

# The Arbitration Fairness Act of 2009

## I. INTRODUCTION

Arbitration law may never be the same again. The Arbitration Fairness Act of 2009 (AFA)<sup>1</sup> amends the Federal Arbitration Act (FAA).<sup>2</sup> Responding to volumes of judicial precedent enforcing pre-dispute arbitration agreements (PDAA),<sup>3</sup> AFA voids all PDAA in consumer agreements, franchise agreements, employment contracts, and PDAA which require arbitration of statutory claims.<sup>4</sup> AFA comes in the wake of decades of judicial precedent that expanded the reach of the FAA,<sup>5</sup> including a recent Supreme Court decision, that resolved an eighteen year controversy in arbitration law and held that PDAA requiring arbitration of statutory claims are valid, even if entered into collectively through a collective bargaining agreement (CBA), rather than individually.<sup>6</sup>

Part II covers the factual background leading up to AFA, including an overview of arbitration and PDAA, the FAA and its judicial progeny, the ensuing normative debate, and empirical research on both sides of the controversy.<sup>7</sup> Part III explains the AFA, including an overview, findings cited by the bills' sponsors, and the amendments the AFA makes to the FAA.<sup>8</sup> Part IV analyzes the AFA, including arguments in favor and against, and other proposals for reform.<sup>9</sup> Part V concludes that the AFA is the largest legislative decision on arbitration since the FAA and stands to bring Congress into direct confrontation with the Supreme Court, with policy arguments on both sides of the controversy, and ambiguous empirical evidence.<sup>10</sup>

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<sup>1</sup> Arbitration Fairness Act of 2009, H.R. Res. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2009, S. Res. 931, 111th Cong. (2009). This note does not cover companion bills related to nursing homes: the Fairness in Nursing Home Arbitration Act of 2009, H.R. Res. 1237, 111th Cong. (2009); and the Fairness in Nursing Home Arbitration Act, S. Res. 512, 111th Cong. (2009).

<sup>2</sup> Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (1947).

<sup>3</sup> See *infra* Part II.B.2–3.

<sup>4</sup> See *infra* Part III.

<sup>5</sup> See *infra* Part II.B.

<sup>6</sup> 14 Penn Plaza L.L.C. v. Pyett, 129 S. Ct. 1456, 1474 (2009) (enforcing PDAA within CBA requiring arbitration of ADEA claims).

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *infra* Part V.

<sup>10</sup> See *infra* Part VI.

## II. BACKGROUND

## A. Overview of Arbitration and Pre-Dispute Arbitration Agreements

Arbitration is a private forum for dispute resolution where parties submit their dispute to a third party (or panel of third parties) who will review the facts and the law, and issue a binding “award.”<sup>11</sup> The key difference between litigation and arbitration is that, generally, the arbitrator’s decision is unappealable.<sup>12</sup> A trial court decision may be appealed to review conclusions of law “de novo,”<sup>13</sup> and findings of fact if they are “clearly erroneous.”<sup>14</sup> On the other hand, absent fraud or dishonesty by the arbitrator, an appellate court may not overturn or modify an arbitrator’s award, even if it disagrees with the factual findings and the arbitrator’s choice of law.<sup>15</sup>

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<sup>11</sup> See, e.g., Arbitration, Amer. Arb. Ass’n, 2007, [http://www.adr.org/arb\\_med](http://www.adr.org/arb_med) (last visited Apr. 8, 2010) (American Arbitration Association’s definition of arbitration); BLACK’S LAW DICTIONARY 112 (8th ed. 2008) (“A method of dispute resolution involving one or more neutral third parties . . . whose decision is binding.”).

<sup>12</sup> FAA, 9 U.S.C. §§ 10–11 (2006) (FAA grounds for vacating and modifying an arbitration award); see also *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587–90 (2008) (holding that the FAA sections 10–11 provide the exclusive grounds for overturning an arbitrator’s award).

<sup>13</sup> *Schiro v. Farley*, 510 U.S. 222, 232 (1994) (holding that the preclusive effect of a jury verdict is a question of law which is reviewed de novo). When applying de novo review, the appellate court independently reviews the conclusions of law and does not give deference to lower court interpretations. *Exner v. F.B.I.*, 612 F.2d 1202, 1209 (9th Cir. 1980) (Pregerson, J., concurring) (“‘de novo’ means trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered.”) (quoting *Farmingdale Supermarket, Inc. v. United States*, 336 F. Supp. 534, 536 (D.C. N.J. 1971)).

<sup>14</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48 (1995) (applying de novo review to conclusions of law, but accepting findings of fact as valid unless “clearly erroneous”); see also FED. R. CIV. P. 52(a)(6) (“Findings of fact . . . must not be set aside unless clearly erroneous.”). A finding of fact is clearly erroneous when a reviewing court is left with the firm conviction that a mistake has been committed, even if there is evidence to the support the finding. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

<sup>15</sup> See 9 U.S.C. §§ 10–11; see also *First Options of Chicago, Inc.*, 514 U.S. at 942; *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36–39 (1987) (describing limited grounds for overturning arbitration award); Lorraine M. Brennan et al., *Recent Developments in International Commercial Arbitration*, 16 DISP. RESOL. MAG. 14, 15–16 (2009) (providing an overview of “evident partiality” and “manifest disregard” standards, and the current uncertainty in arbitration appeals).

## THE ARBITRATION FAIRNESS ACT OF 2009

PDAAs are forum selection clauses which require arbitration of future disputes.<sup>16</sup> PDAAs are controversial because the decision to arbitrate is a decision to opt-out of a judicial forum.<sup>17</sup> However, PDAAs are popular because they allow parties complete discretion in choosing the applicable procedure, the applicable law, and the decisionmaker before the dispute has arisen—a time when they are most likely to mutually assent.<sup>18</sup> If a PDAA meets the elements of a traditional contract, courts will hold parties to their bargain regardless of when the agreement was signed, even if the court would reach a different decision than the arbitrator, on the law or on the merits.<sup>19</sup> The judiciary's role is limited to determining issues of "arbitrability": whether the claim at issue is governed by the PDAA; if it is, all the court can do is enforce the agreement.<sup>20</sup> However, courts may rely on contract defenses to invalidate some PDAAs.<sup>21</sup>

### *B. The FAA and Its Judicial Progeny*

#### *1. The Federal Arbitration Act Reverses Judicial Hostility Towards Arbitration*

Before the FAA, most courts viewed all arbitration agreements, not just PDAAs, with hostility; arbitration agreements were voidable, and void if one party objected.<sup>22</sup> The FAA, passed in 1925, was designed to eliminate these

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<sup>16</sup> *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 295 (2002) (referring to an arbitration agreement as a forum selection clause).

