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DOES *AT&T MOBILITY LLC v. CONCEPCION* JUSTIFY THE ARBITRATION FAIRNESS ACT?

Steven C. Bennett*

Shortly after the Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*,¹ Senators Al Franken, Richard Blumenthal, and Representative Hank Johnson announced their intention to re-introduce proposed legislation, known as the “Arbitration Fairness Act” (the “AFA” or the “Act”). Senator Franken described *AT&T Mobility* as “another example of the Supreme Court favoring corporations over consumers,” and claimed that the AFA would “rectify the Court’s most recent wrong by restoring consumer rights.”² Many consumer and employment rights groups echoed that sentiment.³

Yet, as this Article explains, the AFA does not address the essential concerns of opponents of the *AT&T Mobility* ruling. Indeed, the central mechanism of the Act (invalidating pre-dispute arbitration agreements in various categories) may create more problems than it solves. This Article suggests that the Court’s ruling in *AT&T Mobility* does not justify congressional action. Moreover, as an alternative, this article suggests that refinement in arbitration procedures and technologies, coupled with heightened consumer and employee education and awareness campaigns may substantially solve the perceived problems advanced as justifications for the Act.

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¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

² Press Release, Franken.Senate.gov, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power In The Courts Against Corporations (Apr. 27, 2011), http://www.franken.senate.gov/?p=press_release&id=1466. Rep. Johnson’s statement similarly referred to *AT&T Mobility*, and noted: “Forced arbitration clauses undermine our indelible Constitutional right to take our disputes to Court[.] . . . They benefit powerful business interests at the expense of American consumers and workers.” See Press Release, HankJohnson.House.Gov, Rep. Hank Johnson, Sens. Franken and Blumenthal Introduce Legislation to Protect Legal Rights of Consumers (May 17, 2011), <http://hankjohnson.house.gov/2011/05/sens-franken-blumenthal-rep-hank-johnson-to-hold-press-conference-announcing-legislation-to-protect.shtml>.

³ See, e.g., Press Release, Alliance for Justice, AFJ Praises Legislative Fix for Anti-Consumer Ruling in *AT&T Mobility v. Concepcion* (May 17, 2011), <http://www.afj.org/press/05172011.html>. (“This Corporate Court, at the behest of big-business interests, has time and again sought to restrict the rights of everyday Americans, but in this case there is a remedy. Alliance for Justice strongly supports the Arbitration Fairness Act”); Press Release, National Consumers League, National Consumers League Applauds Legislative Fix For The Court’s Anti-Consumer Ruling In *AT&T Mobility v. Concepcion* (May 18, 2011), <http://www.nclnet.org/newsroom/press-releases/506-national-consumers-league-applauds-legislative-fix-for-the-courts-anti-consumer-ruling-in-atat-mobility-v-concepcion>; Press Release, National Employment Lawyers Association, NELA Vows To Overturn U.S. Supreme Court Decision, *AT&T v. Concepcion* Validating Class-Action Bans in Arbitration Agreements (Apr. 27, 2011), <http://www.nela.org/NELA/docDownload/32871> (“The *Concepcion* decision effectively eliminates an important means for enforcing longstanding civil rights and employee protections[.]’ . . . ‘This case presents a missed opportunity for the Supreme Court to protect America’s workers from ad-hoc, arbitrary, and unexamined decisions by their employers[.]’ . . . NELA is at the forefront in banning forced arbitration and will continue to advocate in Congress for the passage of the Arbitration Fairness Act (AFA) of 2011.”); Editorial, *Gutting Class Action*, N.Y. TIMES, May 13, 2011, at A26, available at <http://www.nytimes.com/2011/05/13/opinion/13fri1.html> (referring to *AT&T Mobility* as a “model” for how corporations “can avoid class actions,” and suggesting that AFA is a “welcome effort to protect consumers, employees and others” in response).

I. BACKGROUND OF THE ARBITRATION FAIRNESS ACT

Over the course of the last decade, congressional policy-makers have considered the merits of various forms⁴ of an Arbitration Fairness Act.⁵ Although the specific terms of the proposals have varied,⁶ the essential notion of the Act's proponents is that Congress should modify the Federal Arbitration Act ("FAA")⁷ to render unenforceable pre-dispute arbitration agreements involving consumers, employees and others who may have little understanding of the arbitration process, or a limited ability to negotiate terms for arbitration in advance of a dispute.⁸ Proponents of the Act describe these agreements as "forced" or "mandatory" arbitration contracts,⁹ in which the "deck is stacked" against employees and consumers by procedures that favor the corporation over the individual.¹⁰

⁴ Some forms of AFA-style legislation have focused on specific segments of the economy, or specific statutory claims. See, e.g., 15 U.S.C. § 1226(a)(2) (barring pre-dispute arbitration agreements between automobile manufacturers and car dealerships); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (1st Sess. 2009); Civil Rights Act of 2008, H.R. 5129, 110th Cong. (2d Sess. 2008); Rape Victims Act of 2009, S. 2915, 111th Cong. (1st Sess. 2009) (prohibiting employer from enforcing arbitration agreements in employment contracts where employee alleges rape).

⁵ See, e.g., H.R. 815, 107th Cong. (2001); H.R. 2282, 107th Cong. (2001); S. 2435, 107th Cong. (2002); H.R. 3809, 108th Cong. §§ 511-514 (2004); H.R. 2969, 109th Cong. (2005); H.R. 3010, 110th Cong. (2007); H.R. 5129, 110th Cong. §§ 421-424 (2008); S. 931, 111th Cong. (2009); H.R. 1873, 112th Cong. (2011). See generally Thomas E. Carbonneau, "Arbitracide": *The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT'L ARB. 233 (2007); Thomas V. Burch, *Regulating Mandatory Arbitration*, (FSU College of Law, Public Research Paper No. 493, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793303. Arguably, the debate over a need for congressional action on arbitration began even earlier. See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 402 (1996) (suggesting that, "[i]f we are to have sound arbitration law, there is no place to look for it except in the halls of Congress.").

⁶ A version of the proposed Act, introduced by Rep. Johnson in 2009, for example, included a reference to "franchise" disputes. See H.R. 1020, 111th Cong. §4(b)(1) (1st Sess. 2009), text available at www.govtrack.us. That reference was omitted in the 2011 version of the Act.

⁷ The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006).

⁸ For background on the lower court decisions in *AT&T Mobility*, see Samuel Estreicher & Steven C. Bennett, *Preemption of California's Standard of Review of Class Arbitration Waivers*, N.Y.L.J., June 25, 2010. For background on the debate over adhesion arbitration contracts, see Steven C. Bennett & Dean Calloway, *A Closer Look at the Raging Consumer Arbitration Debate*, 65 DISP. RESOL. J. 28 (2010); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 108 (suggesting that individuals are in "no position" to understand and avoid or alter the "form contract terms presented by the market"; "if all the firms in the market impose the same terms, shopping is impossible").

⁹ See, e.g., Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN. ST. L. REV. 1081 (2009); Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act*, 12 J. CONSUMER & COM. L. 151 (2009); Michael A. Satz, *Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform*, 44 IDAHO L. REV. 19 (2007); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004). There has been some effort to avoid the term. See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 105 (1996) (noting potential confusion over use of the term "mandatory" in the context of employment arbitration); Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights*, 38 U.S.F. L. REV. 39, 43 (2003) (suggesting that theorists "stop calling contractual arbitration—mandatory arbitration"); *id.* at 44 ("Arbitration is not mandatory when it arises out of a contract, because contracts are formed voluntarily."). See generally Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole and Drahozal*, 8 NEV. L.J. 271, 273 (2007) (noting that "labels can be important in dispute resolution, both for the legitimacy of the process as well as its legal and ethical consequences").

¹⁰ See National Employment Lawyers Association, *An Assault on Civil and Workers' Rights: Why Congress Must Ban Forced Arbitration of Employment Cases*, NELA.org (June 2010),

Indeed, the “findings” suggested in the version of the Act recently offered by Senators Franken, Blumenthal, and Representative Johnson¹¹ directly criticize the fairness of arbitration in employment, consumer, and civil rights disputes.¹² The drafters suggest that “[a]rbitration can be an acceptable alternative” to litigation, but only “when consent to the arbitration is truly voluntary, and occurs after the dispute arises.”¹³ The 2011 version of the Act would require that “a court, rather than an arbitrator,” decide whether the AFA applies to a specific dispute, applying “federal law.”¹⁴

Although not expressly stated as a justification in the “findings” supporting the Act, a secondary justification for the AFA also arises. On this view, “forced” arbitration agreements are not simply unfair because of the lack of “truly voluntary” consent from the individual, but also because such arbitration agreements may actually be intended by large institutions to “suppress” the exercise of civil rights.¹⁵ Thus, the argument goes, large institutions seek to prevent “low

(continued...)

<http://www.nela.org/NELA/docDownload/29983> (suggesting that “[m]any arbitrators work repeatedly for the same companies,” “[a]rbitrators don’t have to be lawyers or know the law,” “there is no effective appeal from an arbitrator’s decision,” “[a]rbitration is secret . . . and there is no public record of what happens,” and “[a]rbitrators don’t have to justify their decisions, render written decisions, or even follow the law”); Letter from various interest groups to Patrick Leahy, Chairman, and Chuck Grassley, Ranking Member, U.S. Senate Committee on the Judiciary (Oct. 14, 2011), <http://www.fairarbitrationnow.org/sites/default/files/AFA%20Senate%20Support%20Letter%20Oct2011.pdf>. (“Forced arbitration erodes traditional legal safeguards as well as substantive civil rights and consumer protection laws... [w]ith nearly no oversight or accountability, businesses or their chosen arbitration firms set the rules for the secret proceedings, often limiting the procedural protections and remedies otherwise available to individuals in a court of law.”). See generally David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, And Preclusion Principles*, 38 U.S.F. L. Rev. 49, 53 (2003).

¹¹ See S. 987, 112th Cong. (1st Sess. 2011), available at www.govtrack.us. Representative Johnson introduced the identical text of the Act in H.R. 1873, 112th Cong. (1st Sess. 2011), available at www.govtrack.us.

