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Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future

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Recent Supreme Court decisions have sent federal courts a strong signal to enforce mandatory employment arbitration agreements under the Federal Arbitration Act (FAA). Critics worry that individuals lose access to courts to vindicate their statutory employment rights and are subjected to unfair rules and procedures in these private tribunals. We present original empirical research from 396 federal court decisions from 1954–2002 in which employees sought to avoid arbitration, and we analyze rulings before Gilmer, *after* Gilmer, *and before* Circuit City, *and after* Circuit City. *Also, statistical analysis is provided for specific issues raised by employees. This evidence is then related to extensive research of pre-FAA court rulings and debunks the myth that early courts were hostile to arbitration. The historical and statistical elements of our analysis moderate the claims of arbitration advocates and critics. Arbitration supporters would strengthen their case for this ADR method by recognizing that American courts have consistently supported the use of predispute arbitration agreements since the early nineteenth century.*

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*Nevertheless, judicial support for arbitration has been tempered during the last two centuries by due process limitations. This finding addresses a major concern for arbitration critics who perceive current courts as too permissive in enforcing one-sided arbitration agreements. Post-*Gilmer *and* Circuit City *courts have denied enforcement with surprising frequency, notwithstanding the Supreme Court's strong and clear message to avoid interfering with these arrangements. These courts are recreating many of the due process safeguards from nineteenth century courts.*

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> *The mode of settling controversies by arbitration has in* modern times *become peculiary the favorite of the law, and the ancient niceties and technicalities applied to it have given way to a more rational and liberal construction, with a view to encourage and sustain this mode of putting an end to litigation. Hence it is that many of the more ancient adjudications upon this subject are found not to be good authority.*[1]

I. INTRODUCTION

A. *Overview of Mandatory Employment Arbitration*

The substitution of mandatory arbitration for discrimination lawsuits is the most significant employment law development since the early 1990s. Critics charge that employers control too much of this private dispute resolution system.[2] This complaint ignores the fact that the court system functions poorly for employment discrimination plaintiffs.[3]

Employers want unlimited access to arbitration. This dispute resolution process protects them from expensive liability.[4] It is private[5] and shields their documents from discovery.[6] In addition, arbitration is faster and more

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[1] Shockey's Adm'r v. Glasford, 36 Ky. (6 Dana) 10, 11 (1837), *quoted by* Adams' Adm'r v. Ringo, 79 Ky. 211, 219 (Ky. App. 1880) (emphasis added).

[2] *See infra* note 210.

[3] See William M. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RES. J. 40, 44 (Oct.–Dec. 1995) (reporting percentage of employment complaints that are accepted by attorneys), and Susan K. Gauvey, *ADR's Integration in the Federal Court System*, 34 MD. B. J. 36, 41 (2001) (reporting percentage of complaints that go to trial).

[4] *See Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management*, DAILY LAB. REPT, May 14, 2001, No. 93 (reporting an employment lawyer's view that mandatory arbitration helps employers limit damages and eliminate class action lawsuits. David Copus also notes that the biggest financial risk for employers in termination lawsuits— tort claims in which a single plaintiff can be awarded millions of dollars— is controlled by arbitration agreements that cap damages).

[5] See *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 1997 WL 33159163 (E.E.O.C. Guidance July 10, 1997), concluding that "because [arbitration] decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law. The lack of public disclosure not only weakens deterrence . . . but also prevents assessment of whether practices of individual employers or particular industries are in need of reform."

