agency regulation. Regulating mandatory arbitration is consistent with pragmatic principles, and pragmatic liberalism, as a theory, is superior to formalism and liberalism in this context. In fact, taking a pragmatic-liberalism approach will allow us to study mandatory arbitration before deciding whether to eliminate it, meaning that we can fill empirical gaps and examine, over time, regulatory effects on its overall fairness.

Part I begins by highlighting the Federal Arbitration Act’s history, both before and after Congress passed it in 1925. This will give perspective on the Supreme Court’s arbitration formalism by showing how far the Court has expanded the Act beyond Congress’s original intent. From a pragmatic-liberalism perspective, such an overview is necessary because the ends we seek to achieve (in this case, improving mandatory arbitration’s fairness) are not ahistorical. They are justified, at least in part, by their historical genesis. Here, the Act’s legislative history demonstrates that Congress wanted to protect individual rights against abuse from parties with greater bargaining power, which, at the very least, is worth considering when deciding how to proceed in the mandatory-arbitration debate.

Part II then explains the reform advocates’ liberal response to the Supreme Court’s arbitration formalism. Specifically, it addresses the reform advocates’ use of the unconscionability doctrine, the Court’s recent limitation of that defense, and how that limitation leaves Congress as the reform advocates’ last hope against mandatory arbitration. Part II also conducts and summarizes a comprehensive survey of the 135 anti-arbitration bills introduced in Congress since 1995. Overall, this survey shows that the reform advocates have taken a short-sighted approach that disregards
mandatory arbitration’s public benefits and makes arbitration itself seem like the problem – which it’s not. Rather, the problem is the Court’s failure to regulate companies’ abuse of the current mandatory-arbitration system.

Finally, Part III critiques both the Supreme Court’s and the reform advocates’ approach to mandatory arbitration, finding that both are, among other things, too rigid. Part III then offers a more pragmatic approach – one that rejects the formalist idea that law is grounded in permanent, immutable principles and the liberal idea that rights enforcement is the elaboration of a moral consensus. This new approach balances companies’ needs against individuals’ rights, which is the best way to resolve the current discord surrounding the mandatory-arbitration debate.

I. THE SUPREME COURT’S ARBITRATION FORMALISM

Common law develops largely through judgments in litigated cases – even for laws founded in legislation. The result, too often, is bureaucratic formalism in judicial decisions. Courts choose a position and stick with it regardless of facts, circumstances, or events that might otherwise lead to a different outcome. And their written decisions “run in deductive form with an air or expression of single-line inevitability.”

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

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8. See id.
9. Karl Llewellyn, The Common Law Tradition – Deciding Appeals 38 (1960) (describing formalism’s ideology as follows: “the rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law”).
10. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”).
11. Margaret L. Moses, Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, 34 FLA. ST. U. L. REV. 99, 99-100 (2006) (stating that the Act “has been construed to preempt state law, eliminate the requirement of consent to arbitration, permit arbitration of statutory rights, and remove the jury trial right from citizens without their knowledge or consent”).
other words, the Court’s formalism has crafted a Federal Arbitration Act that bears little resemblance to the Act that Congress originally passed.\textsuperscript{12}

The Court stretched the Act so far by routinely distorting the Act’s legislative history. Accordingly, the following sections address the Act’s development before 1925, Congress’s intentions in passing the Act that year, and the Supreme Court’s subsequent, consistent refusal to heed Congress’s intent when interpreting the Act. Together, these sections illustrate the lengths to which the Court has gone to expand the Act and, correspondingly, achieve its goal of reducing judicial caseloads.\textsuperscript{13}

\textbf{A. The Federal Arbitration Act’s Development}

Arbitration was not integral to early social or economic development in the United States.\textsuperscript{14} In fact, although the first arbitration tribunal convened in 1786 in New York,\textsuperscript{15} another 134 years passed before the practice gained widespread acceptance. That happened when New York passed the first modern arbitration statute in 1920.\textsuperscript{16}

New York, not surprisingly, figured prominently in arbitration’s development.\textsuperscript{17} It was the country’s largest commercial center and its courts were backlogged with business disputes.\textsuperscript{18} Those businesses wanted a more efficient, less-expensive method for resolving their differences, one that would help preserve business relationships by avoiding protracted, expensive delays in courts.\textsuperscript{19}

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  \item \textsuperscript{12} Id. at 99-100 (stating that the Act as interpreted today by the Supreme Court probably wouldn’t have commanded any votes in the 1925 Congress).
  \item \textsuperscript{13} See MCNEIL, supra note 2, at 172 (“One cannot immerse oneself in the arbitration cases without coming to the conclusion that a major force driving the Court is docket-clearing pure and simple.”); see also Moses, supra note 11, at 156 (“These judicial policy choices appear to reflect the interest of the courts in reducing the judicial caseload.”).
  \item \textsuperscript{14} FRANCES KELLOR, AMERICAN ARBITRATION 6 (1948) (“It did not become an integral part of the early social and economic development of the country nor a recognized institution of any consequence and its impact was negligible upon the growth of justice in the country.”).
  \item \textsuperscript{15} Id. at 4.
  \item \textsuperscript{16} Id. at 9-11 (calling the New York statute a “revolutionary step”); CAMERON K. WEHRINGER, ARBITRATION PRECEPTS AND PRINCIPLES 5 (1969).
  \item \textsuperscript{17} See generally id. at 3-21; see also MCNEIL, supra note 2, at 15, 25 (stating that arbitration was “neither a new nor an uncommon practice in the United States” at the turn of the Twentieth Century and that “New York had long been a center of arbitration activity”).
  \item \textsuperscript{18} In 1923, for example, the New York Supreme Court was three years behind on its docket. See 1924 Joint Hearings, supra note 5, at 25 (statement of Alexander Rose, Representative, Arbitration Society of America).
  \item \textsuperscript{19} Moses, supra note 11, at 103 (“Businessmen needed solutions that were simpler, faster, and cheaper.”). In fact, it appears that arbitration advocates at the time did not see arbitration as a form of litigation. See JULIUS H. COHEN, COMMERCIAL ARBITRATION AND THE LAW 10-23 (1918) (explaining arbitration as a way to avoid “unnecessary litigation”).
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Arbitration met those needs, but the original system wasn’t perfect. Specifically, neither the common law nor any of the states’ early arbitration statutes would enforce pre-dispute arbitration agreements.\(^{20}\) Either party to a dispute could opt out of arbitration and compel the other to litigate the claim.\(^{21}\)

Courts allowed this to happen for two reasons. First, they wanted to protect parties with little bargaining power.\(^{22}\) Second, the rule was a holdover from English common law when courts zealously protected their jurisdiction.\(^{23}\) American courts tended to follow suit, apparently feeling constrained by the English courts’ longstanding decisions.\(^{24}\) This resulted in decreased certainty over where disputes would be resolved. If either party believed it had a technical advantage in avoiding arbitration (e.g., the expected delay in court, the application of a particular procedural rule, the right to greater discovery), that party was free to ignore the arbitration agreement and litigate the claim in court.\(^{25}\)

\(^{20}\) Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) (“By this Act there is reversed the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable, and in the language of the statute itself, they are made ‘valid, enforceable and irrevocable’ within the limits of Federal jurisdiction.”). There were some exceptions to this general rule, but the problems the rule created were big enough to lead to the reform movement, which led to Congress passing the FAA, which made all pre-dispute arbitration agreements presumptively valid. See McNeil, supra note 2, at 20-21.

\(^{21}\) A party could opt out even after the arbitration had started. And while opting out would be considered a breach of contract, for which damages were available, suits to collect such damages were ineffective. McNeil, supra note 2, at 20; see also Wesley A. Sturges, *Commercial Arbitrations and Awards* 45 (1930) (“Statements … frequently appear to the effect that a party who is aggrieved by the breach of such an agreement can maintain an action for damages. So few cases, however, have involved such an action that if there is such a rule of law it rests upon this popular acclaim.”).

\(^{22}\) 1924 Joint Hearings, supra note 5, at 15 (statement of Julius H. Cohen, General Counsel, New York State Chamber of Commerce) (stating that “at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them!’”).

\(^{23}\) Cohen & Dayton, supra note 20, at 283 (“The explanation is to be found in our English system of jurisprudence. For many centuries there has been established a rule, rooted originally in the jealousy of courts for their jurisdiction, that parties might not, by their agreement, oust the jurisdiction of the courts.”).

\(^{24}\) Id. at 270; see also H.R. REP. NO. 68-96, at 2 (1924) (“The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it.”). Apparently there were English courts questioning the soundness of this rule, but American courts either glossed over or ignored those decisions. See Cohen, supra note 19, at 226-241 (explaining how the English rule of revocability was adopted by American courts).

\(^{25}\) Id. (“The result is that this party is usually loath to surrender his supposed advantage.”).
Such problems led to the arbitration reform movement that started shortly after the turn of the Twentieth Century.\textsuperscript{26} Julius Cohen and Charles Bernheimer shepherded the movement,\textsuperscript{27} and passing New York’s modern arbitration statute was their first major success.\textsuperscript{28} They then relied on this success to lobby Congress for a federal law that would make arbitration agreements enforceable in federal court.\textsuperscript{29} They wanted to ensure that New York parties, for example, could compel parties from other states to arbitrate (assuming they had a valid agreement, of course).\textsuperscript{30}

Cohen wrote the Federal Arbitration Act’s first draft in 1921, basing it largely on New York’s 1920 statute.\textsuperscript{31} He submitted it to the American Bar Association for approval, but it lacked certain procedural provisions (which New York provided in its civil procedure code) so the ABA did not approve it that year.\textsuperscript{32} Cohen fixed the problem and submitted a second draft in 1922, which the ABA approved. Senator Sterling and Congressman Mills then introduced it in each house of Congress,\textsuperscript{33} but their bills went no further than the Senate and House judiciary committees.\textsuperscript{34} So the ABA approved another draft of the Act in 1923 that incorporated Congressional

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\item \textsuperscript{26} MCNEIL, supra note 2, at 25, 28-30, 38 (describing the elimination of the rule of revocability as the reformers’ “quest” and calling Cohen’s 1918 book the “kickoff” of the campaign to educate the public on arbitration); COHEN, supra note 19, at 53-252 (dedicating the majority of the book to explaining why the doctrine of revocability was a “judicial error”);
\item \textsuperscript{27} See Moses, supra note 11, at 101-11 (calling Cohen and Bernheimer “instrumental” in passing New York’s modern statute and then detailing their involvement in passing the Federal Arbitration Act); MCNEIL, supra note 2, at 28 (recognizing Bernheimer and Cohen as the founders of the reform movement). Although Cohen and Bernheimer shepherded the movement, several others were influential in the movement as well. For example, W.H.H. Piatt, chairman of an ABA committee on arbitration, lobbied for the FAA. MCNEIL, supra note 2, at 88. Also, the Arbitration Society of America was instrumental in pushing for federal reform. KELLOR, supra note 14, at 13.
\item \textsuperscript{28} MCNEIL, supra note 2, at 28-31. New York’s new law led to the creation of the Arbitration Society of America in 1922, which was the “first permanent independent institution of arbitration.” KELLOR, supra note 14, at 11. It later merged (in 1926) with the Arbitration Foundation to become the American Arbitration Association. Id. at 15-17. The American Arbitration Association institutionalized arbitration “by giving it a central administrative organization, facilities for research and education, a laboratory for experiment, and a national system of tribunals.” Id. at 25.
\item \textsuperscript{29} See Moses, supra note 11, at 102.
\item \textsuperscript{30} Id. at 101-02.
\item \textsuperscript{31} MCNEIL, supra note 2, at 85-86. One of the main differences was that the proposed Federal Arbitration Act appeared to allow oral agreements to arbitrate future disputes. Id. at 85. The fact that this provision was later stricken shows that the drafters and legislators were concerned about parties’ consent to arbitrate.
\item \textsuperscript{32} Id. at 85-87.
\item \textsuperscript{33} Id. at 88.
\item \textsuperscript{34} Id. at 88-91. The House Judiciary Committee never held a hearing. Id. at 91. The Senate Judiciary Committee held a hearing in January 1923. See 1923 Hearings, supra note 5.
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comments from the previous session. Sterling and Mills introduced this draft to Congress in December 1923, subcommittees from each house’s judiciary committee held a joint hearing in January 1924, and Congress ultimately approved this draft (with minor changes) in February 1925. President Coolidge signed it shortly thereafter, and it became effective on January 1, 1926.

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

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

First, the comments demonstrate that Congress passed the Act as a procedural mechanism for enforcing arbitration agreements in federal, not state, courts. Cohen, for example, submitted a brief at the 1924 Joint Hearings supporting this idea: “The statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by

35 Id. at 91.
36 Id. at 92.
37 See 1924 Joint Hearings, supra note 5.
38 The House passed the Act on June 6, 1924. The Senate passed it on January 31, 1925. The House then considered and passed the Senate’s amendments on February 4, 1925. McNeil, supra note 2, at 100-01. For a copy of the Act as passed by Congress in 1925, see Sturges, supra note 21, at 983.
39 Coolidge signed the Act on February 12, 1925. McNeil, supra note 2, at 101.
40 Moses, supra note 11, at 110.
41 McNeil, supra note 2, at 29-30 (citing Appendix B of the Report of the ABA Committee on Commerce, Trade, and Commercial Law, 49 ABA Rep. 300 (1924)). I want to emphasize the portion of Bernheimer’s comments on the voluntary nature of arbitration. Specifically, he said: “It is voluntary. No one need agree to arbitrate unless it is his wish.” Id. at 30.
42 Bernheimer himself reiterated the same basic comments at the Joint Hearings in 1924. See 1924 Joint Hearings, supra note 5, at 7 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, New York State Chamber of Commerce) (“It raises business standards. It maintains business honor, prevents unnecessary litigation, and eliminates the law’s delay by relieving our courts.”).
43 Part of the reason that comments from the reform advocates are so important in interpreting the intent of the Act is that much of the debate over the Act took place between those advocates before the ABA, not before Congress. Congress basically adopted the Act as provided to it by the ABA. See McNeil, supra note 2, at 107-09.
which Congress is authorized to establish and control inferior Federal courts.\footnote{44} Although there was little testimony on this topic during the hearing,\footnote{45} the House Committee Report confirmed Cohen’s position by stating:

The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential.\footnote{46}

Further confirming this limit on the Act’s scope, Cohen, Bernheimer, and others were pushing the National Conference of Commissioners on Uniform State Laws (NCCUSL) for an arbitration act that states could adopt to make pre-dispute arbitration agreements enforceable in state courts.\footnote{47} If the reformers believed that

\footnote{44}See 1924 Joint Hearings, supra note 5, at 37 (brief submitted by Julius H. Cohen, General Counsel, New York State Chamber of Commerce). Senator Sterling accepted the brief into the record without objection. Id. at 33. Cohen reiterated this intent in his 1926 article in the Virginia Law Review. See Cohen & Dayton, supra note 20, at 283 (“[The statute] rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts.… The statute as drawn establishes a procedure in the Federal courts for the enforcement of certain arbitration agreements.”).

