

Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?

Joshua T. Mandelbaum*

ABSTRACT: In the last twenty years, mandatory binding arbitration has become ubiquitous in consumer contracts. The rise of mandatory binding arbitration represents a deliberate strategy on the part of businesses. The widespread adoption of mandatory binding arbitration in the consumer context has significant negative consequences for consumers and society. However, the Supreme Court's interpretation of the Federal Arbitration Act has, in essence, limited effective policy options for addressing mandatory binding arbitration to federal legislative action. Many consumer advocates have coalesced around the Arbitration Fairness Act, a bill requiring that arbitration in multiple contexts be voluntary, as the best means for addressing mandatory binding arbitration. However, the Arbitration Fairness Act is inadequate to address the problems of mandatory binding arbitration. An approach with more comprehensive disclosure and substantive protections is needed.

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* J.D. Candidate, The University of Iowa College of Law, 2009; B.A., Brown University, 2001. I would like to thank Professor Edward Brunet for his comments and suggestions and the editors and writers of Volumes 93 and 94 of the *Iowa Law Review* for their efforts in guiding this work through the publication process. I would like to give a special thanks to Gretchen Lewis for her love, support, and patience throughout this endeavor.

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I. INTRODUCTION

Hardly a day goes by without the average American consumer talking on a cell phone, or making a credit- or debit-card purchase. Ask a passerby on the street, and he is likely to tell you that he cannot imagine life without these everyday conveniences that were rare or unheard of a generation ago. However, along with these new conveniences, many consumers receive something they did not bargain for—mandatory binding arbitration.

Consumers are likely to encounter mandatory binding arbitration for products beyond credit cards and cell phones. In transactions for home loans, car loans, personal accounts, gym memberships, exterminator services, computers, goods on eBay, prizes in fast-food-restaurant contests, and a variety of other products, companies frequently require mandatory binding arbitration.¹ In all, over 1000 companies include mandatory binding arbitration in routine transactions.²

While mandatory binding arbitration is not unique to the consumer context,³ consumer arbitration has been particularly controversial.⁴ Critics of consumer arbitration point out its many problems for consumers and society. These problems include high fees, a lack of due-process safeguards, unequal bargaining power, arbitrator bias toward the business, the bar of class-action suits, potential private usurpation of the roles of the judicial and legislative branches, and society's inability to make good policy decisions going forward because of a lack of information.⁵ On the other hand, defenders of mandatory binding arbitration argue that it is a cheaper, quicker, and fairer way to resolve disputes,⁶ and that the cost savings it generates ultimately benefit consumers.⁷

1. Jean R. Sternlight, *Consumer Arbitration*, in EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 127, 129 (2006).

2. Kristin Loiacono, *Congress Tackles Mandatory Arbitration*, *TRIAL*, July 2002, at 11, 11.

3. See generally STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 153–69 (2002) (discussing arbitration in the labor, employment, consumer, and securities contexts).

4. See *id.* at 166 (noting that given the conflicting interests of consumers and businesses in dispute-resolution processes, the controversy over consumer arbitration is likely to continue); Sternlight, *supra* note 1, at 140–51 (discussing the controversy surrounding consumer arbitration).

5. See *infra* Part III (discussing these problems).

6. Sternlight, *supra* note 1, at 141.

7. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91 (“Assuming that consumer arbitration agreements lower the dispute-resolution costs of businesses that use them, competition will (over time) force these businesses to pass their cost-savings to consumers.”); see also Stephen J. Ware, *Comments of Professor Stephen Ware*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT*, *supra* note 1, at 327, 328 & n.66 (explaining the economic theory behind the assertion that consumers will ultimately receive the cost savings of consumer arbitration).

A quick search of the popular press demonstrates that there is an abundance of anecdotal evidence documenting the horror stories of mandatory binding arbitration for consumers. For example, without even knowing that there was an arbitration hearing, Beth Plowman had an arbitration judgment of over \$27,000 entered against her for credit-card charges that an identity thief accrued.⁸ Stories like this illustrate dramatically the problems of consumer arbitration—problems that consumer advocates and academics are trying to highlight with their work.

The plight of individuals entangled in mandatory binding arbitration and the resulting outcry of critics have caught the attention of legislators. Over the last decade, a variety of bills have been introduced in Congress to curb mandatory binding arbitration in various contexts.⁹ These bills have typically died with a whimper, killed in committee without so much as a hearing.¹⁰ However, the 2006 elections brought a shift in power to Washington and with it a renewed effort for legislative change on arbitration policy. Advocates and legislators have rallied around the Arbitration Fairness Act, a bill originally introduced in 2007 by Senator Russ Feingold (D-WI) and Congressman Hank Johnson (D-GA)¹¹ and reintroduced in nearly identical form by Congressman Johnson in 2009.¹²

This Note critically assesses the Arbitration Fairness Act to determine if it is the best way to achieve the consumer-arbitration reform that advocates and academics have championed. Part II of this Note highlights the convergence of factors behind the rise of mandatory binding arbitration.

8. Caroline E. Mayer, *Arbitration Left ID Theft Victim with \$27,000 Bill*, WASH. POST, Feb. 24, 2005, at E1; see also, e.g., Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCI. MONITOR, July 16, 2007, at 13 (detailing the case of a consumer who faced an arbitrator's ruling that he owed \$10,000 on a \$2500 loan used to pay for his brother's funeral); Margaret Mannix, *No Suits for You*, U.S. NEWS & WORLD REP., June 7, 1999, at 58, 58 (discussing how a binding-arbitration clause frustrated a couple's efforts to get redress from a termite company that punctured their home's fuel line, making it uninhabitable); *The Arbitration Trap: How Consumers Pay for 'Low Cost' Justice*, CONSUMER REP., Aug. 1999, at 64, 64 (detailing the \$2000 initiation fee a consumer would have to invest and the six-hour round-trip drive a consumer would have to undertake to get a dispute about his new manufactured home settled in arbitration). *But see id.* (describing a consumer's positive resolution of a small auto-repair complaint).

9. See Sternlight, *supra* note 1, at 178–82 (discussing various pieces of federal legislation introduced to curb mandatory binding arbitration).

10. See *id.* at 179 (“[O]pponents of mandatory arbitration have introduced a series of such proposals, although, to date, none of these bills have garnered substantial support.”).

11. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).

12. The Arbitration Fairness Act of 2007 remained unenacted by the end of 2008 and consequently died. However, on February 12, 2009, Congressman Johnson introduced the Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009), which is nearly identical to the 2007 bills; the only difference is inconsequential to the theme of this Note. See *infra* note 123 and accompanying text (noting this difference).

Part III explores the problems for consumers and society created by the widespread use of mandatory binding arbitration. Part IV describes the potential options for correcting the problems of mandatory binding arbitration and assesses their efficacy. Part V details and analyzes the likely congressional approach to addressing mandatory binding arbitration, as represented by the Arbitration Fairness Act. Part VI argues that the Arbitration Fairness Act approaches consumer protection through disclosure; it concludes, however, that the bill fails to require critical substantive disclosures that are necessary to protect consumers from the full range of problems associated with mandatory binding arbitration.

II. THE RISE OF CONSUMER ARBITRATION

Arbitration is a well-known method of alternative dispute resolution. Mandatory binding arbitration in the consumer context refers to the contractual clause by which “a company requires a consumer to agree to submit any dispute that may arise to binding arbitration prior to completing a transaction with the company.”¹³ The rise of mandatory binding arbitration in the consumer context is a relatively recent phenomenon. Congress first took action on arbitration in 1925, when it passed what is now known as the Federal Arbitration Act.¹⁴ However, it was not until significantly later in the century that a line of cases began to interpret the Act in a way that made mandatory binding arbitration enforceable.¹⁵ Even after the line of cases emerged, it took companies some time to figure out how to take advantage of the opportunities that those cases presented.¹⁶

A. THE FEDERAL ARBITRATION ACT

In 1925, Congress enacted what is now known as the Federal Arbitration Act (“FAA”)¹⁷ in order to address the courts’ reluctance to enforce

13. Remar Sutton & Assocs., Binding Mandatory Arbitration Frequently Asked Questions, <http://www.givemebackmyrights.com/bma-faq.htm> (last visited Feb. 21, 2009).

14. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925). “The federal statute was originally called the United States Arbitration Act, but the statute became known as the Federal Arbitration Act after Congress deleted the section of the statute containing the statute’s original name.” Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOT. L. REV. 399, 401 n.3 (2008); see also Act of July 30, 1947, ch. 392, 61 Stat. 669 (codified as amended at 9 U.S.C. §§ 1–14 (2000)) (reenacting the substantive provisions, but not the short-title provision, of the United States Arbitration Act).

15. See *infra* Part II.B (discussing these cases).

16. See Sternlight, *supra* note 1, at 129 (“Throughout the 1990s, companies in a wide array of areas followed the lead of the securities industry and began to use form agreements to require their customers to agree to resolve all future disputes through arbitration rather than litigation.”).

