

OUTSOURCING AMERICAN CIVIL JUSTICE: MANDATORY ARBITRATION CLAUSES IN CONSUMER AND EMPLOYMENT CONTRACTS

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I. INTRODUCTION

The Seventh Amendment right to a jury trial is vanishing before our very eyes.¹ Many sources point to the increased reliance upon alternative dispute resolution, and mandatory arbitration specifically, as an explanation for this trend.² As practicing attorneys, we never paid much attention to the increasing impact arbitration was having on our civil justice system. Since taking the bench, however, we have witnessed an alarming increase in the use of contract clauses mandating arbitration as a mechanism to take the resolution of civil conflicts away from citizen-juries and place it instead into the hands of professional arbitrators. The practical effect of enforcing these provisions is a paradigmatic shift in our civil justice system—no longer is it based upon the fundamental right of trial by jury. A person cannot open a bank account, obtain a credit card, buy a car, or use a cell phone without contracting away the Seventh Amendment right to a jury trial.³ In reality, a person must yield his or her very access to the courts in order to meaningfully participate in our modern society.⁴ Slowly but surely, the widespread enforcement of mandatory arbitration clauses has chipped away at the basic tenets of contract law and of the fundamental freedoms upon which our nation was founded: the right to a jury trial in civil cases.

In this Article, we focus our criticism on the use of mandatory arbitration clauses in consumer and employment agreements, not in contracts between entities operating at arm's-length.⁵ We recognize the ostensible benefits that arbitration brings to agreements between parties of equal bargaining power. These include, *inter alia*, confidentiality, expediency, and cost efficiency.⁶ While this alternative forum may serve the purpose of judicial efficiency, the hidden deleterious effects associated with its use in resolving disputes between parties of unequal bargaining power drastically outweigh its value.

We discuss the gradual transition away from our traditional, jury-based civil justice system to a privatized system of conflict resolution, with focus on

1. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 514 (2004). From 1962 to 2002, the annual number of civil trials declined by more than 20%. *Id.* This decline was most dramatic between the years of 1985–2002, where the annual number of civil trials fell by more than 60%. *Id.* Texas, like most states, seems to have experienced a similar decline in the number of civil cases resolved by trial. See Justice Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 165 (2005).

2. See, e.g., Chief Justice Wallace B. Jefferson, *The State of the Judiciary in Texas*, 70 TEX. B. J. 314, 315 (Apr. 2007).

3. See Galanter, *supra* note 1, at 514–15.

4. See Jefferson, *supra* note 2, at 314.

5. Arm's-length is defined as “[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power.” BLACK’S LAW DICTIONARY 123 (9th ed. 2009).

6. See, e.g., *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1749 (2010); Vicki Zick, Comment, *Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 MARQ. L. REV. 247, 250 (1998).

the U.S. Supreme Court's expansive interpretation of the Federal Arbitration Act (FAA). Part I of this Article recognizes the Seventh Amendment right to a trial in civil cases and sets the stage for mandatory arbitration's erosion of this constitutional right. Part II traces the evolution of case law interpreting the FAA and the development of the Court's current policy favoring arbitration. Part III addresses the current state of this area's jurisprudence as established by two recent Supreme Court decisions: *AT&T Mobility, L.L.C. v. Concepcion* and *Rent-A-Center, West, Inc. v. Jackson*.⁷ Part IV identifies problems posed by the use of arbitration in other than arm's-length transactions, emphasizing its restriction on individual access to our civil justice system, vis-à-vis the Seventh Amendment right to a jury trial. We submit that, in these types of transactions, the current policy endorsing blanket enforcement of agreements to arbitrate should cease. Instead, courts should adopt a national policy returning to constitutional protection and disfavoring mandated arbitration and contracts of adhesion. Part V discusses the various legislative proposals that would restrict or eliminate arbitration in consumer and employment contracts. Finally, Part VI suggests that Congress implement legislation to protect relationships between parties of unequal bargaining power from the harmful consequences of a national policy favoring arbitration.

II. THE SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY

The right to trial by jury is the only right that received the attention of the Framers of the Constitution in two separate amendments to the Bill of Rights.⁸ Many scholars and practitioners have noted, and some with alarm, the increased use of contract clauses mandating arbitration as the mechanism to take decisions related to the rights of competing parties away from citizen-juries and place them instead into the hands of professional arbiters.⁹ Some commentators, as well as a number of jurists, have even suggested that the increased requirement of arbitration cannot coexist with the constitutionally guaranteed right to trial by jury.¹⁰

A number of guarantees that were considered fundamental by the Framers of the United States Constitution were not included in that document's original drafts. These guarantees were thought to be indispensable to the essence of the Republic, and as such, were placed within the Bill of Rights prior to the Constitution's ratification.

In *Adamson v. California*, the U.S. Supreme Court held that the Fifth Amendment protection against self-incrimination was not so fundamental as to

7. *AT&T Mobility*, 131 S. Ct. 1740; *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

8. See U.S. CONST. amends. VI-VII.

9. See, e.g., David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 438, 469-78 (2011).

10. See Paul B. Weiss, Comment, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 765-67 (1989).

apply to state prosecutions.¹¹ Notably, the Justices differed over the incorporation of the Bill of Rights to the individual states.¹² The Court's analysis turned on the notion of the fundamental nature of the rights as enumerated.¹³ Writing for the Court, Justice Miller provided the following guidance as gleaned from earlier Supreme Court precedent: the only way the Bill of Rights protection could be applied in state court would be if it were "implicit in the concept of ordered liberty."¹⁴ In other words, a right must be so basic—so fundamental—that no system could be considered truly just without providing for such a right. The guarantees of speech, free exercise of religion, and security in persons and homes were considered directly fundamental.¹⁵ Rights of the criminally accused have been similarly characterized.¹⁶ The Magna Carta notwithstanding, however, the right to trial by jury in a civil case has not been determined to be so fundamental.¹⁷