[6] *See id.* (stating that "[d]iscovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure").

economical than trials.[7] By unilaterally selecting arbitrators, employers improve their odds of defeating discrimination claims.[8] They also require employees to pay a significant portion of forum costs associated with private judging.[9]

Much of this is potentially bad news for employees. They are often denied attorneys' fees when they prevail on discrimination claims in arbitration[10] and must agree to limits on remedies.[11] Individuals are disadvantaged when they are shut out of the process for selecting an arbitrator.[12] Nevertheless, they have little choice but to go along with all of this because they risk termination if they resist.[13]

For decades, the U.S. Supreme Court has approved various uses of

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[7] *See* Bradford v. Rockwell Semiconductor Systems, Inc., 238 F.3d 549, 552 (4th Cir. 2001) ("'the arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve.'" (quoting Hooters of America, Inc. v. Phillips, 173 F.3d 933, 936 (4th Cir. 1999))).

[8] *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. EMP. L.J. 381, Spring 1996, at 428 ("[S]tatutory discrimination grievances relegated to . . . arbitration forums are virtually assured employer-favored outcomes," given "the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator's desire to be acceptable to one side"); Lisa B. Bingham, *On Repeat Players, Adhesion Contracts, and the Use of Statistics on Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 258–59 (1998).

[9] *E.g.*, LaPrade v. Kidder, Peabody & Co., Inc., 94 F. Supp. 2d 2 (D.D.C. 2000) (employee was assessed $8376 for NASD forum fees).

[10] *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 15–16 (1st Cir. 1999) (rejecting an employee's argument that because arbitrators often refuse to award statutory attorneys' fees, NYSE arbitration procedures were inadequate for Title VII claims).

[11] Morrison v. Circuit City Stores, Inc., 70 F. Supp. 2d 815 (S.D. Ohio 1999) (although Title VII permits up to $300,000 in punitive damages, court upheld $162,000 limit imposed by arbitration agreement).

[12] *See Hooters of America*, 173 F.3d at 938 (concluding that the employer's rules, which included unilateral selection of the arbitrator, were "so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith," and finding that the only possible purpose of these rules was "to undermine the neutrality of the proceeding"). Compare this ruling with empirical research of employment arbitration systems in Mei Bickner et al., *Developments in Employment Arbitration*, 52 DISP. RESOL. J., Jan. 1997, at 8 (survey of 80 employers using predispute arbitration agreements showed that about 15 percent provided for unilateral selection by the employer).

[13] *See* Jones v. Fujitsu Network Communications, Inc., 81 F. Supp. 2d 688, 692 (N.D. Tex. 1999) (quoting at length from company president's memo stating that "[p]articipation in this (arbitration) program (is) mandatory for all employees—continuing and new, full time and part time, regular and temporary—and is a condition of employment").

arbitration.[14] This includes the workplace dispute resolution process known as voluntary labor arbitration, adopted by unions and employers in collective bargaining agreements.[15] Much more recently, the Court approved arbitration systems that employers imposed on their workers in *Gilmer v. Interstate/ Johnson Lane Corp.* (hereafter *Gilmer*),[16] and *Circuit City Stores, Inc. v. Adams* (hereafter *Circuit City*).[17] This dispute resolution process is called mandatory employment arbitration because individuals are compelled to agree to arbitrate, rather than litigate, claims that arise from the employment relationship.[18]

This Article examines current trends in judicial enforcement of mandatory employment arbitration agreements. It presents original empirical research of 396 federal court decisions from 1954–2002. Nearly all of these cases involved employee attempts to sue their employers, while at the same time their employers sought a court order to refer the dispute to arbitration.[19] This empirical approach compares judicial treatment of employment arbitration over three critical periods in the current evolution of this ADR method.[20] We find that courts do not automatically enforce predispute employment arbitration agreements, even though *Gilmer* and *Circuit City* give the clear impression that federal courts should strongly support this process.

Our investigation begins before the contemporary period. This long-term view provides perspective for assessing current regulation of employment

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[14] *E.g.*, Allied Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Rodrigues de Quijas v. Shearson/American Express Inc., 490 U.S. 477 (1989); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Prima Paint Corp. v. Flodd & Conklin Mfg. Co., 388 U.S. 395 (1967); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956); Wilko v. Swan, 346 U.S. 427 (1953).

