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## "Underdog" Arbitration: *A Plan for Transparency*

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# “UNDERDOG” ARBITRATION: A *PLAN FOR TRANSPARENCY*

Ramona L. Lampley\*

*Abstract:* The use of mandatory, pre-dispute arbitration clauses in consumer, employment, health-care, and even nursing home agreements is ever-increasing, even though the general public has distrust and a lack of understanding of the nature of arbitration. The Supreme Court in *AT&T Mobility LLC v. Concepcion*, and then in *American Express Co. v. Italian Colors Restaurant*, has signaled firmly that mandatory pre-dispute arbitration is here to stay. This is true even for individual low-value claims in which one party, say the consumer or employee, has little or no bargaining power. I call these claims “underdog claims.” There have been numerous proposals to amend the Federal Arbitration Act (FAA) to exclude such claims from mandatory pre-dispute arbitration agreements and numerous criticisms raised in reaction to the Court’s jurisprudence. But with the Supreme Court’s theoretical view that arbitrating underdog claims is fair, these criticisms have gone unheeded by the majority of the Court. Now the question is how should we approach this new field of dispute resolution in which so many claims will be resolved? This Article analyzes the meritorious criticisms of underdog arbitration, which include bias, the repeat-player effect, the removal of publicity, the lack of judicial oversight, and a general concern about the lack of transparency. Then I propose a three-part solution for promoting transparency to establish a system in which underdog arbitration can work. I propose that the FAA be amended to require transparency in consumer and employee claims through: (1) uniform data reporting at the arbitration service-provider level; (2) requiring a written statement of decision in such disputes; and (3) data-reporting requirements by the business entity imposing mandatory pre-dispute arbitration on the employee/consumer stake-holder.

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## INTRODUCTION

The consumer, employment, corporate, and health-care spheres now operate in a world in which binding individual arbitration is permitted and widely employed.<sup>1</sup> For years the debate centered on whether pre-

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1. See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 2.3, at 8 (2015) [hereinafter CFPB ARBITRATION STUDY], available at [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) (finding the prevalence of arbitration agreements at over fifty percent market share for credit cards (fifty-three percent), prepaid cards (at least eighty-three percent), storefront payday loans (ninety-nine percent), and mobile wireless accounts (one hundred percent); eighty-six percent of private student-loan contracts studied contained arbitration agreements (as opposed to market share) (all figures rounded to nearest whole number)); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–83 (2008) (examining select consumer contracts in mobile wireless providers, credit card companies, cable providers, and stock-trading services and finding seventy-five percent of the consumer contracts in the sample had arbitration clauses); Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 653–54 (2012) (finding that twenty-four percent of social networking sites included an arbitration agreement in their terms of service or privacy policy; of these about forty-six percent were mandatory arbitration agreements); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 17–18 (2013) (finding that 95.1% of the dollar value of credit card loans (a proxy for market share) was subject to credit card arbitration agreements, but 17.4% of issuers used arbitration agreements in their credit card

dispute binding arbitration imposed on parties with less bargaining power (e.g., consumers and employees) was *fair* as an alternative forum. A corollary debate focuses on whether the class-action waiver/arbitration clause is inherently *unfair* and unenforceable under state unconscionability doctrines or vindication of statutory rights theories when plaintiffs assert low-value claims that an individual would not rationally pursue. In recent cases, most recently *American Express Co. v. Italian Colors Restaurant*<sup>2</sup> and *AT&T Mobility LLC v. Concepcion*,<sup>3</sup> the Supreme Court has repeatedly decided that arbitration is an adequate alternative forum for litigants—even those who must proceed individually with low-value claims.<sup>4</sup> Thus, the Supreme Court has signaled that arbitration in the consumer, employment, and even health-care arenas is here to stay, unless eroded by legislative amendment or regulatory action.<sup>5</sup> The benefits and detriments of class-waiver

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agreements as of 2009; since 2009 the market share has decreased as a result of the National Arbitration Forum (NAF) settlement described below and an antitrust settlement with card issuers).

2. \_\_\_ U.S. \_\_\_, 133 S. Ct. 2304, 2309 (2013) (rejecting argument that class arbitration is necessary to vindicate low-value statutory claims when expert costs are higher than projected individual recovery).

3. 563 U.S. 333, 131 S. Ct. 1740, 1750 (2011) (holding that the Federal Arbitration Act (FAA) preempts California’s state-law rule prohibiting class-waivers because the rule “interferes” with arbitration by requiring class arbitration or class litigation ex post).

4. Although the prevalence of arbitration agreements in consumer products may vary across product markets, *see* sources cited *supra* note 1, when arbitration agreements are present in consumer agreements, they almost always include a class-action/class-arbitration waiver. *See, e.g.*, CFPB ARBITRATION STUDY, *supra* note 1, § 2.5.5, at 44 (for all product markets studied, over eighty-five percent of contracts with arbitration agreements had no-class provisions); Eisenberg et al., *supra* note 1, at 882–84 (finding that every consumer contract with an arbitration clause in the study had a class-arbitration waiver); Rutledge & Drahozal, *supra* note 1, at 25 (reporting that forty-three of forty-seven (ninety-two percent) credit card arbitration agreements informed cardholders they could not be a party to a class action in court if the dispute was governed by the arbitration agreement).

5. If we were to obtain the data and level of transparency called for in this Article, the decision as to whether arbitration is a fair and adequate alternative forum in these contexts (e.g., no bargaining power, inferior resources) could be based on actual evidence instead of theoretical constructions. As for the arbitrability of medical-care claims, in *Marmet Health Care Center, Inc. v. Brown*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1201 (2012) (per curiam), the Supreme Court held that the FAA preempts state law prohibiting agreements to arbitrate personal injury claims based on nursing home care, confirming that hospitals, doctors, and health care facilities can require pre-dispute agreements to arbitrate. *Id.* at 1203. According to the American Arbitration Association’s (AAA) Healthcare Due Process Protocol, it will not arbitrate pre-dispute mandated arbitration agreements in disputes involving patients and a health-care provider. AM. ARBITRATION ASS’N, HEALTHCARE DUE PROCESS PROTOCOL 16 (1998), available at [https://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTAGE2025859&RevisionSelectionMethod=LatestReleased](https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2025859&RevisionSelectionMethod=LatestReleased) (“Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.”).

arbitration agreements to the consumer and to society are hotly contested. Even as this Article was prepared for publication, the Consumer Financial Protection Bureau (CFPB) announced that it will propose a rule prohibiting class-action waivers in arbitration agreements for consumer financial products and requiring more transparency in individual arbitration awards.<sup>6</sup> What becomes of this proposed rule will be decided over the course of the coming year,<sup>7</sup> but the proposal demonstrates the opposition to class-waiver arbitration agreements and the importance of transparency and empirical data on the regulatory regime of arbitration versus class action.

This Article suggests that the debate should move beyond the question of permissibility to the regulatory structures under which arbitration should operate.<sup>8</sup> The conversation begins with the observation that each of the Supreme Court's decisions and academics' arguments are based almost entirely on theories of how arbitration *should* work rather than empirical data about how arbitration *does* work.<sup>9</sup> While the body of empirical research to date is both useful in assessing consumer arbitration and growing, it also has significant

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6. Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray at the Arbitration Field Hearing*, CONSUMER FIN. PROTECTION BUREAU (Oct. 7, 2015), <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing-20151007/>. This drastic rule the CFPB proposes will undoubtedly mean that most consumer financial-services companies will cease offering arbitration agreements. This is unfortunate for the individual consumer who may have preferred a "business pays all" type of dispute resolution process rather than to retain the ability to participate as a class member.

7. Any final rule issued by the CFPB regulating arbitration will not apply to any agreement entered into between the consumer and the financial entity within 180 days of the new rule's effective date. 12 U.S.C. § 5518(d) (2012). The CFPB "contemplates setting an effective date of 30 days after the rule is published." CONSUMER FIN. PROT. BUREAU, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS 22 (2015), available at [http://files.consumerfinance.gov/f/201510\\_cfpb\\_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf](http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf). This means any final rule will likely not have an effect until nearly 2017 or later, depending on how quickly the CFPB proposes its rule for comment.

8. By "debate" I primarily reference two dialogues: (1) the dialogue between courts and underdog arbitration party-opponents in which unconscionability and vindication of statutory rights defenses were commonly raised, and (2) the policy debate between law-makers, lawyers, stakeholders, and academics as to the fairness of the adoption of pre-dispute arbitration agreements with class waivers through employment agreements and terms and conditions of product sales.

9. I have argued that mandatory arbitration agreements, such as the one at issue in *Concepcion*, can actually result in a framework in which the consumer is better off. See Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 512–18 (2009) (arguing that the consumer is actually better off in alternative dispute resolution (ADR) in a corporation-pays-all type agreement with a premium for winning, such as the one at issue in *Concepcion*).

limitations.<sup>10</sup> One limitation is that most of the empirical research to date is based on data from the American Arbitration Association (AAA),<sup>11</sup> which is a widely used arbitration administrator, but certainly not the only administrator. This use of this empirical evidence is rare in the Court’s pro-arbitration jurisprudence. For example, in *Concepcion*, Justice Scalia cited limited statistics from the AAA regarding dispositions of actions within an eight-month period in 2007 compared to disposition statistics for class arbitrations up to 2009 in his opinion describing arbitration as ill suited for class proceedings.<sup>12</sup> Surely we can do better than an eight-month data set as evidence of the outcomes of individual arbitration. But this use of *empirical evidence* was unusual. Most decisions addressing the adequacy of arbitration as an alternative forum are based on no data, perhaps due to lack of comprehensive

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10. See Rutledge & Drahozal, *supra* note 1, at 11–14 (explaining the difficulty in obtaining statistically significant and empirically sound evidence to evaluate arbitration); Alexander J.S. Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, DISP. RESOL. J., Aug.–Oct. 2009, at 6, 6 (“One problem for researchers has been the dearth of publicly available data on which to conduct empirical research that would help evaluate the arguments of both sides of the employment arbitration debate.”). The CFPB Arbitration Study and the Searle Civil Justice Institute (SCJI) Report on consumer arbitration are two recent empirical studies on the outcomes of arbitration of consumer financial products and consumer products, respectively. CFPB ARBITRATION STUDY, *supra* note 1; SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION: PRELIMINARY REPORT 9 (2009) [hereinafter SEARLE INSTITUTE ARBITRATION STUDY], available at [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_010205](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_010205). Although those studies were based on the actual case files from the AAA, which is a superior analytical tool than data metrics, they were limited to AAA information. See discussion *infra* notes 190–98 and accompanying text. On the employment side, see, for example, CFPB ARBITRATION STUDY, *supra* note 1, § 5.3, at 15 n.24 (collecting studies); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 206–07 (1997) (analyzing AAA commercial and employment cases for repeat-player effect); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011) [hereinafter Colvin, *Case Outcomes*]; Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL’Y J. 405, 407 (2007) [hereinafter Colvin, *Clarity*] (relying on AAA data provided pursuant to California law for empirical evaluation of employment-arbitration outcomes); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 45 (relying on AAA employment-arbitration data); 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, 792 (2003) (study based on random sample of AAA employment-arbitration dispute awards).

11. For example, many of the sources referenced in note 10, *supra*, rely on such data. See, e.g., CFPB ARBITRATION STUDY, *supra* note 1, § 5.1, at 4; SEARLE INSTITUTE ARBITRATION STUDY, *supra* note 10, at 37–38; Bingham, *supra* note 10, at 206–07; Colvin, *Case Outcomes*, *supra* note 10; Colvin, *Clarity*, *supra* note 10, at 407; Eisenberg & Hill, *supra* note 10, at 45; Hill, *supra* note 10, at 792.

12. AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1751 (2011).

research until recently.<sup>13</sup>

This Article accepts two principles as a starting point: (1) Access to justice through the federal and state courts for many individual consumers or employees is unobtainable, and (2) my previously voiced position that in certain kinds of pre-dispute class-waiver arbitration agreements, the consumer/employee/plaintiff might be in as good a position, if not better off, as in the courts.<sup>14</sup> The main arguments advanced against this suggestion that arbitration could be just as beneficial to the individual litigant (as opposed to class member) are: arbitrator bias, lack of judicial oversight, the lack of a written decision, potential confidentiality, and the demise of the class action. The first four of these are perpetuated from a general criticism about the lack of transparency in consumer arbitration. However, these flaws could be minimized by the adoption of a regulatory scheme designed to improve transparency.

For example, arbitrator bias is theoretically presumed to stem, in part, from the repeat-player effect. This could occur at the individual arbitrator level or at the service provider level. Critics suggest that arbitrators may be consciously or unconsciously influenced by the fact that the corporate litigant is the paying party, and will not bring him or her repeat business if the arbitrator issues a decision or award that is not favorable to the business.<sup>15</sup> This “don’t bite the hand that feeds you” prognosis has some basic logic to it, but does not necessarily indicate that all arbitrators have repeat-player bias. Much the same argument could be made of state court judges who accept campaign contributions from potential litigants. How are we to know if the repeat-player effect taints the fair administration of arbitral proceedings for “underdog” claims?<sup>16</sup> We need transparency.

At least some history tells us that bias is real and problematic. In 2009

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13. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2304, 2304 (2013); *Concepcion*, 131 S. Ct. at 1740; *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *overruled by Concepcion*, 131 S. Ct. 1740.

14. This is a view I have previously taken. See Lampley, *supra* note 9, at 512–18 (arguing that the consumer is actually better off in ADR in a corporation-pays-all type agreement with a premium for winning, such as the one at issue in *Concepcion*).

15. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 684–85 (1996).

16. I use the term “underdog” claims to encompass consumer and employee claims in which the non-business entity had little or no bargaining power in accepting the mandatory pre-dispute arbitration agreement. Because these arbitration agreements typically prevent participation as a member of a class, the disputant is forced to individually arbitrate his or her claim. For low-value claims, the rational disputant would forego the claim unless an incentive to pursue the claim is available. See *Discover Bank*, 113 P.3d at 1110, *overruled by Concepcion*, 131 S. Ct. 1740.

the Minnesota Attorney General’s office filed suit against the National Arbitration Forum (NAF)—the then leading debt collection arbitration forum.<sup>17</sup> According to the allegations, the NAF purportedly held itself out as an impartial arbitration provider while having ties to key members of the debt collection industry.<sup>18</sup> Within days, the NAF entered into a settlement with the Minnesota Attorney General that required it to cease arbitrating consumer debt collection cases.<sup>19</sup> Increased transparency in the process will make it more likely that state attorneys general, the Department of Justice, the CFPB, and the public can monitor arbitration providers and ensure that the process is fair.

As the example of arbitrator bias illustrates, many of the criticisms against underdog arbitration thrive because of the more general criticism that arbitration simply is not transparent. This lack of transparency means we cannot assess whether arbitration is fair for disputants with less bargaining power.<sup>20</sup> Most arbitration disputes do not result in a published opinion and some underdog arbitrations are confidential.<sup>21</sup> *Concepcion* and *Italian Colors* both danced around this concept that individual arbitration is “fair” without expressly invoking the term or due process rights.<sup>22</sup> But how are we to know if this largely opaque

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17. *Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. TIMES, July 20, 2009, at B8.

18. Complaint at 1–2, *State v. Nat’l Arbitration Forum*, No. 27-CV-09-18550 (Minn. Dist. Ct. July 14, 2009) (on file with author).

19. Consent Judgment, *Nat’l Arbitration Forum*, No. 27-CV-09-18550, 2009 WL 5424036 (July 17, 2009).

20. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 87 (2011) (“The presence of the public divests both the government and private litigants of control over the meanings of the claims made and the judgments rendered and enables popular debate about and means to seek revision of law’s content and application.”); Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985, 990–91 (2012) (acknowledging that parties may prefer to have an award that spells out the disposition of various claims and controversies as well as the rationale underpinning the decision). The AAA requires a statement of the reason for employment awards, and just last year began requiring a statement of the reason for consumer awards, as do some arbitration contracts. *See infra* notes 145–46 and accompanying text.

21. FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 62–63 (2010) [hereinafter FTC CONSUMER DEBT COLLECTION REPORT], available at [http://www.ftc.gov/sites/default/files/documents/public\\_events/life-debt/debtcollectionreport\\_0.pdf](http://www.ftc.gov/sites/default/files/documents/public_events/life-debt/debtcollectionreport_0.pdf) (stating that reasoned opinions in consumer debt collection cases are rare, and must be requested by a party and often accompanied by a fee). This report is the culmination of extensive research by the FTC on consumer debt litigation and arbitration, including a 2007 public workshop to identify consumer problems and possible solutions, a 2009 report concluding that the debt collection system was in need of serious reform, and public roundtables in 2009 in Chicago, San Francisco, and Washington, D.C. bringing together numerous stakeholders in the issues. *Id.* at i–ii. The FTC also solicited and received public comments. *Id.* at ii.

22. *Am. Express Co. v. Italian Colors Rest.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2304, 2310–12 (2013); AT&T

process is fair, and hence, a truly adequate alternative forum? Professor Judith Resnik pointed out this problem, which she characterizes as a lack of “publicity”: “Lost is the ability to assess the qualities of the procedures and of decisionmakers and to evaluate whether asymmetries between disputants are taken into account.”<sup>23</sup> As Professor Resnik recognizes, what is also lost is the extra benefit of publicity so that public initiatives can remedy wrongs that go unchecked when government enforcement is lacking.<sup>24</sup> There is one other downside to arbitration’s secrecy—without open access to the complaint, or decision, it does not flag for other consumers a potential claim or a warning that there may be a problem with the manufacturer. This reduces the deterrent effect our court-based tort system has on manufacturers, retailers, and service providers. Similarly, in the employment context, the lack of publicity or transparency fails to advertise what may be widespread discriminatory practices.

This Article advocates a tri-part solution to address these critiques: (1) Congress should amend the Federal Arbitration Act (FAA) to require that arbitral providers report data on the arbitration proceedings for consumer, employment, and health-care claims (whether this is a claim regarding the quality of care or an insurance dispute) and states should enact an equivalent uniform reporting requirement;<sup>25</sup> (2) the FAA and state arbitration laws should require that arbitrators “publish” online a short statement of the decision; and (3) the FAA and state counterparts should require data reporting by the business entities that require pre-dispute agreements from clients, customers, and employees.

The first piece of the proposal has already been adopted by three states and the District of Columbia.<sup>26</sup> Part III.A of this Article discusses the commonalities of those state reporting requirements and includes suggestions for improvement. With respect to the second piece of the proposal, the “statement of decision” is intentionally not described as an “opinion.” It must set forth quite simply the applicable law and the facts as applied to that law. The third piece of the proposal requires a baseline of reporting by the business entities that impose the pre-dispute

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Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 1747–48, 1751–53 (2011).

23. Resnik, *supra* note 20, at 132.

24. *Id.*

25. See *infra* Part III.A.2 for specific data field recommendations.

26. CAL. CIV. PROC. CODE § 1281.96 (West, Westlaw through 2015 Reg. Sess.); D.C. CODE § 16-4430 (LEXIS through Sept. 16, 2015); ME. REV. STAT. ANN. tit. 10, § 1394 (West, Westlaw through 2015 Reg. Sess.); MD. CODE ANN., COM. LAW § 14-3903 (West, Westlaw through 2015 Reg. Sess.).

arbitration on their stakeholders, whether it is employee or consumer. This third proposal is likely to be the most controversial, but as a matter of marketing, I am surprised it has not already occurred organically. If, as AT&T argued in *Concepcion*, individual binding arbitration is just as fair to the consumer as proceeding collectively in court, why has AT&T not published yearly statistics on the consumer arbitration results? My proposal would simply make baseline reporting on the corporate-user level mandatory, much as companies must provide required information in routine Securities and Exchange Commission (SEC) filings, in order to avail themselves of this alternative private forum.

As an arbitration supporter myself, I am well aware that criticisms of this proposal will abound. The critique will be that the entire design of arbitration is to be streamlined, less expensive, and swift. A regime that makes arbitration more similar to litigation thwarts those goals. The response is that simple data reporting and the requirement of a statement of decision by a person already hired (and paid) as an industry expert will not result in this parade of horrors that will certainly be voiced. Litigation is expensive and protracted due to multiple factors, including extensive e-discovery, motions practice, depositions, and hearings. Arbitration still need not entail those features to the extent required by the state and the Federal Rules of Civil Procedure. Disputes still could be resolved based on little discovery or “on the papers.” The requirement that the seasoned “expert”—paid by the parties (or rather the corporate entity under the ideal arbitration agreement) to adjudicate the dispute—issue a short statement of the rule and application of law should result in a negligible cost increase.<sup>27</sup> And the data required by my proposal is information that is usually already gathered during the proceedings; it would necessitate only further completion of a form by the neutral selected.

Nonetheless, the proposal described in this Article is not a panacea for the funneling of consumer or employment claims to individual arbitration. Collecting data and heightening transparency cannot “prove” that arbitration is fair as compared to litigation, whether litigation proceeds individually or as part of a class.<sup>28</sup> And even with more

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27. Although it may put some arbitrators’ expertise to the test, which is part of the point.

28. For example, “[a] business win-rate of over ninety percent in arbitration does not show arbitration is unfair if the win-rate for comparable cases in court is similar.” SEARLE INSTITUTE ARBITRATION STUDY, *supra* note 10, at 9; *see also* PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION – A GOOD DEAL FOR CONSUMERS 11 (2008), *available at* <http://ssrn.com/abstract=1811133> (“Studies of debt collection actions in major cities reveal that the lender typically wins between 96% and 99% of the time, right in line with the lender win-rate data cited in the Public Citizen Report.”).

uniform reporting requirements, there will almost certainly be challenges in collecting and interpreting the data to understand individual consumer arbitration more fully.<sup>29</sup> But gathering this data in a uniform format will provide a useful tool for assessing the benefits of individual arbitration versus consumer litigation.

This Article begins with an analysis of the recent Supreme Court jurisprudence that embraces arbitration as an alternative forum, even for low-value or underdog claims. Part II addresses criticisms of pre-dispute arbitration, their validity, and their sources. In this Part, I emphasize that arguments both for and against mandatory “underdog” arbitration are grounded almost solely in theory, not on empirical evidence. Drawing on existing empirical research and assessment of current state laws, I propose a uniform reporting requirement for arbitration providers, a reporting requirement for corporate players, and a uniform requirement that arbitrators issue a statement of decision. In this proposal I address more fully the cost/benefit analysis of my tri-part proposal, and explain why the benefits, in enabling transparency, assessing fairness, and preserving publicity, outweigh the costs it will impose. Part III addresses some inherent weaknesses in data collection and assessment. Ultimately, I conclude that the benefits that will inure from heightened transparency justify implementation of this proposal, despite some weaknesses that persist.

## I. WHERE WE ARE AND HOW WE GOT THERE

By now, it is no secret that the Supreme Court has given prospective litigants a nudge, or indeed a *shove*, to the world of alternative dispute resolution. This Part provides an overview of the Supreme Court’s development of the “national policy favoring arbitration.”<sup>30</sup> In 1925 Congress passed the FAA, which states that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>31</sup> In *Prima*

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29. The Searle Institute Arbitration Study noted data inconsistencies in amounts claimed and awarded in AAA datasets input by AAA case managers and the findings made in the same case files by SCJI analysts. SEARLE INSTITUTE ARBITRATION STUDY, *supra* note 10, at 40. This study attributed the inconsistencies to the AAA case managers combining compensatory damages with attorneys’ fees, interest, punitive damages, and other damages. *Id.*

30. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740 (2011); *see also* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 394–98 (2005) (chronicling the consumer-product arbitration agreement); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635–46 (2005) (discussing mandatory binding arbitration in the United States).

31. 9 U.S.C. § 2 (2012).

*Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>32</sup> the Court held implicitly that the FAA preempts state law in federal courts, beginning the FAA preemption doctrine.<sup>33</sup> It extended FAA preemption to state courts in *Southland Corp. v. Keating*.<sup>34</sup> One year after *Keating*, the Court reversed longstanding federal doctrine when it held that the FAA applied to—and rendered enforceable—pre-dispute agreements to arbitrate antitrust claims. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>35</sup> the Court explained that

[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.<sup>36</sup>

After *Mitsubishi Motors*, the sole limitations on enforcement of pre-dispute arbitration agreements were (1) those that arise under state-law grounds, such as duress, fraud, or unconscionability;<sup>37</sup> (2) when the prospective litigant is deprived of vindicating its statutory cause of action in the arbitral forum;<sup>38</sup> and (3) in cases in which Congress has

32. 388 U.S. 395 (1967).

33. *Id.* at 400 (holding that issue of contract validity (as opposed to arbitration clause validity) is for the arbitrator to decide, not the courts, and that this rule of “national substantive law” governs even in the face of contrary state rule); *see also* *Southland Corp. v. Keating*, 465 U.S. 1, 11–12 (1984) (relying on *Prima Paint* as implying that the substantive rules of the FAA apply in state and federal courts).

34. 465 U.S. 1, 8, 12 (1984) (preempting a state statute requiring judicial, rather than arbitral resolution).

35. 473 U.S. 614 (1985).

36. *Id.* at 628.

37. The FAA provides that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity” for the revocation of any contract, 9 U.S.C. § 2 (2012), which refers to general state contract law defenses. Justice Thomas interprets this clause of the FAA as limited to only state contract defenses that concern the formation of the agreement, such as fraud, duress, or mutual mistake. *See* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1755 (2011).

38. *Mitsubishi Motors*, 473 U.S. at 637 (“[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”). Justice Scalia all but eviscerated the “effective vindication” doctrine in *American Express Co. v. Italian Colors Restaurant*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2304 (2013), when he characterized the quoted language as dicta. *Id.* at 2310. In footnote two, Scalia rejected the characterization of the “effective vindication” doctrine as part of *Mitsubishi Motor*’s holding:

Contrary to the dissent’s claim . . . the Court in *Mitsubishi Motors* did not hold that federal statutory claims are subject to arbitration so long as the claimant may effectively vindicate his rights in the arbitral forum. The Court expressly stated that, “at this stage in the proceedings,” it had “no occasion to speculate” on whether the arbitration agreement’s potential deprivation of a claimant’s right to pursue federal remedies may render that agreement unenforceable.

*Id.* at 2310 n.2 (citations omitted) (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19).

specifically restricted statutory claims from arbitration.<sup>39</sup>

In the years following *Mitsubishi Motors*, the Court upheld arbitration agreements arising out of other protective statutes such as section 10(b) of the Securities Exchange Act of 1934,<sup>40</sup> the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>41</sup> and section 12(2) of the Securities Act of 1933.<sup>42</sup> The Court's pro-arbitration stance extended to age discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>43</sup> despite the plaintiff's argument that arbitration would not serve the Age Discrimination in Employment Act's (ADEA) broad purposes without the class device or the broad equitable relief afforded through the courts. Then in 1996 in *Doctor's Associates v. Casarotto*,<sup>44</sup> the Court held that the FAA's command that arbitration agreements be placed on the "same footing" as other contracts preempted a Montana law that would render unenforceable arbitration agreements unless notice of the agreement was typed in underlined letters on the first page of the contract.<sup>45</sup>

Then came *Green Tree Financial Corp.-Alabama v. Randolph*,<sup>46</sup> a classic case of an underdog plaintiff contesting an adhesion pre-dispute

39. See, e.g., *Italian Colors*, 133 S. Ct. at 2309 ("No contrary Congressional command requires us to reject the waiver of class arbitration here."); *CompuCredit Corp. v. Greenwood*, \_\_ U.S. \_\_, 132 S. Ct. 665, 669 (2012) ("[The FAA] requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" (internal citations omitted)); *Mitsubishi Motors*, 473 U.S. at 627 (holding that "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable"). For example, The Dodd-Frank Wall Street Reform and Consumer Protection Act precludes pre-dispute exclusive arbitration agreements in residential-loan contracts. 15 U.S.C. § 1639(c) (2012). Other examples include 9 U.S.C. § 26(n)(2) (pre-dispute arbitration agreements not enforceable for commodity whistleblower claims); 10 U.S.C. § 987(e)(3), (f)(4) (2012) (rendering arbitration agreements unenforceable for military members and families for payday loans and consumer-credit contracts, other than residential mortgages and car loans); 15 U.S.C. § 1226(a)(2) (precluding automobile-dealer franchise pre-dispute arbitration agreements); and 18 U.S.C. § 1514A(e) (2012) (precluding waiver of rights and remedies of whistleblower claims under the Sarbanes-Oxley Act, including by pre-dispute arbitration agreement). See also Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 199 n.92 (2015).

40. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

41. *Id.*

42. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).

43. 500 U.S. 20, 28–29 (1991).

44. 517 U.S. 681 (1996).

45. *Id.* at 683, 687 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Requiring conspicuous notice of agreements to arbitrate, particularly in the consumer or employment context, may indeed be a laudable goal. To be sure, the prominence of the arbitration agreement is a factor in the unconscionability analysis. Congress could easily accomplish this goal by permitting states to require the notice to be conspicuous in the special situations of "underdog" claims.

46. 531 U.S. 79 (2000).

arbitration agreement. The *Green Tree* plaintiff was a consumer purchaser of a mobile home.<sup>47</sup> She financed the transaction through a financial services company.<sup>48</sup> She alleged the defendant failed to disclose a finance charge in violation of federal law.<sup>49</sup> She also argued that the arbitration agreement should not be enforceable because its silence as to cost allocation posed a risk that high arbitration costs would prohibit her from vindicating those federal rights.<sup>50</sup> Consistent with its pro-arbitration trajectory, the Court held that Randolph had not met the requisite level of proof to show that the existence of potentially large arbitration costs would preclude her from “effectively vindicating her federal statutory rights in the arbitral forum.”<sup>51</sup>

During this same time frame, the 1990s and throughout the 2000s, the presence of arbitration agreements in the sale of consumer products and employment agreements was on the rise. During this twenty-year time frame, one notable feature became dominant—the presence of the class waiver.<sup>52</sup> The enforceability of the class-waiver arbitration agreement was hotly contested in the lower federal courts and state courts primarily on two grounds: unconscionability and the “effective vindication” doctrine stemming from *Mitsubishi Motors*.<sup>53</sup> For over a decade many courts treated the class waiver as inherently unconscionable. California courts even applied the “*Discover Bank* rule” which rendered unenforceable arbitration agreements in which

the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has

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47. *Id.* at 82.

48. *Id.*

49. *Id.* at 84.

50. Neither party disputed the arbitration clause’s applicability to all claims, even statutory claims, arising under the contract, and Ms. Randolph did not contend that the Truth in Lending Act (TILA) evinces a clear intention by Congress to preclude waiver of judicial (or class) remedies. *Id.* at 90.

51. *Id.*

52. For a history of the evolution of the class-waiver arbitration agreement, see, for example, Gilles, *supra* note 30, at 394–98; Jeffrey A. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 398 (2008) (“The practical consequences of the new legal era were significant. Arbitration left the province of particular business guilds or commercial environments and shifted to a massive privatization of the adjudicatory function. . . . [A] genre of new arbitration arose, in which arbitration agreements were essentially imposed upon a large, general class of consumers and workers.”).

53. See, e.g., Lampley, *supra* note 9, at 503–10 (analyzing the evolution and use of arbitration agreements in consumer products and services).

carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.<sup>54</sup>

But in very recent cases, the Court has all but eviscerated these defenses. First, in *Rent-A-Center, West, Inc. v. Jackson*,<sup>55</sup> the Court held that a “delegation clause”—granting the arbitrator the exclusive authority to decide the enforceability of the arbitration agreement itself, instead of a court—was enforceable.<sup>56</sup> Traditionally, attacks on the validity of a contract as a whole were issues for an arbitrator to decide, but attacks on the gateway issue of enforceability of the arbitration agreement were for the court.<sup>57</sup> The *Rent-A-Center* Court held that this traditional division of gateway issues could be modified by contractual agreement, delegating authority to the arbitrator to determine issues of arbitration agreement enforceability.<sup>58</sup>

Then came *AT&T Mobility LLC v. Concepcion*, in which the Court held that the FAA preempted the aforementioned “*Discover Bank* rule,” because it “stands as an obstacle” to the FAA’s objectives.<sup>59</sup> The Court rejected Justice Breyer’s dissenting argument that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system” because even if that result is *desirable*, states cannot require it through a procedure inconsistent with the FAA.<sup>60</sup> The Court actually went so far as to declare nonconsensual class arbitration as inconsistent with the FAA because it sacrifices informality for slower, more costly, and more complex decisions that carry greater risks.<sup>61</sup> And the Court made a point of observing the specific consumer-friendly tenets of the AT&T agreement, including AT&T’s incentive payment of \$7500 and double attorney’s fees if the claimant received an arbitral award greater than AT&T’s last settlement offer. The district court found that the plaintiffs were actually “better off” under this arbitration agreement than as a member of a class, “which ‘could take months, if not years, and which may merely yield an opportunity to submit a claim

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54. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *overruled by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011).

