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Mandatory and Fair? A Better System of Mandatory Arbitration

ABSTRACT. This Note proposes a set of reforms that address the problem of systematic bias in mandatory arbitration. Until now, mandatory arbitration literature has focused largely on the pros and cons of the practice rather than on solutions to improve this form of dispute resolution. This Note seeks to shift the debate by showing how institution-level protections can preserve both fairness and efficiency in mandatory arbitration. I argue that the best means of enforcement would be to create a cause of action that enables government prosecutors to bring suit to impose monetary penalties on systematically biased arbitration providers and the businesses who hire them. The threat of such litigation, combined with mandatory data disclosure, will incentivize negotiated self-regulation and result in fairer practices. Because individuals will not be able to appeal their specific arbitration decisions under this system, mandatory arbitration's central advantage of efficiency will be preserved.

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INTRODUCTION

Mandatory arbitration offers the potential for a faster and less costly means of dispute resolution. It holds out the promise of a process that is more efficient and accessible for plaintiffs, yet still preferable for businesses. In application, however, mandatory arbitration has fallen short of this goal. It presents opportunities for abuse, and companies have used it as a means of skewing proceedings in their favor rather than simply providing a more efficient means of dispute resolution. Although there are numerous problems with mandatory arbitration, fundamentally the current system is broken because businesses can use mandatory arbitration clauses to select biased decisionmakers who will systematically preference the drafting party over the party signing the mandatory arbitration clause (usually a consumer or employee).

While there is a wealth of literature attacking the shortcomings of mandatory arbitration,[1] no satisfactory solution has been proposed. Proposals for arbitration reform often focus on granting individuals the means to appeal unjust decisions.[2] But by adding costly and time-consuming procedures, these reforms neglect the primary advantages of mandatory arbitration and simply transform the process into something more akin to traditional litigation. Other proposals call for prohibiting mandatory arbitration for those classes of cases where parties typically have unequal bargaining power.[3] But the potential advantages of using mandatory arbitration are real. In fact, mandatory arbitration offers the greatest benefits in cases where only a small amount of money is at stake, a situation that often arises when parties have unequal bargaining power.

This Note proposes a solution that ensures that mandatory arbitration will be carried out in a more impartial manner, while at the same time preserving its central advantages of speed, cost, and accessibility. Instead of focusing on providing recourse to plaintiffs at the individual level, we must solve the problems posed by mandatory arbitration through systemic reform. I propose an enforcement scheme in which parties drafting mandatory arbitration

1. *See, e.g.*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005) (drawing on numerous papers criticizing mandatory arbitration).

2. *See, e.g.*, Sarah Rudolph Cole, *Revising the FAA To Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007).

3. *See, e.g.*, Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 161-66 (2004); Jean R. Sternlight, *Counterpoint: Fixing the Mandatory Arbitration Problem: We Need the Arbitration Fairness Act of 2009*, DISP. RESOL. MAG., Fall 2009, at 5.

clauses, as well as arbitration providers themselves, are held liable when arbitration providers engage in systematically biased adjudications. By consolidating oversight into large cases alleging widespread unfairness rather than pursuing individual appeals, significant costs can be saved. At the same time, because the fundamental injustices of mandatory arbitration are caused by systemic factors rather than discrete instances of bias, this form of oversight would counteract the central problem posed by mandatory arbitration. This Note is the first to propose a system of institution-level policing for mandatory arbitration.

Liability in cases of systematic unfairness should be enforced by government attorneys, including federal prosecutors, state attorneys general, and other public attorneys empowered to bring affirmative civil cases (such as city attorneys in some jurisdictions). Under such a system, because there would be many prosecutorial actors—including fifty state attorneys general who are each responsive to a somewhat different set of political forces—enforcement would be much less vulnerable to regulatory capture than would attempts to reform mandatory arbitration through the creation of a single regulatory agency. At the same time, government actors are the best enforcement mechanism because they are likely to exercise more restraint than would private attorneys if a private cause of action were created. Because government actors act with more discretion, the governing statute can be less rigidly constructed, making liability for systematic bias easier to prove.

For this system of enforcement to be most effective, prosecutors must be provided with the tools necessary to control misconduct. In addition to the threat of prosecution, incentives and mechanisms should be created for arbitration providers and parties who use mandatory arbitration to make their systems of dispute resolution fairer. In order to accomplish these goals simultaneously, prosecutorial enforcement of systematic bias in mandatory arbitration should be combined with a system of limited data disclosure by mandatory arbitration providers. This system of disclosure would allow prosecutors to encourage self-policing by providing safe harbors for companies that hit certain benchmarks for arbitral fairness. In addition, it would provide judges and prosecutors with a valuable tool in determining when companies are engaging in unfair practices. While others have advocated for data disclosure for mandatory arbitration and one state has even implemented such a disclosure system,[4] this Note is the first proposal to explain how it could be integrated effectively into a system of enforcement.

4. California mandates quarterly disclosure of data regarding decisions by arbitration providers. CAL. CIV. PROC. CODE § 1281.96(a) (West 2007).

Finally, in order to incentivize parties to actively choose fair arbitration providers, liability should be placed directly on the party choosing the arbitrator and on the arbitration provider itself. This would incentivize the parties themselves to choose fair arbitrators and to monitor their own arbitration providers to ensure that disputes are decided in a fair manner. It would also save litigation costs by eliminating the need to prove a principal-agent relationship between drafting parties and arbitration providers.

Although these reforms would most effectively be instituted through a federal statute, similar but more limited results might also be achieved through a patchwork of statewide laws, or else by regulatory action from the newly created Consumer Financial Protection Bureau. Overall, while such a system would impose some additional costs on mandatory arbitration, it would preserve the central efficiency advantages that mandatory arbitration provides. The broad goal of mandatory arbitration would thus be achieved: consumers and employees could benefit from the less cumbersome system that mandatory arbitration provides without receiving unfair treatment in the resolution of their disputes.

This Note proceeds by first discussing the rising use and importance of mandatory arbitration in Part I and outlining the advantages and disadvantages of mandatory arbitration in Part II. Part III lays out many of the existing suggestions for reform and explains why none of these ideas satisfactorily addresses the fundamental problems of mandatory arbitration. Part IV describes my proposed enforcement scheme, discusses how such a system of reforms could be implemented, and considers the effects that this system would have on the cost and efficiency of mandatory arbitration.

I. THE EMERGENCE OF MANDATORY ARBITRATION

Mandatory arbitration has recently grown to be an area of fundamental importance to our legal system. Over the past twenty-five years, it has become increasingly widespread and is now commonly used in a wide variety of contexts, including in business transactions,[5] employment contracts,[6] and

5. *See, e.g.*, Collins v. Int'l Dairy Queen, Inc., 2 F. Supp. 2d 1465, 1467 (M.D. Ga. 1998); Doctor's Assocs., Inc. v. Keating, 836 A.2d 412, 413 (Conn. 2003); Malted Mousse, Inc. v. Steinmetz, 79 P.3d 1154, 1156 (Wash. 2003).

6. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109-10 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991); Coady v. Ashcraft & Gerel, 223 F.3d 1, 6 (1st Cir. 2000).

consumer claims.[7] Mandatory arbitration clauses now appear in nearly every facet of our daily lives, governing contracts related to financial services (such as mortgages, credit cards, and other loans), the sale of goods, and even healthcare, nursing homes, and educational institutions.[8]

No reliable data measure the exact extent of arbitration,[9] and "[i]t is difficult to assess how common mandatory arbitration clauses have become,"[10] especially because of the general lack of disclosure requirements for arbitration proceedings. However, it is clear that arbitration is now used pervasively throughout our society.[11] The American Arbitration Association, just one of many large arbitration providers, conducts over 100,000 cases per year.[12] Indeed, as one commentator has observed, "It is not a hyperbole to state that civil justice or adjudication in the United States . . . is achieved primarily through arbitration."[13] The widespread and increasing use of mandatory arbitration underscores the critical importance of finding a solution that preserves it as an effective option for businesses but that prevents systematic abuse.

7. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995); Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1270 (11th Cir. 2002); Borowiec v. Gateway 2000, Inc., 808 N.E.2d 957, 959 (Ill. 2004).

8. Sternlight, *supra* note 1, at 1638-39; *see also* Katherine V. W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 27, 27 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999) (discussing the increasingly common presence of arbitration in the employment context). Sternlight observes that "some companies are now using arbitration offensively, to obtain speedy default judgments against consumers who allegedly owe them money." Sternlight, *supra* note 1. at 1639.

9. Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 235 (2008).

10. Sternlight, *supra* note 1, at 1639.

11. *See, e.g.*, Carbonneau, *supra* note 9, at 235 n.8 (compiling numerous studies examining the prevalence of arbitration); *see also* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" To Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62 (2004) (finding that at least one-third of the sampled businesses include some form of mandatory arbitration clause in their consumer contracts).

12. Carbonneau, *supra* note 9, at 235-36.

13. *Id.* at 236.

II. THE BENEFITS AND DRAWBACKS OF MANDATORY ARBITRATION

A. Benefits

Advocates of mandatory arbitration tout its speed, reduced cost, and accessibility.[14] They effectively demonstrate that mandatory arbitration enjoys specific structural advantages over traditional litigation and that greater efficiency is necessary, especially for the resolution of certain types of disputes, such as claims for small sums of money.

Delay is one of the largest problems in our legal system. In the last several decades, the state and federal courts have seen increasing caseloads and have resolved disputes at slower and slower rates. The incoming civil caseloads reported by state courts increased by 28% between 2000 and 2009.[15] Although the number of civil cases filed in federal court has remained relatively flat over the same timeframe, the number of civil cases pending in federal court increased by 15% from 2000 to 2009.[16] In other words, filed civil cases in

14. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001) (arguing that mandatory arbitration allows many more plaintiffs to bring cases); Dwight Golann, *Developments in Consumer Financial Services Litigation*, 43 BUS. LAW. 1081, 1091 (1988) ("The primary advantage for consumers in binding arbitration is that it offers at least the possibility of a faster and cheaper decisionmaking mechanism for their complaints."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89-90 (arguing that arbitration reduces businesses' dispute resolution costs and that these savings are ultimately passed on to consumers); *see also* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276-77 (1982) (citing the speed and cost advantages of arbitration); Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 423 (2009) ("[Arbitration] fills wide gaps and makes adjudication accessible to individuals by promoting economy and effectiveness through the provision of expertise, basic fairness, and binding determinations.").

15. *Civil Caseloads Level Off After Three Years of Growth*, CT. STAT. PROJECT, http://www.courtstatistics.org/Civil/CivilGrowth.aspx (last visited Mar. 26, 2012).

16. *Compare* STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS—MARCH 31, 2001 tbl.C (2001), *available at* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/tables/c00mar01.pdf (reporting that 262,548 civil cases were filed in federal district courts in the twelve-month period ending in March 2000 and that 243,422 civil cases were pending at the end of the period), *with* OFFICE OF JUDGES PROGRAM, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS—MARCH 31, 2009 tbl.C (2009), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C00Mar09.pdf (reporting that 258,535 civil cases were filed in federal district courts in the twelve-month period ending in March 2009 and that 301,600 were pending at the end of the period).

federal district courts are being resolved less efficiently. The median time from filing to trial in federal civil cases went from 20 months in 2000 to 25 months in 2009.[17] The median civil case now takes over seven months to be resolved, and many cases take more than three years to reach a resolution.[18]

Mandatory arbitration is designed to allow for a faster dispute resolution process. The results of arbitration are nearly always final, sparing the parties a lengthy appeals process once a decision has been rendered.[19] Arbitration also does not require the "time-consuming procedures that must be adhered to in court proceedings,"[20] instead allowing for a more customizable, abbreviated process that is more directly tailored to the type of dispute.[21]

In addition, because providers of arbitration are private entities, arbitration offers the potential to harness the power of the market to offer faster dispute resolution. Intuitively, market competition fostered by arbitration will cut delay most when the party selecting the arbitrator has a large incentive to see the case resolved promptly. When this is the case (such as when a credit card company seeks to determine whether a person with a delinquent account really owes the money in question), we might expect that arbitration providers will compete with each other to resolve cases as quickly as possible in order to garner the business of the parties selecting the arbitrators.

17. *Compare U.S. District Court—Judicial Caseload Profile*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2000.pl (last visited Apr. 10, 2012) (select "ALL DISTRICT COURTS" and click on "Generate") (reporting data from 2000), *with U.S. District Court—Judicial Caseload Profile*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2009.pl (last visited Apr. 10, 2012) (select "ALL DISTRICT COURTS" and click on "Generate") (reporting data from 2009).

18. *U.S. District Court—Judicial Caseload Profile*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2011Jun.pl (last visited Apr. 10, 2012) (select "ALL DISTRICT COURTS" and click on "Generate") (reporting that for the twelve-month period ending June 30, 2011, the median time from filing to disposition for civil cases in federal district court was 7.3 months, and 13.6% of pending civil cases in federal district court are more than three years old).