In *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* in 1897, the Supreme Court for the first time held as fundamental a specific provision of the Bill of Rights, the Just Compensation Clause of the Fifth Amendment, through the due process guarantees of the Fourteenth Amendment and thereby made the same applicable to the individual states.¹⁸ In *Malloy v. Hogan*, the Court specifically rejected the notion that the Fourteenth Amendment applied to the states "only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"¹⁹ Thereafter, through the first half of the twentieth century, constitutional jurisprudence struggled with the question of the rights secured by the first eight amendments to the Constitution and their applicability to the states.²⁰ For the most part, the answer came to be, occasionally begrudgingly: "Yes, they are fundamental."²¹ Hence, as the incorporation of the Bill of Rights continued throughout the nineteenth and twentieth centuries, a majority of the Court determined many rights to be fundamental and therefore guaranteed to all citizens of the United States.²²

11. See *Adamson v. California*, 332 U.S. 46, 53-54 (1947).

12. *Id.* at 49-51.

13. See *id.* at 50-59.

14. *Id.* at 54 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

15. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (stating that the rights and interests protected by the Free Exercise Clause in the First Amendment are a fundamental right); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (explaining that freedom of speech as protected by the First Amendment is a fundamental personal right and liberty).

16. See *Adamson*, 332 U.S. at 53-54; U.S. CONST. amend. VI.

17. See *Adamson*, 332 U.S. at 78-84 (Black, J., dissenting). It should be noted that calling himself one of the first "Originalists," Justice Hugo Black opined in his dissent in *Adamson* that each of the rights enshrined in the Bill of Rights was placed there precisely because they were (at least to his mind) fundamental to the concept of ordered liberty and essential freedom. See *id.* at 70-71.

18. See *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 233-34 (1897).

19. *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting)).

20. See *infra* notes 23-35 and accompanying text.

21. See *infra* notes 23-35 and accompanying text.

22. See *infra* notes 23-35 and accompanying text.

In *Gitlow v. New York* in 1925, the Court held that the Due Process Clause of the Fourteenth Amendment extended the reach of the First Amendment to the extent that guarantees of freedom of speech and freedom of the press found in that Amendment were so fundamental as to warrant protection, not only against congressional interference, but also from interference from any individual state.²³ Similarly, in *De Jonge v. Oregon* in 1937, the Court also held the First Amendment right to free assembly fundamental and made it applicable to the states.²⁴ In 1940, the Supreme Court in *Cantwell v. Connecticut* held that the states could not impose restrictions based on religious grounds without running afoul of the First Amendment's guarantee of religious protection because the free exercise of religion was also fundamental.²⁵

Fourth Amendment guarantees protecting the rights of those accused of crimes were deemed fundamental and incorporated as applicable to the individual states in 1961 via *Mapp v. Ohio*.²⁶ There, the Supreme Court held that evidence obtained via searches and seizures that were in violation of the Fourth Amendment was inadmissible in state court proceedings.²⁷

In *Miranda v. Arizona*, the Court incorporated the Fifth Amendment right to representation by counsel as well as the right against self-incrimination, making these rights of the accused fundamental and therefore applicable to the individual states.²⁸ Thereafter, in 1969, the Court deemed the Fifth Amendment protection against double jeopardy similarly fundamental and applicable to the individual states in *Benton v. Maryland*,²⁹ as was the Sixth Amendment right to a speedy trial in *Klopper v. North Carolina* in 1967.³⁰

Significantly, the Sixth Amendment right to trial by jury in criminal cases was determined to be a right so fundamental as to mandate respect by the states in *Parker v. Gladden*.³¹ The Supreme Court reaffirmed this position upon review of Louisiana state criminal procedures in *Duncan v. Louisiana* in 1968.³² There, the majority affirmed the Sixth Amendment guarantee to trial by jury and imposed it upon the states again.³³ The *Duncan* Court's analysis determined that the fundamental Sixth Amendment guarantee of trial by jury was founded upon "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."³⁴ The Court determined that

23. See *Gitlow v. New York*, 268 U.S. 652, 666-67 (1925).

24. See *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937).

25. See *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

26. See *Mapp v. Ohio*, 367 U.S. 643, 654-56 (1961).

27. *Id.* at 655.

28. See *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

29. See *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

30. See *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967).

31. See *Parker v. Gladden*, 385 U.S. 363, 364-66 (1966).

32. See *Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968).

33. See *id.* at 149.

34. *Id.* at 148 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

the questions were whether the perceived right is basic in our system of jurisprudence and whether it is a “fundamental right, essential to a fair trial.”³⁵

We suggest that the constituent components that led the *Duncan* Court to determine that a criminal defendant’s right to a trial by jury are concomitant with those contemplated by the Framers in drafting the Seventh Amendment as well. It is the citizen-jury itself that embodies our system of jurisprudence and is essential to a fair trial. In the same vein, the citizen-jury lies at the base of our civil institutions.³⁶ However, Seventh Amendment guarantees were not found to be sufficiently fundamental as to warrant incorporation via the Fourteenth Amendment.³⁷ As such, the right to trial by jury in civil controversies is not a guaranteed right to all citizens of the U.S.³⁸

How has it then come to be that this essential element to a fair trial, this base of our civil institutions, is disappearing from our courts? We, as judges in the Civil District Court of Texas, are seeing an increasing number of “Motions to Abate and Compel Arbitration.” Correspondingly, and not surprisingly, we also bear witness to a drop in the number of commercial cases actually proceeding to jury trial.

III. SETTING THE STAGE: ARBITRATION’S ASSENT TO THE PROMINENT STATUS IT ENJOYS TODAY

Recent developments stemming from the Supreme Court’s decisions in *AT&T Mobility, L.L.C. v. Concepcion* and *Rent-A-Center, West, Inc. v. Jackson*

35. *Id.* at 148-49 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963)).