[15] United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Collectively, the first three cases are known as the *Steelworkers Trilogy*.

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

[17] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[18] *E.g.*, Desiderio v. Nat'l Ass'n of Sec. Dealers, 191 F.3d 198, 200 (2d Cir. 1999) (offer of employment was rescinded after successful job applicant refused to sign mandatory employment arbitration agreement).

[19] On rare occasions, a role-reversal occurs in which an employer sues, notwithstanding its promise to refer disputes to arbitration, and the employee seeks arbitration. *See* Legg, Mason & Co., Inc. v. Mackall & Coe, Inc., 351 F. Supp. 1367 (D.D.C. 1972).

[20] *See infra* Part V.

arbitration under the Federal Arbitration Act (FAA).[21] This statute, enacted in 1925, is the subject of an intense controversy that pits, on one hand, judges and academics who believe that it covers most private-sector employees,[22] and those who believe that the law is meant only for businesses that have commercial disputes.[23] Since current public policy weighs strongly in favor of FAA coverage of predispute employment arbitration agreements, it is important to assess how courts viewed arbitration before this law was enacted. The conventional view of this history, which the Supreme Court currently cites in its favorable pronouncements of mandatory employment arbitration, is that Congress passed the FAA to counteract judicial hostility to private adjudication.[24]

Although there is some evidence to support to this view,[25] we do not accept it as an article of faith.[26] Our research begins with a court ruling in 1746, and traces the relationship between American courts and arbitration through passage of the FAA.[27] These early courts enforced predispute arbitration agreements more often than is currently recognized.[28] Interestingly, common law principles from these decisions are reflected in current court opinions that regulate

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[21] Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1 (2000)) (originally called the United States Arbitration Act, or USAA).

[22] An academic perspective is offered in Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349 (1997). For a judicial view, see generally *Gilmer*, 500 U.S. 20 (1991), discussed *infra* notes 173–81.

[23] *See* Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L. J. 479 (2001) for an academic critique, and Craft v. Campbell Soup Co. 177 F.3d 1083 (9th Cir. 1999), discussed *infra* notes 187–89, for a pro-employee reading of the FAA.

[24] *See Gilmer*, 500 U.S. 20 (1991), discussed *infra* note 180.

[25] *See infra* note 159.

[26] Nor does Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 486 (1995) ("[T]he assumption of court hostility toward arbitration prior to passage of modern arbitration statutes in the 1920s is clearly unwarranted for some courts, and perhaps unwarranted for most."); *see also* Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability:* David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 58 BROOK. L. REV. 279, 298, n.104 (1992) (citation omitted) (finding that the "Supreme Court's unsupported observation that judicial hostility to arbitration rested upon judicial jealousy was considered and rejected in the well-reasoned opinion of the Second Circuit in *Kulukundis Shipping Co.*").

[27] Our research was guided by Addison C. Burnham, *Arbitration as a Condition Precedent*, 11 HARV. L. REV. 234 (1897); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L. J. 595 (1927); Wesley A. Sturges, *Commercial Arbitration or Court Application of Common Law Rule of Marketing?*, 34 YALE L.J. 480 (1925); Joseph Wheless, *Arbitration as a Judicial Process of Law*, 30 W.VA. L.Q. 209 (1924).

[28] *See infra* Parts II.A–II.C.

mandatory arbitration,[29] even though these original sources have been lost over time. Individual employment arbitration has a much longer history than is understood.[30]

We examine this history, not to put our own interpretive gloss on the FAA,[31] but to discern patterns over time in judicial oversight of arbitration. Using extensive empirical data, we conclude that American courts have never been hostile to arbitration, nor have they abdicated their role as public adjudicators. Courts have steered a more intermediate course by enforcing predispute arbitration agreements, while reserving power to void or reform the most objectionable arrangements in these contracts.