19. *See* 9 U.S.C. §§ 9-10 (2006). For a fuller discussion of the "grounds upon which a reviewing court might vacate, modify, or correct an arbitral award," see Thomas S. Meriwether, Comment, *Limiting Judicial Review of Arbitration Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739, 744-49 (2007).

20. Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1711 (2005).

21. *See* Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 774 (2001) ("Because parties can customize the proceedings to suit their interests, arbitration also has the potential for providing an acceptable result at a low cost.").

Finality, streamlined proceedings and market incentives also offer the potential to make mandatory arbitration less costly. These low costs increase accessibility by allowing plaintiffs to bring claims that are either too risky or too small-scale to attract the attention of private lawyers.[22] Mandatory arbitration also saves government resources, because arbitrators are funded privately rather than through taxpayer dollars.[23]

Empirically, it is widely contested whether or not mandatory arbitration is in fact faster and less costly than traditional litigation.[24] Because it is difficult to

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22. *See* Estreicher, *supra* note 14, at 563.

23. *See* Ware, *supra* note 14, at 95. *But see* Sternlight, *supra* note 1, at 1654 (noting that this argument assumes that pro se representation is more successful in arbitration than in litigation).

24. *Compare* CAL. DISPUTE RESOLUTION INST., CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA: A REVIEW OF WEBSITE DATA POSTED PURSUANT TO SECTION 1281.96 OF THE CODE OF CIVIL PROCEDURE 19 (2004), *available at* http://www.mediate.com/cdri/cdri_print_Aug_6.pdf (finding the average dispute resolution time for consumer and employment claims to be 116 days through mandatory arbitration), Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225, 225 (2009) ("AUSAs spent an average of $869 in neutral fees and estimated that the process saved $10,735 in litigation expenses per case. AUSAs spent an average of 12 hours preparing for ADR and 7 hours in the ADR process per case, which they estimated saved 88 hours of staff time and 6 months of litigation time per case."), Joseph L. Daly & Suzanne M. Scheller, *Strengthening Arbitration by Facing Its Challenges*, 28 QUINNIPIAC L. REV. 67, 99-100 (2009) (noting the California Dispute Resolution Institute study's finding, *supra*, and comparing it to an average time of 650 to 720 days to resolve similar claims in court), Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 815-16 (2008) ("First, the upfront costs of arbitration will in many cases be higher than, and at best be the same as, the upfront costs in litigation. . . . Second, for employees and consumers with small and mid-sized claims, the availability of low-cost arbitration makes arbitration an accessible forum, and possibly a more accessible forum than litigation. But for consumers with large claims, and for employees not able to use low-cost arbitration, the evidence is less clear. . . . Third, whether arbitration is an accessible forum for claims that can only be brought on a class basis remains uncertain."), Garry G. Mathiason & Pavneet Singh Uppal, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, *in* EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 875, 894 (ALI-ABA Course of Study Materials: Emp't Discrimination & Civil Rights Actions in Fed. & State Courts, 1994) (comparing a Rand Corporation study finding that the average case in arbitration is resolved in 8.6 months to an observation that "[l]itigation, including an appeal, can range from three to eight years before a final decision is rendered"), Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, DISP. RESOL. MAG., Fall 2008, at 30, 33-34 ("[A]vailable data . . . suggest that compared to litigation, arbitration is a relatively inexpensive and fair mechanism that produces positive outcomes for consumers."), *and* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J., Nov. 2003-Jan. 2004, at 56, 58 (comparing 125

assess whether perfectly analogous cases are being compared across regimes, it is difficult to show definitive proof one way or the other. Nevertheless, because of the numerous factors that facilitate more efficient dispute resolution, the potential for mandatory arbitration to achieve these goals is clear.[25]

B. Drawbacks

Despite these advantages, mandatory arbitration presents large potential for abuse, particularly in cases where the parties have unequal bargaining power. Most fundamentally, mandatory arbitration falls short as a judicial mechanism when only one party chooses the arbitrator, because that party has an incentive to choose an arbitrator that will treat it favorably rather than to select an impartial decisionmaker.[26]

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employment discrimination lawsuits filed in the Southern District of New York with 186 arbitration claims involving employment disputes in the securities industry and finding that the median time from filing to judgment was 16.5 months in arbitration compared to 25 months in litigation), *with* JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 34 (1996) (finding no significant decrease in time to disposition in six court programs using mediation or early neutral evaluation), Chester S. Chuang, *Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable Is Your Right to a Jury Trial?*, 10 EMP. RTS. & EMP. POL'Y J. 205, 210 (2006) ("Experience has shown that resolution times for disputes that are arbitrated are not significantly faster than disputes that are litigated in court."), Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective*, 25 A.B.A. J. LAB. & EMP. L. 227, 236 (2010) ("There seems . . . to be increasing evidence that the assumptions that arbitration is cheaper and faster than litigation may not be correct, or at least that those advantages may not be as significant as previously believed."), *and* Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229 (1991) (arguing that, because arbitration can divert many cases that would have otherwise settled, it can actually lengthen the dispute resolution process).

25. *See* Bingham et al., *supra* note 24, at 260 ("ADR has the potential to improve dispute processing without sacrificing the quality of justice.").

26. Mandatory arbitration also offers other means of abuse, such as "imposition of high costs" on plaintiffs seeking to pursue arbitration, and "limitation of remedies." Sternlight, *supra* note 1, at 1649-50. These include fee-shifting regimes, which place high costs on claimants, and class action bans, which may significantly reduce accessibility for small claims. For discussion of the problems of fee-shifting regimes and other costs that may be imposed on the non-drafting party, see, for example, Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 237-39 (2004), which explains how the drafting party may specify an extremely inconvenient forum for claimants; and Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever* Green Tree *of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 191 (2002), which finds a "rapid growth of cost-shifting cases." For a discussion of the problems posed by class action bans and proposed remedies, see, for

Selection bias is a fundamental problem of mandatory arbitration because there are no practical means of allowing multiple parties to choose an effective and unbiased arbitrator together without dramatically increasing the costs of dispute resolution. Although sometimes selection bias is obvious (such as when a company chooses a representative of company management as an arbitrator), it "can also be somewhat more subtle," taking place by virtue of "a phenomenon known as the 'repeat provider' problem."[27] As Jean Sternlight explains, arbitration providers such as the American Arbitration Association (AAA) and National Arbitration Forum (NAF) compete with one another to act as arbitrators for companies.[28] Because companies—rather than consumers or employees—are the ones drafting the agreements, and because these

example, Heather Bromfield, Comment, *The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements*, 43 U.C. DAVIS L. REV. 315 (2009). A recent Supreme Court ruling severely restricts states from addressing this problem on their own. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (holding that California's ban on class action waivers in arbitration agreements was preempted by the Federal Arbitration Act). However, a plurality decision of the National Labor Relations Board recently held that an employer violates section 8(a)(1) of the National Labor Relations Act when it requires an employee to sign an agreement banning joint, class, or collective claims as a condition of employment. D. R. Horton, Inc., 357 N.L.R.B. No. 184, at 1 (Jan. 3, 2012). The decision is likely to be appealed. *See NLRB Finds that D.R. Horton Engaged in Unfair Labor Practice by Including Class Action Waiver in Mandatory Arbitration Agreement*, HUNTON EMP. & LAB. PERSP. (Jan. 18, 2012), http://www.huntonlaborblog.com/2012/01/articles/nlrb-1/nlrb-finds-that-dr-horton-engaged-in-unfair-labor-practice-by-including-class-action-waiver-in-mandatory-arbitration-agreement.

Whatever the ultimate reach of fee-shifting regimes and class action bans turns out to be, it is clear that they present serious problems. Nonetheless, neither is an inherent feature of mandatory arbitration, and each can be eliminated independently through separate reforms. Importantly, the proposal for arbitration reform outlined in this Note would not be mutually exclusive with proposals to cure abuses caused by these practices. Prohibitions on class action bans and fee-shifting regimes could easily be layered on top of this proposed system of institutional enforcement.

27. Sternlight, *supra* note 1, at 1650. Sternlight distinguishes this phenomenon from the related notion of repeat-player bias, which refers to the comparative advantages companies obtain by virtue of their greater familiarity with the arbitration process. *Id.* at 1650-51. For a discussion of the repeat-player problem in mandatory arbitration, see Bingham, *supra* note 26; Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 452-53; and Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999). Menkel-Meadow's treatment of the subject explicitly accounts for the possibility that providers may also become repeat players. Menkel-Meadow, *supra*, at 35-37. For the foundational argument for why repeat players do better in the legal system, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

28. Sternlight, *supra* note 1, at 1650.

contracts may specify an arbitration provider, arbitration providers have an incentive to skew their proceedings in favor of the company drafting the agreement.[29] They may do so either because they seek more business from a company or simply because, over time, arbitration providers and businesses may form informal and friendly relationships.[30]

Despite the fact that arbitration selection provisions must ostensibly provide a neutral decisionmaker,[31] initial data confirm the presence of a repeat-player bias.[32] A statistical analysis from the Center for Responsible Lending found that "[c]ompanies that have more cases before arbitrators get consistently better results from these same arbitrators"[33] and that "[i]ndividual arbitrators who favor firms over consumers receive more cases in the future."[34] In the most extreme cases, this bias has manifested itself in arbitration

29. *Id.*

30. Cole, *supra* note 2, at 217 ("An institutional party, who chooses arbitration to resolve all disputes, may have an advantage over the party who may utilize the arbitral process only once, and only because his contract with the institutional party requires him to do so. In this situation, the institutional party may develop informal relationships with the arbitrator, creating an incentive for the arbitrator to find in its favor." (footnote omitted)).

31. The Federal Arbitration Act provides that courts may overturn arbitration awards "where there was evident partiality or corruption in the arbitrators." 9 U.S.C. § 10(a)(2) (2006). A party may also challenge an arbitral award:

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

Id. § 10(a); *see also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997) (including the provision of neutral arbitrators among the minimum requirements for valid employment agreements to arbitrate); David R. Wade & Curtiss K. Behrens, *Opening Pandora's Box:* Circuit City v. Adams *and the Enforceability of Compulsory, Prospective Arbitration Agreements*, 86 MARQ. L. REV. 1, 13 (2002) ("Arbitrator selection provisions must be drafted to provide employees with a 'neutral' decision-maker.").

32. Joshua M. Frank, *Stacked Deck: A Statistical Analysis of Forced Arbitration*, CENTER FOR RESPONSIBLE LENDING 1-2 (May 31, 2009), http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf.

33. *Id.* at 1.

34. *Id.* at 2.

providers directly marketing themselves as friendly to businesses,[35] and in the removal of individual arbitrators who rule against the companies in subsequent cases where the same arbitration provider is used.[36] Although it is difficult to draw conclusions with certainty about arbitration provider bias because the data are limited,[37] the initial reports are very troubling.

Unfortunately, because it is difficult to prove that biased arbitrators have violated the law under the current legal regime, many instances of arbitrator bias are likely occurring undetected. Although section 10 of the Federal Arbitration Act (FAA) allows parties to challenge arbitral awards if an arbitrator shows clear partiality or corruption,[38] individuals are incapable of mounting challenges in all but the most obvious cases because, without access to statistics on the disposition of proceedings and limited to only modest amounts of discovery, they are unable even to assess accurately whether wrongdoing has occurred.

Furthermore, because the statute only specifies that a court "*may* make an order vacating the award . . . where there was *evident* partiality,"[39] courts are free to uphold awards even when biased decisionmaking or corruption has occurred, and seemingly no action is merited when an arbitrator's partiality is not immediately evident. Other than the grounds laid out in section 10 of the FAA, parties have little recourse to challenge arbitration results. Some courts have held that decisions may be vacated if an "award was in manifest disregard of the law, completely irrational, in direct conflict with public policy, [or] arbitrary and capricious,"[40] but this standard is very difficult to prove, and courts are not required to vacate awards in these cases. Although this lack of

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35. *See* Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BLOOMBERG BUSINESSWEEK, June 5, 2008, http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm (describing how NAF promised a "marked increase in recovery rates over existing collection methods" in a 2007 PowerPoint presentation targeted towards creditors).

36. *See* PUB. CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 30-31 (2007), http://www.citizen.org/documents/ArbitrationTrap.pdf (highlighting the story of Elizabeth Bartholet, a Harvard law professor who resigned as an arbitrator for NAF on account of what she perceived to be systematic bias on the part of the provider). Prior to her resignation, Bartholet had been removed from several cases after she issued a ruling in favor of a consumer. Videotaped Deposition of Elizabeth Bartholet, Carr v. Gateway, Inc., No. 03-L-1271 (Ill. Cir. Ct. Sept. 26, 2006).

37. *See* Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1062-64 (2009).

38. 9 U.S.C. § 10(a) (2006).

39. *Id.* (emphasis added).

