Uniform Arbitration: "One Size Fits All" Does Not Fit

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I. INTRODUCTION

Modern regulation of arbitration presumes that pre-dispute arbitration agreements are enforceable contracts that should not be disturbed absent some basis in contract law for invalidation. Following this presumption, courts have routinely applied the provisions of the Federal Arbitration Act (FAA) to enforce pre-dispute arbitration agreements in a variety of settings—from agreements between car dealers and manufacturers to contracts between employers and employees. The judicial embrace of arbitration as a means to resolve all types of disputes culminated in the Court's 1991 *Gilmer v. Interstate/Johnson Lane Corp.* decision.[1] This decision, which enforced an agreement to arbitrate an employee's age discrimination claim against his employer, created a firestorm both within and outside of the dispute resolution community. Much of the criticism of the Court's *Gilmer* decision focused on the judicial failure to distinguish between arbitration involving parties with equal and unequal bargaining power. Perhaps in response to this criticism, the numerous regulatory efforts begun after *Gilmer* focused primarily on providing additional procedural protections in arbitration as a means to eliminate the disadvantages the party with lesser bargaining power might face in the arbitral process. Interestingly, these regulatory efforts tend to treat arbitration as a one-size fits all dispute resolution mechanism—one that can and should be regulated using a uniform approach regardless of the participants' negotiating incentives.

This "one size fits all" approach to arbitration, with its focus on increasing procedural protections within the arbitral process, is clearly a response to the problems of two discrete groups—employees and consumers. Proponents of a unified approach to arbitration fail to recognize that increasing process to protect employees and consumers may impose burdens on other groups, such as merchants, where those burdens are not warranted. Moreover, a unified approach achieved through compromise of opposing interests may also fail to provide sufficient protection to those at a disadvantage in negotiating an arbitration agreement and in participating in an arbitration.

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[1] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

Rather than advocating a unified approach, this article identifies two types of arbitration that may deserve different regulatory treatment: traditional arbitration, that practiced among repeat players such as merchants and labor unions, and modern arbitration, imposed by repeat players on one-shot players, such as employees and consumers.[2] While this article does not recommend the prohibition of pre-dispute arbitration agreements in the employer/consumer context, it suggests that it would be appropriate to provide different default rules governing arbitration depending on the status of the parties involved in the arbitration. Although this suggestion may at first seem radical, in fact, a close reading of the cases and commentary on arbitration reveals that courts and commentators have already acknowledged the distinctions among the groups of potential disputants that are signatories to arbitration agreements.

II. TRADITIONAL AND MODERN ARBITRATION

A. *Traditional Arbitration*

Originally conceived as a means to resolve commercial disputes,[3] arbitration has always thrived as the preferred dispute resolution mechanism in specialized, self-regulating communities.[4] The popularity of arbitration

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[2] This Article is not the first to attempt to label different kinds of arbitration. In *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39 (1999), Professor Edward Brunet identifies two kinds of arbitration: "'folklore arbitration,' characterized by final and speedy fact-based awards entered by expert arbitrators after little prehearing process" and "contract" arbitration, characterized by party enhancement of the arbitration process through utilization of traditional litigation tools. In *Arbitration and Assimilation*, 77 WASH. U. L.Q. 1053, 1057–60 (1999), Professor Stephen Ware divides arbitration into two categories: (1) intra-group arbitration, which resolves disputes among members of small cohesive groups, and (2) general arbitration, in which the disputants do not share membership in such groups. The major difference between the two categories is that extra-legal norms govern intra-group arbitrations, while parties participating in general arbitration do not share the same customs and thus rely on legal norms to resolve their disputes. *Id.* at 1059–60.

[3] Arbitration was adopted to resolve disputes long before English merchants began to use it. Roman merchants utilized arbitration to resolve disputes as did the seventh century Ecclesiastical courts. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597–98 (1928).

[4] TOM E. CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION 10 (1st ed. 1997) (noting that the arbitral procedures used in commercial, labor, maritime and construction disputes are very similar); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 334 (1996) (describing

within such communities is easy to explain. Self-contained and self-regulating communities prefer a dispute resolution system that facilitates continuing relationships among members of the community so that the community continues to thrive. To facilitate relationships, community members must be able to resolve disputes quickly and in accordance with communal standards so that members can continue their business relations according to accepted terms without significant disruption. The court system is generally not perceived as an appropriate venue for the resolution of community disputes because of its complex and drawn-out procedures.[5] Moreover, the courts typically have little understanding of the customary norms a particular community follows.[6]

Thus, self-regulating communities, like merchants in the seventeenth and eighteenth centuries, adopted an arbitral system to resolve disputes. Traditional arbitration, unlike litigation, enabled these disputants to appoint a disinterested third party who was an expert in the industry to resolve the dispute in order to ensure that resolution was achieved in accordance with understood customary norms.[7] The arbitral process, with its lack of formalism, provided the swift results the parties desired.[8] Moreover, the arbitral system ensured finality, also essential to facilitating continuing relationships, by obtaining party agreement to abide by the arbitrator's resolution of the claim.[9]

Interestingly, even if the parties had not agreed that the arbitrator's decision was final, judicial involvement would nevertheless have been unnecessary to ensure enforcement of most arbitration agreements or awards

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traditional arbitration as part of "old" ADR which confines disputes to a subset of an industry).

[5] *See* Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 268 (1988) (emphasizing that commercial relationships fared much better under a system that focused on salvaging relationships among the parties rather than on ensuring that stringent procedural safeguards were followed).

[6] As Blackstone emphasized, arbitration was useful in settling mercantile transactions that were "almost impossible to be adjusted on a trial at law." 2 WILLIAM BLACKSTONE, COMMENTARIES *17.

[7] Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 270 (1990).

[8] Brunet, *supra* note 2, at 45 ("In historic folklore arbitration, informal procedures dominated. There was little or no discovery. Evidence rules were inapplicable . . . .") (footnotes omitted).

[9] *Id.* at 43–44; *see also* Randy Linda Sturman, *House of Judgment: Alternative Dispute Resolution in the Orthodox Jewish Community*, 36 CAL. W. L. REV. 417, 418 (2000) (recognizing that in Bet Din, a form of ADR that allows Jews to resolve disputes between themselves, requires signing of a contract agreeing to abide by the decision).

because both parties had an incentive to avoid self-serving behavior.[10] The value of the parties' ongoing relationship, as well as the reputational interest of each party within the industry, vastly outweighs the stakes at issue in any particular case.[11] Thus, parties willingly abided by arbitration agreements and decisions in order to preserve their relationship and their respective reputations.

It is not surprising then that the structure of traditional arbitration was entirely contractual. Allocation of important issues was left to the parties, in part because the governmental powers were not interested in regulating the arbitration process,[12] and in part because informal marketplace sanctions served the enforcement role that regulation often plays today. Yet market sanctions work best when markets consist of relatively few players with frequent business interactions, thus maximizing the importance of reputational concerns.[13] When the market grew wider and more impersonal, market sanctions became less effective. The growth of the market in the late nineteenth and early twentieth centuries played a major role in the development of law regulating arbitration in the commercial context. Initially, the commercial community was quite manageable. Yet as commerce grew beyond local fairs to national and then international venues, the informal marketplace sanctions that accompanied the failure to abide by an arbitral award were no longer sufficient alone to preserve the commercial community.

Another force was at work to undermine the traditional arbitral structure, at least in the context of commercial disputes. As arbitration became the favored means for resolving mercantile disputes, common law judges grew

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[10] Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 280 (1990).

[11] *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 149 (1992) (noting that the diamond industry ensures obedience to arbitral awards through reputational sanctions).

[12] The English courts in the medieval period had little interest or expertise in commercial disputes. Robert B. von Mehren, *From* Vynior's Case *to* Mitsubishi: *The Future of Arbitration and Public Law*, 12 BROOK. J. INT'L L. 583, 583–84 (1986) (suggesting that merchants preferred arbitration to litigation because they believed the King's courts were not well versed in commercial matters).

[13] Bruce Mann, in his extensive study of arbitration in pre-revolutionary Connecticut, emphasized the same phenomenon. According to his study, the success of arbitration is dependent on the existence of a community. Once community bonds weaken, community norms are no longer sufficient to ensure compliance with arbitration decisions. When that weakening occurs, the inability of parties to obtain enforcement of arbitral awards in court becomes problematic. Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 457–58 (1984).

concerned that disputants' systematic circumvention of common law court procedures was reducing judges' salaries.[14] Judges' salaries would be reduced, the theory went, because judges were paid based on the number of cases they heard.[15] To avoid this loss of fees, judges created what came to be known as the "ouster" doctrine. This doctrine, applied in a series of cases in England during the eighteenth century, prohibited the enforcement of pre-dispute arbitration agreements on the basis that they "ousted" the courts of their proper jurisdiction. Although actually cited in only half a dozen cases,[16] American courts adopted wholesale the ouster doctrine.[17]

Confronted by hostile courts and an expanding marketplace, the commercial community in America turned toward Congress to assist them in their efforts to bypass the traditional legal system in favor of a more efficient system of arbitration. The passage of the FAA was an acknowledgment that a purely private approach was no longer workable in light of the developing concerns about enforceability that the market was no longer addressing and that the courts were exacerbating. The primary purpose of the FAA was to ensure that pre-dispute arbitration agreements were as valid and enforceable as any other type of contract. To ensure enforcement, Congress included two key provisions. First, the FAA allowed a party to obtain a stay of litigation pending an arbitration pursuant to a valid arbitration agreement.[18] Second, the FAA enabled enforcement of an arbitration agreement by authorizing a party to an arbitration agreement to file in federal district court a motion to compel the other party to arbitrate.[19]

It is worth noting that although the FAA provided a process for ensuring enforcement of pre-dispute arbitration agreements, it provided little guidance regarding the arbitral process itself. While imperfect, the limited governance scheme the FAA created was designed to protect party autonomy in designing arbitral systems. In other words, if parties wanted to limit

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[14] Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746).