<sup>17</sup> ASSOCIATION FOR CONFLICT RESOLUTION, AN EXAMINATION OF THE ARBITRATION FAIRNESS ACT OF 2009, at 24 (2009) [hereinafter ACR REPORT].

<sup>18</sup> *Id.* at 34. Mutual assent is a key element to any contract. *Utley v. Donaldson*, 94 U.S. 29, 47 (1876) ("There can be no contract without the mutual assent of the parties. This is vital to its existence.").

<sup>19</sup> *United Paperworkers*, 484 U.S. at 36–38; ACR REPORT, *supra* note 17, at 31.

<sup>20</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (holding that arbitrability is an issue to be decided by the courts unless the PDAA expressly reserves the issue for the arbitrator); *see also United Paperworkers*, 484 U.S. at 36–38.

<sup>21</sup> *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 687 (1996) (holding that contract defenses may be used to void arbitration agreements, but state law grounds for annulment cannot conflict with the FAA).

<sup>22</sup> *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270–71 (1995); ACR REPORT, *supra* note 17, at 54.

impediments to arbitration agreements.<sup>23</sup> The FAA affirmed that written agreements to arbitrate current or future disputes involving maritime and commercial transactions were valid, irrevocable, and enforceable when entered into voluntarily by parties of comparable power and sophistication.<sup>24</sup> The FAA was followed by similar state statutes,<sup>25</sup> including the Uniform Arbitration Act of 1955.<sup>26</sup>

## *2. Pre-Dispute Arbitration Agreements Spread Eroding the Perception of Voluntariness*

In response to congressional encouragement via the FAA and Supreme Court support through a series of decisions known as the “Steelworkers Trilogy,”<sup>27</sup> contractual choice of venue provisions providing for arbitration (a.k.a. PDAAAs) were no longer voidable at will. PDAAAs became standard in CBAs and began appearing in consumer contracts (traditionally governed by state law), franchise agreements, and non-union employment contracts.<sup>28</sup>

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<sup>23</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); ACR REPORT, *supra* note 17, at 18–19.

<sup>24</sup> FAA, 9 U.S.C. § 2 (2006) (discussing “[v]alidity, irrevocability, and enforcement of agreements to arbitrate.”); *see also* *Perry v. Thomas*, 482 U.S. 483, 489–91 (1987) (holding that pursuant to section 2 of the FAA, PDAAAs are enforceable in state and federal courts).

<sup>25</sup> ACR REPORT, *supra* note 17, at 55.

<sup>26</sup> UNIF. ARBITRATION ACT §§ 1–33 (amended 2000), *available at* <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf>. Thirteen states have substantially adopted the 2000 revision. Harry N. Mazadoorian, *Whatever Happened to the Revised Uniform Arbitration Act?: A Funny Thing Happened on the Way to the Legislature*, 16 DISP. RESOL. MAG. 21 (2009).

<sup>27</sup> *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960) (holding that when interpreting PDAAAs in CBAs, the courts’ function is limited to determining whether a particular claim is governed by the PDAA, and if it is, no judicial inquiry should be made regarding the merits of the claim); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596–99 (1960) (holding that while an arbitrator’s award must be based on the PDAA within a CBA, courts may not inquire into the merits of the arbitrator’s award, even if the court disagrees with the arbitrator’s interpretation of the PDAA or the reasons for the award are ambiguous); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–83 (1960) (holding that all claims arising under a CBA are presumed to be within the scope of PDAA unless expressly provided otherwise and that doubts should be resolved in favor of arbitrability).

<sup>28</sup> *See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–75, 281 (1995) (enforcing PDAA in consumer pest-control contract); *Gilmer*, 500 U.S. at 35

However, even with the passage of the FAA, courts refused to extend arbitration agreements into unfamiliar territory such as statutory claims<sup>29</sup> and class actions.<sup>30</sup> Employees could pursue statutory discrimination claims de novo in Court, even if required to use arbitration for contract claims.<sup>31</sup> Consumers and franchisees could pursue their low-stakes claims collectively through class action, unless an agreement expressly provided otherwise.<sup>32</sup> However, the Steelworkers Trilogy<sup>33</sup> was a precursor to further Supreme Court expansion of arbitration and the impact of PDAs on employees, consumers, and franchisees.<sup>34</sup>

### 3. *Scope of Arbitrability Increases Raising Questions of Fairness*

A traditionally debated area of FAA expansion concerns statutory claims. If an individual employee consents to arbitration of a statutory claim, arbitrators have authority to interpret, apply, and decide questions relating to most federal statutes (thereby displacing public courts).<sup>35</sup> In addition, through a CBA unions may collectively consent to waive the individual employee's right to pursue statutory claims in court.<sup>36</sup> If the waiver is "clear and unmistakable,"<sup>37</sup> the party objecting to arbitration possesses the burden

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(enforcing PDA in employment agreement); *Southland v. Keating*, 465 U.S. 1, 17 (1984) (enforcing PDA in 7-Eleven franchise agreement).

<sup>29</sup> *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (prohibiting arbitrators from arbitrating conflicts based on interpreting and applying the Securities Act of 1933, 15 U.S.C. § 77a (1933)), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

<sup>30</sup> *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995) (refusing to compel class arbitration where PDA was silent), *abrogated by* *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 100 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2793 (2009); *see also* Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3:2 ENTREPRENEURIAL BUS. L.J. 275, 284 (2009) (quoting *Champ v. Siegel*, 55 F.3d at 275).

<sup>31</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974).

<sup>32</sup> *Champ v. Siegel*, 55 F.3d at 275.

<sup>33</sup> *See supra* text accompanying note 27 (explaining three cases comprising Steelworkers Trilogy).

<sup>34</sup> *See* ACR REPORT, *supra* note 17, at 46 (suggesting that the judicial expansion of arbitration may have been aligned with the "privatization" movement of the 1980s).

<sup>35</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 28 (1991).

<sup>36</sup> *14 Penn Plaza L.L.C. v. Pyett*, 129 S. Ct. 1456, 1474 (2009) (enforcing PDA within CBA requiring arbitration of ADEA claims).

