

# WHO CAN BE AGAINST FAIRNESS? THE CASE AGAINST THE ARBITRATION FAIRNESS ACT

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At present, Congress is considering the most radical overhaul of the Federal Arbitration Act (FAA) since its enactment in 1925.<sup>1</sup> The main reform vehicle, the Arbitration Fairness Act<sup>2</sup> would prohibit most predispute arbitration clauses between companies and individuals. Instead, in such matters, arbitration could only occur after the dispute has arisen, that is, through a post-dispute agreement between the parties.

Much like the sirens of Ulysses, the bill's defenders sing a variety of seemingly irresistible melodies tempting the listener to oppose arbitration: Arbitration surrenders an individual's right to a jury trial. Arbitration clauses in consumer and employment contracts are "mandatory" and therefore give the individual little choice over whether to accept them. Arbitrators are not independent but, rather, are beholden to the repeat players (i.e., the companies). If arbitration is truly such a good deal, then parties will be as likely to agree to it after a dispute arises as they would be on a predispute basis. As the bill's title suggests, this reform movement is ultimately about fairness, and who can be against fairness?

Much like Ulysses, though, we must strap ourselves to the mast of reason and resist such calls. Whatever their allure, they threaten to wreck a seaworthy ship, just like the sirens' songs. Abolishing the system of enforceable pre-dispute agreements, as proponents of the Arbitration Fairness Act urge, would hardly improve the lot of the average individual. Indeed, in such a world, individuals might be far worse off, for they would find it far harder to obtain a lawyer, find the cost of dispute resolution far more expensive, wait far longer to obtain relief and may well never see a day in court. Nor would a system of post-dispute arbitration somehow miraculously salvage the virtues of arbitration while letting its

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<sup>1</sup> 9 U.S.C. § 1 (2006).

<sup>2</sup> Arbitration Fairness Act, S.1782/H.R. 3010, 110th Cong. (2007) [Arbitration Fairness Act].

defects sink to the sea floor. There simply is no empirical evidence demonstrating the viability of postdispute arbitration.

The stakes, thus, should be clear. If Congress enacts the Arbitration Fairness Act, it effectively will kill arbitration between companies and individuals in this country. While leaving the average individual worse off, the bill would, with certainty, benefit one group: Trial lawyers. They would unquestionably find it far easier to bring certain class action lawsuits in court and thereby hope to extract quick, easy and lucrative settlements – with high fees for the lawyers and little coupons for the individuals. A fair system? Hardly.

This is not to suggest that the system of arbitration in the United States is flawless, but it has largely worked well. Where there are flaws, a combination of industry self-regulation and judicial oversight has sought to address those errors. In some cases, those corrections have been far more prompt and efficacious than attempts to correct defects in our civil justice system. And in some matters, the debated issue ultimately turns on an empirical question for which we do not have adequate data to give a definitive answer. In these cases, the Arbitration Fairness Act puts the cart before the horse by abolishing arbitration altogether before we adequately understand some of its essential contours.

In this brief essay, I hope to lay out the case against the Arbitration Fairness Act.<sup>3</sup> Part I of this Article addresses the “findings” on which the act is premised. It explains how in several respects the current research on arbitration flatly contradicts the premises animating those findings (in other respects, the data is incomplete, so the “findings” at best are better described as “untested hypotheses” or “assumptions”). Part II of this Article explains why postdispute arbitration is not a viable alternative to our present system of enforceable predispute arbitration clauses.

## I. THE FINDINGS

The Arbitration Fairness Act administers harsh medicine. As already noted, it would declare unenforceable arbitration clauses in employment, consumer or franchise disputes as well as disputes

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<sup>3</sup> In doing so, I do not question the motives of its Congressional sponsors. Having had the opportunity to testify personally before two Congressional subcommittees on the matter, I found the members to be respectful of and receptive to reasoned argument, even if that argument did not support their public positions.

arising under statutes intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.<sup>4</sup> Additionally, though the bill is not explicit on the matter, it apparently is intended to cover disputes in the securities industry as well.<sup>5</sup> These reforms, along other provisions of the bill, would overturn several of the major Supreme Court precedents in the field of arbitration.<sup>6</sup> Not only is its sweep broad, it also runs deep. Rather than applying simply to arbitration agreements formed after its effective date, the bill applies to “any dispute or claim that arises on or after” its date of enactment. Consequently, the bill invalidates arbitration clauses that may be years old and renders unenforceable entire systems of arbitration that were designed at a time when they were fully legal. Consequently, the bill will upset substantially settled commercial expectations of various companies and in various industries.<sup>7</sup>