36. *See, e.g.*, THOMAS JEFFERSON, *THE JEFFERSONIAN CYCLOPEDIA* 450 (John P. Foley ed., 1900) (statement of Thomas Jefferson: “I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”); 2 JONATHAN ELLIOT’S *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 94 (James McClellan & M.E. Bradford eds., 1991) (1787) (statement of Theophilus Parsons: “[T]he people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.”); 2 GEORGE BANCROFT, *HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 267 (D. Appleton & Co. 1882) (offering context for statement of Theophilus Parsons); 1 EDWIN BURRITT SMITH & ERNEST HITCHCOCK, *REPORTS OF CASES ADJUDGED AND DETERMINED IN THE SUPREME COURT OF JUDICATURE AND COURT FOR THE TRIAL OF IMPEACHMENTS AND CORRECTION OF ERRORS OF THE STATE OF NEW YORK* 725 (1883) (statement of Alexander Hamilton in the case of *People v. Cromwell*, 3 Johns. Cas. 337, 362 (N.Y. Sup. Ct. 1804): “That, in criminal cases, nevertheless, the court are the constitutional advisers of the jury, in matters of law, who may compromi[se] their consciences by lightly or rashly disregarding that advice; but may still more compromi[se] their consciences by following it, if, exercising their judgments with discretion and honesty, they have a clear conviction that the charge of the court is wrong.”).

37. *See Adamson v. California*, 332 U.S. 46, 78 (1947) (citing *Walker v. Sauvinet*, 92 U.S. 90 (1875)); *see also Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (“The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.”).

38. *See Adamson*, 332 U.S. at 78 (citing *Walker*, 92 U.S. at 90).

have once again made arbitration a topic of widespread contention.³⁹ These holdings, which have profoundly negative implications for consumers and employees, are only the latest in a line of increasingly pro-arbitration Supreme Court decisions stretching back decades. Since that time, the Court has steadily increased both the scope of matters considered appropriate as well as the powers of the arbitrators to determine their very own *raison d'être*—in law and in fact.

A. *The Federal Arbitration Act of 1925*

In the early twentieth century, mandatory arbitration was almost nonexistent due to the judiciary's widespread refusal to enforce arbitration agreements.⁴⁰ Arbitration clauses began to appear with limited frequency and almost exclusively to settle fact-based contractual disputes between merchants.⁴¹ In an attempt to “reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts[,]” Congress passed the Federal Arbitration Act of 1925.⁴² The FAA provides that a “written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴³ Its early proponents suggested that an arbitrator's expertise and ability to quickly resolve disputes concerning particular issues arising in contractual disputes made arbitration an attractive alternative to costly and time-consuming litigation.⁴⁴

Evidence suggests that Congress intended to limit the FAA “in three crucial ways.”⁴⁵ First, Congress intended the FAA as a “federal procedural rule that neither applied in state court nor preempted state law.”⁴⁶ Second, “the FAA was part of an effort to gain uniformity in the application of agreements to arbitrate” interstate commercial transactions.⁴⁷ It was “never intended . . . to apply to employment contracts of any sort.”⁴⁸ Finally, Congress intended the FAA to apply to contracts between parties at arm's-length, not to parties with unequal bargaining power.⁴⁹ After nearly forty years as a federal procedural

39. *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

40. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

41. *See Horton*, *supra* note 9, at 444.

42. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).

43. 9 U.S.C. § 2 (2000).

44. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 415 (1967) (Black, J., dissenting).

45. *Horton*, *supra* note 9, at 445.

46. *Id.* at 445-46.

47. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1090 (9th Cir. 1999), *abrogated by Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

48. *Id.*

49. *See, e.g., Horton*, *supra* note 9, at 447.

mechanism for the resolution of disputes between parties of equal bargaining power, judicial interpretation of the FAA gradually expanded its reach into areas not contemplated by its original supporters, creating a “parallel procedural regime for consumer and employment cases.”⁵⁰

B. Robert Lawrence Co. v. Devonshire Fabrics, Inc.

In what would become the first in a number of cases interpreting the FAA as a “substantive” as well as “procedural” statute, the Second Circuit decided *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*⁵¹ There, Robert Lawrence Co. alleged that Devonshire Fabrics, Inc. made fraudulent misrepresentations that induced it into entering a transaction where it agreed to purchase and Devonshire Fabrics agreed to sell woolen fabrics.⁵² The validity of a clause within the contract that mandated arbitration was challenged.⁵³ The court was faced with the question of whether the FAA or state law governed the determination of the validity and interpretation of the arbitration clause contained in a contract.⁵⁴

Despite legislative history indicating congressional purpose that the FAA be a federal procedural statute, the court found “a reasonably clear legislative intent to create a new body of substantive law relative to arbitration agreements affecting commerce or maritime transactions.”⁵⁵ It further opined that, with the exception of the validity of the agreement to arbitrate itself, any challenge to a contract at issue is arbitrable.⁵⁶ The court stated that the FAA “is substantive not procedural in character and . . . it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce.”⁵⁷ Because the agreement between Robert Lawrence Co. and Devonshire Fabrics, Inc. affected interstate commerce, the court held that federal law preempted California state law and the FAA controlled.⁵⁸

In construing the FAA as substantive rather than purely procedural law, the Second Circuit not only extended the statute to reach the *Erie*-type diversity cases that so troubled Justice Frankfurter in his concurrence in *Bernhardt*, but also interpreted it as overriding contrary state law, effectively invalidating years of arbitration jurisprudence in state courts.⁵⁹ All contractual issues became

50. *Id.* at 444.

51. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959).

52. *Id.* at 404.

53. *See id.*

54. *See id.*

55. *Id.*

56. *See id.* at 406-07.

57. *Id.* at 409.