\footnote{45}Senator Sterling and Representative Dyer had a brief exchange on “the authority of Congress to legislate on this subject” with Sterling agreeing that Congress had “ample” authority and jurisdiction. See 1924 Joint Hearings, supra note 5, at 37 (statements of Sen. Thomas Sterling, Chairman, Subcomm. of the Comm. on the Judiciary, and Rep. Leonidas C. Dyer, Chairman, Subcomm. of the Comm. on the Judiciary).

\footnote{46}H.R. REP. NO. 68-96, at 1 (1924). While the report says that the Act “is founded also upon the Federal control over interstate commerce and over admiralty,” this justification was secondary, at best. See Moses, supra note 11, at 110 (“By use of the word ‘also,’ the reference to the commerce and admiralty power appears to be a fall-back position, a secondary basis of power.”). Cohen seemed to think that Congress’s power over federal courts was the main, if not the sole, authority for passing the Act. See Cohen & Dayton, supra note 20, at 283 (“It has been suggested that the proposed law depends entirely for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress. This is not the fact. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts.”); 1924 Joint Hearings, supra note 5, at 37 (brief submitted by Julius H. Cohen, General Counsel, New York State Chamber of Commerce) (same).

\footnote{47}See Moses, supra note 11, at 102. The NCCUSL passed the Uniform Arbitration Act in 1924. See STURGES, supra note 21, at 957.
the Federal Arbitration Act would be applicable in state courts, their efforts before the NCCUSL would have been unnecessary.\textsuperscript{48}

Second, the legislators’ and reform advocates’ comments during this period reveal that Congress intended the Federal Arbitration Act to apply to arbitration agreements between businesses with relatively equal bargaining power – not agreements between businesses and their employees or consumers. Take Bernheimer’s 1923 comments to the ABA, for example. He said that the Act would “preserve business friendships” and that it would apply only to “voluntary” agreements.\textsuperscript{49} While these comments do not explicitly limit the Act to arbitration agreements covering business-to-business disputes,\textsuperscript{50} they strongly imply that the Act was to be limited in such fashion because they responded to existing and anticipated questions over whether the Act would apply to adhesive contracts.\textsuperscript{51} For example, at the 1923 Hearing before the Senate Subcommittee of the Committee on the Judiciary, Senator Walsh expressed concerns over take-it-or-leave-it arbitration agreements,\textsuperscript{52} and Senator Sterling expressed similar concerns at the 1924 Joint

\textsuperscript{48}Jean R. Sternlight, \textit{Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration}, 74 WASH. U. L.Q. 637, 641 (1996) (“The fact that the same groups that sought passage of the FAA were working simultaneously on state laws that would have been superfluous if the FAA were truly intended to govern the state forum as well as the federal bolsters this conclusion.”). The idea that the Act was intended to apply in federal courts is further supported by its repeated references to “federal courts.” MCNEIL, supra note 2, at 106-07 (“Either the ABA and Congress were being extraordinarily dense in failing to recognize that those references should be to all courts, or they meant exactly what they said when they referred only to federal courts.”).

\textsuperscript{49}See MCNEIL, supra note 2, at 30 (citing Appendix B of the Report of the ABA Committee on Commerce, Trade, and Commercial Law, 49 ABA Rep. 300 (1924)); see also 1924 Joint Hearings, supra note 5, at 7 (statement of Charles L. Bernheimer, Chairman, Committee on Arbitration, New York State Chamber of Commerce) (“It preserves business relationships.”).

\textsuperscript{50}One could argue, for example, that a relationship between a business and a customer is a “business friendship” and that customers “voluntarily” sign binding arbitration agreements despite any disparity in bargaining power or lack of choice. I would disagree with such an argument, of course, but I recognize that it could be made.

\textsuperscript{51}This issue was raised perhaps most fervently in arguments before the NCCUSL and the ABA over whether the proposed Uniform Arbitration Act that would apply in state courts should cover pre-dispute arbitration agreements. See MCNEIL, supra note 2, at 49-54 (quoting statements made by Joseph Francis O’Connell, who, in summarizing the feelings of the NCCUSL’s arbitration committee, expressed concern over individuals “giving up rights that the American people really regard as sacred” by signing adhesive agreements to arbitrate disputes). Because of this concern, the NCCUSL excluded pre-dispute agreements from UAA coverage and the ABA subsequently approved this non-modern version of that Act. Id. at 54.

\textsuperscript{52}1923 Hearings, supra note 5, at 9 (statement of Sen. Thomas J. Walsh). Prior to Senator Walsh’s comments, W.H.H. Piatt raised the issue on his own with regard to employment agreements. To alleviate any concerns that the Act would allow employers to force employees into arbitration, Mr. Piatt said: “It is not intended that this shall be an act referring to labor
Hearings.\textsuperscript{53} On both occasions, the persons being questioned assured the Senators that the reformers did not intend to apply the Act to adhesive agreements.\textsuperscript{54} Their statements, along with similar statements made by other reform advocates,\textsuperscript{55} show that the reformers drafted, and that Congress intended to pass, an Act that applied to arbitration agreements between merchants with relatively equal bargaining power.\textsuperscript{56}

Finally, the reform advocates’ comments demonstrate that they did not intend for the Act to apply to statutory disputes. Cohen, for example, stated that arbitration “is not the proper method for deciding points of law of major importance involving . . . the application of statutes.”\textsuperscript{57} Those questions were better reserved, according to Cohen, for “skilled judges” and “established systems of law.”\textsuperscript{58} In fact, the reformers envisioned the Act applying only to “trade disputes” involving factual questions and “simpler questions of law.”\textsuperscript{59} This meshed with their view of the Act’s limited scope, and with how courts applied the Act in the early years after Congress
passed it. But this view wouldn’t survive very long. The Supreme Court soon began expanding the Act far beyond its original scope, ignoring Congressional, and the reform advocates’, intent along the way.

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

Although the Federal Arbitration Act started as a procedural statute applicable in federal courts to agreements between merchants, the Supreme Court eventually transformed it into a substantive law statute that applied in both federal and state courts and to agreements between merchants and individuals. The process started in 1938 with *Erie Railroad Co. v. Tompkins*, a case that on its surface had nothing to do with arbitration. And it has continued over the last 70-plus years through a series of Supreme Court decisions that, collectively, show how the Court has legislated a new Act, one that Congress didn’t envision.

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

The Court first faced this question in 1956 in *Bernhardt v. Polygraphic Co. of America*, a case involving the breach of an employment contract made in New York and carried out in Vermont. The contract required the parties to arbitrate their disputes before the American Arbitration Association in New York, but Bernhardt

60 See McNeil, supra note 2, at 122-33.
61 304 U.S. 64 (1938).
62 See Moses, supra note 11, at 114-54; see also McNeil, supra note 2, at 144 (describing Justice Stevens’ opinion in *Southland* as “an unusually frank recognition of the ongoing legislative role of the Court in amending legislation over time”).
63 42 U.S. 1 (1842).
64 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938).
65 McNeil, supra note 2, at 134 (“The [FAA] was a statute aimed at governing the procedure in federal courts, not the substantive law those courts applied. The act did not therefore depend upon the continuing validity of *Swift*.”).
67 Id. at 110.
68 Id. at 110-11.
sued in a Vermont state court.\textsuperscript{70} At the time, Vermont did not enforce pre-dispute arbitration agreements,\textsuperscript{71} so Polygraphic removed the case to federal court in Vermont, asking it to stay the litigation and compel arbitration. The district court denied the stay; the court of appeals reversed; and the Supreme Court granted cert because of the court of appeals’ “doubtful application” of \textit{Erie}.\textsuperscript{72}

\textit{Bernhardt} held that the Act did not apply in diversity cases involving \textit{intra}state commerce.\textsuperscript{73} And because the Court found that this case did, in fact, involve \textit{intra}state commerce, it could have stopped its opinion there.\textsuperscript{74} But it continued, in dicta, to address whether compelling arbitration could be outcome-determinative, ultimately finding that it could.\textsuperscript{75} Specifically, the Court said: “If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State.”\textsuperscript{76} Put differently, the Act was more than just a procedural statute to be applied in federal court; it was a substantive measure that could affect a dispute’s outcome.\textsuperscript{77} Reaching this conclusion increased the chances that the Court might, in a future case, find that the Act was “substantive in the full-blown regulatory sense that would lead to invocation of the Supremacy Clause.”\textsuperscript{78} And, in 1967, that was what began to happen in \textit{Prima Paint Corp. v. Flood \& Conklin Manufacturing Co.}.\textsuperscript{79}

\textsuperscript{70} Id.
\textsuperscript{71} Id. at 199-200.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 202 (“We conclude that the stay provided in § 3 reaches only those contracts covered by §§ 1 and 2.”).
\textsuperscript{74} Id. at 200-01 (“There is no showing that petitioner while performing his duties under the employment contract was working ‘in’ commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.”).
\textsuperscript{75} Id. at 203. The Court cited the following as reasons why arbitration might lead to a different result: (1) no right to trial by jury; (2) arbitrators not having “the benefit of judicial instruction on the law”; (3) no reasoned opinions; (4) limited record; (5) limited review of awards. \textit{Id.}
\textsuperscript{76} Id. This conclusion appeared to mean that when state arbitration law and the Act conflicted in diversity cases, federal courts would have to apply state law under the \textit{Guaranty Trust Co.} test, thus possibly limiting the Act to federal question cases. Such a limitation would have been problematic given that the Act was passed to enforce arbitration agreements in diversity cases. \textit{See} Moses, \textit{supra} note 11, at 115-16. But because this discussion was dicta, the question would be reserved for a future case. Also, I should note that Justice Frankfurter, in his concurring opinion, actually called for the Act not to be applicable in diversity cases. \textit{See} Bernhardt \textit{v. Polygraphic Co. of America}, 350 U.S. 198, 207-08 (1956) (Frankfurter, J., concurring).
\textsuperscript{77} \textit{See} id.
\textsuperscript{78} McNEIL, \textit{supra} note 2, at 137.
\textsuperscript{79} 388 U.S. 395 (1967).
In *Prima Paint*, a diversity case involving *inter*state commerce, the Court had to decide whether a court or an arbitrator should hear a fraudulent inducement claim.80 This presented a dilemma. If the Court applied *Guaranty Trust Co.*’s outcome-determinative test and *Bernhardt*’s reasoning that arbitration “substantially affects the cause of action created by the State,”81 then it would have to find that the Act did not apply in diversity cases because it was “substantive” under *Erie* – which would directly contradict Congress’s original reason for passing it.82 So, without deciding whether applying state law would lead to a different outcome,83 the Court simply applied the Act and allowed the arbitrator to resolve the claim.84 To support its conclusion, the Court said: “[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’”85 But nothing in the Act’s legislative history supports this.86 And, because the Court didn’t specify that Congress never intended the Act to apply in state courts, its reliance on the Commerce Clause invented a basis for arguing that the Act created substantive rights that would preempt conflicting state laws.87 This made it “logically inescapable” that the Act would eventually apply in state, not just federal, court.88 And that is precisely what the Court did in *Southland Corp. v. Keating* in 1984.89

In *Southland*, the Court finally (and erroneously) described the Act as a substantive federal law that would trump conflicting state laws in state court.90

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80 *Id.* at 402.

81 *Bernhardt*, 350 U.S. at 203.

82 Moses, *supra* note 11, at 117.

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

84 *Id.* at 403-04. In doing so the Court eliminated any doubt over whether the Act applied in diversity cases involving *inter*state commerce. See McNeil, *supra* note 2, at 138. The *Prima Paint* decision created what is known as the “separability rule.” Under this rule, challenges to agreements as a whole are for the arbitrator to decide. And specific challenges to arbitration clauses are reserved for the courts. See *Prima Paint*, 388 U.S. at 403-04.

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

86 See *supra* Part I(B).


89 465 U.S. 1 (1984). The Court foreshadowed this result one year earlier in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). There, in dicta, the Court said: (1) that Congress, through the Act, created a body of substantive federal law that governed in either state or federal court; and (2) that Congress, through the Act, created a liberal federal policy in favor of arbitration. *Id.* at 24. Neither statement is supported by legislative history.

90 See *id.* at 11-12 (stating that the Act “rests on the authority of Congress to enact substantive rules under the Commerce Clause” and that passing the Act under the Commerce Clause “clearly implied that the substantive rules of the Act were to apply in state as well as federal courts”).
Southland thus divorced the Act from its legislative history and freed the Court to create an Act of its choosing.\textsuperscript{91} To help in that creation, the Court also announced a “national policy favoring arbitration” in Southland.\textsuperscript{92} This soon became one of the Court’s key justifications for further expanding the Act to (1) cover statutory disputes and employment agreements, (2) preempt state consumer-protection laws, and (3) to eliminate arbitration’s consent requirement.\textsuperscript{93}

For example, the following year in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the Court cited its national policy and found that arbitration was an appropriate forum for resolving statutory disputes.\textsuperscript{94} To support its decision it said: “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”\textsuperscript{95} But this statement directly contradicted Julius Cohen’s earlier limiting statements\textsuperscript{96} and the Bernhardt Court’s skepticism toward arbitration.\textsuperscript{97} The Court swept aside these concerns, stating simply that “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”\textsuperscript{98}

The Court continued its pro-arbitration trend in Gilmer v. Interstate/Johnson Lane Corp., a 1991 decision where it held that ADEA claims are arbitrable.\textsuperscript{99} It did so

\textsuperscript{91} Moses, supra note 11, at 130.

