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Attempting—and Failing—to Balance Fairness and Efficiency in the Arbitral System: How Arbitration Institutions Are Defeating the Purpose of Arbitration

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COMMENTS

ATTEMPTING—AND FAILING—TO BALANCE FAIRNESS AND EFFICIENCY IN THE ARBITRAL SYSTEM: HOW ARBITRATION INSTITUTIONS ARE DEFEATING THE PURPOSE OF ARBITRATION

by: Hannah Myslik*

ABSTRACT

The Supreme Court has actively expanded the Federal Arbitration Act into realms not originally contemplated by Congress. This harms consumers who are parties to pre-dispute, binding arbitration agreements. If consumers sign a contract containing an arbitration agreement, they may be required to arbitrate everything within the agreement's scope, including their statutory rights. Simultaneously, the Court has restricted class action arbitration—a device on which consumers have relied when they are forced to arbitrate.

The Court's expansion of arbitration and restriction of class action arbitration has led many to distrust and advocate for changing the arbitral system. Arbitration institutions have directly reacted to the concerns about arbitration by promulgating more rules, procedures, and safeguards to make arbitration fairer for consumers. However, adding rules and procedures is probably not enough to make arbitration proceedings truly fair, and doing so creates a system that is so court-like that arbitration loses its chief benefits—affordability and efficiency. Thus, if the Court continues with its expansive arbitration jurisprudence and its anti-class action arbitration jurisprudence, institutional reaction is an unlikely solution to address arbitration's fairness concerns.

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I. INTRODUCTION

Arbitration is a dispute resolution method deeply ingrained in the U.S. legal system. However, resolving disputes through arbitration is not without controversy. While arbitration's proponents champion it as a much cheaper, quicker, and overall more efficient alternative to litigation, arbitration's opponents criticize its unfairness, particularly when it is used to resolve disputes between service providers and consumers. Much criticism surrounding arbitration's unfairness arises from the United States Supreme Court's expansion and contradictory treatment of arbitration under the Federal Arbitration Act ("FAA").¹

Congress passed the FAA to compel hostile federal courts to enforce agreements to arbitrate contractual disputes arising between commercial entities.² Despite the FAA's narrow purpose, the Supreme Court has interpreted the FAA broadly, expanding its application to both federal and state courts³ and both contractual and statutory claims.⁴ Through this expansive interpretation, the Court has asserted a clear policy favoring arbitration.⁵ However, the Court's willingness to liberally construe the FAA screeches to a halt in one particular context—class action arbitration. This jurisprudence is contradictory given the Court's generally favorable view of arbitration and is problematic because class actions are "often the only practical way for individuals to challenge corporations."⁶

The Court's decision in *AT&T Mobility LLC v. Concepcion*—one of the first cases in which the Court directly addressed class action arbitration—highlights the Court's inconsistent treatment.⁷ The *Concepcions* were among the plaintiffs bringing a class action lawsuit

1. See Margaret L. Moses, *How the Supreme Court's Misconstruction of the FAA Has Affected Consumers*, 30 LOY. CONSUMER L. REV. 1, 1 (2017); see also Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 147 (2015).

2. Moses, *supra* note 1, at 1–2.

3. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

4. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–27 (1985).

5. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

6. Editorial Board, *Arbitrating Disputes, Denying Justice*, N.Y. TIMES (Nov. 7, 2015), <https://www.nytimes.com/2015/11/08/opinion/sunday/arbitrating-disputes-denying-justice.html> [<https://perma.cc/H4EB-U4AH>].

7. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

against AT&T for fraud.⁸ They claimed that AT&T had promised them a free phone but instead had charged them \$30.22.⁹ Although the Concepcions had signed an arbitration agreement prohibiting the use of class-wide proceedings, they argued under California law that consumer contracts containing class waivers were unconscionable and thus unenforceable.¹⁰ The Court upheld the arbitration agreement's validity, concluding that the FAA preempted California law,¹¹ because the rule "disfavor[ed] arbitration."¹² Dissenting, Justice Breyer recognized the negative impact the decision would have on consumers seeking to bring claims against service providers, noting that "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30."¹³

The Court's treatment of class action arbitration, and thus consumer arbitration, raises the questions of whether the Court has appropriately expanded the FAA and restricted class action arbitration and whether arbitration should remain a viable method of dispute resolution. But despite the outcry regarding arbitration's unfairness, it is highly unlikely that the Court will overturn decades of its arbitration precedent. Further, the reality is that resolving disputes through arbitration is not ending any time soon. As a result, this Comment assumes that the Court will continue expanding arbitration and limiting class action arbitration. Rather, this Comment shifts its focus away from the Court's jurisprudence and centers its analysis on the entities that have largely been ignored when it comes to addressing arbitration's fairness—arbitration institutions. In doing so, this Comment shows that arbitration institutions have directly reacted to concerns raised by anti-arbitration and consumer advocates regarding the fairness of the Court's jurisprudence.

It makes sense that arbitration institutions closely monitor these concerns: arbitration institutions have a clear interest in maintaining arbitration's viability and popularity. However, these interests often conflict; appropriately addressing arbitration's fairness concerns mandates that arbitration institutions promulgate more rules and procedures for consumer arbitrations. The unintended effect is that arbitration is becoming so litigation- and court-like that it is losing its chief benefits—the quick and inexpensive resolution of disputes.¹⁴

Thus, while arbitration institutions attempt to balance the disparity between fairness and efficiency, the consequences are not desirable for either side of the arbitration debate. Ultimately, institutional reac-

8. *Id.* at 337.

9. *Id.*

10. *Id.* at 337–38.

11. *Id.* at 352.

12. *Id.* at 341.

13. *Id.* at 365 (Breyer, J., dissenting) (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

14. *See id.* at 348 (majority opinion).

tion is likely insufficient to address the fairness problems present in arbitration agreements between consumers and service providers while simultaneously keeping arbitration quick and inexpensive.

Part II addresses the current legal landscape and its development, including the FAA's historical background, the Supreme Court's expansion of the FAA, and the Court's restriction of class action arbitration. This Part also explains the disproportionate and negative impact the Court's jurisprudence has on consumers. Lastly, this Part highlights concerns about arbitration's fairness by examining cases in which courts have carved out ways to invalidate otherwise impenetrable arbitration agreements. Part III analyzes the institutional reaction to these concerns, with a focus on the American Arbitration Association. Finally, Part IV concludes with a discussion on the implications of institutional reaction and considers what solutions, if any, can make arbitration fairer without defeating its purpose.

