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3-1-2011

## Arbitrating Arbitrability: How the U.S. Supreme Court Empowered the Arbitrator at the Expense of the Judge and the Average Joe

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### Recommended Citation

Jennifer Schulz, *Arbitrating Arbitrability: How the U.S. Supreme Court Empowered the Arbitrator at the Expense of the Judge and the Average Joe*, 44 Loy. L.A. L. Rev. 1269 (2011).  
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**ARBITRATING ARBITRABILITY:  
HOW THE U.S. SUPREME COURT  
EMPOWERED THE ARBITRATOR AT THE  
EXPENSE OF THE JUDGE AND THE  
AVERAGE JOE**

*Jennifer Schulz\**

INTRODUCTION

Over the past twenty years, the use of mandatory pre-dispute arbitration clauses has grown exponentially. These clauses permeate the economy: they appear in contracts with cell phone providers, credit card companies, employers, and even nursing homes.<sup>1</sup> In its recent ruling in *Rent-a-Center, West, Inc. v. Jackson*,<sup>2</sup> the U.S. Supreme Court created new obstacles for plaintiffs seeking to bring claims to court when an arbitration agreement is involved. Prior to this decision, the party seeking to compel arbitration bore the burden of establishing that there was a valid agreement to arbitrate. Now the party looking to go to court has the burden of proving the arbitration agreement invalid—a seemingly impossible task given the Court’s new requirements.

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\* J.D. 2011, Loyola Law School Los Angeles; B.S. Architecture 2004, University of Virginia. I would like to thank the editors and staff of the *Loyola of Los Angeles Law Review* for their hard work on this Comment and the Supreme Court issue. I owe my gratitude to Professor David Horton for his guidance and support in writing this Comment. Special thanks go to Elena DeCoste Grieco, Kristin Olin, and Jeff Payne—for everything. Finally, I would like to thank my family for all their support.

1. See Mark Thomsen, *Companies Sneaky with Arbitration Clause*, COULEE NEWS (Sept. 9, 2009, 12:00 AM), [http://lacrossesribune.com/couleenews/news/opinion/article\\_2458168e-8c24-5098-945f-b26ed3594b21.html](http://lacrossesribune.com/couleenews/news/opinion/article_2458168e-8c24-5098-945f-b26ed3594b21.html). In 2007, 40 percent of the 45 million members of the nonunion workforce were working under employment contracts calling for arbitration. David Lewin, *Workplace ADR: What’s New and What Matters?*, in *ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT* 23, 27 (Stephen F. Befort & Patrick Halter eds., 2007). Interestingly, consumers are never subject to mandatory pre-dispute binding arbitration outside of the United States; in fact, the European Union would probably prohibit such a practice. EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 138–40 (2006).

2. 130 S. Ct. 2772 (2010).

The arbitration agreement in *Rent-a-Center* included a provision granting the arbitrator authority to decide all issues, including those relating to the arbitration procedures and to the agreement's validity.<sup>3</sup> These issues are about the claim's arbitrability—that is, whether the parties agreed that a particular claim would be subject to arbitration.<sup>4</sup> The ruling makes it even harder for the Average Joe to bring his case before an impartial judge or a jury of his peers. For the average American, whose only familiarity with the judicial process probably comes from television shows like *Law & Order*, mandatory arbitration is an unpleasant surprise. Most Americans' fundamental comprehension of the U.S. legal system includes the right to a jury of their peers.

This Comment argues that the Court's ruling will negatively affect the rights of ordinary Americans and that Congress needs to amend the eighty-six-year-old Federal Arbitration Act<sup>5</sup> (FAA or "the Act")—or otherwise step in to prevent businesses from using their superior bargaining power to take advantage of employees and consumers.<sup>6</sup> Part I of this Comment lays out the historical framework of arbitration in the United States. Part II describes *Rent-a-Center*'s facts and its path to the Supreme Court. Part III discusses the Court's holding and the reasoning behind it. Part IV analyzes the decision and proposes that Congress amend the FAA.

## I. A BRIEF HISTORY OF SUPREME COURT ARBITRATION JURISPRUDENCE

In the early twentieth century, federal judges commonly treated arbitration clauses as revocable at will<sup>7</sup> and generally would not

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3. *Id.* at 2777.

4. "Arbitrability generally deals with the question of whether parties have agreed to arbitrate a dispute, the scope of that agreement, and the more 'arcane' question of who decides those two issues." Richard C. Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 828 (2003).

5. 9 U.S.C. §§ 1 et seq. (2006).

6. Congress has not amended the FAA to keep up with the Court's decisions. See Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1083 (2009).

7. See Andre V. Egle, Comment, *Back to Prima Paint Corp. v. Flood & Conklin Manufacturing Co.: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement*, 78 WASH. L. REV. 199, 202 (2003).

order specific performance of arbitration agreements.<sup>8</sup> In 1925, Congress enacted what is now the FAA in response to the federal courts' reluctance to enforce arbitration agreements.<sup>9</sup> Congress indicated that the purpose of the FAA was to promote a federal policy of encouraging arbitration, thereby helping businesses reduce expense and delay when resolving disputes.<sup>10</sup> To that end, the FAA requires judicial enforcement of arbitration agreements.<sup>11</sup> Through section 2 of the FAA ("section 2"), Congress declared arbitration contracts to be on "the same footing as other contracts."<sup>12</sup> After the FAA passed, courts treated arbitration clauses as valid, irrevocable, and enforceable unless there were some ground for revocation that would apply to any contract.<sup>13</sup> Section 2 thus prevented courts from treating arbitration clauses as a special category of contracts subject to a different set of rules.

Forty years after Congress passed the FAA, the Supreme Court made its first major decision under the Act. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>14</sup> the Supreme Court had to decide "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or . . . referred to the arbitrators."<sup>15</sup> The Court read section 4 of the FAA ("section 4") to provide an "explicit answer":

[T]he federal court is instructed [by section 4] to order arbitration to proceed once it is satisfied that the "making of the agreement for arbitration . . . is not in issue."