<sup>37</sup> *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998).

of proof to demonstrate that Congress intended to preclude arbitration of the claim at issue.<sup>38</sup>

An emerging concern is the expansion of the FAA to include class actions. Where a PDAA is silent, arbitrators have sole authority to determine if claimants may bypass the PDAA and pursue their claim through class action in litigation.<sup>39</sup> Where a “class action waiver,”<sup>40</sup> “class arbitration waiver,”<sup>41</sup> or “collective action waiver”<sup>42</sup> is express, federal courts are split as to whether the waiver is enforceable.<sup>43</sup> In addition, a pro-PDAA Supreme Court recently granted certiorari to determine whether class arbitration can be compelled when the PDAA is silent on the issue.<sup>44</sup>

These and other decisions by the Court have resulted in a pro-arbitration judicial policy much at odds with the pre-FAA judiciary.<sup>45</sup> Not only are employees (both union and non-union) required to arbitrate statutory claims, but consumers and franchisees are required to pursue low-stake claims through arbitration and individually (if class arbitration is waived). In addition, PDAAs cannot grant courts authority to overturn arbitrators’ decisions on grounds other than provided for in the FAA,<sup>46</sup> parties may contract for punitive damages (even if prohibited by state law),<sup>47</sup> and a non-signatory may enforce a PDAA against a signatory if allowed by contract

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<sup>38</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 628 (1985); see also *Gilmer*, 500 U.S. at 26.

<sup>39</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003).

<sup>40</sup> *Drahozal & Wittrock*, *supra* note 30, at 279 (stating a “class action waiver” is a provision in a CBA which waives the right to bring a class action in court).

<sup>41</sup> *Id.* at 280 (stating a “class arbitration waiver” is a provision in a CBA which waives the right to pursue a class action in arbitration).

<sup>42</sup> *Id.* (stating a “collective action waiver” is a waiver of the right to pursue a class action in court and in arbitration).

<sup>43</sup> *Id.* at 290.

<sup>44</sup> *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 129 S. Ct. 2793 (2009); see also David Moora, *U.S. Supreme Court to Review Whether Class Arbitration Can Be Compelled if Arbitration Clause Is Silent*, *ADR News and Cases*, 16 DISP. RESOL. MAG. 30, 30 (2009) (overview of precedent and facts relevant to *Stolt-Nielsen*).

<sup>45</sup> See, e.g., *Home Ins. Co. v. Morse*, 87 U.S. 445, 451–52 (1874) (holding that PDAAs are “illegal and void”), superseded by FAA, 9 U.S.C. § 1 (1947), as recognized in *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 153 (4th Cir. 1993); *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1009 (S.D.N.Y. 1915) (invalidating PDAA), superseded by 9 U.S.C. § 1, as recognized in *Sverdrup Corp.*, 989 F.2d at 153.

<sup>46</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587–90 (2008).

<sup>47</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59–60 (1995).

beneficiary law.<sup>48</sup> Such developments have generated an intense policy debate about whether courts are steering the FAA in the proper direction.<sup>49</sup>

### C. *The Ensuing Normative Debate*

The spread of PDAAs and expansion of arbitrability has not gone unnoticed.<sup>50</sup> This development has divided the legal community for three decades and generated normative arguments on both sides of the controversy.<sup>51</sup> The normative debate splits on three key issues. First, scholars disagree whether PDAAs are voluntary undertakings to arbitrate.<sup>52</sup> Second, they disagree as to whether arbitration procedures are fair compared to litigation, which concerns the adequacy of procedural protections available in arbitration, sufficiency of arbitrator awards, and accessibility to arbitral forums.<sup>53</sup> Finally, scholars disagree whether arbitration impedes the development of statutory law.<sup>54</sup>

#### 1. *Arbitration as a Voluntary Choice?*

The issue of whether PDAAs are voluntary agreements to arbitrate is especially contentious following *14 Penn Plaza*.<sup>55</sup> Proponents of PDAAs point out that plenty of employment, franchise, and consumer agreements are entered into after negotiation, and even if not, individuals may reject contracts with PDAAs and seek other economic opportunities or purchase different products.<sup>56</sup> Opponents respond that PDAAs are contained in boilerplate language within contracts of adhesion, given on a “take-it-or-leave-it” basis,<sup>57</sup> and dismiss proponents’ “freedom to reject” claim on the grounds that certain consumer products are a necessity and alternate

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<sup>48</sup> Arthur Andersen L.L.P. v. Carlisle, 129 S. Ct. 1896, 1902 (2009).

<sup>49</sup> See *infra* Part II.C.

<sup>50</sup> See *infra* Part II.C.1–3 (overview of debate regarding PDAAs).

<sup>51</sup> See *id.*

<sup>52</sup> See *infra* Part II.C.1.

<sup>53</sup> David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1254–57 (2009); see also *infra* Part II.C.2.

<sup>54</sup> See *infra* Part II.C.3.

<sup>55</sup> *14 Penn Plaza L.L.C. v. Pyett*, 129 S. Ct. 1456, 1474 (2009) (enforcing PDAA within CBA requiring arbitration of ADEA claims).

<sup>56</sup> ACR REPORT, *supra* note 17, at 23.

<sup>57</sup> *Id.* at 22.

employment is often difficult to find.<sup>58</sup> The consent debate also depends on whether arbitration is a fair forum for compelled dispute resolution.<sup>59</sup>

## 2. Arbitration and Fairness?

One debate related to fairness is whether arbitration procedures are adequate. Opponents claim that arbitration agreements waive rights to court-supervised discovery and jury trials,<sup>60</sup> and that private arbitrators are under financial coercion to create systems that favor corporate repeat players.<sup>61</sup> Opponents also point out that arbitration is not transparent because hearings are held in private, written decisions are not always published,<sup>62</sup> and that arbitration is unnecessary because it displaces existing forums such as pre-trial proceedings, small claims courts, courts of limited jurisdiction, and administrative tribunals.<sup>63</sup> Proponents respond that ADR providers do not favor repeat players because they need to build their reputation as impartial and qualified providers of ADR.<sup>64</sup> In addition, the fact that there is no public hearing or written opinion is not an issue; individuals use arbitration because of privacy,<sup>65</sup> arbitrators can be required and trained to write proper opinions,<sup>66</sup> and some providers, such as the American Arbitration Association, already publish information pertaining to important filings.<sup>67</sup>

Others question whether arbitration produces fair outcomes. Opponents argue that many PDAAs contain unfair provisions which prohibit statutory

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<sup>58</sup> *Id.* at 26–28.

<sup>59</sup> *See infra* Part II.C.2.