II. THE CURRENT STATE OF THE LAW

To understand how arbitration institutions' actions may not successfully balance fairness and efficiency concerns, it is first essential to understand the ways in which the FAA's original purpose has been interpreted, how the Supreme Court has expanded the FAA, and the impact this expansion has had on consumers.

A. *The FAA's Original Purpose*

Before Congress enacted the FAA in 1925, federal courts were reluctant to enforce arbitration agreements.¹⁵ Courts were hostile to the idea that parties could "contract out of public litigation and enforce their legal rights without the assurances and protections of a jury system."¹⁶ Even so, arbitration agreements remained popular among commercial entities.¹⁷ Utilizing arbitration to resolve disputes allowed businesses to quickly and efficiently resolve conflicts, keep costs low, and maintain cordial business relationships.¹⁸ Further, businesses could select an arbitrator based on the arbitrator's expertise in a given business field as opposed to submitting their dispute to a judge, who may be unfamiliar with the intricacies of that field.¹⁹ Recognizing arbitration's benefits within the commercial context, Congress enacted the

15. Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1146 (2015).

16. *Id.*

17. See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 850 (1961).

18. See Moses, *supra* note 1, at 1.

19. KATHERINE V.W. STONE ET AL., *ARBITRATION LAW* 34 (3d ed. 2014) (quoting Julius Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926)).

FAA,²⁰ with § 2 establishing the enforceability of arbitration agreements:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²¹

Section 2 curbs judicial hostility toward arbitration by ensuring that judges enforce valid arbitration agreements as they would any other contract.²² Accordingly, § 2 provides that only state-law contract defenses may invalidate arbitration agreements.²³ Other FAA sections require federal courts to grant a stay of litigation and compel arbitration if one party refuses to abide by a valid arbitration agreement.²⁴ Another section mandates that an arbitrator's award is final and binding and can only be overturned in limited circumstances.²⁵

The FAA's legislative history reveals what Congress viewed as the Act's fundamental aspects. Julius Cohen, one of the FAA's chief drafters, emphasized that arbitration under the Act was "entirely voluntary," suited for "ordinary disputes between merchants," and improper for deciding complex constitutional or statutory issues.²⁶ In the congressional debates surrounding the FAA's passage, senators supporting the Act assured their skeptical colleagues that the FAA would only apply to merchant contracts involving the transaction of goods and not to adhesion contracts.²⁷

20. The FAA's purpose was to cure the "evils" that arise in commercial litigation, including:

(1) The long delay usually incident to a proceeding at law . . . , especially in recent years in centers of commercial activity . . . (2) The expense of litigation. (3) The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world. This failure may result either because the courts necessarily apply general rules which do not always fit a specific case, or because . . . the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy.

Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 V.A. L. REV. 265, 269 (1926).

21. Federal Arbitration Act, 9 U.S.C. § 2.

22. *See id.*

23. *See id.*

24. *Id.* §§ 3–4.

25. *See id.* § 10.

26. Cohen & Dayton, *supra* note 20, at 279, 281.

27. In the congressional debates surrounding the passage of the FAA:

Concern was expressed by senators about whether the statute could be applied to adhesion contracts. When Senator Walsh of Montana asked if the legislation would apply to contracts that were not truly voluntary, he was assured by the supporters that the Act would only apply to "a contract between merchants one with another, buying and selling goods." Representative Graham noted in the 1924 House floor debate that the bill "provides for

After the FAA's enactment, arbitration remained the dispute resolution method of choice among commercial entities.²⁸ It also grew in popularity among the judiciary as federal courts recognized their duty to end hostility toward arbitration.²⁹ Acknowledging Congress's intent in enacting the FAA, federal courts treated arbitration agreements like other contracts³⁰ and enforced them according to their terms.³¹ Notably, in the first few decades following the FAA's enactment, courts declined to compel arbitration of federal statutory claims.³² At that time, courts reasoned that "these important matters did not belong in a venue that features narrow appellate review and idiosyncratic procedural and evidentiary standards."³³ Meanwhile, many state legislatures continued viewing arbitration with suspicion and passed laws exempting certain claims relating to consumer or employee disputes from arbitration.³⁴

Despite the federal judiciary and state legislatures initially limiting the FAA's scope, the FAA now applies broadly and thus differs drastically from Congress's original intent. While the FAA was designed as a strictly procedural tool, it can now apply substantively.³⁵ This means that the FAA can apply in both state and federal courts and preempt contrary state law, which interferes with a state's power to limit the arbitrability of certain claims.³⁶ Additionally, commercial entities are no longer alone in their use of arbitration agreements, as today arbitration clauses are present in almost every type of agreement, including in contracts between those with unequal bargaining power.³⁷ Lastly, despite the Court's initial hesitation to allow arbitrat-

one thing . . . to give an opportunity to enforce . . . an agreement to arbitrate when *voluntarily* placed in the document by the parties to it."

Moses, *supra* note 1, at 3.

28. See Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 7–8 (2014) (stating that "[f]or much of the latter half of the twentieth century, out-of-court dispute resolution centered on binding arbitration as an alternative to litigation of commercial disputes").

29. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) (recognizing that "[i]n the light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to arbitration").

30. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443–44 (2006).

31. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

32. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

33. David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 65 (2015) [hereinafter *After the Revolution*].

34. *Id.*

35. Moses, *supra* note 1, at 4.

36. See *id.* at 4–5; *Southland Corp. v. Keating*, 465 U.S. 1, 15–16, 16 n.10 (1984).

37. See Robert Gebeloff & Karl Russell, *Removing the Ability to Sue*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/interactive/2015/10/30/business/dealbook/arbitration-trends.html> [<https://perma.cc/3SPW-L6RB>].

ing statutory claims, important and complicated statutory rights are now subject to arbitration under the FAA.³⁸

B. *The Supreme Court's Expansion of the FAA*

The FAA's expanded scope is the direct result of the Supreme Court's interpretation of the statute.³⁹ Although the FAA was relatively untouched in the decades following its enactment,⁴⁰ the Court began drastically expanding the FAA's scope in the 1980s and, in doing so, abandoned any residual judicial hostility toward arbitration.⁴¹ In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court for the first time declared that § 2 of the FAA was substantive law and asserted that the FAA was "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."⁴² Upon this premise, the Court held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁴³

This holding elevated arbitration as the Court's dispute resolution mechanism of choice and contradicted Congress's intent that the FAA's application be voluntary in nature because even if the parties' intent is unclear, a court can still compel arbitration.⁴⁴ Resolving cases of doubt regarding the parties' intent in favor of arbitration also contradicts Congress's intent to place these agreements on "the same footing as other contracts."⁴⁵ Nevertheless, *Moses H. Cone* became the Court's basis for expanding the FAA "beyond any conception of the drafters or the 1925 Congress."⁴⁶

The Court's declaration that § 2 was substantive law meant that the FAA could apply in state courts and preempt contrary state law.⁴⁷ The Court reiterated this concept in *Southland Corp. v. Keating*, holding that "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."⁴⁸ While the Court noted that state-law contract defenses could still invalidate an arbitra-

38. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

39. Gross, *supra* note 1, at 124.

40. *After the Revolution*, *supra* note 33, at 59.

41. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

42. *Id.* at 24.

43. *Id.* at 24–25.

44. Cohen & Dayton, *supra* note 20, at 279.

45. *See* H.R. REP. NO. 68-96, at 1 (1924). "The existence of a contract depends . . . on the parties' intent to be bound." Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1437 (2009).

46. *Moses*, *supra* note 1, at 8–9.

47. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, 25 n.32.

48. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

tion agreement,⁴⁹ only general defenses applicable to all contracts could work.⁵⁰ Because arbitration agreements were to be placed on equal footing with other contracts,⁵¹ they could not be invalidated by contract defenses appearing to single out⁵² or disproportionately affect arbitration.⁵³ Thus, a substantive interpretation of § 2 restricts a state's power to protect its citizens from arbitration agreements made with unequal bargaining power, as many states had attempted to do following the FAA's passage.⁵⁴

Additionally, statutory claims are now arbitrable under the FAA.⁵⁵ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court reaffirmed that the FAA "create[d] a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate."⁵⁶ Drawing upon this principle, parties could arbitrate statutory claims if the claims fell within the scope of the parties' arbitration agreement.⁵⁷ The Court applied *Moses H. Cone* in concluding that parties' intentions regarding the scope of arbitrable issues should be "generously construed."⁵⁸ Importantly, the Court rejected the argument that statutory claims were too complex for arbitration (and in doing so ignored early interpretations of the statute by the FAA drafters⁵⁹), noting that "adaptability and access to expertise are hallmarks of arbitration."⁶⁰

The Court clarified that parties did not "forgo the substantive rights afforded by the statute" by submitting statutory claims to arbitration because arbitration was simply a change in forum.⁶¹ Thus, if a statu-

49. See *id.* at 10–11 (citing 9 U.S.C. § 2).

50. *Id.* at 16 n.11.

51. Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974).

52. Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 684, 687 (1996) (holding that the FAA preempted a Montana law requiring arbitration clauses to "be typed in underlined capital letters on the first page of the contract").

53. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341–43 (2011).

54. *After the Revolution*, *supra* note 33, at 65.

55. *Id.* at 67.

56. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)).

57. *Id.* at 625–26. In holding this, the Court cited a recent case in which the Court held that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which "requires that we rigorously enforce agreements to arbitrate." *Id.* (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

58. *Id.* at 626.

59. See *Moses*, *supra* note 1, at 4.

60. *Mitsubishi Motors Corp.*, 473 U.S. at 633. The Court also emphasized this view in later cases regarding the arbitrability of statutory rights, including that the "Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims . . . even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985).

61. *Mitsubishi Motors Corp.*, 473 U.S. at 628.

tory claim fell within the agreement's scope, the claim was arbitrable as long as a party could "effectively . . . vindicate" his or her statutory rights in arbitration.⁶²

By asserting such a clear policy favoring arbitration, the Court has shown it is more than willing to expand arbitration in ways not originally contemplated by Congress—even if there is doubt as to the parties' intent; even if the process is slower, costlier, or inefficient; and even if a claim involves highly complex issues. In other words, the Court condones arbitration even when doing so would frustrate the very purposes behind the FAA's enactment.

C. *The Supreme Court's Restriction of Class Action Arbitration*

Despite the Court's willingness to expand arbitration in various contexts, the Court has gone out of its way to restrict one particular form of arbitration—class action arbitration.

The Court first implicitly affirmed class action arbitration's plausibility in *Green Tree Financial Corp. v. Bazzle*, when the Court considered whether an agreement to arbitrate "all contract-related disputes" could be interpreted as allowing a party to proceed through arbitration as part of a class, even when the agreement was otherwise silent on the availability of class action arbitration.⁶³ In that case, Burt and Lynn Bazzle had executed a home-improvement loan with Green Tree Financial Corporation ("Green Tree").⁶⁴ When a dispute arose, the Bazzles and other similarly situated consumers filed actions in South Carolina state court, seeking class certification.⁶⁵ Citing the arbitration clause, Green Tree motioned to stay proceedings and compel arbitration.⁶⁶ The South Carolina trial court granted Green Tree's motions but allowed the case to proceed as a class action.⁶⁷ The arbitrator issued an award favoring the class, and the South Carolina trial court confirmed the award.⁶⁸ Green Tree appealed, claiming that class arbitration was "legally impermissible."⁶⁹ However, the South Carolina Supreme Court disagreed and held that the proceeding was permissible because state law construed arbitration agreements that were silent on the issue as allowing class arbitration.⁷⁰

62. *Id.* at 637. While effective vindication seems like a safeguard, the Court construes effective vindication of statutory rights narrowly to simply mean "the *right to pursue*" a federal statutory claim. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236–37 (2013).

63. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (plurality opinion).

64. *Id.* at 447–48.

65. *Id.* at 448–49.

66. *Id.* at 449.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 447.

