

POLICY ESSAY

MANDATORY ARBITRATION: WHAT PROCESS IS DUE?

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In this Policy Essay, United States Senator Russ Feingold reviews the value of the alternative dispute resolution tool arbitration, how Congress enacted the Federal Arbitration Act to encourage the use of arbitration, and how courts have expanded its application. Senator Feingold argues that powerful parties in contracts governing employment relationships, automobile franchises, and consumer credit are abusing the promise of the Federal Arbitration Act, and converting it into a tool to deprive others of their right to pursue their claims in the court system. Senator Feingold proposes legislative changes to prevent this abuse. These changes include a prohibition of mandatory, binding arbitration in specific contexts where bargaining power is inherently unequal, and a possible arbitration bill of rights.

An insurance company fired agency manager Robert Bungard from his job. Bungard believed that the company fired him because of his age, so he tried to bring an age discrimination claim against the company in court. According to the Wisconsin Court of Appeals, if his case had been decided under the Wisconsin Arbitration Act,¹ he would have had the right to pursue his claim in court. Nonetheless, the court held that the mandatory, binding arbitration clause in his employment contract forced him to submit his case instead to an arbitration panel.² The court relied on the reasoning of the United States Supreme Court in *Southland Corp. v. Keating*,³ which holds that the Federal Arbitration Act (“FAA”)⁴ preempts state laws like Wisconsin’s Arbitration Act. Further, in *Gilmer v. Interstate/Johnson Lane Corp.*,⁵ the Supreme Court held that compulsory arbitration “agreements” can trump remedies available under age discrimination laws. Thus, the Wisconsin Court of Appeals asserted that it had no choice but to deny Robert Bungard his day in court.

Mr. Bungard is not alone. This Policy Essay examines how he and hundreds of thousands of people like him are being deprived of their

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¹ Wis. STAT. ch. 788 (2000).

² Bungard v. Rural Mut. Ins. Co., 537 N.W.2d 433 (Wis. Ct. App. 1995).

³ 465 U.S. 1 (1984).

⁴ Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–15, 201–208 (2002)).

⁵ 500 U.S. 20 (1991).

rights to go to court by mandatory, binding arbitration clauses.⁶ Part I discusses the benefits of arbitration and its limitations in cases of unequal bargaining power. Part II provides a brief legislative history of the FAA, and Part III a brief judicial history. Part IV discusses procedural concerns raised by arbitration, especially mandatory, binding arbitration. Part V examines problems caused by mandatory, binding arbitration and possible legislative remedies in three specific areas: employment agreements, auto dealership franchise contracts, and credit card and other consumer loan agreements. Part IV concludes by recommending that Congress take action to stop the abusive use of arbitration clauses.

I. ARBITRATION AND ITS VALUE

In the same breath, Hamlet complained of “the whips and scorns of time . . . [t]he pangs of dispriz’d love” and “the law’s delay.”⁷ Since then, the law’s delay has abated no more than time’s whips and love’s pangs. Today, civil cases congest court dockets throughout the country.⁸ Pursuing litigation continues to exhaust the finances and patience of all but the wealthiest institutions.⁹ These delays and expenses may be exacerbated, some argue, because Americans litigate so frequently, possibly overusing the court system.¹⁰

As a result, many disputants have turned to alternatives such as mediation and arbitration to resolve disputes without going to court. Because such alternatives streamline adjudicative procedures and allow parties to have their case heard long before a possible court trial, these

⁶ See, e.g., American Arbitration Association, *Proud Past, Bold Future: 2000 Annual Report 5*, available at http://www.adr.org/upload/LIVESITE/About/annual_reports/annual_report_2000.pdf (noting that 198,491 cases were filed with the American Arbitration Association in 2000 alone).

⁷ WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

⁸ See, e.g., Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 2001*, at 13, 23 (2002), available at <http://www.uscourts.gov/judbus2001/contents.html>; Melissa August, *Crowded Courts*, *TIME*, Aug. 13, 2001, at 15; Francis L. Van Dusen, *Comments on the Volume of Litigation in the Federal Courts*, 8 *DEL. J. CORP. L.* 435 (1984); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3–9 (1990); BROOKINGS INSTITUTE, *JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION* (1989).

⁹ See, e.g., Sandra Torry, *Many With Legal Needs Avoid the Court System; ABA Survey Finds Wide Sense of Futility*, *WASH. POST*, Feb. 6, 1994, at A3; *Mid-Year Meeting of American Bar Association*, 52 *U.S.L.W.* 2471, 2471 (1984) (quoting Chief Justice Burger calling the United States civil litigation system “too costly, too painful, too destructive, too inefficient for a truly civilized people.”); AMERICAN BAR ASSOCIATION, *ATTACKING LITIGATION COSTS AND DELAY* 59–60 (1984) (assuming that a major consequence of delay is increased costs which are manifested in additional attorney’s fees).

¹⁰ See, e.g., Shashi Tharor, *Litigious America*, *NEWSWEEK*, July 30, 2001, at 52 (discussing “America’s most crippling disease—fear of litigation.”); Melissa August, *Crowded Courts*, *TIME*, Aug. 13, 2001, at 15 (chronicling “recent highlights of our litigious society”); M.E. Sprengelmeyer, *Litigious Society Feeds on Homeowners Insurance*, *MILWAUKEE J. SENTINEL*, Dec. 10, 2000, at 3F (citing today’s litigious society as reason for increase in popularity of personal “umbrella” insurance policies).

alternatives enable parties to resolve disputes expeditiously. These alternatives, thus, have merit when they provide efficiency and the voluntary choice of whether or not to go to court. Where there are abuses, however, we should act to curtail them, and improve the systems of alternative dispute resolution.

Americans are using arbitration at an increasing rate. The American Arbitration Association reports that 2000 was its sixth year in a row with record caseloads.¹¹ The number of cases filed with the Association jumped forty-two percent in 2000 alone, to nearly 200,000 cases nationally,¹² and about one-quarter of the 1.7 million cases in the Association's seventy-five year history were filed within the last five years.¹³

In arbitration hearings, as in court, a third party—the arbitrator or arbitration panel—reviews the parties' arguments and issues a decision. Arbitration uses rules of evidence and procedure, although it may use simpler or more flexible rules than a court would use.