<sup>60</sup> Joseph D. Garrison, *The Employee's Perspective: Mandatory Binding Arbitration Constitutes Little More than a Waiver of a Worker's Rights*, in HANDBOOK ON EMPLOYMENT ARBITRATION & ADR 311, 311–12 (Thomas E. Carbonneau et al. eds., 2007).

<sup>61</sup> Arbitration Fairness Act of 2009, H.R. Res. 1020, 111th Cong. § 2(4) (2009); S. Res. 931, 111th Cong. § 2(4) (2009); *see also* Schwartz, *supra* note 53, at 1309–12 (providing an overview of empirical research on “repeat player” effect).

<sup>62</sup> H.R. Res. 1020 § 2(6); S. Res. 931 § 2(6); *see also* ACR REPORT, *supra* note 17, at 33.

<sup>63</sup> *See* Schwartz, *supra* note 53, at 1258.

<sup>64</sup> ACR REPORT, *supra* note 17, at 82.

<sup>65</sup> *Id.* at 33.

<sup>66</sup> *Id.* at 80.

<sup>67</sup> Drahozal & Wittrock, *supra* note 30, at 296.



rights and limit award size.<sup>68</sup> Proponents respond that state unconscionability law provides adequate protection against unfair agreements,<sup>69</sup> arbitrators are more predictable than juries,<sup>70</sup> and arbitration creates a greater likelihood of reinstatement than litigation<sup>71</sup> because it allows for earlier resolution of workplace problems.<sup>72</sup>

The third aspect of fairness concerns whether arbitration is more or less accessible than litigation. Proponents of PDAAs point out that arbitration is a necessary alternative to litigation because there is no reasonable evidence that courts are accessible to all parties, especially low-income individuals.<sup>73</sup> They also point out that federal agencies that investigate statutory claims are unable to keep up with their dockets,<sup>74</sup> and claimants in arbitration are not obligated to miss work to pursue their claims because arbitration does not require personal appearance.<sup>75</sup> Opponents respond that many PDAAs ban class actions and require travel to distant forums.<sup>76</sup>

### 3. *Arbitration and the Law?*

A final issue is whether PDAAs impede the development of the common law. Opponents argue that PDAAs impede the progress of civil rights and consumer law, and undermine the judiciary's capacity to ensure consistent

<sup>68</sup> Arbitration Fairness Act of 2009, H.R. Res. 1020, 111th Cong. § 2(7) (2009); S. Res. 931, 111th Cong. § 2(7) (2009).

<sup>69</sup> Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1074–78 (2009).

<sup>70</sup> Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, in HANDBOOK ON EMPLOYMENT ARBITRATION & ADR, *supra* note 60, at 303, 306.

<sup>71</sup> Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMP. RTS. & EMP. POL'Y J. 221, 245–55 (1997).

<sup>72</sup> Oppenheimer & Johnstone, *supra* note 70, at 306.

<sup>73</sup> ACR REPORT, *supra* note 17, at 7.

<sup>74</sup> FitzGibbon, *supra* note 71, at 245–47 (providing an overview of the Equal Employment Opportunity Commission docket); *see also* Oppenheimer & Johnstone, *supra* note 70, at 308–09.

<sup>75</sup> Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need to Know*, 10 CARDOZO J. CONFLICT RESOL. 579, 581 (2009).

<sup>76</sup> Arbitration Fairness Act of 2009, H.R. Res. 1020, 111th Cong. § 2(7) (2009); S. Res. 931, 111th Cong. § 2(7) (2009).

statutory interpretation for comparable cases.<sup>77</sup> Proponents respond that rather than impeding the development of law, arbitrators decide by applying civil rights statutes<sup>78</sup> and adhere to precedent rather than diverge from it.<sup>79</sup> In addition, they argue that applying judicial standards of review to arbitration awards would undermine several benefits associated with the process, including speed, efficiency, decisionmaker expertise, and tailored remedies.<sup>80</sup>

#### D. *The Empirical Debate*

The empirical debate divides along the same lines as the normative debate, with both sides disagreeing whether PDAAs are voluntary, fair, and beneficial to the common law. Proponents on both sides of the issue have a peculiar relationship with existing empirical evidence. First, they cite it in support.<sup>81</sup> Second, they dismiss it as incomplete.<sup>82</sup> Third, given the statistical uncertainty, they defer the burden to the other side, arguing that their side is a fairer default position.<sup>83</sup> Federal and state courts are similarly split.<sup>84</sup>

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<sup>77</sup> H.R. Res. 1020 § 2(5); S. Res. 931 § 2(5).

<sup>78</sup> ACR REPORT, *supra* note 17, at 83.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 32, 49–50.

<sup>81</sup> See, e.g., Peter B. Rutledge, *Point: The Case Against the Arbitration Fairness Act*, 16 DISP. RESOL. MAG. 4, 7 (2009) (arguing that empirical data demonstrates that arbitration produces better outcomes and faster results than litigation). *But see* Schwartz, *supra* note 53, at 1309–15 (arguing that litigation may be cheaper than arbitration and that empirical evidence demonstrates the existence of the repeat player effect).

<sup>82</sup> See, e.g., Schwartz, *supra* note 53, at 1284–1309, 1328–29 (highlighting difficulties associated with data collection and flaws in popular studies, including baseline values used for comparison, potential that cases submitted to arbitration and litigation are inherently different, omission of settlements, and improper sampling and sorting); see also ACR REPORT, *supra* note 17, at 68 (highlighting challenges encountered when gathering empirical data for arbitration); Cole & Blankley, *supra* note 69, at 1079 (finding that empirical record on consumer arbitration is incomplete); Rutledge, *supra* note 75, at 584–85 (stressing the need for more research, especially studies focusing on outcomes, whether post-dispute arbitration agreements are a feasible alternative to PDAAs, the financial impact of arbitration, and how PDAAs fit into a company's broader dispute resolution framework).

<sup>83</sup> See Rutledge, *supra* note 75, at 584 (arguing that Congress should be cautious when attempting arbitration reform given the limited empirical record). *But see* Schwartz, *supra* note 53, at 1259, 1315–20, 1325–27, 1333–38 (arguing that the absence of evidence demonstrating the benefits of litigation over arbitration is not reason alone to infer that litigation is not a better alternative than arbitration and impede reform); Jean R.