On appeal to the United States Supreme Court, four justices concluded—in a plurality decision—that whether or not the arbitration agreement permitted class arbitration was a procedural issue for the arbitrator to decide.⁷¹ The parties had agreed to submit *all* contract-related disputes to an arbitrator, and the class action question in this case was a dispute relating to the contract.⁷²

Although *Bazzle* indicated class action arbitration was possible, later Supreme Court decisions reveal the Court's hostility toward the idea. In *Concepcion*, the issue was whether the FAA preempted a California Supreme Court decision that made contracts containing class action waivers unconscionable.⁷³ AT&T and the Concepcions had entered into an agreement for a free phone.⁷⁴ The agreement contained an arbitration clause stating that claims could be brought solely on an individual basis.⁷⁵ A dispute arose when AT&T charged the Concepcions \$30.22 in taxes.⁷⁶ Alleging fraud, the Concepcions filed a complaint that was later certified as a class action, notwithstanding the clause's terms.⁷⁷ When AT&T moved to compel arbitration, the Concepcions argued "that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures."⁷⁸ The district court and the Ninth Circuit agreed,⁷⁹ holding that the class action waiver was unenforceable.⁸⁰

The Supreme Court reversed, holding that California law was inconsistent with the FAA.⁸¹ While the Concepcions had attempted to invalidate the agreement by using a general state-law contract defense (unconscionability), the defense "applied in a fashion that disfavor[ed] arbitration."⁸² This was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA.⁸³ Thus, if a party wanted to invalidate an arbitration agreement based on a general state-law contract defense, he or she would have to apply the defense and then show that its application did not disfavor arbitration.⁸⁴

71. *Id.* at 447, 451–52.

72. *Id.* at 451–52 (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (holding that arbitration is a "matter of contract")).

73. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011).

74. *Id.* at 336–37.

75. *Id.* at 336.

76. *Id.* at 337.

77. *Id.*

78. *Id.* at 337–38.

79. *Id.* at 338.

80. *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

81. *Concepcion*, 563 U.S. at 348, 352.

82. *Id.* at 341.

83. *Id.* at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

84. *See id.*

Justice Scalia, writing for the majority, took *Concepcion* as an opportunity to dive into all the problems he believed class arbitration presented. According to Scalia, class arbitration was overall inconsistent with the arbitral system⁸⁵ because “[a] prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results.’”⁸⁶ Class arbitration “makes the process slower, more costly, and more likely to generate procedural morass” than bilateral arbitration.⁸⁷ To demonstrate this, Scalia pointed to the class action arbitration procedures, noting their similarity to the class action litigation procedures outlined in the Federal Rules of Civil Procedure (“FRCP”).⁸⁸

Class action arbitration was also problematic because it “include[d] absent parties, necessitating additional and different procedures and involving higher stakes.”⁸⁹ For example, absent parties would be bound by the arbitrator’s decision, presenting fairness concerns.⁹⁰ Absent parties also made confidentiality—another benefit of arbitration—more difficult.⁹¹

Additionally, Scalia was skeptical that arbitrators were qualified to decide the class-certification question, stating that “while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable” on the issue.⁹² Lastly, Scalia addressed the risk class arbitration posed to defendants.⁹³ Because it required that several claims be “aggregated and decided at once, the risk of an error [would] often become unacceptable,” especially due to the limited grounds available to appeal an arbitrator’s award.⁹⁴ The risk that an arbitrator could wrongly decide several claims against a defendant would therefore pressure defendants “into settling questionable claims.”⁹⁵

Beyond upholding class action waivers’ validity, the Court has built upon *Concepcion* and held that parties can only arbitrate on a class-wide basis if the agreement explicitly states that class-wide relief is available.⁹⁶ In *Lamps Plus, Inc. v. Varela*, employee Frank Varela sued employer Lamps Plus in federal district court.⁹⁷ The district court

85. *Id.* at 348–49 (explaining that “class arbitration was not even envisioned by Congress when it passed the FAA in 1925”).

86. *Id.* at 346 (quoting *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008)).

87. *Id.* at 348.

88. *Id.* at 349.

89. *Id.* at 347–48.

90. *See id.* at 348–49.

91. *Id.* at 348.

92. *Id.*

93. *Id.* at 350–51.

94. *Id.*; 9 U.S.C. § 10(a) (listing the four permissible grounds for vacating an arbitral award).

95. *Concepcion*, 563 U.S. at 350.

96. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416–17 (2019).

97. *Id.* at 1413.

granted Lamps Plus's motion to compel arbitration but allowed Varela's case to proceed as part of a class.⁹⁸ The Ninth Circuit affirmed, holding that the arbitration agreement was ambiguous on the availability of class-wide relief.⁹⁹ Because the agreement was ambiguous, the Ninth Circuit applied a California law that construed ambiguity against the drafter, noting that the rule especially applied in matters involving adhesion contracts.¹⁰⁰ Because Lamps Plus was the drafter, the Ninth Circuit interpreted the arbitration agreement as permitting class arbitration.¹⁰¹

Unsurprisingly, the Supreme Court reversed.¹⁰² Building upon its unfavorable view of the device, the Court explained that class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower [and] more costly."¹⁰³ Because of the "'crucial differences' between individual and class arbitration," there was "reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration."¹⁰⁴ Accordingly, "ambiguity d[id] not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'"¹⁰⁵ Because California law allowed parties to arbitrate on a class-wide basis even if the agreement did not explicitly state class-wide relief was available, California law required that the parties arbitrate in a manner to which the parties did not agree.¹⁰⁶ Therefore, the FAA preempted California law, and Varela could not arbitrate as a class member.¹⁰⁷

D. *Contradictory and Problematic Supreme Court Jurisprudence*

The Court's expansion of the FAA and simultaneous restriction of class action arbitration is both contradictory and problematic. It is contradictory for several reasons. First, the Court has established a clear preference for arbitration over litigation even if it is slower, costlier, or inefficient.¹⁰⁸ For example, parties can arbitrate statutory claims despite the claims' complexity¹⁰⁹ and "even where the result

98. *Id.* (summarizing the district court's order).

99. *Id.* (summarizing the Ninth Circuit's holding).

100. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672 (9th Cir. 2017) (citing *Sandquist v. Lebo Auto, Inc.*, 376 P.3d 506, 514 (Cal. 2016)), *rev'd*, 139 S. Ct. 1407 (2019).

101. *Id.* at 673.

102. *Lamps Plus, Inc.*, 139 S. Ct. at 1419.

103. *Id.* at 1416 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)).

104. *Id.* (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685–87 (2010)).

105. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)).

106. *Id.* at 1416–18.

107. *Id.* at 1419.

108. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633–34 (1985).