[15] Scott v. Avery, 10 Eng. Rep. 1121 (1856).

[16] Harrison v. Douglas, 111 Eng. Rep. 463, 464 (1835); Thompson v. Charnock, 101 Eng. Rep. 1310, 1310 (K.B. 1799); Mitchell v. Harris, 30 Eng. Rep. 557, 560 (Ch. 1793); Halfhide v. Fenning, 29 Eng. Rep. 187 (Ch. 1788); Wellington v. Mackintosh, 26 Eng. Rep. 741 (Ch. 1743).

[17] Carbon Black Export Inc. v. SS Monrosa, 254 F.2d 297, 300–01 (5th Cir. 1958); Mitchell v. Dougherty, 90 F. 639, 642 (3d Cir. 1898); Trott v. City Ins. Co., 24 F. Cas. 215, 217 (C.C.D. Me. 1860) (No. 14,189); Tobey v. County of Bristol, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14,065).

[18] 9 U.S.C. § 3 (1994).

[19] 9 U.S.C. § 4 (1994).

remedies, discovery, or other facets of traditional litigation, Congress would make no attempt to prohibit them from doing so.[20]

This laissez faire approach to arbitration made sense in light of Congress's clear understanding of the audience arbitration served. Lobbied by merchants, and cognizant of concerns about including employment relationships within the scope of the FAA, Congress drafted the FAA with the idea that it would address primarily repeat player-repeat player (commercial) transactions rather than repeat player-one-shot player transactions.[21]

More recently of course, the kinds of disputes submitted to arbitration have changed dramatically. Despite this change in subject matter, courts continue to apply the FAA's terms to these disputes to resolve any questions that arise out of these broader pre-dispute arbitration agreement.

B. *Modern Arbitration*

Beginning in the 1980s, the Supreme Court became increasingly receptive to the notion that parties could agree to arbitrate a variety of *statutory* claims. The advent of the alternative dispute resolution (ADR) movement, together with a substantial increase in the workload of the courts, may have contributed to the willingness of courts to sanction the use of ADR

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[20] Courts continue to interpret the FAA primarily as a tool designed to ensure enforcement of arbitration agreements. *E.g.*, Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Southland Corp. v. Keating, 465 U.S. 1 (1984). When an agreement specifies the procedures under which the arbitration will be conducted, however, courts hold that the FAA has no impact. *E.g.*, Volt Info. Scis., Inc. v. Bd. of Trustees, 489 U.S. 468 (1989).

[21] During a floor debate prior to the enactment of the FAA, Congressman Graham, Chairman of the House Committee on the Judiciary, stated:

> This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts–an agreement to arbitrate, when voluntarily placed in the document by the parties to it . . . . It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.

65 CONG. REC. 1931 (1924). At the Senate Judiciary Committee Hearing on the proposed Act, Mr. Piatt, Chairman of the American Bar Association's Committee on Commerce, Trade, and Commercial Law, emphasized that the bill was "not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Comm. on the Judiciary*, 67th Cong. 9 (1923).

generally, and arbitration in particular. The perceived benefits of the ADR movement—efficiency, confidentiality and speed—may have seemed so attractive to the judiciary that little heed was paid to the question of the propriety of utilizing ADR in any particular circumstance. Thus, for example, an extension of the traditional practice of arbitrating claims between brokerage houses, brokers and stock exchanges to disputes between investors and brokerages was readily accepted by the securities industry and the courts in spite of the potential dangers associated with "requiring inexperienced parties to arbitrate with seasoned professionals."[22]

In the non-unionized employment context, judicial acceptance of arbitral resolution of employment disputes culminated in the 1991 Supreme Court decision in *Gilmer v. Interstate-Johnson Lane Corp.*. In *Gilmer*, the Court held that an employee could prospectively agree to arbitrate statutory claims that might arise out of his employment relationship.[23] While *Gilmer* addressed an employee's ability to agree to arbitrate Age Discrimination in Employment Claims, appellate courts following *Gilmer* routinely applied the doctrine to a variety of anti-discrimination statutes including, most prominently, Title VII claims.[24]

Enamored with the potential benefits arbitration provides, particularly efficient and confidential resolution of statutory claims, employers were quick to adopt arbitration clauses as a primary dispute resolution mechanism.[25] Yet adoption of these clauses did not pass unnoticed.

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[22] CARBONNEAU, *supra* note 4, at 11.

[23] Of course, Gilmer's arbitration agreement was with the New York Stock Exchange, not his employer. The Court acknowledged this fact, stating that because Gilmer's contract was not with his employer, the Court need not decide whether the FAA § 1 exempted from its coverage arbitration agreements between employers and employees. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991).

[24] *E.g.*, Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991). *But see, e.g.*, Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).

[25] Many companies have adopted or are considering adopting predispute agreements to arbitrate. Companies such as Burlington Northern Railroad, Brown & Root, ITT (for headquarters employees), and Rockwell International (for management employees) have already taken this step. *Statement by Professor Samuel Estreicher to the Commission on the Future of Worker-Management Relations Panel on Private Dispute Resolution Alternatives*, 188 Daily Lab. Rep. (BNA) at D-33 (Sept. 30, 1994); *see also* Mary A. Bedikian, *Transforming At-Will Employment Disputes into Wrongful Discharge Claims: Fertile Ground For ADR*, 1993 J. DISP. RESOL. 113, 141; Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 100 n.87 (1996) (citing

Almost immediately, commentators began criticizing *Gilmer* and its progeny for enabling employers to impose a process devoid of procedural fairness on employees who could not have knowingly or voluntarily understood the rights they were relinquishing.[26] Following closely on the heels of this criticism, prominent legal organizations and arbitration providers began focusing on the procedural inadequacies of arbitration when statutory claims were at issue and developing guidelines and standards designed to improve the arbitral process so that it better accommodated the needs of disputants with widely disparate negotiating incentives.[27] Finally, the disputants themselves began attacking mandatory arbitration. In the securities industry particularly, pressure from a variety of sources culminated in a decision by the National Association of Securities Dealers to reexamine its support for mandatory employment arbitration and ultimately to abandon the requirement that securities industry employees agree to arbitrate statutory claims as a condition of trading on the exchange.[28] Pressure in the securities industry came from disputants as well.[29] In the 1990s, several class action

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studies and articles emphasizing the growth of individual employment arbitration); Dominic Bencivenga, *Mediation Boutique: Firm Provides 'Neutrals' to Settle Job Disputes*, N.Y. L.J., Dec. 26, 1996, at 5 (noting a dramatic increase in the use of ADR since the *Gilmer* decision in 1991); Margaret A. Jacobs, *Judges Appear to Be Growing Skeptical of Arbitration*, WALL ST. J., Dec. 22, 1994, at B2.

[26] *E.g.*, Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements*, 64 UMKC L. Rev. 449, 471–72 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L. J. 1, 29 (1996); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 385–88; Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Mark D. Klimek, Note, *Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes too Far*, 8 OHIO ST. J. ON DISP. RESOL. 425 (1993).

[27] *E.g.*, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 91 Daily Lab. Rep. (BNA) A-8, E-11 (May 11, 1995). Others might describe "disparate negotiating incentives" as unequal bargaining power.

[28] SEC Order Approving Proposed NASD Rule Change, 64 Fed. Reg. 59815 (Nov. 3, 1999); NASD Proposed Rule Relating to Arbitration of Employment Related Claims, 62 Fed. Reg. 66, 164 (Dec. 17, 1997) (discussing congressional and regulatory pressures for changing the mandatory system); *See generally* Securities Arbitration Reform: Report of the Arbitration Policy Task Force to the Board of Governors National Association of Securities Dealers, Inc. (1996).

[29] *Arbitration: Elimination of Mandatory Arbitration of Discrimination Claims Proposed by NASD,* 153 Daily Lab. Rep. (BNA) AA-1 (August 8, 1997).

lawsuits brought by securities industry employees were settled on the condition that the employer abandon its mandatory arbitration policies.[30]

Despite these attacks, employers outside of the securities industry continue to adopt policies requiring employees, as a condition of employment, to agree to arbitrate any claims arising out of their employment. Few courts are willing to strike down these clauses.[31] Therefore, modern arbitration clearly includes arbitration between parties with similar as well as disparate negotiating incentives. To understand why modern and traditional arbitration should not be regulated in similar ways, it is important to examine how incentives to negotiate and behavior during arbitration change depending on the status of the parties involved.