### 1. *Arbitration as a Voluntary Choice?*

Empirical research does support the position that many adults are bound by PDAAs.<sup>85</sup> Many consumer contracts (ranging from 0%–76.9% by industry),<sup>86</sup> employment contracts (ranging from 10%–92.9% by industry),<sup>87</sup> and franchise agreements (43.7%)<sup>88</sup> contain PDAAs, and the numbers are increasing compared to prior studies.<sup>89</sup> On the other hand, PDAAs are not as widespread as opponents tend to argue; less than a quarter of business contracts contain PDAAs.<sup>90</sup> In addition, although PDAAs are prevalent in consumer and employment contracts,<sup>91</sup> use varies across industries<sup>92</sup> and is most widespread in industries where a high concentration of the market share is held by a few companies.<sup>93</sup> However, the spread of PDAAs is not

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Sternlight, *Counterpoint: Fixing the Mandatory Arbitration Problem: We Need the Arbitration Fairness Act of 2009*, 16 DISP. RESOL. MAG. 5, 5–6 (2009) (arguing that it is better for reform to be too broad, rather than too narrow).

<sup>84</sup> 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, 874–75 (2008) (highlighting inconsistency in both federal & state courts when applying doctrine of unconscionably to PDAAs).

<sup>85</sup> ACR REPORT, *supra* note 17, at 23 (referencing computer equipment purchase agreements, telecommunications agreements, service agreements, and more than 700 million credit card agreements).

<sup>86</sup> Drahozal & Wittrock, *supra* note 30, at 298–99; *see also* ACR REPORT, *supra* note 19, at 25; Eisenberg et al., *supra* note 84, at 882–83.

<sup>87</sup> Drahozal & Wittrock, *supra* note 30, at 299 (estimating between 10% and 41.6%). *But see* Eisenberg et al., *supra* note 84, at 883 (finding that 92.9% of businesses used PDAAs in their employment contracts).

<sup>88</sup> Drahozal & Wittrock, *supra* note 30, at 299.

<sup>89</sup> Eisenberg et al., *supra* note 84, at 877–78 (overview of previous empirical studies); *see also* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 409 (citing General Accounting Office study conducted in 1995). However, use of PDAAs in franchise agreements has remained steady for years. Drahozal & Wittrock, *supra* note 30, at 278.

<sup>90</sup> Eisenberg et al., *supra* note 84, at 886.

<sup>91</sup> *Id.*

<sup>92</sup> Drahozal & Wittrock, *supra* note 30, at 278.

<sup>93</sup> Eisenberg et al., *supra* note 84, at 891–92.

necessarily a bad development given that judicial and administrative dockets need assistance.<sup>94</sup>

## 2. Arbitration and Fairness?

Empirical research concerning process fairness is uncertain. Comparisons of small claims cases to arbitration hearings yield few differences.<sup>95</sup> Research does not support the claim that repeat players have an advantage in arbitral forums.<sup>96</sup> However the available data does raise some concerns about the intentions behind PDAAs, such as the observation that while most companies use PDAAs in consumer contracts, less than 10% use them in non-consumer, non-employment business contracts. This data suggests companies prefer to litigate against peers and arbitrate against less formidable opponents.<sup>97</sup> Similarly, while no employment or consumer contracts without PDAAs waive jury trials if PDAAs are treated as a jury trial waiver, then most consumer (76.9%) and employment (92.9%) contracts contain a jury trial waiver.<sup>98</sup>

Research is inconclusive regarding whether damage awards are lower in arbitration than litigation.<sup>99</sup> Some studies support the position that consumers and non-union employees get less favorable results in arbitration than in court.<sup>100</sup> Others studies support the position that arbitration allows for faster

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<sup>94</sup> For example, employment discrimination alone amounts to 20% of all federal and state court claims. Oppenheimer & Johnstone, *supra* note 70, at 305.

<sup>95</sup> Rutledge, *supra* note 75, at 581 (finding no statistically significant difference between win rates in small claims courts and arbitration).

<sup>96</sup> ACR REPORT, *supra* note 17, at 84; *see also* Eisenberg et al., *supra* note 84, at 894.

<sup>97</sup> Eisenberg et al., *supra* note 84, at 876.

<sup>98</sup> *Id.* at 885–86.

<sup>99</sup> *Id.* at 873.

<sup>100</sup> *See, e.g.,* Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers 2* (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf> (last visited Apr. 8, 2010) (finding that virtually all consumers lose in consumer arbitration).

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resolution of disputes with comparable outcomes.<sup>101</sup> However, both sides dismiss each other's conclusions, citing poor methodology.<sup>102</sup>

In terms of accessibility, arbitrator fees can range from \$3,750 to \$14,000,<sup>103</sup> although a recent study demonstrated that most consumers do not pay fees in collections arbitration.<sup>104</sup> However, there are some indications that PDAs are displacing class actions. Since *Green Tree*<sup>105</sup> class arbitration filings have increased,<sup>106</sup> and use of class action waivers, class arbitration waivers, and “nonseverability”<sup>107</sup> provisions has become more common in franchise agreements.<sup>108</sup> A recent study also concluded that businesses may be using PDAs to avoid aggregate dispute resolution.<sup>109</sup> Even so, despite an increase in class arbitration filings since *Green Tree*,<sup>110</sup> a recent study reasoned that class action waivers are not a threat to the future of class actions because of a split in the judiciary which makes it difficult to predict whether a court will enforce class action waivers and non-severability

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<sup>101</sup> Cole & Blankley, *supra* note 69, at 1064–67, 1072–73 (finding that consumers tend to pay less in collection arbitration than the amount claimed by creditors and have a faster rate of dispute resolution through arbitration than litigation).

<sup>102</sup> See *supra* text accompanying note 82 (sample of articles criticizing methodologies employed by empirical studies evaluating impact of PDAs); see also Cole & Blankley, *supra* note 69, at 1052–64 (criticizing Public Citizen report on grounds that study was designed to reach adverse conclusion).

<sup>103</sup> Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135, 166 (2000).

<sup>104</sup> Cole & Blankley, *supra* note 69, at 1067–70 (finding that business parties paid approximately 99% of all arbitration fees).

<sup>105</sup> *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003) (holding that where a PDA is silent, arbitrators have sole authority to determine whether claimants may pursue their claims through class action litigation).

<sup>106</sup> *Drahozal & Wittrock*, *supra* note 30, at 285–87 (discussing the impact of *Green Tree*, 539 U.S. at 452–53).

<sup>107</sup> A “nonseverability” provision prohibits a court from severing an invalid class arbitration waiver from a PDA and permitting a class of claimants to enforce the PDA (i.e. requiring class arbitration), by specifying that the entire PDA is unenforceable if a court holds that the class arbitration waiver is invalid. *Id.* at 278, 294.