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8. BRUNET ET AL., *supra* note 1, at 36. They would, however, award damages for breach. *Id.*

9. Peter Feuille & Michael H. LeRoy, *Where Is the New Enterprise Wheel? Judicial Review of Employment Arbitration Awards*, in *ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT*, *supra* note 1, at 339, 348.

10. *See id.*

11. *See id.* at 349.

12. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting H.R. REP. NO. 68-96, at 2 (1924)). Section 2 states, in pertinent part, as follows:

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

9 U.S.C. § 2 (2006).

13. 9 U.S.C. § 2.

14. 388 U.S. 395 (1967).

15. *Id.* at 402.

Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.<sup>16</sup>

The Court treated the arbitration clause at issue as though it were separate from the “container” contract of which it was a part.<sup>17</sup> This interpretation confirmed the separability doctrine, a legal fiction that the parties formed two contracts: the container contract and a second contract consisting of just the arbitration clause.<sup>18</sup> This second contract often calls for arbitration of issues regarding the validity of its container contract, thus granting power to the arbitrator to decide the merits of whether the container contract is enforceable.<sup>19</sup>

Nearly thirty years later, the Court used a seemingly different standard in *First Options of Chicago, Inc. v. Kaplan*:<sup>20</sup> there, the Court decided that an arbitrator—rather than a judge—would decide whether the parties agreed to arbitration only where “clear and unmistakable” evidence demonstrates that both parties agreed to arbitrate arbitrability.<sup>21</sup> The Court reasoned that the general presumption in favor of arbitration should give way in cases in which permitting an arbitrator to determine arbitrability might “too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.”<sup>22</sup>

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16. *Id.* at 403–04.

17. Stephen J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 109 (2007).

18. *Id.* Although some courts use the term “severability” instead of “separability,” the two are basically interchangeable. For consistency, this Comment will use the term “separability.”

19. *See id.* at 109–10. According to Justice Black’s vigorous dissent, the FAA is clear in its intent that an arbitration agreement should be enforced unless the *court*—not the arbitrator—finds grounds for its revocation. *Prima Paint*, 388 U.S. at 412 (Black, J., dissenting).

20. 514 U.S. 938 (1995). The Court laid out the parties’ disagreements this way:

First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for [their company]’s debt to First Options. That disagreement makes up the *merits* of the dispute. Second, they disagree about whether they agreed to arbitrate the merits. That disagreement is about the *arbitrability* of the dispute. Third, they disagree about *who should have the primary power to decide the [arbitrability]*.

*Id.* at 942.

21. *Id.* at 944.

22. *Id.* at 945. The Court indicated that this difference was important because parties contracting for arbitration have likely given some thought to the scope of arbitration but might

Prior to *Rent-a-Center*, the most recent case on the issue of arbitrability was *Buckeye Check Cashing, Inc. v. Cardegna*.<sup>23</sup> The Court distinguished between a challenge to the arbitration agreement specifically (which goes to the court) and a challenge to the contract as a whole (which goes to the arbitrator).<sup>24</sup> In *Buckeye*, the contracts' identical arbitration provisions were separable under *Prima Paint* and therefore enforceable apart from the remainder of the contracts, even if the contracts as a whole were found to be void.<sup>25</sup> The plaintiffs should have specifically challenged the arbitration clause if they wanted a court to hear their claims.

As a result of these decisions, when *Rent-a-Center* came before the Court in 2010, there seemed to be two distinct methods of determining arbitrability claims. Under *Prima Paint* and *Buckeye*, the presumption in favor of enforcing arbitration clauses requires the plaintiff to expressly challenge the validity of the arbitration agreement itself before a court will hear the case. *First Options*, however, has the opposite presumption—one against arbitrating arbitrability—and requires the court to determine whether the party wishing to compel arbitration has shown clear and unmistakable evidence that the parties agreed to arbitrate. In *Rent-a-Center*, the Court resolved the conflict created by these cases.

## II. STATEMENT OF THE CASE

Antonio Jackson (“Jackson”), an African American man, worked for Rent-a-Center West, Inc. (RAC) in Reno, Nevada.<sup>26</sup> Like many corporations, RAC required that each of its employees agree to

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not realize the significance of having an arbitrator determine the scope of his own power. *Id.*

The Court further defined its exception to the general federal policy favoring arbitration agreements in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). There, the Court explained that when “questions of arbitrability” reference the gateway matter of whether the parties actually agreed to arbitrate (e.g., whether the parties are bound by a given arbitration clause), the questions go to the court. *Id.* at 83–84. In instances in which the parties would likely expect the arbitrator to decide the issue, such as whether a claim has been waived or whether a condition precedent to arbitration has been fulfilled, the question goes to the arbitrator. *Id.* at 84.

23. 546 U.S. 440 (2006). This was a class action suit against a payday lender for using illegal practices that would render its agreements with the plaintiffs invalid. *Id.* at 443.

24. *Id.* at 444, 449.

25. *Id.* at 446.

26. Complaint and Jury Demand at ¶¶ 1, 3, Jackson v. Rent-a-Center West, Inc., No. 03:07-CV-0050-LRH, 2007 WL 7030394 (D. Nev. June 7, 2007) [hereinafter Complaint].

arbitrate all disputes,<sup>27</sup> and Jackson signed RAC's Mutual Agreement to Arbitrate Claims ("the Agreement") on the day he was hired.<sup>28</sup> The Agreement stated that RAC and Jackson consented to arbitrate all past, present, and future claims, including discrimination claims, and gave the arbitrator exclusive authority to resolve disputes regarding the interpretation, applicability, enforceability, or formation of the Agreement.<sup>29</sup>

During his employment with RAC, Jackson sought promotions on multiple occasions, but RAC repeatedly denied him.<sup>30</sup> RAC instead promoted non-African American employees with less seniority than Jackson.<sup>31</sup> Jackson filed a complaint for racial discrimination and retaliation in federal court.<sup>32</sup> RAC moved to dismiss the proceedings and compel arbitration, arguing that the Agreement precluded him from pursuing his claims in court;<sup>33</sup> in response, Jackson argued that the Agreement was unconscionable and therefore unenforceable.<sup>34</sup> The district court granted RAC's motion:<sup>35</sup> because Jackson had challenged the Agreement as a whole, the question of arbitrability was for the arbitrator and not the court.<sup>36</sup>

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the enforceability of an agreement to arbitrate arbitrability is for the court—not the arbitrator—to decide, even if the contract delegates that determination to the arbitrator.<sup>37</sup> The court

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27. Declaration of Steven A. Spratt at ¶ 3, *Rent-a-Center*, 2007 WL 7030394 (No. 03:07-CV-0050-LRH), 2010 WL 723713 at \*27.