III. GAME THEORY AND ARBITRATION

Another way to distinguish traditional and modern arbitration is to identify characteristics of those parties participating in the arbitral process. Typically, participants fall into one of two categories. Either they are "repeat players,"[32] such as employers, or one-shot players, such as employees.[33] An analysis of the interactions between one-shotters and repeat players

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[30] Paine Webber Allows Bias Claims in Court; Other Brokerages Still Mandate Arbitration, 67 U.S.L.W. 24, 2374 (Jan. 5, 1999) (Paine Webber voluntarily abandons mandatory arbitration program); Merrill Lynch Drops Mandatory Arbitration Under Agreement Settling Discrimination Suit, 66 U.S.L.W. 2697 (May 19, 1998) (settlement agreement abolishes mandatory arbitration program); Smith Barney Settlement May Signal Shift in Mandatory Dispute Settlement Debate, 66 U.S.L.W. 2355 (Dec. 16, 1997) (Smith Barney agrees to set aside its mandatory arbitration program as part of settlement of class action sex discrimination lawsuit).

[31] *But see, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 682–83 (Cal. 2000) (rendering an arbitration agreement unenforceable when the remedies were limited); Hooters of America, Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999) (revoking an arbitration agreement when the terms of arbitration were unconscionable); Gibson v. Neighborhood Health Clinics, 121 F.3d 1126, 1131 (7th Cir. 1997) (finding an arbitration agreement invalid due to lack of consideration).

[32] A repeat player is typically an organization that frequently interacts with a particular institution or engages in certain behaviors, for example, commercial transactions or labor-management negotiations. Representative repeat players include unions and employers as well as large organizations like securities firms or insurance companies.

[33] A lack of organization and sophistication characterizes the one-shot player. The one-shot player will usually have few opportunities to negotiate agreements and even fewer opportunities to litigate a claim. The one-shot player's limited exposure to negotiating and dispute resolution are defining aspects of his nature.

demonstrates that repeat players have a distinct and systematic advantage in interactions with one-shot players.[34]

Moreover, such analysis helps explain why external regulation is more appropriate in arbitral agreements involving one-shot and repeat players than it is in agreements between repeat players. In discussing the repeat and one-shot player interaction, this article will focus on employers and employees because much of the current debate regarding the propriety of utilizing arbitration involves these two groups.

A. *Repeat Players and One-Shot Players*

1. *"Negotiation" of the Arbitration Agreement*

In selecting arbitration as their preferred dispute resolution mechanism when interacting with employees, employers, as repeat players, attempt to maximize profits and benefits from economies of scale by using standardized forms presenting limited opportunity for negotiation of terms. When presented with a standardized agreement and limited time for negotiation, an employee can only attempt to gain concessions on the negotiable terms if he fully appreciates the disadvantages or costs arising from the nonnegotiable portions of the agreement.[35] To appreciate the value of the nonnegotiable

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[34] Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465,1476 (D.C. Cir. 1997); Marc Galanter identifies several advantages a repeat player will have over a one-shot player, including: (1) experience in negotiation that assists in structuring future transactions; (2) economies of scale; (3) informal relations with institutional incumbents; (4) adoption of risk-taking as a long-term strategy; and (5) investing resources in obtaining implementation of rules favorable to the repeat player. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–100 (1974).

[35] Of course in the long run, if all employers do not adopt arbitration agreements, employers are likely to raise the wages of employees who are bound by an arbitration agreement if the agreement is perceived as a benefit to the employer and a detriment to the employee. Stephen J. Ware, *The Effects of* Gilmer*: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001). After all, employees are always free to consider employment offers elsewhere and might do so if they perceive the arbitration agreement as problematic and receive no remuneration in exchange for continuing to work under the agreement. It may be difficult for an employee to fully appreciate the value of an arbitration agreement either at the time she agrees to it or at some later time, however, because employees may suffer from judgmental bias. Judgmental bias causes individuals to misperceive the likelihood that an event that rarely occurs, and that they have never experienced, will occur again in the future. Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463, 465 (Daniel Kahneman at. al. eds., 1982). This bias, together with most people's belief that they are immune

terms, the employee would need to read and understand the proposed agreement.[36] Yet the rational employee will not invest substantial resources in reading or analyzing a proposed agreement. Such behavior is rational because the expected benefits from undertaking such an investigation would be significantly outweighed by the costs associated with such investigation. The expected benefits of reading and understanding the agreement may be reduced even further if the nonnegotiable terms concern the consequences of unlikely occurrences and appear in small print and/or are defined using obscure language.[37]

Empirical evidence supports the theory that the rational employee does not expend his limited resources reading and analyzing terms other than wages or benefits. According to David Charny, employees typically learn about crucial issues such as dispute resolution mechanisms, job safety or compensation a substantial amount of time after beginning employment.[38]

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from hazards, results in an inability to perceive accurately the likelihood that a low probability event will occur. *Id.* at 468.

Applying the judgmental bias theory to the employment area yields the following result: when the employee reviews his employment agreement and encounters an arbitration clause that requires him to arbitrate all disputes arising out his employment, his judgmental bias, developed from his personal experiences, is likely to render him unable to place the proper value on the clause. In other words, the employee is unable to value the clause properly because he will tend to discount the probability that he will engage in a dispute with his employer. After all, he has never had a dispute with an employer in the past and he knows that, in general, such disputes happen to other people.

[36] A repeat player who utilizes standardized forms neither expects nor wishes for the one-shot player it deals with to read the agreements. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981) ("A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms.").

[37] Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 241–43 (1995). Eisenberg explains that rational form readers will remain ignorant of the terms because the cost of evaluating them is a waste of resources and the likelihood of the clause's relevance is low. *Id.* at 243. Perhaps more importantly, workers simply have other things on their minds. As one author put it, "'people want to eat first and consider legal and philosophical implications later.'" Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1387 (1991) (quoting 2 Brecht, *Dreigroschenoper* [The Three Penny Opera], *in* GESAMMELTE WERKE: STUCKE [Collected Works] 457 (1967)).

[38] David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375, 417 (1990). Charny acknowledges that empirical evidence regarding employees' knowledge about the jobs they accept and the reasons why they accept them is sparse. *Id.* at 417 n.144. Charny suggests that the evidence available indicates that "workers are generally poorly informed and learn most relevant information only after substantial experience at the job." *Id.* (citing W. KIP VISCUSI, RISK BY CHOICE 63–69 (1986)); W. Kip Viscusi & Charles O'Connor, *Hazard Warnings for Workplace Risks:*

By contrast, a rational employer will have included the dispute resolution system of its choice in the employment agreement with an employee because it will have developed an understanding of the different methods of dispute resolution available and identified the method that affords it the greatest benefit.[39] The employer's greater understanding of the value of the arbitral clause, together with its ability to maximize its surplus by determining which provisions should be included in the agreement, will enable the employer to structure the employment agreement in a way that furnishes it the most advantage.[40] Typically, in the employment area, this understanding has led some employers to include arbitration provisions as their preferred dispute resolution mechanism. The employer's ability to present the arbitration agreement on a take-it-or-leave-it basis further enhances its superior bargaining position. If an employee actually understands the arbitration provision and attempts to negotiate the elimination of the provision, the employer will simply refuse and make a job offer to someone else.

An analysis of arbitration demonstrates that the process of negotiation is not the only area where repeat players have the potential to obtain significant advantage.[41] The employer's repeat player status also creates a systematic bias in its favor in the arbitration proceedings.[42] The bias results from the employer's incentive to foster relations with the arbitrator and create a precedent system for tracking arbitration decisions.

Effects on Risk Perceptions, Wage Rates, and Turnover, in LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION 98, 101–09 (W. Kip Viscusi & Wesley A. Magat eds., 1987)).

[39] The ability to structure an agreement to insure advantages may also allow the employer to structure the actual arbitration hearing in a manner that most favors it. Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards,* 29 MCGEORGE L. REV. 223, 240 (1998) ("[T]he employer can try to structure the arbitration hearing process to its advantage . . . .").

[40] Charny, *supra* note 38, at 418.

[41] *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1476 (D.C. Cir. 1997); 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, 4–5 (1994).

[42] Bingham, *supra* note 39.

2. *Interaction with the Arbitrator*

An employer using arbitration to resolve disputes has the incentive to compile information about potential arbitrators and their past decisions and develop a relationship with those arbitrators.[43] The former will allow better predictability of arbitral outcomes. The latter will potentially allow the employer to influence the outcome of the arbitration.

It makes economic sense for the employer to monitor arbitrators' decisions and acquire advance intelligence about each arbitrator because it is likely that it will use that information repeatedly in the future. Not surprisingly, it is common for large organizations and law firms that represent employers to keep databases containing extensive background information on each potential arbitrator, including how the arbitrator ruled in a number of cases, as well as the quality of his decisions.[44]

For the same reason, the repeat player will take the opportunity to develop facilitative informal relations with the arbitrator, investing resources in attending events or conferences where the arbitrator will be present in order to establish a friendly relationship with the arbitrator that may result in bias in favor of the employer in the future.[45] A one-shot player who devoted any substantial time and resources to obtaining information about arbitrators or developing relationships with them would, by contrast, be acting irrationally because he would never have use for the information again.[46]

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[43] Galanter, *supra* note 34, at 99. One of the repeat player's advantages is its ability to establish informal relationships with "institutional incumbents." Bingham, *supra* note 39, at 242 (stating arbitrators "might tend to rule in favor of the only party in a position to maintain an institutional memory and use arbitrators again in the future, namely the employer.").