<sup>108</sup> *Id.* at 288–90, 294–95.

<sup>109</sup> Eisenberg et al., *supra* note 84, at 888–90 (finding that research supports the position that companies are using PDAs to avoid class actions and class arbitrations).

<sup>110</sup> *Green Tree*, 539 U.S. at 444.

provisions. As a result, businesses using PDAAs with such provisions do so at their own risk.<sup>111</sup>

### 3. *Arbitration and the Law*

Finally, no solid research exists in terms of arbitration's compatibility with the common law. Opponents point out that reporters are full of cases highlighting how PDAAAs have been abused.<sup>112</sup> Proponents respond that such cases demonstrate the capacity of courts to deal with improper PDAAAs through the doctrine of unconscionability (although their ability to do so varies by state).<sup>113</sup> Additionally, a court's refusal to invalidate agreements on unconscionability grounds or claims of arbitrator bias is not necessarily a bad omen, especially because this indicates that courts are putting more faith in arbitrators to properly resolve disputes.<sup>114</sup>

## III. THE ARBITRATION FAIRNESS ACT OF 2009

### A. *Overview*

The AFA is composed of two parallel bicameral democratic efforts:<sup>115</sup> House Resolution 1020 introduced by Representative Henry Johnson (D-

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<sup>111</sup> Drahozal & Wittrock, *supra* note 30, at 293–98. By using a PDAA waiver a business may insulate itself from class litigation or arbitration. But if the court finds a waiver unconscionable, it may sever the waiver from the PDAA and require class arbitration (a result at odds with the business's interest). Similarly, if the PDAA contains a nonseverability provision, courts may waive the entire PDAA and permit class action in court (another result at odds with the business's interest). *Id.*

<sup>112</sup> See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (invalidating a PDAA because it lacked "bilateralism"); *Hooters of Am. v. Phillips*, 173 F.3d 933, 938–40 (4th Cir. 1999) (finding that the purpose of the PDAA was to undermine, rather than sustain, neutrality); *Brower v. Gateway 2000 Inc.*, 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) (invalidating PDAA because cost of pursuing a claim through arbitration often exceeded the value of claim).

<sup>113</sup> ACR REPORT, *supra* note 17, at 34–35.

<sup>114</sup> Cole & Blankley, *supra* note 69, at 1074–75.

<sup>115</sup> The House bill has 109 cosponsors; all are Democrats, with the exception of one Ohio Republican. GovTrack.us, H.R. 1020: Arbitration Fairness Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1020> (last visited Mar. 11, 2010). The Senate bill has eleven co-sponsors; all are Democrats. GovTrack.us, S. 931: Arbitration Fairness Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=s111-931> (last visited Mar. 11, 2010).

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GA)<sup>116</sup> and Senate Resolution 931 introduced by Senator Russell Feingold (D-WI).<sup>117</sup> Both bills are currently in committees.<sup>118</sup> The House bill was referred in March 2009 and the Senate Bill was referred in April 2009.<sup>119</sup> The House bill has some public support.<sup>120</sup> Both bills are the successors of similar companion bills introduced in the previous Congress,<sup>121</sup> and a Senate bill introduced in the 107th Congress,<sup>122</sup> all three of these previous efforts stalled in committee.<sup>123</sup>

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<sup>116</sup> Arbitration Fairness Act of 2009, H.R. Res. 1020, 111th Cong. (2009).

<sup>117</sup> Arbitration Fairness Act of 2009, S. Res. 931, 111th Cong. (2009).

<sup>118</sup> GovTrack.us, H.R. 1020: Arbitration Fairness Act of 2009, Committee Assignments, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1020&tab=committees> (last visited Mar. 11, 2010); GovTrack.us, S. 931: Arbitration Fairness Act of 2009, Committee Assignments, <http://www.govtrack.us/congress/bill.xpd?bill=s111-931&tab=committees> (last visited Mar. 11, 2010).

<sup>119</sup> GovTrack.us, H.R. 1020: Arbitration Fairness Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1020> (last visited Mar. 11, 2010); GovTrack.us, S. 931: Arbitration Fairness Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=s111-931> (last visited Mar. 11, 2010).

<sup>120</sup> The House bill has eleven public sponsors: California Labor and Employment Law, The Consumerist, Home Owners Against Deficient Dwellings, Public Citizen, National Association of Consumer Advocates, Home Owners for Better Building, National Employment Lawyers Association, Coalition of Franchisee Associations, USLaw, ATrialLawyer, and the Drum Major Institute. GovTrack.us, H.R. 1020: Arbitration Fairness Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1020> (last visited Mar. 11, 2010). It only has two public opponents: the American Health Care Association and National Center for Assisted Living. *Id.*

<sup>121</sup> The previous efforts are similar to their current 110th congressional counterparts, except that the previous Senate bill did not include civil rights disputes. Arbitration Fairness Act of 2007, H.R. Res. 3010, 110th Cong. (2007), *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=h110-3010>; Arbitration Fairness Act of 2007, S. Res. 1782, 110th Cong. (2007), *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=s110-1782>.

<sup>122</sup> The 107th Senate bill was an attempt to impose model arbitration rules. Arbitration Fairness Act of 2002, S. Res. 3026, 107th Cong. (2002), *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=s107-3026>.

<sup>123</sup> GovTrack.us, H.R. 1020: Arbitration Fairness Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1020&tab=related> (last visited Mar. 11, 2010); GovTrack.us, S. 931: Arbitration Fairness Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=s111-931&tab=related> (last visited Mar. 11, 2010).

## B. *The Findings*

AFA's sponsors find that the FAA was only intended to apply to disputes between commercial entities of similar sophistication and bargaining power.<sup>124</sup> However, following a series of Supreme Court decisions, the FAA has been judicially extended to disputes involving non-union employees, consumers, and franchisees: "parties of greatly disparate economic power."<sup>125</sup> With entire industries adopting mandatory arbitration clauses, most individuals have no choice but to accept, and often do so without knowing.<sup>126</sup> With the Supreme Court in favor of PDAAs, lower courts are forced to uphold such clauses, even if egregiously unfair.<sup>127</sup>

## C. *Amendments to the Federal Arbitration Act*

AFA amends the FAA by defining four new types of disputes: "employment disputes,"<sup>128</sup> "consumer disputes,"<sup>129</sup> "franchise disputes,"<sup>130</sup>

<sup>124</sup> Arbitration Fairness Act of 2009, H.R. Res. 1020, 111th Cong. § 2(1) (2009); S. Res. 931, 111th Cong. § 2(1) (2009).