28. Respondent Antonio Jackson's Brief in Opposition to Petition for Writ of Certiorari at 2, *Rent-a-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497).

29. *Rent-a-Center, Inc. Mutual Agreement to Arbitrate Claims*, Exhibit 1 Attached to Motion to Dismiss Proceedings and Compel Arbitration, *Rent-a-Center*, 2007 WL 7030394 (No. 3:07-CV-0050-LRH), 2010 WL 723713 at \*29–34.

30. Complaint, *supra* note 26, at ¶¶ 5–6.

31. *Id.* at ¶ 6. Jackson was promoted eventually, only to be terminated two months later. *Id.* at ¶ 11.

32. *Id.* at ¶¶ 14–20.

33. Motion to Dismiss Proceedings and Compel Arbitration at 2, *Rent-a-Center*, 2007 WL 7030394 (No. 03:07-CV-0050-LRH).

34. Opposition to Motion to Compel Arbitration and for Attorney Fees at 2, *Rent-a-Center*, 2007 WL 7030394 (No. 03:07-CV-0050-LRH).

35. *Rent-a-Center*, 2007 WL 7030394, at \*3. The court reasoned that the Agreement "clearly and unmistakably [sic] provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable." *Id.* at \*2.

36. *Id.*

37. *Jackson v. Rent-a-Center West, Inc.*, 581 F.3d 912, 919 (9th Cir. 2009), *rev'd*, 130 S. Ct. 2772 (2010).

found it significant that the Agreement was not simply a clause within a larger container contract; rather, it was a freestanding agreement to arbitrate.<sup>38</sup> The Ninth Circuit interpreted *First Options* as requiring courts to apply “ordinary state-law principles” in deciding whether the parties had agreed to arbitrate arbitrability.<sup>39</sup> Therefore, when “a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court.”<sup>40</sup>

### III. THE COURT’S DECISION

In a 5–4 decision, the Supreme Court overruled the Ninth Circuit, holding that because Jackson did not challenge the specific provision granting the arbitrator authority to resolve any dispute regarding the Agreement’s enforceability, the Court had to treat that provision as separable, rendering it valid and enforceable.<sup>41</sup> Therefore, the arbitrator could determine arbitrability—and, necessarily, his own jurisdiction.<sup>42</sup> The majority<sup>43</sup> framed the issue as whether the sentence stating that the arbitrator has exclusive authority to resolve disputes about the Agreement’s enforceability—the “delegation provision”—was valid under section 2.<sup>44</sup>

Under section 2, a party may challenge the validity of an arbitration agreement in two ways: either by specifically challenging the validity of the agreement to arbitrate or by challenging the contract as a whole.<sup>45</sup> The Court stated that only the former allows a court to determine an arbitration agreement’s enforceability and that as a matter of federal law, an arbitration provision is separable.<sup>46</sup>

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38. *Id.* at 915–16.

39. *Id.* at 917 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

40. *Id.*

41. *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010).

42. *Id.*

43. Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, wrote the majority opinion. *Id.* at 2774.

44. *Id.* at 2778 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)). This section requires courts to enforce arbitration agreements according to their terms, unless “generally applicable contract defenses, such as fraud, duress, or unconscionability” invalidate the agreements. *Id.* at 2776 (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). For the text of section 2, see *supra* note 12.

45. *Rent-a-Center*, 130 S. Ct. at 2778.

46. *Id.* (citing *Buckeye*, 546 U.S. at 445).



Thus, a plaintiff must direct a challenge specifically at the agreement to arbitrate for a court to intervene; if a party challenges another contract provision or the contract as a whole, the court can enforce an agreement to arbitrate.<sup>47</sup> The Court further explained that it was of no consequence that the entire contract was an arbitration agreement (rather than a contract unrelated to arbitration that merely included an arbitration clause)—the delegation provision was still separable from the remainder of the arbitration agreement.<sup>48</sup> Because Jackson challenged the validity of the Agreement as a whole, an arbitrator, not a judge, had to hear his claim.<sup>49</sup>

In one of his last written opinions, Justice Stevens dissented<sup>50</sup> and claimed that the majority's "breezy assertion that the subject matter of the contract at issue—in this case, an arbitration agreement and nothing more—'makes no difference' . . . [was] simply wrong."<sup>51</sup> He argued that certain issues—particularly those that the parties would likely expect a court to decide—remain within the province of judicial review even though the FAA allows parties to define the scope of arbitration agreements.<sup>52</sup> Thus when parties have included a delegation provision, courts must decide whether that provision is valid.<sup>53</sup> Justice Stevens concluded that questions of arbitrability should go to the arbitrator in only two circumstances: "(1) when the parties have demonstrated, clearly and unmistakably, that it is their intent to [send such questions to the arbitrator]; or (2) when the validity of an arbitration agreement depends exclusively on the validity of the [entire] substantive contract of which it is a part."<sup>54</sup>

Justice Stevens, therefore, would have relied on *First Options*<sup>55</sup> alone, as Jackson's claim that the Agreement is unconscionable shows that he did not clearly or unmistakably intend to allow the arbitrator to determine arbitrability.<sup>56</sup> By expanding the *Prima Paint*<sup>57</sup>

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47. *Id.*

48. *Id.* at 2779.

49. *Id.*

50. He was joined by Justices Ginsburg, Breyer, and Sotomayor. *Id.* at 2781 (Stevens, J., dissenting).

51. *Id.* at 2781–82.

52. *Id.* at 2782.

53. *Id.* at 2783.

54. *Id.* at 2784.

55. *See supra* notes 20–22 and accompanying text.