This jackhammer approach to arbitration reform rests on a series of seven “findings” about the current state of arbitration. Those findings, found in Section 2 of the bill, reflect a mix of empirical judgments and value judgments. This part of the Article analyzes those findings and demonstrates how, in several respects, they are either not supported by, or flatly contradicted by, the empirical record. In the subsections that follow, I reproduce, largely

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<sup>4</sup> Arbitration Fairness Act *supra* note 2, at § 4. The bill does not define what statutes qualify as ones “intended to protect civil rights” or “to regulate contracts or transactions between parties of unequal bargaining power.” While some statutes such as Title VII or the ADEA probably fall within this definition, interpretive gaps remain. This is particularly true with respect to the second part of the definition. Does RICO “regulate contracts or transactions between parties of unequal bargaining power?” If enacted, the Arbitration Fairness Act virtually guarantees litigation over such interpretive ambiguities.

<sup>5</sup> See Statement of Sen. Russ Feingold, Senate Committee on the Judiciary, Subcommittee on the Constitution (Dec. 12, 2007), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=3055&wit\\_id=4083](http://judiciary.senate.gov/member_statement.cfm?id=3055&wit_id=4083) (last visited Feb. 20, 2008).

<sup>6</sup> The invalidation of arbitration clauses would certainly overturn the holdings of several cases. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991); *Rodriguez de Orija v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). It also would invalidate the results in a number of other cases which, though not presenting the precise issue of arbitrability, nonetheless involved contracts covered by the act. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *GreenTree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). Another provision of the bill declares that a court, applying federal law, shall determine the Act’s applicability to the arbitration agreement’s enforceability. This provision would largely overrule the holding of the Supreme Court’s decision in *First Options v. Kaplan*, 514 U.S. 938 (1995).

<sup>7</sup> These changes may well raise constitutional concerns, but that issue is beyond the scope of this article.

verbatim, the various findings in the FAA and, thereafter, analyze them.

*Finding 1:* “The Federal Arbitration Act . . . was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.”<sup>8</sup>

*Analysis:* This finding really is a statement about the legislative history of the FAA. That legislative history is in fact quite sparse. Congress held virtually no hearings on the bill and appears to have based it largely on New York’s successful experience with its own arbitration law.<sup>9</sup> The scant legislative history does contain some indication that it was designed primarily for inter-company disputes, but at least one snippet of the history expresses a belief that the bill will benefit individuals as well.<sup>10</sup> At bottom, though, this finding is not particularly important. Regardless of the actual intent of Congress in 1925, the current Congress certainly is not bound by it and is, as a constitutional matter, free to amend the bill to reflect a different set of commercial realities and norms.

*Finding 2:*

A series of Supreme Court decisions have changed the meaning of the [FAA] so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.<sup>11</sup>

*Analysis:* This finding breaks down into two subsidiary propositions. The first proposition concerns the growing frequency of arbitration clauses. While some evidence suggests that arbitration clauses are on the rise and that arbitration dockets are growing, the picture is actually far more complex. One recent study of consumer arbitration in over thirty industries found that the frequency of clauses varied greatly across industries. Approximately thirty-three percent of surveyed companies employed arbitration clauses - nowhere were they universally used. Industries such as the financial services sector used them 69.2% of the time while other indus-

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<sup>8</sup> Arbitration Fairness Act, *supra* note 2, at § 2(1).

<sup>9</sup> See Katherine van wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

<sup>10</sup> See S. Rep. No. 536 (1924) (noting that the FAA, by avoiding the delay and expense of litigation, will appeal to, among other groups, individuals).