¹² See S. 987 § 2 (stating that the FAA was intended to apply to “commercial entities of generally similar sophistication and bargaining power”; the Supreme Court has “changed the meaning” of the FAA to apply it to consumer and employment disputes; “[m]ost consumers and employees have little or no meaningful choice whether to submit their claims to arbitration”; and “[m]andatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators’ decisions”).

¹³ *Id.* § 2(5). The 2011 version of the AFA does not outline what might be required to make a post-dispute agreement to arbitrate “truly voluntary.”

¹⁴ *Id.* § 402(b)(1).

¹⁵ See *Arbitration: Is It Fair When Forced?: Hearing on S. 931 Before the S. Comm. on Judiciary*, 112th Cong. 2 (2011) (statement of F. Paul Bland, Jr., Senior Attorney, Pub. Justice), <http://judiciary.senate.gov/pdf/11-10-13BlandTestimony.pdf> (“mandatory” arbitration clauses “have the effect of immunizing corporations from any liability or accountability,” and “undermines the marketplace when there is no enforcement of the rules of the road”); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1761675 (“The compelling logic of what is commonly called ‘mandatory arbitration’ is that it is intended to suppress claims.”); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1323 (2009); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 MICH. J. L. REFORM 871, 876 (2008) (study claiming that “absence of arbitration provisions [in corporations’] material contracts suggests that many firms value, even prefer, litigation over arbitration to resolve disputes with peers.”); Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 173 (2006) (“Every indication is that the imposed arbitration clauses are nothing but a shield against legal accountability by the credit card companies.”); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 412 (2005) (suggesting “vast potential reach” of class action waivers as shield for misconduct).

stakes” cases from becoming “high stakes” matters, by avoiding consolidated or class action proceedings in court.¹⁶

That the AFA has been introduced repeatedly in Congress without progressing past committee suggests that the legislation lacks any real chance of adoption.¹⁷ Yet, proponents have achieved some success in enacting pre-dispute arbitration agreement bans in specific areas.¹⁸ For example, the 2006 Talent-Nelson Amendment to the Defense Authorization Act provided the Defense Department with authority to ban or restrict mandatory arbitration clauses in lending agreements with service members.¹⁹ In 2009, moreover, in response to a notorious military case,²⁰ Congress enacted the “Jamie Leigh Jones Amendment” regarding 2010 Defense Department appropriations, prohibiting the award of large Defense contracts to any company using mandatory pre-dispute arbitration agreements covering Title VII and sexual assault-related tort claims.²¹ Congress also enacted a “whistleblower” protection provision in the 2009 stimulus bill, which provides that certain whistleblower claims cannot be subject to arbitration.²² Further, the Dodd-Frank Act of 2010 provided for creation of a Bureau of Consumer Financial Protection with the authority (among other things) to regulate pre-dispute arbitration agreements between

¹⁶ See David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, *supra* note 15, at 240 (citing Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Pre-dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567 (2001) and other authorities).

¹⁷ See Russ Bleemer, *Senate Judiciary Committee Testimony for Today’s Arbitration Fairness Hearing*, *Resources*, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (Oct. 13, 2011), <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/729/Senate-Judiciary-Committee-Testimony-for-Todays-Arbitration-Fairness-Hearing-Oct-13.aspx> (AFA bill “won’t get through the Republican-controlled House”); Steven J. Mintz, *Supreme Court Favors Class Action Waivers In Arbitration*, *Litigation News*, AM. BAR ASSOC (Aug. 30, 2011), <http://apps.americanbar.org/litigation/litigationnews/articles-print/summer2011-supreme-court-class-action-waivers.html> (“Given that the relevant House committees are now controlled by Republicans and that one of the [AFA’s] strong proponents [Sen. Feingold] was not reelected in 2010, passage in this Congress seems unlikely. But the issue will not go away[.]”).

¹⁸ See Deepak Gupta, *Why and How We Should Ban Class-Action Bans*, 4 (Mar. 17-18, 2011) (unpublished manuscript, <http://www.law.gwu.edu/News/2010-2011Events/Documents/Gupta%20Submission.pdf>) (suggesting that AFA “faces widespread opposition from virtually the entire business community,” and that a “more successful and promising legislative approach has been to target mandatory pre-dispute arbitration clauses in particular contexts, such as mortgage lending and auto contracts”).

¹⁹ See 10 U.S.C. § 987(e)(3) (2006) (providing authority to ban or restrict pre-dispute arbitration clauses in lending agreements with military service personnel).

²⁰ See generally *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009); Wade Goodwyn, *Rape Case Highlights Arbitration Debate*, NPR (June 18, 2009), <http://www.npr.org/templates/story/story.php?storyId=105153315>.

²¹ Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8166, 123 Stat. 3409, 3454.

²² See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(d), 123 Stat. 115, 297.

consumers and financial service providers.²³ Thus, it appears that the debate over pre-dispute arbitration agreements will continue, at least in some form.²⁴

II. SUMMARY OF THE AT&T MOBILITY LLC V. CONCEPCION DECISION

On its face, the notion that *AT&T Mobility* justifies the enactment of the AFA is overbroad.²⁵ The essential structure of the AFA was proposed long before the decision in *AT&T Mobility*.²⁶ The decision, moreover, did not validate all forms of pre-dispute arbitration agreements; nor did it suggest that exceptions to enforcement of pre-dispute agreements, already outlined in the FAA and judicially recognized, must be limited.²⁷ Instead, in *AT&T Mobility*, the

²³ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Christopher J. Keller & Michael W. Stocker, *Is the Shield Beginning to Crack?*, N.Y.L.J., Nov. 15, 2010, at S8. See generally Lea Haber Kuck & Gregory A. Litt, *Will Stolt-Nielsen Push Consumer, Employment and Franchise Disputes Back Into the Courts?*, 4 N.Y.S.B.A. NEW YORK DISPUTE RESOL. LAWYER 16 (2011). The Dodd-Frank law requires the Bureau to complete a formal study of the use of binding arbitration agreements, after which it may use its regulatory power to limit or fully prohibit arbitration agreements in financial services contracts. See Pub. L. No. 111-203 § 1028.

²⁴ See Amy Schmitz, *Arbitration Ambush in a Policy Polemic*, 3 PENN ST. YEARBOOK ON ARB. & MED. 52, 53 (2011) (noting that debate over arbitration has been caught up in a “firestorm” of issues involving “public power and control over private contracts,” arising out of the financial crisis); F. Paul Bland & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 393 (2009) (enforceability of class action waivers is “one of the most hotly contested issues in all of consumer and employee litigation”).

²⁵ See Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSblog (Sep. 13, 2011), www.scotusblog.com (“enacting the AFA would be an overbroad response to the Court’s decision in *Concepcion*”; the Act “would do more than simply reverse *Concepcion*”); see also David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J.L. & PUB. POL’Y 419, 458 (2010) (suggesting that AFA is “a gross overreaction to the proven efficacy and fairness of labor and employment arbitration”); E. Gary Spitko, *Exempting High-Level Employees and Small Employers From Legislation Invalidating Pre-dispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 600 (2009) (suggesting that AFA is “too broad,” and that it should “exempt claims by or against certain high-level employees and claims by or against certain small employers”).

²⁶ Indeed, nearly a year before *AT&T Mobility* was decided, one commentator had already predicted a “showdown” between Congress and the Court on arbitration law. See Marcia Coyle, *Arbitration Showdown Looms Between Congress, Supreme Court; Congress, high court take opposing views of mandatory agreements*, THE NAT’L L. J. (ONLINE), June 14, 2010, http://www.lexisnexis.com/lawschool/research/Default.aspx?e=&pp=002&com=2&com=2&ORIGINATION_CODE=00086&searchtype=get&search=128+s%20ct.%202709&autosubmit=yes&topframe=on&powernav=on&tocdisplay=of&cookie=yes.

²⁷ The Court in *AT&T Mobility* recognized the “saving” clause of the FAA (Section 2), which preserves “generally applicable contract defenses.” See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (2011); see also 9 U.S.C. § 2 (providing for enforcement of arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract”). The Court held that the intent of the FAA cannot be to “destroy itself,” thus, the “grounds” available under FAA Section 2 “should not be construed to include a State’s mere preference for procedures that are incompatible with arbitration.” *AT&T Mobility*, 131 S. Ct. at 1748 (quotation omitted).

Court applied a relatively straightforward analysis. Under the FAA,²⁸ a state law that “prohibits outright” the arbitration of claims is preempted by federal law.²⁹ Therefore, a rule classifying an arbitration agreement as “unconscionable,” for failure to follow specific procedures, may be invalid.³⁰ The Court applied these precepts to the rule established by the California Supreme Court in the *Discover Bank* case to the effect that waiver of rights to consumer class action, even in the context of an arbitration agreement, may be unconscionable.³¹ In effect, the Court held that the California rule required a specific form of procedure (class arbitration) for a certain class of arbitration agreements, thus violating principles of federal preemption.³²

The dissent in *AT&T Mobility* did not suggest that application of the *Discover Bank* rule would generally invalidate consumer arbitration agreements, in favor of class actions.³³ Instead, the dissent focused on the majority view that *Discover Bank* would compel “class arbitration” procedures for consumer disputes, thus discouraging the use of arbitration agreements.³⁴ Indeed, the dissent challenged the majority view that arbitration is somehow “poorly suited” to “high-stakes” class action litigation (thereby challenging the view that a rule compelling class arbitration of certain disputes might discourage arbitration).³⁵

Whatever the merits of in-court class action procedures versus class arbitration, little evidence supports the view that *AT&T Mobility* may somehow produce a “gold rush” of corporations embracing arbitration (coupled with class arbitration waivers) to avoid large stakes

²⁸ In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court held that the Interstate Commerce Clause (on which the FAA is based) and the Supremacy Clause of the U.S. Constitution require that state laws singling out arbitration clauses for special limitations must be voided. “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[.]” *See id.* at 10. The Court has repeatedly reaffirmed that view. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 349 (2008); *Doctor’s Assoc. v. Casarotto*, 517 U.S. 681, 685 (1996). Some vehement criticisms of the Court’s *Southland* preemption doctrine have arisen. *See, e.g.*, David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 6 (2004) (arguing that “*Southland* is wrong, and the justifications for it are wrong”).