56. *Id.*

rule,<sup>58</sup> however, the majority required Jackson to use greater specificity and challenge the exact sentence delegating such disputes to the arbitrator,<sup>59</sup> even though in Jackson’s case, “any challenge to the contract itself [was] also, necessarily, a challenge to the arbitration agreement. They [were] one and the same.”<sup>60</sup>

#### IV. HOW THE COURT GOT IT WRONG

To most Americans, the Court’s decision seems irrational—if a party did not agree to an arbitration agreement as a whole, how could he agree to any of the agreement’s provisions? There is a general sense that “[i]f an agreement to arbitrate is unfair, the arbitrator shouldn’t decide that question.”<sup>61</sup> The Court’s decision is more than simply illogical, however. It follows neither the FAA nor Congress’s intent in enacting the FAA and Congress must act to reverse the Court’s ever-increasing embrace of mandatory pre-dispute arbitration.<sup>62</sup>

##### *A. The Decision Does Not Follow the FAA*

The Court has “recast arbitration in an activist set of cases that largely ignore careful legislative history and even the explicit words of the FAA.”<sup>63</sup> It is well settled that arbitration is a matter of contract,<sup>64</sup> and arbitration agreements should be as enforceable as

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57. See *supra* notes 14–19 and accompanying text.

58. It is interesting to note that this line of cases was not briefed by the parties or relied on by the Ninth Circuit. *Id.* at 2785. In fact, even RAC itself suggested that the Court should follow *First Options*. Reply to Opposition to Petition for a Writ of Certiorari at 4, *Rent-a-Center*, 130 S. Ct. 2772 (No. 09-497) (“In this case, *First Options* is front and center.”).

59. *Rent-a-Center*, 130 S. Ct. at 2787.

60. *Id.*

61. See Ameet Sachdev, *High Court Sides with Businesses on Arbitration Case*, CHI. TRIB., June 22, 2010, at C17 (quoting Karen Halverson Cross, professor at John Marshall Law School).

62. This Comment criticizes mandatory pre-dispute arbitration clauses in consumer and employment contexts. Although liberally applying the FAA has effectively cleared dockets, consumer and employee claims constitute a disproportionate majority of the dismissed cases. *Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 84 (2007) (statement of David S. Schwartz, University of Wisconsin Law School) [hereinafter Schwartz, *Mandatory Binding Arbitration Agreements*].

63. BRUNET ET AL., *supra* note 1, at 1.

64. In fact, this argument is used by those favoring the Court’s decision: a contract is an exercise of choice by the parties, and those who agree to use arbitration should not be allowed to go to court. Timothy Sandefur, *Rent-a-Center v. Jackson: Supreme Court Upholds the Right to Contract for Arbitration*, PLF LIBERTY BLOG (June 21, 2010, 7:46 AM), <http://plf.typepad.com/>

other contracts—but not more so.<sup>65</sup> Consequently, parties can certainly agree, as they often do, to resolve disputes through arbitration; they can even agree to have the arbitrator rule on his or her own jurisdiction. Jackson claimed, however, that forcing him to argue his dispute in front of an arbitrator required him to abide by an invalid contract. According to *Prima Paint*, Jackson needed only to allege that he did not agree to the arbitration clause.<sup>66</sup> The Court required more of him, however, and in doing so, turned our constitutional tradition of access to the courts on its head.<sup>67</sup>

### 1. The Making of the Arbitration Agreement Was in Issue

Unlike the *Prima Paint* contract—where the contract was a detailed expression of the parties’ entire understanding, and the agreement to arbitrate was only one clause<sup>68</sup>—the *Rent-a-Center* agreement to arbitrate was the entire contract. As the dissent argued, this fact should have made a difference in the Court’s analysis.<sup>69</sup>

Section 4 *requires* courts to hear disputes if the making of the arbitration agreement is in issue.<sup>70</sup> Jackson challenged the Agreement as unconscionable, a finding that depends on the circumstances at the

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plf/2010/06/rentacenter-v-jackson-supreme-court-upholds-the-right-to-contract-for-arbitration.html. That, however, is exactly Jackson’s argument: he did not agree to arbitration.

Interestingly, although arbitration is a matter of contract, parties cannot contractually customize the legal standard of review for an arbitration award. *See infra* note 78.

65. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). The National Association of Consumer Advocates (NACA) argued that the rule creates a “federal common law rule of self-enforcement that applies only to arbitration clauses and overrides the state-law requirements applying to all other contracts,” thereby doing the opposite of the FAA’s intent of putting arbitration clauses on the same footing as other contracts. Brief of National Association of Consumer Advocates as Amicus Curiae in Support of Respondent at 4, *Rent-a-Center*, 130 S. Ct. 2772 (No. 09-497) [hereinafter NACA Brief].

66. The Agreement was just one piece of Jackson’s employment contract with RAC, and Jackson challenged only the Agreement. Respondent Antonio Jackson’s Brief in Opposition to Petition for Writ of Certiorari at 6, *Rent-a-Center*, 130 S. Ct. 2772 (No. 09-497).

67. *See* David H. Gans, *Why the Supreme Court’s Decision in Rent-a-Center v. Jackson Matters*, TEXT & HIST. BLOG (June 22, 2010), <http://theusconstitution.org/blog.history/?p=1785>.

68. Also, the contract in *Prima Paint* was between two businesses of arguably equal bargaining power, not between an employer and an employee. *See Prima Paint Corp.*, 388 U.S. at 397–98.

69. *Rent-a-Center*, 130 S. Ct. at 2782.