17. See *supra* note 14 and accompanying text.

arbitration agreements.¹⁸ Section 2 of the Act made arbitration provisions in a contract “valid, irrevocable, and enforceable.”¹⁹ The Act gave courts the power to enforce arbitration agreements and stay pending litigation until the arbitration concluded.²⁰ Like most legislation, however, the FAA failed to address a number of eventualities. This left significant issues for the courts to decide, such as questions involving federal jurisdiction, scope and preemptive effect, grounds on which to refuse enforcement, public-policy exclusions, and the immutability of the Act’s provisions.²¹

B. THE SUPREME COURT’S STAMP OF APPROVAL

Since Congress enacted the FAA, the Supreme Court has played a critical role in interpreting its boundaries. The Court has construed the FAA’s boundaries loosely, frequently citing Congress’s preference for arbitration as a rationale for its decisions.²²

A clear line of decisions has emerged that broadly favors arbitration as national policy. The Court has held that the FAA preempts state laws that limit the enforceability of arbitration agreements.²³ The Court has further limited the states’ ability to invalidate arbitration clauses through the states’ power to regulate contracts.²⁴ The Arbitration Fairness Act succinctly describes the impact of these court cases when it notes in its findings that “[a] series of United States Supreme Court decisions have [sic] changed the meaning of the [FAA] so that it now extends to disputes between parties of

18. See Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1243 (2001) (“Until the enactment of the Federal Arbitration Act (FAA) in 1925, mandatory arbitration was generally viewed with hostility by the courts.” (footnote omitted)).

19. 9 U.S.C. § 2 (2000).

20. Richard E. Speidel, *Common Legal Issues in American Arbitration Law*, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT, *supra* note 1, at 29, 37.

21. See *id.* at 37–45 (discussing notable omissions from the FAA).

22. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements”); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519–20 & n.15 (1974) (upholding an arbitration clause and noting that “the passage of Chapter 2 of the United States Arbitration Act provide[s] strongly persuasive evidence of congressional policy consistent with the decision we reach today”).

23. See *Southland Corp.*, 465 U.S. at 16 (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.” (footnote omitted)).

24. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (holding that states cannot “decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause”).

greatly disparate economic power, such as consumer disputes and employment disputes.”²⁵

C. THE ADOPTION OF CONSUMER ARBITRATION BY BUSINESSES

Once the U.S. Supreme Court started to give mandatory binding arbitration its stamp of approval, many businesses began to look for new ways to use arbitration.²⁶ Consumer arbitration quickly rose to the fore because it could “be of great advantage to manufacturers, distributors and other businesses that face the potential for burdensome, costly litigation arising out of disputes with the consumers to whom they sell.”²⁷

In theory, consumer arbitration benefits businesses, consumers, and society as a whole. An early arbitration scholar, Frances Kellor, commenting on arbitration in general, noted that “any instrumentality which reduces the burden of waste and cost of disputes to a nation is an activating power for the advancement of civilization.”²⁸ Benefits of arbitration include speed, potentially low costs, finality, informality, low-stress environments, confidentiality, and party control over both the process and the choice of decisionmaker.²⁹

To the extent that speed and efficiency reduce legal costs, both sides benefit from arbitration. The finality of arbitration that results from the limited right of appeal is also beneficial to both sides if the arbitration

25. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(2) (2009).

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

27. BENNETT, *supra* note 3, at 161–62. For a consumer advocate’s perspective on why businesses use mandatory binding arbitration, see Pub. Citizen, Arbitration Q&A, <http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=7490> (last visited Feb. 21, 2009), which states:

A business will use an arbitration clause when it anticipates being the *defendant* in a civil lawsuit. Businesses generally do not use them if they anticipate being a plaintiff in a lawsuit, and usually draft the clauses so that only the business can force the consumer, employee, or franchisee into arbitration, and not the other way around. Because the high costs of arbitration and inability to bring class actions in arbitration discourage claims from being brought, arbitration clauses give an advantage to a potential defendant.

Id.

28. FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 117 (1948).

29. ABRAHAM P. ORDOVER & ANDREA DONEFF, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 143–45 (2d ed. 2002). Others have formulated slightly different lists of arbitration’s benefits. For example, Edward Brunet notes that “[a]rbitration appears to rest on a firm bedrock of . . . efficiency, the opportunity for a fair hearing, party autonomy, privatization, arbitrator expertise, neutrality, and finality.” Edward Brunet, *The Core Values of Arbitration*, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT, *supra* note 1, at 3, 3.

proceedings result in outcomes that are fair (i.e., outcomes that benefit whichever side has the most favorable facts).

However, many of these benefits, as they accrue in mandatory consumer arbitration, tend to be one-sided.³⁰ Businesses are able to choose the decisionmaker and control the terms of the arbitration proceedings through arbitration clauses included in adhesion contracts. The private nature of arbitration as a dispute-resolution mechanism, while useful for a consumer trying to protect his or her privacy, tends to be significantly more useful for a business that wants to avoid negative publicity and quietly dispute potential wrongdoing.³¹ As discussed below, many practices in the context of mandatory consumer arbitration have detrimental consequences for consumers.³²

There is also a set of benefits that accrue exclusively for businesses that employ mandatory consumer arbitration. These benefits include the ability to have nationwide uniformity of arbitration procedures and forms, and procedural benefits such as the ability to limit discovery.³³ In a business context, the ability to limit discovery allows for the protection of critical business information. Many of the benefits of consumer arbitration that are exclusive to businesses derive from the ability to avoid litigation and the advantages that this avoidance provides.

While businesses emphasize a variety of advantages to mandatory consumer arbitration, business lawyers have placed a particularly strong emphasis on one specific advantage: protecting businesses from litigation.³⁴

30. See JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 568 (2005) (“Where unequal bargaining power exists, some of the favorable attributes of arbitration may appear to be one-sided advantages.”).

31. See Brunet, *supra* note 29, at 8 (“It should come as no surprise that repeat users of arbitration include banks, credit card issuers, computer manufacturers, physicians, securities brokers, car dealers, and chain restaurant franchisers—each businesses with a strong desire to avoid potentially negative publicity that may accompany a public court hearing.”). The ability to shame publicly a company that behaves poorly may be one of the strongest leverage points that a consumer can have, and mandatory binding arbitration eliminates it.

32. See *infra* Part III.A (discussing problems impacting consumers).

33. Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, in 2 13TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE 75, 83 (PLI Corp. Law & Practice, Course Handbook Series No. B-1657, 2008).

34. In an article in the late 1990s, as consumer arbitration emerged as a standard business practice, a leading financial-services attorney and his litigator co-author described the problem from a business perspective:

All too often, consumers with sometimes marginal claims bring class action suits in forums hostile to the lending industry. These consumers rely upon the *in terrorem* threats of costly and drawn-out litigation, runaway juries, exorbitant punitive damages, and adverse publicity to pressure lenders into costly settlements. This increase in litigation has been exacerbated by the growing number of plaintiffs' lawyers who have abandoned securities, antitrust, and products liability litigation in favor of consumer financial services litigation.

Although part of the benefit of avoiding litigation derives from the cost savings of resolving disputes quickly, businesses may also want to avoid litigation because of the unpredictable nature of jury verdicts and the costliness of punitive damages and class actions.³⁵ Businesses may prefer mandatory binding arbitration because it is a beneficial tactic in an ongoing adversarial struggle with the plaintiffs' bar.³⁶ Some consumer-financial-services lawyers may have deliberately tried to take advantage of the animosity toward plaintiffs' lawyers by scaring businesses into using consumer-arbitration clauses.³⁷

The ability to use arbitration as an efficient debt-collection and enforcement tool is another advantage of arbitration for businesses. For example, First USA, one of the nation's largest credit-card issuers, brought 51,622 claims against consumers within the first two years of implementing its mandatory-binding-arbitration policy, while consumers filed only four cases.³⁸ Of the 19,705 cases that an arbitrator ultimately decided, First USA prevailed in 19,618, giving the company a 99.6% success rate.³⁹ Perhaps an even more dramatic example of the advantages that mandatory binding arbitration affords businesses is the story of an arbitrator who awarded each

Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: Current Trends and Developments*, 53 BUS. LAW. 1075, 1075 (1998).

35. See Kaplinsky, *supra* note 33, at 83 (noting that advantages to consumer arbitration include "curtailment of class action[s]," "[e]limination of irrational, biased jury verdicts and elected state court judges who may be beholden to [the] plaintiffs' bar," and "[t]empering of punitive damages"). In fact, the reaction to JAMS, a national arbitration firm, when it attempted to change its class-arbitration policy highlights the importance to businesses of the elimination of class actions in arbitration. In 2004, JAMS announced that it would allow class arbitrations because of concerns that a prohibition on them hurts consumers. Several clients removed JAMS from their contracts as an acceptable arbitrator, and JAMS quickly reversed its policy. See PUB. CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* 43 (2007), available at http://www.citizen.org/documents/Final_wcover.pdf (describing JAMS's policy shifts and their consequences).

36. See Kaplinsky & Levin, *supra* note 34, at 1075 ("[A] rapidly growing number of lenders and financial institutions are leveling the playing field [against plaintiffs' lawyers and consumers who wield litigation as a threat] by incorporating arbitration clauses in their consumer contracts.").