²⁹ *AT&T Mobility*, 131 S. Ct. at 1747.

³⁰ *See id.*

³¹ In *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), the California Supreme Court held an arbitration provision unconscionable in the context of a consumer contract of “adhesion.” The court stated: “But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party ‘from responsibility for its own fraud, or willful injury to the person or property of another.’ . . . Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” *Id.*

³² *See AT&T Mobility*, 131 S. Ct. at 1751–53; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010) (“[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”). *But see* S.I. Strong, *Does Class Arbitration “Change The Nature” of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles*, 17 HARV. NEGOT. L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791928 (suggesting that “class arbitration is not significantly more complicated than international or investment arbitration”).

³³ *See AT&T Mobility*, 131 S. Ct. at 1757 (suggesting that *Discover Bank* rule is “consistent” with the basic purpose of the FAA).

³⁴ *See id.* at 1758 (“[C]lass arbitration is consistent with the use of arbitration.”).

³⁵ *See id.* at 1760 (noting “numerous counterexamples” of high-stakes disputes in arbitration).

class disputes.³⁶ As Professor Christopher R. Drahozal summarized, in testimony before the Senate Judiciary Committee, most consumer contracts do not contain arbitration clauses, and it is “unlikely” that many businesses will respond to the decision by switching to arbitration.³⁷

If Congress wished to do so, moreover, it could mandate that arbitration of consumer, employment or other types of cases must include an option for class arbitration procedures. Alternatively (and more broadly) Congress might grant consumers, employees and others a right to avoid arbitration (at their option) in favor of class action proceedings in court for all, or a selected set of cases.³⁸

Thus, the National Labor Relations Board, in its recent decision in *D.R. Horton, Inc. v. Cuda*,³⁹ held that Section 7 of the National Labor Relations Act (“NLRA”), which protects the rights of employees to engage in “concerted activities” for purposes of collective bargaining or “other mutual aid or protection,”⁴⁰ necessarily includes protection of the rights of employees to proceed by class action to address grievances against their employers.⁴¹ According to the Board, the NLRA precludes employers from requiring employees to waive their rights to such “protected” class action activity.⁴²

³⁶ Editorial reaction to *AT&T Mobility* immediately suggested this possibility. See Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, SAN FRANCISCO CHRONICLE, Nov. 7, 2010, at E8, available at www.articles.sfgate.com (“If the court goes down AT&T’s path, the consequences could be staggering. It could be the end of class action litigation.”); Adam T. Liptak, *Supreme Court Allows Contracts that Prohibit Class-Action Arbitration*, N.Y. TIMES, April 28, 2011, at B3, available at <http://www.nytimes.com/2011/04/28/business/28bizcourt.html> (“The decision basically lets companies escape class actions, so long as they do so by means of arbitration agreements.” (quoting Brian T. Fitzpatrick, law professor at Vanderbilt University)); Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J. L. BLOG <http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/> (April 27, 2011, 14:36 EST) (“Once given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to such provisions.” (quoting Brian T. Fitzpatrick, law professor at Vanderbilt University)).

³⁷ See Statement of Christopher R. Drahozal, John M. Rounds Professor of Law, University of Kansas School of Law, *Arbitration: Is it Fair when Forced?: Before the S. Comm. on the Judiciary*, 112th Cong. (Oct. 13, 2011), available at <http://www.judiciary.senate.gov/pdf/11-10-13DrahozalTestimony.pdf>. Professor Drahozal is, among other things, co-author of the Searle Civil Justice Institute Report on consumer arbitration. See Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study Of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843 (2010).

³⁸ See *infra* Part V, final paragraph.

³⁹ Case No. 12-CA-25764, 357 N.L.R.B. No. 184 (2012).

⁴⁰ 29 U.S.C. § 157 (1947) (right of employees as to organization, collective bargaining, etc.).

⁴¹ *D.R. Horton*, 357 NLRB No. 184 at 4 (“When multiple named-employee-plaintiffs initiate the action, their activity is clearly concerted. . . . Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.”).

⁴² See *id.* at 4–5 (citing 29 U.S.C. § 158(a)(1) (noting NLRA Section 8 “makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of their rights” guaranteed in Section 7”)). The EEOC reached a similar conclusion (although not specific to class actions) in 1997. See Beth M. Primm, *A Critical Look At The EEOC’s Policy Against Mandatory Pre-dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMP. L. 151 (1999).

Whatever the merits of the Board's decision,⁴³ and whatever the possibilities for further appeals or other proceedings that may modify or overturn the Board's ruling, the decision⁴⁴ demonstrates (at least in principle) that Congress could specifically act to preserve class action rights in one or more fields of law that may be affected by arbitration.⁴⁵ Where Congress has not done so, the choice is significant.⁴⁶

The Supreme Court's most recent arbitration-related decision, in *CompuCredit Corp. v. Greenwood*,⁴⁷ highlights this point. In *CompuCredit*, the Court cited the "liberal federal policy" favoring enforcement of arbitration agreements, which requires courts to enforce such agreements "even when the claims at issue are federal statutory claims," unless the FAA's enforcement mandate "has been overridden by a contrary congressional command."⁴⁸ The Court, noting the "clarity" with which Congress has restricted the use of arbitration in some contexts,⁴⁹ held that a statutory provision that merely references or contemplates judicial enforcement does not suffice to establish a "congressional command" to override the FAA.⁵⁰ In short, if Congress wishes to eliminate arbitration of specific claims, or wishes to ensure class actions in support of specific claims, it is entirely free to do so, and Congress certainly knows how to do so.⁵¹

⁴³ The Board acknowledged a potential conflict between its ruling and the Supreme Court's decision in *AT&T Mobility*. See *D.R. Horton*, 357 NLRB No. 184 at 10 (noting the question of conflict between NLRA and FAA is "an issue of first impression" for the Board); *id.* at 15 (distinguishing *AT&T Mobility*). In 2010, moreover, the Board's General Counsel suggested a conclusion quite different from the Board's ruling in *D.R. Horton*. See NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, MEMORANDUM GC 10-06, GUIDELINE MEMORANDUM CONCERNING UNFAIR LABOR PRACTICE CHARGES INVOLVING EMPLOYEE WAIVERS IN THE CONTEXT OF EMPLOYERS' MANDATORY ARBITRATION POLICIES (2010) at 6 (suggesting that NLRA permits employees to band together to "test the validity of their individual agreements and to make their case to a court that class or collective action is necessary if their statutory rights are to be vindicated," *not* that the NLRA invalidates all arbitration agreements that preclude class actions).

⁴⁴ The *D.R. Horton* case was heavily litigated, with the Board inviting (and receiving) extensive amicus briefs from interested parties. See Case 12-CA-025764, Invitation To File Briefs, (June 16, 2011) available at www.nlr.gov; Case 12-CA-025764, Docket Sheet (2011) available at www.nlr.gov (listing briefs received from U.S. Chamber of Commerce, National Retail Federation, National Employment Lawyers Association and other groups). No doubt the case will produce additional litigation. See Steven Greenhouse, *Labor Board Backs Workers on Joint Arbitration Cases*, N.Y. TIMES, Jan. 6, 2012, available at <http://www.nytimes.com/2012/01/07/business/nlr-backs-workers-on-joint-arbitration-cases.html> ("[T]he business community will be up in arms because you have federal labor law being applied in a nonunion setting.") (quoting Professor Alex Colvin, professor at Cornell School of Industrial and Labor Relations)). Indeed, at least one court has already considered, and apparently rejected, the reasoning in *D.R. Horton*. See *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308 at 16 (S.D. N.Y. Jan. 13, 2012) (court "declines to follow *D.R. Horton*"); see also Samuel Estreicher & Kristina A. Yost, *NLRB Reaches Into Employment Law to Invalidate Class Action Waivers*, N.Y.L.J., Feb. 2, 2012 at 4, 8 (*D.R. Horton* represents a "problematic ruling").

⁴⁵ The *D.R. Horton* decision does not affect the rights of unions to waive individual rights (such as the right to pursue a class action) as part of the collective bargaining process. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); see also Steven C. Bennett, *Arbitration Of Employment Discrimination Claims: Impact of the Pyett Decision on Collective Bargaining*, 42 TEX. TECH L. REV. 23 (2009).

⁴⁶ See *Scott v. Cingular*, 160 Wash. 2d 843, 852 (2007); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 378 (2005).

⁴⁷ *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2011).

⁴⁸ *Id.* at 669 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

⁴⁹ See *id.* at 672 (citing examples).

⁵⁰ See *id.* at 671 ("[W]e have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.").

⁵¹ The opposite rule, that "mere formulation of the cause of action" with reference to suit in court might preclude arbitration would mean that "valid arbitration agreements covering federal causes of action would be rare indeed." *Id.* at 670.

III. OVERRULING AT&T MOBILITY LLC V. CONCEPCION BY STATUTE

Congress made the FAA, and Congress may, if it wishes, amend or repeal the law.⁵² In 1970, for example, Congress amended the FAA, to add Chapter Two, dealing with international arbitration agreements and awards under the New York Convention, and in 1990 Congress added Chapter Three, dealing with the Panama Convention.⁵³ In theory, amendment of the FAA (through the AFA or any other similar enactment) could be used to overrule *AT&T Mobility* and any other pro-arbitration decisions of the Supreme Court in recent years.

Yet, legislative revision of the judicially-constructed doctrine is fraught with (known and unknown) perils.⁵⁴ Although proponents of the legislative modification of “incorrect” Supreme Court rulings point to some successful “narrow” legislative “overrides” of the Court;⁵⁵ even “narrow” legislative efforts may produce unintended consequences.⁵⁶ Inevitably, the Court (and the courts in general) may face circumstances that are similar to the original case, but not clearly within the statutory language of the override itself.⁵⁷ Congress may draft “opaque” statutory terms,⁵⁸ and thus “plain meaning,” legislative history and “purpose” analyses can produce wildly varying and unpredictable results.⁵⁹ Where the Court has not invited legislative action,⁶⁰ moreover, there is some danger that the Court may strain to restrict new legislative terms.⁶¹

⁵² See William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT’L ARB. 75, 77 (2002) (“The time has come to considering amending the FAA to provide greater clarity for international arbitration.”); Joseph D. Becker, *Fixing the Federal Arbitration Act by the Millennium*, 8 AM. REV. INT’L ARB. 75 (1997) (suggesting need for “renovation” of the FAA; “the dusting of an antique, not a revolution”).