Arbitration can be either "binding" or "non-binding."¹⁴ If arbitration is "non-binding," the arbitrator's decision takes effect only if the parties agree to the resolution *after* they know what the decision is. If the arbitration decision is "binding," parties agree in advance to abide by the arbitrator's decision, whatever that decision may be.

Another distinction is made between arbitration that is "mandatory" and "voluntary."¹⁵ In "mandatory" arbitration, contracts contain clauses that designate arbitration as the exclusive remedy to resolve disputes after the contract takes force. If a dispute arises, the contractual provision prevents the complaining party from filing suit in court; the complainant can pursue only arbitration. In "voluntary" arbitration, the complaining party has the option of filing suit or of pursuing arbitration.

Thus, "mandatory, binding arbitration," is the form with most potential for abuse because the parties *must* use arbitration to resolve future disagreements by contractual agreement, and the arbitrator's decision will be final. The parties have no ability to seek relief in court or other methods of dispute resolution.

If a court resolves a dispute, the parties may have broad grounds upon which to pursue an appeal. Under mandatory, binding arbitration, however, even if a party believes that the arbitrator did not consider all the facts or follow the governing law, the party cannot file a suit in court or appeal the decision on the merits.¹⁶ In only a narrow set of circum-

¹¹ American Arbitration Association, *supra* note 6, at 4.

¹² *Id.* at 5.

¹³ *Id.* at 13.

¹⁴ *See, e.g.,* Meis & Waite v. Parr, 654 F. Supp. 867, 869 (N.D. Cal. 1987); Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399, 401.

¹⁵ *See, e.g.,* United States v. Bankers Ins. Co., 245 F.3d 315, 322 (4th Cir. 2001).

¹⁶ *See, e.g.,* Wilko v. Swan, 346 U.S. 427, 435–38 (1953) (noting that the power of the court to vacate arbitration awards is limited and failure to follow the SEC Act must be "made clearly to appear" despite the lack of a written opinion or record).

stances may a party challenge a binding arbitration decision. The arbitrator must have committed actual fraud; or have been partial, corrupt, or guilty of misconduct; or exceeded his or her powers.¹⁷ In all probability, if a party is not satisfied with the arbitration outcome, the party has no recourse.

Because mandatory, binding arbitration is so conclusive, it is a credible means of resolving disputes only when all parties enter into the agreement fully and intelligently. They must know and understand the ramifications of agreeing to mandatory, binding arbitration and freely choose to waive their rights. Where one party does not understand these ramifications, however, or lacks the bargaining power to negotiate other dispute resolution terms, mandatory, binding arbitration contracts raise concerns.

In a variety of contexts, including employment contracts, motor vehicle franchise agreements, and credit card agreements, informed, voluntary consent is often lacking. In these contexts, parties with little bargaining power are effectively coerced into waiving their rights to go to court. The more powerful parties present them with adhesion contracts that give the weaker parties no realistic choice as to the terms of the contract.

Regrettably, with the help of the federal courts, powerful institutions are subverting Congress's original intention in passing the FAA. Instead of providing disputants with options for dispute resolution, the courts and these institutions are converting arbitration into a tool for the powerful to exert authority over the less powerful. Thus, many people are essentially forced to forgo constitutional rights when disputes arise relating to their jobs, businesses, and finances.

Congress should act to remedy the abuses of mandatory, binding arbitration to preserve all citizens' access to the court system, particularly where parties have very unequal bargaining power.

II. A BRIEF HISTORY OF THE FEDERAL ARBITRATION ACT

President Calvin Coolidge signed the FAA into law on February 12, 1925. Congress passed the act to make arbitration agreements "valid, irrevocable, and enforceable . . . in any maritime transaction or a contract evidencing a transaction involving commerce."¹⁸

Congress's first motivation was to realize the efficiency gains of arbitration. The House Judiciary Committee report on the bill that became the FAA cited the cost and length of litigation as one motivation to enact the law: "[A]ction should be taken at this time when there is so much

¹⁷ See, e.g., 9 U.S.C. § 10(a) (listing grounds for vacating arbitration awards); see also *Wilko*, 346 U.S. at 436.

¹⁸ 9 U.S.C. § 2 (1925).

agitation against the costliness and delays of litigation.”¹⁹ The report asserted that “agreements for arbitration, if . . . made valid and enforceable” would “largely eliminate[]” these problems.²⁰

Congress’s second motivation was to address the courts’ reluctance to enforce agreements to arbitrate. The House Judiciary Committee report called this reluctance “an anachronism of our American law” resulting from “the jealousy of the English courts” seeking to protect their jurisdiction centuries earlier.²¹ Years later, the Supreme Court summarized that “the basic purpose of the Federal Arbitration Act is to overcome courts’ refusals to enforce agreements to arbitrate.”²²

Ironically, it was a Supreme Court decision in 1924 that opened the door for Congress to legislate on the subject. In *Red Cross Line v. Atlantic Fruit Co.*,²³ the Court upheld the constitutionality of a 1920 New York law that made arbitration in a maritime contract “valid, enforceable and irrevocable.”²⁴

Senator Thomas Sterling (R-S.D.) and Representative Ogden Mills (R-N.Y.) had first introduced federal arbitration legislation in 1922, under the name “A bill to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.”²⁵ The House Judiciary Committee report attributed the law’s authorship to “a committee of the American Bar Association,” and its sponsorship to the ABA and “a large number of trade bodies.”²⁶ The ABA specifically sought “the further extension of the principle of commercial arbitration.”²⁷

To extend this principle, the House Judiciary Committee report went on to state that, under the bill, “[a]n arbitration agreement is placed upon the same footing as other contracts.”²⁸ House Judiciary Committee Chairman George Graham (R-Pa.) said that the bill would “simply provide for one thing, and that is to give an opportunity to enforce an

¹⁹ H.R. REP. NO. 68-96, at 2 (1924).

