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OPENING PANDORA'S BOX: *CIRCUIT CITY V. ADAMS* AND THE ENFORCEABILITY OF COMPULSORY, PROSPECTIVE ARBITRATION AGREEMENTS

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I. INTRODUCTION

Congress enacted the Federal Arbitration Act (FAA) in 1925 to mitigate the hostility of courts enforcing arbitration agreements.[1] The FAA's coverage provision, section 2, endorses the enforcement of arbitration agreements "in any maritime transaction or a contract evidencing a transaction involving commerce . . . save upon such grounds as exist at law or in equity for the revocation of any contract."[2] Section 1 of the FAA excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[3]

In 1973, the Supreme Court first faced the issue of the enforceability of arbitration agreements in the employment context in *Alexander v. Gardner-Denver Co.*[4] The Court did not consider the scope of section 1 or section 2 of the FAA. It relied instead on other grounds in refusing to enforce an arbitration agreement contained in a collective-bargaining agreement.[5] In *Alexander,* the Court held that "[a]n employee's statutory right to trial *de novo* under . . . the Civil Rights Act of 1964 is not foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement."[6]

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1. Circuit City Stores, Inc., v. Adams, 532 U.S. 105, 111 (2001).
2. 9 U.S.C. § 2 (1994).
3. 9 U.S.C. § 1 (1994).
4. 415 U.S. 36, 36–37 (1974) (Syllabus).
5. *Id.* at 36–38 (Syllabus).
6. *Id.* at 36 (Syllabus).

In 1991, the Court faced the issue of the enforceability of arbitration agreements contained in securities registration applications in *Gilmer v. Interstate/Johnson Lane Corp.*[7] The Court declined to address the scope of the section 1 exclusion because Gilmer's arbitration clause was not contained in a contract of employment; but instead, it was found in Gilmer's securities registration application.[8] The Court simply followed the uniform conclusions of the lower courts "that the exclusionary clause in section 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications,"[9] and avoided the antecedent question of whether agreements to arbitrate in private, non-collectively bargained employment contracts were excluded from FAA coverage by section 1.[10]

In the 2001 case of *Circuit City Stores, Inc. v. Adams*,[11] the United States Supreme Court faced the question of the enforceability of arbitration agreements in private employment contracts head on. A majority of the Court declared unequivocally: "Section 1 exempts from the FAA only contracts of employment of transportation workers."[12] By so holding, the Supreme Court endorsed the view of a majority of jurisdictions,[13] and rejected the view of the Ninth Circuit.[14]

The Supreme Court reached its holding in two large interpretive

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7. 500 U.S. 20 (1991).

8. *Id.* at 25 n.2. In *Gilmer*, amici had raised the antecedent issue of whether contracts of employment were wholly exempt from the FAA under section 1. *Id.* Since Gilmer had failed to raise this issue in the lower courts, the Court stated, "we will leave for another day the issue raised by *amici curiae*." *Id.* Instead, the majority simply relied on the fact that Gilmer's contract was not an employment contract because his contract was with the securities exchanges, and not with his employer, Interstate. *Id.* As such, it did not implicate the language of section 1.

9. *Id.*

10. The two dissenters in *Gilmer* took issue with the majority's failure to address this "antecedent question." *Id.* at 36. In their opinion, "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA." *Id.* (Stevens, J., dissenting).

11. 532 U.S. 105 (2001).

12. *Id.* at 119.

13. The Court cited *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575–76 (10th Cir. 1998); *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 274 (4th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997); *Cole v. Burns International Security Services*, 105 F.3d 1465, 1470–72 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747–48 (5th Cir. 1996); *Asplundh Tree Co. v. Bates*, 71 F.3d 592, 596–601 (6th Cir. 1995); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Tenney Engineering, Inc. v. United Electric & Machine Workers of America*, 207 F.2d 450 (3d Cir. 1953). *Circuit City*, 532 U.S. at 111.

14. Circuit City Stores, Inc. v. Adams, 194 F.3d 1070, 1071–72 (9th Cir. 1999); *see also* Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999).

steps. First, the Court rejected the contention that "an employment contract is not a 'contract evidencing a transaction involving interstate commerce' at all, since the word 'transaction' in section 2 extends only to commercial contracts."[15] The court reasoned, "If all contracts of employment are beyond the scope of the Act under the section 2 coverage provision, the separate exemption for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce' would be pointless."[16] The majority concluded that Congress, by using the language "involving interstate commerce," intended to regulate employment contracts, a type of commercial contract, to the fullest extent of its power.[17] This justifies the section 1 exemption of certain employment contracts from the reach of the FAA. Justice Stevens' dissent accuses the majority of "[p]laying ostrich to the substantial history behind the amendment,"[18] while asserting there is no "evidence that the proponents of the legislation intended it to apply to agreements affecting employment."[19]

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15. *Circuit City*, 532 U.S. at 113. The dissent stated that "[t]he majority's reasoning is squarely contradicted by . . . *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200, 201 n.3 (1956), where the Court concluded that an employment contract did not 'evidence' a transaction involving commerce' within the meaning of section 2 of the Act." *Id.* at 128 (Stevens, J., dissenting). Justices Ginsburg and Breyer also dissented. *Id.*

16. *Id.* at 113. The dissent noted that the section 1 exemption language was an amendment to the original draft of the statute in response to concerns by representatives of organized labor "that the legislation might authorize federal judicial enforcement of arbitration clauses in employment contracts and collective-bargaining agreements." *Id.* at 127 (Stevens, J., dissenting). The dissent noted that "it is not 'pointless' to adopt a clarifying amendment in order to eliminate opposition to a bill." *Id.* at 128.

17. *Id.* at 113. The majority relied on *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). Justice Souter's dissent found this expansive reading of "involving commerce" as implementing Congress's intent "to fully exercise its commerce power," unobjectionable and consistent with *Allied-Bruce*, but noted that, in that case, the Court engaged in expansive interpretation of statutory language when it "held that 'involving commerce' showed just such a plenary intention, even though at the time . . . we had long understood 'affecting commerce' to be the quintessential expression of an intended plenary exercise of commerce power." *Circuit City*, 532 U.S. at 135–36 (Souter, J., dissenting).

18. *Id.* at 128 (Stevens, J., dissenting).

19. *Id.* at 126 (Stevens, J., dissenting). The dissent took issue with the majority's refusal to consider neither "the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925." *Id.* (Stevens, J., dissenting) (citing Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994), for the proposition that "[w]e do not resort to legislative history to cloud a statutory text that is clear.") The majority refused to consider testimony by the chairman of the American Bar Association (ABA) committee that drafted the legislation or statements by the Secretary of Commerce before a Senate subcommittee hearing because the statements were not "made by a Member of Congress, nor were they included in the official Senate and House reports." *Circuit City*, 532 U.S. at 119–20.

Having disposed of this first interpretive hurdle, the Court, in an impressive display of hermeneutical legerdemain, dusted off the interpretive maxim *ejusdem generis*[20] and proceeded to interpret the section 1 language of "any other class of workers engaged in foreign or interstate commerce" as evidencing a very narrow congressional intent to regulate only contracts of transportation workers.[21] The dissenters took issue with the majority's interpretation of section 1, finding that interpreting "involving commerce" in section 2 and "engaged in commerce" in section 1 so differently is both disingenuous[22] and

20. The interpretive maxim of *ejusdem generis* is used to justify the Court's conclusion that the residual phrase "any other class of workers engaged in foreign or interstate commerce" must be controlled and defined by its definitional phrase, "contracts of employment of seamen, railroad employees." *Id.* at 115.

21. *Id.* at 114–15. Since the residuary phrase is controlled and defined by the definitional phrase, this "other class of workers" must be clearly analogous to seamen, railroad employees, or both. As a result, the Court concluded that section 1 excludes only contracts of employment of transportation workers. *See also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1471 (D.C. Cir. 1997). In this respect, the dissent's analysis was just as plausible and more compelling. The dissent argued that Congress was, in the definitional clause, specifically exempting those whom, under controlling constitutional interpretations of congressional power under the Commerce Clause in 1925, it could permissibly regulate, and exempting, through the residuary clause, all those others it could not. *Circuit City*, 532 U.S. at 140 (Souter, J., dissenting). Under this interpretation, Congress's definitional exclusion was the general one of "any class of workers engaged in interstate commerce." The exclusion of "contracts of employment of seamen, railroad employees" was inserted to placate those who feared the FAA might upset pending legislation specifically directed at maritime and railroad workers. *See id.* at 126–27 (Stevens, J., dissenting). The dissent claimed Congress was simply being thorough, finding that "the explanation for the catchall is not *ejusdem generis*; instead, the explanation for the specifics is *ex abundanti cautela*, abundance of caution." *Id.* at 140 (Souter, J., dissenting).

22. *Id.* at 114. It is disingenuous, as argued by Adams, that Congress intended to exclude from arbitration the class of workers it certainly had the power to regulate while authorizing arbitration of those it likely could not. *Id.* at 138 (Souter, J., dissenting). Similarly, the dissent argued that it is disingenuous to believe that Congress, in 1925, believed employees stood in a sufficiently powerful bargaining position with employers to produce fair arbitration agreements. *Id.* at 138–39. The year of 1925 lay within a period of American history marked by violent episodes of rebellion by the working class and equally violent reactions against them by the government and the owners of capital. This period culminated legislatively in the National Labor Relations Act in 1935, which explicitly guaranteed workers the rights to organize, select exclusive bargaining representatives, and engage in concerted labor activities, while prohibiting employers from intimidating or coercing employees to eschew collective action. *See generally* 29 U.S.C. §§ 151-187 (1994); *see also* 29 U.S.C. § 157 (detailing employee rights); 29 U.S.C. §158 (detailing unfair labor practices by employers).

The dissent also noted that the majority's expansive reading of section 2 is in stark contrast to its narrow reading of section 1. *Circuit City*, 532 U.S. at 134–35 (Souter, J., dissenting). The dissent noted that the majority gives the "involving commerce" language of section 2 a broad, evolutionary reading to include not only those commercial contracts Congress could regulate under the limited interpretation of the Commerce Clause in 1925,

inconsistent with the Court's own precedents.[23]

While the Supreme Court's decision succeeds in settling the fundamental issue of the enforceability of arbitration agreements, specifically compulsory, prospective agreements like those present in *Circuit City*, its decision offers no new guidance as to the permissible scope of such arbitration agreements' provisions, the bargaining conditions that must be met for such agreements to be enforceable, or the consequences for failing to meet any required conditions. Similarly, the decision sheds no new light on the extent to which arbitration under the FAA inherently conflicts with federal statutory law.[24] These issues now demand our attention. In Part II, we will examine the line of decisions that led to the *Circuit City* decision's majority opinion and dissents. In Part III, we will examine case law from other jurisdictions to ascertain the permissible scope and negotiating conditions of enforceable arbitration agreements and the extent to which arbitration under the FAA inherently conflicts with federal statutory law.

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but also those contracts Congress can now regulate under the modern expansive reading of the Commerce Clause that began in 1937. *Id.* at 134. Conversely, the dissent noted the majority's narrow non-evolutionary reading of section 1 "engaged in commerce" to encompass only those employment contracts Congress was certain it could regulate in 1925, *i.e.*, contracts of transportation workers engaged in interstate commerce. The dissent believed that "[t]he statute is . . . entitled to a coherent reading as a whole . . . by treating the exemption for employment contracts as keeping pace with the expanded understanding of the commerce power generally." *Circuit City*, 532 U.S. at 137 (Souter, J., dissenting). Justices Stevens, Ginsburg, and Breyer joined in Justice Souter's dissent. *Id.* at 133.

23. The dissent asked us to do the following:

> Compare *The Employers' Liability Cases*, 207 U.S. 463, 496, 498 (1908) (suggesting that regulation of the employment relations of railroad employees "actually engaged in an operation of interstate commerce" is permissible under the Commerce Clause but that regulation of a railroad company's clerical force is not), with *Hammer v. Dagenhart*, 247 U.S. 251, 271–76 (1918) (invalidating statute that had the "necessary effect" of "regulat[ing] the hours of labor of children in factories and mines within the States").

Circuit City, 532 U.S. at 136 (Souter, J., dissenting). The dissent then concluded the following:

> [B]y using "engaged in" for the exclusion, Congress showed an intent to exclude to the limit of its power to cover employment contracts in the first place, and it did so just as clearly as its use of "involving commerce" showed its intent to legislate to the hilt over commercial contracts at a more general level.

Id.

24. While noting that *Circuit City* involved the application of the FAA in a federal court, rather than in a state court, the Court endorsed the continuing vitality of their decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). It reiterated that *Southland* has not been overruled by either judicial or legislative action. *Circuit City*, 532 U.S. at 122.