58. *Id.*

59. *See id.*; *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 207-12 (1956) (Frankfurter, J., concurring).

arbitrable, with the limited exception of the validity of the agreement to arbitrate itself.⁶⁰

C. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*

Eight years after *Robert Lawrence Co.*, the Supreme Court adopted the Second Circuit's reasoning in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁶¹ *Prima Paint* involved an agreement where Flood & Conklin Manufacturing Company (F&C) was to provide consulting services to Prima Paint.⁶² Prima Paint alleged that F&C fraudulently induced it to sign the contract.⁶³ F&C claimed that the issue of whether there was fraud in the inducement of the contract should be determined by the arbitrator, pursuant to the contract's arbitration clause.⁶⁴

Because Prima Paint claimed fraud in the inducement of the contract generally, and not particularly in relation to the arbitration clause, the Court ordered that the parties address the contractual issues in arbitration, not in the federal courts.⁶⁵ This expansion from the FAA as procedural to substantive law is critical to the development of case law in the arbitration arena because it preempts substantive state legislation in this field.⁶⁶

The Court also adopted the Second Circuit's position on severability of arbitration agreements, holding that, pursuant to federal law, an arbitration clause is separable from the contract as a whole unless a claim is made against the arbitration clause itself.⁶⁷ In other words, unless the validity of the arbitration clause itself is at issue, contractual issues subject to resolution through arbitration will remain subject to arbitration.⁶⁸ Ultimately, the Court's decision in *Prima Paint* chipped away at the Seventh Amendment right to a jury trial by substantially increasing the number of disputes that, as a matter of law, must be resolved by arbitration.⁶⁹

D. *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*

In 1977, the Supreme Court's decision in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* dealt with the interaction between the Occupational Safety and Health Act (OSHA) and the FAA.⁷⁰

60. See *Robert Lawrence Co.*, 271 F.2d at 409.

61. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

62. *Id.* at 397.

63. *Id.* at 398.

64. *Id.* at 399.

65. See *id.* at 400.

66. See *id.*

67. See *id.* at 403-04.

68. See *id.*

69. See *id.* at 406.

70. See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 444-45 (1977).

Congress enacted OSHA in 1970 to address the growing problem of employee deaths and injuries caused by unsafe working conditions.⁷¹ In 1972, the Secretary of Labor cited petitioner Atlas Roofing Co. (Atlas) for hazardous work conditions that caused the death of an employee.⁷² Under OSHA, the administrative law judges and then the Health Review Commission review challenges to citations and penalties.⁷³ Atlas contended that “a suit in a federal court by the [g]overnment for civil penalties for violation of a statute is a suit for a money judgment which is classically a suit at common law”; therefore, it “has a Seventh Amendment right to a jury determination of all issues of fact in such a case.”⁷⁴ Because the procedure for review of claims under OSHA did not allow Atlas the opportunity to voice its grievances to a jury, Atlas claimed that it was deprived of its Seventh Amendment right to a jury.⁷⁵ The issue before the Court was whether assigning the task of adjudicating OSHA violations to an administrative agency violated the Seventh Amendment.⁷⁶

In its decision, the Court noted that “Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.”⁷⁷ The Court held that Congress may, without conflicting with the Seventh Amendment, assign to administrative agencies the adjudication of newly created statutory “public rights,” such as those available under OSHA, “with which a jury trial would be incompatible.”⁷⁸ Further, the Court held that the Seventh Amendment was meant to preserve the right to a jury trial in civil cases that existed at common law, not to mandate a right to such trial when one had not existed before.⁷⁹

E. *Southland Corp. v. Keating*

While *Prima Paint* certainly extended the Act’s impact beyond “procedural” issues, the Court’s *Southland Corp. v. Keating* decision stretched its reach even further. *Southland* involved a franchise agreement between 7-Eleven owner and franchisor Southland Corporation, and Keating, a franchisee.⁸⁰ Keating and nearly eight hundred other franchisees brought a class-action suit against Southland, claiming, among other things, breach of contract, fraud, and oral misrepresentation.⁸¹ In determining the applicability of

71. *Id.* at 445.

72. *Id.* at 447.

73. *See id.* at 447-48.

74. *Id.* at 449.

75. *See id.* at 448.

76. *Id.* at 449.

77. *Id.* at 450.

78. *Id.* at 455.

79. *Id.* at 459.

80. *Southland Corp. v. Keating*, 465 U.S. 1, 3-4 (1984).

81. *Id.* at 4.

an arbitration clause in the franchise agreement, the Court had to decide whether the FAA preempted a California franchise investment law.⁸² In holding for Southland Corporation, the Court reiterated that “[t]he Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause.”⁸³ This substantive law is applicable in both state and federal courts and preempts conflicting state laws.⁸⁴

In the most significant portion of the Court’s decision, Chief Justice Burger interpreted Congress’s enactment of § 2 of the FAA as a declaration of a “national policy favoring arbitration.”⁸⁵ Further, he held that the FAA “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,” thereby “mandat[ing] the enforcement of arbitration agreements.”⁸⁶ The Court’s newly created “national policy favoring arbitration” marked a tipping point where mandatory arbitration provisions expanded beyond commercial, arm’s-length negotiated agreements.⁸⁷

F. *Gilmer v. Interstate/Johnson Lane Corp.*

Due in part to the unprecedented increase in statutory employment rights in the 1960s and the subsequent increase in employment-related litigation, judicial efficiency has become an oft-cited rationale behind the courts’ acceptance and endorsement of arbitration.⁸⁸ Perhaps as a response to this increase in litigation, the courts expanded the use of arbitration under the FAA to apply to transactions between parties of unequal bargaining power.⁸⁹ *Gilmer v. Interstate/Johnson Lane Corp.* illustrates this transition from arbitration as a tool used primarily to resolve disputes between entities with relatively equal bargaining power to its use in employer–employee and consumer–merchant relationships.⁹⁰

In *Gilmer*, a dispute arose concerning Interstate/Johnson Lane Corporation’s termination of its employee.⁹¹ *Gilmer*, the discharged employee, filed suit against Interstate, alleging that the company violated the Age Discrimination in Employment Act (ADEA) by discharging him because of his age.⁹² In response, the company sought to compel arbitration pursuant to an arbitration clause embedded in an application *Gilmer* had filed when he

82. *Id.* at 3.