<sup>11</sup> Arbitration Fairness Act, *supra* note 2, at § 2(2).

tries such as food and entertainment never used them.<sup>12</sup> Another very recent study of corporate 8-K filings found that companies used arbitration clauses only about eleven percent of the time; the precise data again varied with the type of contract (with clauses more frequent in licensing and employment contracts), but with respect to no category of contracts did companies use arbitration clauses a majority of the time.<sup>13</sup>

The second proposition concerns the availability of a jury trial to those who agree to arbitrate. It is certainly true that arbitration does not involve a jury. But it bears emphasis that eliminating arbitration would not suddenly cause all of those disputes to be decided by a jury. Numerous studies have documented how most civil litigation is resolved far before a case ever reaches a jury, whether through voluntary dismissal, settlement or dispositive rulings by the judge.<sup>14</sup> Ironically, in at least one respect, arbitration enhances the opportunity for a jury to hear an individual's case. When an individual resists arbitration, the Federal Arbitration Act grants the individual the right to have a jury decide whether the individual entered into an enforceable arbitration agreement.<sup>15</sup>

*Finding 3:*

Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize or understand the importance of the deliberately fine print that strips them of their rights, and because entire indus-

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<sup>12</sup> Linda J. Demaine & Deborah R. Hensler, *Volunteering to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 L. & CONTEMP. PROBS. 55 (2004).

<sup>13</sup> Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=1076968](http://papers.ssrn.com/so13/papers.cfm?abstract_id=1076968). In a similar vein, a somewhat dated study of arbitration clauses in the securities industry found that clauses were used more frequently for higher-risk accounts. GAO: *How Investors Fare* at 28 (May 1992). Likewise, a survey of the telecommunications industry published in 2001 found that sixteen percent of firms surveyed used external arbitration procedures in their employment disputes. See Alexander Colvin, *Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. DISP. RES. 643 (2001).

<sup>14</sup> See Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1566 (2005) (finding a vast majority of cases dismissed or resolved without court action undermines claim that arbitration will stagnate development of the law); Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 47 (1998) (cases that never reach a jury – of 3419 employment discrimination cases filed in 1994 that led to definitive judgment, sixty percent were disposed of by pretrial motion, with employers prevailing in ninety-eight percent of those); Michael Delikat & Morris Kleiner, *Comparing Litigation And Arbitration Of Employment Disputes: Do Claimants Better Vindicate Their Rights In Litigation?*, A.B.A. LITIG. SEC. CONFLICT MGMT. 3, 8 (2003).

<sup>15</sup> 9 U.S.C. § 4 (2008).

tries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often they are not even aware that they have given up their rights.<sup>16</sup>

*Analysis:* This finding breaks down into three subsidiary propositions. One concerns a positive assumption about people's awareness that they are agreeing to arbitrate. I do not know of any empirical study actually documenting consumer or employee understanding of such matters. For the sake of argument, though, let us stipulate that this first proposition is accurate. Even if true, that complaint is not directed at arbitration in particular but, instead, at form contracts more generally. A form contract may contain a variety of terms, ranging from dispute resolution to liability waivers to attorney fee shifting, which an individual may not read. At bottom, then, the argument proves too much. If ignorance about a contract term supplied sufficient reason to override it as a matter of law, then a large array of contract terms, not simply arbitration clauses, would be invalid.

The second proposition concerns the frequency with which companies have adopted arbitration clauses. As noted above, the actual picture is far more nuanced. The frequency of arbitration clauses varies across industry and with the type of contract, and the most recent evidence (the Eisenberg and Miller study)<sup>17</sup> suggests that no single type of contract universally employs arbitration clauses.

The third proposition concerns the lack of consumer choice. This proposition could be understood in two ways. It might be understood to be an empirical statement about the pervasiveness of arbitration clauses in a particular industry (i.e., every credit card company uses arbitration clauses, so people who want credit cards "have no choice" but to consent to arbitration). To the extent that is the intended import, I have already noted how the empirical picture does not support the proposition.

This proposition might also be understood as normative – that regardless of the pervasiveness of an arbitration clause in a given industry, individuals are being presented such clauses on a "take it or leave it" basis, and such contracts of adhesion are inherently unfair. Like the proposition about ignorance over contract terms,

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<sup>16</sup> Arbitration Fairness Act, *supra* note 2, at § 2(3).