[44] One large, management-side, labor law firm in Chicago maintains a database that indicates whether an arbitrator found in favor of management or union, describes the issue in dispute and offers the participating attorney's opinion regarding the quality of the decision. Like this law firm, other repeat players have attempted to create a firm institutional memory. Kaiser Permanente created a database containing information on medical malpractice arbitration awards in order to assist its legal department in future litigation. Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 189, 218 (1997). Other resources containing information about arbitrators exist. The Labor Arbitration Information Service (LAIS) provides information regarding an arbitrator's past decisions, including the percentage of times the arbitrator has found in favor of management and the union. The LAIS also indicates the arbitrator's percentages in discipline and nondiscipline cases and then considers the arbitrator's decisions individually, providing a summary of the subjects at issue in the arbitration.

[45] Galanter, *supra* note 34, at 110–12 (1974).

[46] Although potential plaintiffs would be acting irrationally if they attempted to obtain similar information, the question is why a business or law firm has failed to

Similarly, there is little incentive for plaintiffs' lawyers to collect and maintain a database containing information about arbitrators. While such information would make a plaintiff's lawyer more marketable and would allow him to increase his fees if the information made her more successful, an investment in that information might not be fruitful because employees are one-shot players in the legal hiring world just as they are in the dispute resolution world.

The structure of the current arbitrator selection system does not eliminate the one-shot employee's disadvantages. On the contrary, the current system provides significant benefits to the employer, at the expense of the employee. The arbitrator is likely to feel pressure to find in favor of the permanent party, the employer, in most cases because industry members will more frequently appear before the arbitrator. In addition, in many employment arbitrations the employer pays the arbitrator's entire fee.[47] The sense that the employer "owns" the process as a result may influence the arbitrator's ultimate resolution of the case. An arbitrator who regularly finds in favor of complaining employees may be certain that the employer will be reluctant to rehire her in the future.

Thus, the employer maintains significant advantages over the employee in structuring and executing a dispute resolution clause. On that basis, a persuasive argument can be made that predispute arbitration agreements between employers and employees that require arbitration of statutory discrimination claims should not be enforced.[48] Yet the Supreme Court firmly rejected this argument in *Gilmer*, holding that, as a general rule,

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develop similar databases for plaintiffs' use. The response is simply that it would be economically inefficient to expend the kind of resources necessary to obtain such information unless there was some assurance that plaintiffs would choose to pay the collector of the information for use of that information. In other words, as long as a business or law firm would have no assurance that they would receive a return on their investment, it would be irrational for them to compile such a resource. Employers and their law firms, on the other hand, do have an incentive to compile such information because a large employer will typically hire one law firm to handle all of its employment lawsuits.

[47] Tia Schneider Denenberg & R.V. Denenberg, *The Future of the Workplace Dispute Resolver*, DISP. RESOL. J., June 1994, at 48, 50. The D.C. Circuit has held that it is preferable to have employers pay for the entire process. Cole v. Burns Int'l. Sec. Servs. 105 F.3d 1465 (D.C. Cir. 1997). The *Cole* court suggested that the *Gilmer* court might not have approved a program of mandatory arbitration of statutory claims in the absence of an agreement to pay arbitrators' fees. *Id.* at 1484. Moreover, the *Cole* court rejected the theory that a repeat player has the ability, if it pays for the process, to control it. The *Cole* court stated, "[i]t is doubtful that arbitrators care about who pays them, so long as they are paid for their services." *Id* at 1485.

[48] *See generally* Cole, *supra* note 26.

statutory claims are subject to binding arbitration, at least outside the collective bargaining context. Despite the perceived unfairness such agreements generate, the arbitral agreements of non-unionized employees will be enforced.

B. *The Repeat Player Interacting with the Repeat Player*

In marked contrast to relationships between one-shotters and repeat players, the possibility of overreaching will rarely play a part in negotiation and other interactions between repeat players. In such interactions, external nonlegal interests, such as each party's interest in maintaining a smooth working relationship, together with relatively equivalent negotiating power, provides the incentive not to overreach. Moreover, efforts to take advantage of status during negotiation are likely to be detected because both parties have similar experience in negotiating contracts as well as participating in dispute resolution proceedings.

1. *Drafting the Arbitration Agreement*

The dynamics of the relationship between two repeat players temper many of the defects present in the relationship between a repeat player and a one-shot player. In repeat player relationships, both actors should have similar experience and expertise in negotiation and dispute resolution.[49] Economies of scale do not favor either party; nor does one party have a greater understanding of the dispute resolution process than the other. More importantly, in a transaction involving two repeat players, both parties will have an economic incentive to avoid self-serving behavior. In most instances, nonlegal sanctions, such as the desire to maintain a profitable business relationship with the other party, induces the repeat player to keep its commitments. These nonlegal sanctions, together with the awareness that both parties have similar knowledge and access to information about negotiation and dispute resolution, motivate the drafting party to apportion fairly the agreement's surplus.

The drafting party creates the agreement with the knowledge that an experienced negotiator will review it. As a result, the party presenting the first draft is aware that drafting an unfair or oppressive agreement may result in the kind of ill will that might ultimately trigger the relationship's demise. Further, even if the self-serving behavior went undetected initially, the self-

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[49] Galanter, *supra* note 34 at 110–11. By "repeat player," I mean those entities, such as union and management, that interact with each other repeatedly or merchants, who operate in a smaller cohesive group where reputational concerns are paramount.

serving party would have difficulty dealing with the other party throughout the life of the agreement and would certainly face tough opposition in subsequent negotiations. Thus, in drafting an agreement with another repeat player, the drafter has the proper incentives both to draft an efficient contract, and to distribute equitably the economic benefits.

In game theory terms, the strategy that motivates a repeat player engaged in continued interactions with other repeat players to avoid overreaching is the game of "tit for tat."[50] Using the "tit for tat" strategy, a party's optimal strategy is to begin by cooperating and continue to cooperate as long as one's opponent does. If one's opponent engages in an act of betrayal, the affected party should retaliate. This strategy discourages noncooperative behavior while permitting a pattern of mutual cooperation to develop. Thus, "tit for tat" is the best strategy in a repeat-move game involving repeat players.[51]

2. *Dispute Resolution Between Repeat Players*

A study of repeat player behavior establishes that arbitration is the dispute resolution mechanism of choice for a repeat player engaged in a dispute with another repeat player.[52] According to Galanter, repeat players dealing with other repeat players have the expectation that they are dealing and will continue to deal with each other frequently.[53] Because both parties are interested in "continued mutually beneficial interaction," they will prefer to use informal controls to govern their relations. The use of informal controls is preferable because the potential loss of their continuing relationship outweighs any official remedy available.[54] Thus, repeat players prefer a dispute resolution form "detached from official sanctions."[55]

Arbitration provides just such detachment. Arbitration is typically conducted in private. Moreover, the parties have considerable freedom in designing the procedures governing their arbitration because no formal rules govern the proceedings. Because parties can customize the proceedings to suit their interests, arbitration also has the potential for providing an acceptable result at a low cost. Consequently, arbitration limits wealth transfers between parties, enabling the parties to retain resources rather than expending them on lengthy litigation that does not produce income for either

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[50] *See generally* ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION (1984).

[51] Such strategy is not available to a one-shot player engaged in a transaction with a repeat player because the one-shot player has only one opportunity to negotiate.

[52] Galanter, *supra* note 34, at 110.

[53] *Id.*

[54] Katz, *supra* note 10, at 281.

[55] Galanter, *supra* note 34, at 110.

side. Moreover, for repeat players, it is irrelevant that errors may occur in determining the outcome of a particular dispute, as long as no systematic bias presents itself. Repeat players are aware that outcomes should balance out over the long term.

IV. EFFORTS TO REGULATE ARBITRATION

Following the Supreme Court's decision in *Gilmer*, repeat player utilization of arbitration agreement in contracts with one-shot players increased dramatically. A 1991 study of arbitration found that only 4 of 111 employers used outside arbitration as a means for resolving employment disputes.[56] In 1995, by contrast, the United States General Accounting Office reported that ten percent of employers with 100 or more workers utilized arbitration as the means for resolving employment disputes.[57] The increased use of arbitration in the employment setting, as well as in other settings where repeat players interact with one-shot players, led to considerable criticism from a variety of sources: legislators, commentators and practicing attorneys. This criticism prompted the development of several legislative and policy initiatives designed to alleviate the two major criticisms of arbitration, its lack of due process for participants and the impropriety of its use between disputants with disparate negotiating incentives. These efforts have taken three principal forms: the Due Process Protocol, the Revised Uniform Arbitration Act (RUAA), and state and federal legislative enactments. As described below, each of these developments have led to the increased judicialization of the arbitral process.