These results have important implications for the current controversy over mandatory arbitration. To employers who rely upon proarbitration signals from *Gilmer* and *Circuit City*, we show that lower courts do not refer disputes to arbitration as reflexively as these landmark cases suggest should occur. Thus, employers who wish to test the limits of self-advantage in these agreements will be discouraged to see empirical evidence that courts abrogate a variety of one-sided arrangements.[32]

Critics of mandatory arbitration will also be unsettled by the results of this study. Relying on textual passages from leading Supreme Court cases, they worry that federal courts are in lock-step agreement with the pro-arbitration Justices who authored these decisions. Some believe that a legislative remedy is needed to undo damage from the Supreme Court.[33] The reality is, however, that lower courts sidestep these precedents more often than is realized. This Article shows that the judiciary is currently developing a set of due process guidelines consistent with common law traditions dating to the early nineteenth century.[34] In summary, our main finding is that courts behave more consistently over extended periods than either arbitration advocates or critics realize.

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[29] *See infra* Part VII.

[30] *See infra* Part II.B.

[31] For an insightful interpretation of the FAA, see Matthew W. Finkin, *Workers' Contracts Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. OF EMP. & LAB. L. 282, 290–98 (1996).

[32] *See infra* Part VI.

[33] *See Bill Prohibiting Predispute Arbitration Agreements in Employee Contracts Debated in California*, 12 WORLD ARB. & MED. REP'T (Nov. 2001); Simon J. Nadel, *Arbitration: Mandatory Programs Not For All Employers*, DAILY LAB. REP., No. 102, May 28, 2002, at C-1 (discussing recently proposed federal legislation to exclude all employment contracts from FAA coverage, thereby negating mandatory employment arbitration).

[34] *See infra* Part VII.

B. *Organization of This Article*

Part II presents a detailed history of the common law of arbitration before Congress passed the FAA.[35] This original research is significant because it provides evidence that courts were not hostile to arbitration, as the Supreme Court and current arbitration advocates claim. This research also shows that courts either embraced arbitration or imposed reasonable limits on its use. Part II.A examines early common law doctrines that regulated predispute arbitration agreements.[36] Support is provided for the conventional view that early courts protected their jurisdiction from competition with arbitrations.[37] We show, however, that these courts imposed reasonable limits on arbitration, contrary to notions that they were hostile to this dispute resolution method. Our discussion then turns to a variety of court decisions that approved the use of arbitration.[38] Part II.B highlights early examples of individual employment arbitration, and analyzes common law regulation of these workplace disputes.[39] Part II.C challenges as a fallacy the idea that courts were hostile to arbitration before the FAA.[40]

In Part III, we examine how the FAA applies to predispute employment arbitration agreements.[41] Its legislative history is studied to determine whether Congress intended it to be applied to employment contracts.[42] The discussion proceeds to current Supreme Court decisions that instruct federal courts to enforce predispute workplace arbitration agreements under the auspices of the FAA.[43] We also explain the tension between the Supreme Court and the Ninth Circuit Court of Appeals, and explore ramifications of this pointed disagreement.[44]

Our research methodology for this study is presented in Part IV.[45] We begin by briefly reviewing examples of policy-oriented research that pervade the

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[35] *See infra* notes 58–146.

[36] *See infra* notes 58–108.

[37] *See infra* notes 80–92.

[38] *See infra* notes 93–108.

[39] *See infra* notes 109–27.

[40] *See infra* notes 128–46.

[41] *See infra* notes 147–209.

[42] *See infra* notes 151–59.

[43] *See infra* notes 163–181, and 203–07.

[44] *See infra* notes 185–202.

[45] *See infra* notes 210–44.

subject of mandatory arbitration.[46] Next, we justify the need for more empirical research.[47] This is followed by a careful discussion of how the sample of cases in this study was assembled.[48]

Parts V and VI present our empirical findings. Part V answers the question, "How has judicial enforcement of predispute arbitration agreements changed over time?"[49] This question allows us to assess court behavior over three contemporary periods of Supreme Court regulation. Tables 1[50] and 2[51] summarize our findings, respectively, for district and appellate courts. Part VI identifies trends in how federal courts rule on particular legal issues that employees use to challenge mandatory arbitration agreements.[52] Tables A[53] and B[54] present these findings for district and appellate courts.