\textsuperscript{92} Southland, 465 U.S. at 10. Technically, the Court first announced this policy one year earlier in dicta in Moses H. Cone, 460 U.S. at 24. The national policy had no basis in the Act’s legislative history. Moses, supra note 11, at 123 (“The 1925 Congress never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes.”).

\textsuperscript{93} Moses, supra note 11, at 99-100.

\textsuperscript{94} 473 U.S. 614, 626-27 (1985). The claims in Mitsubishi Motors arose under the Sherman Act. Id. at 616. The Court would later expand the Act to cover other statutory disputes as well. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (finding that ADEA claims are subject to mandatory arbitration).

\textsuperscript{95} Id. at 628.

\textsuperscript{96} Cohen & Dayton, supra note 20, at 281 (stating that arbitration “is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes” and that such questions are better reserved for “skilled judges”).

\textsuperscript{97} Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1956) (“[T]he remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State.”).

\textsuperscript{98} Mitsubishi Motors, 473 U.S. at 626-27. The Court confirmed this view in 1987 in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (“This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.”). The Court also said that the party trying to avoid arbitration has the burden of showing that Congress did not intend for the statutory claims in question to be arbitrated. Id. at 226-27.

despite its prior statement in *Alexander v. Gardner-Denver Co.* that “[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.”\(^{100}\) The *Gilmer* Court also addressed, in a footnote, whether employment disputes can be arbitrated.\(^{101}\) Although it ultimately sidestepped the question, its reasoning was thin,\(^{102}\) which foreshadowed its subsequent decision in *Circuit City Stores, Inc. v. Adams.*\(^{103}\) There, it explicitly held that the Act does cover disputes between employers and employees, despite W.H.H. Piatt’s assurance at the 1923 hearing that the Act was not “an act referring to labor disputes, at all.”\(^{104}\)

After cases like *Mitsubishi Motors* and *Gilmer*, the Court seemed to believe that arbitration was an appropriate forum for resolving most disputes. Its next major step was to expand the number of disputes potentially falling within the Federal Arbitration Act’s scope. In 1995, in *Allied-Bruce Terminix Cos. v. Dobson*, it found that Section 2’s coverage of contracts “evidencing a transaction involving commerce” reached the limits of Congress’s Commerce Clause powers.\(^{105}\) In other words, the Court adopted the broadest possible definition of “involving commerce,” meaning that the Act would apply to all “commerce in fact.”\(^{106}\) This reading of the phrase reduced the likelihood that disputes would be covered by state arbitration acts instead of the Federal Arbitration Act, thus pushing the Act “further into the realm of state court jurisprudence.”\(^{107}\)

\(^{100}\) 415 U.S. 36, 56 (1974).

\(^{101}\) Specifically, it asked whether *Gilmer* could avoid arbitration under the Act because of Section 1’s exclusion of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” *Gilmer*, 500 U.S. at 25 n.2; *see also* 9 U.S.C. § 1 (2006). *Gilmer* had signed an industry-wide “securities registration application” that mandated arbitration of any disputes between himself and his employer, Interstate. After being fired, *Gilmer* sued Interstate for age discrimination in a federal district court. Interstate then moved to compel arbitration under the “application.” *Id.* at 23-24.

\(^{102}\) The Court sidestepped the question by finding that the industry-wide “securities registration application” signed by *Gilmer* was neither an employment contract nor part of an employment contract. *Id.* at 25 n.2.

\(^{103}\) 532 U.S. 105, 109 (2001).

\(^{104}\) *Id.; 1923 Hearings, supra* note 5, at 9 (statement of W.H.H. Piatt, Chairman, Committee of Commerce, Trade, and Commercial Law, American Bar Association). The Court explicitly refused to consider the Act’s legislative history. *Id.* at 119. It based its decision on the text of Section 1, stating that the text was clear. *Id.* at 114-15. Never mind that it applied the principle of *ejusdem generis*, which typically is used only if the text doesn’t give a direct answer.


\(^{106}\) *Id.* at 281 (“[W]e accept the ‘commerce in fact’ interpretation, reading the Act’s language as insisting that the ‘transaction’ in fact ‘involve’ interstate commerce, even if the parties did not contemplate an interstate commerce connection.”).

\(^{107}\) Sterlighrt, *supra* note 48, at 665.
The following year in *Doctor’s Associates v. Casarotto*, the Court severely restricted states’ abilities to pass laws regulating arbitration covered by the Act. Specifically, the Court found that lower courts could not “invalidate arbitration agreements under state laws applicable only to arbitration provisions.” This meant that state legislatures could protect consumers and others from mandatory arbitration only through laws dealing with purely local transactions or through laws dealing with contracts generally.

Finally, in one of its more transparent efforts to keep disputes out of court and before an arbitrator, the Court in 2010 made it easier for parties to assign arbitrability questions to the arbitrator through its decision in *Rent-a-Center, West, Inc. v. Jackson*. Specifically, as Justice Stevens explained in his dissent, the Court adopted the following rule: “Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge to the arbitrator unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator – the so-called ‘delegation clause.’” Put differently, parties may waive their right to challenge an arbitration clause in court, which is problematic because courts traditionally have protected individuals from substantively unfair arbitration clauses through the unconscionability doctrine. Plus, the rule does not mesh with the Act’s language or its legislative history. Specifically, Section 4 says that courts “shall hear the parties” and that courts should compel arbitration only “upon being satisfied that the making of the agreement for arbitration . . . is not in issue.” Also, Julius Cohen assured Congress at the 1924 Joint Hearings that the Act provided protections against forcing parties to arbitrate without some measure of judicial review:

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109 Id. at 687 (emphasis in original).
110 See Sternlight, supra note 48, at 668. After Allied-Bruce, fewer arbitration disputes were considered local disputes. See Allied-Bruce, 513 U.S. at 281.
112 Rent-a-Center, West, Inc. v. Jackson, 561 U.S. ___ (2010) (Stevens, J., dissenting) (emphasis in original). This, of course, is Justice Stevens’ characterization of the majority’s holding, but it is accurate.
114 9 U.S.C. § 4 (2006). As David Horton points out, there is some ambiguity in the term “making.” It could require judicial review only for forgery or fraud in executing the agreement. The more appropriate reading, however, is that it requires judicial review when a party raises any defense to contract formation. See Horton, supra note 113, at 7; see also 1923 Hearings, supra note 5, at 5 (statement of Sen. Thomas J. Walsh) (“The court has got to hear and determine whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law….”).
At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim.\footnote{115}

Nevertheless, under the Rent-a-Center decision, if parties assign the arbitrability question to the arbitrator through a delegation clause, arbitrators have the exclusive right to determine whether the agreement is unconscionable, thus “limiting the judiciary’s role to little more than rubber-stamping motions to compel arbitration.”\footnote{116}

Overall, the Court’s recent opinions – from Southland to Allied-Bruce to Rent-a-Center – demonstrate that it will compel arbitration under its “national policy” and the idea of “party autonomy” despite conflicting precedent, contrary legislative history, or other concerns about arbitration in any particular case (e.g., disparities in bargaining power\footnote{117}). Its reasoning is based on its desire to reduce judicial caseloads – a worthy goal no doubt.\footnote{118} But whether that goal should trump concerns over the loss of individual rights through mandatory arbitration remains an open question, one that reform advocates are now urging lower courts and Congress to address.

II. THE RISING LIBERAL RESPONSE TO MANDATORY ARBITRATION

As the Supreme Court expanded the Federal Arbitration Act’s scope and simultaneously required lower courts to grant greater deference to parties’ arbitration agreements, the parties drafting those agreements increasingly included unfair and overreaching terms. State legislatures could do little about this after Doctor's Associates.\footnote{119} So that left two basic methods for parties to seek relief from unfair agreements: (1) through the unconscionability doctrine in lower courts; and (2) through Congress.

The unconscionability doctrine, when applied, allows parties to avoid the most oppressive mandatory-arbitration agreements. But it does not provide wide-scale relief; it simply allows courts to review agreements on a case-by-case basis.\footnote{120}

\footnote{115}{1924 Joint Hearings, supra note 5, at 37 (brief submitted by Julius H. Cohen, General Counsel, New York State Chamber of Commerce).}
\footnote{116}{Horton, supra note 113, at 2.}
\footnote{117}{See, e.g., Shearson/American Express v. McMahon, 482 U.S. 220, 229-30 (1987).}
\footnote{118}{McNeil, supra note 2, at 172 (“[T]he Court is motivated to reduce the cases having to be tried by the judicial system, particularly the federal judicial system.”).}
\footnote{119}{See Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996).}
That is why advocates for eliminating mandatory arbitration have asked Congress for protection.\textsuperscript{121} They want Congress to preclude companies from requiring their customers, employees, franchisees and others to arbitrate disputes.

This section explores parties’ increased reliance on the unconscionability doctrine after \textit{Doctor’s Associates} and the Supreme Court’s most recent attempts to limit the doctrine’s use. It also addresses the reform advocates’ efforts in Congress during this period, showing that they have increased in lock-step with parties’ reliance on the unconscionability doctrine. So far neither Congress nor the unconscionability doctrine has produced the results that reform advocates want – mandatory arbitration’s wholesale elimination. But that could change as the reform advocates continue pressuring Congress for relief.

\textit{A. The Rise (and Ultimate Fall) of Unconscionability}

Section 2 of the Act allows courts to invalidate arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{122} Put differently, courts may invalidate arbitration agreements under general state laws that would make any contract unenforceable.\textsuperscript{123} “Unconscionability” is one such law.

Although the unconscionability doctrine is at least two and a half centuries old, courts have not yet agreed on how to define it.\textsuperscript{124} In part, this is because it requires a fact-based inquiry, the results of which will vary from case to case.\textsuperscript{125} Nevertheless, courts have developed a two-part test for applying the doctrine. First, the party challenging the arbitration agreement should prove that the manner in which it was asked to arbitrate was somehow unfair (e.g., through an adhesion

\textsuperscript{121} See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) (giving a proposed agency the power to prohibit or impose limitations of mandatory arbitration by rule if the agency decides such a rule would benefit the public interest).


\textsuperscript{123} See Bruhl, supra note 120, at 1422.


\textsuperscript{125} Take, for example, the UCC’s definition of unconscionability. It recognizes that whether unconscionability exists depends on the circumstances existing at the time of the contract. \textit{See} U.C.C. § 2-302, comment 1 (2010) (“The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”); \textit{see also} Sandra F. Gavin, \textit{Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years after Doctor’s Associate’s, Inc. v. Casarotto}, 54 CLEV. ST. L. REV. 249, 264 (“[T]he unconscionability defense may be predicated upon a variety of factors and is a case sensitive analysis.”).
contract). This is known as procedural unconscionability. Second, the party challenging the agreement must demonstrate that the agreement’s terms are too unreasonable to warrant judicial enforcement. This is known as substantive unconscionability. Some courts require parties to satisfy both tests before invalidating an agreement. Others find that substantive unconscionability is enough.

As you might imagine, this fact-based inquiry makes it relatively easy for courts to invalidate arbitration agreements with little chance of being reversed on appeal. While they are not supposed to interpret arbitration agreements any differently than other contracts under state law, reviewing courts find it difficult to tell if lower courts did so. Put differently, lower courts have been able to use the unconscionability doctrine to avoid the Supreme Court’s arbitration mandate. In

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126 See Stempel, supra note 124, at 794 (stating that procedural unconscionability “involves unfair contracting practices”).

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

128 See, e.g., Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999) (stating that “unconscionability” requires both procedural and substantive unconscionability); see also Ramona L. Lampley, Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape, 18 CORNELL J. L. & PUB. POL’Y 477, 490 (2009) (“The arbitration clause contestant must prove that the clause was either procedurally unconscionable or substantively unconscionable, and in most states, both.”).

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

130 See Bruhl, supra note 120, at 1422.

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

132 Bruhl, supra note 120, at 1422 (“This difficulty creates opportunities for lower courts to misapply, or perhaps even manipulate, state contract doctrines so as to nullify arbitration agreements while simultaneously frustrating the ability of reviewing courts to reverse.”).

133 See Stephen A. Broome, An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act, 3 HASTINGS BUS. L.J. 39, 40 (2006) (“Although ostensibly applying the ‘generally applicable’ contract defense of unconscionability, in cases involving the validity of arbitration agreements the California courts routinely apply an entirely different test, requiring less of parties seeking to avoid arbitration.”);
fact, it has been the main method for invalidating awards under Section 2 for “courts skeptical of the increasingly pervasive use of arbitration.”

But there was a lag between when the Supreme Court created the “national policy favoring arbitration” and when lower courts began employing unconscionability as a ground for invalidating awards. In the two years before \textit{Southland}, for example, a study by Susan Randall found only fifty-four unconscionability cases, eight of which involved arbitration agreements. And only one of the eight unconscionability challenges succeeded. After \textit{Southland}, this general trend continued as courts mostly followed the Supreme Court's pro-arbitration rulings. But as the Court became more aggressively pro-arbitration, including when it cut off state legislatures’ ability to regulate arbitration agreements in \textit{Doctor’s Associates}, unconscionability challenges became much more common. Consider the following chart created by Aaron-Andrew Bruhl:

Steven J. Burton, \textit{The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate}, 2006 J. Disp. Resol. 469 (stating that lower courts, through the unconscionability doctrine, have “gone too far” in failing to follow Supreme Court precedent); Susan Randall, \textit{Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability}, 52 Buffalo L. Rev. 185, 198 (2004) (“An examination of the application of unconscionability to similar issues in arbitration and nonarbitration contexts supports the conclusion that judges are avoiding arbitration through arbitration-specific expansions of the doctrine of unconscionability.”).