A. *Due Process Protocol*

The drafting of the *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* was one of the first efforts to ameliorate the perceived inadequacies mandatory arbitration of statutory claims created.[58] Influential members of arbitral organizations, the bar, and other dispute resolution organizations were

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[56] Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 1, 27–42 (1995).

[57] U.S. Gen. Accounting Office, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR– EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION, GAO/HEHS-95-150 at 7 (July 1995).

[58] *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 91 Daily Lab. Rep. (BNA) A-8, E-11 (May 11, 1995).

responsible for the Protocol's content.[59] Ultimately, two major arbitrator provider organizations, the American Aribitration Association (AAA) and JAMS/Endispute, adopted the Protocol's terms and do not provide arbitrators for employment claims pursuant to arbitration agreements unless the parties agree to abide by the Protocol's terms.[60]

Unable to reach a consensus on whether pre-dispute agreements to arbitrate statutory claims are appropriate, the Protocol instead focuses on the other perceived problem with arbitration—its lack of due process for one-shot player participants. The theme underlying the Protocol's development is that if consensus on the inarbitrability of statutory claims could not be reached, strong recommendations on a variety of due process related concerns should be issued so one-shot players required by agreement to arbitrate statutory claims would be more likely to participate in a fair hearing.

Thus, the Protocol attempts to transform the traditional arbitral hearing into a process that more closely mirrors the procedural and substantive protections the litigation process offers. Among other recommendations,[61]

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[59] Signatories to the Protocol include Arnold Zack, President of the National Academy of Arbitrators; Max Zimny, General Counsel, International Ladies' Garment Workers' Union and representative, Council of Labor and Employment Section, ABA; Carl E. VerBeek, Management Co-Chair, Arbitration Committee of Labor and Employment Section, ABA; Robert D. Manning, Union Co-Chair, Arbitration Committee of Labor and Employment Section, ABA; Charles Ipavec, Neutral Co-Chair, Arbitration Committee of Labor and Employment Section, ABA; George H. Friedman, Senior Vice President, AAA; Michael F. Hoellering, General Counsel, AAA; W. Bruce Newman, SPIDR; Wilma Liebman, FMCS; Joseph Garrison, NELA; and Lewis Maltby, ACLU.

[60] National Rules for the Resolution of Employment Disputes (American Arbitration Association), http://www.adr.org/rules/archives/employment_rules.html (Jan. 1, 1999). The Rules state that the AAA will administer dispute resolution programs that meet the standards articulated in the Due Process Protocol and in the National Rules. If the program, "on its face, substantially and materially deviates from the minimum due process standards" of the National Rules and the Due Process Protocol, the AAA "may" decline to administer cases from that employer. Later in its Rules, AAA states that programs that it administers "must be consistent" with the National Rules and the Due Process Protocol. The National Rules do not refer to the Due Process Protocol, nor do they address the due process concerns that are the focus of the Protocol.

[61] The Protocol is written using permissive rather than mandatory terms. To the extent that it has been adopted by arbitral providers like AAA, however, compliance with its terms is a condition of utilizing the provider to resolve the dispute. Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW YORK UNIVERSITY'S 53RD ANNUAL CONFERENCE ON LABOR (Samuel Estreicher ed., forthcoming 2001). According to Bingham, the AAA uses one employee to review all employer plans in

the Protocol suggests that employees have the right to be represented at arbitration by an attorney or other chosen representative. It recommends that the employer reimburse the employee for his or her attorney's fees, especially if the employee is lower-paid. It encourages pre-trial discovery, including document production and depositions. The Protocol further recommends that the arbitrator be empowered to issue whatever relief would be available to the parties in a court proceeding. It also requires the arbitrator to issue an opinion following his or her decision in the dispute. It suggests that the scope of judicial review should be limited, but provides no additional details regarding interpretation of the word "limited." Finally, it suggests that the parties shoulder equal responsibility for paying the arbitrator's fees and expenses.

The Protocol attempts, in large part, to imbue the arbitral process with the protections litigants would be entitled to if they had participated in a court proceeding. The right to discovery, in particular, increases the likelihood that arbitration will look more like litigation. While such a change may enhance the perception that the arbitration result is unbiased, the change will be accomplished at the expense of altering the arbitral process so that it is no longer as cheap or as efficient. In fact, the movement of employers toward mediation and away from arbitration may stem from the increased judicialization of arbitration that measures like the Protocol have prompted.[62] Employers, seeing that arbitration is no longer an inexpensive means of resolving disputes, are turning away from arbitration, at least for disputes with one-shot players.[63]

B. *The Revised Uniform Arbitration Act*

The Protocol and other similar efforts judicialize the arbitral forum, at least with respect to statutory discrimination claims. The RUAA, on the other hand, is providing judicialization of all arbitration, regardless of the participants' characteristics. Its focus on enhanced procedural protections in

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which the AAA is named as a third party administrator. If the plan is inconsistent with the Protocol's terms, AAA refuses to administer any arbitrations and advises the employer to revise its plan.

[62] Lisa Brennan, *What Lawyers Like: Mediation*, NAT'L L.J., Nov. 15, 1999, at A1. Other explanations are also possible. It may be that the perceived unfairness of the arbitral process or fear of litigation over requiring participation in a mandatory arbitration process are additional reasons why employers have begun to favor the use of mediation over arbitration.

[63] A less savory explanation is that the Due Process Protocol is impacting the employers' ability to create a biased proceeding, and that employers are thus moving away from arbitration because the scales of justice are no longer tipped in their favor.

the arbitral process represents a direct attack on traditional notions of arbitration as a streamlined, efficient procedure for dispute resolution.

In the prefatory note to the RUAA, the drafters emphasize that many of the RUAA's provisions are nonwaivable to ensure that "fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another."[64] More than any other regulatory effort, the RUAA has fallen into the trap of proposing changes to arbitration that fail to acknowledge that additional process and procedure, while potentially beneficial to certain groups, may impose unnecessary and undesirable burdens on groups that have traditionally participated in arbitration.

Perhaps most indicative of the RUAA drafters' view of arbitration as a "one size fits all" process is the decision to make a number of provisions nonwaivable or nonwaivable until a dispute arises. The latter category includes the right to representation by an attorney at an arbitral proceeding, the right to move the arbitrator to award provisional remedies and interim awards, the right to move the arbitrator to issue subpoenas for witnesses, records or to order depositions.[65] The former category focuses on the parties' ability to waive the court's participation in the arbitral process. Thus, the nonwaivable provisions include those that prohibit parties from waiving (1) the right to move the court to confirm, vacate, or modify an arbitral award or compel or stay arbitration, (2) the power of the court to award reasonable costs for motions and subsequent judicial proceedings, and (3) arbitrator immunity or the arbitrator's right not to testify.[66]

Concern about preemption issues prompted RUAA drafters to limit the scope of the Act to the arbitral process itself.[67] Limitations or restrictions of parties' ability to enter into an agreement to arbitrate would, in the view of the drafters, be preempted by the FAA.[68] Although the drafters were less clear about the preemptive impact of the FAA on the provisions governing judicial review of arbitral awards, the drafters nevertheless cautiously approached this issue, eschewing the notion that judicial review of an arbitral award could be granted on grounds other than those articulated in FAA § 10.[69]

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[64] RUAA prefatory n.

[65] RUAA §§ 4, 8, 17(a), 17(c).

[66] RUAA § 4(c).

[67] RUAA § 6, cmt. 7 ("[T]reating arbitration clauses differently from other contractual provisions would raise significant preemption issues under the Federal Arbitration Act.").

[68] RUAA prefatory n.

[69] RUAA § 23, cmt. B. For further discussion of the question of whether section

The RUAA's focus on governance of arbitration issues was driven by the drafters' belief that the FAA is unlikely to preempt state rules focusing on the workings of the arbitral mechanism.[70] Unlike questions regarding the enforceability of the agreement to arbitrate or the question of arbitral award review, Congress, in the FAA, left the arbitral process largely unregulated. The Supreme Court confirmed this theory in *Volt Information Sciences, Inc. v. Board of Trustees,*[71] when it held that state law principles selected by the parties to govern their arbitration will not be preempted by the FAA as long as they do not interfere with the enforceability of the arbitration agreement. Thus, the RUAA's focus on regulating the arbitral process rather than the negotiation of the arbitration agreement makes sense.

Efforts to improve the arbitral process, however, do not take into account the differences between traditional and modern arbitration. Nothing in the RUAA suggests that provisions intended to improve the quality of due process apply only in those cases where the parties involved are repeat and one-shot players. Thus, regardless of a party's negotiating incentives, the RUAA, to the extent its provisions are nonwaivable or not waivable until a dispute arises, will apply. By making extensive discovery available and unwaivable until the dispute arises, the RUAA places a heavy burden on both repeat player-repeat player arbitrations and one-shot-repeat player arbitrations. While the burden may be justified by the countervailing benefits in the one-shot-repeat player context, it is less clear that imposing procedural burdens on two repeat players will have any corresponding benefits.[72]

Moreover, it may well be that the RUAA's judicialization of the arbitral process provides insufficient protection to one-shot players compelled by pre-dispute arbitration agreements to arbitrate their statutory claims. To the extent that the RUAA's provisions offering additional procedural protections to arbitration participants were tempered by the drafters' desire to ensure arbitration's efficiency and finality, a notion the official commentary to the

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10's provisions are default or mandatory rules, see Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199 (2000).