40. Cole, *supra* note 2, at 227.

appealability is necessary to preserve the low costs of mandatory arbitration, the complete lack of enforcement encourages arbitration providers to preference the drafting party in subtle ways, either through unconscious bias or willful misconduct.[41]

It is true that parties drafting mandatory arbitration agreements may not always see it as in their best interests to choose a biased arbitrator. For example, a company may decide that the cost of consumers bringing successful claims is sufficiently small, and the potential damage to its reputation from using unfair arbitrators sufficiently high, for it to make sense to choose fair arbitrators. However, because our current system has few substantive mechanisms for detecting and deterring biased arbitrators, and often few liability consequences when bias occurs, it is difficult even to know how often or to what extent drafting parties are choosing biased arbitrators. What is clear is that, because the decision to choose a biased arbitrator often holds few consequences and affords a company the opportunity to save costs on unfavorable judgments, the existing incentive scheme for arbitrator choice is unacceptable.

Defenders of mandatory arbitration contend that the practice does not present problems because rational parties will not enter into fundamentally unfair agreements with biased decisionmakers.[42] If they do, it is their own fault and they should accept the consequences. Although this may be the case when parties are of equal bargaining power, this argument breaks down for consumer and employee arbitration.

In the consumer context, practically speaking, parties cannot reasonably be expected to know the minute details of every contract with an arbitration agreement that they sign. Nor can consumers be expected to take the remote risk of arbitration into account.[43] Shoppers simply do not think about what will

41. *Cf.* Emmanuela Truli, *Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case Against Absolute Arbitral Immunity*, 17 AM. REV. INT'L ARB. 383, 390-91 (2006) (noting how, in a similar manner, arbitrator immunity "protect[s] arbitrators from every claim against them arising from all kinds of possible and even willful misconduct on their part").

42. *See, e.g.*, Robert A. de By & Amy L. Rudd, *Court Is Not the Answer for Securities Arbitration Disputes*, 25 ALTERNATIVES TO HIGH COST LITIG. 129, 133 (2007) ("The consumer can choose to simply walk away from the contract, or choose a different provider."); Steven J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington and Haagen)*, 29 MCGEORGE L. REV. 195 (1998) (arguing that a contractualist approach to arbitration gives consumers freedom of choice).

43. Consumers are naturally inclined to assume that long-shot events of misfortune and dispute will not befall them and thus will undervalue the differences between dispute resolution policies. *See* Michael Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 561, 561 (1977) ("The effect of consumer misperceptions is that

occur in the remote possibility that a dispute arises, nor can they accurately assess these risks with the information available.[44] Furthermore, the reality is that in some areas, such as credit card agreements, consumers often have no choice but to sign mandatory arbitration agreements because no alternatives are available.[45] Similarly, employees may have few, if any, other options but to sign an agreement providing for mandatory arbitration. Because of these failures of the market, if mandatory arbitration is to be used, then structures should be put in place to ensure that the system is as fair and efficient as possible.

III. EXISTING PROPOSALS FOR REFORM

Many different proposals for reforming mandatory arbitration have been put forward.[46] Some commentators want to ban mandatory arbitration entirely in cases of unequal bargaining power.[47] Others seek to offer additional mechanisms for judicial review that could protect against biased or unethical

demand votes are miscast, and the supply-side produces the wrong products."); *see also* Tom Baker & Timothy D. Lytton, *Allowing Patients To Waive the Right To Sue for Medical Malpractice: A Response to Thaler and Sunstein*, 104 NW. U. L. REV. 233, 234 (2010) (showing a similar tendency for consumers to underestimate the risks of medical negligence).

44. *See* Vincent-Wayne Mitchell, *Consumer Perceived Risk: Conceptualisations and Models*, 33 EUR. J. MARKETING 163, 164 (1999). In the arbitration context, see Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 340, which explains the view that pre-dispute mandatory arbitration may be a "trap for the unwary."

45. *See* Demaine & Hensler, *supra* note 11, at 64 tbl.2 (finding that nine of twelve credit card contracts contained mandatory arbitration clauses). Mandatory arbitration is even more pervasive in other areas. Demaine and Hensler found that seventeen of eighteen consumer contracts for homeowner's insurance, renter's insurance, auto insurance, and health insurance contained mandatory arbitration clauses. *Id.* at 63 tbl.2.

46. For an excellent discussion of many of these proposals, see *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1170-81 (2009).

47. *See, e.g.*, sources cited *supra* note 3. A related proposal would make arbitration agreements binding only on the drafting party. *See* Suzette M. Malveaux, *Is It the "Real Thing"? How Coke's One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77; Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82 (2007). Others have called for a repeal of mandatory arbitration in specific contexts, such as contracts between nursing homes and their patients, where it is particularly unpopular. *See* Suzanne M. Scheller, *Arbitrating Wrongful Death Claims for Nursing Home Patients: What Is Wrong with This Picture and How To Make It "More" Right*, 113 PENN. ST. L. REV. 527, 559 (2008); Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263 (2004).

proceedings.[48] But making arbitration optional or expanding procedural safeguards would undermine the central efficiency advantages that mandatory arbitration provides. Alternatively, mandatory arbitration could be overseen by a central regulatory agency. But the same repeat-player problem that causes selection of biased arbitrators would lead to regulatory capture and ineffective monitoring of arbitrators. Reformers have also proposed mandatory data disclosure and ethics rules governing arbitrators.[49] But while these are useful building blocks for an effective system of oversight, alone they would not do enough to counteract bias in mandatory arbitration.

A. Eliminate Mandatory Arbitration Entirely in Cases with Unequal Bargaining Power

Many have argued that mandatory arbitration should be eliminated entirely in cases where the parties have unequal bargaining power.[50] Most prominently, former Senator Russ Feingold put forth the Arbitration Fairness Act of 2009, which declares that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute."[51] The Arbitration Fairness Act has garnered significant support in the Senate but currently remains well short of the number of votes that would be required for passage.[52]

Some criticize the Arbitration Fairness Act for not going far enough, arguing that it still allows companies to take advantage of consumers, including by tricking them into arbitration when it is not actually favorable to them.[53] Companies might impose hidden costs or downplay other negative features of arbitration, such as limited discovery or potentially biased

48. *See* Cole, *supra* note 2.

49. *See, e.g.*, Gail Hillebrand, *Should California's Ethics Rules Be Adopted Nationwide?: Yes! They Represent Thoughtful Solutions to Real Problems*, DISP. RESOL. MAG., Fall 2002, at 10.

50. *See, e.g.*, sources cited *supra* note 3.

51. Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3 (2009) (calling for the addition of a new chapter to Title 9 of the United States Code, with the quoted language to be codified at 9 U.S.C. § 402(a)).

52. The Act was reintroduced by Senator Al Franken in 2011. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011). As of March 26, 2012, it has sixteen cosponsors. *See Bill Summary & Status: 112th Congress (2011 - 2012): S.987*, THOMAS (LIBR. OF CONGRESS), http://thomas.loc.gov/cgi-bin/bdquery/z?d112:S.987: (last visited Mar. 26, 2012).

53. *See* Joshua T. Mandelbaum, Note, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV. 1075, 1100-02 (2009).

arbitrators. However, the fundamental problem with the Arbitration Fairness Act is not that it would fail to provide consumers with sufficient protection. It is instead that rendering arbitration voluntary would often prevent companies, consumers, and employees from taking advantage of the benefits that mandatory arbitration provides by significantly reducing the number of cases in which both parties would benefit from arbitration.

Allowing parties the choice between arbitration and traditional litigation would cause rational actors in each individual case to choose the alternative better for them, regardless of the cost to the system as a whole. A rational individual would elect to pursue litigation over arbitration even if it increased her own expected return by only a small fraction and imposed a very large cost on the company and on the judicial system as a whole. Furthermore, parties could leverage their choice of dispute resolution to increase their own returns at the cost of the system. For example, if litigation costs were higher than arbitration costs, then a claimant likely to prevail in a case where winning parties may recover attorney's fees could refuse arbitration and compel a large settlement by threatening his opponent with costly litigation. Similarly, claimants could leverage the option of litigation into large settlements where litigation would reveal embarrassing information that would otherwise be kept confidential through arbitration. In these cases, because the costs of allowing parties to elect not to choose arbitration would be spread among all consumers and employees, allowing parties to choose whether to arbitrate would be akin to requiring all parties to purchase very expensive insurance for only slight risks. Although in each individual instance plaintiffs would be better off having the choice of whether or not to arbitrate, the overall costs of contracting would be higher for everyone.

Furthermore, allowing choice over whether to arbitrate introduces transaction costs by allowing for the potential of negotiations over the decision of whether to arbitrate.[54] And irrational behavior by the parties could raise costs. Cognitive biases can lead to excessive litigation.[55] Studies have shown that self-serving biases impede parties from agreeing to settlement; because parties tend to overestimate their own positions, they are unlikely to negotiate

54. For instance, defendants might offer a transfer payment in exchange for an agreement to arbitrate if litigation favored the plaintiff. *See* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 746-47 (showing in a model that plaintiffs should prefer to arbitrate in cases where the transfer payment is great enough, but noting that "once a dispute arises, the costs of agreeing to arbitrate combined with a transfer payment may be greater than simply settling the case altogether").

55. *See* Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1193 (2003).

even when it would be mutually beneficial.[56] One would expect that these same biases could cause parties to litigate even when arbitration would be more favorable. A potentially erroneous perception that arbitration is unfair may lead consumers to litigate even when they would benefit from arbitration.[57]

Thus, while banning mandatory arbitration in cases of unequal bargaining power might be preferable to the status quo in light of the many abuses it allows, such a solution would also undermine the central efficiency advantage that arbitration provides. Banning mandatory arbitration would also create an additional burden for the federal courts (because many cases not going to arbitration would have to be litigated), could disincentivize international commerce with the United States (because companies would no longer be able to use arbitration agreements they are accustomed to), and could create problems regarding the enforceability of current arbitration agreements.[58]

B. Expand Judicial Review

Similarly, expansion of judicial review for mandatory arbitration would undermine the central cost-saving reasons for using mandatory arbitration.[59] Although allowing for judicial review of decisions could reduce the number of arbitrary, erratic, incorrect, and biased decisions, it would do so at the price of allowing appeal in every single instance where such conduct occurred, substantially increasing procedural costs.[60] This would undercut one of the

56. *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1501-04 (1998); *see also* Linda Babcock, Xianghong Wang & George Loewenstein, *Choosing the Wrong Pond: Social Comparisons in Negotiations that Reflect a Self-Serving Bias*, 111 Q.J. ECON. 1 (1996) (showing how teachers' unions and school boards each err in their own favor in selecting "comparable" districts, creating impasses in salary negotiations).

57. *See* Becky L. Jacobs, *Often Wrong, Never in Doubt: How Anti-Arbitration Expectancy Bias May Limit Access to Justice*, 62 ME. L. REV. 531 (2010).

58. *See* Edna Sussman, *The Unintended Consequences of the Proposed Arbitration Fairness Act*, FED. LAW., May 2009, at 48.

59. For proposals to expand review of mandatory arbitration, see, for example, Cole, *supra* note 2; *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1691 (1996); and Julian J. Moore, Note, *Arbitral Review (or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572, 1583-98 (2000). For an explanation of how this would undermine mandatory arbitration's central efficiency advantages, see Meriwether, *supra* note 19, at 740, 758 & nn.110-11, 766, 768.

60. Eliminating arbitral immunity and allowing claimants to sue arbitrators would similarly increase procedural costs by allowing potential legal action in every case of alleged misconduct. *See* Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 INDUS. REL. L.J. 228, 237, 255 (1989).

fundamental differences between mandatory arbitration and litigation: finality. To the extent that a greater array of appeals is permitted in mandatory arbitration, the process would resemble litigation more and more closely.

Median litigation costs in cases requiring discovery, which would be required in such an appeal, are "$15,000 for plaintiffs and $20,000 for defendants,"[61] dwarfing the amount at stake in small consumer claims. Although neither plaintiffs nor defendants would ever pay such high sums in cases with less at stake, median costs are illustrative of the usual price of such procedures and thus of how many plaintiffs would be kept out of court through unwillingness to shoulder these costs. Furthermore, while parties with the resources to appeal might be able to ensure more fairness in the process, businesses could tailor unfair proceedings towards claimants who they expected would not have resources to appeal, potentially creating a system with even more bias towards those with the fewest resources.[62]

C. Government Regulation or Inclusion of an Institutional Middleman

Another option would be to create a central regulator that either appointed neutral arbitrators directly or monitored and policed the activities of arbitration providers.[63] However, such a solution would not solve the repeat-player problem. An administrative agency charged with either task would be very

61. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010).

62. In addition, because allowing for judicial review would compromise the finality of judgment provided for in section 2 of the FAA and because section 10 of the FAA lays out grounds for vacating an award, there is a significant possibility that any statewide expansion of judicial review would be preempted by federal law. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586, 590 (2008), the Court held that parties may not contractually provide for heightened judicial review under the FAA but left open the question of whether state legislation may provide for additional review. Since this decision, however, the Court has enunciated a strong position regarding the preemptive effect of the FAA. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); *cf.* Brian T. Burns, Note, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After* Hall Street, 78 FORDHAM L. REV. 1813, 1865-73 (2010) (arguing that the FAA should preempt state laws permitting contractual expansion of judicial review). Thus, any proposal to expand judicial review meaningfully would likely require federal legislation, a remote prospect in today's Congress.