⁵³ See generally STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS*, 131–50 (2002) (summarizing U.S. law on international arbitration); Jarred Pinkston, *Toward a Uniform Interpretation of the Federal Arbitration Act: The Role of 9 U.S.C. § 208 in the Arbitral Statutory Scheme*, 22 EMORY INT’L L. REV. 639 (2008) (reviewing interplay between FAA and U.S. international arbitration treaty commitments); John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT’L ARB. 1 (2000).

⁵⁴ See Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 428 (1992) (noting “few identifiable patterns in the types of decisions that Congress overrules”).

⁵⁵ See Megan Coluccio, *Fait Accompli?: Where the Supreme Court and Equal Pay Meet a Narrow Legislative Override Under the Lilly Ledbetter Fair Pay Act*, 34 SEATTLE U. L. REV. 235 (2010).

⁵⁶ See Kathryn Eidmann, *Ledbetter in Congress: The Limits of a Narrow Legislative Override*, 117 YALE L.J. 971 (2008).

⁵⁷ Deborah Widis, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 515 (2009) (citing examples in the area of employment discrimination and noting in these circumstances, the original “shadow” precedents may “continue[] to hold sway”); *id.* at 423 (“[O]verrides often fail to play their role as a check on judicial lawmaking.”).

⁵⁸ See John F. Manning, *Textualism and Legislative Intent*, 91 VA L. REV. 419, 431 (2005); see also Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594 (2002) (citing examples of “deliberate ambiguity” in statutory drafting); GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* (2003) (suggesting that Congress deliberately drafts ambiguous statutes in order to defer to Supreme Court rulings on difficult issues).

⁵⁹ Compare ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 31–37 (Amy Gutmann ed., 1997) (criticizing use of legislative history), and Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U.L. REV. 807, 812–14 (1998) (noting frequent misuse of legislative history) with Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847–61 (1992) (noting value of legislative history) and Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 230–32 (arguing for legislative history as reasonable guide to congressional intent); see also Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO L.J. 1119, 1122 (2001) (“[A]cademic theorists have no coherent idea of Congress, nor one based on what experts know about how Congress works.”).

The risk of congressional action also includes the prospect that, in some instances, Congress may agree with the Court's ruling and expressly codify that view through legislation.⁶² To a degree, the constitutional system of checks and balances operates on the assumption that the Court can accurately predict whether a congressional override might result from a controversial ruling.⁶³ Further, in taking up a controversial topic, the legislature may attract lobbying attention, producing an entirely different structure from the "narrow," even well-intentioned purposes of the initial proponents of the override.⁶⁴ If anything, the stark alignment of interest groups on the questions that surround consumer and employee arbitration suggests that a "narrow" revision of

(continued...)

⁶⁰ See generally Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162 (1999).

⁶¹ Professor Richard Paschal has called this phenomenon the "continuing colloquy" between Court and Congress. See Richard Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143, 199–203 (1991); see also JEB BARNES, *OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* 43 (2004). Some hint of this tension may be seen in the "game" played between the Supreme Court and state courts over the application of unconscionability rules in the context of the FAA. See Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008); 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, 484 (2009); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469; Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).

⁶² See Nancy C. Staudt, Rene Lindstadt & Jason O'Connor, *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340 (2007) ("Overrides, although the main focus of the extant literature, account for just a small portion of the legislative activity responding to the Court. In fact, Congress is nearly as likely to support and affirm judicial decision-making through the codification of a case outcome as it is to reverse a decision through a legislative override."); Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEGIS. STUD. Q. 5, 7–8 (2005) (suggesting that Congress is most likely to override the Court when legislators are ideologically distant from the Court); Abner J. Mikva & Jeff Bleich, *When Congress Overrides the Court*, 79 CAL. L. REV. 729, 729 (1991) (overrides may reflect "political upheaval or turmoil in which the Court's erroneous interpretations appear to reflect deliberate attempts to frustrate the policy objectives of Congress").

⁶³ See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335 (1991) (noting that the Court must consider congressional preferences in order to avoid risk of override); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) (applying game theory to interactions between branches of government on policy-making).

⁶⁴ See Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEGIS. STUD. Q. 5, 10 (2005); Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353, 358 (1994); Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377, 391 (1965). Indeed, the very purpose of congressional overrides, in some instances, may be linked to interest group politics. See Victor M. Sher & Carol Sue Hunting, *Eroding The Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 487 (1991) (describing lobbying efforts for overrides that provide project-specific exemptions from environmental laws).

the FAA is almost impossible.⁶⁵ Once modified, moreover, a new form of FAA could wreak havoc for years.⁶⁶

Experience with the Revised Uniform Arbitration Act (“RUAA”) provides some indication of the scope and character of the problem in codifying a legislative solution to the issues addressed in *AT&T Mobility*.⁶⁷ The Uniform Arbitration Act (“UAA”), largely modeled on the FAA, was first promulgated in 1955 by the National Commission on Uniform State Laws, and has been adopted by 35 states, with some 14 more using the UAA as a model for varied forms of state arbitration legislation.⁶⁸ Drafting of the RUAA (starting in 1997) included consideration of the problem of adhesion contracts and unconscionability. Yet, the drafters were unable to agree on a universal means to deal with the problem, and thus the RUAA merely mentions the problem and leaves to developing state (and federal) common law the means to its solution.⁶⁹ Similarly, although the RUAA drafters took up the question of consolidation of arbitration proceedings, they chose not to include any specific provision in the RUAA regarding class action arbitral proceedings.⁷⁰ If the framers of the RUAA, after three years of study, and eight formal meetings, including representatives from the American Bar Association, the American Arbitration Association and similar national arbitration service providers, and numerous interest group representatives, could not agree on solutions to these essential problems, it seems somewhat unlikely that Congress, in the context of overriding a Supreme Court precedent, is any more likely to make useful progress.⁷¹

The legislative fate of the proposed Fair Arbitration Act (“FairArb”) further illustrates the difficulty.⁷² This statutory scheme, offered by Senator Sessions, aims at providing a

⁶⁵ *AT&T Mobility*, like most of the recent Supreme Court cases on consumer and employment arbitration, especially in the context of questions about class action treatment, drew amicus briefs from consumer and employee advocates, corporate counsel, trade groups and other interest groups. See Frank Blechschmidt, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 542 (2012) (noting extensive briefing in light of “far-reaching implications for consumer and employment contracts and class action policy”); see also Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 417 (2009) (noting the “maul[ing]” of U.S. arbitration law by the “claws of politicization”).

⁶⁶ See Peter B. Rutledge & Christopher R. Drahozal, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1170 (2011) (noting risk that, once Congress amends FAA, “Congress will naturally turn to other matters, and occasions for reexamination will be scant”).

⁶⁷ The texts of the UAA and the RUAA are available at www.nccusl.org. For a summary of the RUAA, UAA, and other legislative efforts at modification of arbitration law, see Mary A. Bedikian, *Alternative Dispute Resolution*, 55 WAYNE L. REV. 21, 74–76 (2009).

⁶⁸ See Sarah Rudolph Cole, *The Revised Uniform Arbitration Act: Is it the Wrong Cure?*, DISP. RESOL. MAG., Summer 2002, at 10.

⁶⁹ See *id.* at 11; see also Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 3 (2001).

⁷⁰ See Heinsz, *supra* note 69, at 15 (RUAA “does not address the hotly debated issue of class-action arbitrations”).

⁷¹ Significantly, the RUAA has not received anywhere near the legislative support from the states seen in response to the original, more bare bones, form of the UAA. *Arbitration Act (2000)*, UNIFORM LAW COMMISSION, available at <http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20> (2000) (ten years after completion, RUAA has been adopted by only 14 states and the District of Columbia); see also Jack M. Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WM. & MARY BUS. L. REV. 227, 247 (2011) (noting that “bare bones” form of FAA, instead of a “comprehensive and systematic approach” to the law of arbitration, “relies almost entirely on the common law of contracts, along with the developing federal common law” of arbitration, to fill statutory gaps).

⁷² Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007); Fair Arbitration Act of 2011, S. 1186, 112th Cong. (2011). These bills have not addressed class action, class arbitration, or the *AT&T Mobility* case.

comprehensive set of “default” arbitration procedural rights for consumers and employees.⁷³ This kind of scheme serves as an alternative to banning all pre-dispute arbitration agreements, or otherwise addressing the interplay between arbitration and class action procedures.⁷⁴ The bill, like the AFA, however, has never progressed to a vote in either congressional chamber.⁷⁵

IV. POTENTIAL ADVERSE CONSEQUENCES OF THE AFA

The risk with introduction of the AFA in Congress is not simply that the legislation may go astray (failing to achieve its intended purposes). The potential adverse consequences of the AFA, even if enacted precisely as its sponsors suggest, are manifest. First, the AFA may actually *reduce* access to justice for some consumers and employees.⁷⁶ For cases not subject to class action treatment, arbitration may provide a faster, cheaper justice system for individuals,

⁷³ Senator Sessions, in describing the most recent form of the FairArb bill, stated: “Arbitration is a quick and cost-effective means of resolving disputes, but the process could be further improved to address some recent cases where individuals claimed that arbitrations were not conducted under fair conditions. My legislation would establish reforms to make absolutely certain that arbitration is as fair as possible for all parties involved.” See *Sessions Comments On Fair Arbitration Act*, June 16, 2011, JEFF SESSIONS, available at http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=9e1c07bf-9116-cd9f-68a9-44be4f5a4a17&Region_id=&Issue_id=; see also Andrew L. Sandler & Victoria Holstein-Childress, *Supreme Court and Congress Focus on Mandatory Pre-Dispute Arbitration Agreements: The Debate Continues*, 27 CORP. OFFICERS & DIRECTORS LIABILITY, July 5, 2011, at 4 (suggesting that “Congress should address the fairness considerations [addressed in *AT&T Mobility*] by implementing specific procedural rules to balance arbitral mechanisms between businesses and their consumers or employees”); *id.* at 8 (FairArb bill is “[b]ased largely on the AAA’s Consumer Due Process Protocol,” and “seeks to ensure the continuing viability of arbitration while enhancing its effectiveness through certain reforms”).