55. 561 U.S. 63 (2010).

56. *Id.* at 72–73.

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

58. A party could raise a defense to the enforcement of the *delegation* clause under *Rent-A-Center*, which would still raise a gateway issue of enforceability for the courts, but a general attack on the arbitration agreement itself would be subject to the otherwise enforceable delegatory-arbitration agreement. *Rent-A-Center*, 561 U.S. at 72.

59. *Concepcion*, 131 S. Ct. at 1753.

60. *Id.*

61. *Id.* at 1751–53.

for recovery of a small percentage of a few dollars.”<sup>62</sup> And the Ninth Circuit stated that aggrieved consumers who filed claims were “essentially guarantee[d]” to be made whole.<sup>63</sup> While *Concepcion* could not have wholly removed unconscionability as a general contract defense to a truly one-sided arbitral agreement, it did significantly limit the contours under which that defense could be asserted. No longer is the argument that arbitration agreements are unfair because they remove the class device valid. This is true even for traditionally “underdog” claims.

Following *Concepcion*, many observers claimed that the consumer class action was dead.<sup>64</sup> But for federal statutory claims, opponents of the class-arbitration waiver found cover in *Mitsubishi Motor’s* “vindication of statutory rights” doctrine. As applied to low-value claims, the theory went that it would be irrational to pursue an individual claim through arbitration when the cost of arbitration outweighed the potential recovery. Hence, the removal of the class device precluded the litigant’s opportunity to vindicate statutory rights. Two years after *Concepcion*, the Court struck a deathblow to this argument in *American Express Co. v. Italian Colors Restaurant*.<sup>65</sup> Although *Italian Colors* did not involve a typical “underdog” claim, it did involve the claims of individual small business owners against the monolithic American Express. The claims of those small business owners resembled underdog claims because the merchants had no negotiating power and were allegedly coerced into “take it or leave it” agreements with American Express. The small business-owner merchants wanted to sue American Express for antitrust violations based on American Express’s alleged improper tying agreements, by which American Express required a merchant to accept its credit card if a merchant was going to accept the more lucrative charge card.<sup>66</sup> But they wanted to proceed collectively. And they had each signed agreements requiring them to arbitrate individually. The merchants claimed that due to exorbitant expert fees needed to prove their antitrust claims, it would be too expensive to bring these claims individually in arbitration. Thus, the merchants argued,

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62. *Id.* at 1753 (quoting *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*12 (S.D. Cal. Aug. 11, 2008), *aff’d sub nom.* *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev’d sub nom. Concepcion*, 131 S. Ct. 1740).

63. *Id.* (alteration in original) (quoting *Laster*, 584 F.3d at 856 n.9).

64. *See, e.g.*, Fitzpatrick, *supra* note 39, at 199 (predicting that after *Concepcion* and *Italian Colors*, businesses will adopt class waivers “en masse against consumers and employees” insulating themselves from class liability).

65. *Am. Express Co. v. Italian Colors Rest.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2304, 2304 (2013).

66. *In re Am. Express Merchants’ Litig. (Amex I)*, 554 F.3d 300, 307–08 (2d Cir. 2009).

depriving them of the class device prohibited vindication of their rights under the federal antitrust statute.<sup>67</sup>

The Court disagreed, holding that the vindication of statutory rights “exception” applies only to the “prospective waiver of a party’s *right to pursue* statutory remedies.”<sup>68</sup> The class-action waiver did not eliminate the *right to pursue* that remedy.<sup>69</sup> As the Court succinctly put it, “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>70</sup> But the Court’s opinion did not stop there. Justice Scalia’s characterization of the vindication of statutory rights doctrine as “judge-made” “dictum” in *Mitsubishi Motors* calls into question the entire propriety of the vindication of statutory rights doctrine all together—at least if it were applied to render an arbitration agreement unenforceable.<sup>71</sup> The Court recognized some situations in which the exception would be applicable—a provision in an arbitration agreement forbidding the assertion of statutory rights, for example, or filing and administrative fees that were so high such that *access to the forum* were prohibitively expensive.<sup>72</sup> But those examples are the extremes and do not “save” the underdog claims that are irrational to pursue in light of arbitral costs. The Court reminded us that this issue was “all but resolv[ed]” in *Concepcion*: “We specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’”<sup>73</sup> The Court reiterated this holding as if to give strength to what could have been characterized as dicta in *Concepcion*. At least in the majority’s view, the argument that without the class device underdog claims will go unprosecuted is not a basis for refusing to enforce an arbitration agreement.

The significance of these pro-arbitration decisions is magnified by other Roberts Court opinions. In *Marmet Health Care Center, Inc. v. Brown*,<sup>74</sup> the Court easily overturned a decision by the West Virginia

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67. Brief for Respondents at 2, *Italian Colors*, 133 S. Ct. 2304 (No. 12-133), 2013 WL 267025, at \*2.

68. *Italian Colors*, 133 S. Ct. at 2310 (emphasis in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

69. *Id.* at 2311.

70. *Id.* (emphasis in original).

71. *Id.* at 2310.

72. *Id.* at 2310–11.

73. *Id.* at 2312 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1753 (2011)).

74. \_\_\_ U.S. \_\_\_, 132 S. Ct. 1201 (2012) (per curiam).

Supreme Court holding that pre-dispute arbitration agreements are unenforceable when they involve claims for personal injury or wrongful death against a nursing home.<sup>75</sup> The per curiam decision merely reinforced FAA preemption doctrine, which was almost a foregone conclusion after *Concepcion*. But *Marmet* removed any doubt that pre-dispute arbitration agreements are enforceable for personal injury claims, including medical malpractice claims.<sup>76</sup> And as discussed above, in *Hall Street Associates v. Mattel, Inc.*,<sup>77</sup> the Court held that the same parties who agreed to arbitrate individually could not contractually enlarge the grounds for judicial review of the arbitral award.<sup>78</sup> *Hall Street* also cast significant doubt on whether “manifest disregard of the law” remains a ground for vacating an arbitral award, because it is not specifically enumerated in section 10 of the FAA.<sup>79</sup> The very narrow limitations for review or modification of an arbitral award, even if the parties have otherwise agreed, is an effective grant of authority from the Court to arbitrators to do what they will without interference by courts or the rule of stare decisis.

The Court’s message conveyed through *Concepcion* and *Italian Colors*, and to a lesser degree, *Marmet* and *Hall Street*, is loud and clear. Arbitration is here to stay. This is true for consumer products and services. This is true for employer/employee claims. This is true for contracts in which the litigant has waived an opportunity to participate

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75. *Id.* at 1203. In its scathing opinion, the Court wrote, “[t]he West Virginia court’s interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.” *Id.* The West Virginia Supreme Court had based its holding on its errant conclusion that:

Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public.

*Id.* (quoting *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 291 (W. Va. 2011)).

76. Some state courts continue to apply state public policy grounds to invalidate arbitration agreements. See *infra* note 189. In an interesting twist on the issue of state law preemption, a California court of appeals held an arbitration agreement unenforceable under the contract language providing that if the state law rendered the class-arbitration waiver unenforceable, the entire arbitration agreement is unenforceable, because California’s Consumer Legal Remedies Act (CLRA) precludes waiver of the class action. But to the extent the CLRA imposes class arbitration on parties without agreement, it is preempted by the FAA, which would mean the contractual class waiver does not offend state law. *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 195 (Ct. App. 2014). The Supreme Court granted certiorari review from the state court of appeals decision in March 2015. *DIRECTV, Inc. v. Imburgia*, 135 S. Ct. 1547 (2015).

77. 552 U.S. 576 (2008).

78. *Id.* at 586.

79. See Timothy Dyer, “Manifest Disregard” Alive and Well?, 17 J. CONSUMER & COM. L. 82 (2014).

as part of a class. This is even true for low-value arbitration claims. If the parties agreed to pre-dispute individual arbitration, absent some element of fraud, duress, or oppression, the Court would look favorably upon that agreement. And with this new era of mandated approval of arbitration agreements, it is time to accept that individual arbitration for “underdog” claims may be here to stay, and may even be a feasible system in which to operate. It is time for a new approach in which academics and lawyers work within the existing system and find a way to fashion an alternative dispute forum that works.

## II. INDIVIDUALIZED ARBITRATION OF UNDERDOG CLAIMS: *SOME NOTEWORTHY CRITIQUES*

The cases discussed above show that, at least for now, the Supreme Court has fully embraced individual arbitration (through the class waiver) for low-value claims, even if it means that some claims will slip through the cracks. Yet the foundation of these cases is the theoretical idea that arbitration, as a court alternative, is adequately fair.<sup>80</sup> The genesis of the *Discover Bank* rule at issue in *Concepcion* was due to a concern about fairness—the California Supreme Court held that it was inherently unfair, indeed unconscionable, for a party with superior bargaining power to “deliberately cheat large numbers of consumers out of individually small sums of money” through an adhesion contract in which a consumer agreed to individual arbitration and waived the opportunity to participate as a member of a class.<sup>81</sup> Certainly, even after *Concepcion*, states are free to determine whether arbitration agreements are subject to general contract law defenses, including the unconscionability defense.<sup>82</sup> But states cannot apply their unconscionability doctrines in a way that stands as an obstacle to the FAA’s role.<sup>83</sup>

Even beyond this preemption-based holding, however, the Supreme

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80. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1753 (2011); *see also* Resnik, *supra* note 20, at 132 (“The Justices did not use the phrase ‘due process,’ . . . yet their judgments and disagreements entailed considering the quality of procedures, the asymmetries between disputants . . . , and the relevance of access and publicity, all of which are dimensions of the due process analyses set forth at the outset.”); *id.* at 93 (“[A]ll nine Justices assessed what fairness requires, in resources and in process, in or out of public courts.”).

81. *Concepcion*, 131 S. Ct. at 1753 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

82. *Id.* at 1748 (“Although § 2’s saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”).

83. *Id.*

Court reiterated the district court’s finding that the plaintiffs were “*better off* under their arbitration agreement with AT&T than they would have been as participants in a class action . . . ‘which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.’”<sup>84</sup> By couching its holding in terms of the utilitarian benefit to the plaintiff, the Court reaffirmed its theoretical assumption that arbitration is a perfectly fair alternative forum to litigation.

That theoretical assumption is not new. It formed the bedrock of the Supreme Court’s pro-arbitration jurisprudence beginning with *Mitsubishi Motors*. There the Court grounded its holding on the assumption that arbitration is a fair substitute for litigation:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.<sup>85</sup>

This recognition of the fairness of the arbitral forum also percolates into the Court’s holding in *Italian Colors*. In rejecting the argument that class arbitration is necessary to prosecute small-value claims, the Court noted that “[t]he class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938,”<sup>86</sup> even though the economic effect of that result will mean that some individual, low-value claims will not be asserted individually.<sup>87</sup> To drive home this point, the Court suggested that an arbitration provision forbidding the assertion of certain statutory rights would fail the “effective vindication” doctrine (to the extent it still exists), as would “perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”<sup>88</sup> Each of these examples involves elements that would render arbitration inaccessible and unfair as a litigation alternative.

What is interesting about this underlying assumption that arbitration

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84. *Id.* at 1753 (emphasis in original) (quoting *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*12 (S.D. Cal. Aug. 11, 2008), *aff’d sub nom.* *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev’d sub nom. Concepcion*, 131 S. Ct. 1740).

85. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

86. *Am. Express Co. v. Italian Colors Rest.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2304, 2311 (2013).

87. *Id.* at 2312 (rejecting argument that class arbitration is necessary to prosecute claims “that might otherwise slip through the legal system” (quoting *Concepcion*, 131 S. Ct. at 1753)).

88. *Id.* at 2310–11.

is a fair alternative forum, even for underdog cases, is that the Supreme Court relied on no empirical evidence of outcomes suggesting that arbitration may be a fair alternative forum.<sup>89</sup> It just seems, particularly on the face of consumer-friendly arbitration agreements like that at issue in *Concepcion*, that arbitration should be an adequate alternative forum to litigation.

And herein lies the problem. Criticisms of pre-dispute individual arbitration abound. They are no more inconceivable than the idea that arbitration itself should be fair. But again, there is no evidence, no data, and no proof that confirms the existence of the criticisms. However, these criticisms highlight the need for more information about underdog arbitration agreements and outcomes. This Part of this Article will describe the main tenets of the most prominent criticisms of underdog arbitration: the class-waiver, arbitrator bias, lack of judicial oversight, lack of a written opinion, and the potential for confidentiality, many of which stem from the current regulatory system in which arbitration is not transparent.

#### A. *The Class-Waiver: Fair? Economical? Rational? Who Knows?*

One of the central problems raised by underdog arbitration is the almost uniform implementation of a clause requiring the consumer to waive the right to participate as a member of a class in court or in arbitration, i.e. the class waiver.<sup>90</sup> Opponents of this type of clause argue that individual low-value claims will not be brought if the sole option is to bring those claims as an individual disputant in arbitration.<sup>91</sup> The

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89. See *Concepcion*, 131 S. Ct. at 1751 (citing AAA statistics for length of time toward dispute resolution, but offering no analysis of the prevalence of or outcomes data for low-value consumer claims).

90. See Fitzpatrick, *supra* note 39, at 199 (predicting that after *Concepcion* and *Italian Colors*, businesses will adopt class waivers “en masse against consumers and employees,” insulating themselves from class liability); Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 868 (2012) (“The pragmatic point is that rights *will not in fact* be vindicated if we ban collective action.” (emphasis in original)); Gilles, *supra* note 30, at 430 (“Allowing companies to simply opt out of exposure to collective litigation is no more defensible than a system in which corporations may decide whether they wish to be exposed to federal antitrust, securities, or civil rights laws.”); Resnik, *supra* note 20, at 127 (criticizing *Concepcion* and discussing the negative ramifications of the class waiver); Sternlight, *supra* note 30, at 1652 (“Given these benefits of class actions, it is clear that by eliminating the class action option, companies increase plaintiffs’ costs of pursuing a claim and thereby make it more difficult, if not impossible, for them to bring claims against the company.”).

91. This was the central issue in *Italian Colors*. See *supra* notes 65–73, 81 and accompanying text.

proposal detailed in this Article will not fully address the fairness concerns raised by those who oppose the arbitration-with-class-waiver device, but the Article would miss a piece of the argument without at least raising the criticism.

One point is worth making however—if we are to base our judgment of the class device trade-off with an assessment of dispute resolution economies, we simply do not have enough empirical information to conclude that the class waiver is a disservice to consumers. Indeed, a few points from the recent CFPB Arbitration Study show that for the time being, we should remain open to the idea that private dispute resolution on an individual basis may be an acceptable alternative to the imperfect class device. First, approximately sixty percent of the consumer financial products class actions filed ended in a non-class settlement or potential non-class settlement (i.e., withdrawal or dismissal by the plaintiff); approximately twelve percent (sixty-nine cases) reached an approved class-action settlement.<sup>92</sup> This means that only a small portion of class actions that are filed result in any damages to the class-member consumer. Second, looking at a broader data set of consumer financial class-action settlements from 2008–2012, the average claims rate (claims made as a percentage of eligible class members) was low, twenty-one percent, with an eight percent median.<sup>93</sup> Thus, even when consumers obtain a settlement through the class device, they usually do not take the administrative steps to obtain the payout. Third, the consumer survey reflects that the dispute resolution process matters little to consumers in product selection (at least for credit cards) and that most consumers do not know if they can sue in court or are subject to mandatory pre-dispute arbitration agreements.<sup>94</sup> This

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92. CFPB ARBITRATION STUDY, *supra* note 1, § 6.6.1, at 36–39, 40 fig.11. The CFPB Arbitration Study analyzed 562 consumer financial products putative class cases filed between 2010–2012; it identified an outcome for 478 of those cases by the study date. *Id.* at 36; *id.* § 6.5, at 16–18 (describing methodology). Of those, *none* went to trial on the merits. *Id.* § 6.2.2, at 7. Ten were resolved against the company on motion, but only three (0.63%) of those were on a class-wide basis. *Id.* Additionally, of those ten resolved on the merits, seven were through default judgment. *Id.* § 6.6.1, at 37–38. It is also worth noting that in 94 of the 562 class actions studied, companies moved to compel arbitration; 46 of such motions were granted in full or in part. *Id.* § 6.7.1, at 57–58.