37. An example of the type of rhetoric that could scare businesses into using mandatory binding arbitration comes from Kaplinsky and Levin:

Lenders that have not yet implemented arbitration programs should promptly consider doing so, because each day that passes brings with it the risk of additional multi-million dollar class action and individual lawsuits. These suits might have been avoided had arbitration procedures been in place. . . . Those *remaining lenders* who do not implement arbitration programs *will be singled out by plaintiffs' lawyers*, whose pool of defendants is quickly shrinking.

Id. at 1083 (emphasis added).

38. Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1.

39. *Id.*

business the total amount of money it requested in every one of the sixty-eight cases he handled in a day.⁴⁰

The benefits that accrue to businesses that utilize mandatory-binding-arbitration clauses in consumer contracts help explain why these clauses have become so ubiquitous. As of 2002, over 1000 companies included mandatory binding arbitration in routine sales transactions.⁴¹ As long as businesses continue to reap benefits from mandatory consumer arbitration, these clauses are likely to become more prevalent.

III. PROBLEMS WITH CONSUMER ARBITRATION

Consumer-advocate groups and academics are constantly highlighting problems that arise as a result of mandatory binding consumer arbitration. Different scholars and advocates have summarized these problems in different ways.⁴² This Note groups the problems into two distinct categories: (1) problems impacting consumers, and (2) problems for society generally. The problems impacting consumers include high costs, lack of due-process safeguards, unequal bargaining power, and arbitrator bias towards businesses. The problems for society include the potential private usurpation of the roles of the judicial and legislative branches, and society's inability to make good policy decisions going forward because of a lack of information.

A. PROBLEMS IMPACTING CONSUMERS

The most direct impact of mandatory binding arbitration is on the consumers whose contracts contain these clauses. The cost of arbitration proceedings can affect whether a consumer brings a claim, even in instances where consumers have legitimate claims. Another problem is that unequal bargaining power between the parties leads to arbitration clauses that consumers do not understand but that are nevertheless stacked against them. Furthermore, the lack of due-process protections and arbitrator bias impact the outcome of arbitration proceedings in ways that harm consumers.

40. Press Release, Pub. Citizen, Mandatory Arbitration Stacks Deck Against Credit Cardholders, Data Show (Sept. 27, 2007), available at <http://www.citizen.org/pressroom/release.cfm?ID=2519>.

41. Loiacono, *supra* note 2, at 11.

42. For various discussions of the problems with mandatory binding arbitration, see generally Sternlight, *supra* note 1, at 141–48 (discussing criticisms of mandatory arbitration); Pub. Citizen, Mandatory Arbitration Clauses: Undermining the Rights of Consumers, Employees, and Small Businesses, <http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=7332> (last visited Feb. 21, 2009) (explaining the disadvantages to consumers of arbitration); Remar Sutton & Assocs., *supra* note 13 (explaining why consumer groups oppose mandatory arbitration in automotive transactions).

1. High Cost to Consumers

One of the most significant problems with mandatory binding arbitration is its high cost to consumers. Although advocates of arbitration frequently claim that cost reduction is one of arbitration's chief benefits,⁴³ in reality, the costs of arbitration impose a significant burden on consumers and, in many cases, discourage consumers from seeking any redress at all.⁴⁴

While arbitration fees may be lower for consumers on smaller claims, this advantage has to be balanced against the smaller benefits of bringing a claim of that size. In some arbitration clauses, there are restrictions on damages that, when taken into account, make the value of a consumer claim minimal at best.⁴⁵ However, for larger claims, the fee schedule alone represents costs significantly greater than the filing costs of a court action.⁴⁶

An excellent illustration of the burden that arbitration places on consumers comes from a compilation of cases in which consumers have challenged the costs of arbitration in court.⁴⁷ In those cases, consumers tried to overcome high up-front costs, initiation fees larger than the claims

43. See *supra* Part II.C (discussing the benefits of arbitration).

44. See Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 133, 134 (concluding that "the cost of arbitration is often prohibitively high," leaving consumers with "no legal means of obtaining a remedy for a business's illegal conduct").

45. See *id.* at 137 (discussing an arbitration agreement that "bars the award of multiple, consequential, or exemplary damages").

46. See *id.* at 136–43 (discussing the fees that consumers must pay to have their claims arbitrated by the major U.S. arbitration organizations). For example, consider the American Arbitration Association's maximum fees for consumers: \$125 for claims less than \$10,000; \$375 for claims between \$10,000 and \$75,000; and \$2250, plus a deposit of one-half of the arbitrator's compensation, for claims between \$75,000 and \$150,000. *Id.* at 136–37; see also Am. Arbitration Ass'n, Consumer Arbitration Costs, <http://www.adr.org/sp.asp?id=22039> (last visited Feb. 21, 2009) (setting forth arbitration fees). The National Arbitration Forum requires consumer claimants to pay a filing fee and half of a participatory-hearing fee up to \$250, which means a claim of more than \$55,000 would cost a consumer just under \$500. NAT'L ARBITRATION FORUM, FEE SCHEDULE TO CODE OF PROCEDURE 2–3 (2008), available at <http://www.adrforum.com/users/naf/resources/2008FeeSchedule-FinalPrint1.pdf>.

47. See Budnitz, *supra* note 44, at 143–44 (describing several cases in which consumers had high arbitration costs). In *Popovich v. McDonald's Corp.*, a consumer involved in a dispute over a McDonald's promotional game submitted an un rebutted affidavit showing that arbitration costs would likely be between \$48,000 and \$126,000. *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772, 778 (N.D. Ill. 2002). In *Phillips v. Associates Home Equity Services, Inc.*, the plaintiff had a \$72,900 mortgage and put on evidence that she would have had to pay \$4000 up front in arbitration costs plus potential additional costs throughout the process. *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 842, 846 (N.D. Ill. 2001). In *Mendez v. Palm Harbor Homes, Inc.*, the court noted: "Here, it is reasonably sure by prima facie proof that Mr. Mendez would have been required to spend up front well over \$2,000 to try to vindicate his rights under a contract to buy a \$12,000 item in order to resolve a potential \$1,500 dispute." *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 605 (Wash. Ct. App. 2002).

themselves, and the potential for six-figure fees.⁴⁸ These cases represent only a miniscule fraction of consumer experiences. High costs, coupled with the fact that many consumers contemplating arbitration have already sustained a serious loss, put an often insurmountable pressure on many consumers to drop their cases.⁴⁹ To the extent that arbitration costs force consumers to decide not to pursue claims that they otherwise would pursue, these costs are harmful.⁵⁰

2. Lack of Due-Process Safeguards

There are a whole host of due-process problems with mandatory binding arbitration. Some of these problems exist only if the business drafts them into the contract. Other problems are an inherent part of the way arbitration works. Each due-process problem has its own effect on consumers, and several of the due-process problems have broader implications for society as well.

Many contracts with mandatory-binding-arbitration provisions also prohibit class-action lawsuits and class arbitrations.⁵¹ This significantly affects consumers, since many consumer claims are for small amounts. These small claims are not usually worth the cost and effort involved in bringing an action, and the consumer in those cases often ends up “lumping it” (i.e., dealing with the situation through resignation and inaction).⁵² The class action is in some respects a remedy to the problem of having to “lump it.” Class actions allow consumers and their lawyers to combine claims that would not be worth pursuing on an individual basis—not because there is no wrong, but rather because the effort spent remedying the wrong would be greater than the remedy itself.⁵³ Precluding the use of class actions therefore reduces consumers’ ability to remedy the typical harm in a consumer

48. See Budnitz, *supra* note 44, at 143–44 (discussing the relevant cases); see also *supra* note 46 (same).

49. Pub. Citizen, *supra* note 42.

50. See *Popovich*, 189 F. Supp. 2d at 778 (“Popovich himself has averred, unsurprisingly, that costs in that range would be prohibitive . . .”).

51. PUB. CITIZEN, *supra* note 35, at 43.

52. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 14–15 (1983) (explaining the phenomenon of “lumping it” and describing several studies that support the existence of this phenomenon).

53. See Alderman, *supra* note 18, at 1258 (“In consumer cases, the class action often provides the most viable means of litigating disputes. Its major benefit is that it permits the litigation of disputes in which the claim of any one individual would not justify the time and expense of a lawsuit.”).

transaction and removes a potentially important source of accountability for businesses.⁵⁴

Another due-process problem of mandatory binding arbitration is that “it denies claimants access to . . . a jury trial.”⁵⁵ As Sternlight succinctly notes, “any dispute that is required to be presented in arbitration will not be presented to a jury.”⁵⁶ While in some cases there are benefits to arbitration that both consumers and businesses prefer, the consumer’s waiver of the right to a jury trial in a form agreement that the consumer may or may not have read represents a subtle erosion of a fundamental right that the Seventh Amendment⁵⁷ and most state constitutions⁵⁸ grant. A consumer can waive the right to a trial by jury, but that waiver typically must be “knowing, voluntary, and intelligent.”⁵⁹ However, courts tend not to evaluate mandatory-binding-arbitration clauses using this standard, often leaving the consumer without her right to a jury trial.⁶⁰

Yet another due-process problem is that mandatory binding arbitration limits discovery rights.⁶¹ For example, in cases where the parties do not cooperate on discovery, the National Arbitration Forum rules limit interrogatories to no more than twenty-five written questions and place vague limitations on depositions, such as requirements that costs be “commensurate with the amount of the claim” and that requests be “reasonable and not unduly burdensome.”⁶² Arbitrators also have the authority and discretion to turn down a party’s subpoena requests.⁶³ Without access to information through discovery, consumers in arbitration

54. One textbook describes the benefit to a company of limiting class-action lawsuits as follows:

[F]or a company producing defective products, arbitration may be a mechanism to shield the company from consolidated consumer efforts (e.g., class action lawsuits), [and] avoid potentially large jury awards, unfavorable judicial precedent, and media attention. Instead, the company will be able to handle each claim on a case-by-case basis in the relative privacy of an arbitral proceeding.