70. 9 U.S.C. § 4 (2006). Prior to the *Rent-a-Center* decision, some commentators suggested that the only thing a party needed to do to put the “making” in issue was to invoke a contract defense like unconscionability. David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. IN BRIEF 1, 8 (2010), <http://www.virginialawreview.org/inbrief/2010/04/02/horton.pdf>.

time of contract formation.<sup>71</sup> Therefore, in Jackson’s case, the “making of the agreement” was, in fact, in issue.<sup>72</sup> Nevertheless, the Court found that because Jackson did not specifically challenge the delegation clause, the Agreement’s making was not in issue.<sup>73</sup> This decision abolishes section 4’s judicial review requirement and essentially allows private parties to unilaterally alter substantive and procedural rights without meaningful state oversight.<sup>74</sup>

## 2. It Is Unclear If a Plaintiff Can Ever Make the Required Showing

While section 2 indicates that arbitration clauses are “valid, irrevocable, and enforceable” unless separate grounds to revoke the contract exist,<sup>75</sup> the Court’s decision makes arbitration clauses enforceable notwithstanding possible grounds for revocation. The Court treated the Agreement between Jackson and RAC as if it had two discrete parts: the first required arbitration of all disputes, and the second required the arbitrator to decide any challenge to the Agreement’s validity. Essentially, the Court claimed that the fifty-word delegation clause constituted a second agreement to which Jackson knowingly and willingly agreed even if he did not agree to the rest of the Agreement.

This conclusion is hard to understand: by separating an agreement into a potential multitude of independent sentences—each allegedly agreed to on its own—rather than treating it as a whole, the Court read the FAA to “establish[] a near-bulletproof presumption of validity for all arbitration clauses.”<sup>76</sup> This reading requires a party

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71. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

72. One could argue that unconscionability does not involve the making of the agreement: unlike defenses such as duress that hinge on an inability to meaningfully assent to the making of the contract, unconscionability prohibits unfairness.

73. *Rent-a-Center*, 130 S. Ct. at 2779.

74. See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 441 (2011). A delegation clause uses section 2 to trump another part of the FAA, section 4. *Id.* at 484.

75. 9 U.S.C. § 2 (2006).

76. Justice Scalia exploited the principle of separability to find that sub-arbitration agreements may be embedded within a larger arbitration agreement and that each of those embedded agreements are separable. This means that an aggrieved party must challenge each sub-provision directly and individually. See James M. Gaitis, *Rent-a-Center, West, Inc. v. Jackson and the Ongoing Assault on Party Autonomy*, KARL BAYER BLOG (June 23, 2010), <http://www.karlbayer.com/blog/?p=9732>. Holding the delegation clause enforceable even if the remainder of the arbitration agreement is unconscionable treats the agreement as a collection of separately enforceable mini-agreements, each individually considered and assented to by the parties. Justice Stevens’ dissent likened such a situation to a set of Russian nesting dolls. *Rent-a-Center*, 130 S. Ct. at 2786 (Stevens, J., dissenting).

challenging a contract to prove that the delegation provision in and of itself is revocable, but how can one ever offer such proof for a single sentence taken out of context?<sup>77</sup> By making it virtually impossible for parties to prove a delegation clause's invalidity, *Rent-a-Center* precludes parties from obtaining judicial review of arbitration clauses alleged to be unfair or unconscionable.<sup>78</sup>

Companies now can (and likely will) insert similar language in employment agreements, secure in the knowledge that if an employee fails to challenge the delegation provision specifically, the employee will be compelled to arbitrate.<sup>79</sup> With this change, access to the courts appears to be a privilege granted by an employer rather than a constitutionally guaranteed right. The Average Joe will increasingly find himself forced into arbitration even when he did not knowingly relinquish his right to judicial review.

### 3. The FAA Was Not Meant for Employment Contracts

Not only does the *Rent-a-Center* Court's decision not comply with sections 2 or 4, but it also does not comport with the FAA's legislative history. Congress originally intended the FAA to protect the contractual decisions of commercial parties with similar

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77. Courts often invalidate arbitration clauses due to infringement of substantive rights, but a delegation provision waives a procedural right (the right to have a judge hear the claim). Horton, *supra* note 74, at 468. In order for a plaintiff to prove that a delegation provision infringes on a substantive right, he must show not only that will it be harder for him to pursue his cause of action but also that the arbitrator will enforce the delegation provision, and courts are unlikely to engage in this amount of speculation. *Id.* Clearly, the additional showing a plaintiff must make dramatically increases his or her burden, and even Justice Scalia seemed to concede that if Jackson had challenged the "correct" part of the Agreement, he still probably would have lost. *See id.* at 467.

78. *See id.* When a court reviews an arbitral award, the arbitrator's decision is entitled to deference even if that decision determines the validity of the agreement. BRUNET ET AL., *supra* note 1, at 42. Thus, most awards survive judicial review. *See* Feuille & LeRoy, *supra* note 9, at 341–42. Professor David Horton describes delegation clauses like the one in the RAC Agreement as "private procedural rulemaking" that "change arbitration from an alternative to litigation to a parallel, private judicial system in which [companies] make the rules." Horton, *supra* note 74, at 465.

As section 10 of the FAA provides four exclusive grounds for vacating an arbitral award (fraud, arbitrator bias, arbitrator misconduct, and arbitrators exceeding their power), parties cannot contract for any additional grounds for vacatur. *See* 9 U.S.C. § 10; Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 585 (2008).

79. *See* Horton, *supra* note 74, at 490–91. More disconcerting yet, plaintiffs may not even be aware that their contracts include such delegation clauses. *Id.* at 490. Many contracts incorporate by reference the rules of a major arbitral provider like the American Arbitration Association. *Id.* Such rules often empower the arbitrator to rule on his or her own jurisdiction. *Id.*

bargaining power and levels of sophistication.<sup>80</sup> Indeed, the FAA's plain language demonstrates that Congress did not intend for it to extend to employment contracts. Section 1 states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>81</sup> At the time of the FAA's enactment, these were the only employment relationships subject to federal jurisdiction.<sup>82</sup> Between the early 1960s and the mid-1990s, however, Congress passed a number of statutes regulating the workplace, and between 1980 and 2005, federal litigation concerning employment disputes increased 600 percent.<sup>83</sup> Congress needs to amend the FAA to reflect the federal government's more prominent role in the employment arena.