²⁰ *Id.*

²¹ *Id.* at 1–2.

²² *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995). *See also* *Circuit City v. Adams*, 532 U.S. 105, 125 (2001) (Stevens, J., dissenting); *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 466–7 (1957) (Frankfurter, J., dissenting). For a review of history before the FAA, *see generally* Preston Douglas Wigner, *The United States Supreme Court’s Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995).

²³ 264 U.S. 109 (1924).

²⁴ *Id.* at 118. Note that the Federal Arbitration Act echoes the New York statute’s words. Compare *supra* note 18 and accompanying text with *supra* note 22 and accompanying text.

²⁵ S. 4214, 67th Cong. (1922); H.R. 13522, 67th Cong. (1922); 64 CONG. REC. 732, 797 (1922).

²⁶ H.R. REP. NO. 68-96, at 1.

²⁷ *Report of the Forty-Third Annual Meeting of the ABA*, 45 A.B.A. REP. 75 (1920).

²⁸ H.R. REP. NO. 68-96, at 1.

agreement in commercial contracts and admiralty contracts.”²⁹ Representative Mills explained that the bill “provides that where there are commercial contracts and there is disagreement under the contract, the court can enforce an arbitration agreement in the same way as other portions of the contract.”³⁰ The chairman of the New York Chamber of Commerce, one of the many business organizations that sought the bill’s introduction, testified before a Senate Judiciary Committee Subcommittee that it was needed “to enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the Federal and State courts.”³¹

The law had important exclusions, however, when Senator Sterling and Representative Mills reintroduced the bill in 1923. The exclusions stated: “nothing contained herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”³² The legislative history of the act indicates the importance of this exclusion in passing the law. In the words of Justice Stevens, the legislative history indicates that:

the potential disparity in bargaining power between individual employees and large employers was the source of organized labor’s opposition to the FAA, which it feared would require courts to enforce unfair employment contracts. That same concern . . . underlay Congress’[s] exemption of contracts of employment from mandatory arbitration.³³

Thus, again in the words of the Supreme Court, with the passage of the act, Congress “declared a national policy favoring arbitration” and “withdrew” from the states the power to ignore agreements to arbitrate.³⁴

III. A BRIEF HISTORY OF CASE LAW UNDER THE FEDERAL ARBITRATION ACT

Until a 1995 Supreme Court decision under the FAA, courts had been divided over how much “commerce” the FAA covered. Some courts

²⁹ 65 CONG. REC. 1931 (1924) (remarks of Rep. Graham).

³⁰ 65 CONG. REC. 11080 (1924) (remarks of Rep. Mills).

³¹ *Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 2 (1923).

³² S. 1005, 68th Cong. (1923); H.R. 646, 68th Cong. (1923); *Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. (1924).

³³ *Circuit City v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting). *Cf.* *Leading Cases*, 115 HARV. L. REV. 507, 515 (arguing that the majority had “attributed an utterly implausible intent to Congress” by reading the employment exemption in accord with the “commerce power when the FAA was adopted” while reading the coverage “in accord with the modern commerce power,” thus attributing the congressional intent not to exempt only those employment contracts it did not, but would eventually, have power over).

³⁴ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

had limited the FAA's applicability only to contracts where the parties contemplated interstate commerce.³⁵ For example, Judge Lumbard of the Second Circuit phrased the issue to be "not whether . . . the parties did cross state lines, but whether, at the time they . . . accepted the arbitration clause, they contemplated substantial interstate activity."³⁶

Other courts, by contrast, extended the reach of the FAA to the limits of Congress's power to regulate commerce.³⁷ The Seventh Circuit, for example, had interpreted previous Supreme Court decisions under the FAA to mean that "Congress intended the FAA to apply to all contracts that it constitutionally could regulate"³⁸ under the Commerce Clause.

In 1995, the Supreme Court adopted an expansive interpretation of the FAA's language "involving commerce."³⁹ It held that "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' [s] commerce power to the full."⁴⁰ The Court then rejected Judge Lombard's "contemplation of the parties" view.⁴¹

Not only did the Supreme Court adopt an expansive reading of the FAA, but in another case the Court also, in a more troubling move, held that states could not pass legislation to carve exceptions to the FAA to account for unequal bargaining power.⁴² Many state legislatures had enacted laws to prohibit mandatory, binding arbitration clauses in certain kinds of agreements.⁴³ In *Southland Corp. v. Keating*,⁴⁴ however, the Supreme Court held that the FAA implicitly preempts these state laws. Thus, the decision nullified the many state arbitration laws enacted to protect parties with weak bargaining positions from signing away their rights. Although contract law is generally the province of the states, the

³⁵ See, e.g., *Lachney v. Profitkey Int'l, Inc.*, 818 F. Supp. 922 (E.D. Va. 1993); *Allied-Bruce Terminix Cos. v. Dobson*, 628 So.2d 354 (Ala. 1993), *reversed by*, 513 U.S. 265 (1995); *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127 (Kan. 1982); *Burke County Pub. Sch. Bd. of Educ. v. Shaver P'ship*, 279 S.E.2d 816 (N.C. 1981).

³⁶ *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F. 2d 382, 387 (2d Cir. 1961) (Lumbard, C.J., concurring); *Burke*, 279 S.E.2d at 822 (quoting Chief Judge Lumbard).

³⁷ See, e.g., *Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986); *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984).

³⁸ *Snyder*, 736 F.2d at 418.

³⁹ *Allied-Bruce*, 513 U.S. at 266.

⁴⁰ *Id.* at 277.

⁴¹ *Id.* at 277-81.

⁴² *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁴³ See, e.g., CAL. CORP. CODE ANN. § 31512 (2001) (California statute declaring void provisions in franchise contracts purporting to waive compliance with the law); Section 9:2779 of the Louisiana Revised Statutes (B)(1) (declaring unenforceable clauses allowing arbitration proceedings to be brought in a forum or jurisdiction outside of this state); 15 OKLA. STAT. § 818 (2002) (limiting making arbitration agreements between employers and employees, and insurers and insureds, unenforceable); Alabama Motor Vehicle Franchise Act, 1975 ALA. CODE § 8-20-4 (m) (2001) (declaring attempts by automobile manufacturers to coerce automobile dealers to assent to mandatory arbitration agreements to be unfair and deceptive trade practices).