FOLBERG ET AL., *supra* note 30, at 568 (citation omitted).

55. Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 20 (2003).

56. Sternlight, *supra* note 1, at 148.

57. U.S. CONST. amend. VII.

58. *E.g.*, ILL. CONST. art. I, § 13; IOWA CONST. art. I, § 9.

59. Sternlight, *supra* note 55, at 22.

60. *See id.* at 22–23 (“[F]ederal courts have not even considered jury trial rights when examining the viability of arbitration clauses. Instead, ignoring any special jury trial waiver standards, courts have typically done an ordinary contractual analysis” (footnote omitted)).

61. PUB. CITIZEN, *supra* note 35, at 38.

62. *Id.* (quoting NAT’L ARBITRATION FORUM, CODE OF PROCEDURE R. 29(B)(1) (2006), available at <http://www.adrforum.com/users/naf/resources/20060501CodeOfProcedure072106.pdf>).

63. *Id.*

do not know what type of evidence their opponents have, nor are they able to obtain all the evidence necessary to present their best case.

3. Unequal Bargaining Power

In many of the transactions where businesses use mandatory binding consumer arbitration, the bargaining power rests predominantly with the business. Consumers in these circumstances sign boilerplate contracts that include an arbitration clause that the business drafted.⁶⁴ Consumers often fail to read the form agreements that contain mandatory-binding-arbitration clauses, and even when they do read them, they frequently do not understand those clauses.⁶⁵ In some cases, companies label mandatory-binding-arbitration clauses in innocuous and nondescript ways, which contributes to a lack of consumer understanding.⁶⁶ This means that the use of mandatory binding arbitration often is nonconsensual. The problem is exacerbated by the fact that even when consumers understand arbitration clauses, they are unable to evaluate effectively those clauses due to consumers' inability to perceive correctly the likelihood of ending up in a circumstance where the clause becomes relevant.⁶⁷ The net result is that when a consumer accepts a mandatory-binding-arbitration clause, the business understands the consequences of the clause, but the consumer does not.

Furthermore, "[w]here unequal bargaining power exists, some of the favorable attributes of arbitration may appear to be one-sided advantages."⁶⁸ The substance of arbitration clauses often favors the drafter.⁶⁹ Businesses have taken advantage of mandatory-binding-arbitration clauses by including one-sided provisions.⁷⁰ Examples of one-sided benefits favoring businesses

64. FOLBERG ET AL., *supra* note 30, at 557.

65. *Id.*; Sternlight, *supra* note 1, at 143.

66. See Remar Sutton & Assocs., *supra* note 13 ("Some companies call these clauses 'Dispute Resolution Mechanism' and other equally hard-to-understand names.").

67. See Sternlight, *supra* note 1, at 143 ("[P]sychologists have shown that predictable irrationality biases will prevent [consumers] from properly evaluating the costs and benefits of accepting such a clause."). Sternlight gives the following example of a "predictable irrationality bias" in the consumer context: "[B]ecause people tend to be overly optimistic they will often under-predict the need they might have to bring a claim against the company and thus undervalue what they are losing by giving up a right to sue." *Id.*

68. FOLBERG ET AL., *supra* note 30, at 568.

69. Sternlight, *supra* note 1, at 144 ("There are virtually an infinite number of ways in which the company, as drafting party, can try to use the arbitration clause to gain the upper hand, including arbitrator selection, imposition of high costs, and limitations of remedies. . . . [S]ome of [these excesses] are quite common.").

70. See *id.* at 131 ("[S]ome companies have included clauses in the arbitration agreement that shorten statutes of limitations, limit or eliminate discovery, require claimants to file in a distant forum, prevent consumers from joining together in a class action, or bar consumers from recovering particular forms of relief. . . .").

include nationwide uniformity of arbitration procedures and forms, limitations on due-process safeguards for consumers, and efficiency in debt collection and enforcement.⁷¹ In some cases, companies use arbitration clauses to limit substantive relief by shortening consumers' statutes of limitations or barring recovery of punitive damages, compensatory damages, or attorneys' fees.⁷² Perhaps more significantly, businesses often draft contracts such that the arbitration clauses and their advantages flow one way—i.e., they apply only to consumers, while businesses preserve their right to litigate disputes.⁷³

4. Arbitrator Bias

Another problem with mandatory binding arbitration is arbitrator bias. Arbitrator bias takes two main forms: repeat-provider bias and repeat-player bias. While the two forms of bias operate differently, both work against the consumer in the arbitration process.

The repeat-provider problem occurs because arbitration providers—such as the American Arbitration Association, the National Arbitration Forum, and JAMS—compete to provide arbitration services for companies that need to arbitrate disputes.⁷⁴ These arbitration providers have a strong incentive to establish policies that attract and retain clients, including companies that need arbitration on a regular basis as part of their

71. See *supra* Part II.C (discussing these benefits).

72. Sternlight, *supra* note 1, at 146–47. Sternlight notes that some courts have struck down or revised these provisions in arbitration clauses. *Id.* at 147. However, their inclusion in the first place makes it difficult and costly for consumers to challenge them. *Id.* This is because attorneys may be less likely to take cases for which recovery is potentially limited. See *id.* (describing this problem).

73. Pub. Citizen, *supra* note 42 (“Most arbitration clauses require only the weaker party (the consumer, employee, or franchisee) to arbitrate its claims, while allowing the dominant party (the corporation) to sue in court on its claims.”). A slightly different manifestation of this concept is that a business may find mandatory binding arbitration unfair when imposed against it, while being perfectly willing to impose mandatory binding arbitration on consumers. One of the more interesting examples of this contradiction can be found in car dealerships. Automobile dealers successfully lobbied Congress to make arbitration voluntary in their contracts with manufacturers. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, §§ 11028(a)(1)–(2), 116 Stat. 1758, 1835–36 (2002) (codified at 15 U.S.C. §§ 1226(a)(1)–(2) (Supp. V 2005)) (requiring postdispute consent from all parties before disputes under such contracts can be arbitrated); Carl J. Chiappa & David Stoelting, *Tip of the Iceberg? New Law Exempts Car Dealers from Federal Arbitration Act*, 22 FRANCHISE L.J. 219, 219 (2003) (“[T]he Act appears to reflect the considerable political clout of the motor vehicle dealer lobby . . .”). However, when it came to dealer contracts with consumers, the automobile dealers continued to maintain that it was important for them to be able to impose mandatory binding arbitration on their customers. *Id.* at 220.

74. Sternlight, *supra* note 1, at 144–45.

business.⁷⁵ Arbitration providers that have policies that companies find to be too “pro-consumer” risk losing business.⁷⁶

Individual arbitrators are also susceptible to the same type of repeat-provider bias that institutional arbitration providers face. A steady stream of business from a client can be very lucrative for an arbitrator. Stories of arbitration providers blackballing arbitrators who issue pro-consumer rulings may influence arbitrators who enjoy a steady flow of business and prevent them from treating consumers fairly.⁷⁷

In contrast to the repeat-provider problem, the repeat-player problem occurs because a given company often arbitrates multiple disputes, while a given consumer may usually arbitrate only one.⁷⁸ The companies and their attorneys, therefore, have more exposure to and experience with the arbitration process than do consumers. Likewise, the arbitrators know and understand the circumstances and operations of the company due to frequent and repeated exposures. There is evidence that companies that repeatedly appear before an arbitration provider do better than parties that appear only once.⁷⁹

B. PROBLEMS FOR SOCIETY

The use of mandatory binding arbitration has broader implications for society as a whole. Arbitration has the potential to significantly impact governmental institutions and society’s ability to make informed policy decisions.

1. Usurpation of Judicial and Legislative Roles

The adaptability and flexibility of the common law are two of the strengths of the American legal system. The common law frequently fills in gaps left by statutes and ultimately helps create and mold legal rights.⁸⁰ However, the widespread use of mandatory binding arbitration threatens the role and efficacy of the common law in the American legal system.⁸¹

75. PUB. CITIZEN, *supra* note 35, at 7.

76. *Id.* at 7–8.

77. *See id.* at 30–31 (describing how the National Arbitration Forum removed Harvard law professor Elizabeth Bartholet from seven credit-card disputes that she was supposed to arbitrate after she ruled in favor of a consumer in one dispute).

78. Sternlight, *supra* note 1, at 145.

79. *See* PUB. CITIZEN, *supra* note 35, at 33 (discussing two different academic analyses that found evidence of repeat-player bias).

80. *See* Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 3–8 (2003) (discussing the role of the common law in the legal system generally and, more specifically, in protecting consumer rights).