63. One example of such a proposal calls for the creation of an "institutional middleman" that would choose arbitrators for disputes and "could serve as a processor for financial transactions and offer oversight of the arbitration process." Bradley Dillon-Coffman, Comment, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1121 (2010).

vulnerable to regulatory capture by industries favoring mandatory arbitration.[64] And any private intermediary between drafting parties and arbitration providers would likely provide as little oversight as possible and choose favorable arbitrators in order to ensure that it retains the business of parties using arbitration to resolve disputes. Although regulation by a central actor might initially be enforced thoroughly, it is likely that over time such regulations would be watered down, ignored, and filled with loopholes.[65] If oversight were provided by an administrative agency, creating such an agency would be costly. This would especially be the case if the government were charged with the task of appointing arbitrators. Mechanisms would have to be devised to select neutral arbitrators, and a bureaucracy would have to be created to manage and oversee the system. Furthermore, government agency oversight would only ensure fairness to the extent that such an agency had adequate resources and motivation to ferret out arbitral corruption. If oversight could be dampened by lobbying efforts by arbitration providers and drafting parties directed at only one government regulator, capture would ultimately be inevitable because of the absence of any countervailing party with a concentrated financial stake in the regulatory outcome.

D. Disclosure of Data Regarding Arbitration

A more promising means of mitigating arbitration bias is through increased disclosure of data regarding arbitration outcomes.[66] However, disclosure alone is not adequate to prevent bias in mandatory arbitration.

64. *See Developments in the Law—Access to Courts*, *supra* note 46, at 1179-80; *see also* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (laying out the regulatory capture hypothesis, and arguing "that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit").

65. A vivid illustration of the potential of regulatory capture to render administrative oversight nugatory can be seen in the events preceding the *Deepwater Horizon* oil spill in the Gulf of Mexico. *See* Joseph Karl Grant, *What Can We Learn from the 2010 BP Oil Spill?: Five Important Corporate Law and Life Lessons*, 42 MCGEORGE L. REV. 809, 818-22 (2011).

66. Data disclosure is now being used as a means of regulation in a wide variety of fields. Implementation of disclosure programs has often affected the underlying behavior of the regulated industry and is best used in situations such as this, where victims may be unaware of the costs being imposed on them. *See, e.g.*, Mark A. Cohen & V. Santhakumar, *Information Disclosure as Environmental Regulation: A Theoretical Analysis*, 37 ENVTL. & RESOURCE ECON. 599, 599-601, 616 (2007). Cohen and Santhakumar's study discusses such programs in the area of environmental regulation. It notes that a number of different disclosure programs have caused reductions in pollution but cautions that such programs do not always make sense from a cost-benefit perspective. It argues that such programs are best used under the polluter pays principle "when the victim underestimates the damages caused

Under a regime of data disclosure, arbitration providers would be required to disclose a small amount of basic information regarding the proceedings. Disclosure of data regarding mandatory arbitration has the potential to improve fairness in a number of ways. It enables media organizations, as well as consumer and employee advocacy groups, to highlight the practices of those arbitrators with records that are especially skewed in favor of business and reveal which companies are using the services of these unfair arbitrators. Although behavioral economics suggests that most consumers will still undervalue the inclusion of fair dispute resolution contracts,[67] knowledgeable or particularly risk-averse consumers will be able to distinguish among companies that use more consumer-friendly arbitrators, and companies would be incentivized to compete for the business of these consumers. Furthermore, companies could potentially try to avoid using arbitrators and arbitration providers that have been cast as particularly unfair, in order to avoid the potential public-relations disaster that might stem from such a situation.

The disadvantages of requiring disclosure of this information include the recordkeeping costs that such a requirement would impose on the arbitration providers[68] and the potential for the published data to be mischaracterized or misunderstood.[69] In addition, the disclosure of *too* much information regarding an arbitration case could compromise the confidentiality of the arbitration proceedings, which, in certain contexts, can be a principal

by the pollution and the actual level of damages exceed[s] the cost of abatement." *Id.* at 616. *See generally* Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 531-535 (2000) (discussing the use of information disclosure in a wide variety of areas, extolling the potential virtues of such an approach, and particularly noting the success of the Emergency Planning and Community Right-to-Know Act, a statute aimed at reducing exposure to hazardous chemicals).

67. *See supra* note 43 and accompanying text.

68. *See* Jaimie Kent, *The Debate in California over and Implications of New Ethical Standards for Arbitrator Disclosure: Are the Changes Valid or Appropriate?*, 17 GEO. J. LEGAL ETHICS 903, 914 (2004) (explaining how arbitration providers resisted the regulations because they felt the regulations increased their burdens and costs).

69. Supporters of mandatory arbitration and other observers have suggested that data disclosed in California, which recently enacted reporting requirements, have been misconstrued and used to mislead consumers about the fairness of arbitration. They argue that the consumer advocacy group Public Citizen has cherry-picked data and taken advantage of the common mistake among the general public to assume that a fair process would result in a 50% win rate for consumers, when in fact characteristics of the types of claims brought under mandatory arbitration may make those claims wildly less likely to succeed. *See* Carbonneau, *supra* note 14, at 402-03 (2009); Cole & Frank, *supra* note 24, at 31-32.

motivation behind arbitration.[70] Requiring arbitration providers to disclose information may also introduce the cost of potential liability incurred under the disclosure statute if a provider mistakenly (or intentionally) disseminates inaccurate information. To the extent that there is a competitive market for arbitration providers, some of these costs will be passed either directly to the consumers who bring arbitration claims (in the case where consumers pay some or all of the cost of arbitration) or indirectly to all consumers who use the products or services of a given business (in the case of businesses that pay for the cost of arbitration).

Overall, the arguments against data disclosure are weak. Although it is true that requiring arbitration providers to disclose data will add *some* costs to mandatory arbitration, these costs are not prohibitive. Simply in order to communicate their decisions, arbitration providers must already fill out forms classifying claims and recording the results. The additional step of publishing these data on a website does not seem overly burdensome. Confidentiality is only an essential benefit of a small class of arbitrations, and these claims could easily be exempted from data disclosure requirements if necessary.[71] And even with comprehensive data disclosure, arbitration could still provide a much more private setting than litigation. Although such published data would of course have the potential to mislead if not construed properly, so does any information about mandatory arbitration or litigation. If misleading arguments are advanced about this information, they can be rebutted with more credible studies. On the whole, we should instead expect that, over time, making more information available will lead to a better-informed citizenry.

California recently passed a law mandating that arbitration providers publish specific data about arbitrations administered in the past five years,[72] and administration of the program has posed few problems to this author's knowledge. The state requires providers offering consumer arbitration services to disclose, among other things, the name of the nonconsumer party involved in each arbitration, the type of dispute involved, the number of times the nonconsumer party has previously been a party to arbitration administered by

70. However, cases where confidentiality is important to arbitration tend not to be cases where systematic bias is particularly likely. They include, for example, major commercial cases, technology cases, and cases involving sensitive personal information. *See* Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 962 (2002).

71. *See id.* (explaining that confidentiality is a factor in "major commercial cases, modern intellectual property and high technology cases, and in some more personal matters, like sexual harassment or discrimination").

72. *See* CAL. CIV. PROC. CODE § 1281.96(a) (West 2007).

the provider in question, the results of the dispute, and the amount of the reward and any other relief granted. This information must either be published on the company's website in a computer searchable format or provided free of charge in written format to anyone who requests it.[73] Although commentators have criticized California's regime for not focusing on certain disclosures deemed critical to evaluating the fairness of dispute resolution proceedings,[74] the program has proven that data disclosure requirements are workable in practice.

Instead, the main problem with California's disclosure laws, and with data disclosure requirements in general, is that they do not do enough to ensure fairness in arbitration. California's program is particularly hamstrung by the lack of availability of data from other states, which prevents widespread comparison of arbitration providers and restricts the amount of data available for analysis. But even if similar disclosures were extended nationwide, disclosure without the potential of liability would not adequately protect against the threat of bias in arbitration proceedings. Basic psychology suggests that it would be absurd to expect consumers to stop buying credit cards because of the risk that they might one day fall victim to an unjust resolution of a dispute with the company, even if arbitrators were to disclose blatantly biased results. Absent additional restrictions or policing of particularly skewed behavior, the publication of data could even potentially allow businesses to choose more expertly arbitrators who are likely to rule in their favor.

Rather than offering a standalone solution to mandatory arbitration bias, disclosure requirements must instead be used as a piece of a broader solution. As discussed below in Subsection IV.A.3, published data regarding arbitration results offer their greatest potential as a tool in government prosecution of bias and negotiation of self-regulatory enforcement. Data disclosure would alert government attorneys and third-party public interest groups to possible bad actors among arbitration providers, informing potential prosecutions. Prosecutors could provide safe harbors to providers who showed greater fairness to consumers, incentivizing providers to fall within certain benchmarks for arbitral fairness in order to avoid a lawsuit.[75] This would allow disclosure to achieve the ultimate goal of making arbitration providers

73. *Id.*

74. *See* Cole & Blankley, *supra* note 37, at 1062-64 (noting, for example, that the data do not include the type of claim, nor whether the company filed a counterclaim).

75. These benchmarks could be established by comparing arbitration outcomes of different arbitration providers with one another.

themselves more attuned to their own fairness and cause them to strive to be more impartial.

IV. CREATING AN ENFORCEMENT STRUCTURE TO PREVENT SYSTEMATICALLY BIASED MANDATORY ARBITRATION

As discussed above, many ideas for mandatory arbitration have been put forward. Although some present incremental gains in fairness, none offers a viable option for retaining the benefits of mandatory arbitration while at the same time addressing the fundamental lack of accountability and potential bias in arbitral decisionmaking. To do this, we must create a system of enforcement that keeps costs low by prosecuting cases of systematic abuse rather than allowing individual appeals. This system should require arbitration providers to disclose a limited amount of data regarding the resolution of disputes, and it should leverage these data in order to allow for fairer and more efficient administration of the law. Liability should be enforced by many different prosecutorial actors in order to prevent regulatory capture. And liability should not lie exclusively on arbitration providers. Drafting parties should also be held directly liable for biased and unfair actions undertaken by the arbitration providers they select. Ultimately, this system would allow for an efficient yet fair administration of mandatory arbitration. Individual claims would still be final, and other procedural advantages of arbitration would be applied. But both drafting parties and the arbitration providers they select would be incentivized against biasing their decisionmaking processes.

A. Institution-Level Enforcement To Prevent Systematically Biased Behavior

In order to preserve the efficiency of mandatory arbitration, it is essential to police bias at the institutional level rather than at the level of individual cases. While it is true that such a system could not prevent each individual instance of bias or impropriety, an institutional system could effectively prevent mandatory arbitration decisions from being skewed systematically in favor of the drafting party. Ultimately, consistent bias in arbitration proceedings is the result not of individual errors or oversights, but rather of the systematic actions and policies employed by arbitration providers (unconsciously or not) in order to curry favor with drafting parties. A system of institution-level policing would place liability on organizations that engage in corrupt actions, put in place structures that encourage systematic bias, or fail to prevent or address partisan decisionmaking engaged in by their arbitrators. It would mandate that arbitration providers put in place policies that require unbiased dispute resolution by their arbitrators and hold arbitrators to a minimum standard of ethical behavior.

In order to effectively motivate arbitration providers and drafting parties to self-police, a relatively broad legal standard must be created. As discussed below in Section IV.B, prosecutorial discretion by government actors would help prevent overenforcement in this regime. A basic standard banning systematically biased practices would be augmented through specific descriptions providing examples of this type of behavior and by a mandate that providers adhere to an articulated minimum set of ethical standards. Disclosed data could also be used as evidence in prosecutions and as a tool for prosecutors to institute investigations only against arbitration providers with particularly unfair results. The ability of the legal system to articulate specific liability-inducing behaviors from a broad legal standard has been proven numerous times in a wide variety of areas. In California, an even broader statute of liability has already been used to hold a biased arbitration provider and its principal employer accountable.[76]

Ultimately, a broad standard would incentivize a robust and efficient form of self-regulation that would allow mandatory arbitration to achieve its potential. Disclosed data would allow for the establishment of industry benchmarks, which—as negotiated organically between arbitration providers, prosecutors, and nongovernmental consumer advocacy groups—would incentivize industry actors towards unbiased decisionmaking and ensure that only providers who failed to meet acceptable industry standards for fair practices would be exposed to potential liability.