⁴⁴ 465 U.S. 1 (1984).

Court's *Southland* decision has effectively barred any state action on this contract issue.⁴⁵

Under the Court's interpretation of the FAA, congressional action would be required to exclude certain contracts, and certain forms of pre-dispute arbitration agreements, from the FAA. I believe Congress should do so. Congress should reconsider arbitration to remedy its inadequacies, especially in situations with unequal bargaining power.

IV. THE PROBLEMS ARBITRATION CREATES BY CURTAILING DUE PROCESS

One reason that mandatory, binding arbitration has become so troubling is because it threatens a fundamental principle of our justice system: the constitutional right to take a dispute to court. All Americans have the right to trial by jury in certain contexts. The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."⁴⁶ The Seventh Amendment provides: "In suits at common law . . . the right of trial by jury shall be preserved."⁴⁷ Many states provide a similar right to a jury trial in state court. Although individuals can of course waive constitutional rights,⁴⁸ we need to remember the constitutional foundation of our civil justice system and that individuals should not be coerced or duped into waiving their fundamental rights.

Without the option to go to court, the FAA could lead to the inequitable application of substantive law. Under the FAA, arbitrators are not required to apply the particular federal or state law that would be applied by a court.⁴⁹ This enables the stronger party to use arbitration to circumvent laws specifically enacted to regulate the parties' relationship in a particular jurisdiction. Circumventing these laws is inequitable and eliminates their deterrent effects.

⁴⁵ For a critical view of the Supreme Court's decision to read the FAA as preempting state laws, see, e.g., *Overview of Contractual Mandatory Binding Arbitration: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. 2-3 (2000) [hereinafter *Hearing*] (statement of Chairman Grassley).

⁴⁶ U.S. CONST. amend. VI.

⁴⁷ U.S. CONST. amend. VII.

⁴⁸ See, e.g., *Patton v. U.S.*, 281 U.S. 276, 298 (1930) (upholding waiver of Sixth Amendment right to jury trial in criminal prosecution); *U.S. v. Moore*, 340 U.S. 616, 621 (1951) (upholding waiver of Seventh Amendment right to jury trial in civil action); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (recognizing the right to waive assistance of counsel in criminal prosecutions if made knowingly and voluntarily).

⁴⁹ See, e.g., *Wilko v. Swan*, 346 U.S. 427, 435-38 (1953) (noting that arbitrators' determinations of legal meanings of statutory requirements cannot be examined, as their award may be made without explanation of their reasons and without complete records of their proceedings).

In addition to substantive law, the procedural methods of binding arbitration might disadvantage a party with a grievance. Arbitration lacks many of the important due process safeguards offered by administrative procedures and the judicial system. For example, binding arbitration lacks the formal court-supervised discovery process often necessary to establish facts and to gain documents.⁵⁰ Further, in arbitration, a victim cannot join with a class of persons similarly harmed;⁵¹ nor can parties seek injunctive relief; nor must it be conducted with public access, often being conducted in secret. Arbitrators need not follow judicial rules of evidence,⁵² and they generally have no obligation to provide a factual or legal discussion of their decision in a written opinion.⁵³ Moreover, arbitration often allows for only very limited judicial review. As a result, arbitration procedural safeguards pale in comparison with those of the courts.

Nonetheless, mandatory, binding arbitration clauses have become commonplace. If individuals today want to engage in many common economic activities, they may be forced to relinquish their legal rights and forego the use of courts or administrative forums to resolve disputes.

Though I doubt Congress originally intended the FAA to enable stronger parties to force weaker parties into binding arbitration, the FAA now enables this outcome by nullifying state laws that attempt to create exceptions to protect employees and other weaker parties. The FAA should not be a tool to coerce parties to relinquish important protections and rights that the judicial system affords. This invidious practice is at odds with our nation's elementary notions of fair play and justice. Congress should act to enable states to curb this practice to protect citizens from unknowingly or involuntarily sacrificing their rights.

V. PROBLEM AREAS AND PROPOSED LEGISLATIVE RESPONSES

Pre-dispute contractual agreements are requiring mandatory, binding arbitration in a growing number of circumstances, including employment

⁵⁰ See, e.g., *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (D.C.N.Y. 1957) (vacating notice to take depositions because by agreeing to arbitration respondent elected to avail itself of procedures peculiar to the arbitral process rather than those in judicial determinations); *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9 (D.C. Pa. 1960).

⁵¹ See, e.g., Ann C. Hodges, *U.S. Supreme Court Roundup; Take 'Em to Arbitration; Five Times this Term, Justices Stand up for Integrity of ADR System*, LEGAL TIMES, June 25, 2001, at 76.

⁵² See, e.g., *Pompano-Windy City Partners, Ltd. v. Bear Stearns & Co.*, 794 F. Supp. 1265 (S.D.N.Y. 1992) (stating that in handling evidence an arbitrator need not follow all the niceties observed by the federal courts and must only grant the parties a fundamentally fair hearing).

⁵³ See, e.g., *United Steelworkers of America v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (stating that an arbitrator is not required to provide written legal discussion or opinion).

agreements, auto dealership franchise contracts, and credit card and other consumer loan agreements. Congress should consider the effects of the FAA and the Court's interpretation of it in each of these areas and attempt to remedy the problems they create.