81. *See id.* at 11 (arguing that the expanded use of mandatory binding arbitration in the consumer context “threatens the core of our justice system”).

The development of the common law occurs as precedents are built upon one another and depends on the existence of litigants and a series of cases. Mandatory binding arbitration disrupts this process in several ways. First, the widespread use of arbitration “eliminates litigation in a public forum, precedent-establishing decisions, and stare decisis.”⁸² The widespread use of arbitration could “‘freeze’ the common law in the form that exists at the time universal arbitration is imposed.”⁸³ This freezing of the common law would eliminate its benefits and leave it unable to adapt to changes in the world. More troubling is the fact that, in theory, a sophisticated use of mandatory binding arbitration by drafters who have the option of using the courts at their discretion could lead to a manipulated development of the common law, with cases hand-picked to lead to precedents that favor business interests at the expense of consumers.⁸⁴

Additionally, mandatory binding arbitration threatens the role of the jury trial, a fundamental part of the American justice system since its inception. The civil jury trial has become increasingly rare, with just 1.21% of federal-court cases ending in a jury verdict in 2000.⁸⁵ By its nature, mandatory binding arbitration denies consumers access to jury trials.⁸⁶ There is an inherent threat to our justice system when consumers, through adhesion contracts, unknowingly waive or are coerced into waiving a fundamental right.⁸⁷ This has led one scholar to declare: “If our society is to eliminate the civil jury trial right we should do so in the open, following a full public discussion. It is wrong to allow companies to use mandatory arbitration clauses to surreptitiously eliminate this precious right.”⁸⁸

In addition to its implications for the role of the judicial branch, the widespread use of mandatory binding arbitration has legislative implications as well. When Congress passed the Federal Arbitration Act in 1925, it approved of arbitration as a dispute-resolution mechanism in order to realize the efficiency gains of arbitration and overcome the reluctance of the courts to enforce arbitration agreements.⁸⁹ With the FAA, Congress

82. *Id.*

83. *Id.* at 13.

84. *Id.* at 14.

85. Sternlight, *supra* note 55, at 17 n.1.

86. *See supra* note 56 and accompanying text (noting that any dispute subject to mandatory binding arbitration would not be presented to a jury).

87. *See* Russell D. Feingold, Policy Essay, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 288 (2002) (“Although individuals can of course waive constitutional rights, we need to remember the constitutional foundation of our civil justice system and that individuals should not be coerced or duped into waiving their fundamental rights.” (footnote omitted)).

88. Sternlight, *supra* note 55, at 38.

89. *See* Feingold, *supra* note 87, at 284–85 (discussing the legislative history of the Federal Arbitration Act).

addressed the issue of whether arbitration was an acceptable dispute-resolution system.⁹⁰ Congress did not, however, even attempt to address more nuanced arbitration-policy issues, such as whether it is appropriate to make arbitration mandatory.

While the courts have played a role in the development of arbitration policy, private-sector actors have made many of the critical decisions about mandatory binding arbitration and its widespread use. As one scholar notes, “[l]egislatures have not concluded that arbitration should be mandatory, but many merchants have.”⁹¹ In essence, the widespread adoption of mandatory binding arbitration represents a major policy decision—one affecting literally millions of consumers—that private-sector actors have made in the absence of legislation.

2. Inability to Make Informed Policy Decisions

Mandatory binding arbitration impacts how society is able to make policy decisions about arbitration and the business practices that rely on arbitration. The lack of written arbitration decisions⁹² means that records of arbitration proceedings are typically scant. Couple this with the fact that most arbitration proceedings are private, closed hearings,⁹³ and the result is a vacuum of information about arbitration and its outcomes. It is difficult to evaluate the effectiveness of arbitration as a dispute-resolution mechanism when there is little or no information available with which to do so.

IV. FEDERAL LEGISLATION IS THE BEST SOLUTION

There are several ways to attempt to curtail mandatory binding arbitration and eliminate its negative consequences, but none of them is as far-reaching or effective as federal legislation. States have tried to regulate mandatory binding arbitration, and the courts have tried to rein in particularly abusive arbitration practices, but these attempts have met with only limited success. National arbitration providers currently employ several voluntary policy options, but these policy options have limited effect.

State legislative attempts to address mandatory binding arbitration have proven ineffective. Multiple states have passed legislation that attempts to

90. See 9 U.S.C. § 2 (2000) (providing that arbitration agreements “shall be valid, irrevocable, and enforceable”).

91. MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 793 (4th ed. 2003).

92. See Brunet, *supra* note 29, at 9 (“Typically, arbitration in the United States ends silently with a cryptic written award that does not contain a discursive opinion.”).

93. See *id.* at 8 (“Hearings take place in private facilities and locations, such as hotel conference facilities, law firms, or space provided by an arbitration administrator. These hearings are effectively and intentionally shielded from the public eye. They are private because they are secret.”).

limit or otherwise address mandatory binding arbitration.⁹⁴ However, the line of Supreme Court cases that has made mandatory binding arbitration a popular option for businesses⁹⁵ limits the effectiveness of state policy options.⁹⁶ States can attempt to address mandatory binding arbitration through alternative legislative strategies that are not preempted, but such strategies would be precarious at best.⁹⁷

Utilizing the courts is another strategy for attempting to limit the reach of arbitration clauses. This strategy involves challenging arbitration clauses using “contractual and other common law attacks.”⁹⁸ Consumers have challenged arbitration clauses based on fraud, unconscionability, lack of consideration, and failure of the contract to cover the particular claim.⁹⁹ While this strategy is successful in some cases, it fails more often than it succeeds due to judicial reluctance to invalidate arbitration clauses and the ability of companies to address effectively the contractual arguments.¹⁰⁰ This approach is further limited by the fact that most consumers lack the savvy and financial resources to make use of the courts.¹⁰¹

Another possible option to curtail the problems of mandatory binding arbitration is self-regulation by the arbitration providers. The “due process

94. See, e.g., ALA. CODE § 8-1-41 (LexisNexis 2002) (“The following obligations cannot be specifically enforced: . . . [a]n agreement to submit a controversy to arbitration . . .”). Alaska has addressed arbitration in the health-care context by enacting legislation providing that an agreement to arbitrate cannot be—and must provide in bold print that it is not—a prerequisite to receiving care. ALASKA STAT. §§ 09.55.535(a)–(b) (2008). Montana law used to have the following consumer-protection provision: “Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.” MONT. CODE ANN. § 27-5-114(4) (1995) (repealed 1997). However, Montana dropped this provision from its law, see MONT. CODE ANN. § 27-5-114 (2007) (current version of the law), after the Supreme Court held that the Federal Arbitration Act preempted it, *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

95. See *supra* notes 23–24 and accompanying text (discussing Supreme Court cases on federal preemption and limits to contract remedies); see also *Doctor’s Assocs.*, 517 U.S. at 683 (invalidating the Montana law discussed *supra* at note 94, holding that “Montana’s first-page notice requirement, which governs not ‘any contract,’ but specifically and solely contracts ‘subject to arbitration,’ conflicts with the FAA and is therefore displaced by the federal measure”).

96. See Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 326 (2007) (“[T]he Supreme Court has shaped a Federal Arbitration Act . . . that routinely trumps state laws dealing with arbitration and created a situation in which applications of state arbitration law are the exception.”).

97. See Sternlight, *supra* note 1, at 175–78 (discussing state legislative strategies for regulating arbitration, including efforts to avoid the “preemption problem” and California’s requirements for disclosure of arbitration information).

98. *Id.* at 163.

99. *Id.* at 164.

100. See *id.* at 167–70 (explaining why most arbitration clauses are upheld).

101. *Id.* at 170.

protocols” that arbitration providers adopt represent an effort to do exactly this.¹⁰² However, these standards are voluntary and do not have the force of law.¹⁰³ Furthermore, the lack of monitoring, enforcement, and transparency undermines the effectiveness of the protocols.¹⁰⁴ Indeed, the protocols may be more effective as protection for arbitration providers and the businesses that use them than as a means for addressing the problems of mandatory binding arbitration.¹⁰⁵

Consumer groups have also tried to solve the problems of mandatory binding arbitration by leading efforts to pressure companies not to use mandatory binding arbitration and then rewarding those companies that implement a policy not to use it. Many consumer-group websites include a question-and-response section that encourages consumers to be vigilant and avoid companies that require mandatory binding arbitration.¹⁰⁶ The organized effort by consumer groups has produced limited success. For example, as a result of consumer-group pressure, Freddie Mac and Fannie Mae no longer invest in loans that are subject to mandatory binding arbitration.¹⁰⁷ Public Citizen’s recent report on arbitration in the credit-card

102. See generally Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369 (2004) (discussing the origins of the “due process protocols,” and analyzing the efficacy of the protocols as self-regulatory instruments).

103. *Id.* at 370; see also Sternlight, *supra* note 1, at 174 (“Although a disputant may bring a supposed violation of a protocol to the attention of a provider, the disputant has limited recourse if the provider chooses to administer the clause, notwithstanding the violation of the protocol.”).

104. See Harding, *supra* note 102, at 427–28 (discussing these problems). Harding notes that the lack of monitoring and enforcement is especially problematic in the current arbitration context “because of the lack of other mechanisms that could hold arbitrators and providers accountable for their conduct.” *Id.* at 428.