⁷⁴ See Thomas W. Stipanowich, *Revelation and Reaction: The Struggle to Shape Arbitration, Contemporary Issues in International Arbitration and Mediation* (Pepperdine Univ. Legal Studies Research Paper No. 2011/11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1757258 (noting recent Supreme Court decisions on “gateway” issues involving consolidation of claims in arbitration, and calling for legislation to establish due process standards for arbitration).

⁷⁵ See David D. Caron & Seth Schreiber, *Anticipating the 2009 U.S. “Fairness in Arbitration Act”*, 2 WORLD ARB. & MEDIATION REV. 15 (2008); see also Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (2010).

⁷⁶ The Association for Conflict Resolution (“ACR”), a group including more than 3,000 mediators, arbitrators, educators and others, issued a comprehensive report on the AFA, concluding: “Pre-dispute mandatory arbitration has the potential for developing a fast, efficient, fair, low-cost dispute resolution process to which all citizens could gain access[.] By broadly making void and unenforceable pre-dispute agreements to arbitrate a future consumer, employment, franchise, or civil rights controversy, the proposed AFA eliminates this potential. . . . [I]n the absence of a post dispute agreement to arbitrate, the AFA requires that all controversies be adjudicated in an appropriate court. However, there is no reasonable evidence that such a court forum is accessible to all parties[.]” ASSOC. FOR CONFLICT RESOL., AN EXAMINATION OF THE ARBITRATION FAIRNESS ACT OF 2009 7 (2009), available at <http://www.acrnet.org/uploadedFiles/Publications/FinalReport%2012-1-09.pdf>. The ACR recommended against any form of the AFA that “broadly prohibits the use of pre-dispute arbitration agreements[.]” *Id.* at 13.

especially those who cannot afford counsel.⁷⁷ Available evidence suggests, moreover, that when administered in accordance with essential due process standards, arbitration outcomes may be as favorable to employees and consumers as conventional litigation.⁷⁸ Once a dispute arises, however, parties are much less likely to agree to arbitrate, because the calculus of litigation (higher cost, but with greater procedural protection) versus arbitration (generally lower cost, but more informal) may change.⁷⁹

The AFA also introduces new questions of statutory interpretation and doctrine, which could *increase* the cost of conventional litigation. The terms “consumer” and “civil rights” disputes, for example, presenting gateway issues in determining the application of the AFA, are

⁷⁷ See Jyotin Hamid & Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery with a Hatchet Instead of a Scalpel?*, 74 ALBANY L. REV. 769, 780 (2010–2011); Kirk D. Knutson, *Anti-Arbitration Bills Imperil the Universal Benefits of Consumer Arbitration*, METROPOLITAN CORP. COUNS., Aug. 1, 2008 (“[S]tudies have consistently shown that where similar subject matter is at issue, arbitration produces the same outcomes as court but in less time and at less expense.” (referencing research at www.adrforum.com/benefitsof Arbitration)); Amy Cook, *ADR is A-OK*, CBA REC. (Chi. Bar Ass’n, Chicago, Ill.), Apr. 1, 2008, at 6 (noting ABA survey finding that 78% of lawyers believe that arbitration was “timelier” than litigation, “and most said it was more cost effective”); Mark Fellows, *Limits on Arbitration Would Burden Courts and Taxpayers*, METROPOLITAN CORP. COUNS., Dec. 1, 2007, at 8 (“Surveys of arbitration participants consistently show that they spend less money resolving disputes in arbitration than in court.”); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALBANY L. REV. 241, 241 (1999) (“in exchange for reduced costs and speedier resolution, arbitrating parties agree to limit their right to appeal”); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 429 (1988) (“[O]bservers frequently depict arbitration as a speedy and economical process.”).

⁷⁸ See CTR. FOR LEGAL SOLUTIONS, EMPIRICAL RESEARCH ON ARBITRATION OUTCOMES, available at <http://www.centerforlegalsolutions.org/arbitration.data.shtml>; Lisa Bingham, *Is There a Bias in Arbitration of Non-Union Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT’L J. OF CONFLICT MGMT. 369 (1995) (study finding that employees won more often than employers and received a greater percentage of their demands, in arbitration).

⁷⁹ See Peter B. Rutledge, *Who Can be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 280 (2008) (“[A] variety of empirical measures suggest that postdispute arbitration will not work.”); David Sherwin, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1 (2003); Lewis J. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313 (2003). Such a post-dispute agreement may be particularly difficult to achieve in the context of multi-party controversies. See Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party — Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT’L L. REV. 711, 717-18 (2003) (where commonality of facts is sole link between parties, “impossible” to obtain consent to arbitrate from all parties).

not crystal clear.⁸⁰ The anti-arbitration “findings” of the AFA, moreover, could have meddlesome consequences, even outside of consumer, employment and civil rights arbitration.⁸¹

Commentators have warned that fundamental changes in the FAA could adversely affect the position of the United States as a site for global dispute resolution.⁸² Due to the large volume of international commerce involving this country, the United States has become an important center for dispute resolution.⁸³ The AFA, however, would overturn a “fundamental principle” of international arbitration law, to the effect that arbitrators normally may proceed with arbitration notwithstanding jurisdictional challenges.⁸⁴

Finally, despite the current controversy surrounding Supreme Court interpretation of the law, the FAA has served the U.S. (and international) arbitration community for roughly 80

⁸⁰ See Mauricio Gomm Santos & Rodney Quinn Smith, *The Changing Landscape of Arbitration in the United States and its Effects on International Arbitration*, 14 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654354 (“The definitions of consumer and civil rights disputes remain quite broad. Litigants seeking to avoid arbitration will be able to plead their claims through one of these two areas and require a judicial decision before going to arbitration. These decisions would require opinions from all levels of the courts in order to define their parameters. In the meantime, arbitration would experience a significant delay.”); David Caron & Seth Schreberg, *Anticipating the 2009 U.S. “Arbitration Fairness Act”*, 2 WORLD ARB. & MEDIATION REV. 3 (2008) (AFA would alter doctrine of “separability” of arbitration contracts, requiring judicial interpretation).

⁸¹ See Mark Kantor, *Legislative Proposals Could Significantly Alter Arbitration in the United States*, 74 ARB. 444 (2008); Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 49 (2010) (“very likely” that AFA and FairArb laws “will affect day-to-day commercial arbitration practice in unhelpful ways”); Alicia J. Surdyk, *On the Continued Vitality of Securities Arbitration: Why Reform Efforts Must Not Preclude Predispute Arbitration Clauses*, 54 N.Y.L. SCH. L. REV. 1131 (2009-2010); NEW YORK CNTY. LAWYERS ASS’N COMM. ON THE FED. COURTS, REPORT ON THE PROPOSED ARBITRATION FAIRNESS ACT OF 2007, 249 F.R.D. 402 (Apr. 15, 2008) (“the findings of the AFA could have the unintended consequence of undermining all arbitrations,” not simply those within the “sectors” on which the law focuses).

⁸² See Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT’L ARB. 455, 463 (2007) (“The proposed legislation would have a marked impact on the acceptability of the United States as an arbitration-friendly jurisdiction. It would not only reverse the trend over the past years towards more frequent selection of the U.S. as a seat for arbitration and potentially reduce the retention of U.S. dispute resolution institutions and arbitration specialists, but would also make U.S. businesses less attractive as trading partners.”); see also Mark Kantor, *Congress Considers Legislation that Could Significantly Alter Arbitration in the United States*, 1 N.Y. DISP. RESOL. LAW. 38, 39 (2008) (overturning doctrines of arbitrator competence to decide jurisdiction, and separability of arbitration agreements from remainder of contracts would “place the United States in opposition to decades of arbitration developments worldwide and arguably violate international obligations under a variety of international arbitration treaties”); Emmanuel Gaillard, *International Arbitration Law*, N.Y.L.J., Apr. 22, 2008, at 3 (stating that the AFA “pos[es] a serious threat to the promotion of efficient international dispute resolution and of the United States as a friendly place to arbitrate”); Thomas W. Stipanowich, *Revelation and Reaction: The Struggle to Shape Arbitration, Contemporary Issues in International Arbitration and Mediation*, at 50 (Pepperdine University Legal Studies Research Paper No. 2011/11, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1757258 (“the breadth and ambiguity of the [AFA], and the potential impact of the statute on international transactions, is of great concern to the international business community”); cf. S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT’L L. 1017 (2009).

⁸³ See PEDRO J. MARTINEZ-FRAGA, AMERICAN INFLUENCES ON INTERNATIONAL COMMERCIAL ARBITRATION, 133–34 (2009); Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 84 (2003).

⁸⁴ See N.Y. STATE BAR ASSOC., REPORT OF THE DISPUTE RESOLUTION SECTION ON THE ARBITRATION FAIRNESS ACT AND OTHER FEDERAL ARBITRATION BILLS, Mar. 18, 2009, at 7, available at http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&ContentID=52543&Template=/CM/ContentDisplay.cfm; see *id.* at 8 (noting risk that AFA could have “a grave and harmful impact on international commerce”).

years.⁸⁵ Critics suggest that the AFA, and any suggested reform of the nation's fundamental arbitration law, must pass a "first, do no harm" test (which, to date, proponents have not satisfied).⁸⁶ Further, to the extent that any reforms to the FAA might tend to decrease incentives to use arbitration, thus placing additional strains on overstretched courts, caution seems advisable.⁸⁷

V. ALTERNATIVES TO THE AFA

The search for appropriate alternatives to the AFA must start with competent empirical evidence.⁸⁸ To the extent that *AT&T Mobility* implicates a choice between in-court, class action proceedings and individual proceedings in arbitration, questions include: (1) the frequency of use

⁸⁵ Justin Kelly, *Republican Senator Proposes Changes to FAA*, THE DISP. RESOL. ADVOCATE (Disp. Resol. Sect. of the State Bar of Ga.), Summer 2007, at 2, available at <http://www.gabar.org/committeesprogramssections/sections/disputeresolution/upload/summer07news.pdf> ("My preference would be to leave the FAA alone, because it is working well for the vast majority of users.") (quoting John M. Townsend); John M. Townsend, *Leave the Federal Arbitration Act Alone*, A.B.A. BUS. LITIG. COMM. NEWSLETTER, Summer 2007, (suggesting that FAA has worked well for 80 years); John M. Townsend, *The Federal Arbitration Act is Too Important to Amend*, INT'L ARB. NEWS 2, 19 (2004).