93. *Id.* § 8, at 5; § 8.3.4, at 30. Assessing claims rate is difficult and has some limitations as acknowledged in the CFPB Study. *Id.* § 8.3.4, at 30 & n.49. Thus, the CFPB advises that these numbers should be viewed as a floor, because it may underestimate the actual rate. But the data reflect that consumers fail to capture much of the settlement relief offered. *Id.*

94. *Id.* § 3.1, at 3 (finding that consumers did not volunteer “dispute resolution procedure” as a feature important to their decision to obtain the credit card they use most often, and this factor ranked lowest when the consumer was asked to identify important features out of a list).

information, while only representative of a small segment of the market, shows that consumers care little at the point of purchase about preserving the right to participate as a class, and perhaps more surprising, that the majority of consumers are not seeking class recovery even when it is available to them through a settlement decree. If the findings of the CFPB study regarding class action settlements are indicative of other markets, the class action is a flawed device for making the consumer whole. This makes the CFPB's rule proposal to ban class waivers in consumer financial services arbitration agreements seem like a very drastic remedy, because it will effectively mean that financial entities cease providing for pre-dispute arbitration altogether.<sup>95</sup>

In past writings, I have taken the view that business-funded arbitration with a litigation incentive can leave a consumer better off than he or she would be as a member of a class.<sup>96</sup> The Supreme Court in *Concepcion* agreed (admittedly, without empirical information on arbitration outcomes).<sup>97</sup> While a full discussion of the fairness concerns of the class waiver in consumer and employee arbitration agreements is beyond the scope of what can be adequately addressed in this regulatory proposal, increased data about underdog arbitration will inform that central debate in a much needed way.

#### B. *Bias: You Don't Bite the Hand that Feeds You*

One of the main criticisms of arbitration in "underdog" claims is that the arbitrator or arbitral forum will be biased.<sup>98</sup> As noted in the Introduction, nowhere is this more evident than in the claims lodged against the NAF for misrepresenting its neutrality in debt collection cases when it was affiliated with the New York hedge fund that also

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95. Alan S. Kaplinsky, *Our Thoughts on Director Cordray's Arbitration Comments to the CFPB's Consumer Advisory Board*, CFPB MONITOR (Oct. 22, 2015), <https://www.cfpbmonitor.com/2015/10/22/our-thoughts-on-director-cordrays-arbitration-comments-to-the-cfpbs-consumer-advisory-board/>.

96. Lampley, *supra* note 9, at 512–18. An incentivizing clause typically promises a premium to the consumer and/or attorney's fees if the consumer wins more in arbitration than the company's last settlement offer. See, e.g., *Netflix Terms of Use* § 15(e), NETFLIX, <https://www.netflix.com/TermsOfUse> (last updated Sept. 15, 2014); *Wireless Customer Agreement* § 2.2(4), ATT.COM, <http://www.att.com/legal/terms.wirelessCustomerAgreement.html#disputeResolutionByBindingArb> (last visited Oct. 22, 2015).

97. See *supra* note 84 and accompanying text.

98. See, e.g., Sternlight, *supra* note 30, at 1649 ("There are virtually an infinite number of ways in which a company, as the drafting party, can try to use an arbitration clause to gain the upper hand, including arbitrator selection, imposition of high costs, and limitation of remedies. While it would be wrong to suggest that most of these excesses are included in most arbitration clauses, some of them are quite common.").

owned the country’s largest debt collection enterprises.<sup>99</sup> The Minnesota Attorney General’s complaint alleged that the NAF worked closely with creditors to (1) encourage them to file arbitration claims as an alternative way to collect debt from consumers; (2) draft arbitration clauses, advise creditors on arbitration legal trends, and in some cases, help them draft claims to be filed against consumers; and (3) refer them to debt collection law firms, which then file arbitration claims against consumers in the Forum.<sup>100</sup> The NAF ultimately settled this lawsuit, agreeing to stop accepting all consumer arbitrations.<sup>101</sup>

The cases against the NAF, which used to be one of the top three arbitral forums in the United States, show that we cannot ignore the bias critique. In addition to bias due to financial ties, critics have long argued that with arbitration in which the employer or manufacturer is likely to be a repeat player, bias is structural.<sup>102</sup> Employers, manufacturers, and retailers that enforce arbitration agreements are more likely to be “repeat players” than individuals, typically “one-shot” players. The CFPB Arbitration Study to Congress found that in consumer financial services and product disputes filed in 2010–2011, heavy repeat players “dominated” arbitration filings, constituting over eighty percent of case filings.<sup>103</sup> The repeat player has an advantage in arbitrator selection because it is more familiar with the pool of potential arbitrators.<sup>104</sup>

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99. Complaint, *State v. Nat’l Arbitration Forum*, No 27-CV-09-18550 (Minn. Dist. Ct. July 14, 2009) (on file with author).

100. *Id.*

101. *See Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. TIMES, July 20, 2009, at B8.

102. *See, e.g., Julius G. Getman, Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 936 (1979) (“A system of private selection would be disadvantageous to employees, since an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants.”); *see also Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (“If an arbitrator is likely to ‘lean’ in favor of an employer—something we have no reason to suspect—it would be because the employer is a source of future arbitration business.”); Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs that Use Arbitration: Transparency, the Universal Sanitizer*, 6 Y.B. ON ARB. & MEDIATION 32, 41 (2014) (concluding that adhesive arbitration bears indicia of structural bias because the disputant with superior economic control takes unilateral control over designing the dispute system for conflicts, and the arbitration agreements restrict recourse to the public civil justice system by typically removing collective action options).

103. CFPB ARBITRATION STUDY, *supra* note 1, § 5.6.12, at 59. “Heavy” repeat players are those that appeared in four or more disputes from 2010–2012. Notably, “heavy” repeat consumer attorneys constituted forty-five percent of all filings, representing a trend in representation in this market. *Id.*

104. *See Richard A. Bales & Sue Irion, How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1094 (2009). Bales & Irion dub this “submerged bias.” *Id.*

Empirical studies confirm that repeat players do tend to win more than one-shot players, at least in employment arbitration, but are inconclusive as to the cause for this effect.<sup>105</sup> For example, simpler, faster procedures in arbitration may incentivize employees to bring lower-value claims.<sup>106</sup> Additionally, the availability of dispositive motions in pre-trial litigation practice may lead to the dismissal of weaker cases, reflecting a higher overall win rate at trial.<sup>107</sup> The repeat player may also fare better in the process because it has had an opportunity to learn from prior procedures and improve its strategy, potentially settling weaker cases to pursue the stronger ones.<sup>108</sup> Professor Elizabeth Hill coined this the “appellate effect” in her empirical study of two-hundred AAA employment cases.<sup>109</sup> Professor Hill found that employers who repeatedly arbitrate did tend to win more frequently than one-shot players, but only two of the two hundred cases in her sample involved an arbitration involving the same company and arbitrator.<sup>110</sup> The fact that only one percent of the parties were truly repeat players with each other means that arbitrator bias to the repeat party should not have demonstrated an effect. But Hill also found the win-loss record for those repeat employers who maintained an in-house dispute resolution program culminating in AAA

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105. See, e.g., Bingham, *supra* note 10, at 213 (finding that in repeat player cases, employees won something only sixteen percent of the time, compared with a sixty-three percent employee win rate overall, and that employees dealing with non-repeat players recovered an average of forty-eight percent of what they demanded, while employees dealing with repeat players recovered only eleven percent of what they demanded); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 239 (1998) [hereinafter Bingham, *On Repeat Players*] (“The repeat player effect is a cause for concern because in dispute resolution, sometimes the perception of fairness is as important as the reality. There is undeniably a repeat player effect in employment arbitration.”); Colvin, *Clarity*, *supra* note 10, at 412–17, 430, 434 (finding employee win rate of 32% against one-shot employers compared to 13.9% against repeat-player employers, and only 11.3% where the repeat-player employer was paired with a repeat arbitrator; finding 2% win rate when a repeat employer was paired with a repeat arbitrator against a pro se claimant). But there may be many factors contributing to these differential outcomes, such as the strength of the claims, the settlement rate, and award ratio.

106. Colvin, *Clarity*, *supra* note 10, at 417.

107. *Id.*

108. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 862 (2010) (collecting empirical studies and observing that “[o]verall, the empirical evidence tends to support the existence of a repeat-player effect, but suggests that the effect may be due to case screening by repeat businesses rather than repeat-arbitrator or repeat-player bias”); see also Bingham, *On Repeat Players*, *supra* note 105, at 241; Colvin, *Clarity*, *supra* note 10, at 417–18.

109. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May–July 2003, at 9, 15.

110. *Id.*

arbitration to be much higher than those repeat employers without an in-house program.<sup>111</sup> Thus, according to Hill, the “effect appears to be the result of the selection processes of large employers’ in-house dispute resolution programs, not merely the by-product of large employers’ repeat appearances at arbitration.”<sup>112</sup>

Additionally, the arbitrator may be more inclined to side with the repeat player (even subconsciously) because that entity is likely to be the source of repeat business if a favorable decision is reached. Professor Jean Sternlight has dubbed this the “repeat provider” problem.<sup>113</sup> The basic premise is that companies typically designate the provider of arbitration services in their arbitration agreement. Both the arbitrator and the provider will be paid for the services performed, the arbitrator will receive fees, and the provider will earn administrative fees or possibly even a percentage of the fees charged by the arbitrator.<sup>114</sup> If the company is unhappy with a ruling from an arbitrator, or even a provider, the company has an incentive to refuse to select that particular arbitrator again, or, over time, to choose a different provider.<sup>115</sup> As Professor David Schwartz points out, the more palpable concern “is that arbitrators will reduce their awards to increase their chances of being rehired by *any* future defendant.”<sup>116</sup> Thus, “every defendant is functionally a repeat player” to the extent information about prior decisions is available to potential disputants.<sup>117</sup>

Similarly, Professor Lisa Blomgren Amsler examined the common provisions of adhesive arbitration agreements under the “dispute system design” (DSD) framework.<sup>118</sup> Amsler argues that “[s]tructural bias in

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111. *Id.*

112. *Id.*

113. Sternlight, *supra* note 30, at 1650 (explaining the “repeat provider” effect).

114. *Id.*

115. *Id.* (“Thus, charge the critics, providers have a financial incentive to make sure that the company is pleased with the results in arbitration.”).

116. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1311 (2009) (emphasis in original); see also Larry J. Pittman, *Mandatory Arbitration: Due Process and Other Constitutional Concerns*, 39 CAP. U. L. REV. 853, 856 (2011) (“Arbitrators know that repeat players are more likely to choose them either if the arbitrator has ruled in the repeat players’ favor during past arbitrations or if they are likely to rule for them during future arbitrations.”).

117. Schwartz, *supra* note 116, at 1311.

118. Amsler, *supra* note 102, at 35–42. According to Amsler:

DSDs generally fall into one of three categories: (1) a court, agency, or other third party designs it for the benefit of disputants (third party design); (2) two or more disputants subject to the system jointly design it (all disputants or parties design); and (3) a single disputant with stronger economic power designs it and imposes it on the other disputant (one party design).

*Id.* at 40.

DSDs may depend on (1) who is designing the system; (2) what their goals are, and (3) how they have exercised their power.”<sup>119</sup> Using this approach, she concludes that adhesive arbitration bears indicia of structural bias because the disputant with superior economic control takes unilateral control over designing the dispute system for conflicts; the arbitration agreements restrict recourse to the public civil justice system; and adhesive arbitration clauses typically remove collective action options.<sup>120</sup> Like myself, Professor Amsler believes that the potential for bias presents the need for additional transparency.<sup>121</sup> Increased transparency can help the public evaluate the extent of repeat-player bias, and help the public avoid arbitrators and arbitration service providers who have repeatedly found in favor of one repeat player. This perception that private, pre-dispute mandatory arbitration is subject to inherent bias is perpetuated by two other factors that lead to its wide criticism—the lack of judicial review and public distrust of the court alternative.

### C. *Whatever Happened to Judicial Oversight?*

Mandatory arbitration with class waivers in underdog claims is also criticized for its finality.<sup>122</sup> Members of Congress have expressed a similar concern, stating: “Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators’ decisions.”<sup>123</sup> Judicial review

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119. *Id.*

120. *Id.* at 41.

121. *See generally id.* at 51–55 (arguing that “transparency can be a powerful tool for controlling the abuse of power” and offering examples of ways to achieve transparency).

122. Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. KAN. L. REV. 47, 75 (2010) (proposing that courts review all awards in “mandatory arbitration for legal error under the manifest-disregard standard”); Pittman, *supra* note 116, at 872 (noting that “another way that courts can provide more protection to ensure fairness in arbitration is to engage in a more exacting level of judicial review of arbitration awards”); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 720–27 (1999) (recognizing that arbitrators often do not “follow the law” and proposing that “[t]he Court must either reverse its decisions that claims arising under otherwise mandatory rules are arbitrable, or require de novo judicial review of arbitrators’ legal rulings on such claims”); Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 207 (2012) (“[J]udicial deference to arbitrators and the outcomes they produce becomes especially worrisome when arbitration draws its efficacy from the enforcement power of the state and the arbitrators’ and arbitral organization’s role is due to their special relationship with just one of the parties, usually the more powerful repeat player.”).

123. Arbitration Fairness Act of 2013, S. 878, 113th Cong. § 2 (2013).

of an arbitral award is very narrow.<sup>124</sup> The finality of the arbitral award leads to public distrust and criticism among consumer or employee advocates.

Sections 10 and 11 of the FAA prescribe the exclusive grounds for vacating or modifying an arbitral award which,<sup>125</sup> according to the Court in *Hall Street Associates v. Mattel, Inc.*, cannot even be modified by agreement of the parties.<sup>126</sup> This limited review “maintain[s] arbitration’s essential virtue of resolving disputes straightaway.”<sup>127</sup> Otherwise the perceived simplicity of arbitration would become “merely a prelude to a more cumbersome and time-consuming judicial review process.”<sup>128</sup>

Under Section 10 of the FAA, the sole grounds for vacating an arbitral award are when there was evident corruption, fraud, or undue means in the procurement of the award or in the arbitrators themselves; when the arbitrators exceeded their powers, or failed to make a “mutual, final, and definite award” on the matter; or when the arbitrators are “guilty of misconduct” in procedural matters such as refusing to hear evidence or postpone a hearing.<sup>129</sup>

Notably, the first two grounds speak to corruption, undue means, or bias. But absent the flagrant bribery charge, how can the appealing

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124. Even when a court agrees to hear a review of an arbitral award under the very limited grounds set forth in notes 129 and 133, *infra*, “courts overturn only about 10% of arbitration awards reviewed under the [FAA].” Lindsay Melworm, *Biased? Prove It: Addressing Arbitrator Bias and the Merits of Implementing Broad Disclosure Standards*, 22 CARDOZO J. INT’L & COMP. L. 431, 441 (2014) (citing Platt W. Davis III, *Nondisclosure of Arbitrator Conflicts and the “Evident Partiality” Standard*, CPA J., June 2004, at 54, 55).

125. 9 U.S.C. §§ 10, 11 (2012).

126. 552 U.S. 576, 586 (2008). *Hall Street* was a bit of an anomalous result in the arbitration world, where although almost everything can be negotiated by contract, the grounds for judicial review cannot. *Id.* Of course, the Court hinted that there may be some leeway around the narrow scope of review based on the FAA under state statutes, or even based on the Court’s inherent case-management power under Federal Rule of Civil Procedure 16, *id.* at 590–92, and parties could contract around this altogether by providing for arbitral review of an award that is egregious by some metric.

127. *Id.* at 588.