A. *Employment Contracts*

In the Civil Rights Act of 1991,⁵⁴ Congress expressly created a right to a jury trial for employees when it voted overwhelmingly to amend Title VII of the Civil Rights Act of 1964.⁵⁵ Employers in a variety of industries, however, are undermining the intent of the 1991 Act and other civil rights and labor laws, such as the Age Discrimination in Employment Act of 1967,⁵⁶ by requiring employees to submit to mandatory, binding arbitration as a condition of employment or advancement.⁵⁷

Pre-dispute arbitration agreements in employment contracts have caused problems in the securities industry. In the late 1990s, when New York Attorney General Dennis Vacco⁵⁸ and the United States Senate Banking Committee⁵⁹ held separate public hearings on discrimination and sexual harassment in the securities industry, the industry was the only industry as a whole that required its employees to waive their rights to bring such claims in court as a precondition of employment.⁶⁰ At the time, more than 550,000 securities industry registered representatives were required to sign Form U-4—the Uniform Application for Securities Industry Registration or Transfer—as a condition of employment in the industry. Form U-4 contained a clause mandating that the employee file any employment dispute before an arbitration panel.

In the wake of these inquiries, the National Association of Securities Dealers ("NASD") agreed to remove the mandatory, binding arbitration clause from its Form U-4.⁶¹ The association's decision to remove the

⁵⁴ Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 2 U.S.C. §§ 601, 1201–1224, 16 U.S.C. § 1a-5 note, 29 U.S.C. § 626, and scattered sections of 42 U.S.C.).

⁵⁵ 42 U.S.C. §§ 2000e to 2000e-17 (1994).

⁵⁶ 29 U.S.C. §§ 621–634 (1967).

⁵⁷ See Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997).

⁵⁸ See Susan Harrigan, *Vacco Criticizes Gender-Bias Plan*, NEWSDAY, Jan. 23, 1998, at A49 (reporting public hearing on issues of discrimination and sexual harassment in the securities industry).

⁵⁹ *Mandatory Arbitration Agreements in Employee Contracts in the Securities Industry: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. (1998).

⁶⁰ *Id.* at 2 (statement of Sen. Feingold); see *id.* at Prepared Testimony of the Honorable Edward Markey (D-Mass.), Member of Congress; Prepared Testimony of the Honorable Isaac Hunt, Commissioner Securities and Exchange Commission; Prepared Testimony of Ms. Patricia Ireland, President, National Organization for Women.

⁶¹ See Securities Exchange Act Release No. 40109, 63 F.R. 35299 (June 29, 1998) (approving change to NASD rules eliminating requirement that securities industry employees arbitrate statutory employment discrimination claims).

binding arbitration clause, however, does not prohibit its constituent organizations from including a mandatory, binding arbitration clause in their own employment agreements, even if it is not mandated by the industry as a whole.

Increasingly, working Americans face the choice of accepting a mandatory arbitration clause in their employment agreements or having no employment at all. The number of labor cases submitted to arbitration increased by seventy percent between 1972 and 1985.⁶² In 2000, more than a quarter of California companies required employees to sign arbitration agreements.⁶³ The American Arbitration Association reports that it now resolves 14,500 labor-management disputes every year.⁶⁴ Many more employers are requiring employees to agree, or perhaps more accurately “submit,” to resolve employment discrimination or sexual harassment claims through mandatory, binding arbitration before they can be hired or promoted.

The Supreme Court’s decisions in *Gilmer v. Interstate/Johnson Lane Corp.*⁶⁵ and *Circuit City v. Adams*⁶⁶ have further broadened the application of arbitration to the employment relationship and invited employers to expand this practice. *Gilmer* made clear that pre-dispute arbitration contracts could affect the Age Discrimination in Employment Act of 1967.⁶⁷ *Circuit City* removed another potential obstacle to mandatory arbitration by narrowly construing the FAA’s exclusion of employment contracts. The Court held that the exclusion applies only to seamen, railroad workers, and other workers directly engaged in the interstate transportation of commerce.⁶⁸

⁶² Linda Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 n.7 (1985).

⁶³ Lisa Girion, *Arbitration Hearings Expected To Rise in Wake of Court Ruling*, L.A. TIMES, Aug. 26, 2000, at C1.

⁶⁴ American Arbitration Association Web site, available at <http://www.adr.org/index2.1.jsp?JSPssid=10530>.

⁶⁵ 500 U.S. 20 (1991).

⁶⁶ 532 U.S. 105 (2001).

⁶⁷ 29 U.S.C. §§ 621–634 (1967).

⁶⁸ *Circuit City*, 532 U.S. at 121 (2001). In January 2002, the Supreme Court decided *EEOC v. Waffle House*, 122 S. Ct. 754 (2002), holding that an agreement between the employer and employee to arbitrate disputes relating to the employment relationship does not bar the Equal Employment Opportunity Commission (“EEOC”) from seeking victim-specific or injunctive relief when the EEOC is seeking to vindicate a public interest. *Id.* at 766. The Court determined that despite the FAA policy favoring arbitration agreements, there is nothing in the FAA that allows a court to compel arbitration by any party that is not a party to the agreement. *Id.* at 764. The Court concluded that “the FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty’s choice of a judicial forum.” *Id.* at 762. Although the Court limited the application of arbitration agreements to the parties who entered into the agreements, the court continued to express its willingness to uphold private arbitration agreements between parties, regardless of the nature of the bargaining positions between the parties when the agreement was made.

Despite the appearance of a freely negotiated contract, in reality, mandatory arbitration clauses in employment contracts often amount to a non-negotiable requirement that prospective employees relinquish their rights to redress in a court of law. Such requirements have been referred to as “front door” contracts: they require employees to surrender certain rights to “get in the front door.”⁶⁹ With the threat of not getting a job or a promotion, these agreements effectively, by withholding work, coerce individuals into relinquishing fundamental legal protections.⁷⁰

Mandatory arbitration provisions force employees to waive their right to take legitimate grievances, such as charges of discrimination, to court. The practice of mandatory, binding arbitration does not comport with the purpose and spirit of our nation’s civil rights and sexual harassment laws. As a nation that values work and actual freedom of contract, and that deplores discrimination, we should not allow this practice to continue.