⁸⁶ Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169, 170 (2007) (suggesting that FAA should be preserved, as courts are "more likely than legislators to get it right" and "the most plausible outcome would be to let loose all sorts of unanticipated errors and evils"); Thomas Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427 (2007) (suggesting need for careful consideration of any statutory reform of arbitration law, and suggesting possibility of a Restatement of Dispute Resolution as a means to produce new guidance in the field).

⁸⁷ See Edna Sussman, *The Dodd-Frank Act: Seeking Fairness and the Public Interest in Consumer Arbitration*, 18 DISP. RESOL. MAG. 25, 27 (2011) ("Court congestion and the recent cutbacks in judicial budgets are also relevant to the analysis [of need for arbitration systems] as they affect access to the courts for the resolution of disputes."); David Allen Larson, *The End of Arbitration as We Know it? Arbitration Under Attack*, 3 PENN. ST. Y.B. ON ARB. & MEDIATION 93, 96 (2011) ("State budgets are in turmoil and legislators must make significant cuts. Underfunded court systems that already were carefully rationing resources will have to find additional ways to reduce expenditures, which probably will require a further reduction in services. As a result and as a simple, practical matter, the Judiciary needs healthy arbitral institutions and smoothly functioning arbitral processes."); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 440 (2011) ("[A]rbitration arguably reduces the judiciary's workload and reduces litigation costs, allowing companies to offer lower prices and higher wages."). Recent surveys of the impact of the economic crisis on courts support this concern. See AM. BAR ASSOC. COALITION FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS (2010), available at <http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf> (60% of judges reported seeing a greater number of self represented parties; 62% of these judges believed not having an attorney negatively impacted the outcomes for self represented parties); Editorial, *Thread Bare American Justice*, N.Y. TIMES, Aug. 18, 2011, at A20 ("State courts, which handle the vast majority of civil and criminal cases, are in a state of crisis. . . . [These courts are] less and less able to deliver justice."); see also Judith Resnik, *Compared to What?: ALI Aggregation and Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 632 (2011) (noting concern regarding "growing population" of persons in court without legal representation).

⁸⁸ Amy Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEG. L. REV. 115, 118 (2010) ("The potential value of precluding or regulating arbitration clauses is . . . unclear. . . . [P]olicymakers propose policies in the dark by failing to consider existing empirical data that is critical to crafting effective and efficient arbitration reforms."); see also N.Y. STATE BAR ASSOC., DISPUTE RESOL. SECT., COMMENTS TO THE CONSUMER FINANCIAL PROTECTION BUREAU 4 (2011) available at <http://www.sussmanadr.com/articles.htm> ("assessment of the public interest should include consideration of fairness to consumers" from changes in arbitration law) (listing specific questions); Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need to Know*, 10 CARDOZO J. CONFLICT RESOL. 579 (2009).

of pre-dispute arbitration clauses containing class action waivers;⁸⁹ (2) the degree to which such class action waiver clauses may preclude consumers and employees from vindicating their rights,⁹⁰ and deterring wrongful conduct;⁹¹ (3) the degree to which class action devices would

⁸⁹ See Peter Rutledge, *Point: The Case Against the Arbitration Fairness Act*, 16 DISP. RESOL. MAG. 4, 7 (2009) (suggesting need for additional empirical research to determine whether adoption of class action waivers is a widespread problem); 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, 503 (2009) (noting creation of new class arbitration waiver clauses, in light of judicial developments); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007) (reviewing empirical studies and noting “consistent pattern of significant expansion of employment arbitration in the decade and a half since the *Gilmer* decision”); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 225 (1998) (suggesting that the “use of employment arbitration began to accelerate dramatically after the United States Supreme Court decided *Gilmer*”); see also Philip J. Loree, Jr., *Stolt-Nielsen Delivers a New FAA Rule—and then Federalizes the Law of Contracts*, 28 ALTERNATIVES TO HIGH COST LITIG. 124 (2010) (suggesting that Stolt-Nielsen “put the kibosh on class arbitration in the commercial context and most probably also in the context of adhesive contracts”).

⁹⁰ See Christopher R. Drahozal & Stephen J. Ware, *Why do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 437 (2010) (stating that the “received wisdom” is that some businesses use arbitration clauses to avoid exposure to class actions and potential large-scale damage awards); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1319 (2009) (suggesting that businesses choose consumer arbitration agreements to avoid class action proceedings; “their primary concern is to deter claims, not to ensure that all claims against them are aired more cheaply”); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004). Conversely, one may ask whether class actions necessarily provide “bang for the buck” results for consumers and employees. See Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 85 (2008) (noting debate on whether class procedures encourage frivolous claims for settlement purposes); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1189 (2009) (“In some settlements, such as ‘coupon’ settlements . . . class counsel receive large fees while class members receive little or nothing of actual value.”); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor’s Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343 (2005) (noting examples where plaintiffs’ lawyers are paid fees, and consumers receive no substantial compensation); see also S. Rep. No. 109-14, at 15 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 16 (Senate Committee Report on Class Action Fairness Act) (noting “numerous class-action settlements approved by state courts in which most—if not all—of the monetary benefits went to the class counsel”).

⁹¹ An essential assumption in class action doctrine is to the effect that class proceedings tend to vindicate public rights, and deter wrongdoing, especially in small-stakes cases. See *AmChem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that “small recoveries do not provide the incentive for any individual to bring a sole action,” and suggesting that class actions can aggregate potential recoveries “into something worth someone’s (usually an attorney’s) labor”); *In re Am. Express Merchants’ Litig.*, 667 F.3d 204 (2d Cir. 2012) (“[T]he class action is the only economically rational alternative when a large group of individuals . . . has suffered an alleged wrong but the damages due to any single individual . . . are too small to justify bringing an individual action.”); Class Action Fairness Act of 2005, 28 U.S.C. § 1711 (2005) (“Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.”); see also Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1902 (2006) (noting central argument in opposition to class-action waivers, to the effect that they may affect public legislation by withdrawing a private right of action); David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 843 (2002) (stating that the class action device is essential for “optimal deterrence” of wrongdoing).

solve these problems,⁹² and (4) the relative costs and benefits of an arbitral versus in-court class action system.⁹³ More generally, if pre-dispute arbitration clauses are to be made invalid under the AFA (or similar legislation), policy-makers must consider: (1) the degree to which “mandatory” arbitration clauses produce results at odds with in-court procedures;⁹⁴ (2) the degree to which access to arbitration may be adversely affected by a ban;⁹⁵ and (3) impacts on the judicial system of reduced access to arbitration.⁹⁶ The answers to these kinds of questions may determine whether any reform is necessary, and shed light on the most appropriate means of reform.⁹⁷

The “least harm” alternative to the AFA is precisely what has occurred over the past decade,⁹⁸ since the AFA was first proposed: expanded development of arbitration “common law,”

⁹² See *Arbitration: Is it Fair When Forced?: Hearing Before the S. Judiciary Comm.*, 112th Cong. 14 (2011) (statement of Victor E. Schwartz) (noting that “the vast majority of consumer claims are individualized;” class actions “are of no help in these circumstances”); Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1082 (2011) (“Class certification may well not be ‘superior’ to individual litigation—indeed, it may be inferior—on ‘fairness’ grounds due to the lack of need for aggregation of the prescribed dollar sum in order to provide a sufficient incentive” for claims) (quotation omitted).

⁹³ Is it correct, for example, as the Court assumed in *AT&T Mobility*, that the advantages of arbitration necessarily would be lost if the class action device were superimposed on arbitration? See *AT&T Mobility v. Concepcion*, 141 S. Ct. 1740, 1750–53 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010); David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History*, 63 BUS. LAW. 55 (2007).

⁹⁴ Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 9 (2011); Bradley Dillon-Coffman, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1108 (2010) (reviewing studies); Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1062 (2009) (reviewing empirical data); Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL’Y 549, 556 (2008) (reviewing studies); Kirk D. Jensen, *Summaries of Empirical Studies and Surveys Regarding How Individuals Fare in Arbitration*, 60 CONSUMER FIN. L.Q. REP. 631 (2006) (summarizing studies and surveys); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1569 (2005) (reviewing studies).

⁹⁵ Darren P. Lindamood, *Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009*, 45 WAKE FOREST L. REV. 291, 310 (2010) (preventing consumers from signing pre-dispute arbitration agreements “will result in less access to a remedy for plaintiffs with small claims. . . . [W]hen employers or manufacturers are not bound by a pre-dispute arbitration agreement, they can refuse to agree to arbitrate small claims with the knowledge that the high cost of litigation will prohibit the plaintiff from obtaining counsel.”); Andrew L. Sandler & Victoria Holstein-Childress, *Supreme Court and Congress Focus on Mandatory Pre-Dispute Arbitration Agreements: The Debate Continues*, 27 CORP. OFFICERS & DIRECTORS LIABILITY 1, 7 (2011) (“Prohibiting mandatory pre-dispute agreements likely would leave many consumers and employees without access to a viable dispute-resolution forum, and would reward only the trial lawyer’s bar, which would stand to profit from the inevitable increase in litigation.”).

⁹⁶ See Theodore J. St. Antoine, *Mandatory Arbitration: Why it’s Better than it Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008) (study suggests that only 5% of employees claiming discrimination can gain access to court system; “it looks like arbitration—or nothing” as a remedy); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. 8, 10–11 (2003) (summarizing additional studies).