\textsuperscript{134} Bruhl, \textit{supra} note 120, at 1422. It’s a form of strategic judging that allows the lower courts to “insulate their rulings from reversal by ideologically adverse reviewing courts.” \textit{Id.} at 1425.

\textsuperscript{135} Randall, \textit{supra} note 133, at 196 (2004).
\textsuperscript{136} Id.
\textsuperscript{137} See Stempel, \textit{supra} note 124, at 798.
\textsuperscript{138} See \textit{id.} at 761-62 (stating that the use of unconscionability “accelerated in the late 1990s”). Because the Court had finally cut off state legislatures’ ability to regulate arbitration agreements, state courts tried to implement the legislatures’ policy wishes through judicial measures. \textit{See} Bruhl, \textit{supra} note 120, at 1434-35 (“State courts that resist the Supreme Court’s federal policy favoring arbitration are in many cases trying to effectuate not their own preferences but fundamental state legislative policies that restrict arbitration or apply heightened procedural safeguards.”).

\textsuperscript{139} Bruhl, \textit{supra} note 120, at 1440.
Bruhl’s chart shows that unconscionability challenges began increasing around 1995 and that the upward trend more or less continued through 2007, when the challenges constituted approximately nineteen percent of all arbitration cases. And while this shows only the increased use of the unconscionability defense, some evidence exists that the defense’s success rate increased during this period, too. For example, Randall’s study showed that parties succeeded in approximately fifty percent of their unconscionability challenges in 2002-03, compared to a 12.5% success rate in 1982-83. So, in addition to unconscionability challenges becoming more prevalent, it appears that lower courts have become more receptive to those challenges, too.

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

141 Randall, supra note 133, at 194. In 1982-82, parties successfully used the unconscionability doctrine to invalidate arbitration agreements in 12.5% of the cases in Randall’s study. And they succeeded at a rate of 15.2% in unconscionability challenges to other types of agreements. By 2002-03, the numbers were 50.3% and 25.6%, respectively. In other words, by 2002-03, courts appeared to be twice as willing to use the unconscionability doctrine in the context of arbitration, which is a pretty significant change from the parity that existed in 1982-83. See id. at 194-96; see also Broome, supra note 133, at 48 (studying California appellate court decisions and finding that “as a purely empirical matter, unconscionability challenges succeed
This upswing in the unconscionability doctrine’s use and success occurred despite several movements at the end of the Twentieth Century that sought to limit judicial power – e.g., the rise of law and economics analysis, strong academic criticisms of the unconscionability doctrine generally, a push for greater judicial restraint.\textsuperscript{143} It was the best remaining defense that lower courts had against the Supreme Court’s arbitration mandate, so they used it regardless of contrary intellectual and political trends.\textsuperscript{144} Put simply, lower courts were using the doctrine to sidestep the Supreme Court’s pro-arbitration jurisprudence. But the Supreme Court noticed. In fact, it recently began shifting decision-making authority away from courts and toward arbitrators, thus reducing lower courts’ ability to use the unconscionability doctrine to nullify unreasonable arbitration agreements.\textsuperscript{145}

In \textit{Buckeye Check Cashing, Inc. v. Cardegna}, for example, the Florida Supreme Court refused to compel arbitration because it found the underlying contract “void for illegality.”\textsuperscript{146} The Supreme Court reversed, relying on \textit{Southland}\textsuperscript{147} and \textit{Prima Paint}.\textsuperscript{148} Specifically, the Court said that \textit{Southland} made the Federal Arbitration Act with far greater frequency when the contractual provision at issue is an arbitration agreement”). While this increased success rate could be due to an increase in the prevalence of unconscionable arbitration clauses, the sheer size of the increase, along with an examination of the case law, indicates that courts are subjecting arbitration agreements to increased scrutiny under the unconscionability doctrine. \textit{See} Bruhl, supra note 120, at 1441-42, 1455-64.

\textsuperscript{142} On a related note, the overall hostility toward the Supreme Court’s arbitration mandate appears to be increasing. Take two anecdotal examples. First, twenty state attorneys general joined the respondents in \textit{Allied-Bruce} in asking the Court to overturn \textit{Southland}. \textit{See} Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995). And, forty states, along with Puerto Rico and the District of Columbia, asked the Court to overturn \textit{Southland} in \textit{Buckeye Check Cashing}. \textit{See} Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Brief of Florida, et al., in Support of Respondents in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), available at 2005 WL 2477361. Second, lower courts are vocalizing their displeasure with the Supreme Court’s pro-arbitration rulings. Two judges on the Minnesota Supreme Court, for example, refused to sign an order compelling arbitration after the \textit{Doctor’s Associates} case was remanded to it by the Supreme Court. They said: “[W]e cannot in good conscious be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the U.S. Supreme Court’s decision in this and other cases which interpret and apply the Federal Arbitration Act.” \textit{See} Randall, supra note 133, at 220-21 (citing Richard C. Reuben, \textit{Western Showdown: Two Montana Judges Buck the U.S. Supreme Court}, ABA J., Oct. 1996, at 16).

\textsuperscript{143} \textit{See} Stempel, supra note 124, at 812-40.

\textsuperscript{144} \textit{See} id.

\textsuperscript{145} Bruhl, supra note 120, at 1470-86. Part of what no doubt caught the Court’s attention was the increased number of certiorari petitions received in recent years that raised the unconscionability issue. \textit{Id.} at 1466.

\textsuperscript{146} 546 U.S. 440, 442-43 (2006). The underlying contract was a “Deferred Deposit and Disclosure Agreement” that charged, according to the lower court, usurious interest rates. \textit{Id.}


\textsuperscript{148} \textit{Prima Paint Corp. v. Flood & Conklin Mfg. Co.}, 388 U.S. 395 (1967). Recall that the separability rule from \textit{Prima Paint} requires (a) arbitrators to review challenges to an agreement as a
applicable in state courts and that *Prima Paint* required arbitrators, not courts, to decide challenges to the contract as a whole.\(^{149}\) The Florida Supreme Court thought it could avoid *Prima Paint’s* severability rule by finding the contract void ab initio – as opposed to the voidable contract in *Prima Paint*.\(^{150}\) The Supreme Court found this distinction irrelevant and ordered the parties to arbitrate.\(^{151}\) Overall, it reminded lower courts of the Court’s ability to shift decision-making authority to arbitrators and thereby reduce their roles in monitoring arbitration agreements.\(^{152}\)

In fact, *Buckeye Check Cashing* foreshadowed the Court’s most recent decision in *Rent-a-Center, West, Inc. v. Jackson*.\(^{153}\) *Rent-a-Center* involved an arbitration agreement with a delegation clause that assigned disputes over the agreement’s enforceability to the arbitrator.\(^{154}\) Jackson challenged the agreement, claiming that some of its provisions (e.g., a provision requiring the parties to split arbitration fees) were unconscionable.\(^{155}\) By specifically challenging the arbitration provisions, it appeared that Jackson had complied with *Prima Paint* and *Buckeye Check Cashing*. But the Supreme Court disagreed, finding that Jackson’s challenge to the arbitration agreement must be decided by the arbitrator under the delegation clause.\(^{156}\) This appears to mean that any time an arbitration agreement has a delegation clause similar to Jackson’s, the only way to raise an unconscionability challenge in court is to challenge the *delegation clause* itself.\(^{157}\) That is, the party must show that the delegation clause is somehow unconscionable. Only then will the court be able to hear unconscionability challenges to the arbitration agreement as a whole.\(^{158}\) Once drafting parties begin inserting these delegation clauses in their arbitration agreements, (b) courts to review challenges to the arbitration clause. *Id.* at 403-04. In other words, the separability rule is a rule for determining “who decides.”

\(^{149}\) *Buckeye Check Cashing*, 546 U.S. at 445-46.

\(^{150}\) *Id.* at 446 (“In declining to apply *Prima Paint*’s rule of severability, the Florida Supreme Court relied on the distinction between void and voidable contracts.”).

\(^{151}\) *Id.* at 446, 449.

\(^{152}\) See Bruhl, *supra* note 120, at 1474-75.

\(^{153}\) 561 U.S. ___ (2010).

\(^{154}\) *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. ___, ___ (2010). Specifically, the delegation clause stated that the arbitrator “shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to[,] any claim that all or any part of this Agreement is void or voidable.”


\(^{156}\) *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. ___, ___ (2010). To reach this conclusion, the Court had to use some pretty tortured logic. Namely, it said that the arbitration agreement in this case was the entire agreement and, therefore, that Jackson’s claim had to be arbitrated under *Prima Paint*. *Id.* at ___.


agreements, it will become more difficult – if not impossible – for non-drafting parties to challenge the agreements’ substantive provisions in court.\textsuperscript{159}

\textbf{B. Reform Advocates Seek Congressional Relief}

Even before the Court’s recent \textit{Rent-a-Center} decision, reform advocates had started seeking Congressional relief against companies that mandated arbitration. Using the unconscionability doctrine didn’t fully resolve the mandatory-arbitration problem – it worked only on a case-by-case basis.\textsuperscript{160} Plus, parties subjected to mandatory arbitration generally found the process fundamentally unfair. They believed they were being subjected to an impartial process that limited their substantive and procedural rights,\textsuperscript{161} and they wanted Congress to preclude its use.

Between 1995 and July 2010, members of Congress introduced 135 bills that sought to either: (a) eliminate mandatory arbitration for certain categories of disputes; or (b) restrict the ways in which companies can use it.\textsuperscript{162} 1995 works well as a start date; it was the year before \textit{Doctor’s Associates} and thus reveals whether there is a Congressional trend that mirrors the unconscionability trend in lower courts.\textsuperscript{163} Not surprisingly, there is. While individual parties were increasing their challenges to arbitration provisions in the courts,\textsuperscript{164} advocacy groups increasingly challenged them in Congress. Here’s a breakdown of the number of bills introduced during this period:

\begin{itemize}
  \item \textsuperscript{159} See Horton, supra note 113, at 2.
  \item \textsuperscript{160} See Bruhl, supra note 120, at 1442, 1486.
  \item \textsuperscript{161} See Nat’l Consumer Law Center, Consumer Arbitration Agreements: Enforceability and Other Topics 4-9 (4th ed. 2004).
  \item \textsuperscript{162} Eighty-seven of these bills were introduced in the House and 48 were introduced in the Senate. I found these through the Library of Congress’s THOMAS website.
  \item \textsuperscript{163} What I mean, specifically, is that I wanted to see if members of Congress began introducing more anti-arbitration bills post-\textit{Doctor’s Associates}, just as the use of the unconscionability doctrine increased in lower courts post-\textit{Doctor’s Associates}. See Bruhl, supra note 120, at 1440.
  \item \textsuperscript{164} See id.
\end{itemize}
As the list attached as Appendix I explains, some of these bills were arbitration-specific, and others suggested changes to arbitration laws as a small part of a larger act. Either way, most died in committee; many were re-introduced in following years only to meet the same fate; and the few that ultimately passed applied only to relatively narrow categories of disputes.

In fact, only five anti-arbitration bills passed both houses and became law during this period. The first was the Motor Vehicle Franchise Contract Arbitration Fairness Act, which failed in the 105th and 106th Congresses before finally passing in the 107th. It was limited to prohibiting motor-vehicle manufacturers, importers

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165 Because of the difficulty of searching the THOMAS website, it’s possible that this list is not comprehensive (although it should at the very least be very close). In any event, the list should give a good idea of the activity in Congress starting around the time of Doctor’s Associates and continuing through today.

166 See, e.g., A Bill to Amend Title 9, United States Code, to Allow Employees the Right to Accept or Reject the Use of Arbitration to Resolve an Employment Controversy, H.R. 613, 106th Cong. (1999).


and distributors from mandating arbitration under their franchise agreements.\textsuperscript{169} The second was the John Warner National Defense Authorization Act for Fiscal Year 2007, which passed the 109th Congress.\textsuperscript{170} It contained a provision exempting military personnel and their dependents from having to arbitrate consumer-credit disputes.\textsuperscript{171} The third was the Food, Conservation, and Energy Act of 2008, which contained a provision allowing parties to opt out of arbitration under livestock and poultry contracts.\textsuperscript{172} Senators Feingold and Grassley introduced bills with comparable provisions in three prior Congresses before finally passing this one in the 110th.\textsuperscript{173} The fourth was the Department of Defense Appropriations Act of 2010, which contained a provision prohibiting the government from contracting with employers that require arbitration of “any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.”\textsuperscript{174} Popularly known as the Franken Anti-Rape Amendment, it passed the 111th Congress after the uproar over the dispute between Jamie Leigh Jones and KBR.\textsuperscript{175} Finally, the 111th Congress also passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.\textsuperscript{176} Among other things, this Act gave the SEC authority to restrict or prohibit mandatory arbitration under the Securities and Exchange Act of 1934 and the Investment Advisers Act of 1940.\textsuperscript{177} It also created a Consumer Protection Financial Bureau that will have the same power over arbitration provisions in “consumer

\textsuperscript{169} The bill defined motor vehicle franchise contracts as contracts “under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer’s motor vehicle.” \textit{See id.} at § 2. The bill said that if a motor vehicle franchise contract called for arbitration of disputes, then the parties to the contract would be able to opt out of that provision after any dispute arose. If the parties chose to proceed with arbitration, then the bill required the arbitrator to provide a written award. \textit{Id.}


\textsuperscript{171} \textit{See id.} at § 670.