II. DOCTRINAL DEVELOPMENT

In *Alexander v. Gardner-Denver Co.,* the Court held that an employee's prior submission of his claim to binding arbitration under the nondiscrimination clause of a collective-bargaining agreement does not foreclose the employee's statutory right to a trial under Title VII of the Civil Rights Act of 1964.[25] Further, the Court held that "[t]he federal court should consider the employee's claim *de novo.*"[26] The Court decided that "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[27]

The Court, following an analysis of the goals of Title VII,[28] as amended by the Equal Employment Opportunity Act of 1972,[29] reached the general conclusion that "federal courts have been assigned plenary powers to secure compliance with Title VII,"[30] and recognized that Congress gave individuals a private right of action as an "essential means of obtaining judicial enforcement of Title VII."[31] It found "no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."[32] Pursuant to a collective-bargaining agreement, "there can be no prospective waiver of an employee's rights under Title VII."[33]

The Court reasoned by analogy that since legislative enactments

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25. 415 U.S. 36, 59–60 (1974).

26. *Id.* at 60.

27. *Id.* The Court declined to adopt specific standards for weighing an arbitral decision. Instead, "this must be determined in the court's discretion with regard to the facts and circumstances of each case." *Id.* at 60 n.21. The Court did note relevant factors: "[T]he existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators." *Id.*

28. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

29. 42 U.S.C. § 2000e(a) (1994).

30. *Alexander,* 415 U.S. at 45.

31. *Id.*

32. *Id.* at 47.

33. *Id.* at 51. The Court did note the following:

> [A] union may waive certain statutory rights related to collective activity, such as the right to strike. These rights . . . foster the processes of bargaining and properly may be exercised or relinquished by the union . . . to obtain economic benefits for union members. Title VII . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities.

Id. (citations omitted).

have intentionally provided for overlapping forums[34] in bringing discrimination claims, "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement."[35] The Court envisioned tandem, complementary[36] forums—arbitration for the vindication of collective contractual rights, and federal courts for the vindication of individual statutory rights.[37] Either or both forums are available to an employee complainant.[38] The Supreme Court has extended this rule to cases implicating other statutes protecting employees.[39]

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court affirmed the court of appeals for the Fourth Circuit, holding that "a claim under the Age Discrimination in Employment Act of 1967 . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application."[40] In *Gilmer,* the

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34. *Id.* at 47 (citing 42 U.S.C. § 2000e-5(b) (Supp. II 1972) (EEOC)); 42 U.S.C. § 2000-5(c) (1994) (state and local agencies); 42 U.S.C. § 2000e-5(f) (Supp. II 1972) (federal courts)). The Court noted that "in general, submission of a claim to one forum does not preclude a later submission to another." *Id.* at 47–48.

35. *Id.* at 49.

36. The Court noted that "[t]he relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each." *Id.* at 50–51.

37. Arbitration would also be available for vindication of individual statutory rights if a claimant opts to pursue their claim in only that forum.

38. Presumably, the former would be available at the initiation of the employer. The Court noted that this does not give employees "two strings in his bow" because the employer cannot bring a suit under Title VII because employers simply do not complain. *Id.* at 54. In the arbitration context, other employment-related claims other than Title VII claims (*e.g.*, wrongful discharge claims without any allegation of statutory civil rights discrimination) may occur causing the employer to resort to arbitration of the claim as readily as the employee.

39. *See* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 737 (1981) (applying *Alexander* in an overtime pay dispute under the Fair Labor Standards Act); McDonald v. City of West Branch, 466 U.S. 284, 289 (1984) (applying *Alexander* to a title 28 U.S.C. § 1983 claim).

40. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991). Gilmer was required by his employer to register as a securities representative with various exchanges including the New York Stock Exchange. *Id.* Gilmer completed a registration application entitled "Uniform Application for Securities Industry Registration or Transfer" (U-4). It contained an agreement "to arbitrate any dispute, claim or controversy . . . that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." *Id.* (quoting Gilmer's registration application). Subsequently, Gilmer registered with the New York Stock Exchange (NYSE). At issue in *Gilmer*, then, was the New York Stock Exchange Rule 347 allowing for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.* The Court also noted:

Supreme Court reached a different result than *Alexander*, but did not explicitly overrule it. Instead, the Court distinguished the two cases. First, *Alexander* involved arbitration in the context of a collective-bargaining agreement, while *Gilmer* involved arbitration in a non-union context, specifically a registration application.[41] Second, *Alexander* involved the issue of "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims,"[42] while *Gilmer* involved the enforceability of an agreement to arbitrate individual statutory claims.[43] The Court's decision in *Gilmer* creates an odd doctrinal anomaly by rejecting compulsory arbitration of statutory employment discrimination claims for unionized employees under a collective-bargaining agreement,[44] while requiring arbitration of statutory employment discrimination claims by non-union employees.[45]

"[W]e have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1-7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*; and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2)." *Id.*

41. The Court noted the "important concern . . . [of] the tension between collective representation and individual statutory rights" in *Alexander* was not present in *Gilmer*. *Id.* at 35. The Court quoted *Alexander* to support its view that "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.* at 34 (quoting *Alexander*, 415 U.S. at 58 n.19). The Court, therefore, justified its view that "*Alexander* and its progeny provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim." *Id.* at 35.

42. *Id.*

43. The Court stated that "[s]ince the employees [in *Alexander* and its subsequent line of cases] had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Id.*

44. The *Gilmer* court reiterated the principles announced in *Alexander*. Since the Court declined to overrule *Alexander*, most subsequent federal courts have denied compulsory arbitration of discrimination claims where the arbitration provision is provided for in a collective-bargaining agreement. *See, e.g.*, Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997), Varner v. Nat'l Super Markets, 94 F.3d 1209 (8th Cir. 1996); Felt v. Atchison, Topeka & Santa Fe, 60 F.3d 1416 (9th Cir. 1995). *But see* Austin v. Owens-Brockway Glass Container Co., 78 F.3d 875, 885 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996) (The Fourth Circuit reviewed *Alexander* and its progeny and dispensed with the distinction between agreements to arbitrate created "under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement.... So long as the agreement is voluntary, it is valid, and... it should be enforced.").

45. Most circuits have followed the analysis in *Gilmer*. *See, e.g.*, Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110 (3d Cir. 1993) (holding that compulsory arbitration of ERISA claims by trustees is appropriate); Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656 (5th Cir. 1995); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (holding that an arbitration clause in a U-4 securities registration form required arbitration of

In *Circuit City*, the arbitration agreement was not a part of a collective-bargaining agreement as in *Alexander*, nor was it a boilerplate provision in a uniform securities registration application required by many employers in the securities business as in *Gilmer*. Instead, Saint Clair Adams, in a non-union context, signed an employment application that contained a mandatory arbitration agreement drafted[46] and used only by Circuit City.[47] The Ninth Circuit Court of Appeals held that the arbitration agreement was contained in a contract of employment[48] and,

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statutory claims); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (holding that broker must arbitrate based on arbitration clause in NASD registration); Bender v. A.G. Edwards & Son, Inc., 971 F.2d 698 (11th Cir. 1992) (holding broker must arbitrate under registration agreements with NYSE and NASD). The Ninth Circuit and the Seventh Circuit have interpreted *Gilmer* somewhat differently. In *Farrand v. Lutheran Bros.*, 993 F.2d 1253, 1254 (7th Cir. 1993), the Seventh Circuit, after reviewing the NASD Code of Arbitration Procedure, concluded that arbitration under the U-4 form was not compulsory because the NASD rules referred to by the U-4 form did not specifically require arbitration of employment disputes. In *Prudential Insurance Co. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994), the Ninth Circuit Court of Appeals agreed with the Seventh Circuit in *Farrand* and held that complainants under Title VII can only be forced to forego statutory remedies in favor of arbitration if the complainant knowingly agreed to arbitrate those specific disputes. The court noted that the U-4 form and the NASD arbitration clause failed to specifically mention sex discrimination or discrimination generally as disputes subject to arbitration. *Id.* As such, the court concluded that the plaintiff did not knowingly agree to arbitrate discrimination claims. *Id.*

46. The arbitration agreement read: "[A]n employee cannot work at Circuit City without signing the DRA (Dispute Resolution Agreement). If the employee signs the DRA and then withdraws consent within three days, the employee 'will no longer be eligible for employment at Circuit City.'" Circuit City Stores, Inc. v. Adams, 194 F.3d 1070, 1071 (9th Cir. 1999).

47. Specifically, Adams completed a six-page application with Circuit City. *Id.* at 1071. Two pages of the application were devoted to the DRA. *Id.* The DRA stated:

> [I agree that I will settle any and all] previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments to the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.

Id. at 1071 n.1.

48. The Ninth Circuit "defined an 'employment contract' as 'an agreement setting forth 'terms and conditions' of employment'." *Id.* at 1071 (citing Modzelewski v. Resolution Trust Corp., 14 F.3d 1374, 1376 (9th Cir. 1994)). The Ninth Circuit, in reaching the conclusion the DRA is an employment contract, disregarded Circuit City's disclaimer in the DRA that stated, "I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me.... [T]his Agreement in no way alters the 'at-will' status of my employment." *Id.* The Ninth Circuit

as such, the FAA was inapplicable.[49] In doing so, the Ninth Circuit followed its decision in *Craft v. Campbell Soup Co.*[50] in which they held that the FAA did not apply to labor and employment contracts.[51] The Ninth Circuit's holding conflicted with all other Courts of Appeals that had addressed this issue.[52] The Supreme Court granted certiorari to resolve this conflict and held that "[s]ection 1 exempts from the FAA only contracts of employment of transportation workers."[53]

From this doctrinal line of case law, a number of clear rules emerge. First, individual agreements, negotiated collectively, do not preclude subsequent individual statutory claims in a judicial forum.[54] While most courts have consistently applied *Alexander* to preclude compulsory arbitration in union settings,[55] the Fourth Circuit Court of Appeals has interpreted *Gilmer* and its progeny in a manner that effectively overrules *Alexander*.[56] Despite the Fourth Circuit's contrary interpretation, the Supreme Court, in *Wright v. Universal Maritime Service Corp.*,[57] has recently reaffirmed *Alexander's* general principle that a general arbitration clause, collectively bargained, cannot waive an individual employee's right to litigate a claim under the Americans with Disabilities Act (ADA).[58]

Second, courts are instructed not to enforce any agreement, negotiated collectively or individually, if "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory

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found the agreement was a condition precedent to employment and thus constituted a "condition of employment" and therefore was a "contract of employment." *Id.* at 1071–72.

49. *Id.*

50. 177 F.3d 1083 (9th Cir. 1999).

51. *Id.* at 1094 (holding that the FAA does not apply to labor or employment contracts).

52. *See supra* note 13 (listing relevant cases).

53. *Circuit City*, 532 U.S. at 119.

54. *Circuit City* does not explicitly overrule *Alexander*. To the contrary, the Court in *Circuit City* is conspicuously silent on the subject.

55. *See, e.g.*, Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997); Varner v. Nat'l Super Markets, 94 F.3d 1209 (8th Cir. 1996); Felt v. Atchison, Topeka & Sante Fe, 60 F.3d 1416 (9th Cir. 1995).

56. *See* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996). After examining related case law, the court found insignificant the distinction between arbitration agreements contained in collective-bargaining agreements and those contained in individual employment agreements. *Id.* at 880–85. *See also* Almonte v. Coca-Cola Bottling Co., 959 F. Supp. 569 (D. Conn. 1997) (adopting the Fourth Circuit's analysis).

57. 525 U.S. 70 (1998).

58. Justice Scalia, without considering the effect on *Gilmer*, stated, "[A] union waiver of employee rights to a federal judicial forum for employment-discrimination claims" would not be "appropriate" if the waiver was not "clear and unmistakable." *Id.* at 82 n.2.

rights at issue."[59] This inherent conflict must be "discernible from the text, history, or purposes of the statute."[60] Therefore, statutory rights are presumptively arbitrable unless Congress has expressed a contrary intention.[61] This presumption places the burden of persuasion of this issue squarely on the shoulders of the party resisting enforcement of the arbitration agreement.[62] In *Gilmer*, the Supreme Court found no inherent conflict between arbitration and the purpose of the Age Discrimination in Employment Act (ADEA).[63] Gilmer made five distinct arguments in support of the view that arbitration is inconsistent

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59. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985). In the context of an arbitration agreement negotiated individually, the Court relies on *Mitsubishi*. In the context of arbitration agreements negotiated collectively, the *Alexander* Court found that a waiver of employee rights before the fact "would defeat the paramount congressional purpose behind Title VII." Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1973). It also found that "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal." *Id.* at 56.

60. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987). This principle was not one announced by the Supreme Court soon after the enactment of the FAA in 1925. Indeed, the Supreme Court, between 1953 and 1985, had circumscribed federal policy favoring arbitration in cases implicating public law statutory rights. *See, e.g.*, Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (Supreme Court refused to require arbitration to resolve a claim under the Securities Act of 1933 15 U.S.C. §§ 77a-77aa (1933)); *Alexander*, 415 U.S. 36. Rather, this principle is one first articulated by the Supreme Court in 1985 and reaffirmed in 1986. *See Mitsubishi Motors Corp.*, 473 U.S. 614 (noting a presumption in favor or arbitrating public law rights in a case implicating the Sherman Antitrust Act.); *Shearson/American Express Inc.*, 482 U.S. 220 (upholding arbitration in a case implicating the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78mm (1994)). It has been argued that *McMahon* effectively, although not explicitly, overruled *Wilko*. *See* G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on* Shearson/American Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397, 414 (1988). *Wilko* and *McMahon* are distinguishable in that Wilko's claim was under the 1933 Act and McMahon's claim was under the 1934 Act. Nevertheless, both the 1933 Act and the 1934 Act contain identical anti-waiver clauses that prohibit waiver of "compliance with any provision" of the Act. *Id.* at 408 n.81 (citing the Securities Exchange Act of 1934, 15 U.S.C. § 77n (1989)).