Part VII states our two main conclusions.[55] First, federal courts continuously regulate a dispute resolution process that is not adequately addressed by the FAA or Supreme Court precedents. These issues, which we illustrate with late-breaking decisions, cover eleven different facets of mandatory employment arbitration.[56] Second, although federal courts are mostly inclined to permit employers to unilaterally require their employees to forgo litigation of employment disputes, they increasingly resist problematical forms of mandatory arbitration.[57] This conclusion relates to our historical findings in Part II, and underscores our thesis: Courts in the past were never hostile to arbitration, nor are they presently inclined to take a laissez-faire approach. Instead, they have consistently taken on a supervisory role over the past 200 years. In sum, while courts have allowed parties to resolve their disputes privately, they also have remained available to guard against procedural and substantive abuses of this method.

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[46] *See infra* notes 210–11.

[47] *See infra* notes 212–30.

[48] *See infra* notes 231–44.

[49] *See infra* notes 245–47.

[50] *See infra* pp. 301.

[51] *See infra* pp. 302.

[52] *See infra* notes 248–86.

[53] *See infra* pp. 310.

[54] *See infra* pp. 312.

[55] *See infra* notes 287–364.

[56] *See infra* notes 290–350.

[57] *See infra* notes 351–64.

II. COMMON LAW DEVELOPMENTS BEFORE ENACTMENT OF THE UNITED STATES ARBITRATION ACT (FEDERAL ARBITRATION ACT)

A. *Early Common Law Doctrines That Regulated Predispute Arbitration Agreements*

The current popularity of arbitration cannot be attributed to a single source; however, Chief Justice Warren Burger is often credited for advocating wider use of ADR.[58] The following quotation reflected his thinking: "The ancient niceties and technicalities applied to arbitrations have given way to a more liberal and rational construction. This mode of ending litigation is to be encouraged."[59] Remarkably, this view of the law and its policy prescription were stated by an 1880 Kentucky court of appeals. It epitomizes the main theme of this Part: There is more myth than fact to the widely accepted view that American courts were hostile to arbitration before the United States Arbitration Act (later amended to be called FAA) was enacted in 1925.

The idea that arbitration was in competition with courts is not unfounded, but this study shows that the tension between judges and arbitrators is significantly overstated. Judicial hostility to arbitration is traced to a decision in 1746, *Kill v. Hollister*, which ruled that an arbitration agreement could not "oust this court."[60] Early American courts were influenced by this English idea.[61] According to an 1897 study, although some courts accepted bargained-for arbitration as a condition precedent to litigation, many gave no effect to such agreements.[62] This history is relevant because the Supreme Court has repeatedly asserted that the FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts."[63]

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[58] *See generally* Warren E. Burger, *Isn't There a Better Way*?, 68 A.B.A. J. 274 (March 1982); and Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, Keynote Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *in* 70 F.R.D. 83, 93–96 (1976).

[59] *Adams' Adm'r v. Ringo*, 79 Ky. 211 (Ky. Ct. App. 1880).

[60] Kill v. Hollister, 1 Wils. 129 (1746).

[61] Courts from the 1800s quoted Lord Kenyon's emphatic rejection of a motion to enforce a predispute arbitration agreement: "It has been decided *again and again* that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction." *See, e.g.*, Thompson v. Charnock, 8 Term R., 134, 139 (N. Y. ed. of 1834, 91) (emphasis added).

[62] *See* Burnham, *supra* note 27.