109. *See id.*

would be the possibly inefficient maintenance of separate proceedings in different forums.”¹¹⁰ Thus, the Court will readily forfeit efficiency in favor of sending a dispute to arbitration. Yet the Court cites class action arbitration’s slowness, costliness, and formality as primary reasons why class action arbitration is inconsistent with the FAA.¹¹¹

Second, the Court has held that when an arbitration agreement is valid, it is the arbitrator’s job—not a court’s—to determine procedural issues.¹¹² Although litigants still debate whether the ability to bring a claim on a class-wide basis is a procedural issue for an arbitrator to decide,¹¹³ the Court has stated (albeit in a plurality decision) that it is.¹¹⁴ Even if the class-wide relief question is not procedural, the Court has affirmed that an arbitration agreement leaving doubt regarding the scope of arbitrable issues should be interpreted with a strong preference toward arbitrability.¹¹⁵ Therefore, Court precedent would naturally lead one to conclude that any question regarding whether an arbitration agreement permits class-wide relief should be construed as permitting class action arbitration. Instead, the Court has held that if an agreement is silent or ambiguous on the issue, the agreement should be construed *against* allowing class action arbitration.¹¹⁶ In so holding, the Court required a heightened version of consent for class arbitration agreements¹¹⁷ and placed arbitration on unequal footing with other contracts, frustrating a purpose of the FAA.¹¹⁸

Lastly, “it is well established that the FAA’s fundamental underlying policy . . . is a preference for permitting parties to design the [alter-

110. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985).

111. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

112. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85 (2002) (explaining that procedural issues are for the arbitrator to decide).

113. There is currently a circuit split over whether the issue of class-wide arbitration is a procedural question. Liz Kramer, *Circuit Split Deepens over Whether Arbitrators Should Decide Availability of Class Action*, *ARB. NATION* (Aug. 26, 2018), <https://www.arbitrationnation.com/circuit-split-deepens-whether-arbitrators-decide-availability-class-action/> [<https://perma.cc/W57T-2RDU>].

114. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451–52 (2003) (plurality opinion) (stating that the ability to bring a claim on a class-wide basis is a question of procedure for the arbitrator to decide).

115. *See, e.g., Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

116. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416–17 (2019).

117. In *Lamps Plus*, *see id.* at 1416, and *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 687 (2010), the Court refused to hold that the parties agreed to arbitrate on a class-wide basis simply because the Court thought it was unlikely that parties would consent to class action arbitration given the fundamental differences between bilateral and class arbitration.

118. H.R. REP. NO. 68-96, at 1 (1924) (noting that, in passing the FAA, Congress intended that arbitration agreements be “placed upon the same footing” as any contract).

native dispute resolution] mechanism of their choosing.”¹¹⁹ Courts should not decide that the parties’ choice, which could very well be class arbitration, is invalid because it takes too long or costs too much. Therefore, the Court’s hostility toward class arbitration could frustrate another purpose of the FAA, which is to honor the parties’ intentions.¹²⁰

The Court’s jurisprudence is also problematic in that it disproportionately and negatively impacts consumers. After the Court expanded the FAA in the 1980s, arbitration exploded in popularity among employers and service providers.¹²¹ Most arbitration agreements between consumers and service providers are placed in “adhesion contracts,”¹²² in which one party has essentially no bargaining power and might not even realize that, by signing the contract, he or she is consenting to mandatory, binding arbitration.¹²³

The Court’s decision that the FAA applies in state court and can preempt state law restricts a state’s ability to protect consumers from arbitration agreements in adhesion contracts in two ways. First, the FAA preempts state laws that appear to single out arbitration agreements, even if the law’s purpose is simply to apprise consumers that they are signing a contract containing an arbitration agreement.¹²⁴ For example, the FAA preempted a state law merely requiring that arbitration agreements be typed and underlined.¹²⁵ Second, even if a state law appears generally applicable to all contracts, the FAA still preempts that law if it disproportionately affects arbitration.¹²⁶

It is also concerning that a party to an adhesion contract may be forced to arbitrate his or her statutory rights. Although statutory claims are only arbitrable if a party can “effectively vindicate” his or her rights in the arbitral forum, “effective vindication” means only “‘the right to pursue’ a federal statutory right.”¹²⁷ Given this narrow interpretation, it is unsurprising that courts have rarely applied the

119. Neal Troum, *The Problem with Class Arbitration*, 38 VT. L. REV. 419, 428 (2013).

120. *Id.*

121. Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights*, 61 UCLA L. REV. DISCOURSE 164, 167 (2013).

122. In *Concepcion*, Justice Scalia noted that “the times in which consumer contracts were anything other than adhesive are long past.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–47 (2011).

123. Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1192 (2001).

124. *See Dr.’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 687 (1996).

125. *See id.* at 684, 688.

126. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–43 (2011).

127. Colby J. Byrd, Note, *Vindicating the Effective Vindication Exception: Protecting Federal Statutory Rights in the Employment Context*, 70 OKLA. L. REV. 761, 762 (2018) (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013)).

“effective vindication” exception to invalidate an arbitration agreement.¹²⁸

Lastly, even if a consumer knows the contract contains an arbitration clause, a consumer cannot bargain over adhesion contract terms. Minimal bargaining power calls into question the fairness of the terms that prescribe how the parties would proceed through arbitration should a dispute arise.

While the Court’s expansion of the FAA alone raises fairness concerns, the Court’s restriction of class action arbitration and approval of class action waivers makes it even more difficult for consumers to bring claims against service providers. Because it is unlikely that plaintiffs would pursue low-value claims that they would otherwise pursue as class members, class arbitration waivers function like a “get out of jail free card” for defendants.¹²⁹ Further, service providers prefer to arbitrate cases on an individual basis because they are likely to be “repeat players” in the arbitral system, which allows them to “stockpil[e] information” and “cultivat[e] relationships” with arbitration institutions.¹³⁰ Service-provider experience puts consumers at an obvious disadvantage and increases the risk that an arbitrator may favor a service provider.

E. *Carving Out Exceptions: Attacking the Validity of Arbitration Agreements*

The Court’s expansion of the FAA and the resulting negative effects on consumers led anti-arbitration and consumer advocates to voice their concerns over both the lack of protection consumers receive when entering arbitration agreements and the lack of fair procedures for consumers once forced to arbitrate. In light of these concerns, there are scenarios in which courts will invalidate allegedly unfair arbitration agreements.

First, arbitration agreements (particularly those in adhesion contracts) may prohibit plaintiffs from effectively vindicating their statutory rights in the arbitral forum.¹³¹ An often-targeted provision is one that details arbitration costs and, specifically, how parties will split those costs.¹³² Anti-arbitration and consumer advocates argue that provisions requiring consumers to bear excessive costs prevent them from bringing claims.¹³³ If excessive costs prevent a consumer from

128. *See id.* at 766.

129. *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Cal. Ct. App. 2002).

130. *After the Revolution*, *supra* note 33, at 68.