Consequently, beginning in 1994, I have introduced in each Congress the Civil Rights Procedures Protection Act,⁷¹ which aims to preserve the right to take employment discrimination claims to court. Over the years, Representatives Pat Schroeder (D-Colo.) and Edward Markey (D-Mass.) have introduced companion legislation.⁷² In January 2001, along with Senators Patrick Leahy, Edward M. Kennedy, and Robert Torricelli, I introduced the Civil Rights Procedures Protection Act of 2001.⁷³ Representative Markey, along with twenty-seven other Members of Congress, has introduced a similar bill in the House of Representatives.⁷⁴

The Civil Rights Procedures Protection Act of 2001 would amend seven civil rights statutes to guarantee that a federal civil rights or sexual harassment plaintiff can still seek the protection of our nation’s courts rather than being forced into mandatory, binding arbitration. The legisla-

⁶⁹ See, e.g., 143 CONG. REC. E407–04 (daily ed. Mar. 6, 1997) (statement of Rep. Markey) (“At best such a setting has the appearance of unfairness; at worst, it is a tainted forum in which an employee can never be guaranteed a truly fair hearing. Like forcing employees to buy goods at the company store, the price of such so-called justice is just too high No employer should be permitted to ask workers to check their constitutional and civil rights at the front door.”); Press Release, Russ Feingold, Prevent Mandatory Arbitration of Civil Rights Claims, (July 31, 1998) (on file with author).

⁷⁰ See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

⁷¹ S. 2405, 103d Cong., 140 CONG. REC. S12101–02 (daily ed. Aug. 18, 1994); S. 366, 104th Cong., 141 CONG. REC. S2272 (daily ed. Feb. 7, 1995); S. 63, 105th Cong., 143 CONG. REC. S438–39 (daily ed. Jan. 21, 1997); S. 121, 106th Cong., 145 CONG. REC. S551 (daily ed. Jan. 19, 1999); S. 163, 107th Cong., 147 CONG. REC. S530 (daily ed. Jan. 24, 2001).

⁷² H.R. 4981, 103d Cong. (1994) (Rep. Schroeder and nine others); H.R. 3748, 104th Cong. (1996) (Rep. Schroeder and ten others); H.R. 983, 105th Cong. (1997) (Rep. Markey and 61 others); H.R. 872, 106th Cong. (1999) (Rep. Markey and 53 others); H.R. 1489, 107th Cong. (2001) (Rep. Markey and 27 others).

⁷³ S. 163, 107th Cong., 147 CONG. REC. S530 (daily ed. Jan. 24, 2001).

⁷⁴ H.R. 1489, 107th Cong. (2001).

tion affects claims raised under Title VII of the Civil Rights Act of 1964,⁷⁵ section 505 of the Rehabilitation Act of 1973,⁷⁶ the Americans with Disabilities Act,⁷⁷ section 1977 of the Revised Statutes,⁷⁸ the Equal Pay Act,⁷⁹ the Family and Medical Leave Act,⁸⁰ and the FAA. By amending the FAA, the protections of this legislation are extended to claims of unlawful discrimination arising under state or local law and other federal laws that prohibit job discrimination.

The bills specify that the statutory procedures for enforcement of those laws can be superceded only by a voluntary agreement to engage in arbitration *after* a claim arises. Our bills aim to protect civil rights in a fairly narrow way. They target only mandatory, binding arbitration clauses in employment contracts entered into by the employer and employee *before* a dispute has arisen. The bills would restore the right of working men and women to pursue their claims in the venue that they choose, and would thus help restore the spirit of our nation's civil rights and sexual harassment laws.

Representative Dennis Kucinich (D-Ohio) and thirty-seven other Members of Congress have responded with an even broader approach. Their bill, the Preservation of Civil Rights Protections Act of 2001,⁸¹ would amend the FAA to modify the definition of "commerce" to exclude employment contracts generally from arbitration provisions. This has merit because parties in employment situations almost never have relatively equal bargaining power for voluntary agreement, and binding arbitration is only appropriate in a truly voluntary agreement. Therefore, Congress could simply amend the FAA to make it clear that these provisions are unenforceable in employment contracts. Representative Kucinich's bill would do that, and I plan to offer a similar bill in the Senate.

B. Automobile Dealerships

Automobile and truck manufacturers are increasingly including mandatory and binding arbitration clauses as a condition for entering into or maintaining an auto or truck franchise. Currently, at least 11 auto and truck manufacturers—including Saturn, Daimler-Chrysler, Nissan, and Volkswagen—require some form of such arbitration in their dealer contracts.⁸² According to one estimate, by 2000, manufacturers had subjected 5700 to 5800 auto dealers to mandatory, binding arbitration agreements.⁸³

⁷⁵ 42 U.S.C. §§ 2000e to 2000e-17 (1994).

⁷⁶ 29 U.S.C. § 794(a).

⁷⁷ 42 U.S.C. §§ 12101–12213 (1994 & Supp. IV 1998).

⁷⁸ 42 U.S.C. § 1981.

⁷⁹ 29 U.S.C. §206(d).

⁸⁰ 29 U.S.C. §§ 2601–2654 (1994 & Supp. IV 1998).

⁸¹ H.R. 2282, 107th Cong. (2001).

⁸² *Hearing, supra* note 45, at 15–16 (statement of Gene N. Fondren, President of the Tex. Automobile Dealers Ass'n and response to questioning of Jill N. MacDonald, Con-

Applications and renewals of franchise agreements for auto and truck dealerships are typically not negotiable between the manufacturer and the dealer. Manufacturers often present dealers with “take it or leave it” contracts.⁸⁴ The dealer accepts the terms offered by the manufacturer, or it loses the dealership. In some jurisdictions, manufacturers can unilaterally amend these agreements merely by mailing the dealer an addendum.⁸⁵ Dealers, therefore, have been forced to rely on the states to pass laws designed to balance the manufacturers’ far greater bargaining power and to safeguard the rights of dealers.