128. *Id.*

129. Section 10 provides that the sole grounds for vacating an arbitral award are:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)–(4).

litigant ever prove bias? What is notable about the second two grounds is what is lacking—judicial review for an arbitral decision based on a manifest disregard of the law or clear abuse of discretion. Under the grounds as given, an award cannot be vacated even if it ignores *stare decisis* or mistakes the facts presented. Further, *Hall Street* casts significant doubt on whether “manifest disregard of the law” remains a ground for vacatur, because it is not specifically enumerated in section 10.<sup>130</sup> Thus, even under the “exceeds powers” provision of section 10(4), the Court has held that the party seeking award vacatur “bears a heavy burden” because a showing of error, “even a serious error,” will not provide grounds for vacating the award.<sup>131</sup> It is only when the arbitrator acts outside his “contractually delegated authority” that this ground permits vacating the award.<sup>132</sup>

Section 11 mitigates section 10 somewhat by providing that awards may be modified in certain circumstances. Awards may be modified if there is evident miscalculation or an evident material mistake surrounding the description of a person, thing, or property.<sup>133</sup> Also under section 11, awards can be modified if the arbitrator based an award on a matter not submitted to arbitration (unless it is a matter not affecting the merits) or when the award’s form is imperfect in a way not affecting the merits.<sup>134</sup> But even under section 11, a decision cannot be reversed if wrongly decided provided that the arbitrator did not engage in fraud, misconduct, corruption, was not biased, and acted within his or her powers.

Although the veritable lack of appeal from arbitration is often criticized, the decision to appeal a court-resolved case is often an economic decision, not a guarantee. Professor David Schwartz estimates the federal appeal rate to be one appeal for every fourteen cases.<sup>135</sup>

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130. See Dyer, *supra* note 79.

131. Oxford Health Plans LLC v. Sutter, \_\_U.S. \_\_, 133 S. Ct. 2064, 2068 (2013).

132. *Id.* (quoting E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)).

133. Section 11 provides for review:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

134. *Id.*

135. Schwartz, *supra* note 116, at 1281 (“To the extent that arbitration is faster and cheaper than litigation, the restrictions on appeal are undoubtedly a factor, but one that is all too easily exaggerated.”).

While the lack of judicial appeal troubles consumer-rights and employee-rights proponents, there is some evidence to suggest that defendants fare better on appeal from court trials than plaintiffs, meaning that consumer plaintiffs may not benefit from more liberal grounds for arbitral appeal.<sup>136</sup> While the proposal below will not entirely cure the concern about limited judicial oversight of arbitration awards, requiring detailed data reporting about arbitration outcomes and a written statement of decision will inform us as to how strong of a criticism the lack of judicial oversight is. Are arbitrators engaging in manifest disregard of the law? Even if they are, requiring a written statement of decision should curb abuse. To what extent would an increased route of judicial appeal cure fairness concerns? To answer these questions we need to know more about what is occurring in individualized arbitration.

#### D. *Preserving the Rule of Law*

One other problem with widespread mandatory pre-dispute arbitration of consumer claims is the erosion of the rule of law.<sup>137</sup> Arbitration typically requires no written, reasoned decision.<sup>138</sup> This is perpetuated by the lack of judicial review and by the desire to avoid unnecessary delay and expense in a process that by its nature should be streamlined and cost-effective.<sup>139</sup> The grand sphere of power given to private arbitrators

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136. Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 948 (2002) (“Defendants that appealed their losses after trial obtained reversals at a 28% rate, while losing plaintiffs succeeded in only 15% of their appeals, with the spread increasing to 31% and 13% for appeals from jury trials.”).

137. Sternlight, *supra* note 30, at 1661 (“Even if it could be shown that mandatory arbitration were beneficial for many or potentially all consumers and employees who had claims, some argue it would still be detrimental to society in that it curtails the use of public (sometimes jury) trials and eliminates the development of public precedent.”).

138. MARTIN DOMKE ET AL., 1 DOMKE ON COMMERCIAL ARBITRATION: THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 34:7, at 34-18 (3d ed. 2015) (“Arbitrators are not required to state the reasons for their award, and commercial arbitration awards, unlike labor awards, are rarely accompanied by written opinions.” (citations omitted)); *see also* FTC CONSUMER DEBT COLLECTION REPORT, *supra* note 21, at 62–63 (“Arbitrators issue awards at the conclusion of the proceeding, but they are not required to accompany their awards with an opinion setting forth a statement of the law and an application of the law to the facts.”). What the FAA does require is a final and definite award. 9 U.S.C. § 10(a)(4).

139. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 529 (1997) (“It is a familiar enough proposition that an arbitrator’s freedom from the need to explain or justify his award is closely linked to his lack of accountability in terms of judicial review: The naked award that is the norm in domestic commercial arbitrations can be explained as much by a desire to insulate decisions from judicial scrutiny as by any desire to avoid the delay or added expense that

with no requirement to follow *stare decisis*, no requirement of a public decision, and virtually nonexistent concern about reversal, feeds into the concern that the system fosters bias. As Professor Resnik put it: “[P]rivate dispute resolvers are left to do as they wish . . . . [T]he public face of private dispute resolution largely depends on what providers decide to put forth.”<sup>140</sup> The lack of a written opinion was one of the main tenets behind the proposed Arbitration Fairness Act of 2009, which stated that “[m]andatory 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 decisions that are widely available to the public, arbitration offers none of these features.”<sup>141</sup>

In contrast, courts are transparent. Filings and hearings are generally open to the public. Although juries do not issue reasoned decisions, their verdicts are public.<sup>142</sup> Judicial opinions are published and even the unpublished opinions are accessible. This transparency informs the parties and the public regarding how the law is both interpreted and applied.<sup>143</sup> The decisions send a signal to the public about the merits of potential cases and the likelihood of a damages award or attorney general action. Public decisions also serve as a guide to future decision-makers that may be binding, or may be merely persuasive, but at least

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written opinions would entail.”).

140. Resnik, *supra* note 20, at 108 (acknowledging that California has a requirement that arbitrators “collect, publish . . . , and make available to the public’ information about parties, categories of disputes, time to disposition, and outcomes”) (alteration in original) (citing CAL. CIV. PROC. CODE § 1281.96 (West 2011)). Under this 2002 enactment, the AAA complies by providing quarterly reports including nationwide data. *See also* D.C. CODE § 16-4430 (LEXIS through Sept. 16, 2015); ME. REV. STAT. ANN. tit. 10, § 1394 (West, Westlaw through 2015 Reg. Sess.); MD. CODE ANN., COM. LAW § 14-3903 (West, Westlaw through 2015 Reg. Sess.). Providers do not, however, provide comprehensive data. *See* CAL. DISPUTE RESOLUTION INST., CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA: A REVIEW OF WEBSITE DATA POSTED PURSUANT TO SECTION 1281.96 OF THE CODE OF CIVIL PROCEDURE 5 (2004), *available at* [http://www.mediate.com/cdri/cdri\\_print\\_Aug\\_6.pdf](http://www.mediate.com/cdri/cdri_print_Aug_6.pdf).

141. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(6) (2009).

142. Arbitration, while private, is not automatically confidential. Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) (stating arbitration is private in that it is a closed process, but it is not confidential because information revealed during the process may become public). Unless the parties agree otherwise, or the arbitrator provider requires confidentiality, there is no reason why arbitral awards cannot become public and reported by the press just as are verdicts.

143. *See* Sternlight, *supra* note 30, at 1662 (“[O]ur public court hearings educate the public and potential wrongdoers as to how the law is being interpreted, thereby deterring potential wrongdoers from violating the law, educating victims as to their rights, and inviting the public to take action to help reform the law should it not be satisfied with public results.”).

are present.<sup>144</sup> This social good is lost when decision-making is privatized and not public as it often is in arbitration.

The arbitration industry response to these criticisms seems to validate the critique. The AAA, one the nation’s leading arbitration providers for dispute resolution, recently imposed the requirement that “[t]he award shall provide the concise written reasons for the decision unless the parties all agree otherwise” in consumer disputes.<sup>145</sup> It has had a similar rule for employment disputes since 2009.<sup>146</sup> The rule requiring written reasons for arbitral decisions is very new—it became effective September 1, 2014—and appears to still be somewhat at odds with Principle 15 of the AAA’s Consumer Due Process Protocol, which conditions the provision of a “brief written explanation of the basis of the award” on a party request.<sup>147</sup> The comments accompanying Consumer Due Process Protocol Principle 15 note the “tension between the desire for confidentiality in arbitration . . . and the need to provide Consumers access to information regarding arbitrators” and arbitration administrators.<sup>148</sup> The tension is in the default rule. Under the Due Process Protocol the default is to provide a written explanation of the award *on party request*; under the Consumer Arbitration Rules, the default is to provide “concise written reasons” for the award unless the parties agree otherwise.<sup>149</sup> Notably the AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award.<sup>150</sup>

The Judicial Arbitration and Mediation Services’ (JAMS) Minimum

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144. See Mark Edwin Burge, *Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 143, 176 (2013) (advocating scaling back the predominance of the stare decisis model in legal pedagogy due to the growth of administrative law and arbitration decisions and arguing that arbitrators need not even follow the law).

145. AM. ARBITRATION ASS’N, CONSUMER ARBITRATION RULES 27–28, R. 43 (2014) [hereinafter CONSUMER ARBITRATION RULES], available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased>. The new rules were effective September 1, 2014.

146. AM. ARBITRATION ASS’N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 29, R. 39(c) (2009), available at [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004362](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362).

147. AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL 3, Principle 15.3 (1998) [hereinafter CONSUMER DUE PROCESS PROTOCOL], available at [https://adr.org/aaa/ShowPDF?doc=ADRSTG\\_005014](https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014) (“At the timely request of either party, the arbitrator should provide a brief written explanation of the basis for the award.”).

148. *Id.* at 31 (providing reporter’s comments to Principle 15).

149. CONSUMER ARBITRATION RULES, *supra* note 145, at 27–28, R. 43.

150. *Id.* at 28, R. 43(c).

Standards of Procedural Fairness in consumer arbitration requires that the award “provide a concise written statement of the essential findings and conclusions on which the award is based.”<sup>151</sup> JAMS has a similar requirement for employment cases.<sup>152</sup> As noted above, the NAF no longer accepts consumer arbitration disputes.

Additionally, corporate imposers of mandatory pre-dispute arbitration are beginning to see the usefulness of a written decision requirement. For example, the Netflix Arbitration Agreement (which is inconspicuously nestled in Paragraph 15 of its Terms of Use) requires the arbitrator to “issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based.”<sup>153</sup> But Verizon Wireless’s Customer Agreement does not require an arbitrator to issue a written decision and also limits the effect of an arbitration award: “An arbitration award and any judgment confirming it apply only to that specific case; it can’t be used in any other case except to enforce the award itself.”<sup>154</sup>

The Federal Trade Commission (FTC) recently adopted a recommendation that arbitrators should issue reasoned opinions to accompany awards in all debt collection arbitrations.<sup>155</sup> According to the FTC, the “opinions” should “state the law applied, explain the application of the law to the facts, and set forth a calculation of the amount awarded.”<sup>156</sup> A separate question is what precedential effect these “opinions” should have on future cases. The FTC opined that “[b]ecause most of these opinions would involve relatively limited and case-specific factual disputes . . . [they] would not ordinarily be well-suited for use as precedent in future proceedings.”<sup>157</sup> That principle may not necessarily hold up for all debt collection proceedings and is certainly not applicable to all consumer arbitrations.

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151. JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 3, Standard 10 (2009), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Consumer\\_Min\\_Std-2009.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Std-2009.pdf). These standards became effective on July 15, 2009. *Id.*

152. JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES 22–23, R. 24(h) (2014), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_employment\\_arbitration\\_rules-2014.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_rules-2014.pdf) (requiring a “concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the Award is based”).

153. *Netflix Terms of Use*, *supra* note 96, § 15(e).

154. *Customer Agreement* ¶ (7), VERIZON, <http://www.verizonwireless.com/b2c/support/customer-agreement> (last updated Aug. 18, 2015).

155. FTC CONSUMER DEBT COLLECTION REPORT, *supra* note 21, at 64.

156. *Id.* (footnote omitted).

157. *Id.*

Professor Sarah Rudolph Cole would take the recommendation for a written decision one step further. She proposes that arbitration providers require arbitrators to “draft reasoned written opinions.”<sup>158</sup> Professor Cole’s proposal would require the arbitrator to identify the issues in dispute, use the parties’ post-hearing briefs and hearing evidence to identify the parties’ contentions, state the decision, interpret the evidence, resolve questions of fact, apply principles of law and custom, and explain why he or she accepted or rejected the parties’ theories.<sup>159</sup> In addition, the opinion must describe the award and its consequences for the disputants.<sup>160</sup> Requiring some type of written decision by an arbitrator can reduce the concern about developing and preserving the rule of law, and serve as a guidepost for potential corporate error. But addressing this issue is complicated by the issue of confidentiality.

### *E. The Confidentiality Problem*

Requiring a written decision does nothing to increase public awareness of the issue or deter conduct if the decision is confidential. The implementation of confidentiality provisions in consumer arbitration agreements perpetuates both the distrust of the system and an erosion of public cognizance to deter improper corporate behavior.<sup>161</sup> Although arbitration is private, it is not automatically confidential unless the parties agree or the rules of the arbitral provider require confidentiality.<sup>162</sup> But the concern that arbitral outcomes will remain secret is worrisome with respect to employment discrimination claims, consumer claims, and claims that affect public health and safety.<sup>163</sup>

In early generation pre-dispute arbitration cases, the party opposing arbitration would frequently argue that a confidentiality clause rendered the agreement unenforceable.<sup>164</sup> Many courts have held confidentiality clauses in consumer or employment arbitration agreements

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158. Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 326–27 (2013).

159. *Id.* at 304–05.

160. *Id.*

161. Amy J. Schmitz, *Assuming Silence in Arbitration*, N.J. LAW., Apr. 2011, at 16, 18 (“Arbitrators’ bare awards fail to provide the parties with direction regarding future behavior. Lack of published opinions in arbitration also may allow for privatization of the law.”).

162. Schmitz, *supra* note 142, at 1211.

163. Schmitz, *supra* note 161, at 18.

164. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 218 (2004) (“Many arbitration agreements provide that the arbitration proceedings and the award must be kept confidential.”).

unconscionable.<sup>165</sup> But as if to reinforce the assumption that arbitration, by its nature, is confidential, the Court in *Stolt-Neilson S.A. v. AnimalFeeds International Corp.*,<sup>166</sup> cast confidentiality as a “presumption” that would be diluted by forced class arbitration.<sup>167</sup> Additionally, arbitrator ethical rules impose confidentiality duties on arbitrators.<sup>168</sup> Yet in *American Express Co. v. Italian Colors Restaurant*, the viability of the confidentiality agreement in the business-to-business arbitration agreement was a matter of some concern to the Court at oral argument and in the courts below.<sup>169</sup> As the case bounced from Supreme Court to the Second Circuit over the course of nine years, American Express adopted the argument that costs of individual arbitration were not prohibitively high because the individual plaintiffs could share the costs of expert preparation.<sup>170</sup> For example, individual plaintiffs could pool resources in selecting an expert, who would then develop a common expert report to address common issues. While the Second Circuit found this argument “intriguing,” the court held that it conflicted with the express language of the agreement prohibiting disclosure of

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165. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003) (holding a “secrecy provision” unconscionable, in part because “the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against [the defendant]”); *Zuver v. Airtouch Comme’n, Inc.*, 153 Wash. 2d 293, 315, 103 P.3d 753, 765 (2004) (holding confidentiality provision in employment contract unconscionable because “keeping past findings secret undermines an employee’s confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid discrimination claim”); Randall, *supra* note 164, at 218 n.128 (collecting cases).

166. 559 U.S. 662 (2010).

167. *Id.* at 686 (reasoning that “[u]nder the Class Rules, the presumption of privacy and confidentiality that applies in many bilateral arbitrations shall not apply in class arbitrations, . . . thus potentially frustrating the parties’ assumptions when they agreed to arbitrate” (citation and internal quotation marks omitted)).