105. See *id.* at 426 (“The most obvious benefit may be that the protocols have helped to clothe the practice of mandatory arbitration . . . in legitimacy. . . . [T]he protocols may have diminished the urgency for congressional intervention.”).

106. See Nat’l Ass’n of Consumer Advocates, *Know Your Rights: Binding Mandatory Arbitration*, <http://www.naca.net/binding-mandatory-arbitration/> (last visited Feb. 21, 2009) (“Don’t deal with any companies that require a mandatory binding arbitration clause. . . . If the seller does require a clause, tell the seller you won’t buy from them and why.”); Remar Sutton & Assocs., *supra* note 13 (“Don’t deal with any companies that require a mandatory binding arbitration clause. . . . If the seller does require an [sic] clause, tell the seller you won’t buy from them and why.”).

107. See FANNIE MAE, ANNOUNCEMENT 04-06, at 4 (2004), available at <https://www.efannie.mae.com/sf/guides/ssg/annlrs/pdf/2004/04-06.pdf> (“[M]ortgage loans that are subject to mandatory arbitration are ineligible for sale to, or securitization by, Fannie Mae.”); Press Release, Freddie Mac, Freddie Mac Promotes Consumer Choice with New Subprime Mortgage Arbitration Policy (Dec. 4, 2003), available at http://www.freddiemac.com/news/archives/afford_housing/2003/consumer_120403.html (announcing that Freddie Mac would “no longer invest in subprime mortgages . . . that contain mandatory arbitration clauses” and that “[t]his policy is aligned with [Freddie Mac’s] existing prohibition on the use of mandatory arbitration [in the] prime market”).

industry encouraged consumers to “Examine All Consumer Contracts for Arbitration Clauses” and “Put Up a Fight.”¹⁰⁸ Public Citizen’s request that consumers put up a fight is informative—the group encourages consumers to lobby for federal legislation.¹⁰⁹

Despite these various options, a number of scholars, consumer advocates, and policymakers have concluded that federal legislation is the best policy option for reforming the practice of mandatory binding arbitration in the consumer context.¹¹⁰ They consider federal legislation the best policy option because of its ability to respond to Supreme Court decisions and to have a major impact nationwide.¹¹¹ These stakeholders have put forth a variety of policy solutions. The suggested legislative options include prohibiting predispute consumer arbitration agreements;¹¹² prohibiting predispute arbitration agreements in specific consumer contracts;¹¹³ removing federal preemption of state arbitration law;¹¹⁴

108. PUB. CITIZEN, *supra* note 35, at 56–57. The report encourages consumers to support companies that do not have mandatory binding arbitration in their contracts. It suggests to consumers looking for a mortgage: “[M]ake sure the lender does not require [mandatory binding arbitration]. Seek a mortgage that qualifies for a Fannie Mae or Freddie Mac loan. Neither organization allows [mandatory binding arbitration].” *Id.* at 57.

109. *Id.* at 57 (“Support efforts in Congress to exempt consumer and employment contracts from binding mandatory arbitration.”). As a bullet point under “Put Up a Fight,” the report also encourages consumers to respond immediately and seek legal help if they receive notice that an arbitration case has been initiated against them. *Id.*

110. *See, e.g.*, Alderman, *supra* note 80, at 16 (“[T]he only way to prevent the continued growth of arbitration, and the further degeneration of consumers’ rights, is a change in federal law, namely amending the Federal Arbitration Act.”); Budnitz, *supra* note 44, at 166 (“For the welfare of consumers and the integrity of the legal system, it is essential to solve this problem through legislation.”); Sternlight, *supra* note 1, at 178 (“For those who oppose the use of mandatory arbitration in the consumer context it is clear that federal legislation is the most powerful tool by which such arbitration might be eliminated or regulated.”).

111. *See* Sternlight, *supra* note 1, at 178–79, 183 (advocating for the use of federal legislation in combating the problems of consumer arbitration).

112. Alderman, *supra* note 80, at 16; Budnitz, *supra* note 44, at 166.

113. Legislation prohibiting predispute arbitration agreements in specific contractual contexts has been introduced on a regular basis over the last decade. Recent examples include the American Homebuyers Protection Act, H.R. 1519, 110th Cong. § 2(a) (2007) (prohibiting mandatory arbitration in homebuilding purchase contracts); the Fair Contracts for Growers Act of 2007, S. 221, 110th Cong. § 2(a) (2007) (prohibiting predispute arbitration agreements in livestock and poultry contracts); and the Automobile Arbitration Fairness Act of 2008, H.R. 5312, 110th Cong. § 2(a) (2008) (prohibiting predispute arbitration agreements in automobile purchases and leases).

114. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 712 (1996). However, a decade later, Sternlight reversed course, noting that a law removing federal preemption of state laws “would not accomplish as much as a federal law banning [mandatory arbitration] in all fifty states” and that “[t]aking the . . . battle to all fifty states would be expensive,” risky, and inefficient. Sternlight, *supra* note 1, at 181–82.

codifying pieces of the arbitration “due process protocols”;¹¹⁵ limiting FAA scope and applicability;¹¹⁶ and placing limits on arbitration agreements, such as requirements for express agreement and cost allocations.¹¹⁷ These proposals demonstrate that there may be multiple means to accomplish the same end. Perhaps more importantly, there is the potential to adopt legislative proposals in response to other strategic priorities, such as the likelihood of passing particular legislative options or the need to target particularly troublesome problems with mandatory binding arbitration.

For federal legislation addressing mandatory binding arbitration to be truly effective, it must comprehensively address the root problems of mandatory binding arbitration. The approach suggested in the Arbitration Fairness Act—which addresses only some of the problems of mandatory binding arbitration by making an agreement to arbitrate a postdispute decision—is inadequate.¹¹⁸ In addition to the reforms in the Arbitration Fairness Act, there must be comprehensive disclosure so that the consumer’s postdispute decision to arbitrate is well informed.

V. FEDERAL LEGISLATIVE STRATEGY AS REPRESENTED BY THE ARBITRATION FAIRNESS ACT

The Arbitration Fairness Act (“AFA”)¹¹⁹ represents a broad reform approach to mandatory binding arbitration. A more detailed exploration of this proposed legislation reveals its shortcomings and informs suggestions for effective strategic approaches to address the effects of mandatory binding arbitration in the consumer context.

Senator Russ Feingold (D-WI) and Congressman Hank Johnson (D-GA) introduced the AFA to “reinstate[] the FAA’s original intent by requiring

115. See *The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 12 (2007) [hereinafter *Hearing*] (statement of Richard Naimark, Senior Vice President, American Arbitration Association) (recommending that Congress “pass[] a requirement that the due process protocols . . . [be] applied to all consumer and employment arbitrations”). This approach allows mandatory binding arbitration if it meets minimum standards. Senator Jeff Sessions (R-AL) has introduced similar legislation on a regular basis since the debate over mandatory binding arbitration began, including a bill he introduced in 2007. See *Fair Arbitration Act of 2007*, S. 1135, 110th Cong. § 2(a) (2007) (setting forth various requirements designed to ensure the procedural fairness of arbitration). Reform advocates and academics have criticized this approach because it “would legitimize the unknowing involuntary loss of the right to take a legal claim to trial . . . [and] would inevitably fail to list every unfair practice that companies might envision.” Sternlight, *supra* note 1, at 181.

116. Margaret L. Moses, *Privatized “Justice,”* 36 *LOY. U. CHI. L.J.* 535, 548 (2005).

117. *Id.* at 549.

118. See *infra* Parts V–VI (describing the Arbitration Fairness Act and assessing its effectiveness).

119. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); see also *supra* notes 11–12 and accompanying text (discussing the 2009 AFA’s predecessors).

that agreements to arbitrate employment, consumer, franchise, or civil rights disputes be made after the dispute has arisen.”¹²⁰ The AFA contains a findings section that highlights many of the problems of consumer arbitration specifically and mandatory binding arbitration more generally.¹²¹ A provision that clarifies congressional intent about the scope of the FAA is an important part of the findings.¹²²

The key substantive change of the AFA is the addition of several subsections to section 2 of the FAA. The most significant new subsection reads: “No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of[:] (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights.”¹²³ The AFA changes arbitration from a process that businesses can impose upon consumers, employees, and franchisees to one that parties must voluntarily agree to after the dispute arises.

The AFA takes a broad approach to eliminating mandatory binding arbitration. Instead of merely targeting consumer arbitration or a specific subset of consumer arbitration, such as credit-card arbitration, the AFA lumps together all of the major types of contracts—consumer, employment, and franchise—in which businesses have included mandatory-binding-arbitration clauses.¹²⁴ In essence, the AFA would eliminate altogether the practice of predispute mandatory binding arbitration. For parties to use binding arbitration as a dispute-resolution mechanism, they would have to agree to arbitration after the dispute arose.¹²⁵ The breadth of this proposed reform is significant in how it affects the major contracts in which mandatory binding arbitration is used. However, in using only one legislative mechanism—the invalidation of predispute arbitration agreements—the depth and comprehensiveness of the proposed reform leaves something to be desired.