83. *Id.* at 11.

84. *See id.* at 11-13.

85. *Id.* at 10.

86. *Id.*

87. *See id.* at 7, 10-11.

88. *See, e.g.,* Zick, *supra* note 6, at 247-48.

89. *See id.*

90. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-42 (1991).

91. *Id.* at 23.

92. *Id.* at 23-24.

registered as a securities representative.⁹³ Gilmer asserted that arbitration panels would be biased and urged that courts should refuse to enforce arbitration agreements due to the inequality in bargaining power between employers and employees.⁹⁴ He also claimed that because arbitrators generally do not issue opinions, mandatory arbitration would result “in a lack of public knowledge of employers’ discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law.”⁹⁵

The Court was not persuaded by Gilmer’s arguments; it dismissed the bias argument holding that New York Stock Exchange arbitration rules (NYSE rule) and the FAA contain provisions that purportedly protect against such bias.⁹⁶ It found that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”⁹⁷ Thus, unless grounds to revoke the contract exist at law or in equity, even contractual disputes between parties of unequal bargaining power must be submitted to mandatory arbitration.⁹⁸ In addition, the Court found that the NYSE rule requiring the arbitration award to be in writing, contain a summary of the controversy, and be made public was sufficient to address Gilmer’s remaining argument.⁹⁹

IV. ARBITRATION TODAY: FAA TRUMPS PUBLIC POLICY

Two recent landmark Supreme Court decisions have pushed the Court’s preference for the enforcement of arbitration agreements even further by transforming what was once a special tool for special relationships into a broad brush limited only by the reach of the Commerce Clause.

A. *Rent-A-Center, West, Inc. v. Jackson*

In *Rent-A-Center, West, Inc. v. Jackson*, an employee, Jackson, sued his employer, Rent-A-Center, for employment discrimination.¹⁰⁰ Rent-A-Center sought to compel arbitration of the employee’s complaint under the FAA, pursuant to a broad arbitration clause contained in the employment contract.¹⁰¹ The clause required arbitration in “all ‘past, present or future’ disputes arising out of Jackson’s employment.”¹⁰² The agreement also contained a delegation provision, which “provided that ‘[t]he Arbitrator, and not any federal, state, or

93. *Id.* at 24.

94. *See id.* at 30, 32-33.

95. *Id.* at 31.

96. *See id.* at 30-31.

97. *Id.* at 33.

98. *See id.*

99. *See id.* at 31-32.

100. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2775 (2010).

101. *See id.*

102. *Id.*

local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of th[e] Agreement is void or voidable.”¹⁰³ Jackson attacked the arbitration clause as unconscionable.¹⁰⁴ Rent-A-Center maintained that the issue of unconscionability should be resolved by the arbitrator pursuant to the contract terms.¹⁰⁵

The ultimate issue before the Court was “whether, under the Federal Arbitration Act . . . , a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator.”¹⁰⁶ According to *Prima Paint*, an arbitration clause may be severed from the underlying contract.¹⁰⁷ In order to avoid arbitration, a party challenging the contract must attack the arbitration clause specifically, not the contract generally.¹⁰⁸ In *Rent-A-Center*, the Court applied this same logic.¹⁰⁹ The delegation clause at issue could, like the arbitration clause in *Prima Paint*, be severed from the rest of the contract if challenged directly.¹¹⁰

Jackson alleged that a fee-splitting arrangement and limitations on discovery, as required by the contract, rendered “the *entire arbitration agreement*, including the delegation clause, . . . unconscionable.”¹¹¹ The Court stated that where the parties delegate to the arbitrator the task of determining unconscionability, the Court must treat the delegation clause as valid and enforceable unless a party challenges it specifically.¹¹² Jackson “did not make any arguments specific to the delegation provision; he argued that the fee-sharing and discovery procedures rendered the *entire* Agreement invalid.”¹¹³ Because he did not claim that the delegation clause, specifically, was unconscionable, the Court upheld the arbitration agreement and left the issue of unconscionability to the arbitrator.¹¹⁴

Until this case, the issue of whether an arbitration agreement was unconscionable was determined by the court, not by an arbitrator.¹¹⁵ With this decision, parties are empowered to delegate that role instead to an arbitrator.¹¹⁶ This effectively gives the arbitrator the discretion to decide whether or not he or

103. *Id.* (first alteration in original).

104. *See id.*

105. *See id.*

106. *Id.*

107. *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

108. *See id.*

109. *See* *Rent-A-Center*, 130 S. Ct. at 2777-79.

110. *See id.* at 2779.

111. *Id.* (citing Brief for Respondent at 55).

112. *See id.*

113. *Id.* at 2780.

114. *See id.*

115. *See id.* at 2786 (Stevens, J., dissenting).

116. *See id.*

she has authority to perform a task that he or she will receive income for completing, thus creating an inherent and untenable conflict of interest.¹¹⁷

After *Rent-A-Center*, it is not enough to attack the arbitration clause directly.¹¹⁸ Rather, the party must specifically attack the validity of the delegation clause embedded in the arbitration clause in order to have a chance of having a complaint heard before a court.¹¹⁹ This new wrinkle makes it even more difficult for average employees and consumers to successfully challenge the validity of mandatory arbitration clauses.¹²⁰ This decision may also result in an increase in the number of these clauses that assign “gateway” issues, like unconscionability, to arbitrators in consumer and employment contracts.¹²¹