61. This presumption is consistent with and reflects the Court's view that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

62. The Court, in *McMahon*, held that the McMahons had the burden of persuasion to demonstrate, through recourse to the Act's text, legislative history, and underlying purposes, that Congress intended to "limit or prohibit" arbitration of 1934 claims. *McMahon*, 482 U.S. at 227.

63. Citing *McMahon*, the Court examined the text, history and purposes of the ADEA to determine whether Congress intended to limit or prohibit arbitration. *Gilmer*, 500 U.S. at 26.

with the ADEA.[64] The Supreme Court disposed of each of these arguments in turn, despite contrary analysis in *Alexander*.[65]

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64. First, Gilmer argued that "arbitration panels will be biased." *Id.* at 30. The Court noted that the FAA contains protections against bias and, in the absence of specific evidentiary showings of bias, the mere speculation of possible bias is insufficient to justify a blanket refusal to enforce arbitration agreements. *Id.* at 30–31. Second, Gilmer argued the more limited discovery permitted in arbitration than in judicial actions will make it difficult to prove discrimination. *Id.* at 31. The Court noted generally that the limited discovery allowed in arbitration simply "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). In the specific context of discovery, the Court noted "there ha[d] been no showing in this case that the NYSE discovery provisions . . . will prove insufficient to allow ADEA claimants . . . a fair opportunity to present their claims. Although those procedures might not be as extensive as in the federal courts . . . ." *Id.* Third, because arbitrators are not required in all cases to issue written opinions, there will be "a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law." *Id.* The Court found no merit in this argument because the NYSE rules require "all arbitration awards [to] be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued." *Id.* at 31–32. "In addition, the award decisions are made available to the public." *Id.* at 32. Fourth, "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id.* The Court noted that arbitrators generally have the power to "fashion equitable relief" and that the NYSE rules specifically authorize arbitrators to grant "damages and/or other relief." *Id.* Further, the Court noted, "[A]rbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief." *Id.* Fifth, because "there often will be unequal bargaining power between employers and employees," courts should refuse to enforce arbitration agreements. *Id.* at 33.

> The Court noted that "the FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract . . . . [And] this claim of unequal bargaining power is best left for resolution in specific cases."

Id. at 33.

65. In *Alexander*, the Court considered the assumption that "arbitral processes are commensurate with judicial processes." Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974). The Court noted that "[w]e deem this supposition unlikely." *Id.* The Court then noted, "[O]ther facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights." *Id.* at 57. The Court considered the special competence of arbitrators in claims involving industrial relations and the lesser competence of arbitrators in the statutory and constitutional interpretation often required in Title VII claims. *Id.* The Court also found:

> [T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable . . . . [And] "arbitrators have no

Third, individual agreements, negotiated individually, are unenforceable only when they offend established state common-law contract rules, impose unfair costs, or are acquired through "fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"[66]

The Court left open three avenues of attack on arbitration agreements negotiated individually, notwithstanding *Circuit City*: (1) The outcome and/or the arbitrator are biased; (2) the limitation of certain procedural rights[67] creates an inherent conflict between arbitration and the text, history and purposes of the statute at issue;[68] (3) the negotiating positions of the parties and/or the terms of the contract violate some settled principle of contract law or constitute deception or fraud.[69]

III. AVENUES OF ATTACK ON ARBITRATION AGREEMENTS

A. Arbitrator Selection Bias

Arbitrator selection provisions must be drafted to provide employees with a "neutral" decision-maker.[70] In *Gilmer v.*

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obligation . . . to give their reasons for an award."

Id. at 57–58 (quoting United Steelworkers of Am.v. Enter.Wheel & Car Corp., 363 U.S. 574, 598 (1960)) (alterations in original); *see also* Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972) (setting forth a standard for judicial deference to arbitrator decisions under Title VII); Paul E. Mirengoff, Note, *Judicial Deference to Arbitrator's Decisions in Title VII Cases*, 26 STAN. L. REV. 421 (1974).

66. *Gilmer*, 500 U.S. at 33 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 627 (1985)). The FAA's coverage provision in section 2 explicitly provides for enforcing arbitration agreements except in cases where the agreement violates a legal principle "at law or equity for the revocation of any contract." 9 U.S.C. § 2 (Supp. V 1999).

67. Examples of procedural rights that might be limited by arbitration include, among others, discovery, jury trial, and probing appellate review. *See Gilmer*, 500 U.S. at 31.

68. *See infra* Part III.B.

69. *See infra* Part III.C.

70. The Court of Appeals for the District of Columbia has discussed several procedural requirements to ensure that the arbitral forum meets certain fairness minimums. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997). The court held that, to be enforceable, such agreements must, at a minimum, establish an "arbitration arrangement" that:

> (1) [P]rovides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs *or* any arbitrators' fees or expenses as a condition of access to

Interstate/Johnson Lane Corp.,[71] the Supreme Court refused to "indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators."[72] The court specifically noted that the New York Stock Exchange (NYSE) arbitration rules provide protections against biased panels.[73] The court also noted that once there is a "final" decision, the FAA also protects against bias by providing that courts may overturn arbitration decisions "[w]here there was evident partiality or corruption in the arbitrators."[74] Thus, there is a safeguard in place to protect a selection procedure that appears neutral on its face, but which, in actuality, produces an arbitrator who was not neutral in his or her decision-making.[75]

To date, courts have provided little guidance regarding the minimum requirements for arbitrator selection procedures in a mandatory prospective environment.[76] In *Graham v. Scissor-Tail, Inc.*,[77] the California Supreme Court refused to enforce a contract's arbitration panel provision because the stipulated panel was biased and the selection provision was, therefore, unconscionable.[78] The contract between musicians and a music promoter required submission of every dispute "for determination by the [American Federation of Musicians]... and such determination shall be conclusive, final and

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the arbitration forum.

Id.

71. 500 U.S. 20 (1991).

72. *Id.* at 30 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 634 (1984)).

73. *Id.* at 30–31 (citing 2 CCH New York Stock Exchange Guide ¶¶ 2608 (Rule 608), 2609 (Rule 609), and 2610 (Rule 610) (1991)). "The rules require, for example, that the parties be informed of the employment histories of the arbitrators, and that they be allowed to make further inquiries into the arbitrators' backgrounds." *Id.* "[E]ach party is allowed one peremptory challenge and unlimited challenges for cause." *Id.* "[T]he arbitrators are required to disclose any 'circumstances which might preclude [them] from rendering an objective and impartial determination.'" *Id.* (quoting NYSE Guide ¶ 2610, at 4315 (Rule 610)).

74. *Gilmer*, 500 U.S. at 30–31 (quoting 9 U.S.C. § 10(b) (1994)).

75. A post-decision challenge of arbitrator bias will not be discussed here. ELKOURI & ELKOURI, HOW ARBITRATION WORKS (Marlin M. Volz & Edward P. Goggin eds. 5th ed. 1997), presents excellent coverage of this issue and the entire arbitration forum in general.

76. See Martin H., *Privatizing Justice—But By How Much: Questions* Gilmer *Did Not Answer*, 16 OHIO ST. J. ON DISPUTE RESOL. 589 (2001) for a recent scholarly discussion of concerns to be addressed.

77. 623 P.2d 165 (Cal. 1981).

78. *See id.* at 173–77.

binding upon the parties."[79] The California Supreme Court, recognizing the strong federal policy favoring arbitration, remanded the case back to the trial court to afford the parties a reasonable opportunity to agree on a suitable arbitrator.[80]

The court acknowledged that the parties do have considerable leeway in structuring alternative dispute resolution arrangements and that the parties may agree to "arrangements which vary to some extent from the dead-center of 'neutrality.'"[81] Nevertheless, the court found that the contract's designation of the musicians' union as the final, binding decision-maker was "so inimical to fundamental notions of fairness as to require non enforcement."[82]

The *Graham* court took particular interest in a decision from New York and agreed with that court's reasoning that a contract designating one of the parties as the arbitrator of all contractual disputes is illusory.[83]

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79. *Id.* at 168.

80. *Id.* at 180. "[F]ailing such agreement, the court should on petition of either party appoint the arbitrator. In the absence of an agreement or petition to appoint, the court should proceed to a judicial determination of the controversy." *Id.* (citation omitted).

81. *Id.* at 176. "As the United States Supreme Court has said in a related context, 'Congress has put its blessing on private dispute settlement arrangements . . . , but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity.'" *Id.* (quoting Hines v. Anchor Motor Freight, 424 U.S. 554, 571 (1976)) (alterations in original).

82. *Graham*, 623 P.2d. at 174. The court reasoned as follows:

> Although our review of the record has disclosed nothing which would indicate that A.F. of M. procedures operate to deny any party a fair opportunity to present his position prior to decision, we are of the view that the 'minimum levels of integrity' which are requisite to a contractual arrangement for the nonjudicial resolution of disputes are not achieved by an arrangement which designates the union of one of the parties as the arbitrator of disputes arising out of employment—especially when, as here, the arrangement is the product of circumstances indicative of adhesion.

Id. at 177.

83. According to *Graham*, the court in *In re Cross & Brown Co.*, 4 A.D.2d 501, 167 N.Y.S.2d 573 (1957) considered the validity of a provision in an employment contract establishing the employer as the arbitrator and the arbitrator/employer's decision as final. *Graham*, 623 P.2d at 175. Quoting *Cross*, the *Graham* court stated:

> [T]he provision [was found] unconscionable; enforcement was denied. "A well-recognized principle of 'natural justice' is that a man may not be a judge in his own cause. Irrespective of any proof of actual bias or prejudice, the law presumes that a party to a dispute cannot have that disinterestedness and impartiality necessary to act in a judicial or quasi-judicial capacity regarding that controversy. This absolute disqualification to act rests upon sound public policy. Any other rule would be repugnant to a proper sense of justice."

Graham, 623 P.2d at 175 (quoting *In re* Cross & Brown Co., 167 N.Y.S.2d at 575).

The *Graham* court reasoned:

> We have also indicated that the same result would follow, and for the same reasons, when the designated arbitrator is not the party himself but one whose interests are so allied with those of the party that, for all practical purposes, he is subject to the same disabilities which prevent the party himself from serving.[84]

Other than this extreme example, the reported cases offer no other guidance on selection bias that would create a *per se* violation. Courts, on a case-by-case basis, will review arbitrator bias arguments and determine what "minimum levels of integrity" exist to justify enforcement.[85] Whether the courts will scrutinize arbitrator selection procedures more carefully in the context of mandatory prospective contracts remains to be seen.

In *Cole v. Burns International Security Services*,[86] the D.C. Circuit enforced a compulsory, prospective arbitration agreement that provided for the appointment of a neutral arbitrator through the American Arbitration Association (AAA) and for the arbitration hearing to be conducted in accordance with AAA rules.[87] While the court never explicitly stated it, using an experienced "neutral" third-party

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84. *Graham*, 623 P.2d at 177. The *Graham* court reasoned:

> In view of these considerations we think it must be concluded that a contractual provision designating the union of one of the parties to the contract as the arbitrator of all disputes arising thereunder—including those concerning the compensation due under the contract—does not achieve the 'minimum levels of integrity' which we must demand of a contractually structured substitute for judicial proceedings.

Id. at 178. While *Graham* declared unconscionable an arbitration provision designating a party himself or one closely allied with the party as arbitrator, *Graham* did not "limit the power of contracting parties to designate arbitrators who, with the knowledge of the parties, may have an interest in the dispute or who sustain relationship to a party which would otherwise disqualify the arbitrator from serving." *Id.* at 175 (quoting *In re* Cross & Brown Co., 167 N.Y.S.2d at 576).

85. *Id.* at 176.

86. 105 F.3d 1465 (D.C. Cir. 1997).

87. *Id.* at 1482. The court found the arbitration provision at issue valid because it:

> (1) [P]rovides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs *or* any arbitrators' fees or expenses as a condition of access to the arbitration forum.

Id.

organization to appoint the arbitrator seems to prevail against a pre-hearing selection bias argument.[88]

In three recent cases involving an arbitration provision crafted by Ryan's Family Steak Houses,[89] courts have expressed concerns regarding the potential for bias in the selection of the arbitration panels.[90] In these cases, the employer (Ryan's) had entered into a contract with Employment Dispute Services, Inc. (EDS) to have EDS provide an arbitration forum for all employment related disputes between Ryan's and its employees.[91] EDS Rules called for a panel of three adjudicators to be chosen by the parties from pools of potential arbitrators selected by EDS alone.[92]

The Sixth Circuit expressed "serious reservations" as to whether this arbitral forum was suitable for the resolution of statutory claims.[93] The Seventh Circuit discussed the trial court's concerns with the EDS

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88. The FAA always protects against actual bias by providing that courts may overturn arbitration decisions "[w]here there was evident partiality or corruption in the arbitrators." 9 U.S.C. § 10(a)(2) (1994).

89. Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753 (7th Cir. 2001); Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000); Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985 (S.D. Ind. 2001).

90. The courts ultimately refused enforcement on the basis of state contract law and the lack of a valid exchange of mutual consideration under the totality of circumstances. *Penn*, 269 F.3d at 759–60; *Floss*, 211 F.3d at 315–16; *Geiger*, 134 F. Supp. 2d at 1000–02; *see also infra* Part III.C (discussing state contract law and arbitration agreements).

91. In *Penn*, the court hypothesized that the parties may have created the arrangement the way they did "for fear that the Supreme Court might use *Circuit City* to strike down or restrict" mandatory arbitration agreements as a condition of employment. *Id.* at 761. And the court noted, "[I]f so, the half-life of the kind of system EDS has been using may be rather short at this point." *Id.*

92. *See* EDSI Rules, Art. IX, §§ 1, 2. One pool consisted of supervisors or managers of an employer signatory to EDSI Agreements, the second pool was composed of non-exempt employees who are signatory to EDSI Agreements, and the third pool was made up of attorneys, retired judges, or other competent professional persons not associated with either party. *Geiger*, 134 F.Supp. 2d at 990, 991.

93. *Floss*, 211 F.3d at 314. The court reasoned:

> Specifically, the neutrality of the forum is far from clear in light of the uncertain relationship between Ryan's and EDSI. Floss and Daniels suggest that EDSI is biased in favor of Ryan's and other employers because it has a financial interest in maintaining its arbitration service contracts with employers. Though the record does not clearly reflect whether EDSI, in contrast to the American Arbitration Association, operates on a for-profit basis, the potential for bias exists. In light of EDSI's role in determining the pool of potential arbitrators, any such bias would render the arbitral forum fundamentally unfair.

Id. (citation omitted).

arbitration selection provisions at length.[94] The court observed that, unlike the AAA, EDS handles only employment arbitration, "so essentially all of its funding comes from employers."[95] In addition to this alleged financial "incentive to tilt its arbitration panels in favor of the companies that employ it," the employee argued that EDS "has substantial opportunity to shade its procedures in favor of employers."[96] The Seventh Circuit stated that the district court "was particularly troubled by the fact that EDS, which the court saw as essentially an alter-ego for the employer, had complete control over the lists of potential arbitrators."[97]

Courts are willing to consider arguments that the arbitrator selection procedures are biased against employees. An employer may not mandate a selection procedure that establishes either party, or one closely allied with either party, as the arbitrator. The latter category includes companies, other than an established experienced neutral professional organization such as the AAA, with which the employer has contracted for the selection of the arbitrator. An employee must raise the selection bias argument before agreeing to proceed to the arbitration hearing. If not, the pre-hearing selection bias argument will be waived.[98] When a court finds an arbitrator selection procedure

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94. *Id.* at 753. The court elaborated:

> In the district court, Penn argued that the EDS arbitration system is inherently biased against employees .... Although Penn raised objections to several aspects of the EDS system, the overarching theme of his challenge was that EDS was no more than a straw-man for the employers who fund it, and thus, presumably, any award they rendered would reflect the kind of 'evident partiality' that the Federal Arbitration Act (FAA), 9 U.S.C. §10(a)(2), recognizes as a reason for unenforceability.

Id. at 756.

95. *Id.* "In addition, the employers who contract with EDS are repeat players, and if an employer becomes dissatisfied with EDS's services, EDS stands to lose a substantial amount of business. *Id.*

96. *Id.* at 756–57. As an example, EDS has complete control over the names that appear on the lists for both the employer's arbitrator and the employee's arbitrator. *Id.* at 756.

97. *Id.* at 757.

98. *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998). The court stated:

> On the other hand, we also held in *Nghiem* that plaintiffs who "voluntarily initiate binding arbitration" of their Title VII claims are "bound by the arbitrator's decision .... Once a claimant submits to the authority of the arbitrator and pursues arbitration," we explained, "he cannot suddenly change his mind and assert lack of authority."

biased, one important question remains: Will the court correct the bias by appointing an acceptable arbitrator, or will the court invalidate the entire arbitration agreement?[99]

B. Inherent Conflicts Between Arbitration and Civil Rights Statutes

1. Arbitration and the Civil Rights Act of 1991

On November 21, 1991, President George H.W. Bush signed into law the Civil Rights Act of 1991 (CRA 1991).[100] Section 118 of CRA 1991 states in part, "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."[101] The "Acts or provisions of Federal law" include Title VII of the Civil Rights Act of 1964,[102] the Americans with Disabilities Act of 1990,[103] the Age Discrimination in Employment Act of 1967,[104] and the Rehabilitation Act of 1973.[105]

Gilmer v. Interstate/Johnson Lane Corp. was argued on January 14, 1991 and decided on May 13, 1991.[106] *Gilmer*, therefore, pre-dates the final passage of CRA 1991 by six months. An interpretive problem arises because *Gilmer* was decided after CRA 1991 was drafted and reported out of committee, but before President Bush signed it into law. Congress "encouraged" arbitration among other alternative dispute resolution mechanisms only "where appropriate"[107] and to the "extent

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Duffield, 144 F.3d at 1189 (citation omitted) (quoting Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1439–40 (9th Cir. 1994)).

99. *See Infra* Part III.C.4 (discussing severability).

100. Pub. L. No. 102–166, 105 Stat. 1071–1100 (1991) (codified as amended in scattered sections of 42 U.S.C.).

101. *Id.* § 118.

102. 42 U.S.C. § 2000e to 2000e-17 (1994).

103. 42 U.S.C. § 12101-12213 (1994). The text of § 118 is identical to language in the Americans with Disabilities Act of 1990. *See* § 12212. The ADA was enacted first because President Bush had vetoed, in 1990, an earlier version of CRA 1991 that he had signed.

104. 29 U.S.C. § 621-634 (1994).

105. 29 U.S.C. §§ 710-797b (1994).

106. 500 U.S. 20 (1991).

107. Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1193 (9th Cir. 1998). The Ninth Circuit concluded that "where appropriate" and "to the extent authorized by law" impose two separate limitations. *Id.* It believes "'where appropriate' ... would appear to

authorized by law."[108] Courts are split as to whether the "extent authorized by law" codifies *Gilmer*.[109] Some courts believe the "plain language" of section 118 is a codification of *Gilmer*, and no further inquiry into legislative intent is necessary or proper.[110] Other courts believe section 118 is ambiguous,[111] and thus inquiry into legislative

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mean where arbitration furthers the purpose and objective of the Act—by affording victims of discrimination an *opportunity* to present their claims in an alternative forum, a forum that *they* find desirable—not by forcing an unwanted forum upon them." *Id.* at 1194.

108. There is some disagreement among courts of appeals as to the meaning of "to the extent authorized by law." Some circuits hold that this provision refers to the FAA and courts should enforce any arbitration agreement since the FAA expresses a liberal "federal policy favoring arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); *see* Koveleskie v. SBC Capital Mkts., 167 F.3d 361, 365 (7th Cir. 1999) (citing Seus v. John Nuveen & Co., 146 F.3d 175, 183 (3d Cir. 1998)). Other Circuits hold that the provision refers to the case law establishing the conditions and limitations on arbitration of statutory violations under the civil rights acts amended by CRA 1991. *See Duffield*, 144 F.3d at 1193–96.

109. One scholar has found that "[t]he cases addressed by the Act are: (1) *Ward's Cove Packing Co. v. Atonio*; (2) *Patterson v. McLean Credit Union*; (3) *Price Waterhouse v. Hopkins;* (4) *Martin v. Wilks*; (5) *EEOC v. Arabian American Oil Co. (ARAMCO)*; (6) *Lorance v. AT&T Technologies, Inc.*; (7) *Library of Congress v. Shaw*; and (8) *West Virginia University Hospitals, Inc., v. Casey*." Donald R. Livingston, 23 STETSON LAW REVIEW 53 (1993) (citations omitted). It is unlikely that Congress considered *Gilmer* since section 118 is identical to section 513 of the ADA enacted six months before *Gilmer*. If section 118 was simply borrowed from the ADA without significant deliberation, compulsory, prospective arbitration agreements would not be "authorized by law" unless "completely voluntary." H.R.REP. NO. 558, 101st Cong. 2d (1990). For a discussion of different standards of voluntariness, see Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) (examining the standards of knowing, voluntary and intentional for waivers of Seventh Amendment jury trials); Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 448 (1999) (arguing that the language "where appropriate" in section 118 should be read to require "a heightened voluntariness test, similar to the requirement for a 'knowing and voluntary' waiver specified in the Older Workers Benefit Protection Act").

110. Those courts who endorse this view of section 118 note that at the time CRA 1991 was signed into law, the Supreme Court had decided *Gilmer*, which approved a compulsory, prospective arbitration agreement under the ADEA. Their argument is that *Gilmer* "authorized by law" compulsory arbitration of all employment discrimination claims because of its passage after the decision and because Title VII is similar to the ADEA. Compulsory, prospective arbitration agreements, therefore, are "encouraged" by Congress in section 118. No extensive analysis of legislative history is proper because a plain language reading of section 118 is sufficient. *See Koveleskie*, 167 F.3d at 364 (rejecting the contention that Congress intended to preclude Title VII claims from the FAA); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 163 F.3d 53, 63 (1st Cir. 1998) (holding "neither the language of the statute nor the legislative history demonstrates an intent in the 1991 CRA to preclude prospective arbitration agreements.").

111. Congress amended the ADEA through the Older Worker's Benefit Protection Act of 1990 after the Supreme Court granted certiorari in *Gilmer*. The OWPA requires that all waivers must be "knowing and voluntary." 29 U.S.C. § 626(f)(1) (1994). A waiver is not "knowing and voluntary" if its waives "rights or claims that may arise after the date the

intent is both necessary and proper.[112] As a result of that inquiry, section 118 should be viewed as a codification of *Alexander v. Gardner-Denver Co.*[113]

Circuit courts of appeals, depending on their interpretive bent, have reached different conclusions as to the compatibility of compulsory arbitration agreements and the civil rights statutes. The Ninth Circuit, in *Duffield v. Robertson Stephens & Co.*,[114] examined the text and legislative history of CRA 1991[115] and concluded that section 118 effectively nullified *Gilmer*. The court, therefore, refused to enforce a compulsory, prospective Form U-4 arbitration agreement.[116] The Third

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waiver is executed." 29 U.S.C. § 626(f)(1)(C) (1994). The Supreme Court, in *Gilmer*, did not address this new statutory language.

112. Those courts adhering to this view of section 118 note that *Gilmer* was decided on May 13, 1991, after CRA 1991 was drafted and after it was reported out of committee. They note that Committee Reports are considered by the Supreme Court as the authoritative source of legislative intent and the view of the House Committee on Education and Labor was that section 118 codified *Gardner-Denver* and explicitly rejected the conclusions that were eventually reached by the Supreme Court in *Gilmer*. *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1195–96 (9th Cir. 1988) (noting that Congress specifically rejected a proposal allowing employers to enforce compulsory arbitration agreements). Prior to *Gilmer*, "[*Gardner-Denver*] was widely interpreted as prohibiting any form of compulsory arbitration of Title VII claims." Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1303 (9th Cir. 1994); *see also Duffield*, 144 F.3d at 1188 ("The circuit courts read *Gardner-Denver* as sending a simple message: Title VII is different.").

113. As evidence that Congress intended section 118 as a codification of *Gardner-Denver* are comments during the floor debates by congressmen. *See* 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (During the debate immediately preceding the Act's passage, the Chairman of the House Committee on Education and Labor stated that section 118 was "intended to be consistent with decisions such as *Alexander v. Gardner-Denver Co.*.... No approval whatsoever is intended of the Supreme Court's recent decision in *Gilbert* [sic] *v. Interstate/Johnson Lane Corp.*, or any application or extension of it to Title VII."); 137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (citation omitted) (Section 118 encourages arbitration only "where parties knowingly and voluntarily elect to use those methods."); 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde) (Section 118 encourages arbitration only where, "the parties knowingly and voluntarily elect to submit to such procedures.").

114. 144 F.3d 1182 (9th Cir. 1988) *cert denied*, 525 U.S. 982 (1998).

115. The Ninth Circuit engaged in this analysis because the Supreme Court in *Gilmer* reaffirmed the notion that the burden of demonstrating that "Congress intended to preclude a waiver of a judicial forum for [TitleVII] claims" is on the plaintiff. *Id.* at 1190 (quoting *Gilmer*, 500 U.S. at 26). The court continued, "If such an intention exists, it will be discoverable in the text of [the Act at issue], its legislative history, *or* an 'inherent conflict' between arbitration and the [Act's] underlying purpose." *Id.* (quoting *Gilmer*, 500 U.S. at 26) (alteration in original).