*B. In Employment and Consumer Settings,  
Courts Should Always Hear Arbitrability Challenges*

By eliminating judges' ability to strike down unconscionable arbitration provisions, the Court has abolished an important check on companies imposing mandatory pre-dispute arbitration in order to gain an unfair advantage in disputes. As a result, consumers and employees now have more difficulty ensuring that their disputes with companies and employers are fairly heard.<sup>84</sup> A company has much to gain and little to lose from inserting unconscionable provisions in standard employment contracts that the Average Joe will, for all intents and purposes, be forced to sign. Drafters can make mandatory arbitration clauses self-enforcing merely by indicating that an

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80. Historically, businesses did not enter into arbitration agreements with consumers, and the legislative history of the FAA shows that Congress did not think the business-consumer setting was an appropriate place for arbitration. See BRUNET ET AL., *supra* note 1, at 127.

81. 9 U.S.C. § 1.

82. *Mandatory Binding Arbitration: Is It Fair and Voluntary?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 92 (2009) (statement of Cliff Palefsky, National Employment Lawyers Association) [hereinafter Palefsky, *Mandatory Binding Arbitration*].

83. Lewin, *supra* note 1, at 26.

84. Brief of National Consumer Law Center and Consumer Action as Amici Curiae in Support of Respondent at 12, *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497) [hereinafter Brief of National Consumer Law Center]. For a discussion in support of mandatory arbitration, see Jean Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1653-58 (2005) (explaining that defenses include that employees and consumers have better access to arbitration than they have to courts, and that arbitration on a post-dispute basis is not feasible).

arbitrator will decide challenges to the clause's validity.<sup>85</sup> Companies will be "free to impose one-sided terms or select clearly biased arbitrators with close ties to the company, secure in the knowledge that any challenge to the fairness of arbitration will be decided by the arbitrator whose very authority comes from the challenged arbitration agreement."<sup>86</sup>

Arbitration has traditionally been agreed to by two knowing business entities of presumably comparable strength. Parties to employment and consumer contracts, however, almost always have unequal bargaining power.<sup>87</sup> These employees and consumers are often presented with take-it-or-leave-it contracts of adhesion that leave little room for negotiation,<sup>88</sup> and "judicial review for unconscionability operate[d] as a sort of safety valve that ma[de] arbitration of consumer and employment disputes palatable."<sup>89</sup> Judges could take the parties' relative bargaining power into account when deciding whether the parties had knowingly agreed to allow the arbitrator to decide if arbitration should proceed. This safety valve has been eliminated.

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85. NACA Brief, *supra* note 65, at 4. NACA argued further that these clauses would be "subject to no law whatsoever." *Id.* at 6.

86. Deepak Gupta, *Supreme Court Decides Rent-a-Center v. Jackson: Companies Can Delegate Unconscionability Challenges to the Arbitrator*, CONSUMER L. & POL'Y BLOG (June 21, 2010, 4:28 PM), <http://pubcit.typepad.com/clpblog/2010/06/supreme-court-decides-rentacenter-v-jackson-companies-can-delegate-unconscionability-challenges-to-t.html>.

87. Statutes often regulate contracts in these settings to prevent overreaching and unfair terms precisely because businesses have a history of taking advantage of their superior bargaining position. Schwartz, *Mandatory Binding Arbitration Agreements*, *supra* note 62, at 85; see NACA Brief, *supra* note 65, at 7.

88. A recent survey of leading financial services and telecommunications firms found that arbitration clauses appear in 77 percent of employment contracts and 93 percent of consumer contracts. Horton, *supra* note 74, at 481 n.242. It is unlikely that so many people knowingly and voluntarily gave up their right to go to court.

Tellingly, corporations avoid binding arbitration when it applies to them—only 11 percent of contracts between corporations have arbitration clauses. NAT'L CONSUMER LAW CTR., CONSUMER ARBITRATION AGREEMENTS § 1.4 (Supp. 2006). For example, Congress passed the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001 because franchisees opposed mandatory arbitration imposed on them by car manufacturers. BRUNET ET AL., *supra* note 1, at 179. Ironically, although manufacturers cannot impose arbitration on franchisees because of unequal bargaining power, franchisees still can (and do) impose arbitration on their customers. *Id.*

89. Aaron Bruhl, *Allocating Power Between Courts and Arbitrators—And Why Scholars of Federal Courts Should Care*, PRAWFSBLAWG (Feb. 22, 2010, 9:23 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/02/index.html>.

1. Unequal Bargaining Power Leads to Employees and Consumers Alienating Their Rights Without Consent

It does not make sense to apply the same rules to contracts between the Average Joe and his employer that apply to contracts between two sophisticated business parties negotiating at arm's length.<sup>90</sup> When the employee is presented with a boilerplate employment contract that he must sign as a condition of getting hired, it seems unlikely that the employee fairly agreed to arbitration or that the employee even understood what he signed.<sup>91</sup> This scenario stands in stark contrast to a general commercial transaction between two businesses, in which both parties are likely to have legal representation during the negotiations, are likely to be familiar with the contractual clauses, and are more likely to have equal bargaining power. Judicial review must be available to ensure that unsophisticated employees and consumers are treated fairly and are not forced to participate in arbitration to which they did not knowingly agree.<sup>92</sup>

By its very definition, arbitration eliminates certain rights of employees and consumers.<sup>93</sup> Form contracts such as the one Jackson

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90. Companies are understandably eager to design their own dispute-resolution processes to minimize exposure to liability and avoid public embarrassment. BRUNET ET AL., *supra* note 1, at 182.

91. Indeed, “[i]n the real world, when a lower level employee is provided with a large pile of documents . . . , the employee is almost never aware of the existence of that [arbitration] clause, much less its meaning[.]” and he is likely reluctant to forego the job over a seemingly petty issue. *Id.* at 323.

92. Lack of consent is not the only problem with mandatory employment and consumer arbitration. Arbitrators’ decisions can be detrimental to the public, as they “place much less pressure on companies to change their practices than court decisions because these decisions are confidential, non-binding, and often unwritten.” Brief of National Consumer Law Center, *supra* note 84, at 5. Our public system of justice is vital to deterring harmful conduct and fostering faith in the justice system. BRUNET ET AL., *supra* note 1, at 182. Because arbitration proceedings are private, they bypass public precedent and public exposure.