76. The San Francisco City Attorney's Office recently settled a case brought against Bank of America's credit card subsidiary, FIA Card Services, for its employment of the National Arbitration Forum (NAF), allegedly in order to achieve biased decision outcomes. News Release, City Att'y Dennis Herrera, Herrera Secures $5 Million Settlement, Consumer Safeguards Against BofA Credit Card Subsidiary: Three-and-a-Half-Year-Old Case Continues To Win Industry Reforms Nationwide To Protect Credit Card Holders in Debt Disputes (Aug. 22, 2011), *available at* http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=880. San Francisco secured a $5 million penalty, as well as an agreement prohibiting the company from using arbitration to resolve credit card disputes in California for two years and from employing NAF for five years. *Id.* NAF had already agreed to cease providing consumer credit card dispute resolution services pursuant to a prior settlement with the Minnesota Attorney General. *See* Consent Judgment at 2, Minnesota v. Nat'l Arbitration Forum, Inc., No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009).

1. Legal Standard

The legal standard governing abuse of mandatory arbitration should be a ban on "systematically biased" practices by arbitration providers. Although the specific wording of this ban would have some effect on its enforcement, no particular articulation of such a prohibition would be essential for the success of a liability regime for mandatory arbitration. Instead, the critical attributes of liability are that it ultimately set a standard for providers as a whole rather than for individual arbitrators, that it create a rule banning any practice that has the ultimate effect of skewing proceedings in favor of the drafting party, and that it mandate that providers put controls in place to prevent systematic bias from occurring.

This legal standard should be further elucidated through a nonexhaustive list of behaviors that could be taken as evidence of systematic bias. Numerous behaviors designed to skew proceedings have already been identified and would be clearly banned. Most obviously, any internal memoranda or communications attempting to skew outcomes or instructing arbitrators to bias proceedings toward the drafting party would be evidence of systematic bias. In addition, anything advertising "business-friendly" decision outcomes or otherwise-biased decisionmaking to drafting parties could be used to prove wrongdoing.[77] Furthermore, employment practices would be scrutinized as evidence of systematic bias. Providers would be held liable if they terminated arbitrators for ruling in favor of consumers or if they systematically funneled more business to arbitrators with records favoring the drafting party.[78] While any evidence of providers intentionally making employment decisions based on arbitration outcomes would be clear proof of systematic bias, statistically significant data showing that arbitration outcome was a factor in employment decisions would also expose providers to liability. This would incentivize providers to ensure proactively that they do not, even implicitly, favor arbitrators with pro-drafting-party records.

77. For an example of advertising that suggests biased decisionmaking, see Berner & Grow, *supra* note 35. Although such evidence would not provide definitive proof unless it explicitly promised biased proceedings, statements such as those made by NAF could contribute to ultimate proof of bias by a provider.

78. A 2007 Public Citizen report details how a small number of arbitrators working for NAF handled a very large proportion of cases and ruled against consumers an overwhelming percentage of the time, suggesting that these arbitrators received more business because of their friendliness towards corporate clients. PUB. CITIZEN, *supra* note 36, at 15. Cole and Frank criticize the Public Citizen report's overall characterization of the disposition of claims. Cole & Frank, *supra* note 24, at 1. However, this critique does not disprove the claim that NAF funneled more cases to its arbitrators who had especially pro-business records.

Liability could not be circumscribed to a particular set of behaviors, because rigid requirements would allow arbitration providers to escape liability by devising methods to bias proceedings not enumerated in a liability statute. Instead, judges would enforce a standard punishing all potentially novel attempts at circumventing the purpose of the statute: to prevent systematically biased proceedings in favor of the drafting party. Although such a statute would necessarily create questions surrounding the precise contours of liability, it would ultimately allow for a manageable and administrable enforcement regime. Courts frequently apply more imprecise standards with respect to fraud, duress, unconscionability, and other doctrines familiar in the contract-law context. The basic standard of systematic bias would be further articulated through judicial decisions. Furthermore, this system would incentivize self-regulation and an organic process of negotiation among stakeholders to achieve efficient enforcement.

2. *Ethics Standards for Arbitration Providers*

Arbitration providers would be held to a basic minimum set of ethical requirements. The arbitration providers themselves provide a useful baseline for establishing a set of standards to which arbitration providers would be required to adhere, as they nearly always subscribe to a code of ethics or analogous set of rules.[79] These rules, among other things, require neutral decisionmaking, contain protections against arbitrator conflicts of interest, and strictly bar any partiality in the arbitration process.[80] Currently however, these requirements are voluntary, so arbitration providers have little incentive to ensure adherence to these standards.[81] Making these requirements mandatory would ensure compliance.

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79. *See, e.g.*, *Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization*, AM. ARB. ASS'N, http://www.adr.org/sp.asp?id=22036 (last visited Apr. 1, 2011).

80. *See id.*

81. Other than reputational concerns, the only barriers preventing complete flouting of these rules appear to be statutes preventing consumer fraud, deceptive trade practices, and false advertising. Minnesota initiated a lawsuit based on these statutes in 2009. Complaint at 39-41, Minnesota v. Nat'l Arbitration Forum, Inc., No. 27-CV-09-18550 (Minn. Dist. Ct. July 14, 2009), 2009 WL 2029918. However, these statutes set an exceedingly high bar of misconduct, and even substantial evidence of systematically biased conduct may not provide sufficient proof to hold a firm accountable. Minnesota was able to reach a settlement with NAF barring the organization from participating in future consumer arbitrations, but the arbitration provider did not admit any liability under these statutes. Consent Judgment, *supra* note 76, at 1-2.

In addition to arbitrators' own ethics codes, California has enacted a mandatory set of ethics requirements that provides an example from which to draw.[82] California's rules require arbitrators to "disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial."[83] The rules then enumerate fourteen different subjects that fall within that standard;[84] these subjects run the gamut from family relationships with a party involved in the arbitration,[85] to past service as a lawyer, arbitrator, or other dispute resolution neutral for one of the parties.[86] Additional information must be disclosed for consumer arbitrations administered by a provider organization,[87] including any relationships between the arbitration provider organization and a party or lawyer,[88] and any financial relationships between the arbitrator and the arbitration provider organization "other than receiving referrals of cases."[89] These conflict of interest requirements are significantly more stringent than are those of mainstream arbitration organizations such as the American Arbitration Association (AAA)—which drafted ethics requirements in conjunction with the ABA—and Judicial Arbitration and Mediation Services, Inc. (JAMS).[90]

California's ethics rules also require arbitrators to uphold the overarching duty to "maintain impartiality toward all participants in the arbitration at all

82. CAL. R. CT., ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION [hereinafter ETHICS STANDARDS], *available at* http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf. These ethics standards are incorporated by reference into the California Code of Civil Procedure. CAL. CIV. PROC. CODE § 1281.85(a) (West 2007). The procedure code also imposes direct mandates on arbitrators. *Id.* §§ 1281.9-1281.96. These mandates serve as a baseline floor of protection upon which the ethics standards are permitted to build. *Id.* § 1281.85(a).

83. ETHICS STANDARDS, *supra* note 82, std. 7(d).

84. *Id.* std. 7(d)(1)-(14).

85. *Id.* std. 7(d)(1).

86. *Id.* std. 7(d)(4)-(7).

87. *Id.* std. 8(b)-(c).

88. *Id.* std. 8(b)(1).

89. *Id.* std. 8(c)(1).

90. *See* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II (2004) ("An arbitrator *should* disclose any interest or relationship likely to affect impartiality . . . ." (emphasis added)); *Arbitrator Ethics Guidelines*, JAMS, para. V(A)-(D), http://www.jamsadr.com/arbitrators-ethics (last visited Feb. 14, 2012); *see also* Keisha I. Patrick, Note, *A New Era of Disclosure: California Judicial Council Enacts Arbitrator Ethics Standards*, 2003 J. DISP. RESOL. 271, 284 ("[I]t is unclear whether the JAMS and AAA standards for disclosure are optional or required.").

times."[91] Arbitrators must, among other things, refuse gifts or favors from any interested party,[92] conduct the arbitration "fairly, promptly, and diligently,"[93] avoid ex parte communications,[94] and not accept a fee that is "in any way contingent on the result or outcome of the arbitration."[95] Importantly, California requires that arbitration providers be "truthful and accurate in marketing . . . services and . . . not make any representation that directly or indirectly implies favoritism or a specific outcome."[96]

The precise requirements of ethical conduct could be negotiated in the formation of a statutory liability regime. The essential aspects of achieving meaningful enforcement need only be that they provide a baseline for ethical conduct and that breach of these standards could be taken as evidence of systematic bias. Importantly, because these standards would be enforced at the institutional level rather than on a decision-by-decision basis (as are California's standards), ethics standards could be strict without creating unacceptable costs.[97] Thus, isolated violations that do not indicate systematic abuse would not create liability or trigger prosecutions or appeals on their own.

91. ETHICS STANDARDS, *supra* note 82, std. 5.

92. *Id.* std. 11.

93. *Id.* std. 13.

94. *Id.* std. 14.

95. *Id.* std. 16.

96. *Id.* std. 17.

97. California's disclosure standards have been the subject of much debate. *See, e.g.*, Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343 (2003) (describing the debate over and aftermath of California's arbitration legislation); Kent, *supra* note 68; Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for* Neutral *Arbitrators: How Far To Cast the Net and What Is Sufficient To Vacate Award*, 81 ST. JOHN'S L. REV. 203, 206 (2007) (proposing a standard that is "less onerous" than the California requirements); Ruth V. Glick, *Should California's Ethics Rules Be Adopted Nationwide?: No! They Are Overbroad and Likely To Discourage Use of Arbitration*, DISP. RESOL. MAG., Fall 2002, at 13 (2002); Hillebrand, *supra* note 49. However, California's rules create significantly more costs than would a regime allowing only institutional enforcement, because a breach of California's ethics standards can allow for appeal in individual cases. *See* CAL. CIV. PROC. CODE § 1285 (West 2007) (providing that a party to an arbitration in which an award has been made may petition for appeal); *id.* § 1286.2 (providing grounds for vacation of an award). This creates a situation where "[t]oo many detailed directives could create new loopholes to challenge otherwise non-contestable arbitration awards." Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 126 (2003) [hereinafter Glick, *California Arbitration Reform*].

3. *Evidence of Arbitration Provider Bias Would Be Further Informed by Data Disclosure*

Data recording and disclosure could provide another mechanism for ensuring that biased providers incurred liability and that fairer arbitrators received immunity. Data would help inform prosecutions on two levels. As discussed earlier, data disclosure could be used to help prosecutors prove cases of wrongdoing. According to San Francisco deputy city attorneys working on the litigation against the National Arbitration Forum, requiring the disclosure of even just the amount of principal sued for, the interest sued for, the amount of attorney's fees requested, and the amount awarded in each case would make it significantly easier for attorneys to prove cases of wrongdoing.[98]

Data regarding decisional outcomes for each arbitrator at an arbitration firm would be tracked and could be used to determine whether or not providers were either explicitly or implicitly funneling more cases to arbitrators who decide significantly more often in favor of drafting parties, or whether they were dismissing arbitrators on account of decisional outcomes. Statistical analysis to determine whether a provider is engaging in unlawful selection of arbitrators would proceed in much the same manner as disparate impact claims under Title VII of the Civil Rights Act of 1964[99] and other antidiscrimination statutes. Liability would only be triggered in cases where employment decisions correlated with decisional outcomes significantly more than chance alone would predict. Just as disparate impact liability encourages businesses proactively to ensure that even unintentional factors do not result in structural discrimination, statistical liability would encourage arbitration providers to ensure that these factors did not ultimately result in biased processes.

Data disclosure could also be used as an important mechanism restricting lawsuits to arbitration providers with particularly unfair proceedings. Data disclosure would provide a public record of the relative fairness of different arbitration providers. Nationwide data classified by type of arbitration claim would prove particularly illuminating for comparing arbitration firms.[100] It would provide a much larger pool for comparison than California's data disclosure requirements do, and the ability to compare similar claims would

98. Telephone Interview with Ronald P. Flynn & Yvonne R. Mere, Deputy City Att'ys., Office of the S.F. City Att'y (Apr. 27, 2010).

99. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2006)).

100. For a discussion of what types of disclosures would be most illuminating, see Cole & Blankley, *supra* note 37, at 1062-64.

restrict comparison to appropriate cases.[101] As discussed further in Section IV.B, because enforcers of this liability regime would be politically accountable actors, arbitration providers who showed fair results as compared to their peers would be politically insulated from the threat of prosecution.

In addition, data disclosure mandates would only provide a floor for disclosure, and providers would be free to show more. An arbitration provider might disclose more characteristics of its arbitration claims if, for example, it specialized in a field of arbitration in which claims were particularly likely to be decided in favor of the drafting party simply because of the nature of the claims. By explaining this, and by further parsing their arbitration cases, providers could prevent being targeted based on the subject matter of their claims and ensure that prosecutors focused on bona fide data outliers.