116. Following an extensive analysis of legislative intent, the Ninth Circuit, in *Duffield*, found that "Congress concluded that *all* such mandatory agreements as conditions of employment were, at the very least, 'inappropriate' and thus unenforceable." *Id.* at 1196. Under this view, *Gilmer*'s acceptance of compulsory, prospective agreements to arbitrate may

Circuit, in *Seus v. John Nuveen & Co.*,[117] enforced a compulsory, prospective Form U-4 arbitration agreement by ignoring legislative history,[118] refusing to read any limitation into section 118,[119] and finding section 118 "evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims."[120]

2. Statutory Right to a Jury Trial

Prior to CRA 1991, jury trials as well as compensatory and punitive damages were not available in Title VII actions.[121] The Civil Rights Act of 1991 amends 42 U.S.C. § 1981[122] and provides that "a complaining party" alleging intentional discrimination under sections 703, 704, and 717 of the Civil Rights Act of 1964,[123] section 102 of the ADA,[124] and section 501 of the Rehabilitation Act of 1973[125] may demand a jury trial and seek compensatory and punitive damages.[126] CRA 1991 places caps

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not be "appropriate" under section 118 of CRA 1991.

117. 146 F.3d 175 (3d Cir. 1998).

118. "[N]o amount of commentary from individual legislators or committees would justify a court in reaching the result [sought by plaintiffs]." *Id.* at 182.

119. *Id.* (finding any such limitation would be an "implied repealer" of the FAA).

120. *Id. See also* Koveleskie v. SBC Capital Mkts., 167 F.3d 361, 365 (7th Cir. 1999).

121. Instead, damages in Title VII actions had been limited to equitable remedies such as backpay, frontpay, retroactive seniority, injunction, etc. *See* 42 U.S.C. § 2000e-5(g)(1) (1994).

122. Congress accomplished its legislative purposes by amending 42 U.S.C. § 1981 to create a new section 1981(a) rather than amending each statute separately. The core substantive provision of section 1981 remains unchanged by CRA 1991. Section 1981 prohibits discrimination on the basis of race or ethnicity by guaranteeing that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." Unlike Title VII, section 1981 has always offered procedural and remedial advantages to claimants. Section 1981 offers claimants the option of a jury trial and compensatory and punitive damages without statutory limitation caps. *See* 42 U.S.C. § 1981 (1994). Section 1981 also does not limit backpay to two years, and does not require nor permit claimants to first employ the EEOC's administrative procedures before bringing a private lawsuit and applies to businesses with less than fifteen employees. In 1989, the reach of section 1981 was dramatically limited by the U.S. Supreme Court's decision in *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989). The Court held that section 1981 prohibited racial discrimination during the initial formation of a contract, but did not govern discriminatory post-formation conduct. *Id.* at 171. Congress, in section 1981a(b), reestablished the pre-Patterson rule. *See, e.g.,* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454 (1975).

123. 42 U.S.C. §§ 2000e-2 to 2000e-3 (1994).

124. 42 U.S.C. § 12112 (Supp. II 1990).

125. 29 U.S.C. § 791 (Supp. V 1981).

126. 42 U.S.C. § 1981a(c)(2) (1994). The Act also directs courts not to make juries aware of the caps. *Id.*

on compensatory[127] and punitive[128] damage awards contingent on an employer's number of employees.[129]

In claims brought under statutes amended by CRA 1991, a submission to arbitration will constitute a waiver of claimants' statutory right to have their claim decided by a jury.[130] When considering the enforceability of arbitration agreements, courts have not yet had to address the issue of whether and under what circumstances such agreements can and will act as jury-trial waivers.[131] Instead, most courts have reached their decisions by emphasizing that arbitration is "favored,"[132] interpreting arbitration agreements broadly,[133] and interpreting defenses to arbitration narrowly.[134]

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127. Compensatory damages include "damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." § 1981a(b)(3).

128. Punitive damages are awarded in cases of intentional discrimination where the defendant has acted, "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." § 1981a(b)(1). Punitive damages are imposed on parties "other than a government, government agency or political subdivision." *Id.*

129. § 1981 a(b)(3). The term "complaining party" includes the EEOC, the Attorney General, and private litigants. § 1981a(d)(1).

130. For a thorough analysis of waiver requirements under the Seventh Amendment, see Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

131. Courts have not intentionally dodged the waiver issue. Instead, they have failed to address this issue because no claimant has raised the issue in the trial court.

132. In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983), the Supreme Court noted:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration .... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id.

133. *See* Gilmer v. Interstate/Johnson Lane Corp. 500 U.S. 20, 26–27 (1991) (holding that ADEA claims are subject to arbitration); Rodriguez de Quijas v. Shearson, Am. Express, Inc., 490 U.S. 477 (1989) (holding that securities fraud cases are arbitrable); Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (noting that the "parties' intentions ... are generously construed as to issues of arbitrability"); Williams v. Imhoff, 203 F.3d 758 (10th Cir. 2000) (holding that ERISA claims are arbitrable); Gregory v. Electro-Mechanical Corp., 83 F.3d 382 (11th Cir. 1996) (interpreting broadly arbitration provision as covering claims of fraud, deceit, and tort.); Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 53–54 (7th Cir. 1995) (interpreting arbitration provision to cover statutory as well as contractual claims); Jones v. Fujitsu Network Communications Inc., 81 F. Supp. 2d 688 (N.D. Tex. 1999) (upholding arbitrability of Family and Medical Leave Act claims.)

134. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25 (noting that defenses such as laches,

These cases, therefore, offer no guidance in answering the important question of whether a waiver of a claimant's right to a jury trial through the enforcement of a compulsory, prospective agreement to arbitrate creates a conflict with the text, intent, or purpose of the civil rights statutes.[135] Is it "appropriate" under section 118 to allow parties, whom Congress has identified,[136] to demand, as a condition of employment, a prospective waiver of the jury trial Congress clearly and carefully provided?[137]

Congress listed, among its formal findings, that "legislation is necessary to provide additional protections against unlawful discrimination in employment."[138] Congress's purpose was "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace."[139] Congress, in CRA 1991, explicitly provided the right to a jury trial as one of these additional protections.[140] Prior to CRA 1991, claims of intentional discrimination were heard and decided by a judge. Congress did not extend the right to a jury trial to cases alleging disparate impact. By distinguishing intentional claims from disparate impact claims, affording only intentional claims the option of a jury trial, Congress acknowledged the very different natures of the two claims' respective litigation.[141]

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estoppel, and waiver are subject to a narrow interpretation); *Ex parte* Smith, 736 So. 2d 604, 610 (Ala. 1999) ("[C]ourts will not lightly infer a waiver of arbitration rights.").

135. *See Gilmer*, 500 U.S. at 26.

136. Congress, in section 1981a, reaffirmed the judicial view announced in *Runyon v. McCrary*, 427 U.S. 160 (1976) that section 1981 extends to public and private employers alike. *See* 42 U.S.C. §1981a(b)(2) (1994). *But see* § 1981a(b)(1) (exempting governmental actors from punitive damages).

137. *See* § 1981a(c) (1994). *See also* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1192–93 (9th Cir. 1988) (noting the "mild paradox" of Congress strengthening existing protections while endorsing compulsory, prospective waivers of those same protections.) In *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997), Chief Judge Posner noted this paradox in a collective-bargaining context and recognized that arbitration agreements, imposed without employees' consent, conflict with the individual's statutory right to a jury trial. *Id.* Judge Posner also recognized that compulsory, prospective arbitration agreements pose similar, yet "attenuated," consent problems. *Id.* at 364.

138. 42 U.S.C. § 1981a (Congressional Findings).

139. § 1981a (1994 ed.) (Purposes of 1991 Amendments).

140. § 1981a(c).

141. Disparate treatment means that an employer treats some people less favorably than others because of their protected class status (race, gender, ethnicity, disability, age, etc.). Proof of discriminatory motive is crucial. Such a motive may be inferred from statistical evidence and from unexplained differences in treatment. Disparate treatment can be distinguished from disparate impact. In impact cases, a facially neutral rule, practice, or device disproportionately disadvantages minority members and is not justified by business necessity. Proof of a discriminatory motive is not required. *Compare* Griggs v. Duke Power

In disparate impact claims, the plaintiff challenges the employer's use of facially neutral selection criteria without being justified by business necessity; this criteria disproportionately disadvantages protected class members.[142] The plaintiff's case relies almost completely on the precision and analysis of statistical data.[143] In claims of intentional discrimination, the plaintiff relies more on assessments of character and credibility.[144] The finder of fact, on the basis of

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Co., 401 U.S. 424, 430–32 (1971) *with* McDonnell Douglas v. Green Corp., 411 U.S. 792, 802–06 (1973).

142. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977) (challenging height and weight requirements for correctional counselors); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (challenging the use of standardized tests for entry-level skilled positions); *Griggs*, 401 U.S. 424 (challenging a high school degree requirement and an I.Q. test for employee transfers).

143. In his or her prima facie case, a plaintiff must "show that there are statistical disparities in the employer's work force . . . [and is] responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)). Analysis of variance (ANOVA) may be the best statistical technique to study the influence of a number of continuous and discrete variables when the dependent variable is discrete. An ANOVA analysis measures the percentage influence of each independent variable (*e.g.*, sex of candidate, race of candidate, score on standardized measure, years of experience, educational attainment, etc.) on the discrete dependant variable (*e.g.*, hired or not, promoted or not, discharged or not, etc.) When the dependent variable is continuous, multiple regression may be the preferable statistical technique. In a regression analysis, the relationship between the dependent variable (*e.g.*, salary) and each independent variable (*e.g.*, sex of candidate, race of candidate, score on standardized measure, years of experience, educational attainment, etc.) is determined by holding the other independent variables constant. The measure of the relationship is the regression coefficient of the independent variable. *See* Frankling M. Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 705–06 (1980); David Baldus & James W.L. Cole, STATISTICAL PROOF OF DISCRIMINATION (1980 & Supp. 1983).

144. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989 (1988) (noting that plaintiff was apparently told that the teller position involved "a lot of money . . . for blacks to have to count"); Slack v. Havens, 522 F.2d 1091, 1093 (9th Cir. 1975) (finding a supervisor commented that "'[c]olored people are hired to clean because they clean better,' or words to that effect."). Cases of intentional discrimination are commonly referred to as "pretext" cases. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); *McDonnell Douglas*, 411 U.S. at 804–05. In such cases, plaintiffs, in their prima facie cases, need only establish four, easy factual predicates. *Burdine*, 450 U.S. at 253–54; *McDonnell Douglas*, 411 U.S. at 904–05. If successful, the defendant, in rebuttal, must merely *produce* a legitimate, nondiscriminatory reason for the adverse employment decision. Burdine, 450 U.S. at 254–57; McDonnell *Douglas*, 411 U.S. 802–03. Following rebuttal, plaintiff, in surrebuttal has the opportunity to *persuade* the factfinder that the legitimate, nondiscriminatory reason produced by the defendant is unworthy of belief and is a "pretext" to disguise intentional discrimination. Pretext is established by adducing evidence of the employer's past discrimination against the claimant, statistical evidence showing a pattern or practice of discrimination by the employer and testimonial evidence of bad comments. *Burdine*, 450 U.S. at 256; *McDonnell Doublas*,

circumstantial and/or statistical evidence, arrives at a finding of intentional discrimination inferentially.[145] By only offering a jury trial in cases of intentional discrimination, Congress determined that ordinary people should make judgments of character and credibility, not professional judges.[146] Arbitrators are professional judges.[147] To permit employers, by fiat, to compel arbitration of claims alleging intentional discrimination, flies directly in the face of any rational intent of Congress as it robs a claimant of the option of a jury trial Congress so deliberately and explicitly provided.

3. Statutory Right to EEOC Protection

The Supreme Court recently considered whether limiting the remedies available in an Equal Employment Opportunity Commission enforcement claim creates an inherent conflict between arbitration and civil rights statutes, specifically the ADA, in *Equal Employment Opportunity Commission v. Waffle House, Inc.*[148] The Court faced the question of "whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific judicial relief... in an enforcement action alleging... [a violation] of the Americans with Disabilities Act of 1990 (ADA)."[149] A majority of the Supreme Court held that it did not and reversed the

411 U.S. at 904–05. Based on the totality of the evidence, the factfinder either believes the legitimate nondiscriminatory reason advanced by the employer or believes it is merely a pretext disguising intentional discrimination. *See generally McDonnell Douglas*, 411 U.S. at 792 (1973).

145. It is never directly proven that the employer intentionally discriminated because there is neither a "smoking gun" nor admission by the defendant. Instead, intentional discrimination is inferred when the plaintiff successfully eliminates all of the common legitimate justifications for the adverse employment decision, and the defendant fails to produce evidence of a less obvious legitimate justification for the decision. *See* Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (stating that the *McDonnell Douglas* formula does not require direct proof of discrimination).

146. As a historical note, CRA 1991 immediately followed the allegations of sexual harassment made by Anita Hill during the Clarence Thomas Supreme Court confirmation hearings. Based on the allegedly insensitive inquiries of male senators, many women felt the Senators "just don't get it." Women were elected in unprecedented numbers during the next election cycle. The issue of harassment, defined as a form of intentional discrimination, was met with a general skepticism of status quo views held by powerful men. Congress may have addressed the problem by providing jury trials.

147. Not only are they professionals, they are often also experts. Decision-making by a jury of one's peers is the antithesis of decision-making by a professional expert.