131. Amalia D. Kessler, *Arbitration & Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2943 (2015) (“Opponents argue, by contrast, that consumers and employees forced into binding, mandatory arbitration are denied the procedural tools required for meaningful vindication of their rights.”).

132. *See After the Revolution*, *supra* note 33, at 71.

133. *See id.*

bringing a statutory claim, a consumer is essentially forfeiting his or her right to pursue that claim. In that circumstance, arbitration would not simply be a change in forum, and courts would not require a consumer to arbitrate.¹³⁴ The Supreme Court case *Green Tree Financial Corp. v. Randolph* portrays this argument.¹³⁵

In *Randolph*, a consumer sued a service provider alleging that the service provider violated the Truth in Lending Act and the Equal Credit Opportunity Act.¹³⁶ Under an arbitration clause, the service provider motioned to compel arbitration.¹³⁷ The consumer argued, however, that she “lacked the resources to arbitrate”¹³⁸ and that the risk of substantial arbitration costs made her “unable to vindicate her statutory rights.”¹³⁹ The Court considered whether the arbitration agreement, which was silent on costs, gave the consumer enough protection from the possibly expensive costs of presenting her federal-law claims in arbitration.¹⁴⁰ The Court conceded that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”¹⁴¹ However, in this case, the record did not contain sufficient evidence that the consumer would bear prohibitive costs.¹⁴² Thus, the risk the consumer faced was too speculative to justify invalidating the arbitration agreement.¹⁴³

Courts have continued evaluating this issue on a case-by-case basis.¹⁴⁴ In *Morrison v. Circuit City Stores, Inc.*, a plaintiff argued that the cost-splitting provisions in an arbitration agreement denied her the ability to effectively vindicate her statutory rights.¹⁴⁵ Although under the agreement the defendant would initially pay all arbitration costs, the parties would split fees once the arbitrator issued an award.¹⁴⁶ And the arbitrator could require the losing party to pay *all* the arbitration costs.¹⁴⁷

134. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that submitting statutory claims to arbitration was simply a change in forum and, in doing so, parties did not “forgo the substantive rights afforded by the statute”).

135. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

136. *Id.* at 83.

137. *Id.*

138. *Id.* at 83–84.

139. *Id.* at 90.

140. *Id.* at 89.

141. *Id.* at 90.

142. *Id.*

143. *Id.* at 91.

144. The Court has “adopted a case-by-case approach to determining whether a cost-splitting provision in an arbitration agreement denies potential litigants the opportunity to vindicate their statutory rights.” *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 659 (6th Cir. 2003) (en banc).

145. *Id.* at 657–58.

146. *Id.* at 654–55.

147. *Id.* at 655.

The Sixth Circuit invalidated the cost-splitting provision because it would “deter a substantial number of . . . similarly situated” plaintiffs “from seeking to vindicate their statutory claims.”¹⁴⁸ Under the provision, the costs of arbitrating the dispute could far exceed the costs that the plaintiff would incur in litigation.¹⁴⁹ The court noted that while “[c]ourts charge plaintiffs initial filing fees, . . . they do not charge extra for in-person hearings, discovery requests, routine motions, or written decisions, costs that are all common in the world of private arbitrators.”¹⁵⁰ Further, the overall costs for the plaintiff’s claim could possibly range from “three to nearly *fifty* times the basic costs of litigating in a judicial . . . forum.”¹⁵¹ That was enough to show that the plaintiff would bear prohibitive costs and to invalidate the cost-splitting provision.¹⁵²

Another potential defense to enforcing an arbitration agreement is unfairness in the arbitration proceeding itself. “An arbitral forum need not replicate the judicial forum” in its entirety.¹⁵³ In fact, it is not desirable that an arbitral forum do so because arbitration should in theory be less costly and more efficient than litigation. However, arbitration proceedings should at a minimum be fair and neutral.¹⁵⁴ An arbitration agreement’s provisions often predetermine a proceeding’s fairness.¹⁵⁵ In *Hooters of America, Inc. v. Phillips*, the agreement required the plaintiff to provide a witness list while the defendant did not have the same obligation.¹⁵⁶ Also, the arbitrator could only be selected from a list that the defendant created.¹⁵⁷ Lastly, the defendant had the right to modify the procedure at any time.¹⁵⁸ The Fourth Circuit held that the agreement’s terms were so “egregiously unfair” and “one-sided” that the defendant had “undermine[d] the neutrality of the proceeding.”¹⁵⁹ Thus, the arbitration agreement was unconscionable and unenforceable.¹⁶⁰

Similarly, courts have invalidated an arbitration agreement when it limits discovery.¹⁶¹ In *Ostroff v. Alterra Healthcare Corp.*, the plaintiff could only depose the defendant’s expert witness and not any fact wit-

148. *Id.* at 668–69.

149. *Id.* at 669.

150. *Id.*

151. *Id.*

152. *Id.* at 670.

153. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999).

154. *Id.* If an arbitration proceeding does not meet these minimum standards of fairness, it constitutes a ground for vacating an arbitral award under § 10 of the FAA. See 9 U.S.C. § 10(a)(2).

155. *Hooters of Am., Inc.*, 173 F.3d at 938–40.

156. *Id.* at 938.

157. *Id.* at 938–39.

158. *Id.* at 939.

159. *Id.* at 938.

160. *Id.* at 940–41.

161. See, e.g., *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 545 (E.D. Pa. 2006).

nesses.¹⁶² The court found that this discovery limitation was severe enough to deny the plaintiff “a fair opportunity to present [her] claims”¹⁶³ and held that the arbitration agreement was unenforceable.¹⁶⁴

Lastly, arbitration proceedings are unfair when the agreement prohibits certain damages types.¹⁶⁵ In *Simpson v. MSA of Myrtle Beach, Inc.*, the agreement prohibited an arbitrator from awarding punitive damages in favor of any party.¹⁶⁶ Prohibiting punitive damages was “oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker.”¹⁶⁷ The unfair provision was thus unenforceable.¹⁶⁸

III. INSTITUTIONAL REACTION

As the cases above demonstrate, courts will invalidate arbitration agreements in adhesion contracts in the interest of fairness. However, the circumstances are limited. Further, there is no indication that the Supreme Court will stop expanding arbitration and limiting consumers’ ability to bring class actions in arbitration. Thus, this Comment now shifts focus to other entities in the arbitration world—the arbitration institutions—to consider whether they have reacted to the Court’s controversial jurisprudence by addressing the minimal protections available to consumers entering arbitration agreements.