4. Development of a Well-Defined Legal Standard for Liability

Although the imposition of a liability regime would initially create some questions regarding the extent of liability, the precise legal standard would become better and better articulated with the passage of time. Case law is replete with examples of similar statutes whose exact contours have been developed through time, often with definitions of prohibited conduct that are significantly less specific than the standard I have proposed. These include, for example, the Sherman Act[102] (where case law has further defined an "unreasonable" restraint of trade[103]), antidiscrimination laws[104] (where case law has fleshed out what it means to "discriminate" unlawfully against an individual[105]), and California's Unfair Competition Law[106] (where case law has further explained what it means for a business to engage in "unfair

101. *See id.*

102. 15 U.S.C. §§ 1-7.

103. *See* Bob Nichols & Eric Schmitt, *Antitrust Violations*, 48 AM. CRIM. L. REV. 335, 338-44 (2011) (describing how courts have illuminated this standard).

104. *E.g.*, 42 U.S.C. §2000e-2(a) (prohibiting employers from "discriminat[ing] against any individual . . . because of such individual's race, color, religion, sex, or national origin" and proscribing behavior that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin").

105. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (articulating a test to determine employment discrimination liability).

106. CAL. BUS. & PROF. CODE § 17200 (West 2008) (giving "unfair competition" the broad definition of, inter alia, "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising").

competition"[107]), which has itself been used to combat systematically biased arbitration practices.

Similarly, the precise conduct barred by a standard prohibiting systematic bias by arbitration providers, augmented with examples, a code of arbitrator ethics, and arbitration data, would quickly achieve further definition as soon as case law began to grapple with the issue. Although the initial ambiguity might provoke cautious behavior by arbitration providers eager to avoid liability, many would regard this outcome as a positive and appropriate incentive to ensure fairness in this relatively new system of dispute resolution. Articulating a standard and allowing it to develop while the practice is still nascent is preferable to delaying and imposing a standard when it would have greater industry effects.

Furthermore, ambiguity created by the statute would be limited by the several sources informing appropriate conduct. The ethics standard would provide a guide to appropriate conduct; providers would be informed of their relative fairness through disclosure; and they would know to avoid all of the specifically enumerated examples of systematically biased conduct. Because only government prosecutors could bring cases, a further political check would guard against unwarranted liability. In practice, liability regimes with significantly greater scope and ambiguity have proven workable. And the statute suggested here would be significantly narrower than many existing state laws, such as California's Unfair Competition Law, which allows any consumer to bring claims in nearly any area (including situations as diverse as environmental pollution,[108] misconduct by financial institutions,[109] and farm animal abuse[110]).

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107. *See, e.g.*, Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 544 (Cal. 1999) (defining "unfair" practices in the context of competition to be "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition"). For a description of how the meaning of California's Unfair Competition Law has been made more clear over time, see Julia B. Strickland, Lisa M. Simonetti & Scott M. Pearson, *2008 Overview of California's Unfair Competition Law and Consumer Legal Remedies Act*, *in* 13TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE 7 (PLI Corporate Law & Practice, Course Handbook Ser. No. 14257, 2008).

108. *See* James Wheaton, *California Business and Professional Code Section 17200: The Biggest Hammer in the Tool Box?*, 16 J. ENVTL. L. & LITIG. 421 (2001).

109. *See* Michele Floyd, *Recent Developments in California's Unfair Competition Law Involving Financial Institutions*, 120 BANKING L.J. 818 (2003).

110. *See* Donna Mo, Comment, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws To Fight Farm Animal Abuse*, 52 UCLA L. REV. 1313 (2005).

5. Using a Robust Legal Standard To Incentivize Self-Regulation

Ultimately, perhaps the most beneficial effect of creating a robust legal standard preventing systematically biased arbitration proceedings is that it would incentivize the organic creation of a system of self-regulation and informal regulatory enforcement imposed by public prosecutors and other stakeholders. This would result in low-cost enforcement of fairness in arbitration, which would be particularly beneficial because efficiency is such a central concern of mandatory arbitration.

Businesses and regulators have increasingly turned to self-regulation and voluntary compliance efforts in a wide range of areas.[111] In fact, as discussed above in Subsection IV.A.2, arbitration providers themselves have embraced this model through voluntary impositions of ethical codes. But, with neither the threat of significant liability should such self-regulatory efforts fail nor the means of detecting these failures, self-regulatory regimes prove impotent to prevent abuses.[112] A cause of action against arbitration providers and the drafting parties employing them would provide a means of "targeted public enforcement . . . supply[ing] much of the impetus for effective self-regulation."[113]

In addition, data disclosure would generate a wealth of information that would bolster self-regulatory and negotiated enforcement in several crucial ways.[114] It would empower third-party consumer advocacy groups to act as effective industry watchdogs by scrutinizing arbitration data for evidence of wrongdoing.[115] These groups could leverage this data not only to monitor

111. *See* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 323 (2005); *see also* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 101-32 (1992) (discussing a model of enforced self-regulation).

112. *See* Estlund, *supra* note 111, at 335-37. Although many self-regulation regimes were initially created in response to potential liability under various statutes, they often proved toothless because simple implementation of a self-regulatory regime insulated companies against the possibility of any liability. *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

113. Estlund, *supra* note 111, at 319.

114. "Sunshine" has been described as a crucial factor in achieving effective "responsive regulation." Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 720 (2006); *see also* AYRES & BRAITHWAITE, *supra* note 111, at 57-58 (explaining the necessity of supplying third parties with information to allow them to enforce regulatory compliance under these regimes).

115. *See* Gerken, *supra* note 114, at 720-21; *see also* AYRES & BRAITHWAITE, *supra* note 111, at 54-100 (describing the potential of "tripartite" regimes that incorporate third parties such as citizen groups, public interest watchdogs, and whistleblowers to create more effective regulatory enforcement); Estlund, *supra* note 111 (explaining how third-party watchdogs are

arbitration providers, but also to apply political pressure on government prosecutors to carry out enforcement actions against the worst offenders.[116] Furthermore, prosecutors themselves could use information obtained by data disclosure to incentivize voluntary action by negotiating automatic safe harbors for providers who attain specific benchmarks for fairness when compared to their peers.[117] Benchmarking has contributed to successful enforcement in a broad range of contexts, including voting rights,[118] utilities regulation,[119] and numerous other areas of administrative law.[120]

Thus, in contrast to a system that offers parties the opportunity to appeal unfair or biased decisions in individual cases, the combination of data disclosure and a credible threat of liability for systematic abuses would create conditions where arbitration providers themselves would proactively institute fairer procedures in order to protect themselves from litigation.[121] Permitting individual appeals in cases of bias would not allow for low-cost, negotiated

an essential element in effective self-regulatory regimes). Third parties could use disclosed data to better inform consumers about arbitration policies, helping to counteract consumers' normal tendencies not to differentiate among products based on these policies. *See supra* notes 43-44 and accompanying text. For example, disclosed data might even allow for the creation of a "Fair Arbitrator" label (akin to Fair Trade certifications or Good Housekeeping Seals of Approval) to help consumers differentiate among products.

116. The ability of information to empower third parties to engage in a dual-monitoring role has been described in the administrative law context. *See* Gerken, *supra* note 114, at 721 (explaining how granting public interest groups information allows them "not only to monitor the regulated entities, but to monitor the regulating agency itself").

117. Fairness in arbitration decision outcomes would be measured by the percentage of cases in specific categories decided in favor of the drafting party. Providers would be considered more "fair" if they decided more cases against the drafting party. Although theoretically the fairest outcome would not always favor the party signing the mandatory arbitration agreement, this conception of fairness would provide appropriate countervailing incentives because, as discussed *supra* Section II.B, arbitration providers receive a natural incentive to bias proceedings in favor of drafting parties.

118. *See* Damian Williams, Note, *Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform*, 116 YALE L.J. 1116 (2007) (explaining how "static benchmarking" is currently used in voting rights law and proposing a new "dynamic benchmarking" model).

119. *See* Ren Orans, C.K. Woo & William Clayton, *Benchmarking the Price Reasonableness of a Long-Term Electricity Contract*, 25 ENERGY L.J. 357 (2004).

120. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 345-48 (1998).

121. Significantly, this system of negotiated enforcement would take place against the backstop of the companies' ability to provide for traditional litigation, rather than mandatory arbitration, in their contracts. In light of companies' ability to exercise this option, it is exceedingly unlikely that prosecutors would demand compliance actions that would drive costs above those of traditional litigation.

solutions in the same manner because arbitration providers would not have any single party with whom to negotiate.

B. Government Prosecutors as Enforcers

Systematic bias in mandatory arbitration could be prevented most effectively by allowing government prosecutors across jurisdictions to enforce this legal standard. Government prosecution would be ideal because it provides a relatively diverse array of enforcers to curb the repeat-player risk of regulatory capture, while at the same time allowing for prosecutorial discretion, which is necessary when articulating a broad legal standard of liability.

Under a regime enforced by public prosecutors, Justice Department officials, including the various United States Attorneys, would be authorized to bring civil liability claims. More importantly in terms of avoiding regulatory capture, claims could also be brought by state attorneys general, who represent a diverse array of constituencies. In addition to being numerous, state attorneys general respond to unique sets of political factors. Arbitration providers and drafting parties could not easily concentrate their lobbying efforts as they could with a single regulatory agency. Attorneys general have proven capable of effectively holding industries accountable in other cases where regulatory capture has rendered administrative agencies impotent—most prominently through the tobacco litigation of the 1990s.[122] So long as one state felt

122. *See generally* Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 1998, 2003-2007 (2001) (discussing and defending multistate litigation in a wide variety of areas and highlighting the tobacco cases as a watershed moment in holding industries accountable); Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL'Y & L. 769, 774-79 (1999) (generally describing the history of tobacco litigation and explaining how state attorneys general were successful in the 1990s). Although Jacobson and Warner conclude that litigation is a "second-best solution," they reflect on the failure of the legislative and regulatory processes "to confront the public heath harms of tobacco," and they note both the powerful contribution that litigation had towards holding the companies accountable and the way in which it helped prompt a change in society's view of the industry. Jacobson & Warner, *supra*, at 769, 776-78, 801. Some commentators view the tobacco litigation as a case of attorneys general themselves being captured by the plantiffs' bar. *See, e.g.*, Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143 (2001). However, as discussed *infra* notes 125-128 and accompanying text, the view of attorneys general as captured by the plaintiff's bar is unpersuasive. While it is true that the large attorneys' fees paid in the tobacco cases were met with widespread criticism, *see, e.g.*, *'Outrageous' Tobacco Legal Fees Spark Writ Lawyers To Get $2.3 Billion*, FORT WORTH STAR-TELEGRAM, Jan. 27, 1998, at 1 METRO, the fallout comfortable bringing a lawsuit against an arbitration provider, the fear of liability would incentivize arbitration providers to use fair practices. And if one state were successful in litigation, this would help create popular support for holding the industry accountable and would pressure other attorneys general to follow suit.[123]

One can imagine that creating a system of government enforcement might spur the establishment of arbitration providers that only conduct business within one state so as to minimize the number of potential enforcement entities. However, smaller providers would have less political clout than larger actors would, minimizing the problem of regulatory capture. In addition, other market forces such as economies of scale would help keep large arbitration providers in business. These providers would be incentivized to play by the rules because of their potential liability to suits brought in any state in which they did business. To the extent that arbitration providers did tailor their behavior to the administrative environment created by state attorneys general, this could be seen as a good thing, because it would reintroduce a certain degree of state autonomy into an area in which states have been hindered from taking independent action by the Federal Arbitration Act. Attorneys general would likely be more aggressive and engender a stricter adherence to ethical standards in states where mandatory arbitration was less popular and provide

from these large settlements illustrates the democratic pressure that attorneys general face. Several challenges to the attorneys' fees were instituted and blame was cast on attorneys general who had agreed to large contingency fee arrangements. *See, e.g.*, Joseph Giordono, *Tobacco Dividend Sparks Fights; Lawyers Fees Challenged*, STATELINE (July 14, 1999), http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=13738. Actions by state attorneys general have continued to play an important role in high-profile issues. In February 2012, forty-nine state attorneys general joined a $25 billion settlement with banks over foreclosure and mortgage servicing abuses. Derek Kravitz, *States, Banks Reach Foreclosure-Abuse Settlement*, SEATTLE POST-INTELLIGENCER, Feb. 9, 2012, http://www.seattlepi.com/mount-rainier/article/States-banks-reach-foreclosure-abuse-settlement-3198884.php.

123. Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS 37 (2003), explains how attorneys general can be seen as entrepreneurs with incentives to bring politically popular and successful cases. Because the political incentives to bring cases are different in each state, attorneys general will use a wide variety of approaches. *Id.* at 45-47. Thus, we can expect the chances of regulatory capture for all of them at once to be very low. Furthermore, because they have incentives to bring successful cases, attorneys general should be expected to bring similar litigation when one of their peers is successful in another state. *Id.* at 43. Pioneering attorneys general may first bring litigation against potential bad actors within the mandatory arbitration industry. If they unearth cases of real bias and improper conduct, other attorneys general will be expected to follow suit.

less oversight in states where people preferred allowing arbitration providers more independence.