148. 122 S. Ct. 754, 758 (2002).

149. *Id.* at 758.

decision of the Fourth Circuit. The Court found the Fourth Circuit's distinction between injunctive and victim-specific relief specious[150] and rejected their balancing of the competing policies of the ADA and the FAA.[151] The Court's holding resolved a split among Courts of Appeals regarding the EEOC's pursuit of injunctive and victim-specific remedies.[152] The EEOC is left where the Court found it. It retains its ability to pursue the full range of statutory remedies in the federal courts to enforce civil rights laws.

The Court analyzed the statutory text of Title VII, as amended, and the subsequent case law[153] addressing Congress's grant of enforcement power to the EEOC to reach its conclusion that "no language in the statute or in... cases suggest[] that... an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available."[154] To justify this conclusion, the Court first found that Congress, in the 1972 Amendments to Title VII, "created a system in which the EEOC was

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150. The Court noted that "while punitive damages benefit the individual employee, they also serve an obvious public function in deterring future violations.... [I]njunctive relief, although not seemingly 'victim-specific,' can be seen as more closely tied to the employees' injury than to any public interest." *Id.* at 764–65.

151. *See generally id.* at 762–65. Specifically, the Court rejected the Fourth Circuit's reasoning that:

> When the EEOC seeks "make-whole" relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest in minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's actions.

EEOC v. Waffle House, Inc., 193 F.3d 805, 812 (4th Cir. 1999). *But see* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1998). The court stated: "[L]imiting the EEOC to the pursuit of injunctive and not monetary relief... would severely impede its ability to protect the public interest against unlawful employment discrimination, and would effectively eradicate the efforts of Congress to provide meaningful enforcement powers to the EEOC." *Id.* at 466.

152. *Compare Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (noting that the EEOC's independent statutory authority to pursue both equitable and monetary remedies is not affected by an employee's arbitration agreement with an employer), *with* EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998) (noting that the EEOC may pursue injunctive relief but not monetary relief in the federal courts), *and* Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Nixon, 210 F.3d 814 (8th Cir. 2000) (denying the EEOC power to pursue monetary relief.).

153. *See generally Waffle House*, 122 S.Ct. at 759–61.

154. *Id.* at 761.

intended 'to bear the primary burden of litigation.'"[155] Second, the Court noted that Congress, in the Civil Rights Act of 1991, "amended Title VII to allow the recovery of compensatory and punitive damages by a 'complaining party.'"[156] The term "complaining party" includes "both private plaintiffs and the EEOC,[157] and the amendments apply to ADA claims as well."[158] Third, the Court examined the text of the FAA and found it inapplicable to EEOC enforcement actions.[159]

4. Costs, Access and Deterrence

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court stated, "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[160] The District of Columbia Court of Appeals, in *Cole v. Burns International Security Services*,[161] considered a prospective arbitration agreement that was imposed on employees as a condition of employment. The court framed the relevant question as "can an employer require an employee to arbitrate all disputes and also require the employee to pay all or part of the arbitrator's fees."[162] The court concluded that:

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155. *Id.* at 760 (quoting Gen. Tel. Co. of Northwest v. EEOC, 446 U.S. 318, 326 (1980)). In relation to possible remedies, the Court cites 42 U.S.C. § 2000e-5(g)(1) (1994), which states, "[T]he courts may enjoin . . . [employers] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." *Id.* The majority dismissed the respondent's and dissent's argument that "appropriate" limits remedies and "may recover" directs courts, not the EEOC, to determine appropriate relief as disingenuous and "not the natural reading of the text." *Waffle House*, 122 S. Ct. at 763. It found that 42 U.S.C. § 1981a(a)(1) (1994) explicitly authorizes compensatory and punitive damages and reaffirms the court's discretion in fashioning relief as "warranted by the facts of that case." *Id.*

156. *Id.* (citing § 1981a(a)(1)).

157. *Id.* (citing § 1981a(d)(1)(A)).

158. *Id.* (citing § 1981a(a)(2), (d)(1)(B)).

159. Specifically, the Court stated the following:

> [N]othing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement. 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.

160. *Gilmer*, 500 U.S. at 28 (1991) (quoting Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (alteration in original)).

161. 105 F.3d 1465 (D.C. Cir. 1997).

162. *Id.* at 1468.

> [A]n employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure the resolution of statutory claims under Title VII. . . . The only way that an arbitration agreement of the sort at issue here can be lawful is if the employer assumes responsibility for the payment of the arbitrator's compensation.[163]

While the D.C. Court of Appeals in *Cole* announced a *per se* rule in statutory cases,[164] other courts of appeals have adopted a case-by-case approach.[165]

In *Green Tree Financial Corp.—Alabama v. Randolph*,[166] the Supreme Court conceded that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[167] The Court endorsed a case-by-case approach[168] and placed the burden of persuasion on the issue of

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163. *Id.* The arbitration agreement in *Cole* did not require employees to pay the arbitrator's compensation. Rather, it was silent in this regard. Nonetheless, the court felt that even the risk of an employee having to pay the arbitrator's compensation would be sufficient to deter employees from bringing statutory claims to arbitration and result in a de facto forfeiture of statutory rights. *Id. See also* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 687 (Cal. 2000) (concluding that, "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court."); Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (concluding that the possibility that high costs will be paid by the employee is a legitimate basis for refusing to enforce an arbitration agreement.). *But see* Green Tree Fin. Corp.—Alabama v. Randolph, 531 U.S. 79, 91 (2000) (finding that an "arbitration agreement's silence on [cost allocation], and that fact alone is plainly insufficient to render it unenforceable.").

164. The D.C. Circuit Court of Appeals, in *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821, 823 (D.C. Cir. 2001), distinguished its decision in *Cole* and refused to extend its holding in *Cole* to cases involving non-statutory state law claims. The *Brown* case involved claims of wrongful termination, breach of implied contract, defamation, slander, and tortious interference. *Id.*

165. *See* Bradford v Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001) (upholding a fee-splitting provision requiring the employee to pay half of arbitrator's fees and costs); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 170 F.3d 1, 15–16 (1st Cir. 1999) (rejecting the amici argument that fee-splitting renders arbitration agreement unenforceable).

166. 531 U.S. 79 (2000).

167. *Id.* at 90.

168. In that case, the Court considered "the question whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs," and concluded that "an arbitration agreement's silence with respect to such matters does not render the agreement unenforceable." *Id.* at 82. Refusing to enforce such an agreement "would undermine the 'liberal federal policy favoring arbitration agreements.'" *Id.* at 89–91 (quoting Moses H.

prohibitive expense on the party resisting the enforcement of the arbitration agreement.[169] The *Green Tree* decision effectively overrules the *per se* rule in *Cole* and mandates a case-by-case analysis.[170]

The Court declined to offer guidance on the level of detail litigants must produce to carry their burden as to prohibitive expense except that a speculative "risk" of prohibitively high expenses is insufficient.[171] The Court similarly offered no guidance as to when this evidentiary showing must be made because in *Green Tree* "neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point."[172] Various courts of appeals have reached different conclusions; some require this issue to be resolved as a threshold matter, others require this issue to be resolved during judicial review of the arbitrator's decision.[173]

Under *Green Tree*, the financial affluence of a prospective litigant is relevant and is listed by courts as one factor to be considered in a case-by-case analysis of whether arbitration denies the claimant an adequate forum for the resolution of statutory claims.[174] Nothing in the statutory

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

169. The Court held that where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. The Court analogized this burden to "the burden of proving that the claims at issue are unsuitable for arbitration" and the "burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue." *Id.* at 91–92. Both of these burdens are on the party resisting enforcement of the arbitration agreement. *Id.*

170. Nevertheless, *Cole* is cited as persuasive dicta on the issue of cost deterrence and defeating the remedial and deterrent function of the statutes. *See, e.g.*, *Bradford*, 238 F.3d 549 (4th Cir. 2001).

171. The Court stated, "The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Green Tree*, 531 U.S. at 91.

172. *Id.* at 92.

173. *Compare* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 687 (Cal. 2000) (holding that "cost issues should be resolved not at the judicial review stage but when a court is petitioned to compel arbitration.") *with* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 170 F.3d 1, 16 (1st Cir. 1999) (finding that "if unreasonable fees were to be imposed on a particular employee," the argument that the imposition of such fees is inconsistent with the statute at issue "could be presented by the employee to the reviewing court").

174. *See Green Tree*, 531 U.S. at 90–91. *See also Bradford*, 238 F.3d at 556 (4th Cir. 2001) (upholding a fee-splitting provision requiring employees to pay half of arbitrator's fees and costs and that a case-by-case inquiry includes, "among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims"); Shankle v. B-G Maint. Mgmt., Inc., 163 F.3d 1230, 1234–35 (10th Cir. 1999) (finding unenforceable a mandatory arbitration agreement containing a fee-splitting arrangement requiring employee to pay one-half of the arbitrator's fees because "Mr.

scheme of Title VII, as amended, contemplates that the affluence of a prospective litigant is in any way relevant. Indeed, in the Act's provision authorizing the awarding of attorney's fees, the wealthy litigant is equally entitled to attorney's fees as the destitute litigant.[175] Paying substantial arbitration costs is no more palatable to the rich than to the poor. Why should any party be compelled to pay costs in an arbitral forum that they would not bear in a judicial forum simply because a court believes them capable of doing so? The logical result is that arbitrators will decide the statutory rights of affluent claimants and judges and juries will decide the statutory rights of poor claimants. As the pervasive spirit of the civil rights statutes is equality of treatment, this outcome is utterly inconsistent with that spirit.

C. Violations of Contract Principles

The FAA's coverage provision, section 2, endorses the enforcement of arbitration agreements "in any maritime transaction or a contract evidencing a transaction involving commerce . . . save upon grounds as exist at law or in equity for the revocation of any contract."[176] Therefore, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."[177] These common law contract doctrines are discussed below.

1. Unconscionable Contract of Adhesion

On September 12, 2001, the Ninth Circuit Court of Appeals, after reviewing *de novo* the district court's decision to refuse to compel

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Shankle could not afford such a fee, and it is unlikely other similarly situated employees could either."); Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752, 764–65 (5th Cir. 1999) (enforcing an arbitration agreement requiring employee to pay one-half of the forum fees after noting that "[t]he evidence in this case does not indicate that Williams is unable to pay one-half of the forum fees or that they are prohibitively expensive for him. . . . Williams testified that he was making more money than he did at Cigna and his 'income so far this year is in excess of six figures.'"); *Rosenberg*, 170 F.3d at 15–16.

175. *See* 42 U.S.C. § 2000e-5(k) (1994) (attorney's fees provision).

176. 9 U.S.C. § 2 (1994).

177. Doctors Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). In *Doctor's Associates*, the Supreme Court distinguished generally applicable contract defenses that apply to "any contract" from state provisions that "specifically and solely" apply to arbitration provisions. *Id.* at 683. The Court held any latter provision "conflicts with the FAA and is therefore displaced by the federal measure." *Id.*

arbitration, decided *Ticknor v. Choice Hotels International, Inc.*[178] The federal district court, after applying Montana contract law, had refused enforcement of an arbitration clause contained in a franchise agreement between Ticknor and Choice Hotels.[179] The Ninth Circuit agreed with two conclusions of the district court.[180] First, the franchise agreement constituted a contract of adhesion because it "was a standardized, form agreement that Ticknor was forced to accept or reject without negotiation."[181] Second, the arbitration provision was unconscionable because it required binding arbitration of claims by Ticknor, the weaker bargaining party, but allowed Choice Hotels, the drafter and the stronger bargaining party, to bring claims in state or federal court.[182] As such, the Ninth Circuit concluded, "[T]he arbitration provision . . . 'lacks mutuality of obligation, is one-sided, and contains terms that are unreasonably favorable to the drafter.'"[183]

On September 26, 2001, the Ninth Circuit, on remand and applying California law, decided *Circuit City Stores, Inc. v. Adams*.[184] The court, citing *Armendariz v. Foundation Health Psychcare Services Inc.*[185] extensively, found Circuit City's Dispute Resolution Agreement substantively and procedurally unconscionable.[186] The California

178. 265 F.3d 931 (9th Cir. 2001).

179. Ticknor Lodging Corporation executed an Econo Lodge Franchise Agreement with Choice Hotels International, Inc. The franchise agreement, which was a preprinted standard form instrument drafted by Choice, contained an arbitration clause providing as follows:

> Except for our claims against you for indemnification, actions for collection of moneys owed us under this Agreement, or actions seeking to enjoin you from using the Marks in violation of this Agreement, any controversy or claim relating to this Agreement, or the breach of this Agreement, including any claim that this Agreement or any part of this Agreement is invalid, illegal, or otherwise voidable or void, will be sent to final and binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

Id. at 935.

180. *Id.* at 939–41. Relying upon the Montana Supreme Court's decision in *Iwen v. U.S. West Direct*, 293 Mont. 512, 977 P.2d 989 (Mont. 1999), the court concluded that "[t]o determine the enforceability of a specific contractual provision under *Iwen*, a Montana court must first decide whether the contract is one of adhesion." *Ticknor*, 265 F.3d at 939. "If so, then the provision will not be enforced against the weaker contracting party if it is (1) not within that party's reasonable expectations, or (2) if within those expectations, it is unduly oppressive, unconscionable, or against public policy." *Id.* (citing *Iwen*, 977 P.2d at 994–95).