<sup>125</sup> H.R. Res. 1020 § 2(2); S. Res. 931 § 2(2).

<sup>126</sup> H.R. Res. 1020 § 2(3); S. Res. 931 § 2(3).

<sup>127</sup> H.R. Res. 1020 § 2(7); S. Res. 931 § 2(7).

<sup>128</sup> An "employment dispute" is defined as "a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act." H.R. Res. 1020 § 3 (amending FAA, 9 U.S.C. § 1 (2006), to insert "(3) 'employment dispute'"). The Senate resolution contains a slight modification, defining an "employment dispute" as "a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203)." S. Res. 931 § 3(a) (inserting 9 U.S.C. § 401(3)).

<sup>129</sup> A "consumer dispute" is defined as

a dispute between a person other than an organization who seeks or acquires real or personal property, services [including services relating to securities and other investments (S. Res. 931 only)], money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit.

H.R. Res. 1020 § 3 (amending 9 U.S.C. § 1, to insert "(4) 'consumer dispute'"); S. Res. 931 § 3(a) (inserting 9 U.S.C. § 401(2)).

<sup>130</sup> A "franchise dispute" is defined as

a dispute between a franchisor and franchisee arising out of or relating to contract or agreement by which—(A) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or



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and “civil rights disputes” (Senate version only),<sup>131</sup> and prohibits “pre-dispute arbitration agreements”<sup>132</sup> to arbitrate these four types of disputes.<sup>133</sup> Courts, not arbitrators, are required to determine whether an agreement falls into one of these four prohibited categories, and must apply federal law when doing so.<sup>134</sup> Where applicable, the AFA applies to any dispute or claim arising after its enactment, effectively banning all prohibited PDAAs, both prospectively and retroactively.<sup>135</sup> While the House bill does not apply to

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system prescribed in substantial part by a franchisor; (B) the operation of the franchisee’s business pursuant to such plan or system is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and (C) the franchisee is required to pay, directly or indirectly, a franchisee fee.

H.R. Res. 1020 § 3 (amending 9 U.S.C. § 1, to insert “(5) ‘franchise dispute’”). The Senate resolution contains a slight modification defining a “franchise dispute” as “a dispute between a franchisee with a principal place of business in the United States and a franchisor arising out of or relating to contract or agreement by which—[the rest of the text is the same as the House Resolution].” S. Res. 931 § 3(a) (inserting 9 U.S.C. § 401(4)).

<sup>131</sup> A “civil rights dispute” is defined as

a dispute—(A) arising under—(i) the Constitution of the United States or the constitution of a State; or (ii) a Federal or State statute that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the Federal Government or State government, including any statute enforced by the Civil Rights Division of the Department of Justice and any statute enumerated in section 62(e) of the Internal Revenue Code of 1986 (relating to unlawful discrimination); and (B) in which at least 1 party alleging a violation of the Constitution of the United States, a State constitution, or a statute prohibiting discrimination is an individual.

S. Res. 931 § 3(a) (inserting 9 U.S.C. § 401(1)).

<sup>132</sup> A “pre-dispute arbitration agreement” is defined as “any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement.” H.R. Res. 1020 § 3 (amending 9 U.S.C. § 1, to insert “(6) ‘pre-dispute arbitration agreement’”). The Senate resolution contains a slight modification defining a “pre-dispute arbitration agreement” as “any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.” S. Res. 931 § 3(a) (inserting 9 U.S.C. § 401(5)).

<sup>133</sup> H.R. Res. 1020 § 4 (inserting 9 U.S.C. § 2(b)); S. Res. 931 § 3(a) (inserting 9 U.S.C. § 402(a)).

<sup>134</sup> H.R. Res. 1020 § 4 (inserting 9 U.S.C. § 2(c)); S. Res. 931 § 3(a) (inserting 9 U.S.C. § 402(b)(1)).

<sup>135</sup> H.R. Res. 1020 § 5; S. Res. 931 § 4; *see also* ACR REPORT, *supra* note 17, at 74.

PDAAs in CBAs,<sup>136</sup> the Senate bill expressly forbids PDAA preemption of litigation as a forum for statutory claims (both in the Union and non-Union context),<sup>137</sup> thereby overruling a very recent Supreme Court decision, *14 Penn Plaza*.<sup>138</sup>

#### IV. ANALYSIS

##### A. Arguments in Favor of the AFA

Opponents of PDAAs argue that a legislative response is required to rein in the judiciary's expansion of arbitration.<sup>139</sup> By invalidating PDAAs in the four target contexts, AFA removes many problems related to fairness, including unequal bargaining power, uninformed decisionmaking, skewed procedures, and opacity.<sup>140</sup> By giving parties a choice to refuse arbitration, it ensures that those who agree do so voluntarily.<sup>141</sup> By delegating to the courts all authority to determine the validity or enforceability of an agreement to arbitrate, AFA eliminates concerns that arbitrators are biased towards enforcing PDAAs and returns these classes of disputes to a public forum.<sup>142</sup> Consumers and franchisees would be able to pursue their claims via class action,<sup>143</sup> and the common law would be free to develop.<sup>144</sup>

##### B. Arguments Against the AFA

The primary criticism of AFA is that it is too broad: “[a]t bottom, the Arbitration Fairness Act applies a meat cleaver to an issue that requires a

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<sup>136</sup> H.R. Res. 1020 § 4 (inserting 9 U.S.C. § 2(d)).

<sup>137</sup> S. Res. 931 § 3(a) (inserting 9 U.S.C. § 402(b)(2)).

<sup>138</sup> *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009) (enforcing PDAA within CBA requiring arbitration of ADEA claims).

<sup>139</sup> Schwartz, *supra* note 53, at 1338–40; *see also* Sternlight, *supra* note 83, at 6 (referencing twenty years of pro-arbitration Supreme Court precedent, and similar legislative responses in Europe).

<sup>140</sup> ACR REPORT, *supra* note 17, at 38.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 38, 73.

<sup>143</sup> Kevin R. Casey, *Mandatory Consumer Arbitration*, 17 METRO. CORP. COUNS. 18A (Aug. 2009).