B. AT&T Mobility, L.L.C. v. Concepcion

AT&T Mobility, L.L.C. v. Concepcion involved a dispute over a cellular telephone contract between a consumer, Concepcion, and cellular service provider, AT&T Mobility, L.L.C. (AT&T).¹²² Concepcion alleged that AT&T had engaged in fraud and false advertising by charging sales tax on a phone that AT&T had advertised as “free.”¹²³ Concepcion’s claim was consolidated with a putative class action.¹²⁴ The cellular service contract, however, contained an arbitration clause with an embedded class waiver provision.¹²⁵ Concepcion argued that the arbitration agreement was “unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures.”¹²⁶ A California state law, which the Court referred to as the *Discover Bank* rule, deemed class waivers in adhesion contracts unconscionable.¹²⁷

The issue in this case was whether federal law, embodied in the FAA, or California state law, the *Discover Bank* rule, applied.¹²⁸ If the California law applied, the arbitration clause would be considered unconscionable, and Concepcion would be permitted to join in classwide arbitration against

117. See generally *id.* at 2788 (recognizing the problems with delegating the unconscionability determination to the arbitrator).

118. See *id.* at 2787.

119. See *id.* at 2779 (majority opinion).

120. See Edward F. Sherman, *Arbitration Law in Flux and Maritime Implications*, 85 TUL. L. REV. 1221, 1234 (2011).

121. See *id.* at 1234; see also *Rent-A-Center*, 130 S. Ct. at 2782 (Stevens, J., dissenting) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)) (explaining that “‘gateway matter[s]’ . . . are necessary antecedents to enforcement of an arbitration agreement; they raise questions the parties ‘are not likely to have though they had agreed that an arbitrator would’ decide”).

122. *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1744 (2010).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1745; see *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005).

127. See *AT&T Mobility*, 131 S. Ct. at 1746.

128. *Id.*

AT&T.¹²⁹ If the FAA preempted state law, Concepcion would have to submit to binding arbitration to determine the issue of unconscionability.¹³⁰

The Court found that by forbidding parties to incorporate class waivers into their contracts, the California law interfered with the FAA's "liberal federal policy favoring arbitration agreements."¹³¹ Appearing to find issue with class arbitration in general, the Court reasoned that compelling class arbitration in the absence of consent by all parties was likely to frustrate many of arbitration's beneficial attributes.¹³² The Court reasoned that "classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."¹³³ Ultimately, the Court held that the FAA preempted California's *Discovery Bank* rule because the California rule stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹³⁴ Therefore, the issue of the unconscionability of the class waiver was to be decided in binding arbitration.¹³⁵

This Supreme Court decision sounds a death knell for consumer class actions. Consumer claims are often small in value compared to amounts at issue in disputes between corporate entities.¹³⁶ Alone, these small-dollar claims appear insignificant and are far less likely to see their day in court.¹³⁷ In its decision, the Court acknowledged this concern and did not dispute its seriousness; however, it did not find these concerns sufficient to protect in the face of the stated controlling policy.¹³⁸

V. THE SYSTEM WE'RE LEFT WITH: PRIVATE LAW SUPPLANTS COMMON LAW?

Over the past five decades, judicial interpretation of the FAA has eroded the Seventh Amendment right to a jury trial. Between parties of equal standing, arbitration serves material purposes. It is often promoted as a faster, more flexible, and less expensive alternative to traditional litigation.¹³⁹ In addition, the arbitration process may also include simpler procedural and evidentiary rules.¹⁴⁰ Some arbitration advocates contend that, unlike combative litigation, arbitration may have the effect of minimizing hostility and causing less

129. *See id.* at 1745.

130. *See id.*

131. *Id.* at 1749-50 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

132. *See id.* at 1750.

133. *Id.* at 1748.

134. *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

135. *See id.* at 1752-53.

136. *See id.* at 1753; *id.* at 1761 (Breyer, J., dissenting).

137. *See* opinions cited *supra* note 136.

138. *See AT&T Mobility*, 131 S. Ct. at 1753.

139. H.R. REP. NO. 97-542, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777.

140. *Id.*

disruption to the “ongoing and future business dealings among the parties.”¹⁴¹ Particularly beneficial to commercial transactions, “arbitrators are frequently better versed than judges and juries in the area of trade customs and the technologies involved in [particular] disputes.”¹⁴² In the context of consumer and employment contracts, however, the benefits of a policy promoting broad enforcement of arbitration agreements are grossly outweighed by its ultimate effect.¹⁴³

A. *Judicial Endorsement of Adhesion Contracts*

The right of parties to contract is an essential component of our civil justice system. While there is little dispute that arbitration may be appropriate between parties with relative bargaining power, Congress did not intend the FAA to support the blanket enforcement of pre-dispute arbitration clauses in contracts of adhesion, such as those found in rental car and bank service agreements.¹⁴⁴ Senate hearings discussing the FAA reveal that “[i]t is purely an act to give the merchants the right or the privilege of sitting down and agreeing with *each other* as to what their damages are.”¹⁴⁵ This language does not contemplate the enforcement of arbitration clauses in agreements between parties not at arm’s-length, such as those in employment and consumer contracts.¹⁴⁶ On other occasions, members of Congress have “expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power.”¹⁴⁷

In consumer contracts, problems arise when large corporate entities insist upon arbitration agreements in contracts that consumers have no ability to negotiate.¹⁴⁸ The result is a contract of adhesion, in which the consumer is forced to “take it or leave it.”¹⁴⁹ This inequity is particularly acute when an entire industry demands arbitration. If every industry player requires arbitration of all contractual disputes, the consumer loses all bargaining power and is forced to succumb and sign away his or her rights in order to meaningfully participate in the marketplace. Most do not understand that by agreeing to

141. *Id.*

142. *Id.*

143. See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036-43 (1996) (describing the negative side effects of mandatory arbitration in the employment context).

144. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting).

145. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (emphasis added) (quoting *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923)).

146. See Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap “Sophisticated Parties” Too*, 2010 J. DISP. RESOL. 235, 236-37 (2010).

147. *Prima Paint Corp.*, 388 U.S. at 414 (Black, J., dissenting).