181. *Id.*

182. *Id.* at 940–41.

183. *Id.* (quoting *Iwen*, 977 P.2d at 996)

184. 279 F.3d 889 (9th Cir. 2002).

185. 6 P.3d 669 (Cal. 2000).

186. *Circuit City*, 279 F.3d at 893.

Supreme Court in *Armendariz*[187] reversed the judgment of the court of appeals compelling arbitration and remanded the case "with directions to affirm the judgment of the trial court" that had invalidated the entire arbitration agreement.[188] The California Supreme Court endorsed the analysis of the "judicially created doctrine of unconscionability"[189] announced in *Graham v. Scissor-Tail Inc.*[190]

An analysis of "[u]nconscionability . . . begins with an inquiry into whether the contract is one of adhesion."[191] "If the contract is adhesive, the court must then determine whether 'other factors are present which, under established legal rules—legislative or judicial—operate to render it [unenforceable].'"[192] The court identified two judicially imposed

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187. 6 P.3d 669 (Cal. 2000). In this case, employees had filled out and signed application forms that contained an arbitration clause. The clause stated as follows:

> I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights, I and Employer agree to submit any such matter to binding arbitration. . . . I and Employer further expressly agree that in any such arbitration, my exclusive remedies . . . shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief.

Id. at 675.

188. *Id.* at 699.

189. *Id.* at 689.

190. 623 P.2d 165 (Cal. 1981).

191. *Armendariz*, 6 P.3d at 689. "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Id.* (quoting Neal v. State Farm Ins. Cos., 188 Cal. App. 2d 690 (Dist. Ct. App. 1961)).

192. *Id.* (quoting *Graham*, 623 P.2d 165 (alteration in original)). The court endorsed the definition of unconscionability explained in *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486–87 (1982) ("[U]nconscionability has both a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided results.'") (citations omitted). The court stated: "The prevailing view is that [procedural and substantive unconscionability] must both be present . . . for a court . . . to refuse to enforce a contract or clause under the doctrine of unconscionability." *Armendariz*, 6 P.2d at 690 (quoting Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1533 (Dist. Ct. App. 1997)). The court continued: "But . . . they need not be present in the same degree. 'Essentially a sliding scale is invoked . . . .'" *Id.* (citation omitted). "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.*

limitations on the enforcement of adhesion contracts:

> [F]irst . . . such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him . . . [and] second, . . . a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable."[193]

Applying these principles, the court concluded that the arbitration agreement was adhesive.[194] The court then concluded that the agreement was substantively unconscionable because it required only employees to arbitrate their wrongful termination claims against the employer, but did not require the employer to arbitrate any claims it may have against the employees.[195] The court also concluded that "[t]he unconscionable one-sidedness of the arbitration agreement is compounded in this case by the fact that it does not permit the full recovery of damages for employees, while placing no such restriction on the employer."[196] The court found the agreement procedurally unconscionable because it was imposed as a condition of employment on a take-it-or-leave-it basis.

In *Lagatree v. Luce, Forward, Hamilton & Scripps,*[197] a California appellate court upheld the discharge of an employee who refused to sign a compulsory prospective arbitration agreement. The court cited several post-*Gilmer* decisions rejecting arguments that prospective

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193. *Armendariz*, 6 P.2d at 689 (citations omitted).

194. The *Armendariz* court reasoned:

> It was imposed on employees as a condition of employment and there was no opportunity to negotiate.
>
> Moreover, in the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.

Id. at 690.

195. "[A]n arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims . . . ." *Id.* at 694. The court acknowledged and rejected the contrary result reached by the Alabama Supreme Court in *Ex Parte McNaughton*, 728 So. 2d 592, 598–99 (Ala.1998). *Armendariz*, 6 P.2d at 692–93.

196. *Id.* at 694.

197. 88 Cal. Rptr. 2d 664 (Dist. Ct. App. 1999).

arbitration agreements imposed as a condition of employment constitute invalid contracts of adhesion.[198] The court concluded that the cases have uniformly agreed that compulsory prospective arbitration agreements are not invalid just because they may be required as a condition of employment or are offered on a "take-it-or-leave-it" basis.[199]

What is clear from this case law is that prospective arbitration agreements, without some sort of substantive unconscionability, are not invalid simply because they are compulsory. Conversely, a substantively unconscionable arbitration agreement, without some sort of procedural unconscionability, is not invalid simply because its terms appear one-sided. An unconscionable and therefore unenforceable arbitration agreement must be actually or effectively compulsory due to disproportionate bargaining power, and the terms of the agreement must be unduly harsh, oppressive, and/or one-sided.

2. Consideration

Two interesting questions of consideration arise when an arbitration provision is part of an employee handbook unilaterally promulgated by an employer. First, is new or continuing employment adequate consideration when an employer first introduces an employee handbook either to applicants or incumbent workers? Second, is continued employment adequate consideration when an employer unilaterally modifies an existing employee handbook by inserting an arbitration provision?

The Illinois Supreme Court, in *Duldulao v. Saint Mary of Nazareth Hospital Center*,[200] addressed the first question. The court noted that while "[s]everal courts have rejected the notion that an employee handbook or manual can ever create binding contractual obligations. . . . [T]he overwhelming majority of courts . . . have held that an employee handbook may, under proper circumstances, be contractually binding."[201] The court then established three conditions necessary for an employee's continued work to constitute consideration for the promises

198. The *Lagatree* court cited, among others, *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1 (1st Cir. 1999); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3d Cir. 1998); *Kelly v. UHC Management Co., Inc.*, 967 F. Supp. 1240 (N.D. Ala. 1997); *Beauchamp v. Great West Life Assur. Co.*, 918 F. Supp. 1091 (E.D.Mich. 1996); *Lang v. Burlington Northern Railroad Co.*, 835 F. Supp. 1104 (D. Minn. 1993).

199. *Lagatree*, 88 Cal. Rptr. 2d at 680.

200. 505 N.E.2d 314, 316–17 (Ill. 1987).

201. *Id.* (citations omitted).

in the employee handbook[202] and held the employee handbook to be a binding contract.[203]

In the context of an initial employment offer, if an arbitration provision in an employee handbook is sufficiently clear and definite, the provision is clearly disclosed to the applicant, the applicant signs an acknowledgment form agreeing to arbitrate employment claims, and the applicant commences work, the employer's providing at-will employment will constitute sufficient consideration in exchange for the employee's agreement to arbitrate his or her employment disputes.[204] If an employer is promulgating an employee handbook containing an arbitration provision for the first time, the aforementioned conditions must be present to bind incumbent workers to its terms by their continued work.

The Illinois Supreme Court, in *Doyle v. Holy Cross Hospital*,[205] limited the impact of its earlier ruling in *Duldulao*.[206] In *Doyle* the court considered whether continuing work by the employee, without more, would be adequate consideration for an employer's unilateral modification of an employee handbook, and distinguished an

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202. The court determined that "an employee handbook or other policy statement" can create "enforceable contractual rights" if the following three conditions are met:

> First, the language . . . must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement. When these conditions are present, then the employee's continued work constitutes consideration for the promises contained in the statement, and . . . a valid contract is formed.

Id. at 318.

203. *Id.* at 319.

204. *See, e.g., Ex parte* McNaughton, 728 So. 2d 592, 595 (Ala. 1998). "United's provision of new at-will employment . . . was sufficient consideration to make McNaughton's promise to arbitrate employment disputes under United's arbitration policy a binding agreement." *Id.* at 596.

205. 708 N.E.2d 1140 (Ill. 1999).

206. The Illinois Supreme Court reasoned:

> We believe that *Duldulao*'s reference to continued work was intended to apply to cases in which an employer who did not previously have an employee handbook decides to promulgate one; in those circumstances, employees' continued work for the employer represents consideration for the handbook. *Duldulao* did not involve handbook modifications, and therefore the court in that case was not speaking to the situation involved here.

Doyle, 708 N.E.2d at 1146.

employer's unilateral modification to the detriment of current employees from an employer's unilateral modification to the benefit of current employees.[207] The court concluded that "after an employer is contractually bound to the provisions of an employee handbook, unilateral modification of its terms by the employer to an employee's disadvantage fails for lack of consideration."[208] In dicta, the court stated that continued employment would be consideration for an employer's unilateral modification to the benefit of current employees.[209] Modifying an existing employee handbook by inserting a mandatory arbitration provision requiring incumbent employees to waive their statutory judicial forum constitutes a unilateral modification to their detriment and, according to *Doyle*, will require consideration other than continued employment.[210]

3. Mutuality

While *Graham* declares unconscionable selection provisions designating as arbitrator a party or one closely allied with a party,[211] *Graham* does not "limit the power of contracting parties to designate arbitrators who, with the knowledge of the parties, may have an interest in the dispute or who sustain some relationship to a party which would otherwise disqualify the arbitrator from serving."[212] Nevertheless,

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207. *See generally id.* at 1144–47.

208. *Id.* at 1145. The court noted that:

> [B]ecause the defendant was seeking to reduce the rights enjoyed by the plaintiffs under the employee handbook, it was the defendant, and not the plaintiffs, who would properly be required to provide consideration for the modification. But in adding the disclaimer to the handbook, the defendant provided nothing of value to the plaintiffs and did not itself incur any disadvantage. In fact, the opposite occurred: the plaintiffs suffered a detriment – the loss of rights previously granted to them by the handbook – while the defendant gained a corresponding benefit.

Id.

209. *Id.* at 1146. The court dismissed defendant's argument "that if continued employment does not constitute consideration for a disclaimer, then it also cannot constitute consideration for benefits that would be conferred on existing employees by later versions of the handbook." *Id.* The court concludes, "[T]he employee's decision to accept the beneficial modification by his or her continued performance would be supported by consideration." *Id.*

210. *See* J.M. Davidson, Inc. v. Webster, 49 S.W.3d 507 (Tex.App. 2001) (concluding that an employer's mandatory arbitration policy was unenforceable against an at-will employee who was already working when the policy was promulgated and that any implied benefit of continued employment was illusory for an at-will employee).

211. *See supra* Part III.A.

212. *Graham*, 623 P.2d at 175 (quoting *In re* Cross & Brown Co., 167 N.Y.S.2d 573, 576 (1957)).

employers must be careful how they structure such arrangements.

In *Floss v. Ryan's Family Steak Houses, Inc.*,[213] the Sixth Circuit Court of Appeals refused to enforce an arbitration agreement after finding that there was no mutuality of obligation.[214] The court found that the arbitral forum retained unfettered discretion "to alter the applicable rules and procedures without any obligation to notify, much less receive consent from" the employees.[215] As such, the court ruled that there was an illusory promise that did not create a binding contract.[216] In *Penn v. Ryan's Family Steak Houses, Inc.*,[217] the Seventh Circuit reached the same conclusion.[218] The arbitration agreement between EDS and Penn contained only "an unascertainable, illusory promise on the part of EDS."[219]

A lack of mutuality argument can be presented when the mandatory arbitration language is included in an employment handbook. Employers often retain the power to modify the handbook's provision at any time, without the consent of employees. In *Snow v. BE & K Construction Co.*,[220] a federal district court in Maine refused to enforce an arbitration agreement contained in a six-page booklet. The booklet specifically stated, "The Company reserves the right to modify or discontinue this program at any time."[221] In such a case, it can certainly be argued that there is a lack of mutuality and, as such, no enforceable contract for mandatory arbitration. The court felt the defendant was trying to "have its cake and eat it too."[222]

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213. 211 F.3d 306 (6th Cir. 2000).

214. *Id.* at 315 (applying Kentucky and Tennessee contract law).

215. *Id.* at 315–16.

216. *Id.* at 316. "Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory." *Id.* (citing 1 SAMUEL WILLISTON, CONTRACTS § 43, at 140 (3d ed. 1957)).

217. 269 F.3d 753 (7th Cir. 2001).

218. *Id.* at 759 (applying Indiana law of contract).

219. *Id.*

220. 126 F. Supp. 2d 5 (D. Me. 2001).

221. *Id.* at 9 (citing BE & K Employee Solution Program at 4).

222. *Id.* at 15. The court stated:

> Defendant wished to bind its employees to the terms of the booklet, while carving out an escape route that would enable the company to avoid the terms of the booklet if it later realized that the booklet's terms no longer served its interests. Here, Defendant unilaterally constructed all of the rules of its alternative dispute resolution program, without negotiating with Plaintiff or asking her to demonstrate her assent with a signature. Therefore, it would be fundamentally unfair to hold

4. Severability

The court, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, addressed the circumstances under which it would sever or restrict an unconscionable provision, as opposed to refusing to enforce the agreement in its entirety.[223] The court, after a lengthy analysis of California statutory and case law regarding the severability of *illegal* contract terms, concluded that the principles announced:

> appear fully applicable to the doctrine of unconscionability .... If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose ... and ... can be extirpated ... by means of severance or restriction, then such severance and restriction are appropriate.[224]

The court offered two reasons for refusing to enforce the arbitration agreement in its entirety. First, there was more than one unconscionable provision in the arbitration agreement at issue.[225] "[I]t has both an unlawful damages provision[226] and an unconscionably unilateral arbitration clause."[227] Second, the lack of mutuality so permeates the agreement that "there is no single provision a court can

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Plaintiff to the terms of the booklet, when Defendant retains its ability to evade the booklet's terms entirely.