A regime of prosecutorial enforcement by multiple government actors might alternatively be attacked as too narrow or too broad. Advocates of more robust enforcement might contend that creating a private cause of action would eliminate the repeat-player problem most fully.[124] Arbitration providers would have no government officials to whom to ingratiate themselves over time, and private firms would bring cases so long as they had a chance of winning. However, because private firms cannot be expected to show the discretion of public prosecutors, this system would risk overenforcement. Under such a system, if the statute were written too broadly, then a flood of litigation would drive costs up and unfairly penalize arbitration providers. The discretion afforded by only allowing government prosecutors to bring actions would provide a political check to ensure that responsible arbitration providers are not prosecuted.

Proponents of private enforcement might argue that Congress could arrive at an appropriate standard for such a system by passing a first set of regulations and later revising them through updated statutes. However, forcing Congress to address mandatory arbitration on several successive occasions rather than in one fell swoop creates a repeat-player problem of its own. Not only would passage of multiple bills be extremely difficult in today's world of legislative gridlock, but successive bills, if passed, would likely be increasingly favorable to industry because of the concentrated industry's inherent advantages in mobilizing support across multiple congressional sessions. Thus, paradoxically, allowing for private enforcement could actually weaken enforcement powers rather than strengthen them.

Other critics might fear that allowing state attorneys general and other government litigators authorized to bring affirmative suits a course of action against mandatory arbitration providers would cause too much and too aggressive oversight. As with other parens patriae litigation, the main concern with attorney general oversight is that attorneys general will themselves be captured by the plaintiff's bar and by consumer protection groups, pursuing litigation as a means of enriching their plaintiff-lawyer cronies through contingency-fee partnerships in litigation.[125] However, this account of attorneys general as corrupt actors beholden to pro-litigation interests is

124. *See Developments in the Law—Access to Courts*, *supra* note 46, at 1180-81.

125. *See* David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315 (2001); Jack Ratliff, Parens Patriae*: An Overview*, 74 TUL. L. REV. 1847, 1858 (2000).

unconvincing.[126] When state attorneys general choose to seek the help of outside counsel, their decisions have the potential to be highly visible and highly scrutinized,[127] and a number of states require an "open and competitive bidding process" for contingency-fee arrangements.[128] In many states, attorneys general are elected, meaning that their actions must face popular scrutiny. While it is true that they may receive campaign support from plaintiffs' attorneys and consumer groups, business interests provide substantial counterweight in this process. It is precisely because they are held accountable to such a diversity of interests that attorneys general will likely administer an appropriate degree of oversight—proving less vulnerable to regulatory capture by arbitrators than other potential regulators would be, but also acting pursuant to incentives against bringing frivolous litigation.

C. Holding Drafting Parties as Well as Providers Directly Liable for Wrongdoing

Another important question raised in constructing an enforcement scheme is who should be liable when systematically biased proceedings occur. In order to most effectively incentivize fair practices in mandatory arbitration, liability should be placed directly on the business employing an arbitration provider in addition to on the arbitration provider itself. This would motivate drafting parties to choose the providers they believe to be least likely to engage in prohibited actions and would undermine all incentives for the drafting party to select a biased arbitrator, attacking the very core of the problem of unfairness in mandatory arbitration. This liability mechanism would be similar to a variety of "[o]ther legal regimes [that] extend liability from a primary wrongdoer to some other party—a 'gatekeeper' or an 'enabler'—who is in a

126. *E.g.*, Dana, *supra* note 125, at 318-19 (explaining how "[t]he AGs who negotiated contingency fee arrangements regarding tobacco were, as far as one can discern, quite sophisticated lawyers" and noting that "[t]he significant variation in the contingency agreements suggests" a bona fide negotiation of the terms and not merely passive agreement).

127. *See, e.g.*, Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629, 629-30 (2010) (referring to the high-publicity nature of many products liability suits brought by state attorneys general in the past decade).

128. Leah Godesky, Note, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COLUM. J.L. & SOC. PROBS. 587, 610 (2009) (explaining that seven states have already passed legislation requiring open and competitive bidding for contingency fees). More states are likely to follow. *See* Dana, *supra* note 125, at 319 (explaining why such controls are likely to be instituted).

position to disrupt the wrongdoing by withholding her services or cooperation, or by taking some preventive measure."[129]

Gatekeeper and vicarious liability regimes incentivize parties facing liability for wrongdoing engaged in by others to institute proactively policies that prevent violations.[130] Under Title VII, potential liability for sexual harassment claims incentivizes employers to take proactive steps so that harassment will not occur.[131] Similarly, vicarious liability has been promoted to prevent abuses at managed care organizations because applying liability to the organizations themselves would lead to "greater efforts . . . to reduce physician malpractice."[132] Placing liability directly on drafting parties would also incentivize these businesses to engage in proactive steps to prevent the hiring of biased arbitration providers. Companies would likely institute policies scrutinizing the conduct of arbitration providers before hiring, or perhaps they would require arbitration providers to guarantee fair services or indemnify the company should any liability be incurred.

Overall, several aspects of mandatory arbitration make placing liability on drafting parties as well as on providers a particularly appropriate solution for preventing biased proceedings.[133] Because detecting violations at the institutional level is fairly difficult, penalties must be high to deter wrongful behavior. But, if only arbitration providers were held liable, providers could blunt the incentive effect of the penalty by rendering themselves judgment-proof above a low amount. Companies employing arbitration providers would be less likely to do so, because they necessarily engage in a variety of business activities unrelated to the arbitration itself and thus would have less incentive to alter their business structure solely for the purpose of minimizing liability.

In addition, placing liability on drafting parties as well as on arbitration providers would greatly enhance adherence to fair practices because it would prevent a few bad actors from spoiling the entire system. A system where only

129. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 365 (2003). Gatekeeper and vicarious liability regimes are used in a variety of other contexts, including general tort law (where principal-agent liability applies) and in areas as diverse as securities fraud regulation and gun manufacturing. *Id.*

130. *Id.*

131. *Id.* at 366. Under Title VII, employers are additionally incentivized to be proactive because implementation of preventative policies may be taken as an affirmative defense to certain claims. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

132. Levinson, *supra* note 129, at 367.

133. *See generally* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986) (describing the factors that make gatekeeper liability appropriate).

arbitration providers were potentially liable would break down if even a small minority of providers engaged in banned conduct under the statute, because drafting parties may choose among many different providers. Unscrupulous and risky providers could quickly attract large amounts of business from clients seeking favorable proceedings because, unless principal-agent liability could be proven, drafting parties using their services would be immune from liability and would thus have a clear incentive to choose biased providers. This phenomenon would resemble behavior seen in illicit markets.[134] For example, in the market for illegal prescription drugs, "word about the identities of willing doctors spreads rapidly among drug abusers," so the presence of only a few doctors willing to flout the law corrupts the entire system.[135]

Drafting-party liability is also an especially attractive option in this case because data disclosed regarding arbitration decision outcomes for different providers would enable businesses to evaluate effectively whether an arbitration provider was engaging in overly risky conduct. Holding the businesses employing arbitration providers liable would also prove more effective than would holding only providers liable because businesses prefer to minimize risks in areas where they do not have expertise.[136] Because the substance of their business involves matters other than arbitration, drafting parties have significantly less incentive to engage in such risky behavior than the arbitration providers themselves do.

In addition, making drafting parties liable would reduce transaction costs by obviating the need for prosecutors to prove a principal-agent relationship, as is required for vicarious liability. Furthermore, if a principal-agent relationship were required for liability, drafting parties would be incentivized to take a hands-off attitude when they suspected that their arbitration providers were engaged in wrongdoing. Holding parties accountable even without a principal-agent relationship, by contrast, would incentivize drafting parties to take a proactive attitude to ensure fairness.

Holding drafting parties liable in this manner raises the question of what the appropriate standard by which they should incur such liability is. A regime of strict liability that automatically places liability on drafting parties if they use biased arbitrators would create the clearest incentives for drafters cautiously to select arbitration providers with fair records and would provide the lowest

134. *See generally id.* at 66-69 (describing the phenomenon of illicit markets in a variety of contexts).

135. *Id.* at 67.

136. *Cf.* René M. Stulz, *Rethinking Risk Management*, 9 J. APPLIED CORP. FIN. 8, 14-15 (1996) (explaining how firms are incentivized to take risks where they have a comparative informational advantage).

transaction costs. However, this is not the only possible option. To alleviate concerns that a drafting party might be unfairly saddled with liability despite making its best efforts to secure a fair arbitrator, a more lenient alternative approach would allow drafting parties to prove their good faith as an affirmative defense.[137]

D. Remedy

Structuring the system of liability in this manner raises the question of what the proper remedy should be. Unlike appeals addressing the unethical actions of an individual arbitrator, which raise the natural remedy of vacating the arbitrator's decision, prosecutions of arbitration providers and drafting parties that focus primarily on institutional structures and practices rather than on the facts of each individual case do not suggest a clear or natural form of relief. One possible penalty would be to vacate all of the decisions decided within some specified period for an arbitration provider that has engaged in systematically biased practices. Although perhaps providing the most just solution, this remedy is unadvisable because of the costs and delays it would create. The potential for awards to be undone would compromise the finality of the proceedings, one of the central advantages of mandatory arbitration. Furthermore, any state legislation proposing vacatur would be preempted under the FAA.[138]

Instead, a more appropriate solution would focus on the incentive structure introduced into the system. A monetary penalty large enough to make unscrupulous actions uneconomical would be ideal. Consumer protection laws across a wide range of states disincentivize actions in this manner by imposing penalties with maximums ranging from $1000 to $40,000 for each violation.[139] In its recently settled lawsuit against the National Arbitration Forum and two of the arbitrator's primary clients, the City of San Francisco alleged violation of California's Unfair Competition Law,[140] which penalizes violations with a "civil

137. In an even more lenient option, prosecutors could be required to show bad faith by the drafting party. However, given the difficulty of proving intent, this would likely render drafting party liability toothless.

138. *See infra* notes 148-150 and accompanying text.

139. Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT'L CONSUMER L. CTR. 17-18 (2009), *available at* http://www.nclc.org/images/pdf/udap/report_50_states.pdf.

140. *See* Complaint for Injunctive Relief & Civil Penalties for Violations of Business & Professions Code Section 17200, People v. Nat'l Arbitration Forum, Inc., No. CGC-08-473569 (Cal. Super. Ct. Mar. 24, 2008).

penalty not to exceed two thousand five hundred dollars ($2,500) for each violation."[141]

A similar remedy could be constructed through this formalized enforcement scheme, with the size of the civil remedy structured based on the average amount disputed in arbitration proceedings under a given provider, the number of arbitration disputes that were decided under the skewed system, and the degree of wrongdoing in which the arbitration provider engaged. Assuming even entirely self-interested companies, biased and unfair proceedings would be prevented so long as the size of the penalty multiplied by the chance of catching a bad actor would exceed the benefits gained through engaging in unfair practices multiplied by the chance of not being caught.[142] In order to ensure that all wrongdoing is punished and to most effectively deter illegal conduct, drafting parties and arbitration providers should be held jointly and severally liable for the systematically biased proceedings an arbitration provider carries out on behalf of a drafting party. Joint and several liability would cause drafting parties to be especially wary of hiring judgment-proof arbitration providers because this could leave them responsible for the entire amount of any penalties that might be incurred. Thus, arbitration providers would be incentivized against attempting to minimize their own assets in order to escape liability.

While in principle paying this remedy to the victims of unfair arbitration decisions would provide the most just solution, this could prove costly. It would require a determination identifying each victim and evaluating the amount of damages she suffered relative to other victims. Because litigation would focus on system-wide practices rather than on individual cases, evaluating each individual case could substantially increase costs or even prove impossible. Correspondence with victims and distribution of payments would also prove administratively burdensome.[143] Instead, damages should be paid to the states whose public prosecutors brought the case. By incentivizing

141. CAL. BUS. & PROF. CODE § 17206(a) (West 2008).

142. Formally represented, the system would prevent unfair practices so long as $Pr > B(1 - r)$ for either all drafting parties or all arbitration providers, or both, where P is the penalty, B is the benefit gained through unfair practices, and r is the risk of getting caught (measured on a scale of 0 to 1). The absence of perfect information could cause overconfident and unscrupulous drafting parties or arbitration providers to attempt to systematically bias proceedings (by improperly estimating this calculation), but dual liability would force any drafting party seeking to violate the law to find a similarly overconfident and unscrupulous arbitration provider in order actually to carry out those actions (and vice versa).

143. In addition, because compensating victims could be seen as tying the remedy to individual cases, it might present preemption concerns under the FAA if such a remedy were incorporated into state legislation. See *infra* notes 148-150 and accompanying text.

prosecutors to bring cases against arbitration providers operating illegally, this remedy would align with the primary purpose behind the litigation: to prevent arbitration providers from engaging in systematic bias.