[70] RUAA prefatory cmt.

[71] Volt Info. Scis., Inc. v. Bd. of Trustees, 489 U.S. 468 (1989).

[72] One might argue that two repeat players, even though required pre-dispute to agree to burdensome discovery terms, could, once the dispute arises, renegotiate the arbitration agreement to avoid these provisions. While that result is certainly possible, the disputants' awareness of their legal positions would have an undeniable impact on the disputants' bargaining positions when they would attempt to negotiate a post-dispute arbitration agreement. The willingness of parties to forego procedural protections would likely depend on factors, such as the party's belief in the likelihood of the success of its claims, not present at the time an initial arbitration agreement is negotiated.

RUAA supports, the process ultimately articulated may not provide adequate protection to those unable to negotiate the terms of the arbitration agreement. A better solution would require separate arbitration acts—one designed to offer procedural protections to one-shot players and the other to protect the integrity of the traditional arbitral process.

C. *Efforts to Reverse the Impact of Gilmer Through Legislation*

The RUAA's attempt to improve due process in arbitration is inadequate because it judicializes all forms of arbitration, regardless of the nature of the parties to the arbitration agreements. As such, it imposes burdens on repeat player arbitration with few, if any, commensurate benefits. The legislative approach to arbitration is also problematic, albeit for different reasons. Rather than the wholesale approach the RUAA adopted, Congress has taken a piecemeal approach, proposing amendments to exempt certain kinds of disputes from the FAA rather than reforming the FAA to provide due process protections where there is unfairness while leaving alone arbitrations between parties with similar negotiating incentives. The congressional approach is particularly troublesome because the potential exemptions to the FAA are proposed primarily by interest groups with strong lobbies. As a result, to the extent that certain kinds of disputes are ultimately exempted from the FAA's provisions, it is likely that those exemptions will do little to help the true one-shot players like the employee and the consumer.

An example of this piecemeal approach is the proposed legislation entitled "The Fairness and Voluntary Arbitration Act."[73] This act, which currently has 238 co-sponsors in the House of Representatives and was approved unanimously by the House Judiciary Committee, would amend the FAA to exempt from its coverage pre-dispute arbitration agreements between car dealers and manufacturers. A similar bill in the Senate, the "Motor Vehicle Franchise Contract Arbitration Fairness Act," would prohibit car manufacturers from requiring car and truck dealers to sign pre-dispute arbitration agreements as a condition of doing business. Underlying the effort to pass these bills is the belief that the difference in bargaining power between automobile dealers and manufacturers is so significant that enforcing a pre-dispute arbitration agreement between them would be unconscionable. While car dealers may be at some disadvantage in negotiations with car manufacturers, they are hardly the one-shot players most in need of federal legislative protection. Ironically, while the car dealers attempt to obtain this exemption for dealings with car manufacturers, they

[73] H.R. 534, 106th Cong. (1999).

continue to include in their contracts with consumers, pre-dispute agreements to arbitrate any controversies arising out of automobile sales.

Other proposed legislation, while still piecemeal, suggests that the federal government recognizes that pre-dispute arbitration agreements are problematic in cases where one party may be in a disadvantageous negotiating position. The Clinton Administration had asked Congress to ban mandatory arbitration clauses in high-cost home loans as part of its broader strategy for curbing predatory lending practices. In its report, entitled "Curbing Predatory Home Mortgage Lending," the Administration suggested banning pre-dispute arbitration agreements because those clauses "limit[] the borrowers flexibility to choose the forum that may provide the best opportunity for resolving [a] controversy."[74] The report emphasized that while there is competition in the loan market in general, the "sub-prime loan market has not yet reached a level of competitiveness that allows borrowers to shop among loans that offer trade-offs between arbitration and loan costs, and that the 'most vulnerable borrowers in the subprime market may be the least likely to understand the implications of mandatory arbitration.'"[75]

These pieces of proposed legislation acknowledge the limitations of the FAA in disputes involving parties with disparate negotiating incentives while, at the same time, spell trouble for traditional arbitration. As it is currently drafted, the FAA has worked successfully for over seventy five years to ensure minimal regulation of arbitration among repeat players. Elevating arbitration agreements to contracts by ensuring judicial enforcement of those agreements, together with limited judicial review, has been all that was necessary to preserve continuing commercial relationships. Concerns about arbitration where parties do not have equal bargaining power underlie the proposed amendments to the FAA. Because these amendments may alter the basic arbitration process, by adding burdensome discovery provisions or exempting certain kinds of disputes from the FAA's purview, it is important to scrutinize carefully proposed amendments to ensure that their adoption does not undermine the stability of the existing traditional arbitral structure.

In other words, it may be that what is needed is a second federal arbitration act, one that applies to modern arbitration—arbitration agreements between parties with disparate negotiating incentives (*i.e.*, repeat and one-shot players). This second FAA would include within its provisions those ideas already incorporated into the RUAA and the Due Process Protocol,

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[74] Tony Kreindler, *Federal Officials Seek Bar on Arbitration Clauses in Loan Contracts* (June 21, 2000), *at* http://www.ADRWorld.com.

[75] *Id.*

such as extended discovery and right to representation, and likely extend those protections because the pressure to maintain traditional arbitration procedures would not be present. By adopting a new FAA to apply to cases involving disparate negotiating incentives, a cure for the ailing modern arbitration system might be found while preserving the FAA that has been successfully utilized in commercial and other repeat player relationships.

V. THE NEW FEDERAL ARBITRATION ACT–COVERAGE ISSUES

The difficulty with proposing a new FAA is determining what kinds of disputes a new act should cover. While it seems clear that classic repeat player-repeat player relationships such as those among merchants, labor and management, and construction industry participants should fall within the purview of the original FAA, creating a sufficiently expansive one-shot player category to protect all truly disadvantaged negotiators from the oppressive terms of traditional arbitration may be more difficult.

Analysis of the game theoretic model, empirical studies of the repeat player-one shot player relationship in the employment context, and state legislation concerning arbitration suggests the validity of taking a different approach to regulating arbitration when the parties to the process have disparate negotiating incentives. While these three sources may not be exhaustive, examination of them yields a normative prescription about arbitration that is hard to ignore.

As this Article suggests, commentators evaluating arbitration between parties with disparate negotiating incentives rely quite heavily on the game theory notion of repeat and one-shot players. Numerous articles suggest the validity of the distinctions Marc Galanter initially drew in his seminal article *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*.[76] More recently, courts and administrative agencies have embraced the game theory model. The EEOC's Policy Statement on Mandatory Arbitration[77] condemns the private arbitral system, when imposed as a

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[76] Galanter, *supra* note 34. *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L. J. 381, 403, 426 (1996); Bingham, *supra* note 39, at 240; Cole, *supra* note 26; Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 963–64 (2000) (discussing repeat player effect); Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 669, 656; Maltby, *supra* note 41, at 4–5; Sternlight, *supra* note 26, at 685; David M. Kinnecomes, Note, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B.U. L. REV. 745 (1999).

[77] *EEOC Policy Statement on Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA)

condition of employment, as inherently biased against employees and applicants for employment. In its statement, the EEOC emphasized that an employee is less able to make an informed selection of an arbitrator because she is likely to have difficulty tracking an arbitrator's record. Moreover, the arbitrator, aware that the employer is a repeat player in the arbitration process "cannot but be influenced by the fact that the employer, and not the employee, is a potential source for future business for the arbitrator."[78] The EEOC also emphasized the advantages the repeat player employer has in structuring the arbitral mechanism. As the drafter of the arbitration agreement, the employer is likely to "manipulate the arbitral mechanism to its benefit."[79]

In an important arbitration decision, the D.C. Circuit, in *Cole v. Burns International Security Services, Inc.*, also acknowledged the role the employer's repeat player status has in the arbitration process.[80] The *Cole* court based its holding that employers should pay for all of the costs of arbitration of statutory claims in part on the notion that the structural protections in cases involving pre-dispute agreements to arbitrate statutory claims in the non-union context are very different from those inherent in the collective bargaining context.[81] Acknowledging the difference between repeat and one-shot players, the court concluded that the employer, by virtue of its repeat player status, "gains some advantage in having superior knowledge with respect to selection of an arbitrator."[82] The court also noted that because pre-dispute arbitration agreements are typically presented to employees on a "take it or leave it" basis, that "employers are free to structure arbitration in ways that may systematically disadvantage employees."[83]

E-4 (July 11, 1997).

[78] *Id.* at 34.

[79] *Id.*

[80] Cole v. Burns Int'l Security Svcs, Inc, 105 F.3d 1465 (D.C. Cir. 1997). The First Circuit, in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7–8 n.4 (1st Cir. 1999), also acknowledged the repeat player effect in the non-unionized arbitration context, but rejected the notion that arbitration between one-shotters and repeat players is so biased that agreements to arbitrate between the two groups should never be enforced.