\textsuperscript{176} \textit{See Dodd-Frank Wall Street Reform and Consumer Protection Act, supra note 121. This is also known as the Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. (2010).}

\textsuperscript{177} \textit{Id.} at § 921. It also exempted certain Truth in Lending Act claims and certain whistleblower retaliation claims from mandatory arbitration. \textit{Id.} at §§ 748, 922, 1057, 1414.
financial products and services” agreements. It is the only bill of the five that even considered regulation as a means for dealing with mandatory arbitration.

In fact, the overwhelming majority of the 135 bills since 1995 proposed eliminating, rather than regulating, mandatory arbitration. And none of the bills that proposed regulating mandatory arbitration received any widespread support. Consider, for example, the Consumer and Employee Arbitration Bill of Rights, the Arbitration Fairness Act of 2002, and the Fair Arbitration Act of 2007, which Senator Sessions introduced in the 106th, 107th, and 110th Congresses, respectively. Each applied to “consumer” and “employment” agreements, which were broadly defined. And each bill’s substance was the same — they all sought to regulate the circumstances under which parties could mandate arbitration. In other words, they did not seek to eliminate mandatory arbitration, as most other bills during this period did. Instead they sought to control how it could be carried out. None of Sessions’ bills had co-sponsors and all three died without hearings in the Senate Judiciary Committee.

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178 Id. at § 1028. The new Bureau will be part of the Federal Reserve, but the Reserve will have little oversight over it. Basically, the Reserve will simply fund its operations. Id. at § 1012.

179 See id. at § 1028.


181 “Consumer” agreements included “the sale or rental of goods, services, or real property, including an extension of credit or the provision of any other financial product or service, to an individual in a transaction entered into primarily for personal, family, or household purposes.” See, e.g., Consumer and Employee Arbitration Bill of Rights, supra note 180, at § 2. “Employment” agreements meant “a uniform, employer promulgated plan that covers all employees in a company, facility, or work grade, and that may cover legally protected rights or statutory rights” and did “not include any individually negotiated executive employment agreements.” Id.

182 Each bill would have required arbitration clauses: (1) to have their headings in bold, capital letters; (2) to state whether arbitration is mandatory or optional; (3) to provide contact information for a source where contracting parties can get more information on the arbitration process; and (4) to allow parties to have the option of resolving disputes under $50,000 in small claims court. The bills also would have entitled parties: (1) to competent and neutral arbitrators; (2) to representation and a fair hearing; (3) to present evidence, cross-examine witnesses, and have a record of the proceedings; and (4) to timely resolution and a written award. See Fair Arbitration Act of 2007, supra note 180, at § 2; Arbitration Fairness Act of 2002, supra note 180, at § 2; Consumer and Employee Arbitration Bill of Rights, supra note 180, at § 2. These bills were unique in that they did not try to eliminate mandatory arbitration outright.

183 See id.; Arbitration Fairness Act of 2002, supra note 180, at § 2; Consumer and Employee Arbitration Bill of Rights, supra note 180, at § 2.

184 See id.; Arbitration Fairness Act of 2002, supra note 180; Consumer and Employee Arbitration Bill of Rights, supra note 180.
Now compare Sessions’ bills to the Arbitration Fairness Acts of 2007 and 2009, two of the more-widely-publicized reform bills introduced during this period. The 2007 Act applied to employment, consumer, and franchise disputes, as well as disputes under statutes intended to (1) protect civil rights or (2) regulate contracts between parties with unequal bargaining power. The 2009 Act covers the same disputes, except that it does not include the unequal-bargaining-power provision. Both Acts would eliminate, rather than regulate, mandatory arbitration for the covered disputes. Although the 2007 Act failed and the 2009 Act is still sitting in each house’s Judiciary Committee, both have received far greater attention and support in Congress than Sessions’ bills did. For example, the 2007 Act had a total of 110 co-sponsors in both houses and the 2009 Act has 127. Also, subcommittees of the Senate Judiciary Committee and the House Judiciary Committee held hearings on the 2007 Act, which did not happen with any of Sessions’ bills.

In short, it appears that Congress has been more open to eliminating, as opposed to regulating, mandatory arbitration – a short-sighted approach that disregards mandatory arbitration’s public benefits (e.g., reducing judicial caseloads and companies’ dispute-resolution costs) and makes arbitration itself seem like the problem, which it’s not. The problem is that companies have abused mandatory arbitration because the Supreme Court has been lax in regulating the process. The better solution is to keep mandatory arbitration in place (for now at least) but regulate it to prevent its past abuses from continuing. This pragmatic approach gives companies a cheaper, alternative method for resolving disputes while also protecting individual rights previously lost in mandatory arbitration.

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187 See, e.g., id.; Arbitration Fairness Act of 2007, supra note 185, at § 4. And both would have a court, rather than an arbitrator, decide initial challenges to an arbitration agreement, thus eliminating Prima Paint's severability rule. Id.; Arbitration Fairness Act of 2007, supra note 185, at § 4.
III. EMBRACING PRAGMATIC LIBERALISM IN MANDATORY ARBITRATION

So far I've addressed the Supreme Court’s success with arbitration formalism and the mixed accomplishments of the reform advocates’ liberal response. In other words, I've addressed whether these two movements have, in fact, worked. Separate from the question of whether the movements have worked is the question of whether they should work. That is what I address in this final section. In short, this part demonstrates that both movements are flawed and that adopting a pragmatic-liberalism approach, one that regulates mandatory arbitration’s use to improve its overall fairness, makes more sense. While I do not prescribe preferred regulations in this Article,\textsuperscript{191} I do aim to establish that pragmatic liberalism, as a theory, is superior to formalism and liberalism in the mandatory-arbitration context.

A. The Problems with Supreme Court Formalism

Defining formalism is complicated because numerous conflicting versions exist.\textsuperscript{192} One common definition, however, explains formalism as “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative.”\textsuperscript{193} This can be expressed in the form of a syllogism:

\begin{center}
\textbf{Major Premise:} All X are Y. \\
\textbf{Minor Premise:} No Z is Y. \\
\textbf{Conclusion:} No Z is X.
\end{center}

The major premise is the controlling rule for deciding the case; the minor premise is the case’s relevant facts; and the conclusion is the court’s holding.\textsuperscript{194} Courts move from the major premise to the conclusion by using deductive logic, meaning that they interpret the controlling rule through factual analysis and established legal-reasoning devices. They do not, however, take policy considerations into account.\textsuperscript{195}


\textsuperscript{195} Id.
Accordingly, formalism is sometimes referred to as “mechanical jurisprudence” because it restricts or eliminates courts’ discretion to make exceptions to a given rule.196 Courts simply look at the rule, decide what conclusion would further that rule given the facts, and then reach that conclusion without considering policies that might justify a different outcome.197

The Supreme Court’s arbitration decisions fall within this general description of formalism.198 It uses the “national policy favoring arbitration” and “party autonomy” as its major premises for deriving case outcomes. Given these premises’ nature and the Court’s general refusal to consider policy concerns regarding arbitration’s potential for abuse,199 the outcome of any given case seems preordained. In fact, over the last twenty-five years, the Court has mechanically relied on the “national policy” and “party autonomy” to expand the Federal Arbitration Act’s scope beyond Congress’s original intent.200 Consequently, mandatory arbitration has increased significantly.201 But the Court’s goal, after all, has been to reduce judicial caseloads, and it has shown little concern over correcting arbitration abuses.202

The Court’s arbitration formalism is subject to at least three criticisms. First, it is too rigid. The Court treats the “national policy” and “party autonomy” as immutable rules that demand arbitration’s expansion. It refuses to make policy-

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196 See Bridgeman, supra note 192, at 1449 (“The traditional definition offered is the familiar caricature of classical formalism as ‘mechanical jurisprudence.’”); Cass R. Sunstein, Must Formalism Be Defended Empirically?, 66 U. Chi. L. Rev. 636, 638-39 (1999) (stating that formalism is an attempt to make the law deductive “in the sense that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases”).

197 See id.; Sunstein, supra note 196, at 638-39.

198 McNEIL, supra note 2, at viii (describing the reasoning in the Court’s arbitration decisions over the last twenty-five years as “bureaucratic formalism”).

199 For example, the Court has disregarded legitimate concerns regarding parties’ lack of consent and arbitration’s unsuitability for certain disputes. See, e.g., Shearson/American Express v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

200 See, e.g., Rent-a-Center, West, Inc. v. Jackson, 561 U.S. __, ___ (2010) (stating that the Act “reflects the fundamental principle that arbitration is a matter of contract,” and enforcing a contractual provision that made the parties submit arbitrability issues to the arbitrator); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (compelling arbitration of a statutory claim and stating that Sections 2, 3, and 4 of the Act reflect the “liberal federal policy favoring arbitration agreements”).


202 See McNEIL, supra note 2, at 172 (“One cannot immerse oneself in the arbitration cases without coming to the conclusion that a major force driving the Court is docket-clearing pure and simple. That is, the Court is motivated to reduce the cases having to be tried by the judicial system, particularly the federal judicial system.”).
based exceptions to those rules.\textsuperscript{203} And it has shown little willingness to reshape those rules as parties’ use of arbitration has changed over time.\textsuperscript{204} For example, as businesses increasingly required arbitration in response to the Court’s pro-arbitration decisions, they simultaneously began limiting non-drafting parties’ procedural rights.\textsuperscript{205} The Court has done little to correct this behavior, relying on formal logic instead of experience to continue expanding the Act.\textsuperscript{206} This failure to respond is why consumers, employees, franchisees, and others increasingly have asked Congress for relief, and it is why their requests have started becoming more successful.\textsuperscript{207}

The second criticism of the Court’s arbitration formalism is that it emphasizes the deductive process over the choice of premises.\textsuperscript{208} Put differently, the Court gives the impression that its premises ("party autonomy" and the "national policy") are self-evident and then deduces an outcome that is inevitable given the premises used.\textsuperscript{209} This makes it appear as if the Court’s decision-making abilities are limited – that it has no other choice but to rule a certain way.\textsuperscript{210} Correctly choosing


\textsuperscript{204} This is a central problem with formalism. See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 41 (1990) ("Formalism contains a built-in bias against legal change….").

\textsuperscript{205} For example, some mandatory arbitration agreements contain provisions that severely limit discovery, eliminate the right to class actions, forbid cross-examination of witnesses, and impose biased arbitrators. See Elizabeth G. Thornburg, Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims, 67 LAW & CONTEMP. PROBS. 253, 262-63 (2004).

\textsuperscript{206} See OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience."). This is problematic given that many of these changes resulted from the Court’s own decisions. This is what I mean by saying that the Court’s stance is too rigid. See generally Steven M. Quevedo, Formalist and Instrumentalist Legal Reasoning and Legal Theory, 73 CALIF. L. REV. 119, 122 (1985) (stating that a formalist court will rely “on existing legal rules and logical deduction to decide any and all cases presented to it,” and that, as a result, legal rules become “rigidly unchangeable”).

\textsuperscript{207} For example, the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act gives the proposed agency the power to either eliminate or regulate mandatory arbitration in certain categories of disputes. See Dodd-Frank Wall Street Reform and Consumer Protection Act, supra note 121.

\textsuperscript{208} See POSNER, supra note 204, at 38-42.

\textsuperscript{209} See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Southland Corp. v. Keating, 465 U.S. 1 (1984); see also Posner, supra note 193, at 182 (stating that formalists want “to give the impression that the premises were self-evident – meanwhile packing as much into the major premises as possible, to shorten the chain of deductions”). The Court’s basic logic looks something like this: Congress created a “national policy favoring arbitration” when it passed the Federal Arbitration Act. And arbitration is a matter of contract, i.e., party autonomy. Accordingly, it makes logical sense to broadly interpret the Act and vigorously enforce parties’ arbitration agreements.

\textsuperscript{210} See BROOKS, supra note 194, at 57.
premises is more difficult than correctly deriving an outcome from given premises.\textsuperscript{211} So instead of focusing on the premises’ validity, the Court simply selects them and then focuses on deriving an outcome, which allows it to deny that it is making any political or moral judgments.\textsuperscript{212} The problem, of course, is that these denials are false.\textsuperscript{213} The Court makes political judgments when choosing premises for its arbitration decisions. Specifically, it wants to reduce judicial caseloads.\textsuperscript{214} Choosing “party autonomy” and the “national policy favoring arbitration” as its premises furthers that end.

Finally, the Court’s two premises are false.\textsuperscript{215} Congress did not create a “national policy favoring arbitration” when it passed the Federal Arbitration Act.\textsuperscript{216} It simply created a procedural law that directed federal courts to enforce merchants’ arbitration agreements.\textsuperscript{217} In fact, the Act’s legislative history makes plain Congress’s intent,\textsuperscript{218} which likely explains why the Court failed to cite any authority when announcing the “national policy” in Moses H. Cone and Southland.\textsuperscript{219} Also, the Court gives too much credence to “party autonomy.” Saying that parties should be free to negotiate the manner in which they resolve their disputes oversimplifies the issue.\textsuperscript{220} Certain parties have little or no bargaining power, which means they have no true choice in deciding whether to arbitrate.\textsuperscript{221} Thus, while arbitration may be a “matter

\textsuperscript{211} See Posner, supra note 193, at 182.

\textsuperscript{212} CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 24 (1996) (“There is a pervasive impulse to formalism within the legal culture, though the impulse moves to the fore in particular periods, when judges find it especially necessary to say that their judgments about ‘what the law is’ do not rest on political and moral claims.”).

\textsuperscript{213} Id. (“The vice of formalism is found whenever people in law falsely deny that they are making political and moral judgments.”).

\textsuperscript{214} See McNeill, supra note 2, at 172; Moses, supra note 11, at 156.

\textsuperscript{215} This is problematic because the truth of an outcome depends on the truth of its premises. See Posner, supra note 204, at 38.

\textsuperscript{216} Moses, supra note 11, at 123 (“The 1925 Congress never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes. It simply made arbitration of commercial and maritime agreements enforceable in federal court because, until 1925, such agreements had essentially been revocable at will by the parties.”).

\textsuperscript{217} See supra Part I(B).