<sup>17</sup> Eisenberg, Miller, & Sherwin, *supra* note 13.

this proposition is not unique to arbitration. Individuals are presented with a variety of terms on a “take it or leave it” basis.<sup>18</sup> For example, my employer presents me with only a single 401(k) plan. Similarly, as a consumer, I may be presented with a variety of “take it or leave it” terms ranging from the interest rate at my bank to the price of the car that I rent. Companies fix these terms for a very simple reason – they enable the company to “price” their goods at a predictable level.<sup>19</sup> Imagine the impact on a rental car company’s bottom line if the parties had to dicker over the price of every rental. Each transaction would take marginally more time (meaning longer waits and fewer rentals), and the company may well lose money if it had to lower the price for certain customers. Just as there are valid economic reasons why a company is unwilling to dicker over terms in this way, so too may a company justifiably refuse to bargain over its dispute resolution, which likewise affects its bottom-line and, therefore, the marginal price for its product.

The normative appeal of this argument admittedly may depend on the nature of the good at issue. For example, we might be more concerned about the lack of consumer choice over certain basic goods (like food) than more discretionary ones (like cell phones). But here it is worth recalling that, as a society, we tolerate a great deal of non-negotiated choice even as to basic goods. For example, I have no choice as to the type of health insurer offered by my employer. Likewise, people may have little choice about the price of gasoline even if they attempt to shop for the lowest one. These are choices that are arguably far more important to the average individual than the choice of forum in which to resolve their disputes. Thus, while the normative aspect of this finding is appealing at first blush, it actually appears quite flimsy in light of the pervasiveness of “take it or leave it” contracts in a variety of settings more important to the average individual.

*Finding 4:* “Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.”<sup>20</sup>

*Analysis:* This finding is really an empirical statement about the economic incentives of arbitration associations. As with the

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<sup>18</sup> See Sherwyn et al., *supra* note 14, at 1563–64.

<sup>19</sup> See, e.g., Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1222 (1983).

<sup>20</sup> Arbitration Fairness Act, *supra* note 2, at § 2(4).

earlier empirical statement about the pervasiveness of arbitration clauses, the reality here tells a far more complex picture than the rhetoric. The empirical record on repeat player effects is decidedly mixed: some studies have found evidence of a repeat player phenomenon while others have found no demonstrable effect.<sup>21</sup> Furthermore, even where the repeat player effect exists, the cause is not clear. Most research suggests that the repeat player effect – if it exists – is not due to the arbitrator’s financial incentives but, instead, to the “learning effects” from the repeat player’s experiences.<sup>22</sup> That is, the repeat player learns what sorts of cases can be won and, therefore, is more likely to settle those, leaving for arbitration those where the repeat player is relatively confident it can win outright. In this respect, the repeat player phenomenon does not differ substantially from similar phenomena in litigation. Several studies show a high win-rate for companies in litigation – both in the summary judgment stage and at trial.<sup>23</sup> Such results do not prove that litigation is inherently unfair or biased in favor of the repeat player (i.e., business); rather, it demonstrates simply that business make rational economic judgments about which cases to settle and which to litigate.<sup>24</sup>

*Finding 5:*

Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators’ decisions. With the knowledge that their rulings will not be seriously examined by a

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<sup>21</sup> Compare Lisa Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT’L J. ON CONFLICT MGMT. 369, 380 (1995) and Lisa Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE N.Y.U. 53RD ANNUAL CONFERENCE ON LABOR* 303, 323 & Table 2 (Samuel Estreicher & David Sherwyn eds., 2004), with Elizabeth Hill, *Due Process At Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 816 (2003).

<sup>22</sup> See Bingham & Sarraf, *supra* note 21, at 323 & Table 2. See also Sherwyn et al., *supra* note 14, at, 1570–77; Hill, *supra* note 21, at 816.

<sup>23</sup> See William Howard, *Mandatory Arbitration of Employment Discrimination Disputes: Can Justice Be Served* (May 1995) (unpublished Ph.D. dissertation Arizona State University) (on file with author).

<sup>24</sup> In formal terms, the company would be willing to settle a case where the costs of litigating the case to potentially successful completion exceed the minimum amount that an individual is prepared to accept in settlement.



court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.<sup>25</sup>

*Analysis:* This finding breaks down into two propositions. The first proposition is an empirical statement about the diminution of public law. There are two basic problems with this proposition. For one thing, it implicitly depends on another empirical assumption about the prevalence of arbitration clauses. If all employers utilized arbitration clauses, then that might well reduce the role of courts in the development of public law.<sup>26</sup> For another thing, the problem again is not unique to arbitration. Settlement also impedes the development of public law; like arbitration, it deprives courts of the opportunity to render a decision in a dispute.<sup>27</sup> Moreover, for those cases that are tried, only a small fraction actually make public law – those that result in published decisions of federal appellate courts and the United States Supreme Court. District court decisions of course have no binding precedential value, and many, indeed most, appellate cases are affirmed through unpublished per curiam decisions that, as a formal matter, have no precedential value.<sup>28</sup>