[81] *Cole*, 105 F.3d at 1476.

[82] *Id.*, (citing Maltby, *supra* note 75, at 4–5) (employees not in as good a position to determine whether arbitrator is truly neutral because of lack of financial resources to research arbitrator's past decisions); Alleyne, *supra* note 76, at 403, 426; Gorman, *supra* note 76, at 656; Sternlight, *supra* note 76, at 685 (one-shot players less able to make informed selection of arbitrator than repeat player).

[83] *Cole*, 105 F.3d at 1477. The court continued by citing several sources supporting the notion that the employer's repeat player status provides it certain advantages both in

Offering further support to the notion that the repeat player effect theory has some normative value are recent empirical studies indicating that repeat player employers do enjoy advantages when they arbitrate employees' claims. For example, Professor Lisa Bingham conducted a study of 270 cases consisting of arbitration awards decided in 1993 under the AAA Commercial Arbitration Rules and arbitration awards decided in 1993 and 1994 under the AAA Employment Dispute Rules.[84] This study, which reviewed awards rendered prior to the implementation of the Due Process Protocol, revealed that arbitrators award damages to employees less frequently and in lower amounts when the employer is a repeat player.[85] According to Professor Bingham, in repeat player cases, employees recover only 11% of what they demand; while in cases against non-repeat player employers, they recover approximately 48% of what they demand.[86] Moreover, employees lose significantly more often in cases involving repeat player employers.[87] According to the study, employees arbitrating with one-shot player employers win over 70% of the time. When arbitrating against repeat player employers, however, they win only 16% of the time.[88]

Another study conducted by Professor Bingham yields similar results. In this later study, Professor Bingham evaluated 203 cases that were decided under AAA's Employment Dispute Resolution Rules prior to the adoption of the Due Process Protocol.[89] Among other things, this study revealed that employees lose more often when the employer has used the arbitrator at least

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negotiating the arbitration agreement and in the arbitration process itself. *Id.* (citing Alfred W. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J. L. REFORM 249, 254–55 (1983) ("In non-unionized private sector employment, there is no organization analogous to the union to represent employee interests in developing arbitration procedures. Therefore, the employer and its lawyers have a comparatively free hand in drafting the details of an arbitration clause. . . . Under these circumstances, some employers may seek to unfairly narrow the legal rights of employees in the arbitration clause."); L.M. Sixel, *Case Leads Employers to Rethink Arbitration Rules*, HOUSTON CHRON. Jan. 29, 1996, *available at* 1996 WL 5579081 ("Starting about three years ago, employers trying to avoid big, expensive lawsuits began forcing their employees to agree to binding arbitration in order to keep their jobs or get new ones. And many employers adopted stiff, self-serving arbitration rules that, for example, prohibit punitive damages or put severe limits on evidence-gathering by employees.").

[84] Bingham, *supra* note 44, at 206.

[85] *Id.* at 209–10.

[86] Bingham, *supra* note 39, at 234.

[87] Bingham, *supra* note 44 at 209.

[88] Bingham, *supra* note 39 at 234.

[89] *Id.* at 236.

once before and that they lose with greater frequency when they arbitrate with a repeat player employer.[90]

Professor Bingham's most recent study, examining the Due Process Protocol's impact on arbitrations between one-shot and repeat players, offers additional support to the theory that employers have structural advantages in the arbitration process by virtue of their repeat player status.[91] Although her study of arbitrations using the Protocol suggests that the adoption of the Protocol lessens the impact of the employer's repeat player status, it certainly does not suggest that the advantage is eliminated. In fact, Professor Bingham reports that only when the Protocol is adopted in conjunction with the adoption of a Personnel Handbook, does the employer's likelihood of success decrease. Bingham could not support her hypothesis that the Protocol alone reduces the chances of employer success.

Empirical studies continue to be conducted in this area. Whether some of the attempts to ameliorate repeat player systemic advantages are ultimately successful is not yet clear. What a review of the existing empirical studies and the game theory literature demonstrates is that the repeat player effect is significant and, therefore, worthy of attention in drafting legislation designed to reduce or eliminate the impact of that effect in arbitral proceedings.

One additional way to separate true one-shot players who should be permitted to opt out of pre-dispute arbitration agreements, or, at the least, be provided more procedural protections in the arbitral process, would be to analyze the limitations or exclusions states have created to protect certain classes of litigants from having to participate in the arbitral process. A number of state legislatures have attempted to provide protections for certain categories of disputants based, it appears, on legislative recognition of the different negotiating incentives those disputants have.[92] While individual

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[90] *Id.* at 238.

[91] Bingham, *supra* note 44, at 215.

[92] Most states have arbitration acts that are identical or virtually identical to 9 U.S.C. § 2 (1994). *E.g.*, ALASKA STAT. § 09.43.010 (Michie 2000); ARIZ. REV. STAT. ANN. § 12-1501 (West 1994 & Supp. 2000); CONN. GEN. STAT. ANN. § 52-408 (West 1991 & Supp. 2001); DEL. CODE. ANN. tit. 10, § 5701 (1999 & Supp. 2000); FLA. STAT. ANN. § 682.02 (West 1990 & Supp. 2001); LA. REV. STAT. ANN. § 9:4201 (West 1997 & Supp. 2001); MASS. GEN. LAWS ANN. ch. 251, § 1 (Law Co-op 1992 & Supp. 2001); N.D. CENT. CODE § 32-29.2-01 (1996 & Supp. 1999); N.J. STAT. ANN. § 2A:24-1 (West 2000 & Supp. 2001); OR. REV. STAT. § 36.305 (Supp. 1998); 42 PA. CONS. STAT. ANN. § 7303 (West 1998); S.D. CODIFIED LAWS § 21-25A-1 (Michie 1987 & Supp. 2000); TENN. CODE ANN. § 29-5-101 (2000) (contains exception for real property disputes); TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (Vernon Supp. 2001); UTAH CODE ANN. § 78-31a-3 (1996 & Supp. 2000); WYO. STAT. ANN. § 1-36-103 (Michie 1999). The following states also contain provisions similar to the FAA but, in addition, contain provisions that specifically identify employer-employee disputes as within the coverage of the state's arbitration act:

states have excluded from compliance with pre-dispute arbitration agreements a wide variety of disputes,[93] there are several categories of disputes that numerous states have identified as particularly poorly suited for arbitration. That states are exempting these categories is particularly interesting in light of the fact that the FAA likely preempts any categorical exclusions from a state uniform arbitration act.

At least twelve states have specifically exempted non-union employer-employee disputes from the coverage of that state's arbitration act.[94] At least eleven states exclude from the state act arbitration agreements between an insured and an insurance company.[95] Several of these states make clear that

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COLO. REV. STAT. ANN. § 13-22-203 (West 2000); IND. CODE ANN. § 34-57-2-1 (West 1999 & Supp. 2001); ME. REV. STAT. ANN. tit. 14, § 5927 (West 1980 & Supp. 2000); MINN. STAT. ANN. § 572.08 (West 2000 & Supp. 2001); NEV. REV. STAT. ANN. 38.035 (Michie 1996); N.M. STAT. ANN. § 44-7-1 (Michie 2000); VA. CODE ANN. § 8:01-581.01 (Michie 2000). Some states refuse to enforce pre-dispute agreements to arbitrate. ALA. CODE § 8-1-41(3) (1993) (prohibiting the enforcement of "[a]n agreement to submit a controversy to arbitration; . . ."); MISS. CODE ANN. §11-15-1 (1999 & Supp. 2000); W. VA. CODE ANN. §55-10-2 (Michie 2000); *see also*, IAN MACNEIL, AMERICAN ARBITRATION LAW 57 (1992); Henry C. Strickland et al., *Modern Arbitration for Alabama: A Concept Whose Time Has Come*, 25 CUMB. L. REV. 59, 60 n.4 (1994) (listing statutes).

[93] In addition to the broader categories discussed already, several states have more unique exclusions. For example, Georgia's statute exempts loan financing contracts and residential real estate agreements. GA. CODE ANN. § 9-9-2(c) (Supp. 2000). Montana and Ohio also exclude residential real estate agreements. MONT. CODE ANN. § 27-5-114 (1999); OHIO REV. CODE ANN. § 2711.01 (Anderson 1991 & Supp. 2000). Iowa and Missouri exclude from coverage "contracts of adhesion." IOWA CODE ANN. § 679A.1(2)(a) (West 1998); MO. ANN. STAT. § 435.350 (West 1992 & Supp. 2001). Neither state defines what constitutes a "contract of adhesion." Montana excludes workers' compensation claims and Vermont excludes constitutional and civil rights claims from arbitration. MONT. CODE ANN. § 27-5-114(2)(d); VT. STAT. ANN. tit. 12, § 5653(b) (Supp. 2000).