Arbitration institutions administer arbitration proceedings.¹⁶⁹ Among other things, they provide parties with specialized rules and procedures for the parties’ given dispute and with a list of qualified arbitrators.¹⁷⁰ For the sake of convenience and efficiency, an arbitration agreement often designates a specific arbitration institution and incorporates that institution’s well-established rules and procedures.¹⁷¹ Although there are several arbitration institutions in the United States and worldwide, this Comment analyzes the American Arbitration Association (“AAA”) because it was the first national arbitration institution and is among the most well-known.¹⁷²

162. *Id.*

163. *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)).

164. *Id.* at 547.

165. *See, e.g.*, *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007).

166. *Id.* at 671.

167. *Id.*

168. *Id.*

169. *Institutional vs. ‘Ad-hoc’ Arbitration*, PINSSENT MASONS (Aug. 12, 2011, 10:56 AM), <https://www.pinsentmasons.com/out-law/guides/institutional-vs-ad-hoc-arbitration> [<https://perma.cc/RTA9-B5YL>].

170. *Id.*

171. *Id.*

172. FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 29 (1948).

A. *The American Arbitration Association*

The AAA formed in 1926, one year after Congress enacted the FAA.¹⁷³ The AAA's goal was to promote arbitration and bring credibility to the arbitral system.¹⁷⁴ Because many parties were unfamiliar with arbitration, the AAA made it more accessible by creating standardized rules and services, which facilitated parties in forming arbitration agreements and in conducting formal arbitration proceedings.¹⁷⁵ The AAA brought credibility to the arbitral system by ensuring that its "procedures . . . would be litigation proof" thereby "eliminat[ing] . . . uncertainties and delays" in the dispute resolution process.¹⁷⁶ Thus, even though arbitration agreements are contracts and the drafting party is generally free to design the procedures how it chooses, the AAA rules are attractive because they help ensure that an arbitration agreement, and its terms, are valid and enforceable.

Due to the AAA's background and prominence in the arbitral scene, the AAA has an interest in ensuring that its rules and procedures continue encouraging arbitration and eliminating the dangers of uncertainty and delay that can permeate the arbitral process. The AAA does so by closely monitoring court decisions regarding the validity of arbitration agreements and harmonizing its rules and procedures accordingly.¹⁷⁷

This monitoring and harmonizing process is evident in the AAA's reactions to instances where courts have held that consumers may invalidate an arbitration agreement. To ensure its agreements remain valid, the AAA has promulgated additional rules and procedures to lessen the fairness issues that might arise in consumer arbitration. However, these rules neither make consumer arbitration truly fair nor do they keep it efficient and inexpensive.

B. *Due Process Protocol*

One of the most significant ways in which the AAA has reacted to the anti-arbitration and consumer-advocate concerns is through promulgating a "Due Process Protocol" for consumer arbitrations.¹⁷⁸ In its Protocol, the AAA acknowledges that "there are legitimate concerns regarding the fairness of" the dispute resolution procedures that service providers insert into arbitration agreements.¹⁷⁹ Thus, the

173. *Id.* at 17.

174. *Id.* at 23–24.

175. *Id.* at 23.

176. *Id.* at 24.

177. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 14–15 (2019) [hereinafter *Arbitration Nation*].

178. *After the Revolution*, *supra* note 33, at 70.

179. AM. ARB. ASS'N, CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES 4 (1998), [https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf) [<https://perma.cc/3RYM-SR66>] [hereinafter CONSUMER DUE PROCESS PROTOCOL].

AAA will not administer the arbitration of a consumer contract that does not “provide for a fair alternative dispute resolution . . . process.”¹⁸⁰ This rule recognizes the court-held requirement that all arbitration agreements and proceedings meet a minimum level of fairness.¹⁸¹ In the interest of a fair proceeding, the AAA requires that an arbitrator be independent, impartial, and neutral.¹⁸² To achieve this, the Protocol states that a consumer and service provider each have an equal voice in selecting an arbitrator.¹⁸³ Further, an arbitrator must disclose any bias he or she might have toward one party.¹⁸⁴ While this requirement might help alleviate egregious cases of arbitrator bias, it does not solve the repeat-player issue. Because service providers are commonly repeat players in arbitration, service providers likely have more information than the consumer as to which arbitrators are more likely to resolve the dispute in their favor.¹⁸⁵

The Protocol also states that service providers should structure their arbitration agreements to ensure that consumers face only a “reasonable cost.”¹⁸⁶ This is a reaction to court decisions holding that a party may invalidate an arbitration agreement if he or she would be financially burdened by excessive fees.¹⁸⁷ Accordingly, in some instances, the AAA will waive consumer filing fees or require the service provider to subsidize arbitration costs.¹⁸⁸ For example, in consumer arbitrations, the consumer must pay a nonrefundable \$200 filing fee but is not required to pay anything if the service provider files the case.¹⁸⁹ Further, the business is responsible for the arbitrator’s compensation at \$2,500 per arbitrator, per day.¹⁹⁰ Additionally, in certain states, “consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs,” notwithstanding any contrary terms in an arbitration agreement.¹⁹¹ At a glance, these cost-balancing rules appear essential to balancing inequalities between consumers and service providers. Indeed, a cap on fees might make arbitration more affordable and thus fairer for the consumer. However, a consumer still has to pay certain fees if he or she is the claimant, which could deter a consumer

180. *Arbitration Nation*, *supra* note 177, at 15.

181. *See Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (1999).

182. CONSUMER DUE PROCESS PROTOCOL, *supra* note 179, at 1.

183. *Id.*

184. *Id.*

185. *See After the Revolution*, *supra* note 33, at 68.

186. CONSUMER DUE PROCESS PROTOCOL, *supra* note 179, at 17.

187. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003).

188. CONSUMER DUE PROCESS PROTOCOL, *supra* note 179, at 17–18.

189. AM. ARB. ASS’N, CONSUMER ARBITRATION RULES 33–34 (2014), <https://adr.org/sites/default/files/Consumer-Rules-Web.pdf> [<https://perma.cc/KME9-EC4W>] [hereinafter CONSUMER ARBITRATION RULES].

190. *Id.* at 33.