93. BRUNET ET AL., *supra* note 1, at 144. In addition to eliminating the right to trial, arbitration almost certainly eliminates other rights, such as the right to appeal. *Id.* Further, the arbitration clauses imposed on consumers and employees often contain provisions regarding discovery, statutes of limitation, permissibility of damages, payment of arbitral fees and costs, and the scope of judicial review. Horton, *supra* note 74, at 480–81. Moreover, arbitrators often have structural incentives to rule in favor of the business. Dahlia Lithwick, *Justice by the Hour: The Supreme Court Tangles with Mandatory Arbitration Clauses*, SLATE (Apr. 26, 2010), <http://www.slate.com/id/2252001/>.

Proponents suggest that arbitration provides employees with a forum that is cheaper, quicker, and more accessible than a court; it also allows employers to reduce their dispute-resolution costs and pass their savings on to the public. BRUNET ET AL., *supra* note 1, at 149–50. However, arbitration can be quite expensive. Arbitrators charge \$250 to \$450 an hour, and



signed require employees to give up constitutional rights as a condition of getting a job.<sup>94</sup> Such contracts include dense boilerplate language that most people do not read and that is nonnegotiable even if one did read it.<sup>95</sup> For example, the Average Joe would not realize that signing an employment contract waives his right to sue even if he is the victim of a harm as egregious as discrimination. Jackson argued that he did not agree to arbitration, yet he was required to arbitrate that very issue. And even if he fully understood the rights that RAC required him to give up, what choice did he have? The Court should not have held him to the terms of the Agreement absent a finding that he had clearly and unmistakably manifested consent. In light of *Rent-a-Center*, drafters are now “quite literally empower[ed] . . . to impose arbitration on others without their consent.”<sup>96</sup> It should not be so easy for people to unknowingly or unwillingly give up their constitutional right to judicial redress.

In addition, because arbitrators’ decisions often do not include explanations, arbitration deprives employees of this essential element of justice.<sup>97</sup> Furthermore, arbitrators are largely unregulated and need not apply or even have knowledge of all the provisions of the applicable law.<sup>98</sup> In short, arbitration is much more than a simple forum change that has no impact on substantive rights,<sup>99</sup> and *Rent-a-*

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arbitration proceedings can carry on for more than 100 hours. Unlike salaried public judges, arbitrators have an incentive to drag the process out. *Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 69 (2007) (statement of Cathy Ventrell-Monsees, National Employment Lawyers Association) [hereinafter Ventrell-Monsees, *Arbitration Fairness Act of 2007*].

94. *Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?: Hearing Before the Subcomm. on Commercial and Admin. Law and the H. Comm. on the Judiciary*, 110th Cong. 11 (2007) (statement of F. Paul Bland, Public Justice) [hereinafter Bland, *Mandatory Binding Arbitration Agreements*].

95. Lawrence Cunningham, *Your (Vanishing) “Day in Court,”* CONCURRING OPINIONS (June 24, 2010, 1:54 PM), <http://www.concurringopinions.com/archives/2010/06/your-vanishing-day-in-court.html>. Only a minute percentage of consumers read form agreements, and even fewer actually understand what they have read. Sternlight, *supra* note 84, at 1648.

96. Horton, *supra* note 74, at 488; see Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL’Y & L. 519, 529 (2004).

97. See Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 43 (2005). In addition, the lack of an explanation makes it essentially impossible to challenge an arbitrator’s decision. Bland, *Mandatory Binding Arbitration Agreements*, *supra* note 94, at 29.

98. BRUNET ET AL., *supra* note 1, at 8, 10; Feuille & LeRoy, *supra* note 9, at 378.

99. Palefsky, *Mandatory Binding Arbitration*, *supra* note 82, at 104. In fact, employees lose the ultimate substantive right: the right to have the law enforced. *Id.*; see also Roma, *supra* note

*Center* makes it harder for the Average Joe to seek justice in court to enforce even his most fundamental rights.<sup>100</sup>

## 2. Violation of Employees' and Consumers' Due Process

Judicial review must be available to ensure the fairness and integrity of arbitration proceedings, as arbitrators have strong incentives to maximize their fees and generate more business for themselves.<sup>101</sup> There are now tens of thousands of arbitrators in the United States, all with potential biases due to their significant financial incentives to resolve the question of arbitrability in favor of arbitration.<sup>102</sup> Because the *Rent-a-Center* Court denied Jackson access to the court system, an arbitrator will rule on “whether the terms of the arbitration agreement are fair, in which case he gets to decide the case (and get paid for doing so), or unconscionable, in which case the matter goes back to court.”<sup>103</sup> In this system of for-profit justice, the arbitrator cannot be a neutral decision maker with respect to arbitrability, as one outcome results in his getting paid while the other results in his losing business. Companies encourage arbitration provisions because arbitrators almost always rule in favor of those businesses:<sup>104</sup> arbitrators who find in favor of business

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96, at 531 (“Arbitrators do not have to receive training in the law; yet they have the important responsibility of enforcing statutory rights.”).

100. Gans, *supra* note 67. Indeed, in Jackson’s case, his right to be free from racial discrimination in the workplace was at issue. Congress specifically passed section 1981—the statute on which Jackson based his claim—to ensure that courts would be open to victims of discrimination. Elizabeth Wydra, *Forced Arbitration: Proof That We Need a Supreme Court That Understands How the Law Affects Ordinary Americans*, ACSBLOG (Apr. 28, 2010, 2:52 PM), <http://www.acslaw.org/node/15990>. One might ask if it is ever appropriate to refuse discrimination victims access to the courts based on pre-dispute arbitration agreements. *Id.*

Arbitration’s secrecy may appeal to employers looking to avoid the adverse publicity associated with public trials on discrimination claims. BRUNET ET AL., *supra* note 1, at 8. For further discussion of mandatory pre-dispute arbitration of discrimination claims, see *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (July 10, 1997), <http://www.eeoc.gov/policy/docs/mandarb.html>.

101. See Brief of National Consumer Law Center, *supra* note 84, at 3, 19.

102. Gaitis, *supra* note 76. Even if arbitrators try to be impartial, it is hard to rule out the possibility that they will at least subconsciously take their own paychecks into account when determining a dispute’s arbitrability. BRUNET ET AL., *supra* note 1, at 155.