Holding drafting parties liable for a monetary penalty would also raise the question of how to apportion liability among different drafting parties where a biased arbitration provider had rendered judgments for many different parties. Theoretically, any of the different liability regimes from tort law could be applied effectively, with the most logical candidates being market-share liability and joint and several liability.[144]

In addition, as they did in the actions pursued by the San Francisco City Attorney's Office and the Minnesota Attorney General's Office, prosecutors should also be permitted to negotiate injunctive remedies, forcing actors who engaged in misconduct to forfeit their ability to resolve future disputes through mandatory arbitration.[145]

E. Implementation

The best and most logical means of implementing this system of enforcement would be through a federal statute that explicitly enacted each of these reforms. Yet, in an age of congressional dysfunction, this approach may prove impossible to carry out in practice.[146] Short of federal legislative action, similar but slightly less comprehensive regimes of institutional liability for systematic bias in mandatory arbitration could potentially be implemented through two alternative means. First, states might be able to pass legislation enacting this regime on a state-by-state basis. Second, the newly created Consumer Financial Protection Bureau (CFPB) could in effect implement this

144. Note that even if a drafting party and an arbitration provider were subject to joint and several liability for the particular proceedings conducted on behalf of the drafting party (as this proposal calls for), it is still possible to cap the damages to a particular drafting party based on its market share of the overall number of proceedings conducted by the arbitration provider.

145. *See supra* note 76.

146. *Cf.* Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 481 & n.8 (2012), http://yalelawjournal.org/2012/02/14/zasloff/html (noting the "staggeringly low" level of legislative activity in the current Congress (quoting Nate Silver, *Unfavorable Ratings for Both Major Parties Near Record Highs*, FIVETHIRTYEIGHT (July 23, 2011, 5:00 AM), http://fivethirtyeight.blogs.nytimes.com/2011/07/23/unfavorable-ratings-for-both-major-parties-near-record-highs)).

system of reforms with respect to contracts covering financial products through its rulemaking authority under the Dodd-Frank Act.[147]

1. State Implementation

In the absence of federal action, states could implement laws enacting this proposed system of reforms. Although the Federal Arbitration Act poses preemption concerns with regard to most state laws that deal specifically with arbitration contracts,[148] there are good reasons to believe that a statewide regime of institution-level enforcement would be upheld. Significantly, because this regime would not jeopardize the finality of arbitration agreements, it would not directly conflict with section 2 of the FAA, which declares that arbitration awards are "valid, irrevocable, and enforceable."[149] Until recently, this section of the FAA has provided the basis for preemption in every Supreme Court decision striking down state laws governing arbitration,[150] so it is

147. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022, 124 Stat. 1376, 1980-85 (2010) (to be codified at 12 U.S.C. § 5512).

148. *See generally* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004) (presenting a four-step framework for evaluating FAA preemption, under step one of which all laws that single out arbitration contracts are subject to further scrutiny). Applying Drahozal's analysis to the proposal set forth in this Note does not provide a definitive answer as to whether or not this system of reform would be preempted under the FAA. Under step one, the law would single out arbitration agreements for different treatment than is given to other contracts, so one must proceed to step two. *See id.* at 407-11. The parties would not have expressly contracted for application of state law in many cases, so step three is applied. *See id.* at 408, 411-15. The law is not preempted under step three because the law would not invalidate the parties' arbitration agreements. *See id.* at 408, 415-16. Finally, the outcome under step four would depend on the "preemption theory" applied, leaving the results ambiguous. *See id.* at 408, 416-20.

149. 9 U.S.C. § 2 (2006).

150. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447 (2006) (describing section 2 as "the only [FAA] provision that we have applied in state court"); Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1241 (2011) ("The Court's FAA preemption jurisprudence is based entirely on section 2 of the FAA . . . ."). One court held that California's ethics standards were preempted by section 2 of the FAA because a breach of the standards allows for appeal of individual arbitral awards. Mayo v. Dean Witter Reynolds, Inc., 258 F. Supp. 2d 1097, 1116 (N.D. Cal. 2003). By letting individual arbitral decisions stand, institutional liability would not present this problem. *See also* Burns, *supra* note 62, at 1835 ("The Supreme Court has not definitively addressed the preemptive effect in state court of FAA sections other than §§ 1 [describing the scope of the FAA] and 2."). More recent decisions have implied that sections 3, 4, 9, 10, and 11 of the FAA may also have preemptive effect. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748-49, 1752-53 (2011) (holding that the FAA preempts California's class action waiver ban and basing the decision in part on sections 2, 3, and 4 of the FAA and in part on section 10 of the Act); Hall

possible that, by avoiding conflict with the enforceability of awards, a regime providing for liability on the institutional level for systematic bias could be upheld. By providing damages as a remedy for systematic bias instead of vacatur of individual awards, this system would also avoid conflict with sections 9 through 11 of the FAA, which provide procedures and grounds for vacating and modifying arbitral awards.[151] Thus, providing for liability on the institutional level may offer states a unique means of guarding against bias in mandatory arbitration in a way that does not conflict with federal policy.[152] Although statewide enforcement would be less effective than a nationwide system because it would limit the number of potential enforcers (thus increasing the risk of capture)[153] and reduce the informative value of disclosure data,[154] it would nevertheless represent a significant improvement over the status quo.

2. Implementation Through the Consumer Financial Protection Bureau

Alternatively, or in addition to state efforts, the CFPB could effectively enact this system of reforms for contracts covering financial products pursuant to its rulemaking authority under the Dodd-Frank Act.[155] "Covered person[s]" under the Act include "any person that engages in offering or providing a consumer financial product or service."[156] Thus, the CFPB's authority extends over businesses that include mandatory arbitration agreements in financial contracts. Mandatory arbitration providers themselves would qualify as "covered person[s]" assuming that arbitration services for financial contracts could be described as "a consumer financial product or service."[157] This

Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 590-92 (2008) (basing a preemption decision on sections 9 through 11 of the FAA).

151. *See* 9 U.S.C. §§ 9-11.

152. Even if a court were not to find a direct conflict with one of the FAA's provisions, it might still hold that, in creating a system of standards for arbitration providers, my regime conflicts with the FAA's "declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). However, this argument should fail because these reforms punish unfair practices in arbitration rather than arbitration itself. Ultimately, by ensuring fairness, these reforms could even increase trust in and use of mandatory arbitration.

153. *See supra* notes 122-123 and accompanying text.

154. *See supra* notes 98-101 and accompanying text.

155. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022, 124 Stat. 1376, 1980-85 (2010) (to be codified at 12 U.S.C. § 5512).

156. *Id.* § 1002(6)(A), 124 Stat. 1376, 1956 (to be codified at 12 U.S.C. § 5481).

157. *Id.*

construction seems at least plausible because consumer financial arbitration is, as its name describes, a service provided in the area of consumer finance. If arbitration providers did not qualify as "covered persons," then penalties would have to be levied solely on the drafting party rather than on the arbitration provider as well. The CFPB is required to supervise a covered person under section 1024(b)(1) of the Act so long as the Board has reasonable cause to determine under section 1024(a)(1)(C) that they are "engaging, or ha[ve] engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services."[158] Supervision under section 1024(b)(1) would require the CFPB to formulate and enact a set of disclosure requirements.[159]

The agency could provide for liability directed at systematically biased decisions under multiple prongs of the statute. It could act "to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."[160] The CFPB could determine that systematically biased arbitration is an unfair practice because it "is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and . . . such substantial injury is not outweighed by countervailing benefits to consumers or to competition."[161] The CFPB could also enact this system of liability by arguing that it falls within its authority to "prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties."[162] The CFPB could act pursuant to this section of the statute so long as it found that "such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."[163]

Significantly, regulations issued by the CFPB would be enforceable not only by federal authorities, but also by state attorneys general: "[T]he attorney

158. *Id.* § 1024(a)(1)(C), 124 Stat. at 1987 (to be codified at 12 U.S.C. § 5514).

159. *See id.* § 1024(b)(1), 124 Stat. at 1987 (to be codified at 12 U.S.C. § 5514) (requiring the CFPB to mandate reports "for purposes of . . . (B) obtaining information about the activities and compliance systems or procedures of such person").

160. *Id.* § 1031(a), 124 Stat. at 2005 (to be codified at 12 U.S.C. § 5531).

161. *Id.* § 1031(c)(1), 124 Stat. at 2006 (to be codified at 12 U.S.C. § 5531).

162. *Id.* § 1028(b), 124 Stat. at 2004 (to be codified at 12 U.S.C. § 5518). Note that, pursuant to this section, the CFPB possesses authority to prohibit entirely or severely restrict mandatory arbitration.

163. *Id.*

general (or the equivalent thereof) of any State may bring a civil action . . . to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law."[164] Thus, the CFPB could effectively enact each portion of this system of reforms by acting pursuant to its authority under different sections of the Dodd-Frank Act.[165]

F. Cost and Efficiency of an Effective Enforcement Regime

Enforcing this set of standards to ensure fair mandatory arbitration proceedings would not be cost-free. However, it would be sufficiently inexpensive so as to preserve the potential for mandatory arbitration to provide a more efficient alternative to traditional litigation, especially in cases, such as those in the consumer context, where procedural costs are high relative to claim size.

Costs associated with data disclosure would be among the primary costs associated with creating a regime for effective mandatory arbitration enforcement. But, as discussed above in Section III.D, only a very limited amount of data would need to be gathered in each case. Nearly all the data to be recorded are likely already catalogued according to arbitration providers' own internal procedures, so requiring arbitration providers to make these data publicly available would not add a significant burden to the process. California's arbitration providers have been able to comply with newly instituted data disclosure requirements without apparent difficulty, suggesting that the process is not overly demanding.[166]

Next, making mandatory arbitration fairer would inherently make the process more costly insofar as procedures enacted by drafting parties and arbitration providers to ensure fairness create new costs. Arbitration providers would have to scrutinize their hiring decisions more closely to ensure that case outcomes were not playing a role. Requiring arbitrators to adhere to higher

164. *Id.* § 1042(a)(1), 124 Stat. at 2012 (to be codified at 12 U.S.C. § 5552).

165. It should be noted that the Federal Trade Commission (FTC) might also be able to enforce liability for systematic bias in mandatory arbitration through its broad power to outlaw unfair trade practices. *See* 15 U.S.C. § 45 (2006). However, while the FTC's actions would not be limited to the financial products area, only the FTC (and not state attorneys general) could institute proceedings to enforce penalties for "unfair practices," as defined by the FTC. *See* 15 U.S.C. § 45(m). Thus, a regime of liability enforced by the FTC would be more subject to regulatory capture.

166. Unfortunately, there is a general lack of information regarding the exact cost of compliance with California's disclosure requirements.

ethical standards would undeniably introduce some costs, as it has in California.[167] Arbitration providers might find it more difficult to attract arbitrators willing to comply with conflict-of-interest disclosure requirements. And introducing liability would cause drafting parties to engage in greater scrutiny of arbitration providers, thus increasing their expenses associated with choosing a firm. Still, each of these impositions would occur at the institutional level and would be minimal in comparison to the procedural costs associated with appeals of individual cases.

Finally, instituting a liability regime would impose costs associated with the procedure of bringing cases of institutional bias. However, consolidating actions challenging the fairness of arbitration providers into single cases alleging systematic abuse would allow for many efficiency gains. Discovery regarding individual cases of bias would only be necessary to the extent required to prove a pattern of bias. Such discovery would focus mainly on arbitration providers' internal documents dealing with systematic practices and on general data regarding decisional outcomes, so careful scrutiny of each individual decision would be unnecessary. Furthermore, creating a cause of action enforceable by a discrete number of individuals would incentivize organic bargaining to create an efficient system of self-enforcement. Litigation would likely arise only when negotiation and self-regulation failed to prevent systematic bias. By restricting costly litigation to these rare cases and consolidating allegations of abuse into institutional actions, this liability regime would preserve the inherent structural efficiency advantages enjoyed by mandatory arbitration. In addition, by restricting enforcement to institutional actions, this enforcement regime would maintain the finality of original decisions and would thus preserve all of mandatory arbitration's potential for swifter decisional outcomes.

CONCLUSION

Overall, mandatory arbitration is a potentially valuable institution, particularly for situations involving many relatively small claims and high costs of litigation, where consumers are discouraged from bringing litigation even for possibly meritorious claims. It offers a potentially more efficient alternative to litigation by lowering costs for all parties involved, allowing more consumers and employees to bring their claims and decreasing the backlog of cases that our judicial system faces.

167. *See* Glick, *California Arbitration Reform*, *supra* note 97, at 129-30.

Yet mandatory arbitration is rife with the potential for abuse. Businesses drafting arbitration clauses are incentivized to choose arbitration providers who are more likely to rule in their favor. Because regulation, enforcement, and even a basic set of substantive standards by which arbitration providers must abide are lacking, businesses that select biased arbitrators face few consequences. Preventing cases of widespread bias is imperative because of the growing importance of mandatory arbitration to our legal system. The proposed enforcement scheme outlined in this Note would prevent mandatory arbitration's use as a general means of skewing dispute resolution proceedings in favor of corporate drafters of these clauses and would allow arbitration to become more purely what it promises to be: a system for making more efficient adjudicatory decisions.