168. AM. ARBITRATION ASS’N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES 7, Canon VI(B) (2004) [hereinafter AAA COMMERCIAL DISPUTES ETHICS], available at [https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG\\_003867](https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG_003867) (“The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.”); *cf.* CONSUMER DUE PROCESS PROTOCOL, *supra* note 147, at 3, Principle 12 (“Consistent with general expectations of *privacy* in arbitration hearings, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law.” (emphasis added)). Recognizing the “tension” between confidentiality and consumer need for data on arbitration and information on arbitrators, the reporter’s comments note that “[a]lthough confidentiality of hearings may be considered an advantage of arbitration, there is no absolute guarantee of confidentiality.” *See id.* at 28 (providing reporter’s comments to Principle 12).

169. Transcript of Oral Argument at 20–21, *Am. Express Co. v. Italian Colors Rest.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2304 (2013) (No. 12-133).

170. *In re Am. Express Merchants’ Litig.*, 554 F.3d 300, 318 (2d Cir. 2009), *cert. granted, vacated sub nom.* *Am. Express Co. v. Italian Colors Rest.*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2401 (2010), *rev’d, Italian Colors*, 133 S. Ct. at 2316.

arbitration documents and filings to any other party.<sup>171</sup> In the oral argument to the Supreme Court, Chief Justice Roberts posed the question as to whether a trade association or multiple claimants could collectively fund an expert report to be used by individual claimants.<sup>172</sup> American Express conceded that the confidentiality agreement would not prohibit such collective expert funding.<sup>173</sup>

The extent of the “confidentiality problem” is not yet clear. The CFPB Arbitration Study found that most consumer financial product arbitration agreements it studied did not have confidentiality provisions, but checking-account arbitration agreements with confidentiality agreements still covered twenty-eight percent of the market.<sup>174</sup> This may depict a move against confidentiality, at least in the consumer context. Some arbitration agreement drafters have already learned from the cases declaring the confidentiality clause in “underdog” cases to be unconscionable and have not required confidentiality in their consumer agreements.<sup>175</sup> But as the language from Verizon Wireless’s arbitration agreement set forth above shows, corporate entities still desire to limit the precedential effect of arbitration on other cases. In order to dispel the opaqueness of arbitration, the minimal benefit gained through confidentiality is something that business disputants should forgo for entry to the alternative dispute arena.

Most of the criticisms discussed above—bias, lack of judicial oversight, erosion of the rule of law, and confidentiality—stem, in part, from a concern that little is known about the process and outcome of underdog arbitration. Although the class waiver critique does not stem directly from lack of transparency, it is built on the theoretical idea that individual arbitration is unfair. But we lack empirical data that confirms or denies this theoretical concern. By passing legislation to increase transparency in underdog arbitration, Congress and state legislatures can

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171. *Id.*

172. Transcript of Oral Argument, *supra* note 169, at 20–21.

173. *Id.* (“Our position is that multiple claimants in arbitration could share the costs of an expert for preparation of a report.”). *But see Italian Colors*, 133 S. Ct. at 2316 (“The agreement also disallows any kind of joinder or consolidation of claims or parties. And more: Its confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report.”) (Kagan, J., dissenting).

174. CFPB ARBITRATION STUDY, *supra* note 1, § 2.5.8, at 52.

175. *See, e.g., Netflix Terms of Use*, *supra* note 96, § 15(e); *Wireless Customer Agreement*, *supra* note 96, § 2.2(4). According to the CFPB’s Arbitration Study, most of the arbitration agreements in the scope of its study did not include nondisclosure or confidentiality agreements. CFPB ARBITRATION STUDY, *supra* note 1, § 2.5.8, at 52–53. Analysis of the prevalence of confidentiality agreements in consumer and employment pre-dispute arbitration agreements is another area in which it would be useful to have more empirical evidence.

give the public, lawyers, academics, and government agencies the information needed to either dispel the myth of arbitration unfairness or confirm the necessity for increased regulation.

### III. A CALL TO CONGRESS: A LITTLE TRANSPARENCY FROM MY FRIENDS

As set forth in the discussion above, many of the criticisms of underdog arbitration stem from the lack of transparency and oversight in the process. To date most critics have argued that arbitration should be off-limits for underdog claims through state unconscionability doctrines or the federal vindication-of-statutory-rights doctrine.<sup>176</sup> But the Supreme Court has held that state courts may not treat arbitration clauses with hostility even for underdog claims and has effectively foreclosed the argument that the class waiver precludes vindication of statutory rights.<sup>177</sup> Critics also argue that the FAA should be amended to preclude application to underdog claims. This has not been successful.<sup>178</sup> This lack of success in excluding underdog claims is not surprising given various lobbying group efforts, the diversion of Congress's attention elsewhere, and the lack of empirical evidence that arbitration is unfair or inaccessible to the average consumer. In response, many observers agree that the need for transparency is now at the forefront. How are we to achieve this transparency? What data set would be beneficial for prospective analysis? Building on the work of others in this area, I propose a neutral and workable paradigm for Congress and the states to implement with the goal of obtaining greater transparency and knowledge of this process to which many consumer and employee claims are being relegated.

I propose that (1) Congress amend the FAA to require that arbitral providers report data on the arbitration proceedings for consumer, employment, and health-care claims (whether this is a claim regarding the quality of care or an insurance dispute), and states should enact an equivalent uniform reporting requirement; (2) the FAA and state arbitration laws should require that arbitrators "publish" online a short statement of the decision; and (3) the FAA and state counterparts should

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176. See Gilles, *supra* note 30, at 399–404; Sternlight, *supra* note 15, at 686–87. Even if the vindication-of-statutory-rights defense had prevailed in *Italian Colors*, it would only provide a defense based on federal statutory rights, not state law claims.

177. See *supra* Part I.

178. But, as stated above, see *supra* notes 6–7 and accompanying text, next year the CFPB will propose a rule banning class-action waivers in consumer financial services pre-dispute arbitration agreements.

require data reporting by the business entities that require pre-dispute agreements from clients, customers, and employees.

A. *The Seemingly Obvious Solution: Mandated Data Reporting*

In light of the theoretically valid criticisms of arbitration explored above—arbitrator bias, lack of judicial oversight, and lack of publicity to the consumer or employee spheres—the solution is seemingly obvious. America needs to see the data. And the data needs to come from those with access to it, the arbitration service providers. While I would very much like to claim authorial pride in the novelty of this idea, it is not novel. Nor is it unduly burdensome. California, Maine, Maryland, and the District of Columbia have already enacted such data-reporting requirements.<sup>179</sup> California’s law has been in effect since 2002. The Maine and Maryland statutes are of more recent vintage, 2012 and 2011 respectively, no doubt reflecting the increasing public awareness of the lack of arbitral transparency.<sup>180</sup> Additionally, the FTC recommended in its 2010 study of consumer debt collection practices, including arbitration, that Congress consider creating a nationwide system requiring arbitration forums to report and make public arbitration awards and decisions.<sup>181</sup>

The state statutes, not surprisingly, have many commonalities. They all apply to consumer arbitrations, but also have provisions that purport to reach employment arbitrations. For example, Maine’s statute, the most recent, applies to “Providers of Consumer Arbitrations.”<sup>182</sup> It goes on to require disclosure of the employee’s annual wage range “if the dispute involved employment” even though the statutory title and scope do not explicitly govern employment disputes.<sup>183</sup> The state statutes generally require the providers to collect and publish in a publicly-available “computer-searchable format”: (1) the name of the

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179. CAL. CIV. PROC. CODE § 1281.96 (West, Westlaw through 2015 Reg. Sess.); D.C. CODE § 16-4430 (LEXIS through Sept. 16, 2015); ME. REV. STAT. ANN. tit. 10, § 1394 (West, Westlaw through 2015 Reg. Sess.); MD. CODE ANN., COM. LAW § 14-3903 (West, Westlaw through 2015 Reg. Sess.).

180. ME. REV. STAT. ANN. tit. 10, § 1394; MD. CODE ANN., COM. LAW § 14-3903.

181. FTC CONSUMER DEBT COLLECTION REPORT, *supra* note 21, at v.

182. ME. REV. STAT. ANN. tit. 10, § 1394(1).

183. *Id.* This imprecision in legislative drafting could lead to questionable applicability. *Cf.* CAL. CIV. PROC. CODE § 1281.96 (stating that it applies to “publication of consumer arbitration information” but also requiring data on employee claims in section 1281.96(a)(3)); D.C. CODE § 16-4430 (requiring information from an arbitration organization on “each *consumer arbitration* it has administered or otherwise been involved in” but also indicating “employment” as a type of dispute (emphasis added)); MD. CODE ANN., COM. LAW § 14-3903 (applying only to consumer arbitration).

nonconsumer party and if the party is a business entity; (2) the type of dispute involved; (3) the wage range of the employee in an employment dispute; (4) whether the consumer prevailed; (5) the number a times a business disputant had previously appeared in a proceeding before the arbitral provider; (6) whether the consumer was represented by an attorney; (7) the dates the provider received the demand, appointed the arbitration, and the date of disposition; (8) the disposition (withdrawal, settlement, award with hearing, award without hearing, default, dismissal, etc.); (9) the amount of the claim; (10) the award or relief amount if any; (11) the name of the arbitrator; (12) the arbitrator's fee; (13) the percentage of fee allocated to each party;<sup>184</sup> and (14)

[w]hether the provider has or within the preceding year had a financial interest in a party or the legal representation of a party in the arbitration or a party or legal representative of a party in the arbitration has or within the preceding year had a financial interest in the provider<sup>185</sup>

(included, no doubt, to attempt to prevent another NAF debacle). California's amended Code of Civil Procedure section 1281.96, effective this year, requires providers to disclose whether the arbitration was demanded pursuant to a pre-dispute arbitration clause and more detailed information regarding the type of claim, award, and fee waivers.<sup>186</sup> It also requires private arbitration companies to make the information available in a format that allows the public to search and sort the information, and to make the information directly accessible from a link on the company's internet website.<sup>187</sup>

But the state statutes are flawed. First, the FAA may preempt these state efforts regulating arbitration service providers.<sup>188</sup> My proposal recommends that Congress, followed by state legislatures, adopt a uniform data-reporting requirement. Federal amendment of the FAA to require data reporting disposes of the ancillary preemption argument. But why require data reporting at the state level? Uniform state adoption

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184. CAL. CIV. PROC. CODE § 1281.96; D.C. CODE § 16-4430; ME. REV. STAT. ANN. tit. 10, § 1394; MD. CODE ANN., COM. LAW § 14-3903.

185. ME. REV. STAT. ANN. tit. 10, § 1394(1)(K).

186. Act effective Jan. 1, 2015, ch. 870, 2014 Cal. Stat. 93 (amending CAL. CIV. PROC. CODE § 1281.96).

187. *Id.*

188. 9 U.S.C. § 2 (2012) (declaring arbitration agreement to be enforceable except upon general contract defenses). The general import of the FAA is that arbitration agreements cannot be treated with more hostility than regular contracts. But does that mean the State cannot regulate arbitration providers? That question is one worthy of an article in and of itself, although the FAA gives little guidance.

promotes uniform implementation among arbitral providers that may not (arguably) rise to the interstate commerce level.<sup>189</sup> Uniformity among the legislative acts is essential, and compliance with the federal mandate should satisfy any corollary state reporting requirement. Many arbitral providers have national or multi-state practices. For data reporting to work in an effective way, the provider should report, but in a “one size satisfies all” fashion.

One might ask why legislatively require data reporting at all? The AAA, which is one of the more widely used consumer arbitration providers,<sup>190</sup> already provides data on arbitration disputes, as does JAMS.<sup>191</sup> The AAA provides this information due to the California and Maryland arbitration reporting laws discussed above.<sup>192</sup> But relying on this data alone, while informative, does not give legislators, academics, practitioners, or the general public information about the full picture of arbitration. Indeed, one could argue that because the AAA embraces consumer-friendly procedural mechanisms—such as fees capped at \$200 for the consumer<sup>193</sup> and special rules governing consumer cases<sup>194</sup>—that businesses seeking either to act unfairly toward consumers through arbitration or to have data publicly reported would *avoid* selecting the

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189. *See, e.g.*, *Bruner v. Timberlane Manor Ltd.*, 155 P.3d 16, 31 (Okla. 2006) (holding that a nursing home agreement does not fall within interstate commerce, thus the FAA did not preempt Oklahoma law precluding pre-dispute arbitration agreements for nursing home care); *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 318 (S.C. 2012) (residential real estate contract for sale of completed home did not involve interstate commerce, thus not subject to FAA). *Bruner* was likely wrongly decided, but the point remains that state courts continue to hold that certain state contracts are governed by state law and do not fall under the FAA because the economic activity does not rise to the level of interstate commerce. Would a representation agreement between a local lawyer and a client involve interstate commerce such that the FAA would control? In *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, No. 13-1026, 2015 WL 3976101 (Tex. June 26, 2015), the Texas Supreme Court declined to impose a public policy requirement that attorneys explain arbitration agreements to prospective clients, despite a professional ethics opinion stating that such an explanation is required. *Id.* at \*2. The court never discussed the FAA or preemption doctrine.

190. Actual data confirming that the AAA is the “most” widely used arbitration service provider is hard to come by, perhaps proving the point. The CFPB Arbitration Study found that the AAA was the most commonly named administrator in the consumer financial products markets it studied, but in most product markets, it was designated as the “sole” arbitration administrator in less than fifty percent of the contracts studied. CFPB ARBITRATION STUDY, *supra* note 1, § 2.5.3, at 34–40.

191. *Consumer Arbitration Statistics*, AM. ARB. ASS’N, <https://www.adr.org/aaa/faces/aoe/gc/consumer> (follow “Consumer Arbitration Statistics” hyperlink) (last visited Oct. 21, 2015); *Consumer Case Information*, JAMS, <http://www.jamsadr.com/consumercases/> (last visited Oct. 21, 2015).

192. *Consumer Arbitration Statistics*, *supra* note 191.

193. CONSUMER ARBITRATION RULES, *supra* note 145, at 33–36. The new rules were effective September 1, 2014.

194. *Id.*

AAA.

As an example of just how large this missing market share of unreported data might be, the CFPB found that a significant portion of arbitration agreements studied did not designate the AAA as the sole administrator. Only 18.3% of storefront payday-loan contracts, 16.7% of private student loan contracts, and 37.3% of prepaid cards studied designated the AAA as the sole administrator, although most of the contracts studied specified the AAA as *either* a sole administrator or potential administrator.<sup>195</sup> But a significant market portion also identified JAMS as a potential arbitration administrator.<sup>196</sup> And some specified no sole administrator. Some credit card agreements even identified the NAF as the sole administrator even though the NAF stopped administering consumer arbitration more than five years ago!<sup>197</sup> By relying on only AAA (or JAMS) data, we obtain a limited piece—a piece potentially skewed by selection bias—of the consumer-arbitration picture.<sup>198</sup>

Thus, the AAA data does not provide the public with a comprehensive view of consumer arbitration and its outcomes. But even the AAA data-collection mechanism has flaws that could be improved with this proposal. For example, the AAA disclaims any guarantee of accuracy or completeness of the data it provides.<sup>199</sup> And the AAA data identifies a number of case dispositions as “administrative” or “withdrawn” without further explanation as to the case disposition.<sup>200</sup> Finally, other studies have found that the data entered in the AAA

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195. CFPB ARBITRATION STUDY, *supra* note 1, § 2.5.3, at 35–38.

196. *Id.* (showing over fifty percent of the market share for credit cards, checking accounts, and payday loans had arbitration agreements that identified JAMS as an alternative).

197. *Id.* at 35.

198. The CFPB Arbitration Study and the Searle Institute Arbitration Study noted that relying solely on AAA data for arbitration “outcomes” analysis was a limitation for this very reason. CFPB ARBITRATION STUDY, *supra* note 1, § 5.1, at 4; SEARLE INSTITUTE ARBITRATION STUDY, *supra* note 10, at 2, 38 (recognizing that the results of any AAA study are not necessarily representative of all consumer arbitrations because other arbitration providers may attract different types of cases and different types of businesses).

199. *Consumer Arbitration Statistics*, *supra* note 191 (“The AAA has not reviewed, investigated, or evaluated the accuracy or completeness of the arbitrator’s/arbitrators’ determination of the ‘prevailing party’ and makes no representations regarding the accuracy or completeness of this information.”).