⁹⁷ Some empirical review of the effects of the Talent-Nelson Amendment, the Jamie Leigh Jones Amendment, and similar AFA-like enactments, see Part I, *supra*, might offer particularly valuable insights. Similarly, the results of the analysis of arbitration processes in the consumer financial section, by the Consumer Financial Protection Bureau, pursuant to the Dodd-Frank law, may bear heavily on the debate over appropriate solutions. See *id.*

⁹⁸ For a contemporary discussion of risk and policy-making (including the concept of “least harm” analysis), see RICHARD B. JONES, *20% CHANCE OF RAIN: EXPLORING THE CONCEPT OF RISK* (2nd ed. 2011).

at both the federal and state level.⁹⁹ Judicial development of doctrine offers the advantage of nuanced response to perceived problems in arbitration law, versus the broad (and unpredictable) legislative approach.¹⁰⁰ In particular, the scope of the unconscionability doctrine has yet to be fully explored.¹⁰¹ The Supreme Court has acknowledged that unconscionability is a general defense to enforcement of contracts that can be applied to arbitration clauses consistent with the FAA.¹⁰² Further, the Court has held that dispute resolution schemes that impinge on the ability to vindicate statutory rights may be invalidated.¹⁰³ Although, given the presumption in favor of enforcement of arbitration agreements, the burden may fall on the party seeking to void an arbitration clause,¹⁰⁴ that burden is not impossible to sustain.¹⁰⁵ In particular, the unconscionability doctrine, a state law concept, offers a flexible form of protection for individual

⁹⁹ See Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233 (2008) (tracing history of Supreme Court doctrine on enforcement of arbitration agreements).

¹⁰⁰ See Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1165 (2011) (suggesting “a blend of industry self-regulation and case-by-case judicial scrutiny, over more blunt approaches such as regulation by an administrative agency or outright statutory prohibitions”).

¹⁰¹ Despite claims of “overpreemption” of state law in Supreme Court jurisprudence on arbitration, Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PENN. L. REV. 1233, 1236 (2011), the Court has not fundamentally departed from the essential principle of preemption, that courts may not “invalidate arbitration agreements under state laws applicable only to arbitration provisions.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis omitted). The precise balance between federal preemption and state law, however, remains a matter for elaboration. See David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 WASH. U. J.L. & POL’Y 129 (2004); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541 (2004).

¹⁰² See *Doctor’s Assocs.*, 517 U.S. at 687 (stating that arbitration agreements may be invalidated by “generally applicable contract” defenses, including “fraud, duress, or unconscionability”); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 555–56 (1995) (“[A]n arbitration clause may be invalid without violating the FAA if . . . the provision is unconscionable[.]”).

¹⁰³ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (stating that arbitration may substitute for judicial forum only “[s]o long as the prospective litigant may vindicate his or her statutory cause of action in the arbitral forum”) (quotations omitted) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)); see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 249 (2009) (“The decision to resolve [age discrimination] claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance[.]”).

¹⁰⁴ See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (stating that the burden is on the opponent of arbitration to show the likelihood of incurring prohibitive costs in arbitration).

¹⁰⁵ See *In re Am. Express Merchs. Litig.*, 634 F.3d 187, 199 (2d Cir. 2011) (“[A]s the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable.”); see also *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1002, 1004–06 (9th Cir. 2010) (ruling that arbitration is inappropriate where plaintiff showed that lack of mutuality and unconscionability permeated the arbitration clause itself); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1292–93 (9th Cir. 2006) (refusing to enforce arbitration agreement placing venue for hearing far from non-drafting party); *Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370, 386–88 (6th Cir. 2005) (invalidating arbitration agreement where employer chose arbitration provider); *Murray v. United Food & Commercial Workers Int’l Union*, 289 F.3d 297, 304 (4th Cir. 2002) (invalidating arbitration agreement where employee’s choice of arbitrator was limited to candidates initially screened by employer); *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 600, 614–15 (D.S.C. 1998) (refusing to enforce arbitration agreement that allowed drafting party to control pool of arbitrator candidates); *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 173 (Wis. 2006) (refusing to enforce arbitration agreement that only allowed drafting party to seek relief in court); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 255–56 (N.Y. App. Div. 1998) (finding terms unconscionable in shrink-wrap arbitration contract relating to ICC arbitration).

rights, which legislation could not duplicate.¹⁰⁶ Thus, claims that *AT&T Mobility* will somehow fundamentally alter state unconscionability law appear exaggerated.¹⁰⁷ Although some courts have applied *AT&T Mobility* to uphold arbitration clauses against challenges,¹⁰⁸ others have construed it quite narrowly.¹⁰⁹

Abundant additional “least harm” suggestions aim at potential abusive forms of pre-dispute arbitration agreements and encouragement of the development of efficient, fair arbitration

¹⁰⁶ See Thomas Stipanowich, *The Third Arbitration Trilogy: Revelation, Reaction and Reflection on the Direction of American Arbitration*, SCOTUSBLOG (Sept. 21, 2011, 8:36 AM), www.scotusblog.com/2011/09/the-third-arbitration-trilogy-revelation-reaction-and-reflection-on-the-direction-of-american-arbitration/ (noting that unconscionability doctrine gives judges a “potent tool to set boundaries on arbitration provisions in standardized contracts,” including limits on discovery, “unfair arbitrator selection schemes, requirements to arbitrate in a distant venue, and remedy-stripping clauses”); *id.* (“Although some worry that unconscionability affords courts too much discretion to strike down or modify arbitration agreements, there are currently no effective alternatives.”); Nina Pillard, *Federal or State Regulation of Arbitration Procedure?*, FUTURE OF ARBITRATION CONFERENCE (Mar. 2011), www.law.gwu.edu/News/2010-2011Events/Documents/Pillard%20Submission.pdf (suggesting that “state law is better equipped to serve as a protector of procedural fairness in arbitration than any newly fashioned federal version of FAA contract law of unconscionability likely would be”); see also Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 616-19 (2009) (noting that unconscionability judicial decisions have grown in response to mandatory arbitration clauses).

¹⁰⁷ See Terry Moritz, *AT&T Mobility and the End of Consumer Class Action Through Commerce Clause Jurisprudence: Not so Fast*, SCOTUSBLOG (Sept. 23, 2011, 10:21 AM), www.scotusblog.com/2011/09/att-mobility-and-the-end-of-consumer-class-action-through-commerce-clause-jurisprudence-not-so-fast/ (concerns motivating the AFA may be “premature” because “some lower courts are reading *AT&T Mobility* very narrowly”); Albert A. Foer & Evan P. Schultz, *Will Two Roads Still Diverge? Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe May be Making it Easier*, 3 GLOBAL COMPET. LITIG. REV. 107, 109 (2011) (“[C]lass actions are not likely to completely disappear in practice. This is partially because the facts of *Concepcion* limit it as a precedent[.]”).

¹⁰⁸ See, e.g., *Bellows v. Midland Credit Mgmt., Inc.*, No. 09CV 1951-LAB (WMC), 2011 WL 1691323, at *3 (S.D. Cal. May 4, 2011) (“[*Concepcion*] disapproved of “[the California Supreme Court opinion in] *Discover Bank*, holding it impermissibly interfered with the Federal Arbitration Act. That decision disposes of Bellow’s best argument, making clear the agreement to arbitrate is not substantively unconscionable merely because it includes a class action waiver. It is therefore not invalid, and will be enforced.”); *Boyer v. AT&T Mobility Servs., LLC*, Civil No. 10CV1258 JAH (WMC), 2011 WL 3047666 (S.D. Cal. July 25, 2011) (arbitration class action dismissed); *Daugherty v. Encana Oil & Gas (USA), Inc.*, Civil Action No. 10-cv-02272-WJM-KLM, 2011 WL 2791338 (D. Colo. July 15, 2011) (*AT&T Mobility* followed and arbitration class claims dismissed).

¹⁰⁹ See, e.g., *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950 (LBS)(JCF), 2011 WL 2671813, at *4 (S.D.N.Y. Jul. 7, 2011) (distinguishing *AT&T Mobility*, as not involving federal statutory rights); *In re Checking Account Overdraft Litig.*, No. 09-MD-02036-JLK, 2011 WL 6225275 (S.D. Fla. Dec. 15, 2011) (holding that defendants had waived rights to demand arbitration); *Wolf v. Nissan Motor Acceptance Corp.*, No. 10-CV-3338 (NLH) (KMW), 2011 WL 2490939 (D.N.J. June 22, 2011) (holding fee provision in arbitration agreement unconscionable, but severing that provision from remainder of agreement, which included class action waiver); *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011) (invalidating arbitration agreement on grounds that it was too confusing, too vague, and too inconsistent to be enforced); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803 (voiding arbitration where named arbitration service was no longer available to conduct proceedings, and describing the agreement as unfairly one-sided and substantively unconscionable irrespective of *AT&T Mobility* holding).

systems.¹¹⁰ Major arbitration-sponsoring organizations have developed “due process” protocols for small-stakes arbitration.¹¹¹ The development and use of such systems could be encouraged, through publicity and education,¹¹² support for research and adoption of “model” systems by government units.¹¹³ In particular, on-line systems may offer low-cost means for mass dispute

¹¹⁰ See Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration* (Univ. of Kan. Sch. of L., Working Paper No. 2011-4) (Aug. 3, 2011), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1904545> (suggesting that courts and policy-makers reinforce arbitration due process protocols, rather than banning pre-dispute arbitration agreements); Andrew L. Sandler & Victoria Holstein-Childress, *Supreme Court and Congress Focus on Mandatory Pre-Dispute Arbitration Agreements: The Debate Continues*, 27 CORP. OFFICERS & DIRS. LIAB. 1, 4 (2011) (same); Amy Schmitz, *Regulation Rash? Questioning the AFA’s Approach for Protecting Arbitration Fairness*, 10 BANKING & FIN. SERV. POL’Y REP. 16 (2009) (suggesting need for encouragement of use of arbitration due process protocols, in lieu of AFA, and identifying “top ten suggestions” for protocols); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 258-60 (2007) (suggesting that, rather than resisting enforcement of arbitration clauses, consumer advocates should focus on arbitral impartiality and adherence to substantive law); Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37 (2007) (advancing need for procedural regulation in lieu of statute barring pre-dispute arbitration agreements). Such systems, of course, are not a panacea. See Thomas J. Stipanowich, *Future Lies Down a Number of Divergent Paths*, 6 DISP. RESOL. MAG. 16, 16 (2000) (“One-size-fits-all approaches [to arbitration] are outmoded and intrinsically problematic.”); Margaret M. Harding, *The Limits of Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 372 (2004) (“The lack of [enforcement] provisions makes it impossible to determine if the due process protocols are in fact being followed by individual arbitrators and arbitration service providers in actual cases.”). Further, at least some suggest that legislation is required, to enforce such protocols. See Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 117 (2010) (suggesting that “shoulds” of arbitration due process protocols should become legislated “musts”).