148. See Doneff, *supra* note 146, at 246.

149. See *id.*

arbitration, they are essentially waiving their constitutional right to a jury trial.¹⁵⁰

Equally widespread is an obvious disparity in bargaining position between a typical employer (of any size) and an individual job-seeker. The inclusion of arbitration clauses in an employment contract translates into the loss of trial by jury in the single most pervasive area of commercial dispute imaginable—employer–employee relations.

B. We Will Lose the Public Component of Our Civil Justice System

Another consequence of mandatory arbitration clauses in consumer and employment contracts is the loss of public component justice.¹⁵¹ Our civil justice system is an open court system, where public and private disputes are resolved in transparent proceedings.¹⁵² This system “ensures that the people . . . benefit from a full public airing of the issues, and it allows innovations and solutions learned from today’s cases to help resolve tomorrow’s disputes.”¹⁵³ Among its many benefits are consistency and “fair and even-handed justice.”¹⁵⁴ While private dispute resolution provides an important alternative to this open-court system, it comes with many hidden costs.¹⁵⁵

The very attributes that make arbitration an attractive alternative to formal litigation for certain contractual relationships make it ill-suited for others. Many cases sent to arbitration often pose important legal questions.¹⁵⁶ The resolution of these matters outside of the court system deprives the citizenry of an open, accessible development of the common law as it pertains to commercial, consumer, and employment disputes. Because arbitration is confidential, there is no public record of the proceedings, which can lead to inconsistent outcomes.¹⁵⁷ And in the event that parties reach an agreement through arbitration to compensate the weaker party for their injuries, the secrecy of the arbitration proceedings leaves other parties injured by similar actions unaware of the availability of relief.¹⁵⁸ This confidentiality-developed “case law” almost certainly results in inconsistent application of the law, which hurts the parties in the instant case as well as future parties to other cases who might benefit from the experience of their forbearers.¹⁵⁹

In addition, this type of injustice is particularly severe where the monetary value of the individual claims is relatively small, and the only way to achieve

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

151. See Jefferson, *supra* note 2, at 314.

152. See *id.*

153. *Id.*

154. See *id.*

155. See *id.*

156. See *id.*

157. See *id.*

158. See *id.* at 314, 316.

159. See *id.*

justice is through larger-scale proceedings such as class-action lawsuits.¹⁶⁰ With the Court's recent decision in *AT&T*, corporate entities can easily avoid these suits via class-waiver clauses.¹⁶¹ Because these types of decisions have made it increasingly more difficult for consumers and employees to join claims, forcing them instead into private arbitration proceedings, it is likely that the injured parties receive inconsistent relief, if any.¹⁶² Thus, in the context of consumer and employment disputes, arbitration leads to inconsistent results and undermines any chance at "fair and even-handed justice."¹⁶³

C. *The Independence of Arbitrators*

In consumer and employment disputes, the larger corporate parties insist on exercising arbitration clauses. Because they arbitrate repeatedly, they benefit from increased familiarity with the arbitrators as well as the arbitration process.¹⁶⁴ This pattern also creates a potential for arbitrators to act in a manner inconsistent with the neutrality that is critical to the fairness and effectiveness of the arbitration process.¹⁶⁵ For example, because corporate entities are often "repeat players" in the arbitration arena and thus more likely to seek the arbitrator's services in the future, there is an incentive for arbitrators to decide in their favor, thus losing neutrality.¹⁶⁶ This incentive produces what is commonly referred to as "repeat player bias."¹⁶⁷

Arbitration involves more than two conflicting parties; it requires a third party, an arbitrator, who must be unbiased and fair.¹⁶⁸ Arbitration, however, is also a service for which arbitrators receive compensation.¹⁶⁹ As Justice Black noted in his dissent in *Prima Paint*, arbitrators' "compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate."¹⁷⁰ He expressed that "it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation."¹⁷¹ The financial incentive inherent in this process creates a daunting conflict of interest.¹⁷² This

160. See *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1760 (2011) (Breyer, J., dissenting).

161. See *id.* at 1750-53 (majority opinion).

162. See Jefferson, *supra* note 2, at 314, 316.

163. See *id.* at 314.

164. See Darren P. Lindamood, Comment, *Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009*, 45 WAKE FOREST L. REV. 291, 293 (2010).

165. See *id.* at 293-94.

166. See *id.* at 293.

167. See, e.g., *Mandatory Binding Arbitration: Is It Fair and Voluntary?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 5 (2009) (statement of Rep. John Conyers, Member, H. Comm. on Commercial and Admin. Law).

168. See Lindamood, *supra* note 164, at 303.

169. See *id.*

170. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 416 (1967) (Black, J., dissenting).

171. *Id.*

172. See Lindamood, *supra* note 164, at 293-94.

direct, result-based financial incentive should not be tolerated in any open or fair civil justice system.

The recent withdrawal of several large arbitration firms from the mandatory consumer arbitration market has drawn nationwide attention to the severity of this growing problem of “arbitrator bias.” On July 19, 2010, Minnesota Attorney General Lori Swanson announced that the National Arbitration Forum (NAF), one of the nation’s largest providers of consumer arbitration services, was exiting the business due to an increasing number of allegations that it was biased in favor of the credit-card companies for whom it regularly arbitrated.¹⁷³ Just days later, the American Arbitration Association (AAA) announced that, until new guidelines are established, it too would no longer participate in the arbitration of consumer debt-collection disputes.¹⁷⁴ An investigation into the business practices of the NAF and AAA revealed “deeply disturbing” abuses by the two firms.¹⁷⁵

VI. PROPOSED SOLUTION

AT&T and *Rent-A-Center* pushed the FAA’s scope to new limits. Courts are now unlikely to find contracts with arbitration provisions unconscionable no matter what state law provides.¹⁷⁶ It is obvious that the application of the FAA has expanded beyond its drafters’ intent and in the face of apparent deficiencies.¹⁷⁷ The *AT&T* Court held that “[s]tates cannot require a procedure that is inconsistent with the FAA.”¹⁷⁸ So with state legislatures made impotent, it is up to Congress to create a balance.¹⁷⁹

Over the past five years, numerous legislators at both the state and federal levels have proposed legislation to address these concerns.¹⁸⁰ On the same day that the Court rendered its decision in *AT&T*, Senators Al Franken and Richard Blumenthal and Representative Hank Johnson declared their intent to propose legislation that “would restore consumers’ rights to seek justice in the courts” and hold corporations accountable for taking advantage of consumers.¹⁸¹

173. See Robert Berner, *Big Arbitration Firm Pulls Out of Credit Card Business*, BUS. WK. (July 19, 2010), http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html.