The second proposition also is an empirical statement about arbitrators' decisionmaking methods. It is indeed true that courts generally conduct only limited review of the merits of an arbitrator's decision (broadly speaking, their review is limited to manifest disregard of the law).<sup>29</sup> Indeed, that lack of judicial intervention is one of the great benefits of arbitration.<sup>30</sup> Yet the lack of judicial oversight does not necessarily mean that the arbitrator will refuse to apply the governing legal rule. Indeed, as I have explained elsewhere, arbitrators may have very compelling incentives to develop reputations for getting the law right.<sup>31</sup> As an empirical matter, moreover, we do not have very good data on whether arbitrators are systematically failing to apply the governing legal rule or, per-

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<sup>25</sup> Arbitration Fairness Act, *supra* note 2, at § 2(5).

<sup>26</sup> Of course, courts would retain a role to the extent they reviewed the award for manifest disregard of the law. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

<sup>27</sup> Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

<sup>28</sup> See, e.g., Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003).

<sup>29</sup> See *Wilko v. Swan*, 346 U.S. 427 (1953); *First Options*, 514 U.S. 938; *Hall St. Assoc. v. Mattel, Inc.*, 170 L. Ed. 2d 254 (2008).

<sup>30</sup> See GARY BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* (Aspen Publishers 2006).

<sup>31</sup> Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151 (2004).

haps more importantly, are inferior to juries in their ability to apply the rules.<sup>32</sup> Thus, at best, this finding remains in the realm of untested empirical proposition.

*Finding 6:* “Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decision that are widely available to the public, arbitration offers none of these features.”<sup>33</sup>

*Analysis:* This finding consists of both an empirical proposition and a normative one. The empirical proposition is a statement about the relative transparency of arbitration compared to litigation. The complaint about arbitration is overblown, for in several respects arbitration is not entirely shrouded in secrecy. Parties to arbitration are not bound to any confidentiality obligation; rather, under most arbitral rules, the confidentiality obligation extends to the administering institution and the arbitrators. It precludes them from divulging details about the arbitration, absent approval by the parties.<sup>34</sup> Moreover, any arbitration is potentially subject to public scrutiny during at least two junctures in the process: litigation over the enforcement of the agreement and litigation over the enforcement of the award.<sup>35</sup> And of course the litigation system is not always bathed in sunshine – protective orders, closed proceedings, filings under seal, and settlements all reduce the degree of public scrutiny of the system.

The normative proposition is that the lack of transparency is an inherently bad quality. This complaint also overlooks the benefits of less public disputes. Confidential proceedings reduce the

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<sup>32</sup> Data comparing outcomes between jury verdicts and arbitrator awards is mixed. Compare Donald Wittman, *Lay Juries, Professional Arbitrators and Arbitrator Selection Hypothesis*, 5 *AM. L. & ECON. REV.* 261 (2003) (finding no significant difference between jury verdicts and arbitrator awards except that juries are more willing to “empty corporate deep pockets”), with Neil Vidmar & Jeffrey J. Rice, *Assessments of Non-Economic Damages*, 78 *IOWA L. REV.* 883, 901 (1993) (finding no significant differences between jury verdicts and arbitrator awards in hypothetical cases and noting certain categories in which arbitrator’s award was more generous than jury verdict).

<sup>33</sup> Arbitration Fairness Act, *supra* note 2, at § 2(6).

<sup>34</sup> See, e.g., National Arbitration Forum Code of Procedure Rule 4, available at <http://www.arb-forum.com/main.aspx?itemID=330&hideBar=False&nayID=183&nows=3>; JAMS Comprehensive Arbitration Rules & Procedures Rule 26(a), available at [http://www.jamsadr.com/images/PDF/JAMS-comprehensive\\_arbitration\\_rules.PDF](http://www.jamsadr.com/images/PDF/JAMS-comprehensive_arbitration_rules.PDF); American Arbitration Association Consumer Due Process Protocol Principle 12(b), available at <http://www.adr.org/sp.asp?id=22019>.