191. *Id.* at 34–35.

from suing.¹⁹² Even if a service provider is required to pay all costs, that raises concerns about arbitrator impartiality. While the AAA acknowledges this concern, its solution that consumers “should have the option to share up to half” the arbitrator’s expenses suggests that consumers must choose between paying possibly excessive costs and having a neutral proceeding.¹⁹³

C. Rules for Consumer Arbitration

The AAA has also reacted to fairness concerns by modifying its rules and procedures for consumer arbitrations. In the interest of conducting a fair proceeding, an arbitrator may require consumers and service providers to disclose “specific documents and other information” and identify all witnesses.¹⁹⁴ The arbitrator has the authority to resolve any dispute arising from the exchange of information.¹⁹⁵ The AAA rules neither limit the amount of discovery a consumer can conduct nor the amount of witnesses a consumer can call.¹⁹⁶ This broad discovery rule is beneficial simply because it allows consumers to collect information about the case they might not obtain otherwise. However, this rule resembles the FRCP’s broad discovery rules.¹⁹⁷ The AAA acknowledges that this rule could make arbitration significantly more court-like, warning that in following this rule, the arbitrator should “keep[] in mind that arbitration must remain a fast and economical process.”¹⁹⁸ On the other hand, the arbitrator may require the parties to share more information in the interest of a fair proceeding, turning arbitration into a long and costly process—the very thing the AAA warns against.¹⁹⁹

The AAA also addressed concerns by creating specific procedures for class action arbitration. As discussed above, allowing consumers to proceed as a class enables consumers to arbitrate low-value claims that would be illogical to arbitrate individually.²⁰⁰ Thus, soon after the Supreme Court implicitly approved the class action arbitration device in *Bazzele*, the AAA enacted its rules for class action arbitrations.²⁰¹

192. *Id.* at 33–36.

193. CONSUMER DUE PROCESS PROTOCOL, *supra* note 179, at 18.

194. CONSUMER ARBITRATION RULES, *supra* note 189, at 20.

195. *Id.*

196. *See id.*

197. *See* FED. R. CIV. P. 26(b).

198. CONSUMER ARBITRATION RULES, *supra* note 189, at 20.

199. *Id.*

200. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365–66 (2011) (Breyer, J., dissenting).

201. “On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzele*, the American Arbitration Association issued its *Supplementary Rules for Class Arbitrations* to govern proceedings brought as class arbitrations.” AM. ARB. ASS’N, AAA POLICY ON CLASS ARBITRATIONS (2005), https://www.adr.org/sites/default/files/document_repository/AAA-Policy-on-Class-Arbitrations.pdf [<https://perma.cc/EVV4-HZCH>].

The class action procedures are designed to supplement other arbitration procedures, like the consumer ones.²⁰² As the Court highlighted in *Concepcion*, the AAA class arbitration procedures are essentially identical to the class procedures outlined by the FRCP.²⁰³ Like the FRCP, the AAA rules require that the arbitrator first address the class-certification question.²⁰⁴ Once the class is certified, the arbitrator must ensure that “class members be provided the best notice practicable under the circumstances.”²⁰⁵ Thus, the confidentiality presumption that exists in most arbitration proceedings does not apply.²⁰⁶ Other procedures similar to the FRCP make class arbitration less efficient and more costly. However, the extensive AAA rules and procedures required for class action arbitration are essential to conducting a fair proceeding.²⁰⁷ So while permitting class actions encourages consumers to bring claims, the device itself is very court-like and loses arbitration’s intended benefits.

While the Protocol and specific rules for consumer arbitration and class action arbitration are at least somewhat beneficial for consumers because they appear to help balance the disparities between consumers and service providers, these rules necessarily contain more safeguards and procedures. The extensive rules inevitably make consumer arbitration appear more and more like litigation. Further, these rules’ inefficiencies might not even be worth the trouble, as the rules do not appear to make arbitration truly fair for consumers. If the AAA continues to promulgate more rules in the name of ensuring fairness or the validity of arbitration agreements, it follows that arbitration proceedings could become—and in many cases often are—just as long and costly as litigation. Thus, in an effort to make arbitration fairer, the AAA and other arbitration institutions are defeating arbitration’s main purposes.

IV. CONCLUSION

The Supreme Court’s expansion of the FAA is concerning for many anti-arbitration and consumer advocates. These advocates view arbitration as an unfair forum, particularly when consumers are parties to adhesion contracts or forced to arbitrate their statutory rights. The anti-arbitration advocates have brought these concerns to courts and, in many cases, courts have carved out exceptions as to when consumer

202. AM. ARB. ASS’N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS 3 (2003), https://www.adr.org/sites/default/files/document_repository/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf [<https://perma.cc/77NY-NLMR>] [hereinafter SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS].

203. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011) (comparing the AAA’s SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS with FED. R. CIV. P. 23).

204. SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, *supra* note 202, at 4–5.

205. *Id.* at 6.

206. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

207. *Id.* at 349.

arbitration contracts could be unenforceable. To maintain arbitration's popularity and ensure the validity of arbitration agreements, the AAA has directly reacted by instituting rules that mandate a minimum level of fairness, cap costs, attempt to ensure arbitrator neutrality, and authorize broad discovery and witness selection. Further, the AAA has developed specific rules for class action arbitrations, providing a device for consumers to bring low-value claims (subject to the Supreme Court's restrictions).

These rules attempt to make arbitration an equal playing field between consumers and service providers while attempting to maintain the informal, efficient nature of arbitration proceedings. However, the rules are often unsuccessful in balancing the tension between fairness and efficiency. Despite the AAA's efforts, their rules are not actually that impactful. Accordingly, it is likely that anti-arbitration advocates will demand stronger efforts to make arbitration fair. If institutions like the AAA continue reacting, arbitration will continue mirroring litigation in that arbitration will be more expensive, complex, and inefficient. Thus, in an effort to ensure arbitration agreements' validity, which is targeted due to the Supreme Court's contradictory and problematic jurisprudence, arbitration institutions are making arbitration less desirable for both parties.

Therefore, institutional reaction is likely not the way to achieve balance between fairness and efficiency in the arbitral system. Without the Supreme Court completely back-tracking its arbitration jurisprudence, congressional action could be the only solution. In 2019, the House of Representatives introduced the Forced Arbitration Injustice Repeal Act ("FAIR Act").²⁰⁸ If passed, the FAIR Act would prohibit pre-dispute arbitration agreements that force consumers to arbitrate or that interfere with a consumer's right to bring a class action.²⁰⁹ Although the FAIR Act is no longer before Congress, it would more appropriately balance fairness and efficiency because it would eliminate the forced arbitration of consumer claims altogether, giving a consumer the freedom to choose arbitration or litigation.

208. *See* Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 2(2) (2019).

209. *See id.*