174. Robin Sidel & Amol Sharma, *Credit-Card Disputes Tossed Into Disarray*, WALL ST. J. (July 21, 2009), <http://online.wsj.com/article/SB124822374503070587.html>.

175. See *Arbitration or Arbitrary: The Misuse of Arbitration to Collect Consumer Debts: Hearing Before the Domestic Policy Subcomm. of the H. Oversight and Gov’t Reform Comm.*, 111th Cong. 4 (2009) (statement of Rep. Dennis Kucinich, Member, H. Oversight and Gov’t Reform Comm.).

176. See *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1753 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2781 (2010).

177. See *AT&T Mobility*, 131 S. Ct. at 1756-62 (Breyer, J., dissenting).

178. *Id.* at 1753 (majority opinion).

179. See *id.* at 1761-62 (Breyer, J., dissenting).

180. See, e.g., *Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts Against Corporations*, AL FRANKEN U.S. SENATOR FOR MINNESOTA (April 27, 2011), http://franken.senate.gov/?p=press_release&id=1466.

181. *Id.*

Senator Blumenthal called the Supreme Court's ruling in *AT&T* "misguided" and stated that, "The Arbitration Fairness Act would reverse this decision and restore the long-held rights of consumers to hold corporations accountable for their misdeeds."¹⁸² Representative Johnson explained that, "Forced arbitration agreements undermine our indelible Constitutional right to trial by jury, benefiting powerful businesses at the expense of American consumers and workers We must fight to defend our rights and re-empower consumers."¹⁸³

On May 12, 2011, Senators Franken and Blumenthal and Representative Johnson introduced identical bills, S. 987 and H.R. 1873, both entitled the "Arbitration Fairness Act of 2011."¹⁸⁴ The text of the Act addresses many of Justice Black's concerns expressed in his dissent in *Prima Paint*.¹⁸⁵ It states that Congress finds the FAA "was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power."¹⁸⁶ It recognizes that "[a] series of decisions by the Supreme Court of the United States have changed the meaning of the Act so that it now extends to consumer disputes and employment disputes."¹⁸⁷ These types of pre-dispute arbitration clauses leave "[m]ost consumers and employees [with] little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights."¹⁸⁸

Echoing the concerns Chief Justice Wallace B. Jefferson expressed in his State of the Judiciary in Texas address of 2007, the Act states: "Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions."¹⁸⁹ The Act reflects the belief that, in order for an agreement to arbitrate to be both meaningful and voluntary, it must occur post- and not pre-dispute.¹⁹⁰ To this effect, it prohibits pre-dispute arbitration agreements in employment, consumer, and civil rights disputes.¹⁹¹

This is not the first time that Congress has considered a bill proposing to overhaul our current arbitration system. Similar legislation entitled "Arbitration Fairness Act" appeared in the House and Senate in 2009 and 2007.¹⁹² Unfortunately, Congress has not enacted any of these legislative proposals.

182. *Id.*

183. *Id.*

184. *See* Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong.

185. *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 408-25 (1967) (Black, J., dissenting).

186. H.R. 1873.

187. *Id.*

188. *Id.*

189. *Id.*; *see* Jefferson, *supra* note 2, at 314.

190. *See* H.R. 1873.

191. *See id.*

192. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong.; Arbitration Fairness Act of 2009, S. 931, 111th Cong.; Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong.

With the recent media attention surrounding the pull-out of major arbitration firms and the Supreme Court's recent troubling decisions in *AT&T* and *Rent-A-Center*, however, it is clear that the current national policy favoring arbitration, at least in regards to consumer and employment contracts, is ripe for change.

Respectful as we are of *stare decisis*, we urge the Court to revisit its blanket "national policy favoring arbitration." The purpose of the FAA was to "place arbitration agreements upon the same footing as other contracts."¹⁹³ The Court's recent decisions have effectively eliminated the requirement of mutual assent. In order to place arbitration agreements on the same footing as other contracts, this fundamental principle of contract law must be required in each and every agreement, and the courts' widespread endorsement of mandatory arbitration clauses in consumer and employment contracts must cease.

VII. CONCLUSION

Blanket enforcement of arbitration clauses in consumer and employment contracts, and the evils discussed above, have waged a full-scale assault on the Seventh Amendment right to a trial by jury. Statistics indicate that, while the legal field has grown drastically over the last generation,¹⁹⁴ there has not been a corresponding increase in the number of civil trials.¹⁹⁵ In fact, since 1985, the number of civil trials has declined by 60%.¹⁹⁶

We recognize the importance of the right to contract, especially when it deals with arm's-length transactions. Contracting parties should have avenues to resolve their conflicts outside of the confines of the civil justice system if they mutually consent. The problem arises, however, when the Court's national policy favoring arbitration is applied to relationships of grossly disparate bargaining power. We are challenged to understand why a system that presents itself as one of equal access and power would apply such an unfair doctrine. The law, including the FAA, should be a shield for the weak and powerless and not a hammer for the strong and powerful.

193. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).

194. *See Galanter*, *supra* note 1, at 460.

195. *Id.* at 514.

196. *Id.*