Most states have laws protecting auto dealers in some way. Wisconsin was the first state to protect auto dealers in 1937 by enacting an automobile statute to protect citizens from injury caused when a manufacturer or distributor induced a Wisconsin citizen to invest considerable sums of money in dealership facilities, and then canceled the dealership without cause.⁸⁶ Since then, all states except Alaska have enacted laws to balance the enormous bargaining advantage enjoyed by manufacturers over dealers and to safeguard small business dealers from unfair automobile and truck manufacturer practices.⁸⁷

Most states have created their own alternative dispute resolution mechanisms and forums with access to auto industry expertise that provide inexpensive, efficient, and non-judicial resolution of disputes. Wisconsin, for example, requires mediation before the start of an administrative hearing or court action, or, if both parties agree, arbitration.⁸⁸ These state dispute resolution forums, with years of experience and precedent, are largely responsible for the small number of manufacturer-dealer law-

sultant to the Alliance of Automobile Manufacturers).

⁸³ *Id.* at 10–11 (statement of Gene N. Fondren, President of the Tex. Automobile Dealers Ass’n).

⁸⁴ *Id.* at 26 (statement of William Shack, Automobile Dealer, Henderson, Nevada, and his response questioning).

⁸⁵ *Id.* at 27 (statement of William Shack, Automobile Dealer, Henderson, Nevada). But some states, among them Wisconsin, limit the ability of manufacturers to modify the agreements. *Id.* (statement of Jill MacDonald, Consultant to the Alliance of Automobile Manufacturers).

⁸⁶ Act of July 1, 1937, ch. 377–78, 417, 1937 Wis. Laws. 602–03, 688.

⁸⁷ *See, e.g.*, California Automobile Franchise Act, Cal. Veh. Code Ann. § 3062 (1978) (requiring an automobile manufacturer who proposed to establish a new retail automobile dealership in California, or to relocate an existing one, first to give notice of such intention to a California agency and to each of its existing franchisees in the same “line-make” of automobile located within the defined “relevant market area.”); Rhode Island General Laws, sec. 31-5.1-4.2 (establishing 20-mile market radius and giving dealers within radius right to protest proposed new dealerships within radius); 46-534(3) of the Code of Virginia (1950) (limiting cancellation of automobile dealerships and forbidding manufacturer coercion or threats of dealers to force contracts or unordered products upon them); *see also* 82 A.L.R.4th 624.

⁸⁸ *See* Wis. Stat. § 218.0136 (1) (requiring licensee to serve a demand for mediation upon the other licensee before a hearing will be granted); § 218.0137 (a manufacturer, importer or distributor and a dealer may agree to submit a dispute arising under a franchise agreement to binding arbitration).

suits. When mandatory, binding arbitration is included in dealer agreements, however, these specific state laws and forums established to resolve auto dealer and manufacturer disputes are effectively rendered null and void with respect to dealer agreements.

Senators Orrin Hatch (R-Utah), Patrick Leahy (D-Vt.), Charles Grassley (R-Iowa), and I have introduced a bill to ensure that dealers are not coerced into waiving their rights. Our bill, the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001,⁸⁹ would provide that each party to an auto or truck franchise contract has the *option* of selecting arbitration, but cannot be forced to do so. Senator Grassley advanced this legislation in the last Congress. By the end of the 106th Congress, we had the support of 56 Senators for this bill. The ranking member and former chair of the Judiciary Committee, Senator Hatch, has taken the lead on the bill this year, and, as a result, the prospects for its enactment seem good.⁹⁰

The bill would not prohibit arbitration. On the contrary, the bill would encourage arbitration by making it a fair choice that both parties to a franchise contract may willingly and knowingly select. The bill simply seeks to ensure that the rights and remedies provided for by our judicial system are not waived under coercion.

C. Consumer Credit Agreements

Credit card companies and consumer credit lenders are also increasingly requiring their customers to use binding arbitration when a dispute arises. These institutions use adhesion contracts at the initiation of such loans to lock consumers into these terms. So, consumers are often unaware of the arbitration agreements, or lack the bargaining power to retain their rights while securing credit. Consumers are then barred by contract from taking a dispute to court, even small claims court. One consumer advocate noted, "consumer protection is in jeopardy . . . in the important areas of credit and finance."⁹¹

Companies like First USA Bank, American Express, and Green Tree Discount Company unilaterally insert mandatory, binding arbitration clauses into their agreements with consumers, often without the consumers' knowledge or consent. Credit card companies like American Express, Bank of America, First USA, and Saks Fifth Avenue have commonly done this through the advertisements and other materials they insert into envelopes with the customers' monthly statements, often called

⁸⁹ S. 1140, 107th Cong., 147 CONG. REC. S7195-96 (daily ed. June 29, 2001).

⁹⁰ S. 1140 was reported by the Senate Judiciary Committee on October 31, 2001, by voice vote. It now awaits action by the full Senate.

⁹¹ *Hearing, supra* note 45, at 44 (statement of Patricia Sturdevant, Executive Director and General Counsel, National Association of Consumer Advocates).

“bill stuffers.”⁹² The arbitration provision is often buried in a lengthy legal document within these bill stuffers that most consumers do not so much as glance at, much less read carefully. These stuffers provide that if customers continue to use the cards, then they are bound by these arbitration contractual provisions. In one case involving Bank of America, the bank knew that no more than four percent of card holders would read bill stuffers.⁹³ Yet it still used this method to provide notice, though consumers rarely know about or read these provisions.

The problem is also a growing practice in the consumer loan industry. Consumer credit lenders like Green Tree Consumer Discount Company are including mandatory, binding arbitration clauses in their loan agreements.⁹⁴ Consumers seeking a loan from such companies are in no position to bargain to have the clause removed. Some consumer borrowers may not fully understand exactly what mandatory, binding arbitration is. Often, they do not understand that they have just signed away their right to go to court to resolve a dispute with the lender. Consumers must either sign the agreement as is, or forgo a loan.

It might be argued that if consumers object to a mandatory arbitration clause, they can cancel their credit cards, or refuse to execute their loan agreements, and take their business elsewhere. Unfortunately, however, the practice is becoming so pervasive that consumers may soon no longer have an alternative unless they forego a credit card or a consumer loan entirely. Consumers should not be forced to make that choice.