120. 153 CONG. REC. S9144 (daily ed. July 12, 2007) (statement of Sen. Feingold). Although Senator Feingold made this statement upon the introduction of the 2007 AFA, it unquestionably describes the intent behind the nearly identical 2009 AFA. See *infra* note 123 and accompanying text (describing the lone difference between the 2009 AFA and its 2007 predecessors).

121. See H.R. 1020 § 2 (setting forth congressional findings).

122. See *id.* § 2(1) (“The Federal Arbitration Act . . . was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.”).

123. *Id.* § 4(4) (internal quotation marks omitted). This is the location of the lone difference between the 2007 AFA and the 2009 AFA; in the former, “civil rights” is immediately followed by: “or to regulate contracts or transactions between parties of unequal bargaining power.” Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4(4) (2007) (internal quotation marks omitted); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4(4) (2007) (internal quotation marks omitted).

124. H.R. 1020 § 4(4).

125. See *id.* (precluding the validity and enforceability of “*predispute* arbitration agreement[s]” (emphasis added)).

VI. ASSESSING THE POLICY EFFECTIVENESS OF THE ARBITRATION FAIRNESS ACT

The potential effectiveness of the Arbitration Fairness Act depends on how well it addresses the problems that mandatory binding arbitration creates in the consumer context. The AFA is a substantive regulation that, by banning predispute arbitration agreements, essentially operates as a form of postcontract disclosure regulation designed to govern the resolution of disputes that arise after the signing of the contract.¹²⁶ By allowing the parties to enter into arbitration agreements only after the dispute arises, the AFA guarantees disclosure of arbitration as a dispute-resolution mechanism when the parties make the decision about how to resolve the dispute. However, the provisions of the AFA do nothing to address how postdispute binding arbitration would work. In other words, the AFA requires the parties to know that they have a dispute before they agree to arbitrate, but it does not require the parties to know anything about what that arbitration would look like before agreeing to be bound by it. Thus, the AFA is a disclosure statute that stops short of the comprehensive disclosures that would be necessary for consumers to make informed postdispute decisions about whether to enter into binding arbitration to resolve their disputes.

A. VOLUNTARILY AGREEING TO ARBITRATE POSTDISPUTE CURES SOME OF THE PROBLEMS OF CONSUMER ARBITRATION

The Arbitration Fairness Act implicitly assumes that making consumer arbitration voluntary would alleviate the problems of mandatory binding arbitration. By making arbitration voluntary in several contexts, the AFA represents what some scholars label the “simplest change” to arbitration policy.¹²⁷

There are significant protections provided to consumers by the “simple change” of making arbitration a dispute-resolution mechanism to which parties can consent only after the dispute arises. The AFA certainly curbs potential abusive uses of mandatory binding arbitration, such as the use of arbitration as an efficient debt-collection and enforcement tool at the

126. See William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 405 (noting that postcontract disclosure regulation “is intended to affect behavior occurring subsequent to the conclusion of the contract”). Whitford goes on to conclude that “postcontract disclosure regulation has greater potential than precontract regulation for actually affecting consumer decisions.” *Id.* at 470. This certainly seems to be the case here. A consumer would pay significantly more attention to a binding-arbitration clause after the initial contract if a dispute had arisen than such a consumer would in signing an adhesion contract with a binding-mandatory-arbitration clause in the first place.

127. Alderman, *supra* note 80, at 16–17 (“The simplest change is to preclude predispute arbitration clauses in consumer contracts, while permitting parties to agree to arbitration after a dispute has arisen.”).

expense of consumers.¹²⁸ If a consumer does not believe that he or she owes a debt or is trying to avoid paying the debt—as must be the case for a dispute to arise—the consumer is less likely to consent to an arbitration proceeding without a better understanding of how that proceeding works. Furthermore, the fact that a consumer must agree to arbitration after the dispute arises limits the assembly-line approach to arbitration—i.e., the use of arbitration as a quick, efficient, consumer-free, debt-collection mechanism—because the consumer must agree before the process can move forward. The process of obtaining consent should alert the consumer to the proceeding and its potential impact on his rights.

The AFA also solves a piece of the unequal-bargaining-power problem¹²⁹ because consumers still have other options, namely litigation, to resolve the dispute if they do not want to pursue arbitration. Therefore, if a business wants to avoid litigation, it has an incentive to negotiate with the consumer to solve the problem. Additionally, making arbitration a postdispute agreement would mitigate to some degree the problem of consumers not paying attention to an arbitration clause buried in the boilerplate language of an adhesion contract.¹³⁰ After the dispute arises, the consumer would certainly be paying attention to the dispute-resolution mechanism.

Although silent on the matter, the AFA likely alleviates the concern about prohibitions on class-action lawsuits and arbitrations.¹³¹ Because arbitration would be a postdispute agreement, a consumer would not have signed a clause that prohibits class actions. The small claims that a consumer would typically ignore without a class-action option may end up being pursued. Having this option is certainly better than confining consumers to “lumping it” when the claim is too small to pursue on an individual basis.¹³²

Some of the concerns with mandatory binding arbitration in the consumer context might still exist even when the agreement to arbitrate occurs postdispute, but the fact that the parties made the agreement after the dispute is sufficient to address the major concerns. For example, while there might be concerns about consumers giving up their right to a jury trial

128. See *supra* notes 38–39 and accompanying text (detailing one company’s use of arbitration as a debt-collection tool).

129. See *supra* Part III.A.3 (discussing unequal bargaining power in mandatory binding arbitration).

130. See *supra* notes 64–67 and accompanying text (describing the problem of consumers failing to read or understand arbitration clauses).

131. See *supra* notes 51–54 and accompanying text (describing the impact on consumers of a prohibition of class actions through mandatory binding arbitration).

132. See *supra* note 52 and accompanying text (describing the problem of consumers having to “lump it”).

through mandatory binding arbitration,¹³³ the waiver of one's right to a jury trial when faced with a known dispute, and therefore an ability to assess the consequences, is not as much of an issue from a consumer perspective. There still may be a broader philosophical or constitutional concern about the diminishing role of the jury,¹³⁴ but the AFA better protects this substantive right.

The AFA also solves some of the larger problems for society that the widespread use of mandatory binding arbitration creates. For example, since not every consumer dispute would be automatically funneled into arbitration, the common law has the opportunity to continue to develop.¹³⁵ In addition, the passage of the AFA would represent Congress's policy preference instead of allowing de facto policymaking via widespread business practices.¹³⁶

The AFA partially addresses the existing inability of society to make informed policy decisions.¹³⁷ By creating a dispute-resolution process that would funnel some cases back into the courts, the AFA guarantees that there would be at least some public record of consumer disputes. However, to the extent that consumers choose postdispute arbitration under the AFA, such proceedings would still not produce a public record.

Passage of the AFA would represent a significant step in addressing the problems with mandatory binding arbitration. The "simple change" in policy that the AFA embodies would dramatically alter the use of mandatory binding arbitration in the consumer context. However, to understand better whether the AFA would have the effects that its supporters intend, it is necessary to examine the problems with mandatory binding arbitration that the AFA fails to address.

*B. THE ARBITRATION FAIRNESS ACT FAILS TO ADDRESS SOME SIGNIFICANT
MANDATORY-BINDING-ARBITRATION PROBLEMS*

There are many problems with mandatory binding arbitration that the Arbitration Fairness Act simply fails to address. Jean Sternlight, a leading arbitration scholar, has cautioned that the problem with mandatory binding

133. See *supra* notes 55–60 and accompanying text (discussing how mandatory binding arbitration denies access to jury trials).

134. See *supra* notes 85–88 and accompanying text (discussing the relationship between mandatory binding arbitration and the diminished use of the jury trial).

135. See *supra* notes 82–84 and accompanying text (describing how mandatory binding arbitration can freeze the development of the common law, and noting the consequences).

136. See *supra* notes 89–91 and accompanying text (discussing how private business decisions have replaced the legislative role in setting arbitration policy).

137. See *supra* Part III.B.2 (discussing the lack of information produced by arbitration proceedings and the problems that creates for future policymaking).

arbitration is not simply that it is mandatory.¹³⁸ Illustrating this point, she notes that even mandatory binding arbitration would be (more) just if the government (as opposed to private parties) were to mandate it.¹³⁹ Government-mandated arbitration would limit the opportunity of a private party to influence unduly the selection of an arbitrator and would make hearings and results public.¹⁴⁰ The implication is that the problems with mandatory binding arbitration, and therefore the solutions, go beyond the fact that it is mandatory. To assess the effectiveness of the AFA, it is important to explore the problems with mandatory binding arbitration that the AFA does not address.

The potential cost of arbitration is a prime example of a problem that the AFA fails to address.¹⁴¹ The proponents of the AFA might argue that making arbitration a postdispute agreement would solve the cost problems because a consumer would not agree to arbitrate if he or she could not afford it. However, this would be the case only if the cost is known by or disclosed to consumers before they make their postdispute decisions to arbitrate. There is no requirement that arbitration resulting from a postdispute agreement be less costly than that which results from a predispute agreement, and nothing in the AFA requires that the consumer receive any information about the cost of arbitration.