Id.

223. *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 695–99 (Cal. 2000). While California case law interpreting California statutory law is in no way binding on federal courts interpreting the FAA, it is instructive by analogy when federal courts apply state contract law in diversity cases.

224. *Id.* at 696.

225. *See also* Hooters of Am., Inc. v. Philips, 173 F.3d 933, 940 (4th Cir. 1999) (refusing to enforce an arbitration agreement in its entirety because Hooters promulgated "so many biased rules" that it created a "sham system unworthy even of the name of arbitration").

226. The court described the arbitration agreement as follows:

> The arbitration agreement specifies that damages are to be limited to the amount of backpay lost up until the time of arbitration. This provision excludes damages for prospective future earnings, so called "front pay," a common and often substantial component of contractual damages in a wrongful termination case.

Armendariz, 6 P.3d at 694 (citations omitted). The employer, on the other hand, is bound by no comparable limitation should it pursue a claim against its employees. *Id.*

227. *Id.* at 697. "Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Id.*

strike or restrict in order to remove the unconscionable taint . . . ."[228] The court would be required to reform the contract by adding language, as opposed to simply severing or restricting an offending term and declined to do so.[229]

There is a split among federal circuit courts of appeals regarding severability.[230] In *Gannon v. Circuit City Stores Inc.*,[231] the Eighth Circuit Court of Appeals disagreed with the Eleventh Circuit's decision in *Perez v. Globe Airport Security Services Inc.*,[232] regarding the enforceability of a mandatory arbitration employment contract that attempted to limit damages to less than the statutory remedy. The Eleventh Circuit, in *Perez*, considered whether an entire arbitration agreement was unenforceable when it allocated the costs of arbitration equally between the employee and the employer.[233] Since fees are available to a prevailing party in Title VII claims, the Eleventh Circuit reasoned that mandating equal sharing of fees and costs of arbitration circumscribed the arbitrator's authority to grant effective relief.[234] Further, the Eleventh Circuit reasoned that if an employer could rely on courts to simply sever an unlawful or unconscionable provision and enforce the remainder, the employer would have an incentive to include unlawful provisions in its arbitration agreements.[235] The Eleventh Circuit held the

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228. *Id.*

229. *Id.* The court did not feel authorized by statute or case law to reform and augment contracts. *Id.*

230. *Compare* Gannon v. Circuit City Stores, Inc., 262 F.3d 677 (8th Cir. 2001) *with* Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1287 (11th Cir. 2001).

231. 262 F.3d 677.

232. 253 F.3d 1280.

233. *Id.* at 1283.

234. *Id.* at 1285. Title VII provides that a prevailing party may be awarded reasonable attorney's fees, including expert fees and costs. *See* 42 U.S.C. § 2000e-5(k)(1994).

> By denying access to a remedy Congress made available to ensure violations of the statute are effectively remedied and deterred, the Agreement eroded the ability of arbitration to serve those purposes as effectively as litigation. *See* Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U.ILL. L.REV. 635, 665 (1995) (Curtailing the availability of a statutorily available remedy reduces the potential award, "undercut[s] the strong compensatory policy of the statute . . . [and] threaten[s] the initiation of many meritorious arbitration proceedings."). Globe's attempt to defeat the remedial purpose of Title VII taints the entire agreement, making it unenforceable.

Perez, 253 F.3d at 1287.

235. *Perez*, 253 F.3d at 1287. *But see Gannon*, 262 F.3d at 681 (noting that *Gannon* advanced this argument). The Eighth Circuit later rejected Gannon's argument stating, "If we were to hold entire arbitration agreements unenforceable every time a particular term is

entire arbitration agreement unenforceable.[236]

The Eighth Circuit, in *Gannon*, considered the severability of a provision limiting punitive damages.[237] The Equal Employment Opportunity Commission, as *amicus curiae*, argued that the Eighth Circuit should follow the Eleventh Circuit's precedent and hold the entire arbitration agreement unenforceable.[238] The Eighth Circuit, relying on Missouri contract law, instead opted to merely sever the limitation on punitive damages and enforce the remainder of the mandatory arbitration agreement.[239] The Eighth Circuit specifically noted *Perez* and rejected the Eleventh Circuit's public policy analysis regarding severability.[240]

In *Circuit City*, the Ninth Circuit, on remand, refused to enforce Circuit City's dispute resolution agreement in its entirety due to its unconscionability.[241] The court rejected the opportunity to sever the unconscionable provisions and enforce the remainder.[242] Citing *Armendariz*, the court concluded that "the objectionable provisions pervade the entire contract."[243] Noting the multiple unconscionable provisions and the unilateral character of the agreement, the court declined to "go beyond mere excision to rewriting the contract, which is not the proper role of this Court."[244]

5. Knowing and Voluntary

Explicit in the Supreme Court's dictum in *Alexander* is that an employee's waiver of a "cause of action under Title VII"[245] must be "voluntary and knowing."[246] Implicit in the Supreme Court's analysis in

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held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties . . . for fear that minor terms could be used to undermine the validity of the entire contract." *Id.* at 681.

236. *Perez*, 253 F.3d at 1287.

237. *Gannon*, 262 F.3d at 679.

238. *Id.* at 681 n.4.

239. *Id.* at 683. The clause found invalid limited punitive damages to five thousand dollars. *Id.* at 679 n.2.

240. "We recognize that the Eleventh Circuit has found public-policy arguments similar to those advanced by Gannon persuasive . . . . To the extent that the court relied on these public-policy arguments for its holding, we would disagree with the decision in *Perez*." *Gannon*, 262 F.3d at 683 n.8.

241. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2001).

242. *Id.* at 896.

243. *Id.*

244. *Id.*

245. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974).

246. *Id.* at 52 n.15.

Gilmer is the knowing and voluntary nature of Gilmer's agreement to arbitrate.[247] In the context of unequal bargaining power, the Court is careful to note that Gilmer was "an experienced businessman" and thus unlikely to have been "coerced or defrauded" into agreeing to arbitrate.[248] A number of commentators have encouraged the adoption of a "knowing and voluntary" standard for any waiver of rights under the civil rights statutes.[249]

The Ninth Circuit, in *Prudential Insurance Co. of America v. Lai*,[250] concluded that "a Title VII plaintiff may only be forced to . . . arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration."[251] The court refused to enforce arbitration of sexual harassment and discrimination claims pursuant to a U-4 form that did not describe the types of disputes that were to be subject to arbitration.[252] In *Austin v. Owens-Brockway Glass Container, Inc.*,[253] the Fourth Circuit, in dicta, noted that arbitration of statutory claims "is permissible when voluntary."[254]

In *Seus v. John Nuveen & Co.*,[255] the Ninth Circuit specifically

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247. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36 (1991).

248. *Id.* at 33.

249. *See, e.g.*, Lewis Maltby, *Paradise Lost – How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 10 (1994) (arguing that arbitration agreements should be "knowing and voluntary); Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 447–48, 479–84 (1999) (proposing a voluntariness standard "similar to the requirement for a 'knowing and voluntary' waiver specified in the Older Workers Benefit Protection Act" for claims under the Civil Rights Act of 1991.).

250. 42 F.3d 1299 (9th Cir. 1994).

251. *Id.* at 1305.

> We agree with appellants that Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes. Such congressional intent, which has been noted in other judicial decisions, is apparent from the text and legislative history of Title VII.

Id. at 1304.

252. *Id.* at 1305. The court stated: "Moreover, even if appellants had signed a contract containing the NASD arbitration clause, it would not put them on notice that they were bound to arbitrate Title VII claims. That provision did not even refer to employment disputes." *Id.*

253. 78 F.3d 875 (4th Cir. 1996).

254. *Id.* at 881. The court reached this conclusion by noting that Congressional conference reports support this view and "[i]n this circuit, conference reports are the most persuasive evidence of legislative intent, after the statute itself." *Id.*

255. 146 F.3d 175, 183 (3d Cir. 1998).

rejected a "heightened knowing and voluntary standard" for prospective arbitration agreements.[256] The Fifth Circuit distinguishes "the waiver or release of *substantive*" statutory rights from the waiver or release of "procedural rights like the right to proceed in a judicial forum."[257] Waiving substantive statutory claims might necessitate an inquiry into such matters as the "specificity of the language of the agreement, the plaintiff's education and experience, plaintiff's opportunity for deliberation and negotiation, and whether plaintiff was encouraged to consult counsel."[258] Waiving procedural statutory rights only requires an employee to understand a binding agreement was being made and there was no evidence of fraud or duress.[259]

The Seventh Circuit, in *Penn v. Ryan's Family Steak Houses Inc.*,[260] evaded "decid[ing] whether this circuit should adopt the Ninth Circuit's 'knowing and voluntary waiver' standard for evaluating the enforceability of arbitration agreements in the employment context . . . ."[261] While the majority opinion questioned "the continued validity" of the Ninth Circuit's 'knowing and voluntary waiver' standard for evaluating the enforceability of arbitration agreements in the employment context "in light of the *Circuit City Stores* decision,"[262] the concurring opinion implied that such a standard continues to exist.[263]

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256. *Seus*, 146 F.3d at 183. The Fifth Circuit, in enforcing a U-4 agreement to compel arbitration of multiple claims of discrimination under Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1967 stated, "We respectfully disagree with the decision of the court in *Lai*." *Id.* at 183 n.2.

257. *Id.* at 184 n.2.

258. *Id.* at 183.

259. *Id.* at 184. The court noted that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Id.* at 180 (quoting *Gilmer*, 500 U.S. 20, 26 (1991)).

260. 269 F.3d 753 (7th Cir. 2001).

261. *Id.* at 761.

262. *Id.*

263. *Id.* The concurrence noted that:

> Penn was being hired as a waiter in a chain restaurant, not as a corporate executive. His employment was only to be "at will." Likely a substantial share of his income would be from tips. . . . Above his signature this agreement states that Penn signed it "knowingly and voluntarily." We doubt it could have been 'knowingly' in view of its complexities, or even "voluntarily." Had he questioned its meaning and its complexities, it is doubtful Penn would have been hired. However, the agreement provided that Penn had the right to consult an attorney, but even if Penn could have afforded an attorney, the appearance of any attorney on the scene would doubtless have foreclosed any job opportunity. In Ryan's eyes, Penn would look like a troublemaker. If he wanted the waiter's job, he would be trapped in an unfair

The necessary scope, clarity, and specificity of any arbitration language remain unclear.[264] The agreement in *Circuit City* specifically listed several federal employment discrimination statutes by name.[265] Subsequent agreements should be careful to include specific references to the waiver or modification of procedural rights (*e.g.*, judicial forum generally; jury trial specifically), and substantive rights (*e.g.*, class-wide remedies, punitive damages). The arbitration agreement should be crafted in language the ordinary person can understand, be individually presented and explained to each employee or applicant, and require the employee's signature.

IV. CONCLUSION

Hard cases make bad law.[266] *Circuit City Stores, Inc. v. Adams* is a hard case and it makes bad law. Had the court adopted the view of the Ninth Circuit, employment contracts would be exempt from arbitration. The enforceability of arbitration agreements would remain primarily a matter of state contract law. Since compulsory, prospective arbitration agreements would be impermissible under the FAA, arguments regarding the incompatibility of arbitration with statutory text, history and purposes would be rendered moot. Instead, the Court sided with a majority of jurisdictions in limiting the FAA exemption of employment contracts to those of transportation workers only. In so doing, the Court

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situation until a court could unravel it.

Id. (Harlington, J., concurring).

264. *See* Romo v. Y-3 Holdings, Inc., 105 Cal. Rptr. 2d 208 (Dist. Ct. App. 2001). The California Court of Appeals ruled that an employee who signed a handbook acknowledgement but did not sign the arbitration section of the handbook was not bound to arbitrate her discharge claim.

265. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 110 (2001).

> By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and [the] law of tort.

Id.

266. Oliver Wendell Holmes, in his first dissent as a member of the U.S. Supreme Court, observed that "[g]reat cases, like hard cases, make bad law.... [I]mmediate interests exercise a hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1903). In a Title VII context, Chief Justice Burger, expressed the same sentiment. "[H]ard cases always tempt judge[s] to exceed the limits of their authority, as the Court does today by totally rewriting a crucial part of Title VII to reach a 'desirable' result." United Steelworkers of Am. v. Weber, 443 U.S. 193, 218 (1973) (Burger, C.J., dissenting).

ensures that federal courts will be hip-deep in questions of statutory interpretation and the application of state common law contract rules as a predicate matter to the actual arbitration of any statutory civil rights claim. The Court, by indulging a slavish devotion to the "liberal federal policy favoring arbitration," invites many new interpretive questions without offering any insight on how to answer them. The Court has opened Pandora's Box and the interpretive evils released will descend, case-by-case, upon the federal courts.

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