<sup>35</sup> See 9 U.S.C. §§ 3–4, 10 (2000).

risk that parties may become “dug in” through public position taking. Moreover, confidential proceedings may spare both parties embarrassing revelations that a public proceeding would disclose. Thus, at a normative level, the virtues of confidentiality at least counterbalance some of the loss of transparency.

*Finding 7:*

“Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes.”<sup>36</sup>

*Analysis:* This finding functions as an empirical proposition about the pervasiveness of certain terms in arbitral clauses. While we do not have extensive research about the terms of arbitral clauses, the best available research suggests that their terms are not as “deliberately tilt[ed]” as the Arbitration Fairness Act would suggest. For example, a 2004 study of consumer arbitration clauses by Demaine and Hensler found that only 30.8% prohibited class actions.<sup>37</sup> As to the situs, fifty percent of the clauses they surveyed specified the situs of the arbitration, and in all but three cases was the specified situs near the individual’s residence or place of service.<sup>38</sup> This led the authors to conclude that “[f]ew of the [fifty-two] clauses reflect the type of egregious self-dealing that has been identified in publicized cases. Most of the clauses appear in many respects to put consumers on equal terms with the businesses that drafted them . . . .”<sup>39</sup>

At a more general level, there is no particular reason to believe that arbitration is “deliberately tilted” against the individual. As I explained elsewhere, most aggregate studies on arbitration suggest precisely the opposite proposition. By most measures, individuals achieve superior, or at least comparable, results in arbitration compared to litigation.<sup>40</sup>

In sum, the findings that underpin the most radical overhaul of federal arbitration law in over eighty years are scientifically unproven, normatively debatable or demonstrably wrong. Instead, arbitration has in important respects improved access to justice for

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<sup>36</sup> Arbitration Fairness Act, *supra* note 2, at § 2(7).

<sup>37</sup> See Demaine & Hensler, *supra* note 12, at 72.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 72.

<sup>40</sup> See Peter B. Rutledge, *Whither Arbitration*, 6 GEO. J. L. & PUB. POL’Y (forthcoming 2008).

the average individual: it has lowered the cost of dispute resolution, it has delivered superior, or at least comparable, outcomes for individuals, and it has done so at a far faster pace than our sluggish system of civil litigation.<sup>41</sup>

At this point in the argument, defenders of the Arbitration Fairness Act have a seductive retort. If arbitration is such a good deal, then surely parties will be just as likely to agree to it on a postdispute basis. Postdispute arbitration will capture all the benefits of arbitration while enabling the individual to make a more fully informed choice about whether to waive their jury right before they even have a claim. The next section of this Essay turns to that argument.

## II. POSTDISPUTE ARBITRATION

Defenders of the Arbitration Fairness Act are fond of saying that they do not oppose arbitration. Indeed, they recognize its many advantages. Rather, they simply object to forcing individuals to ceding their rights on a predispute basis in adhesion contracts. Postdispute arbitration remains available under the Act, thereby retaining the benefits of arbitration while shedding its nefarious elements.

This argument suffers from two main flaws. First, it is analytically unsound. It ignores the differences in the parties' incentives during the predispute and postdispute phases of their relationship. Second, it ignores the empirical evidence demonstrating the unworkability of postdispute arbitration. This section of the article explains these flaws.

At the analytic level, parties' incentives differ in the postdispute setting because they have relatively more information about the likely contours of the dispute. This superior information enables them to make more strategic calculations about which form of dispute resolution better advances their interests (or more effectively hinders the individual's interests). If a company knows that an individual's claim is below a certain amount, it may calculate that the individual could have difficulty obtaining a counsel willing to represent her. In those cases, a company may be *less* likely to

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<sup>41</sup> *Id.*

agree to arbitration precisely because it knows that, effectively, its holdout will prevent the individual from pursuing her claim.<sup>42</sup>

Now contrast this state of affairs with those in the predispute context. In this setting, neither the company nor the individual knows in advance the terms or nature of a dispute.<sup>43</sup> Yet each has an incentive to enter into arbitration – from the individual’s perspective, arbitration provides an affordable forum with superior chances for obtaining a favorable result; from the company’s perspective, arbitration can lower the company’s litigation costs.