200. *Provider Organization Report*, AM. ARB. ASS’N, <https://www.adr.org/aaa/faces/aoe/gc/consumer> (follow “Consumer Arbitration Statistics” hyperlink; then follow “Provider Organization Report” hyperlink) (last visited Oct. 22, 2015) (noting an “administrative” disposition in 944 of 18,915 consumer arbitrations and “dismissed,” “impasse,” or “withdrawn” for significant portions of the data set); *see also* CFPB ARBITRATION STUDY, *supra* note 1, § 5.2.2, at 11 (finding that in more than one third of disputes the AAA case records ends in a manner consistent with settlement, but we cannot know whether there was a settlement in any of those cases).

comprehensive consumer-arbitration statistics database have some inconsistencies in data points, such as amount claimed and amount awarded.<sup>201</sup> In sum, relying on AAA data is useful to the extent it gives us a very informative view of the murky world of consumer arbitration, but it has significant limitations that could be improved on by this proposal.

1. *Data Reporting: The Necessity of a Penalty for Failure to Comply*

History tells us that even though law may require data reporting, that does not mean providers comply. Ten years after the enactment of California’s data reporting statute,<sup>202</sup> a study commissioned by the California State Assembly Committee on the Judiciary found that “the great bulk if not all companies that appear to be doing mandatory consumer arbitrations in California are not complying with the law, and there are many shortcomings in the data.”<sup>203</sup> As recognized by the California State Assembly study, a statutory requirement without civil penalty is hardly a requirement at all.<sup>204</sup> According to the U.C. Hastings College of Law Public Law Research Institute study relied on in the Committee report, half of the private arbitration companies conducting business in California fail to post any of the information required by the statute, and of those that do attempt to disclose data, none fully complies.<sup>205</sup> The failures in transparency are significant. For example, of the companies who do report, most fail to disclose the amount of the claim, a factor that is critical in evaluating award fairness.<sup>206</sup> Additionally, nearly half of the reporting companies do not consistently report the frequency with which the business party has previously used

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201. See SEARLE INSTITUTE ARBITRATION STUDY, *supra* note 10, at 40 (noting the levels of inconsistencies between the AAA data set and the case file sample reviewed for the project).

202. CAL. CIV. PROC. CODE § 1281.96 (West, Westlaw through 2015 Reg. Sess.).

203. KEVIN G. BAKER, ASSEMBLY JUDICIARY COMM., MANDATORY CONSUMER ARBITRATION: HAS COMPLIANCE WITH CALIFORNIA’S LANDMARK DATA TRANSPARENCY LAW BEEN SUFFICIENT TO ACCOMPLISH THE LEGISLATURE’S GOALS? 1 (2013), available at <http://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/Arbitration%20Data%20Background%20paper.pdf>.

204. *Id.* at 8 (noting that the significant omission of required data may continue to foster skepticism of mandatory consumer arbitration and could create a race to the bottom in which the most egregious violators of the data-reporting requirement have a competitive advantage).

205. *Id.* at 7–8 (citing DAVID J. JUNG ET AL., REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA 1, 5–7 (2013), available at <http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update>).

206. *Id.* (citing JUNG ET AL., *supra* note 205, at 11–12).

the arbitration provider.<sup>207</sup> Even though the California legislature amended the private arbitration disclosure requirement effective this year to require more specificity in categorical reporting and disclosure in a publicly useful format, it failed to enact a civil penalty for failure to comply.<sup>208</sup> These failures invite the issue of transparency. If arbitration really is fair, why the failure to report?<sup>209</sup>

Therefore, the FAA data-reporting requirement should include a civil penalty for failure to comply. For example, Maryland's civil penalty statute provides that failure to comply with its data-reporting requirement "[m]ay be considered as a factor in determining whether a consumer arbitration agreement is unconscionable or otherwise unenforceable under law."<sup>210</sup> And, the statute provides for a private right of action such that "[a] consumer or the Attorney General may seek an injunction to prohibit an arbitration organization that has engaged in or is engaging in a violation of § 14-3903 of this subtitle from continuing or engaging in the violation."<sup>211</sup> Even so, a private right of enforcement or the fact that underreporting can be considered as a factor in an unconscionability action are hardly penalties that would give a lucrative but potentially biased arbitral provider pause. The data-reporting requirement I propose should attach a significant penalty: If the arbitration service provider is substantially non-compliant with the requirement, the consumer can enjoin enforcement of the provisions selecting that particular service provider and may, in the consumer's discretion, choose another arbitral service provider. While this potential remedy does affect the business disputant, who may have little control

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207. *Id.* (citing JUNG ET AL., *supra* note 205, at 14–16).

208. Act effective Jan. 1, 2015, ch. 870, 2014 Cal. Stat. 93 (amending CAL. CIV. PROC. CODE § 1281.96). The most the amendment accomplished was the inclusion of a statement that "[i]t is the intent of the Legislature that private arbitration companies comply with all legal obligations of this section."

209. The response from arbitration administrators would likely be that reporting is costly, problems are raised by the confidentiality provisions in some agreements and by arbitrator ethical rules, *see* AAA COMMERCIAL DISPUTES ETHICS, *supra* note 168, and there is no uniform reporting module. This proposal would alleviate some of those concerns by removing confidentiality from consumer arbitration and enhancing uniformity in reporting. But if consumers are obtaining fair results in arbitration, or a high settlement ratio, or even one hundred percent business-funded dispute resolution, one would expect businesses to actively market this consumer-friendly module in favor of arbitration.

210. MD. CODE ANN., COM. LAW § 14-3905(b)(2) (West, Westlaw through 2015 Reg. Sess.). But it may not be the sole reason to refuse to enforce a consumer arbitration award.

211. Section 14-3905(c)(2) provides that "[t]he arbitration organization is liable to the person bringing the action for an injunction for the person's reasonable attorney's fees and costs if: (i) [t]he court issues the injunction; or (ii) [t]he arbitration organization voluntarily complies with § 14-3903 of this subtitle after the action is filed." *Id.* § 14-3905(c)(2).

over the arbitration service provider’s compliance, that is an efficient allocation of market resources.<sup>212</sup> The business client of arbitration providers will necessarily select providers who are compliant so as to avoid enforcement of the penalty. And in response to demand, arbitral service providers will comply with reporting requirements.

## 2. *Data Reporting: The Necessity of Useful Data Fields*

Another lesson learned from California Civil Procedure Code section 1281.96 is that for data reporting to be useful, certain fields are important. The state statutes provide a starting point. The table below reflects common state statutory requirements that should be retained on the left, and fields that are necessary for further data evaluation on the right.<sup>213</sup>

<b>Statutory Fields that Should Be Retained</b>	<b>Additional Fields that Should Be Required</b>
Case type (goods, credit, banking, health-care, insurance, construction, real estate, telecommunications, personal injury, debt collection, employment, etc.) <sup>214</sup>	Nature of the complaint (breach of warranty, breach of contract, breach of statutory law, fraud, personal injury, products liability, racial or gender discrimination, unconscionability, etc.)
If employment, employee wage range	The product or service involved
Whether the consumer was the prevailing party	Was the consumer the plaintiff?
Name of the business entity involved	Was the business entity represented by an attorney?

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212. There is the possibility that an arbitration service provider could conduct so few consumer or employee arbitrations that application of a civil penalty to it would be onerous. Thus, the data-reporting requirement could be limited to those providers that conduct fifty or more consumer or employee disputes per year. Cf. D.C. CODE § 16-4430 (LEXIS through Sept. 16, 2015) (limiting applicability to arbitration organizations “involved in 50 or more consumer arbitrations a year”). “Consumer” should be broadly construed to include, for example, services arising out of health-care from medical providers or consumer/employee contracts with health-insurance providers.

213. To reduce the burden on arbitration administrators and enhance uniformity in reporting, I propose that the legislation adopting this approach specify a detailed coding grid that should be used for reporting purposes.

214. As noted above, California Civil Procedure Code section 1281.96 was recently amended to require more detail in the nature of the dispute. Act effective Jan. 1, 2015, ch. 870, 2014 Cal. Stat. 93.

<b>Statutory Fields that Should Be Retained (continued)</b>	<b>Additional Fields that Should Be Required (continued)</b>
Number of times the business has been a party to arbitration in which the provider was involved	Name and address of the business entity's attorney representative, if any
Whether the consumer was represented by an attorney	The name and address of the consumer's attorney representative <sup>215</sup>
Date the service provider received the demand, date arbitrator was appointed, and date of disposition rendered	Was a hearing held? Was it telephonic? In-person?
Type of disposition (withdrawal, abandonment, settlement, award post hearing, award without hearing, default or dismissal)	Address at which any hearing was conducted <sup>216</sup>
Amount of the claim	Were any counter-claims raised? What was the nature of such claims and amount?
Amount of the award	Was the claim determined to be frivolous?
Arbitrator's name	Number of times the arbitrator has handled a case involving the business entity involved in this dispute
Amount of arbitrator's fee	Amount of administrative fees
Percentage of fee paid by each party	Percentage of administrative fees paid by each party
Whether the provider currently has, or had within the preceding year, a financial interest in a party or legal representative of a party, or whether a party or legal representative of a party had a financial interest in the provider.	Components of the award (Any premium awarded? Attorney's fees? <sup>217</sup> Punitive damages or civil penalties?)

215. Maryland Commercial Law section 14-3903 requires the name of the consumer attorney, as does the amended California Civil Procedure Code section 1281.96. MD. CODE ANN., COM. LAW § 14-3903; *see also* CAL. CIV. PROC. CODE § 1281.96 (West, Westlaw through 2015 Reg. Sess.), amended by Act effective Jan. 1, 2015, ch. 870, 2014 Cal. Stat. 93.

216. To determine proximity to the plaintiff-disputant.

217. CAL. CIV. PROC. CODE § 1281.96, *amended by* Act effective Jan. 1, 2015, ch. 870, 2014 Cal. Stat. 93 (requiring disclosure of awarded attorney's fees).

Statutory Fields that Should Be Retained (continued)	Additional Fields that Should Be Required (continued)
Fee waiver requested? Approved? <sup>218</sup>	Total time to claim resolution
	If withdrawn, basis for withdrawal (e.g., nonpayment of fees? Disqualification of a party?)
	Was discovery permitted?
	Was the arbitration asserted as a class?
	Did the arbitration proceed as a class?

Reporting this additional information serves a number of purposes. First, more detailed information about the nature of the claim and the product or service involved provides important messaging to consumers, federal regulatory agencies, and state attorneys general that something may be amiss when similar claims increase in filing. This transparency helps diminish the loss of publicity of public court proceedings discussed in Part II.D, *supra*. Additionally, providing the name of the consumer attorney could be a helpful resource to consumers seeking arbitration assistance for a similar claim. Requiring information about whether the business is represented by counsel and the name of such counsel will provide another layer of inquiry into the potential problem of repeat-player bias. Information about counterclaims and their basis is essential to understanding any arbitral award. Further, to understand whether arbitral awards are fair, and whether consumer-incentive premiums offer anything but an illusory promise, we need to know the specific components of the award. Similarly, if the arbitrator determined that a claim is frivolous, this may mean a consumer pays a higher portion of fees. This information would be very important in evaluating the fairness of “consumer-friendly” arbitration provisions. Finally, information about whether the demand was lodged or proceeded as a class will provide helpful information in elucidating what occurs in class arbitration as opposed to individual arbitration.

One thing should be clear when analyzing the data-reporting requirements. To comply, the arbitration cannot be confidential.<sup>219</sup> The

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218. These requirements were added by 2014 amendment to section 1281.96 of the California Civil Procedure Code. *Id.*

219. See Melworm, *supra* note 124, at 470 (“The best way to address issues of arbitrator bias, therefore, is to ensure that from the onset, arbitrators are required to openly and broadly disclose

waiver of confidentiality is an inherent feature of required data reporting and one that should be adopted without question in underdog arbitration. For business-to-business arbitration, one can easily see the efficacy of confidentiality. It secures the confidentiality of trade secrets, business agreements, profits, and settlements. But for business-to-consumer or business-to-employee disputes, the benefits of confidentiality fade. A business may claim that confidentiality prevents more consumers from knowing about a meritorious claim and thus reduces filing of claims. But permitting businesses to hide wrongful practices in the shadow of arbitration has never been the purpose of a theoretically fair alternative dispute resolution forum. Indeed, if, as arbitration proponents such as myself contend, arbitration is fair then its players should be willing participants in disclosing this data to the public. As a price to arbitration entry, it would be an implicit waiver of the ability to require confidentiality of the required data fields.

### 3. *Making the Data Useful: The Necessity of a Uniform Consumer-Friendly Reporting Mechanism*

Most of the state statutes requiring data reporting specify that information be available to the public in a “computer-searchable” database.<sup>220</sup> But as we know from the California experience, this phrase has been interpreted to mean a simple text file (with the exception of the AAA, which does provide useful data in a searchable format),<sup>221</sup> which has been unhelpful for research purposes and is not useful to a consumer.<sup>222</sup> The California Judiciary Committee recommended that a “fundamental improvement” to section 1281.96 is to require a spreadsheet format for the reporting mechanism.<sup>223</sup> California did make some progress by amending its statutory disclosure requirement this past year to require disclosure in a “single cumulative report”<sup>224</sup> “in a format that allows the public to search and sort the information using readily

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prior relationships and dealings that may overlap or intertwine with the pending arbitration.”)

220. CAL. CIV. PROC. CODE § 1281.96; D.C. CODE § 16-4430 (LEXIS through Sept. 16, 2015); ME. REV. STAT. ANN. tit. 10, § 1394 (West, Westlaw through 2015 Reg. Sess.). Maryland’s statute does not specify the form of the data, but does require that it be available to the public. MD. CODE ANN., COM. LAW § 14-3903.

221. The AAA provides consumer arbitration statistics in spreadsheet format in its Provider Organization Report. See *Provider Organization Report*, *supra* note 200.

222. BAKER, *supra* note 203, at 10.

223. *Id.*

224. CAL. CIV. PROC. CODE § 1281.96(a).

available software.”<sup>225</sup>

My proposal would go one step further. I recommend that Congress adopt a spreadsheet format with the data fields implemented as columns. Each arbitration provider should be required to use the approved electronic form and publish it on the provider website, thereby achieving uniformity and accessibility among providers and among the states in a format that is user-friendly for researchers, academics, lawyers, state attorneys general, consumers, and employees.

*B. The FAA Should Require Arbitrators in Consumer and Employee Disputes to Issue a Statement of Decision*

The second part of my proposal to increase transparency in “underdog arbitration” is to amend the FAA and adopt uniform state requirements that each arbitrator of a consumer or employment claim issue a statement of decision. As noted above, the lack of a record from the arbitrator presents some troubling concerns. It inhibits the rule of law by privatizing these decisions.<sup>226</sup> It means that different arbitrators may reach conflicting decisions on the same issue without ever being aware of a similarly situated decision-maker’s result. It removes an important messaging mechanism served by our open courts to businesses and the public about potentially wrongful business practices or products. And it means that a reviewing court (to the extent there is judicial review) may have no basis for evaluating the arbitrator’s understanding of the law or rationale in reaching a decision.

Recognizing these concerns of unbridled adjudicatory power, a number of commentators have advocated for the requirement of a written decision when arbitrators decide employee or consumer cases. After its 2010 study of consumer debt collection practices, the FTC concluded that “arbitrators should issue reasoned opinions to accompany awards in all debt collection arbitration proceedings.”<sup>227</sup> Not surprisingly, the FTC found that the benefit of such opinions is that it would help the parties understand the rationale for the amounts the arbitrators awarded, would assist with judicial review of such decisions, and would help inform public assessment of private debt collection arbitration proceedings.<sup>228</sup>

Professor Sarah Rudolph Cole takes a similar position. Professor Cole

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225. *Id.* § 1281.96(b).

226. *See supra* Part II.C.