\textsuperscript{218} See supra Part I(B); see also Southland Corp. v. Keating, 465 U.S. 1, 25 (1984) (O’Connor, J., dissenting) (“One rarely finds a legislative history as unambiguous as the FAA’s. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.”).


\textsuperscript{220} See Sternlight, supra note 48, at 688-93.

\textsuperscript{221} BRUNET ET AL., supra note 1, at 7 (“A consumer who is forced to arbitrate a dispute without having knowingly consented to arbitration loses both the freedom to use the court system and the freedom to contract in a knowing fashion.”).
of contract,” certain contracts deserve greater scrutiny than others. Yet the Court treats all arbitration agreements alike, citing “party autonomy” regardless of the circumstances under which an agreement was signed.\footnote{See Katherine Van Wezel Stone, \textit{Rustic Justice: Community and Coercion under the Federal Arbitration Act}, 77 N.C. L. Rev. 931, 962-69 (1999) (“The problem with understanding the FAA cases as primarily about enforcing private agreements to arbitrate is that, in many recent cases, courts have applied attenuated notions of consent, compelling arbitration when consent is thin, if not outright fictitious.”). Paternalism is one common argument against the unconscionability doctrine. But it is not paternalistic because courts have an interest in refusing to put their stamp of approval on agreements that are “harmful, exploitative, or immoral.” Seana Valentine Shiffrin, \textit{Paternalism, Unconscionability Doctrine, and Accommodation}, 29 Phil. & Public Affairs 205, 224 (2000).}

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

\textbf{B. The Limitations of the Reform Advocates’ Liberal Response}

Liberalism, like formalism, is hard to define. For starters, political liberalism differs from legal liberalism. The former, oversimplified, involves a conception of rights and public goods and a debate over how to take public goods into account, if at all, when deciding how to enforce rights.\footnote{Simon, \textit{supra} note 6, at 133, 135. Professor Simon explains that legal liberalism is based on three background premises (the victim perspective, populism, and the priority of rights) and three strategic premises (a preference for controlling information, choosing between rules and standards, and structuring procedure). \textit{Id.} at 133.} The latter, also oversimplified, distrusts large organizations and views the law’s fundamental concern as attending the needs of the vulnerable.\footnote{Legal liberalism and political liberalism have been linked since the Warren Court. \textit{See Laura Kalman, The Strange Career of Legal Liberalism} 2 (1996).} For purposes of this Article, I use liberalism simply to mean the reform advocates’ attempts to protect consumers, employees, franchisees, and others from large (or more powerful) organizations by eliminating mandatory arbitration. Put so simply, it appears that I am referring to the reform advocate’s actions as a form of legal liberalism, which I am. But because political liberalism and legal liberalism often overlap, I will address their actions from a political-liberalism perspective as well, principally because the reform advocates want to protect individual rights without accounting for any public good that mandatory arbitration may create.\footnote{\textit{See generally Michael J. Sandel, Liberalism and the Limits of Justice} 184-95 (2d ed. 1998). Generally, liberalism insists on fair procedures and respect for individual rights. \textit{Michael J. Sandel, Democracy’s Discontent} 7-8 (1996).} In doing so, I show that the reform advocates’ attempts to eliminate
mandatory arbitration are premature, that we should focus on regulating, rather than eliminating, it as an alternative method for resolving disputes—at least for now.

Most of the reform advocates’ criticisms of mandatory arbitration focus on how it affects individual rights, including the right to a fair hearing, the right to a transparent decision-making process, and the right to make autonomous decisions. They believe arbitration should be governed by principles that promote these rights and that these rights cannot be sacrificed for the public good. In other words, they believe these rights trump considerations of what might be best for the public at large. While I agree with many of the reform advocates’ criticisms, I disagree with how they ignore mandatory arbitration’s larger effect on society—specifically, its potential effect on the public good. Although this is a common criticism of liberalism generally, and although this general criticism can be rebutted, it has particular merit in the mandatory-arbitration context for three reasons.

First, mandatory arbitration is a relatively new phenomenon. It emerged only over the last twenty-five years, which means that courts and policy makers haven’t had a great deal of time to study its use. In fact, empirical data related to its use is limited, so the question of whether mandatory arbitration is a public good is difficult to answer. Accordingly, we should continue studying its use to determine its overall effect on society (while taking steps to improve its fairness). But the reform advocates prefer to ignore mandatory arbitration’s potential benefits and focus

226 See, e.g., Arbitration Fairness Act of 2009, supra note 186, at § 2 (listing the bill’s Congressional “findings”).
228 See id.
229 The reform advocates do, sometimes, reference negative effects that mandatory arbitration has on the public. For example, the Congressional “findings” in the Arbitration Fairness Act of 2009 state that mandatory arbitration “undermines the development of public law for civil rights and consumer rights.” See Arbitration Fairness Act of 2009, supra note 186, at § 2. But they neglect any positive contributions that mandatory arbitration has made. To be clear, I’m not saying that mandatory arbitration is a public good or that its benefits outweigh its costs. I honestly don’t know for certain whether such statements are true. And I’m not sure that anyone else does either. Also, I’m not advocating that the question can be fully answered by a cost-benefit analysis. All I’m saying is that we somehow need to take mandatory arbitration’s effect on the public good into account. I believe adopting a pragmatic-liberalism approach to mandatory arbitration can help achieve this goal.
231 See id. at 198-200.
232 Sternlight, supra note 201, at 1631-32 (“The involuntary imposition of arbitration in lieu of open court procedures is a new and most controversial phenomenon.”).
233 Id. at 1634 (“Although the question of whether mandatory arbitration positively or negatively impacts most individuals has been widely debated among academics and practitioners, empirical data is scant and not likely to resolve this question in the near future.”).
instead on recognizing consumers’, employees’, and others’ “rights.”234 In particular, they disregard mandatory arbitration’s tendency to reduce judicial caseloads and lower companies’ dispute-resolution costs, while concentrating on their right to a fair hearing and to make autonomous decisions – a short-sighted approach.235 We should consider all of these factors. Mandatory arbitration is too new, and the laws surrounding it have changed too fast, to say with absolute certainty that it should be eliminated at this point.236

The reform advocates’ response to this, of course, would be that their rights are prior to, and separate from, the public good, and that their rights should therefore prevail.237 This brings me to my second criticism of the reform advocates’ liberal position: Although I generally agree with the reform advocates’ rights-oriented claims, the validity of those claims is, sometimes, debatable. For instance, Stephen Ware argues that mandatory arbitration does not interfere with autonomy.238 Specifically, he disputes the reform advocates’ claim that individuals should not be forced to arbitrate unless they “knowingly” consented to an arbitration agreement, stating that arbitration law does not apply “subjective knowing-consent standards.”239 Also, Bo Rutledge disputes all of the Congressional “findings” that appear in the Arbitration Fairness Acts of 2007 and 2009.240 He says the findings – which lay out the individual rights that are lost through mandatory arbitration – are based on underdeveloped normative and empirical claims and that arbitration has improved

234 Simon, supra note 6, at 148 (stating that legal liberalism has “a Utopian tendency to ignore the costs of the recognition of entitlements”).
235 Take, for example, the Congressional “findings” in the Arbitration Fairness Acts of 2007 and 2009. Neither set of findings mentions mandatory arbitration’s tendency to reduce judicial caseloads and lower companies’ dispute resolution costs. Instead, both focus on mandatory arbitration’s negative effects. See Arbitration Fairness Act of 2009, supra note 186, at § 2; Arbitration Fairness Act of 2007, supra note 185, at § 2.
236 To be clear, I agree that the current mandatory-arbitration framework is not entirely fair and that it needs to be changed. All I’m saying here is that it’s too soon to eliminate mandatory arbitration because we don’t yet know enough about it. See Simon, supra note 6, at 177-78 (“The Pragmatist objects to the liberal idea of rights enforcement as the elaboration of a pre-existing moral consensus. She sides with the Legal Realist in insisting that whatever normative consensus exists in the society is too incomplete and ambiguous to play the role Legal Liberalism expects.”).
238 BRUNET ET AL., supra note 1, at 335 (“[T]he value of autonomy requires that people be bound by agreements they formed even when they did not know or understand, in any meaningful way, what they were agreeing to.”).
239 Id. at 334-35; see also Stephen J. Ware, Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen), 29 MCGEORGE L. REV. 195, 201 (1998) (“There is no duress in the typical ‘adhesion’ contract. A consumer who contracts in such circumstances does so voluntarily.”).
240 Rutledge, supra note 188, at 268-78.
the average individual’s access to justice. Rutledge’s and Ware’s opinions on these topics are valid and well-stated; in other words, they are not espousing fringe views. Thus, at least some of the reform advocates’ “rights” are debatable, which reduces the validity of their rights-oriented, liberal position.

Finally, the reform advocates assert that the judiciary is more capable of protecting individual rights – even though the judiciary isn’t perfect in this regard – and most fail to consider whether regulating arbitration could make it a more rights-oriented process. In fact, the majority of bills submitted to Congress over the last fifteen years called for eliminating mandatory arbitration, thereby implicitly stating that the court system will protect individual rights lost in arbitration. Also, the few bills that did suggest regulating mandatory arbitration – thus attempting to improve its fairness for individuals subjected to it – received little Congressional support. In other words, the reform advocates have been fixated on eliminating, rather than regulating, mandatory arbitration, even if it means being subjected to a court system that has its own issues with protecting individual rights.

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

C. Proposing a Pragmatic-Liberalism Approach

So far I’ve examined the problems with the Supreme Court’s arbitration formalism, including the resulting increase in mandatory arbitration, and the limits of the reform advocates’ liberal response, including its rigidity. Now I want to propose an alternative method for dealing with mandatory arbitration, one that continues its

\[241\text{ Id. at 277 (“In sum, the findings that underpin the most radical overhaul of federal arbitration law in over eighty years are scientifically unproven, normatively debatable or demonstrably wrong.””).}\]
\[242\text{ Simon, supra note 6, at 133, 135 (“The American judiciary appears to be doing a very poor job of enforcing a broad range of rights.””).}\]
\[243\text{ Very few bills actually suggested changes to current arbitration laws to make the process fairer for individuals subjected to mandatory arbitration. See, e.g., Fair Arbitration Act of 2007, supra note 180, at § 2; Arbitration Fairness Act of 2002, supra note 180, at § 2; Consumer and Employee Arbitration Bill of Rights, supra note 180, at § 2.}\]
\[244\text{ See, e.g., Arbitration Fairness Act of 2009, supra note 186, at § 2.}\]
\[245\text{ For example, the three bills introduced by Senator Jeff Sessions, which proposed certain regulations for the mandatory-arbitration process, had no co-sponsors. See Fair Arbitration Act of 2007, supra note 180; Arbitration Fairness Act of 2002, supra note 180; Consumer and Employee Arbitration Bill of Rights, supra note 180.}\]
use while improving its overall fairness through legislative or agency regulation. Although outlining a set of regulations for mandatory arbitration is beyond this Article’s scope, I do hope to show that regulating mandatory arbitration is consistent with pragmatic principles and that pragmatic liberalism, as a theory, is superior to formalism and liberalism in this context.

Let me start by addressing what I mean by “pragmatic liberalism.” As used here, it is similar to pragmatism generally. It considers consequences; it is anti-dogmatic; it acknowledges that other perspectives exist; and it values experimentation. In that sense, it is consistent with the everyday use of the word “pragmatic” because it focuses on figuring out what works and finding solutions to problems.

It also rejects the formalist idea that law is grounded in permanent, immutable principles and the liberal idea that rights enforcement is the elaboration of a moral consensus. For example, both the Supreme Court’s arbitration formalism and the reform advocates’ arbitration liberalism are too absolute.

To be clear, I’m not proposing pragmatic liberalism as a default approach because of the flaws with formalism and liberalism. Rather, I hope to show substantive reasons why embracing pragmatic liberalism in the context of mandatory arbitration makes sense.


The description that I give here of pragmatic liberalism is pieced together from several sources focusing on pragmatism generally. These sources show there are three basic types: philosophical, legal, and everyday. See Richard A. Posner, *Law, Pragmatism, and Democracy* 49-56 (2003) (explaining everyday pragmatism); Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 Cardozo L. Rev. 21 (1996) (discussing legal pragmatism and philosophical pragmatism and stating that the former should stand free from the latter). I borrow mostly from descriptions of legal pragmatism and everyday pragmatism to describe the pragmatic liberalism that I propose here.


See Posner, *supra* note 248, at 49-50 (discussing everyday pragmatism as “the mindset denoted by the popular usage of the word ‘pragmatic’”); see also Richard A. Posner, *The Problematics of Moral and Legal Theory* 227 (1999) (“I am interested in pragmatism as a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.”). I recognize that Posner discusses pragmatism mostly in the context of judicial decision-making, and that he would disagree with some, if not much, of what I propose, but I like his basic definition of pragmatism, so I am highjacking parts of it and applying it in the context of regulating mandatory arbitration.

See Posner, *supra* note 248, at 50 (stating that pragmatism is an “attitude that predisposes Americans to judge proposals by the criterion of what works”); see also Simon, *supra* note 6, at 177 (“Pragmatist practice is problem solving.”).

Posner, *supra* note 6, at 405; Simon, *supra* note 6, at 177; see also Steven D. Smith, *The Pursuit of Pragmatism*, 100 Yale L.J. 409, 424 (1990) (stating that pragmatism “expresses a deep distrust for” formalism).
mechanically enforces arbitration agreements based on flawed deductive reasoning, allowing companies to mandate arbitration with individuals on terms that aren’t always fair. The latter characterizes sometimes-debatable rights as indisputable and demands mandatory-arbitration’s elimination, disregarding any public benefits that mandatory arbitration may have. Pragmatic liberalism, on the other hand, recognizes that we cannot analytically derive solutions to problems like mandatory arbitration and that any existing moral consensus regarding the rights lost in mandatory arbitration is too ambiguous to play the role that the reform advocates expect. It is a more circumspect, flexible doctrine. In fact, it recognizes that the less certainty we have regarding problems like mandatory arbitration, the more incentive we have to experiment.