103. Alan B. Morrison, *Rent-a-Center = Rent-a-Wreck*, ACSBLOG (June 25, 2010, 3:51 PM), <http://www.acslaw.org/node/16426>.

104. Editorial, *Beware the Fine Print*, N.Y. TIMES, June 25, 2010, at 9. Arbitration companies have strong incentives to favor corporations because ruling too frequently or too generously against corporations may cause them to lose business, as corporations may blackball arbitrators

interests will presumably have repeat customers—thereby generating greater income. Indeed, arbitrators' careers and livelihoods depend on companies' repeat business.<sup>105</sup>

Due process, however, requires a neutral decision maker. When, for example, a judge has *any* financial interest in a case, he must recuse himself regardless of whether the financial interest results in actual bias.<sup>106</sup> On the other hand, an arbitrator's financial interest nearly always aligns with that of the drafter of the agreement.<sup>107</sup> This bias—whether actual or only apparent—flies in the face of our constitutional due process guarantees.

### C. Congress Needs to Act

Congress wrote the FAA as “one-size-fits-all,” and courts have interpreted it to reach employees even though employment contracts differ from most negotiated deals.<sup>108</sup> Some federal and state courts are less enthusiastic than the Supreme Court about arbitration, especially regarding consumer and employment contracts—yet they cannot do anything about it.<sup>109</sup> The Court's pro-arbitration stance thus leaves employees with little hope of successfully challenging arbitration clauses. As the Court has expanded the scope of FAA preemption through cases like *Rent-a-Center*, only the common law of contracts remains to govern arbitration clauses.<sup>110</sup> This is not enough to protect the Average Joe, as the Court has made it clear that challenging arbitration agreements will be very difficult. Therefore, Congress must rewrite the rules.<sup>111</sup>

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who rule against them. Bland, *Mandatory Binding Arbitration Agreements*, *supra* note 94, at 17–18.

105. Ventrell-Monsees, *Arbitration Fairness Act of 2007*, *supra* note 93, at 69. An employee will likely only arbitrate one dispute, whereas a company may arbitrate many. BRUNET ET AL., *supra* note 1, at 145.

106. See, e.g., *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009).

107. Brief of the American Association for Justice and AARP as Amici Curiae in Support of Respondent at 37, *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497).

108. See BRUNET ET AL., *supra* note 1, at 39.

109. Bruhl, *supra* note 89 (“Over the course of the last couple of decades the Supreme Court has shut off most avenues for challenging arbitration agreements at the wholesale level—state law cannot declare particular fields like consumer transactions off limits from arbitration, courts cannot deem arbitration per se violative of public policy, etc. All such arguments are preempted by the Federal Arbitration Act.”).

110. NACA Brief, *supra* note 65, at 7.

111. Congress has already proven its willingness to change arbitration procedures. The recent Wall Street reform bill eliminated mandatory pre-dispute arbitration in mortgages and home

Recently, Congress considered the Arbitration Fairness Act of 2009, which would have excluded employment, consumer, franchise, and civil rights disputes from the FAA's scope.<sup>112</sup> It also would have taken away arbitrators' ability to determine the validity and enforceability of arbitration agreements in all cases.<sup>113</sup> Simple awareness of a risk that courts—not arbitrators—could end up determining the fairness of arbitration agreements may be all that is needed to prevent arbitration-clause drafters from overreaching.<sup>114</sup> The bill's opponents worried that these restrictions would reduce the effectiveness of arbitration as a cost-effective remedy for commercial disputes.<sup>115</sup> However, the bill would not have eliminated the ability of businesses to arbitrate disputes; it would have simply prevented companies from using their unfair bargaining power to force employees or consumers into arbitration. Furthermore, consumers or employees still could have agreed to arbitrate a claim after a dispute had arisen.

#### CONCLUSION

Arbitration should occur when circumstances warrant it—for example, when parties to a contract clearly and unmistakably agree to arbitrate, and both parties understand the consequences. At the same time, courts must have the ability to protect weaker parties from mandatory pre-dispute arbitration when the parties did not clearly and unmistakably agree. Prior to *Rent-a-Center*, employees had the right to go to court and ask judges to find agreements

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equity loans and gave the new Consumer Financial Protection Bureau the ability to preclude arbitration of other consumer financial agreements as well. Stacy Johnson, *Ready, Set . . . Sue! Forced Arbitration Fading*, MONEY TALKS NEWS (Aug. 18, 2010), <http://www.moneytalksnews.com/2010/08/18/ready-set-sue-forced-arbitration-fading>.

112. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(b)(1)–(2) (2009). This bill prohibits the use of pre-dispute mandatory arbitration entirely in these contexts (although post-dispute agreements would still be valid). Less drastic options open to Congress would be to allow mandatory pre-dispute resolution only when such pre-dispute agreements meet certain requirements or allow states to regulate employment and consumer arbitration. For a proposal in line with the former, see Bales & Irion, *supra* note 6, at 1091–92.

113. H.R. 1020 § 2(c).

114. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1488 (2008).

115. Andrew Ness, *Changes Afoot—The Proposed Arbitration Fairness Act*, KLUWER CONSTRUCTION BLOG (Mar. 19, 2010), <http://kluwerconstructionblog.com/2010/03/19/changes-afoot-%E2%80%93-the-proposed-arbitration-fairness-act/>.

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unenforceable under section 2.<sup>116</sup> This judicial review weeded out the worst abuses while upholding most arbitration agreements.<sup>117</sup> Now, the judiciary has been relegated to rubber-stamping motions to compel arbitration.<sup>118</sup>

Courts should not send disputes to arbitration unless parties have formed *enforceable* contracts requiring arbitration of their disputes. The Court's decision in *Rent-a-Center* has eliminated a very important check—judicial review—on mandatory pre-dispute arbitration clauses in the types of contracts average Americans are forced to sign every day. Thus, Congress needs to step in to protect the Average Joe and restore the FAA to its original purpose of encouraging and upholding arbitration clauses in contracts between two *willing* parties.

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116. Gupta, *supra* note 86.

117. *Id.*

118. Horton, *supra* note 70, at 2.