Further, it is unclear whether making arbitration a postdispute agreement addresses concerns about consumers misunderstanding arbitration clauses, even though there is a greater need for the consumer to understand the arbitration agreement in the face of an actual dispute.¹⁴² If a consumer does not understand the arbitration clause, the consumer is not able to ferret out provisions designed to benefit the party that drafted it.¹⁴³ This is particularly true if businesses develop strategies designed to persuade consumers to sign postdispute arbitration agreements.¹⁴⁴ Given how

138. Sternlight, *supra* note 26, at 1673 (“It is tempting to assert that the problem with mandatory arbitration is that it is mandatory. Yet, I think this is too simple.”).

139. *See id.* at 1673–74 (considering how government-mandated arbitration could meet various justice criteria).

140. *Id.*

141. *See supra* Part III.A.1 (describing the high cost of mandatory binding arbitration to consumers and its impact).

142. *See* Sternlight, *supra* note 1, at 143 (noting that of those who read form arbitration agreements, “only a small[] number understand what they read”).

143. While postdispute arbitration could benefit either party, this argument assumes that the business, as the repeat player, is more likely to suggest arbitration as an option and therefore prepare the arbitration agreement.

144. Under the current system, some companies design arbitration clauses to decrease the likelihood that consumers would pay attention to them. Sternlight, *supra* note 1, at 143. Therefore, it is not a stretch to think that companies would attempt to design postdispute arbitration clauses in a similar fashion.

innovative businesses have been regarding the adaptation of arbitration, it is likely that they would attempt to figure out advantageous ways to continue using arbitration in the postdispute context. Existing consumer-protection laws might make this endeavor more difficult for companies, but such laws would likely only constrain the effort rather than eliminate it.¹⁴⁵ This problem is difficult to counteract, and perhaps the only real solution is to make sure that disclosure in other areas is as effective as possible so that consumers are informed about the critical baseline aspects of arbitration prior to agreeing to it.

The AFA also fails to address the problem of repeat-player or repeat-provider arbitrator bias.¹⁴⁶ Even if the AFA passes, businesses would likely continue to engage in multiple arbitration proceedings. They could still funnel business to arbitrators from whom they receive favorable treatment or outcomes, and arbitrators would still be more familiar with the workings of repeat players. Therefore, the problems of repeat-provider and repeat-player bias are likely to continue under the AFA.

The AFA likewise does nothing to address the due-process problem of limited discovery in arbitration proceedings.¹⁴⁷ Simply shifting the timing of when the parties can assent to arbitration does not make the substantive change that would be necessary to address discovery limitations in arbitration.

C. TOWARD EFFECTIVE REFORM OF MANDATORY BINDING
ARBITRATION IN THE CONSUMER CONTEXT

It may not be possible for mandatory-binding-arbitration reform to address every problem with the practice. Certainly, there are shortcomings to every approach. Some may argue that forcing arbitration decisions to be made postdispute is preferable to alternative solutions, such as regulation of arbitration itself. Mark Budnitz offers support for an AFA-like approach rather than a regulatory approach by noting that “[a] clear, flat prohibition on predispute consumer arbitration agreements, permitting post-dispute agreements, would negate the problem of endless litigation over general, vague, and ambiguous [regulatory] provisions.”¹⁴⁸ However, it is possible that the problems of drafting regulation to define fair arbitration

145. The lack of a private right of action under the FTC Act limits the protection that its unfair-or-deceptive-practices section, 15 U.S.C. § 45 (2000), provides to consumers who have been misled or deceived into signing arbitration agreements. Therefore, protection prior to signing an arbitration agreement is preferred.

146. See *supra* Part III.A.4 (explaining repeat-player and repeat-provider bias in mandatory binding arbitration).

147. See *supra* notes 61–63 and accompanying text (describing how limits on discovery in mandatory binding arbitration can handicap consumers).

148. Budnitz, *supra* note 44, at 166.

procedures would appear in a more insidious form in the drafting of postdispute arbitration agreements, since companies could use ambiguity in such agreements to lure consumers into agreeing to business-friendly arbitration.

Many of the concerns with mandatory binding arbitration would be just as applicable to postdispute agreements to arbitrate.¹⁴⁹ Postdispute agreement does nothing to control or ensure disclosure of the costs of arbitration, and consumers cannot make informed decisions without accurate information about how much it would cost to arbitrate their specific disputes.¹⁵⁰ The problems of repeat-player and repeat-provider bias are also likely to exist even when parties enter arbitration agreements postdispute. Consumers would be able to mitigate these bias problems only if they had information about the company's past arbitrator use so that they can select a fair arbitrator. Due-process concerns such as limited discovery and the arbitrator's ability to make decisions without regard to the law still apply, as do concerns about the lack of written opinions and information about arbitration proceedings. Substantive legal protections are the only way to address those concerns.

Without requirements for the disclosure of costs, arbitrator-selection procedures, and other matters, accompanied by substantive protections to address due-process problems, the AFA may leave consumers vulnerable to many of the same problems of mandatory binding arbitration, but with the additional cleansing mechanism or cover provided by the parties' postdispute agreement to arbitrate.

It is clear that there is significant support for the AFA. Since the AFA's introduction, it has picked up a handful of cosponsors in both chambers,¹⁵¹ and the Judiciary Committees of both chambers have held hearings.¹⁵² More importantly, consumer advocates have begun organizing to address the issue of mandatory binding arbitration and have chosen to coalesce around the AFA. For example, a grant from the AARP helps support the work of the "Give Me Back My Rights" Coalition, a group dedicated to raising "consumer awareness about the dangers of binding mandatory arbitration" and pushing for federal legislation to address those dangers.¹⁵³ The Coalition represents

149. See *supra* Part VI.B (discussing the problems with mandatory binding arbitration that the Arbitration Fairness Act fails to address).

150. In many cases, it is not possible to disclose exact costs, but it is certainly possible to provide consumers with upfront fees and rates in order to give them a sense of the cost.

151. By the time they died, the 2007 Senate and House bills had 7 and 103 cosponsors, respectively.

152. *Hearing, supra* note 115; *Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007).

153. Give Me Back My Rights!, About Us & Contact, <http://www.givemebackmyrights.com/bma-about.htm> (last visited Feb. 21, 2009). The "Give Me Back My Rights" Coalition has broad representation from consumer-advocacy groups and their allies. Its founding members include

a broad spectrum of advocates, and if it uses its voice and collective resources effectively, it has the potential to significantly impact the legislative debate.

Academics have been skeptical about the ability of arbitration reform to pass Congress and garner the President's signature.¹⁵⁴ It is likely that the U.S. Chamber of Commerce and arbitration providers are going to oppose any arbitration reform.¹⁵⁵ In fact, the U.S. Chamber of Commerce has already taken a position against the AFA.¹⁵⁶ There may be only one opportunity for advocates to pass legislation reforming mandatory binding arbitration. When they get that opportunity, they will want to make sure that they get it right.

VII. CONCLUSION

The shift in control of Congress in 2006 brought with it tremendous opportunities for legislative change. The new Democratic Congress is, in theory, more sympathetic to addressing the problems of mandatory binding arbitration. However, in order to take full advantage of this opportunity, the new majority will have to be thoughtful in its policy approach and strategic in its legislative approach.

By requiring that all binding-arbitration decisions be made postdispute, the Arbitration Fairness Act represents a significant first step in addressing the problems of mandatory binding arbitration. However, without providing consumers with critical information about their decisions to enter into arbitration, many of the problems with mandatory binding arbitration could reappear in these postdispute arbitration agreements and proceedings. To

Public Citizen, Consumers Union, Consumer Federation of America, U.S. Public Interest Research Group ("U.S. PIRG"), National Consumer Law Center ("NCLC"), National Association of Consumer Advocates ("NACA"), Center for Auto Safety, Consumer Task Force for Automotive Issues, Consumer Action, National Employment Lawyers Association ("NELA"), Alliance for Justice ("AFJ"), Workplace Fairness, Center for Responsible Lending, National Community Reinvestment Coalition ("NCRC"), Privacy Times, Consumers for Auto Reliability and Safety ("CARS"), Association of Community Organizations for Reform Now ("ACORN"), American Association of People with Disabilities ("AAPD"), Maryland Consumer Rights Coalition, Oregon Consumer League, Alexander Community Law Center at Santa Clara University, Lawyers' Committee for Civil Rights Under Law, Jacksonville Area Legal Aid, and the Legal Aid Society—Employment Law Center. *Id.*

154. See Sternlight, *supra* note 1, at 179 ("Congress has not, to date, proved eager to pass laws regulating or prohibiting mandatory arbitration.").

155. See Budnitz, *supra* note 44, at 163 ("Both businesses and the arbitration service providers would . . . likely oppose the prohibition of mandatory, predispute, binding arbitration agreements.").

156. *Capital Roundup: Transportation Bill Moves*, U.S. CHAMBER MAG., Nov. 2007, http://www.uschambermagazine.com/content/0711_2.htm ("The Chamber opposes [the Arbitration Fairness Act] because it would severely damage an alternative dispute resolution system that consumers and businesses have relied on for decades, disrupt current commercial arbitration practices, and increase litigation.").

prevent this from happening, Congress should, in conjunction with requiring that the agreement to arbitrate be postdispute, require a comprehensive set of disclosures about the arbitration agreement, thereby establishing a framework for informed consumer decisions.