To be sure, parties to predispute arbitration agreements are engaging in some tradeoffs – the individual may be trading greater forum accessibility off against higher recoveries in litigation (assuming, of course, she can find a lawyer willing to take her case); the company is trading lower litigation costs off against a reduced likelihood of prevailing in the dispute. But that is the nature of any contractual bargain. The comparative advantage of arbitration is that it enables both parties to enter into an arrangement to manage some of the *ex ante* uncertainties about disputes before they arise, a possibility that is lost once the dispute arises and its terms are better known.<sup>44</sup>

Experience under the recently enacted ban on predispute arbitration clauses in automobile dealer agreements demonstrates how superior information about the dispute may affect the willingness to arbitrate. In 2002, Congress amended the FAA and, for the first time since the FAA’s enactment, explicitly banned predispute arbitration in a category of cases. The stated purpose of the law was to level the playing field between automobile manufacturers and their dealers (while leaving open the possibility of postdispute arbitration).<sup>45</sup> Yet, in a recent case from the Seventh Circuit, an automobile dealer actually sought to compel arbitration, and the manufacturer successfully resisted it with respect to part of their dispute – effectively forcing the dealer to resolve the dispute in multiple forums.<sup>46</sup> Had the parties been able simply to enter into a predispute arbitration agreement, such strategic behavior likely never would have arisen.

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<sup>42</sup> See Maltby, *supra* note 14, at 58.

<sup>43</sup> They may be able to predict a likely dispute to a degree. They could base these predictions on their past experiences and the nature of the relationship between the parties.

<sup>44</sup> See Lewis Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 317 (2003).

<sup>45</sup> 15 U.S.C. § 1226(a)(2) (2008).

<sup>46</sup> Volkswagen Of America, Inc. v. Sud’s Of Peoria, Inc., 474 F.3d 966 (7th Cir. 2007).

At the empirical level, a variety of empirical measures suggest that postdispute arbitration will not work. A recent survey of lawyers indicated that an overwhelming majority of them would advise their clients not to agree to postdispute arbitration.<sup>47</sup> Utilization rates tell a similar story, a recent study of AAA employment arbitrations by Lewis Maltby found that only 6.9% were post dispute in 2001 and a mere 2.6% were postdispute in 2002.<sup>48</sup>

Of course, one should view these statistics with some hesitation. Declining utilization rates of postdispute arbitration do not necessarily show that postdispute arbitration would not be used if it were the only option. An equally valid hypothesis might also be that, as employers increasingly use predispute clauses, the frequency of postdispute arbitration will decline. Other research, however, suggests that the infrequency of postdispute arbitration is more attributable to its structural defects.<sup>49</sup> In his study of postdispute arbitration, David Sherwyn investigated the Illinois Human Rights Commission, a public agency that offered postdispute arbitration of claims falling within its jurisdiction. Sherwyn found that virtually no one utilized the postdispute option. While the topic of Sherwyn's study is admittedly specialized, it does lend credence to the statistics suggesting that parties will not utilize postdispute arbitration.

#### CONCLUSION

At bottom, the Arbitration Fairness Act, while perhaps well intentioned, does not live up to its name. Its call for a radical overhaul of federal arbitration law rests on a series of empirical and normative premises that largely do not withstand close scrutiny. Its "we can have our cake and eat it too" defense of postdispute arbitration simply ignores the analytical and empirical realities of dispute resolution.

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<sup>47</sup> David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 *BERKLEY J. EMP. & LAB. L.* 1, 57 (2000). A slightly more dated GAO study found that most employers likewise do not use postdispute arbitration. GAO, *Alternative Dispute Resolution: Employer's Experiences with ADR in the Workplace 2* (1997).

<sup>48</sup> See Maltby, *supra* note 44, at 319.

<sup>49</sup> These would include the greater opportunity for strategic behavior (described above) and perhaps too the fact that, once a dispute has arisen, the parties are more "dug in" to their positions and may be less willing to enter into any accommodation with their opposing party.

My opposition is not to suggest that the arbitration system is flawless. Indeed, in one respect, the defenders of the Arbitration Fairness Act should be commended. They have drawn attention to the need for more thorough empirical research into the dynamics of arbitration specifically and the resolution of disputes more generally. We all can rally around the common mantra that we all want a system providing just outcomes at a fast pace and at a low cost. Far harder is it to agree on the contours of that system. Based on the present state of knowledge, however, the Arbitration Fairness Act does not provide it.