To say that pragmatic liberalism is flexible and that it values experimentation, however, does not mean that it is value-neutral, which is one of the most frequent criticisms against pragmatism. To avoid this general criticism, I propose a goal-oriented version of pragmatism that seeks to improve mandatory arbitration’s overall fairness. Stated differently, the pragmatic liberalism I propose says something about the ends we should pursue in mandatory arbitration. It attempts to resolve the conflict between companies that wish to mandate arbitration, on the one hand, and individuals that wish to avoid it, on the other, by continuing, but regulating, mandatory-arbitration’s use. In that sense, my proposal recognizes the changes that have occurred in arbitration over the last twenty-five years, but it also recognizes that Congress wanted to protect individuals from abusive practices when it passed the Federal Arbitration Act. Thus, it is a middle-ground, pragmatic approach that

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253 See supra Part III(A).
254 See supra Part III(B).
255 See Simon, supra note 6, at 177-78.
256 POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, supra note 250, at 248 ("The less one thinks one knows the answers to difficult questions of policy, the more inclined one will be to encourage learning about them through experimentation and other methods of inquiry."); see also Simon, supra note 6, at 177 (stating that solutions to public problems “are best derived deliberatively and experimentally”); Sullivan & Solove, supra note 4, at 704 (“Pragmatists are committed to finding substantive sustenance for their guiding ideals through experiential inquiry.”). Some of the experiments might include expanding the review of awards, letting parties choose to have small claims courts handle certain matters, and capping arbitration’s administrative costs for the non-drafting parties, to name a few.
257 BRIAN Z. TAMANAH, REALISTIC SOCIO-LEGAL THEORY 41 (1997) (stating that the core problem with pragmatism is “its substantive emptiness”).
258 I borrowed the idea that pragmatism need not be value-neutral from Sullivan & Solove, supra note 4, at 703.
259 Id. at 703-04.
260 See 1924 Joint Hearings, supra note 5, at 14-15 (statements of Sen. Thomas Sterling, Chairman, Subcomm. of the Comm. on the Judiciary and Julius H. Cohen, General Counsel, New York State Chamber of Commerce); 1923 Hearings, supra note 5, at 9-10 (statements of Sen.
takes arbitration’s history into account while recognizing the potential benefits of its current and future use.261

This approach will allow us to study mandatory arbitration before deciding whether to eliminate it entirely.262 Empirical study, in fact, is one of the key principles263 of the pragmatic liberalism I propose because the existing empirical data on mandatory arbitration is limited.264 It would be helpful to know more about how much money mandatory arbitration saves companies, the extent to which those companies pass savings along to consumers, and how much it really reduces judicial caseloads, to name a few.265 It would also be helpful to continue studying mandatory arbitration’s affect on individual rights given that end goal is to improve mandatory arbitration’s procedural fairness. This “critical assessment of our ends” will allow us to re-examine, among other things, where those ends came from, what they were responding to, and what type of results they have had on parties involved with mandatory arbitration.266


261 Thus, the pragmatic liberalism I propose is not ahistorical. It recognizes that we must look at arbitration’s history to determine what fairness and justice mean in the mandatory-arbitration context. See Sullivan & Solove, supra note 4, at 703-04 (“The pragmatist justifies her value commitments, in part, by analyzing their historical genesis. Guiding ideals such as ‘fairness,’ ‘justice,’ and ‘freedom’ must be critically examined by looking to past experience.”).

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

263 It is one of the key principles of pragmatism generally. See POSNER, supra note 6, at 11 (listing “empirical” as one of the adjectives Posner uses to describe pragmatism); Daniel A. Farber, Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century, 1995 U. ILL. L. REV. 163, 188 (stating that Brandeis “would have wanted a full view of the facts before making up his mind about possible remedies” and that “much can be learned from a more empirical approach”).

264 Sternlight, supra note 201, at 1634 (explaining that the existing empirical data is “scant”).

265 Empirical data could help resolve some ongoing disagreements over these issues. For example, Jean Sternlight and Stephen Ware disagree over the extent to which companies pass along cost-savings to consumers. See BRUNET ET AL., supra note 1, at 329 n.68 (pointing out the lack of empirical data to support either side of the argument).

266 See Sullivan & Solove, supra note 4, at 704-05. A regulatory approach can encourage these questions. Consider, for example, the Dodd-Frank bill that Congress passed earlier this year. See Dodd-Frank Wall Street Reform and Consumer Protection Act, supra note 121. The bill says that the Consumer Protection Financial Bureau must “conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.” Id. at § 1028. Hopefully the CPFB will take time to study and experiment (through regulation) with mandatory arbitration before
In sum, adopting a regulatory approach would allow us to fill empirical gaps and continue examining our “end” goal of improving mandatory arbitration’s procedural fairness. Such an approach will no doubt be imperfect, but the mandatory-arbitration system we have now certainly is not ideal.267 Besides, if companies dislike the regulations adopted under this approach, they can always make an economic decision to eliminate mandatory-arbitration provisions from their contracts or to lobby the regulatory body for change. And, although the approach I propose is unquestionably better than what is currently available, individuals, too, can lobby for change if they believe the new regulations don’t go far enough.268 The point, I suppose, is that this approach seeks to balance companies’ needs against individuals’ rights, hopefully in a manner that ultimately improves the overall public good.

CONCLUSION

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

deciding whether it should be eliminated (which the CPFB has the authority to do for disputes covered under the bill).

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

268 Presumably this would occur through the same organizations that have been lobbying Congress for reform over the last fifteen years. According to Professor Simon, this type of associative democracy is one of the background principles of legal pragmatism. Simon, supra note 6, at 173, 175 (stating that associative democracy “is the idea that citizens should participate in the design and implementation of the policies that affect them” and that citizens’ “participation can take a variety of forms, but there is special emphasis on participation through nongovernmental organizations”).
APPENDIX

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<th>Bill Name</th>
<th>Relevant Purpose of Bill</th>
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<tr>
<td>Federal Fair Franchise Practices Act, H.R. 1717, 104th Cong. (1995).</td>
<td>Section 9 of the bill would have precluded franchisors from “exclud[ing] collective action by franchisees to settle like disputes arising from violation of this Act either by civil action or arbitration.”</td>
<td>Referred to Judiciary Committee.</td>
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<tr>
<td>Civil Rights Procedures Protection Act of 1995, S.366, 104th Cong. (1995).</td>
<td>To “amend certain Federal civil rights statutes to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, sex, national origin, age, or disability, and for other purposes.”  (^{269})</td>
<td>Referred to Committee on Labor and Human Resources.</td>
</tr>
<tr>
<td>Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong. (1996).</td>
<td>Same as other CRPPA bill. (^{270})</td>
<td>Referred to (1) Judiciary Committee’s Subcommittee on Constitution, and (2) Economic and Educational Opportunities Committee’s Subcommittee on Workforce Protections.</td>
</tr>
<tr>
<td>Fairness and Voluntary Arbitration Act of 1996, H.R. 3422, 104th Cong. (1996).</td>
<td>To “amend chapter 1 of title 9 of the United States Code to permit each party to certain contracts to accept or reject arbitration as a means of settling disputes under the contracts.”</td>
<td>Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law.</td>
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\(^{270}\) By saying that this bill has the same purpose as the previous one introduced, I am not saying that the bill is completely unchanged. There may be some amendments to it from the previous version. For our purposes, I’m simply focusing on the overall purpose of the bill as it relates to arbitration.
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271 The bill would have allowed parties to opt out of arbitration and, if parties chose to proceed with arbitration, it would have required the arbitrator to issue a written award. Motor Vehicle Franchise Control Arbitration Fairness Act of 1998, S.2434, 105th Cong., § 2(a) (1998). |

271 The bill would have allowed parties to opt out of arbitration and, if parties chose to proceed with arbitration, it would have required the arbitrator to issue a written award. Motor Vehicle Franchise Control Arbitration Fairness Act of 1998, S.2434, 105th Cong., § 2(a) (1998). |
| Small Business Franchise Act of 1999, H.R. 3308, 106th | Same as prior SBFA bill.                                                              | Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law. |

271 The bill would have allowed parties to opt out of arbitration and, if parties chose to proceed with arbitration, it would have required the arbitrator to issue a written award. Motor Vehicle Franchise Control Arbitration Fairness Act of 1998, S.2434, 105th Cong., § 2(a) (1998). |
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<tr>
<td>A Bill to Amend Title 9, United States Code, to Allow Employees the Right to Accept or Reject the Use of Arbitration to Resolve an Employment Controversy, H.R. 613, 106th Cong. (1999).</td>
<td>The title is pretty self-explanatory. Section 1 would have allowed both parties to choose whether to arbitrate after the dispute arose.</td>
<td>Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law.</td>
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<tr>
<td>Anti-Predatory Lending Act of 2000, H.R. 3901, 106th Cong. (2000).</td>
<td>Section 3 would have amended the Truth in Lending Act to prohibit mandatory arbitration provisions in high cost mortgages.</td>
<td>Referred to Banking and Financial Services Committee’s Subcommittee on Financial Institutions and Consumer Credit.</td>
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<tr>
<td>Predatory Lending Deterrence Act, S.2405, 106th Cong. (2000).</td>
<td>Section 4 would have amended the Truth in Lending Act to prohibit mandatory arbitration in mortgage agreements covered by Section 103(aa).</td>
<td>Referred to Committee on Banking, Housing, and Urban Affairs.</td>
</tr>
<tr>
<td>Consumer and Employee Arbitration Bill of Rights, S.3210, 106th Cong. (2000).</td>
<td>To “amend chapter 1 of title 9, United States Code, to provide for greater fairness in the arbitration process for consumers and employees.”</td>
<td>Referred to the Judiciary Committee.</td>
</tr>
<tr>
<td>Financial Consumers Bill of Rights Act, H.R. 4332, 106th Cong. (2000).</td>
<td>Section 8 of the bill would have prohibited pre-dispute arbitration provisions in “any consumer transaction or consumer contract.”</td>
<td>Referred to (1) Banking and Financial Services’ Subcommittee on Financial Institutions and Consumer Credit, and (2) Commerce</td>
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272 This bill, and the multiple other bills like it that were introduced in subsequent years, may have been prompted by a HUD investigation and report on predatory lending practices. See U.S. DEPT OF HOUSING AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, CURBING PREDATORY HOME MORTGAGE LENDING (2000).

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

274 This bill would have required arbitration clauses to: (1) have their headings in bold, capital letters; (2) state whether arbitration is mandatory or optional; (3) provide contact information for a source where contracting parties can get more information on the arbitration process; and (4) allow parties to have the option of resolving disputes under $50,000 in small claims court. It also entitled parties to: (1) competent and neutral arbitrators; (2) representation and a fair hearing; (3) present evidence, cross-examine witnesses, and have a record of the proceedings; and (4) timely resolution and a written award. See Consumer and Employee Arbitration Bill of Rights, S.3210, 106th Cong., § 2(b), (c) (2000). It is the same as the Arbitration Fairness Act of 2002, S.3026, 107th Cong. (2002) and the Fair Arbitration Act of 2007, S.1135, 110th Cong. (2007). All three were introduced by Jeff Sessions.
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| American Homebuyer's Protection Act, H.R. 5033, 106th Cong. (2000).     | To “prohibit offering homebuilding purchase contracts that contain in a single document both a mandatory arbitration agreement and other contract provisions and to prohibit requiring purchasers to consent to a mandatory arbitration agreement as a condition precedent to entering into a homebuilding purchase contract.  
275                                                                 | Referred to Committee on Banking and Financial Services’ Subcommittee on Housing and Community Opportunity.                                                                                                             |
| A Bill to Amend Title 9, United States Code, to Allow Employees the Right to Accept or Reject the Use of Arbitration to Resolve an Employment Controversy, H.R. 815, 107th Cong. (2001). | Same as the prior version of the bill.                                                                                                                                                                                 | Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law.                                                                                                                                     |
276                                                                 |
| Motor Vehicle Franchise Contract Arbitration Fairness                     | Same as prior MVFCAFA bills.                                                                                                                                                                                                 | Passed the Senate and House. Signed by President Bush.  
277                                                                 |