Credit companies sometimes argue that they rely on mandatory arbitration to resolve disputes more quickly and cheaply than court litigation. Arbitration organizations, however, often charge expensive fees to the consumer who brings a dispute. These costs can be much higher than bringing the matter to small claims court and paying a court filing fee.⁹⁵ They could very well be greater than the consumer’s claim.⁹⁶

In December 2000, in *Green Tree Fin. Corp.-Alabama v. Randolph*,⁹⁷ the Supreme Court found that an arbitration clause that is silent as to the costs and fees of arbitration is enforceable. It left unanswered, however, the question of whether large arbitration costs that effectively preclude a litigant from vindicating federal statutory rights in the arbitral forum render the arbitration clause unenforceable. Thus, arbitration does not necessarily resolve a consumer’s claim more efficiently from the consumer’s point of view. If the costs outweigh the amount in dispute, or if

⁹² *Id.* at 21 (statement of Gene Fondren).

⁹³ *Id.* at 45 (statement of Patricia Sturdevant).

⁹⁴ *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

⁹⁵ *See, e.g.*, *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389, 394 (2001) (fees for arbitration in excess of small claims court costs).

⁹⁶ *See, e.g.*, *Hale v. First USA Bank*, 2001 U.S. Dist. LEXIS 8045, *11–*13 (S.D.N.Y. June 12, 2001) (rejecting claim that arbitration provision was invalid because cost of arbitration exceeded value of claim).

⁹⁷ 531 U.S. 79 (2000).

the consumer cannot afford the costs, the consumer will likely not be able to pursue the claim.

Another significant problem with mandatory, binding arbitration in this context is that the lender gets to decide in advance who the arbitrator will be. For example, American Express and First USA have both chosen the National Arbitration Forum.⁹⁸ All credit card disputes with consumers involving American Express or First USA are handled by that entity. A significant danger exists that this may advantage the lenders, who are “repeat players.” If, for example, the National Arbitration Forum develops a pattern of decisions favoring cardholders, then American Express or First USA could take their arbitration business elsewhere. A system where the arbitrator has a financial interest to reach an outcome favoring the credit card company is not a fair alternative dispute resolution system.

At least one state court has found that mandatory arbitration provisions in credit card bill stuffers are unenforceable. In *Badie v. Bank of America*,⁹⁹ a California state court considered the enforceability of a mandatory arbitration provision announced in mailings by Bank of America to its credit card and deposit account holders. In 1998, the California Court of Appeals ruled that the mandatory arbitration clauses unilaterally imposed on the Bank’s customers were invalid and unenforceable, and the California Supreme Court refused to review the decision.¹⁰⁰

As a result, credit card companies cannot invoke mandatory arbitration in their disputes with customers in California. The American Express bill stuffer notes that the mandatory, binding arbitration provision will not apply to California residents until further action from the company. Though I believe that the California judicial decision was well-reasoned on legal and policy grounds, courts in other states may not reach the same conclusion, and thus those consumers may remain vulnerable.

In 1999, I introduced the Consumer Credit Fair Dispute Resolution Act,¹⁰¹ to prohibit mandatory arbitration provisions in consumer credit agreements. In January 2001, I once again introduced the Consumer Credit Fair Dispute Resolution Act of 2001 with Senator Leahy.¹⁰² My bill extends the holding of the California appellate decision to every credit cardholder and consumer loan borrower by amending the FAA to invalidate mandatory, binding arbitration provisions in consumer credit agreements.

⁹⁸ Hossam M. Fahmy, *Arbitration: Wiping Out Consumers Rights?*, 64 TEX. B.J. 917 (2001).

⁹⁹ 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998).

¹⁰⁰ *Id.*

¹⁰¹ S. 2117, 106th Cong., 146 CONG. REC. S935 (daily ed. Feb. 29, 2000).

¹⁰² S. 192, 107th Cong., 147 CONG. REC. S587 (daily ed. Jan. 25, 2001).

We need to restore fairness to the resolution of consumer credit disputes. I believe the Consumer Credit Fair Dispute Resolution Act would help do so.¹⁰³

VI. TIME FOR A BROADER APPROACH

Arbitration can be a fair and efficient way to settle disputes. We ought to encourage alternative dispute resolution. Arbitration can settle conflicts fairly, however, only when it is entered into knowingly and voluntarily by both parties to the dispute after the dispute has arisen. This is not likely to happen in a variety of cases, including the areas of employment, auto franchise, and consumer credit contracts, where unequal bargaining power exists.

Thus, it is time for a broader prohibition of mandatory, binding arbitration in settings where bargaining power is inherently unequal, or at least unequal in almost all cases. Congress should consider whether it should ban mandatory, binding arbitration agreements from all consumer and employment settings.

Even short of a legislative prohibition, an arbitration bill of rights could improve the situation. We could define standards for what constitutes a conflict of interest that would prohibit an arbitrator from hearing a dispute. Some guarantee of access to the dispute resolution should exist, which may require a cap on filing fees and costs. At least some limited right to discovery should be available to the parties in arbitration, and arbitrators should be required to state their reasons for their decisions in writing. At the very least, arbitrators should have to abide by applicable law, and their decisions should be subject to greater judicial review.

The time has come for Congress to protect the rights of Americans to their day in court, and Congress should not delay in providing that protection.

¹⁰³ During Senate consideration of the farm bill, S. 1731, 107th Cong. (2001), the Senate adopted by a vote of 64 to 31 an amendment that I offered to allow parties to a contract for the sale or production of livestock or poultry to seek resolution to disputes arising from the contract in accordance with any lawful method of dispute resolution, regardless of whether the contract contained a provision requiring arbitration. Senate amend. no. 2522, 147 Cong. Rec. S13,087-92 (daily ed. Dec. 13, 2001). The parties would still have the option of voluntarily submitting the dispute to binding arbitration, but they would not be limited to that forum as the sole place to seek resolution to their grievances. Under my amendment, a party in a better bargaining position would not be able to contractually choose the forum for resolution of all dispute arising out of the contract. The weaker party would be entitled to assert their rights, should they choose, in a civil proceeding.