227. FTC CONSUMER DEBT COLLECTION REPORT, *supra* note 21, at 64.

228. *Id.*

proposes that private arbitrator providers require arbitrators to “draft reasoned written opinions.”<sup>229</sup> Professor Cole’s proposal would require the arbitrator to identify the issues in dispute, use the parties’ post-hearing briefs and hearing evidence to identify the parties’ contentions, state the decision, interpret the evidence, resolve questions of fact, apply principles of law and custom, and explain why he or she accepted or rejected the parties’ theories.<sup>230</sup> Finally, the opinion must describe the award and its consequences for the disputants.<sup>231</sup>

There is an added benefit to requiring a statement of decision from the arbitrator in addition to the important message it sends to the public. As any judge, law clerk, professor, or indeed law student knows, there is an educational function to the writing process. By putting the law and the application of the facts to the page, one comes to understand it in a way one had not previously comprehended, and the requirement of the writing process may indeed lead a person to a result different from what one originally thought. Nonetheless, the danger in requiring an online publishable statement of decision from an arbitrator is that it will increase the cost and complexity of arbitral decisions. Thus, while I agree with Professor Cole’s proposal in spirit—that there should be some written decision reflecting the arbitrator’s decision in a consumer or employee arbitration case—I propose a more simplified approach.

My proposal specifically rejects the necessity of a legal opinion that would explain in detail the resolution of all fact issues and the rationale for accepting or rejecting the various theories. Instead, my statement of decision would require two components: (1) a statement of the applicable law and (2) application of the facts (as the arbitrator determined them to be credible) to that law.<sup>232</sup> Requiring this statement of decision would allow the public to know if arbitrators are engaging in manifest disregard of the law and inherently would put pressure on arbitrators to resist this temptation. Additionally, while requiring a decision statement would admittedly increase the burden on arbitrators, that burden is not significant. First, confidence in arbitration is based, in

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229. Cole, *supra* note 158, at 327.

230. *Id.* at 304–05; *see also, e.g.*, Burch, *supra* note 122, at 81–82 (advocating for reasoned opinions in pre-dispute mandatory arbitration and claiming that “the benefits of reasoned opinions outweigh their costs and would improve the procedural fairness of mandatory arbitration for the parties subjected to it”).

231. *See* Cole, *supra* note 158, at 305.

232. *Cf.* FTC CONSUMER DEBT COLLECTION REPORT, *supra* note 21, at 64 (requiring the proposed opinion to “state the law applied, explain the application of the law to the facts, and set forth a calculation of the amount awarded, including breaking the amount into principal, interest, and fees”).

part, on the belief that an industry expert selected as an arbitrator will have more experience and ease in resolving a dispute, thereby increasing the efficiency of the dispute resolution process. Such decisions should be no great effort for industry legal experts who are knowledgeable in the law. Second, the effort perceived is no more than we expect of even first-year law students on exams—to identify the issue based on the facts presented by the parties, state the law, and apply it.<sup>233</sup> Again, acceptance of some increased complexity to ensure a transparent process is appropriate when balanced with the risks a complete lack of decision provides. Indeed, as exemplified by the Netflix agreement cited above, some industry providers are already moving to the contractual requirement of a statement of decision.<sup>234</sup>

C. *The FAA Should Require Business Entities That Require Binding Pre-Dispute Arbitration for Consumers or Employees to Annually Report Data on the Extent and Nature of Such Arbitrations*

The third and final piece of my proposal to lend transparency to arbitration for “underdog” disputes is to require a dual prong of data reporting. The first prong recommends imposing data reporting on the arbitral service provider. This prong requires data reporting by those entities that would enter this alternative dispute arena. Congress should amend the FAA to require business entities that require binding pre-dispute arbitration for consumers or employees to annually report and make publically available data regarding arbitration claims and their outcomes. Initially, data for consumer claims should be reported to the FTC, the entity charged with “protect[ing] consumers by stopping unfair, deceptive or fraudulent practices in the marketplace.”<sup>235</sup> Data for employment arbitration should be provided to the Department of Labor, the federal department charged with “foster[ing], promot[ing] and develop[ing] the welfare of the wage earners, job seekers, and retirees of the United States.”<sup>236</sup> But the real value in the data-reporting requirement is that the data must be publicly available. Thus, the data would be available and useful to other federal agencies, such as the

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233. The caveat is that a failure to apply the correct law for an arbitrator may mean a loss of business as opposed to a below-curve grade on the exam.

234. *Netflix Terms of Use*, *supra* note 96, § 15.

235. *What We Do*, FED. TRADE COMMISSION, <http://www.ftc.gov/about-ftc/what-we-do> (last visited Nov. 7, 2015).

236. *Our Mission*, U.S. DEPARTMENT LAB., <http://www.dol.gov/opa/aboutdol/mission.htm> (last visited Oct. 2, 2015).

CFPB and the Equal Employment Opportunity Commission (EEOC). It would also be available for state attorneys general to research potential patterns of deceptive trade practices that might otherwise go unnoticed through the veil of arbitration. Finally, the data would be available to consumer and consumer reporting agencies such as *Consumer Reports*. This information would be helpful in determining whether, for example, to seek employment with a particular employer or whether to buy a particular product. A consumer might be dissuaded from purchasing a product, for example, if the consumer sees that hundreds of arbitration claims have been filed regarding a particular product model, regardless of the outcome of those arbitrations. The very presence of numerous claims suggests that something is amiss that may not justify the cost or cost-savings. No doubt publications whose very mission is to provide consumers information about product utility would find this information important in assessing value.

One question might be, why require data reporting from both the arbitration service provider and the business/disputant?<sup>237</sup> Requiring businesses to report data to the public would necessitate business self-analysis. Once a company must make information about claims public, consumer marketing is more likely to assess the information. Then, for example, if it becomes clear that the company is receiving the benefit of repeat-player bias, this becomes a marketing problem both for the company and for pre-dispute mandatory arbitration.<sup>238</sup> Similarly, once a company is aware that it must make the *number of claims and the result* public, it will necessarily become concerned with correcting perceived discrimination or deceptive trade practices based on the data to avoid investigation by state attorneys general or the EEOC and to avoid public boycott. Additionally, reporting at the business level provides an easy-access point for consumers interested in claims data based on product or manufacturer type. The recent CFPB Arbitration Study tells us that most consumers do not know if they can sue their credit card provider in court.<sup>239</sup> It would be expecting much more of a consumer to know he or

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237. Thank you to Professor Christopher Drahozal for raising this question, among others, in response to a draft of this Article.

238. As an example of the power of the marketplace, consider the story of General Mills, which adopted a mandatory pre-dispute arbitration agreement for its products this summer. After significant negative market reaction (which may have been based on some misperceptions of arbitration discussed in this Article), General Mills recanted the terms. See Kirstie Foster, *We've Listened – and We're Changing Our Legal Terms Back*, TASTE GEN. MILLS (Apr. 19, 2014), <http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were/>.

239. CFPB ARBITRATION STUDY, *supra* note 1, § 3.4.3, at 18–19, 19 tbl.1. Overall, fifty-two

she could search a uniform database to extrapolate claims information in arbitration regarding a particular product or manufacturer.<sup>240</sup> Providing this information on a company website would be more likely to reach the target audience, the consumer.

So what form should the data-reporting requirement take? As with data reporting at the arbitral service level, some uniformity is necessary. The data reported should be in a uniform form or spreadsheet, much like an SEC filing. And what data should be required? This proposal seeks the basic information a researcher and/or prospective stakeholder would want. The business entity should report:

1. The number of arbitration claims filed in which it was a defendant;
2. Whether it was an employment or consumer claim;
3. The product or service that was the basis of claim;
4. The defect or practice complained of;
5. The arbitrator used (service and provider);
6. The outcome (win, loss, settle, default, or withdrawal);
7. Damages awarded; and
8. Fees and costs awarded.

The major criticism to data reporting at the business-player level is that it will increase the complexity of arbitration, which by its nature is attractive due to its low-cost and efficiency. But there are many reports that business entities already must file: corporate registrations, annual business designations, and SEC reports are just a few examples. For example, to participate in the market as a publicly-held company, the business entity is required to comply with multiple SEC reporting requirements. By analogy, this amendment to the FAA to require relatively simplistic data reporting could be seen as the cost of entry to alternative dispute resolution when the consumer/employee has no bargaining power. In other words, to play the game, you have to pay the cost of entry, which is data reporting designed to provide information to the public. Additionally, as noted above, to the extent underdog arbitration is a fair alternative venue to the courts, the business entities

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percent of consumers did not know if he or she had the right to sue in court. *Id.* at 18. Of those who believed they could sue in court and were actually subject to a pre-dispute arbitration agreement, eighty percent were wrong, even adjusting for small-claims court carve-outs. *Id.* at 20–21.

240. Although consumers may care little about dispute resolution procedures at the time of product acquisition (which may be due to a variety of factors including lack of knowledge about arbitration or lack of choice), consumers would likely care a great deal about product performance. If a consumer could find data on product claims, this could serve as a useful signpost for product performance.

preferring this resolution model should be more than willing to deliver the data illustrating it.

*D. Increased Transparency: A Step in the Right Direction, but Not a Panacea*

The goal advanced by the proposal set forth above is to increase transparency and tools for assessment in an area in which little is still known about consumer, and to a lesser degree, employment arbitration. Even still, there are some inherent limitations in the proposal for data collection and decisional reporting. First, a significant limitation is that even with enhanced uniformity in reporting, problems will still likely persist with interpretation in coding. For example, an analysis of the amount claimed in arbitration is an important variable. The Searle Civil Justice Institute Report on Consumer Arbitration conducted a study of 301 AAA consumer arbitrations. But the study found that “determining the amount claimed turns out to be more difficult than sometimes assumed.”<sup>241</sup> This is because claimants often combine different damage elements, compensatory damages, interest, attorneys’ fees, or punitive damages, into a single claim amount.<sup>242</sup> Additionally, some claimants specify the claim amount not as a single number, but a range.<sup>243</sup> Still further, the Searle Civil Justice Institute Report found several inconsistencies between the AAA reporting of award claim and amount and its own findings due to the compounding of compensatory damages with other damage categories.<sup>244</sup>

A more theoretical infirmity in the above proposal concerns the use of such data. As evidenced by the debate between Public Citizen and others, simply assessing a consumer “win-rate” in arbitration, or percentage of recovery versus amount claimed, cannot demonstrate whether arbitration is inherently “fair,” although it is useful information in capturing the big picture.<sup>245</sup> One method of assessing arbitration would be to compare arbitration results with litigation results, but many

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241. SEARLE INSTITUTE ARBITRATION STUDY, *supra* note 10, at 47.

242. *Id.*

243. *Id.*

244. *Id.* at 40.

245. *See id.* at 9. Compare PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>, with Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1056 (2009) (pointing out that emphasis on “wins” vs. “losses” in consumer-collection arbitration misses the point that a reduction in a claim asserted by a business against the consumer could be perceived as a win).

factors make this comparison difficult.<sup>246</sup> The cases assessed must be similar, and one should take into account that arbitration fees may be lower (or nonexistent), encouraging more filings that are less likely to succeed. Additionally, dispositive motions are used with greater frequency in litigation.<sup>247</sup> And it would be almost impossible to gauge the loss or benefit to consumers from waiving the class device and having the ability to proceed individually to arbitration, particularly when the arbitration is funded by the business. Even though it is unlikely that a precise “apples to apples” comparison could be achieved, the information gleaned from the reporting called for in this proposal would help policy-makers understand the events occurring in consumer arbitration and would encourage ethical practices from business and arbitration service providers simply due to heightened transparency. While it may be almost impossible to determine whether a consumer would have recovered more in court individually, or more abstractly, as a member of a class, we can obtain sufficient information to determine if we, as a society, should continue to condone arbitration of consumer and employee claims.

Finally, a related concern not addressed by this proposal, but certainly worthy of additional exploration, is the lack of available information about the prevalence of arbitration agreements in consumer or employment contexts and the use of certain features. Some studies providing this information have come to fruition, such as the CFPB Arbitration Study, which provides an empirical analysis of the prevalence of arbitration agreements in six consumer financial product markets.<sup>248</sup> A pervasive problem is in obtaining a complete data set representative of the market.<sup>249</sup> One idea for further development is

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246. SEARLE INSTITUTE ARBITRATION STUDY, *supra* note 10, at 9–10; Eisenberg & Hill, *supra* note 10, at 45 (noting the differences between arbitration and court-resolved disputes lead to differences in case characteristics and settlement rates).

247. SEARLE INSTITUTE ARBITRATION STUDY, *supra* note 10, at 9–10.

248. CFPB ARBITRATION STUDY, *supra* note 1, § 2; *see also* PUBLIC CITIZEN, FORCED ARBITRATION UNFAIR AND EVERYWHERE (2009), available at <http://www.citizen.org/documents/UnfairAndEverywhere.pdf>; Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 L. & CONTEMP. PROBS. 55, 62 (2004) (examining prevalence and features of arbitration agreements in the consumer context); Eisenberg et al., *supra* note 1, 882–83; Rutledge & Drahozal, *supra* note 1, at 16 (analyzing a full set of 293 consumer credit card agreements submitted to the Federal Reserve pursuant to The Credit Card Accountability, Responsibility, and Disclosure Act (Credit CARD Act) of 2009) (collecting studies); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 145 (2010) (describing difficulty in obtaining actual card agreements for use in empirical analysis).

249. *See* Schmitz, *supra* note 248, at 145 (describing difficulty in obtaining credit card agreements for empirical analyses).

whether corporate entities availing themselves of the private dispute forum should be required to provide their arbitration agreements to a central reporting agency, such as the FTC. For example, the Credit Card Accountability Responsibility and Disclosure Act of 2009<sup>250</sup> requires creditors to provide electronic credit card agreements to the CFPB that it publishes on its website.<sup>251</sup> The AAA also requires that businesses which use its service register their consumer arbitration clause with its “Consumer Clause Registry,” which allows online access to the arbitration clause.<sup>252</sup> Additionally, the AAA reviews the consumer arbitration clause to determine if it “substantially and materially” complies with the AAA’s Consumer Due Process Protocol.<sup>253</sup> These consumer agreement databases provide important sources of material for future empirical work, but are still limited in subject matter. Thus, the idea of a central repository for consumer and employee arbitration agreements is a consideration worth further development.

## CONCLUSION

The trajectory of the Supreme Court’s jurisprudence with respect to consumer and employee pre-dispute arbitration tells us that, for now, arbitration is a viable alternative forum to the courts. More and more important consumer and employment claims will be relegated to a dispute resolution process that at the moment is highly opaque. The Court’s approval of arbitration as an alternative forum is based on the theoretical perception that arbitration is a fair forum for resolving consumer and employee disputes, even if those claims involve low-value damages and even if there was little or no bargaining power in agreeing to the arbitration clause. But as discussed above, there is little reliable evidence available to suggest that this theoretical perception of the fairness of arbitration is correct. And as far as theory goes, the theoretical criticisms of binding pre-dispute arbitration for employee and consumer claims have merit. The problems discussed above include the presence of bias, due in part to the repeat-player effect; the lack of judicial oversight; the removal of publicity from the proceedings, including the inhibition of development of the rule of law; and an overall

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250. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C., 16 U.S.C., and 32 U.S.C.).

251. 15 U.S.C. § 1632 (2012); *see also* Rutledge & Drahozal, *supra* note 1, at 7 (using card agreements provided under the Credit CARD Act of 2009 as a data set).

252. *Consumer Clause Registry*, AM. ARB. ASS’N, <https://www.adr.org/aaa/faces/aoe/gc/consumer> (follow “Consumer Clause Registry” hyperlink) (last visited Oct. 30, 2015).

253. *Id.*

public distrust. All of these criticisms stem from a lack of transparency in the process. Thus, achieving greater transparency will either fortify public confidence in the process or provide the public with empirical evidence needed to call its appropriateness into question. Either way, increased transparency serves the greater public good by providing concrete information about the resolution process to which so many underdog claims are being shuffled.

But how to achieve this transparency? I propose a tri-part solution calling for Congress to amend the FAA and the states to follow through uniform arbitration laws requiring: (1) Data reporting of arbitration statistics in consumer and employee claims by the arbitration service provider; (2) A written statement of decision by the arbitrator stating the applicable law and applying the facts to that law; and (3) Data reporting by the businesses seeking to impose mandatory pre-dispute arbitration on their consumers or employees. By requiring data reporting and decision statements in “underdog” arbitration, Congress has an opportunity to strike a middle chord in this debate that is becoming increasingly political. And arbitration participants, such as businesses wishing to avoid expensive discovery costs and class proceedings in court, have an opportunity to put the proverbial proof in the pudding. If arbitration is fair for consumers, if arbitration can work as it should, then show us the numbers.