<sup>144</sup> *Id.*

scalpel.”<sup>145</sup> The AFA eliminates the potential for developing a fast, efficient, fair, and low-cost dispute resolution process.<sup>146</sup> The AFA creates uncertainty for judicial arbitration doctrines, more than thirty years of bicameral deferral to such doctrines, and business practices dependent on this certainty.<sup>147</sup> In addition, some of the findings cited in support of the AFA are not supported by empirical data.<sup>148</sup> Other criticism points out that the AFA does not go far enough. The AFA does not reduce costs associated with arbitration.<sup>149</sup> The AFA also does not provide any measures to inform consumers about arbitration clauses (if agreed to in a post-dispute agreement).<sup>150</sup>

### C. Other Proposals for Reform

Congressional action on the issue can be prohibitive (like AFA) or regulatory.<sup>151</sup> Opponents of the AFA reject prohibition and suggest a regulatory response instead. For example, the Association for Conflict Resolution (ACR) encourages the adoption of a uniform act.<sup>152</sup> The ACR Report concludes that the FAA should be amended to “insure access to, transparency in, and fairness in the administration and conduct of the mandatory arbitration process,” including respecting minimum due process requirements, minimum standards for arbitration procedures, and minimum standards for selecting arbitrators.<sup>153</sup> Other suggestions include making

<sup>145</sup> Rutledge, *supra* note 81, at 7.

<sup>146</sup> ACR REPORT, *supra* note 17, at 7.

<sup>147</sup> *Id.* at 8.

<sup>148</sup> *Id.* at 18; *see also* Rutledge, *supra* note 81, at 4 (arguing that Congress should be cautious given the limited empirical record).

<sup>149</sup> Casey, *supra* note 143, at 18A.

<sup>150</sup> *Id.*

<sup>151</sup> Sternlight, *supra* note 83, at 6.

<sup>152</sup> ACR REPORT, *supra* note 17, at 85–87. The ACR Report rejects the current language of AFA and instead recommends a set of principles to guide pre-dispute arbitration agreements: arbitration must be conducted in accordance with due process requirements; arbitrators should be required to maintain integrity and impartiality; the costs borne by parties should bear a reasonable relationship to claim size; the process should be transparent to all users; opt-out provisions for unwilling participants; safeguards for the arbitrator selection process; greater participation by ADR provider organizations and professional dispute resolution organizations (especially by issuing model codes); and more pragmatic judicial doctrines (such as a stronger and bolder unconscionability doctrine). *Id.* at 9–12, 75–76.

<sup>153</sup> *Id.* at 85–87.

PDAAs enforceable against defendants but not plaintiffs, enforcing PDAAs while allowing claimants de novo appeals to courts, or expanding the jurisdiction of small claims courts.<sup>154</sup> If a regulatory approach is adopted sponsors have a variety of model codes for inspiration.<sup>155</sup> In addition, states could be encouraged to adopt the 2000 revisions to the Uniform Arbitration Act.<sup>156</sup>

Supporters of the AFA argue that a regulatory response is too narrow.<sup>157</sup> In addition, the regulatory approach was unsuccessfully attempted by Senator Sessions (R-AL) during the 107th Congress.<sup>158</sup> The provisions of that amendment provided for fair disclosures, procedural rights, and protection against denial of any other rights.<sup>159</sup> Most notably, one of the procedural rights allowed for an opt-out of arbitration and transfer to small claims court

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<sup>154</sup> Schwartz, *supra* note 53, 1330–31.

<sup>155</sup> See, e.g., AM. ARB. ASS'N, CONSUMER DUE PROCESS PROTOCOL (1998), available at <http://www.adr.org/sp.asp?id=22019> (last visited Apr. 8, 2010); AM. ARB. ASS'N, EMPLOYEE DUE PROCESS PROTOCOL (1995), available at <http://www.adr.org/sp.asp?id=28535> (last visited Apr. 8, 2010); DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), available at <http://www.bna.com/bnabooks/ababna/special/protocol.pdf> (last visited Apr. 8, 2010); International Institute for Conflict Prevention & Resolution, Clauses and Rules, <http://www.cpradr.org/ClausesRules/tabid/40/Default.aspx> (last visited Mar. 11, 2010); International Chamber of Commerce, Commission on Arbitration, <http://www.iccwbo.org/policy/arbitration/id2882/index.html> (last visited Mar. 11, 2010); UNICTRAL ARBITRATION RULES (UN 1976), available at <http://www.jus.uio.no/-lm/un.arbitration.rules.1976/portrait.pdf>; see also Brennan et al., *supra* note 15, at 14–15 (survey of model PDAAs and services available through international organizations); John Wilkinson, *Arbitration Contract Clauses: A Potential Key to a Cost-Effective Process*, 16 DISP. RESOL. MAG. 9, 9–12 (2009) (model proposal for a commercial arbitration PDA).

<sup>156</sup> UNIF. ARB. ITRATION ACT, §§ 1–33 (amended 2000), available at <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf>; see also Mazadoorian, *supra* note 26, at 21–22 (overview of Uniform Arbitration Act, the 2000 revisions, and states which have enacted the revisions).

<sup>157</sup> See Sternlight, *supra* note 83, at 6.

<sup>158</sup> Arbitration Fairness Act of 2002, S. Res. 3026, 107th Cong. (2002), available at <http://www.govtrack.us/congress/billtext.xpd?bill=s107-3026>.

<sup>159</sup> *Id.* The list of procedural rights included: competence and neutrality of the arbitrator and process, mandatory choice of law rules, a right to representation, rules applicable to arbitration hearings, rules of evidence applicable to arbitrations, a right to cross examination, a right to a record of the proceedings, timely resolution of claims, a written decision, guidelines for dividing expenses, and an opt-out to small claims court. S. Res. 3026 § 2 (amending FAA, 9 U.S.C. (2000)).

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(if the court had jurisdiction and the claim was within the court's statutory amount).<sup>160</sup>

### V. CONCLUSION

The Arbitration Fairness Act of 2009, if passed, stands to be the strongest congressional statement on arbitration since the passage of the Federal Arbitration Act. However, the bills have been referred at a time when Supreme Court precedent encourages use of pre-dispute arbitration agreements, and if passed, will derail volumes of such precedent. For this reason the AFA is highly controversial, but in line with the debate concerning PDAAs, which has been controversial for decades. The FAA was enacted when Congress intervened and legislatively overruled judicial precedent suppressing arbitration. The AFA promises to be a similar intervention, except its purpose is the exact opposite of the FAA; the AFA seeks to slow down the spread of PDAAs and, in so doing, is likely to suppress arbitration as well.

*Igor M. Brin*

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<sup>160</sup> S. Res. 3026 § 2(b)(11) (amending 9 U.S.C.).