[94] ARK. CODE ANN. § 16-108-201(b) (Michie Supp. 1999); GA. CODE ANN. § 9-9-2(c) (Supp. 2000); IDAHO CODE § 7-901 (Michie 1998); IOWA CODE ANN. § 679A.1(2)(b) (West 1998); KAN. STAT. ANN. § 5-401(c) (1992); KY. REV. STAT. ANN. § 417.050(1) (Michie Supp. 2000); MD. CODE ANN., [CTS.& JUD. PROC.] § 3-206(b) (1998) (unless agreement provides that this subtitle applies); NEB. REV. STAT. § 25-2602.01 (Supp. 2000); N.C. GEN. STAT. § 1-567.2(b)(2) (1999); S.C. CODE ANN. § 15-48-10(b)(2) (Law Co-op. Supp. 2000) (can be used if agreement provides that provisions of § 15-48-10 apply); WASH. REV. CODE ANN. § 7.04.010 (West 1992 & Supp. 2001); WIS. STAT. ANN. § 788.01 (West 1981 & Supp. 2000).

[95] ARK. CODE ANN. § 16-108-201(b) (Michie Supp. 2000); GA. CODE ANN. § 9-9-2(c)(3) (Supp. 2000); KAN. STAT. ANN. § 5-401 (2000); KY. REV. STAT. ANN. § 417.050(2) (Michie Supp. 2000) (does not prohibit arbitration agreements between insurance companies or in reinsurance contracts); MO. ANN. STAT. § 435.350 (West 1992

the arbitration act would, however, cover the dispute if it involves reinsurance or is a dispute between two insurance companies.[96] Seven states prohibit arbitration of personal injury or other tort claims.[97]

Interestingly, few states prohibit or limit the use of arbitration agreements for consumer disputes.[98] The existence of a Due Process Protocol to protect consumers participating in arbitration, together with the breadth of consumer protection statutes, however, suggests that many believe that consumers are in need of special protection from large sellers. The absence of provisions prohibiting arbitration of consumer disputes may indicate that concern about consumers has not reached the state legislatures in any significant way or that they have considered the issue and determined that consumers do not need special protection from the arbitration process. It is also surprising that no state protects franchisees from arbitration agreements in their state arbitration act (although three states have separate statutes prohibiting the use of arbitration agreements by motor vehicle franchisors as a condition of doing business with a motor vehicle franchisee).[99] In fact, to

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& Supp. 2001) (does not prohibit agreements which warrant new homes against construction defects or reinsurance contracts); MONT. CODE ANN. § 27-5-114(2)(c) (1999) (does not prohibit arbitration agreements between insurance companies); NEB. REV. STAT. § 25-2602.01(f)(4) (Supp. 2000) (allows arbitration agreements between insurance companies and if agreement involves reinsurance); OKLA. STAT. ANN. tit. 15, § 802(a) (West 1993); R.I. GEN. LAWS § 10-3-2 (1997 & Supp. 2000) (allowed if placed before testimonium clause or parties' signatures); S.C. CODE ANN. § 15-48-10(b)(4) (Law Co-op. Supp. 2000) (can be used if agreement provides that provisions of section 15-48-10 apply); VT. STAT. ANN. tit. 12, § 5653 (Supp. 2000).

[96] Montana, Nebraska, and Kentucky allow arbitration agreements between insurance companies. Nebraska and Kentucky allow arbitration agreements where reinsurance is the issue.

[97] ARK. CODE ANN. § 16-108-201(b) (Michie Supp. 2000); GA. CODE ANN. § 9-9-2(c)(10) (Supp. 2000); IOWA CODE ANN. § 679A.1 (West 2000); KAN. STAT. ANN. § 5-401 (2000); MONT. CODE ANN. § 27-5-114(2)(a) (1999); NEB. REV. STAT. § 25-2602.01(f)(1) (Supp. 2000); S.C. CODE ANN. § 15-48-10(b)(4) (Law. Co-op. Supp. 2000).

[98] Only GA. CODE ANN. § 9-9-2(c)(7) (Supp. 2000) and N.Y. GEN. BUS. LAW § 399-C (McKinney 2000) expressly prohibit the use of arbitration agreements to resolve disputes between consumers and businesses. Several states, including Colorado, California, Maryland and Alabama, have pending legislation that would prohibit or restrict the use of pre-dispute arbitration agreements in consumer transactions. S.B. 525, 2000 Leg., Reg. Sess. (Ala.); A.B. 1751, 1999 Gen. Assem., Reg. Sess. (Ca.); H.B. 1250, 62nd Gen. Assem., 2nd Reg. Sess. (Co.); H.B. 599, 414th Gen. Assem., 2000 Reg. Sess. (Md.). In addition, an American Bar Association task force is considering developing a Due Process Protocol that would afford consumers new protections when they arbitrate with businesses. Justin Kelly, *ABA Group Considering Process Protocols for Binding Arbitration*, (November 6, 2000), *at* http://www.ADRWorld.com.

[99] N.J. STAT. ANN. § 56:10-7.3(3) (West Supp. 2001); OR. REV. STAT. 650.165 (Supp. 1998); S.D. CODIFIED LAWS 32-6B-49.1 (Michie 1998).

the extent states address the issue of franchise arbitration at all, they approve of it. (Nine states have statutes approving of franchise arbitration both generally and under specific circumstances).[100] This group of so-called "little guys" are often the subject of debate in terms of whether they should be required to abide by arbitration agreements. The lack of statutes, particularly outside of the motor vehicle area, protecting franchisees from arbitration may suggest that the concern about franchisees in arbitration is unfounded.[101]

VI. CONCLUSION

The review of existing exclusions suggests that there may be both a legislative and theoretical consensus regarding the parameters of the one-shot player categories (*i.e.*, employees, consumers, insureds, victims of torts and patients). That legislatures appear to be drawing distinctions in their arbitration acts based on the game theoretic model suggests that the model may have normative value. This argument may be even stronger in light of the very real concerns most legislatures have about FAA preemption. As the RUAA drafters emphasized, Supreme Court case law makes abundantly clear that any state law, whether an adoption of the UAA or not, that limits or invalidates contractual agreements to arbitrate, will be preempted by the

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[100] ARIZ. REV. STAT. ANN. § 28-4306 (West 1998) (motor vehicle franchise arbitration permissible); ARK. CODE ANN. § 4-72-602 (Michie 1996) (restaurant franchise agreements may contain arbitration clause); CAL. BUS. & PROF. CODE § 20040 (West 1997) (franchise agreement containing arbitration clause permissible); HAW. REV. STAT. ANN. § 486H-4 (Michie 1993) (gasoline dealer franchise agreements may contain arbitration clause); 815 ILL. COMP. STAT. ANN. § 710/12 (West 1999) (motor vehicle franchise disputes subject to uniform arbitration act); IOWA CODE ANN. § 523H.3 (West 1998) (franchise agreements may contain arbitration clause); N.Y. GEN. BUS. LAW § 199-g (McKinney 1988) (franchise arbitration permissible); VA. CODE ANN. § 13.1-571(c) (Michie 1999) (franchise agreements may contain arbitration clause); WASH. REV. CODE ANN. § 46.96.150 (West 2001) (franchise agreements may provide for arbitration of motor vehicle dealer relocations).

[101] At least one alternate explanation is also possible. The Supreme Court decision establishing the notion that the FAA preempts conflicting state law involved the California Franchise Investment Law. That law prohibited the enforcement of pre-dispute arbitration agreements between franchisees and franchisors. The Supreme Court rejected the California law, explaining that any state law which infringes parties' ability to enter into an arbitration agreement is preempted by the FAA. The lack of state law prohibiting or limiting the use of arbitration in the franchise context may be the result of legislators' recognition that such a law would be worthless in light of the *Southland* decision. Of course, preemption is not limited to franchisee-franchisor relationships—it would extend to employment, insurance and other areas that states have continued to attempt to regulate in spite of the *Southland* decision.

FAA.[102] Thus, most of the state laws described in this article are very likely to be preempted by the FAA, at least to the extent the transaction between the parties involved interstate commerce. Yet states continue to enact exceptions to the general rule enforcing arbitration agreements. It may be that these efforts are intended to be purely symbolic or that the states hope that by creating some consensus on categories of disputants deserving of additional protection, they might ultimately sway Congress to amend the FAA to exclude the protected categories of people.[103] The existence of these state acts, considered together with a strong prescriptive model and the creation of several Due Process Protocols for disputes involving one-shot players, suggests that the time for reform of the arbitral process has arrived. Amending the current FAA or drafting a separate FAA designed to protect one-shot players from potential abuses by repeat players would appear to be a sensible solution.

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[102] RUAA prefatory n. (citing Southland Corp. v. Keating, 465 U.S. 2 (1984); Perry v. Thomas, 482 U.S. 483 (1987); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Doctor's Assocs. v. Cassarotto, 517 U.S. 681 (1996)).

[103] The Supreme Court recently weighed in on this question. *See Circuit City v. Adams*, 121 S. Ct. 1302 (2001). At issue in *Circuit City* was whether § 1 of the FAA includes within its coverage agreements to arbitrate claims between employers and employees. Section 1 states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Despite strong legislative history arguments that were made in favor of exclusion of employees from FAA coverage, the Supreme Court, following every circuit court except the Ninth Circuit, held that the FAA covers employer-employee arbitration agreements. Thus, the FAA continues to preempt state legislation exempting arbitration agreements between employers and employees from compliance with the state arbitration act.