275 This bill would have allowed homebuilders and their customers to arbitrate their disputes, but only if the customers signed a separate contract agreeing to arbitration that is not a condition precedent to the homebuilding contract.  See American Homebuyer’s Protection Act, H.R. 5033, 106th Cong., § 2(a), (b) (2000).
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<tr>
<td>Civil Rights Procedures Protection Act of 2001, H.R. 1489, 107th Cong. (2001).</td>
<td>Same as prior CRPPA bills.</td>
<td>Referred to (1) Education and the Workforce Committee’s Subcommittee on Workforce Protections, and (2) Judiciary Committee’s Subcommittee on Constitution.</td>
</tr>
<tr>
<td>Save Our Homes Act, H.R. 2531, 107th Cong. (2001).</td>
<td>Section 3(j) of the bill would have amended the Truth in Lending Act to prohibit lenders from including in high cost mortgages a “mandatory arbitration clause [that] limits in any way the right of the borrower to seek relief through the judicial process.”</td>
<td>Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.</td>
</tr>
<tr>
<td>Truth in Savings Enhancement Act of 2001, H.R. 1057, 107th Cong. (2001).</td>
<td>Section 3(d) of the bill would have amended the Truth in Savings Act to prohibit depository institutions from requiring binding arbitration of disputes with consumers.</td>
<td>Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.</td>
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<tr>
<td>Truth in Lending Modernization Act of 2001,</td>
<td>Section 6(a) of the bill would have amended the Truth in Lending Modernization Act to prohibit depository institutions from requiring binding arbitration of disputes with consumers.</td>
<td>Referred to the Committee on Financial Services’</td>
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<tr>
<td>Protecting our Communities from Predatory Lending Practices Act, H.R. 3607, 107th Cong. (2001).</td>
<td>Section 3(a) of the bill would have amended the Truth in Lending Act to prohibit arbitration in any “contract for the extension of consumer credit secured by the consumer’s dwelling.”</td>
<td>Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.</td>
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<tr>
<td>Predatory Lending Consumer Protection Act of 2001, H.R. 1051, 107th Cong. (2001).</td>
<td>Section 4(g) of the bill would have amended the Truth in Lending Act to prohibit arbitration provisions in high-cost mortgage contracts.</td>
<td>Referred to the Committee on Financial Services’ Subcommittee on Financial Institutions and Consumer Credit.</td>
</tr>
<tr>
<td>Preservation of Civil Rights Protections Act of 2001, H.R. 2282, 107th Cong. (2001).</td>
<td>To “amend title 9 of the United States Code to exclude all employment contracts from the arbitration provisions of chapter 1 of such title.”</td>
<td>Referred to (1) Judiciary Committee’s Subcommittee on Commercial and Administrative Law, and (2) Education and the Workforce Committee’s Subcommittee on Employer-Employee Relations.</td>
</tr>
<tr>
<td>Genetically Engineered Crop and Animal Farmer Protection Act of 2002, H.R. 4812, 107th Cong. (2002).</td>
<td>Section 4(b) would have prohibited mandatory arbitration between biotech companies and purchasers of genetically engineered plants, animals, or seeds.</td>
<td>Referred to Agriculture Committee’s Subcommittee on General Farm Commodities and Risk Management.</td>
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<tr>
<td>INFORM Act of 2002, S.2032, 107th Cong. (2002).</td>
<td>Section 404 would have amended ERISA to prohibit</td>
<td>Referred to Health, Education, Labor, and</td>
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<tr>
<td>Employee Pension Freedom Act of 2002, H.R. 3657, 107th Cong. (2002).</td>
<td>Section 404 would have amended ERISA to prohibit pre-dispute mandatory arbitration clauses.</td>
<td>Referred to Education and the Workforce Committee’s Subcommittee on Employer-Employee Relations.</td>
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278 This is basically the same bill as the Consumer and Employee Arbitration Bill of Rights, S.3210, 106th Cong. (2000) and the Fair Arbitration Act of 2007, S.1135, 110th Cong. (2007).
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<pre><code>                                                             | Same as prior FCGA bill.                                                                 | Referred to Judiciary Committee.                                                                 |
</code></pre>
<p>| A Bill to Amend Title 9, United States Code, to Allow Employees the Right | Same as the prior versions of the bill.                                                 | Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law. |
| Predatory Mortgage Lending Practices Reduction Act, H.R. 1663, 108th Cong. (2003). | Section 1003 would have amended the Consumer Credit Protection Act to prohibit “arbitration clauses imposed on consumers without their consent.” | Referred to Committee on Banking and Financial Services’ Subcommittee on Financial Institutions and Consumer Credit. |
| Responsible Lending Act, H.R. 833, 108th Cong. (2003).                    | Section 102(e) would have amended the Truth in Lending Act to prohibit “oppressive, unfair, or unconscionable” | Referred to Committee on Banking and Financial Services’ Subcommittee on Housing and Community Opportunity. |</p>

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279 This bill would allow arbitration under livestock and poultry contracts only if the parties agreed to arbitrate after the dispute arose. It would also require the arbitrator to issue a written award. See Fair Contracts for Growers Act of 2002, S.2943, 107th Cong., § 2(b), (c) (2002).
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<tr>
<td>Mutual Fund Investor Protection Act of 2003, S.1958, 108th Cong. (2003).</td>
<td>Section 209 would have allowed investors to have complaints heard in “an independent arbitration forum” of the investor’s choice.</td>
<td>Referred to Banking, Housing, and Urban Affairs Committee.</td>
</tr>
<tr>
<td>Taxpayer Abuse Prevention Act, H.R. 5340, 108th Cong. (2004).</td>
<td>Section 4 would have prevented mandatory arbitration provisions in loan agreements linked to anticipated tax refunds.</td>
<td>Referred to (1) Ways and Means Committee, and (2) Banking and Financial Services Committee’s Subcommittee on Financial Institutions and Consumer Credit.</td>
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280 Section 102 has a safe-harbor provision that exempts arbitration provisions so long as they meet the listed requirements (e.g., forum in federal judicial district where property is located).
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<tr>
<td>Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. (2004).</td>
<td>Same as other FAIRNESS bill.</td>
<td>Referred to (1) Judiciary Committee’s Subcommittee on Constitution, (2) Education and Workforce Committee’s Subcommittee on Education Reform, and (3) Transportation and Infrastructure Committee’s Subcommittee on Aviation.</td>
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<td>Prohibit Predatory Lending Act, H.R. 3974, 108th Cong. (2004).</td>
<td>Section 4(d) of the bill would have amended the Truth in Lending Act to prohibit arbitration provisions in high-cost mortgage contracts.</td>
<td>Referred to Committee on Banking and Financial Services’ Subcommittee on Housing and Community Opportunity.</td>
</tr>
<tr>
<td>Taxpayer Abuse Prevention Act, H.R. 969, 109th Cong. (2005).</td>
<td>Same as prior TAPA bills.</td>
<td>Referred to (1) Ways and Means Committee, and (2) Banking and Financial Services Committee’s Subcommittee on Financial Institutions and Consumer Credit.</td>
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<tr>
<td>A Bill to Amend Title 9, United States Code, to Allow Employees the Right to Accept or Reject the Use of Arbitration to Resolve an Employment Controversy, H.R. 3651, 109th Cong. (2005).</td>
<td>Same as the prior versions of the bill.</td>
<td>Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law.</td>
</tr>
<tr>
<td>Borrower’s Bill of Rights Act, H.R. 1643, 109th Cong. (2005).</td>
<td>Section 27(b) would have prohibited pre-dispute mandatory arbitration agreements in consumer lending agreements.</td>
<td>Referred to (1) Committee on Banking and Financial Services, and (2) Judiciary Committee’s Subcommittee on Commercial and Administrative Law.</td>
</tr>
<tr>
<td>Prohibit Predatory Lending Act, H.R. 1182, 109th Cong. (2005).</td>
<td>Section 7 would have amended the Truth in Lending Act to prohibit arbitration provisions in a “consumer credit transaction that is secured by”</td>
<td>Referred to Committee on Banking and Financial Services’ Subcommittee on Housing and Community Opportunity.</td>
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<td>Fair and Responsible Lending Act, H.R. 4471, 109th Cong. (2005).</td>
<td>Section 104 would have amended the Truth in Lending Act to prohibit pre-dispute mandatory arbitration agreements.</td>
<td>Referred to the Committee on Banking and Financial Services.</td>
</tr>
<tr>
<td>Arbitration Fairness Act of 2007, S.1782, 110th Cong.</td>
<td>The AFA’s broad, stated goal was to “amend chapter 1 of</td>
<td>Referred to Judiciary Committee’s Subcommittee</td>
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<td>Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).</td>
<td>Same as other AFA bill.</td>
<td>Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law. Hearings held. Subcommittee then forwarded it to full Committee by voice vote.</td>
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<td>Reservists Access to Justice</td>
<td>Section 3 would have amended</td>
<td>Referred to Veterans’ Affairs</td>
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\(^{282}\) More specifically, it prohibits pre-dispute arbitration agreements for employment disputes, consumer disputes, franchise disputes, disputes under statutes that protect civil rights, and disputes under contracts between parties with unequal bargaining power.

\(^{283}\) This is basically the same bill as the Consumer and Employee Arbitration Bill of Rights, S.3210, 106th Cong. (2000) and the Arbitration Fairness Act of 2002, S.3026, 107th Cong. (2002).
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<td>Act of 2007, H.R. 3393, 110th Cong. (2007).</td>
<td>Chapter 43 of Title 38 of the U.S. Code to make Chapter 1 of Title 9 inapplicable to employment and reemployment claims under Chapter 43.</td>
<td>Committee’s Subcommittee on Economic Opportunity. Hearings held.</td>
</tr>
<tr>
<td>Helping Families Save Their Homes in Bankruptcy Act of 2007, S.2136, 110th Cong. (2007).</td>
<td>Section 203 would have amended Section 1328 of Title 28 of the U.S. Code to say: “Notwithstanding any agreement for arbitration that is subject to chapter 1 of title 9, in any core proceeding under section 157(b) . . . the court may hear and determine the proceeding, and enter appropriate orders and judgments, in lieu of referral to arbitration.”</td>
<td>Referred to Judiciary Committee. Hearings held. Reported out of Committee and placed on Senate calendar under General Orders.</td>
</tr>
<tr>
<td>Private Sector Whistleblower Protection Streamlining Act of 2007, H.R. 4047, 110th Cong. (2007).</td>
<td>Section 104 would have made arbitration provisions that applied to claims between a whistleblower and his or her employer unenforceable.</td>
<td>Referred to Education and Workforce Committee’s Subcommittee on Workforce Protections.</td>
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<td>mortgage loans or extensions of credit secured by a consumer’s principal dwelling.</td>
<td>Referred to Senate Committee on Banking, Housing, and Urban Affairs.</td>
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<tr>
<td>Food, Conservation, and Energy Act of 2008, H.R. 2419, 110th Cong. (2007).</td>
<td>Section 210 required poultry and livestock contracts to contain provisions allowing growers and producers to opt out of arbitration. It also required the governing agency to establish regulations that would allow contracting parties to fully participate in the arbitration process.</td>
<td>Passed House and Senate. Vet overridden.</td>
</tr>
<tr>
<td>Credit Card Safety Star Act of 2007, S.2411, 110th Cong. (2007).</td>
<td>Section 3 would have amended the Truth in Lending Act to create a point rating system for credit cards that awarded one point for agreements with no mandatory arbitration and that took away one point for agreements with mandatory arbitration.</td>
<td>Referred to Committee on Banking, Housing, and Urban Affairs.</td>
</tr>
<tr>
<td>Automobile Arbitration Fairness Act of 2008, H.R. 5312, 110th Cong. (2008).</td>
<td>Section 2 would have prohibited mandatory arbitration provisions in “motor vehicle consumer lease or sales contracts.”</td>
<td>Referred to Judiciary Committee’s Subcommittee on Commercial and Administrative Law. Hearings held. Bill forwarded</td>
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<td>Civil Rights Act of 2008, H.R. 5129, 110th Cong. (2008).</td>
<td>Same as prior FAIRNESS bills.</td>
<td>Referred to (1) Judiciary Committee’s Subcommittee on Constitution, Civil Rights and Civil Liberties, (2) Education and Labor Committee, and (3) Transportation and Infrastructure Committee’s Subcommittee on Aviation.</td>
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| Foreclosure Prevention Act of 2008, S.2636, 110th Cong. (2008).          | Section 423 would have amended Section 1334 of Title 28 of the U.S. Code to say: “Notwithstanding any agreement for arbitration that is subject to chapter 1 of title 9, in any core proceeding under section 157(b) . . . the court may hear and determine the proceeding, and enter appropriate orders and judgments, in lieu of referral to arbitration.”  
                                                                                   | Introduced in Senate. Placed on calendar under General Orders.                                                                                                                                                    |
| Genetically Engineered Technology Farmer Protection Act, H.R. 6637, 110th Cong. (2008). | Section 104 would have prohibited mandatory arbitration between biotech companies and purchasers of genetically engineered plants, animals, or seeds.  
                                                                                   | Referred to (1) Judiciary Committee, (2) Energy and Commerce Committee’s Subcommittee on Health, and (3) Agriculture Committee’s Subcommittee on Livestock, Dairy, and Poultry.       |
| Arbitration Fairness Act of 2009, S.931, 111th Cong. (2009).             | The AFA’s broad, stated goal is the same as the AFA bill from 2007. But the substance of the two bills is somewhat different. This one, for example, drops “disputes under statutes regulating contracts between parties of unequal bargaining power” from its coverage. | Referred to Judiciary Committee.                                                                                                                                |

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

286 This is the same as the provision in the prior versions of the Genetically Engineered Crop and Animal Farm Protection Act. See, e.g., Genetically Engineered Crop and Animal Farmer Protection Act of 2002, H.R. 4812, 107th Cong. (2002).
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<td>Payday Loan Reform Act of 2009, H.R. 1214, 111th Cong. (2009).</td>
<td>Section 2 would amend the Truth in Lending Act to prohibit payday lenders from including mandatory arbitration provisions that are “oppressive, unfair, unconscionable, or substantially in derogation of the rights of the consumer.”</td>
<td>Referred to Committee on Banking and Financial Services.</td>
</tr>
<tr>
<td>Payday Lending Reform Act of 2009, H.R. 2563, 111th Cong. (2009).</td>
<td>Section 2 would amend the Truth in Lending Act to prohibit payday lenders from including mandatory arbitration provisions that are “oppressive, unfair, unconscionable, or substantially in derogation of the rights of the consumer.”</td>
<td>Referred to Committee on Banking and Financial Services.</td>
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<td>Servicemembers Access to</td>
<td>Same as prior SAJA bills.</td>
<td>Referred to Veterans’ Affairs</td>
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<td>title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.</td>
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<tr>
<td>Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009).</td>
<td>Section 125 would give the proposed agency the power to prohibit or regulate mandatory arbitration provisions between “covered persons” and consumers.</td>
<td>Referred to (1) Committee on Banking and Financial Services, and (2) Energy and Commerce Committee’s Subcommittee on Commerce, Trade, and Consumer Protection. Hearings held by the Subcommittee. Reported out of Banking and Financial Services Committee and Energy and Commerce Committee.</td>
</tr>
<tr>
<td>Miner Safety and Health Act of 2010, H.R. 5663, 111th Cong. (2010).</td>
<td>Section 401 would amend 30 U.S.C. 815(c) to include a provision eliminating contracting parties’ ability to</td>
<td>Referred to Committee on Education and Labor.</td>
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<td>“limit the rights and remedies” of this subsection through pre-dispute arbitration. Section 701 would make a similar change to Section 11 of OSHA.</td>
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