¹¹¹ See, e.g., *Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee* (Apr. 17, 1998), AM. ARB. ASS’N, http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_005014&revision=latestreleased (last visited May 23, 2012); *JAMS Policy on Consumer Arbitrations Pursuant to Predispute Clauses: Minimum Standards of Procedure Fairness (effective July 15, 2009)*, JAMS, <http://www.jamsadr.com/consumer-arbitration/> (last visited May 23, 2012). See generally Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 385–87 (2008) (differentiating between “mass” and “custom” arbitration proceedings).

¹¹² Consumer and employee education on the operation of arbitration systems may be essential to an effective system. See Amy J. Schmitz, *Considerations of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN’S L. REV. 123, 160 (2007) (noting that “consumers rarely read or understand” arbitration clauses); Debra Pogrud Stark & Jessie M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617 (2009) (discussing studies suggesting that consumers are unlikely to read standard form contracts); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 57 (1997) (noting concern that individuals signing arbitration agreements do not understand the nature of arbitration).

¹¹³ For general discussion on the notion of the government as a “model employer,” demonstrating the effectiveness of new systems for resolving disputes, see PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION (Dale Belman et al. eds., 1996).

resolution.¹¹⁴ Courts, moreover, may play a role in encouraging the use of fair and effective alternative dispute resolution.¹¹⁵

Moving from encouragement and support to legislation that alters arbitration procedure, “least harm” alternatives to the AFA might focus on the essential problem posed by *AT&T Mobility* (and other recent decisions). Is the class action system fundamentally inconsistent with arbitration processes?¹¹⁶ Additional research and experimentation certainly would help to answer that question.¹¹⁷ Further, if class arbitration is feasible and effective, should it be available as an option, even where parties have not agreed (in advance) to use that procedure?

One alternative to the AFA would put the choice to “opt out” from arbitration in the hands of the individual. A more targeted approach, focused on the potential need for class action treatment of certain disputes, might give both sides the option to opt out. Where an individual claimant (subject to a pre-dispute arbitration agreement) could show that class action treatment is necessary for effective relief, the individual might demand class action arbitration. If the responding party agreed, then the question of class certification in arbitration would be decided by an arbitration tribunal.¹¹⁸ If the responding party refused, then the individual might have the right to proceed with a request for class action treatment in federal court (subject to referral to individual arbitration if no class were certified).¹¹⁹ This form of “Class Arbitration Fairness Act”

¹¹⁴ The Online Dispute Resolution (“ODR”) program adopted for eBay buyers and sellers, for example, has produced successful resolution of tens of thousands of disputes. See [ebay.com, Resolving Transaction Problems in the Resolution Center](http://pages.ebay.com/help/buy/resolving-problems.html), <http://pages.ebay.com/help/buy/resolving-problems.html> (last visited May 23, 2012). For a discussion of other ODR programs, see, e.g., David A. Larson, “*Brother, Can You Spare a Dime?*” *Technology Can Reduce Dispute Resolution Costs When Times are Tough and Improve Outcomes*, 11 NEV. L.J. 523 (2011) (suggesting that creation of culture familiar with internet, cellular telephones and other electronic communications systems may foster use of technology-mediated dispute resolution); David A. Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 OHIO ST. J. ON DISP. RESOL. 629 (2006); Jim Keane & Debi Miller-Moore, *Linking Information Technology and Dispute Resolution: Framing the Future of Online Dispute Resolution Using OdrXML*, 59 DISP. RESOL. J. 58, 58-59 (2004) (discussing Cybersettle system, used in the insurance industry to produce 70,000 settlements).

¹¹⁵ See Steven C. Bennett, *Court-Ordered ADR: Promises and Pitfalls*, 71 PA. B.A. Q. 23 (2000).

¹¹⁶ Compare Neal Troum, *Drawing a Line After AT&T Mobility: How Far Does the FAA Reach into State Contract Regulation?* 29 ALTERNATIVES 129, 135 (2011) (“Arbitration is not the place for class treatment, where there is a preemption of absent class members’ claims but no rigorous rules to ensure that such claims are preempted only after notice and lots of procedural hoops have been jumped through.”), with Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1074 (2011) (noting “doctrinal convergence” between litigation and arbitration); Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 265 (1990) (“nonsense” to equate arbitration and litigation, in expecting one to operate like the other).

¹¹⁷ Such information may include experiences from abroad. See S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT’L L. & COM. REG. 921 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1967101 (manuscript at 2) (noting that “[i]nterest in class and collective relief in arbitration is increasing all over the world”).

¹¹⁸ Due process protocols for class arbitration have been proposed, and might be encouraged in the same manner as (more generally) due process protocols for consumer arbitration have developed. See Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 259–63 (2006) (proposing due process protocols for class arbitration).

¹¹⁹ Presumably, ordinary standards for class action certification would apply in federal proceedings, including proof of commonality of interest of the class members. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011) (holding that variations in circumstances of plaintiffs precluded class action treatment; plaintiffs must offer “significant proof” that employer operated under a “general policy” of discrimination, to establish commonality). One can also imagine the addition of some form of sanction for frivolous demands of class treatment, where intended merely to avoid arbitration.

would, in part, overrule *AT&T Mobility*, but would also preserve the essence of FAA jurisprudence: the grounding of arbitration in freedom of contract.¹²⁰ Although the ability to waive class action rights altogether would be affected, the choice of class arbitration treatment, and the methods of class arbitration, would remain in the hands of the parties.¹²¹ Thus, even if businesses consistently preferred in-court class litigation over class arbitration,¹²² the choice would be theirs, rather than imposed by court or Congress.¹²³

VI. CONCLUSION

Vigorous debate on the wisdom of the Supreme Court decision in *AT&T Mobility* and related cases will, no doubt, continue.¹²⁴ So, too, variations on the AFA legislative scheme may regularly appear in Congress.¹²⁵ Finally, the newly-constituted Consumer Financial Protection Bureau may influence the debate with release of its conclusions regarding arbitration procedures and the need for regulation.¹²⁶ All three branches of government may take up these issues at the state level as well.

¹²⁰ See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”) (quotations omitted) (citing *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

¹²¹ In this regard, the proposal would involve much less change than a complete ban on pre-dispute arbitration agreements, or even an automatic right to class action treatment in court. See Sarah Randolph Cole, *On Babies and Bath Water: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 498 (2011) (suggesting that any amendment of the FAA should focus on the need for a class vehicle for consumer arbitration, rather than banning all pre-dispute arbitration agreements; proposing an FAA amendment to the effect that an arbitration agreement with a consumer is “invalid to the extent that it precludes the consumer from accessing the court or arbitral system to participate in a class action”).

¹²² See Jeffrey J. Greenbaum & Jason L. Jurkevich, *Class Action Waivers in Arbitration Agreements: Can They Survive?*, 11 CLASS ACTION LITIG. RPT. 39, 49 (2010) (“Companies tend to be averse to class arbitration, believing it combines the disadvantages of class action litigation . . . with the disadvantages of arbitration[.]”); David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History*, 63 BUS. LAW. 55, 62 (2007) (same).

¹²³ See W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 100–02 (2007) (suggesting that class arbitration processes could be modified to become more cost-effective and efficient, making them more attractive to individuals and businesses for resolution of large scale disputes); John H. Quisenberry & Susan Abitanta, *Can Employers Preclude Class Actions Through Mandatory Arbitration Agreements that are Silent as to Whether Classes are Permitted?*, CONSUMER ATT’YS OF CAL. FORUM MAG., June 2005, at 22, 24–26 (suggesting that classwide arbitration, if properly administered, can provide parties with same benefits as in-court class proceedings). See also Philip Allan Lacovara, *Class Action Arbitrations—The Challenge for the Business Community*, 24 ARB. INT’L 541 (2008).

¹²⁴ See Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT’L ARB. 435 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938565 (noting that the Supreme Court’s arbitration jurisprudence “will continue to generate endless discussion”).

¹²⁵ See Nancy Welsh, *What is “(Im)partial Enough” in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 395, 405 (2010) (describing AFA as “oft-introduced, oft-ignored” in Congress).

¹²⁶ Richard Cordray, newly appointed as Director of the Bureau, recently remarked: “We understand the importance of this issue, and we’ll be moving forward as required by Congress.” Michelle Singletary, *Why You Cannot Take Your Credit Card Company to Court*, WASH. POST, Jan. 22, 2012, at G1. See also *Arbitrate This!*, COMPLIANCE RPT., Aug. 8, 2011 (stating that it is not “outlandish” to foresee “a change in the landscape” from CFPB action); Kate Davidson, *Supreme Court Gives Banks a Win on Arbitration, but Will CFPB Trump it?*, AM. BANKER, Apr. 28, 2011 (noting that “[s]ome banking lawyers said they do not think the CFPB has much room to change the law”).

We probably cannot (and should not) engage in a wholesale reconstruction of the American arbitration system.¹²⁷ One hopes, at least, that the national debate can proceed with decorum and deliberation, and some common sense of purpose.¹²⁸

¹²⁷ The field of dispute system design, however, can improve understanding of the potential consequences of changes in the system. See Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009) (offering framework for analysis of dispute systems); Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1 (2008) (providing an overview of the field of dispute systems design).

¹²⁸ In 2011, the Senate Judiciary Committee held hearings related to the AFA, entitled “Arbitration, Is It Fair When Forced?” See *Arbitration, Is It Fair When Forced?: Hearing Before the S. Judiciary Comm.*, 112th Cong. 108 (2011) (statement of Sen. Al Franken) (“We may not all agree on the best ways to move forward, and on which legislative proposals are needed[.] . . . Perhaps today’s hearing can help us determine whether there is a sound middle ground[.]”).