[63] In its pronouncement on this point nearly thirty years ago in *Sherk v. Alberto-Culver.*,

But modern authorities, including the Supreme Court, oversimplify this history.[64] A scholarly New York decision from 1832 shows that many pre-industrial courts propounded common law rules in support of arbitration.[65] Like a well-preserved fossil, this decision recites these principles from the early 1800s:

•"By referring a case to arbitration, the court divests itself of its judicial power."[66]

•"An award made in good faith, although erroneous, is conclusive. The dissent of one of the arbitrators subsequently to an award regularly made will not invalidate it."[67]

•"An award may be good in part, and void in part."[68]

•"After an award has been executed, the court will not set it aside, upon the

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417 U.S. 506, 510–11 (1974), the Court recounted that "English courts traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act." *Id.* at 510 n.4. The Court reiterated this view in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219–20 n.6 (1985). This appears to be the last time that the Court provided evidence to support its view that courts were once hostile to arbitration.

[64] Years ago, the Supreme Court made an effort to support this proposition. *See, e.g.*, Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring) (quoting U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007 (S.D.N.Y. 1915)); *see also Dean Witter*, 470 U.S. at 220 (explaining that when Congress passed the FAA it was "motivated, first and foremost, by a desire" to reverse long-standing judicial resistance to arbitration). Recent cases, however, simply state the idea that the FAA was intended to reverse long-standing judicial hostility to arbitration without referring to historical cases, so that now it is not clear that the Justices understand the origins or accuracy of their repeated assertions. *See, e.g.*, Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279 (2002); and Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[65] *See* Campbell v. Western, 3 Paige Ch. 124, 138 n.1 (N.Y. Ch. 1832).

[66] *Id.* (citing McKim v. Thompson, 1 Bland's Ch. Rep. 150, 175 (Md. 1827)).

[67] *Id.* (citing Winship v. Jewett, 1 Barb. Ch. 173 (N.Y. Ch. 1845)); *see also* Maysville, W.P. & L. Turnpike Road Co. v. Waters, 6 Dana 62, 69, 36 Ky. 62 (Ct. App. 1837) (stating a nearly identical rule: "Submission to the arbitration of three or any two, two join in the award giving notice of the award concluded, and being about to be returned to the third, who does not join in it; held, that this is no objection to the validity of the award.").

[68] *Id.* (citing Brown v. Warnock, 5 Dana 492, 493, 35 Ky. 492 (Ct. App. 1837)); *see also id.*(citing Banks v. Adams, 23 Me. 259 (1843) (stating, "An award may be good for part and bad for part; and the part which is good will be sustained, if it be not so connected with the part which is bad, that injustice will thereby be done.").

ground that the arbitrators were not sworn."[69]

•"The technicalities and niceties once favored in relation to awards are no longer allowed."[70]

•"An award must decide the whole matter submitted, and must not extend to any other matter not comprehended in the submission; and it must be certain, final and conclusive upon the whole matter referred."[71]

•"Awards are much favored, and the court will intend everything in their favor."[72]

•"Chancery will not lend its aid to disturb an award, where the party making the application has paid the amount awarded against him, and acquiesced in the award for a period of five or six years."[73]

•"Where an award upon its face purports to be final, and recites all the matters and things submitted, it is prima facie final, and the party impeaching it must show proof to the contrary."[74]

Judicial support for arbitration continued throughout the 1800s. Some courts favored arbitration because of its procedural simplicity[75] and efficiency.[76] Others

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[69] *Id.* (citing Johnson's Ex'rs v. Ketchum, 3 Green's Ch. Rep. 364). *See also id.* (citing Combs v. Little, 3 Green's Ch. Rep. 310) (providing that "if arbitrators are not sworn, the whole proceeding is utterly void").

[70] *Id.* (citing Shockey's Adm'r v. Glasford, 36 Ky. (6 Dana) 9, 10 (Ct. App. 1837)).

[71] *Id.* (citing Carnochan v. Christie, 24 U.S. (11 Wheat.) 446 (1826); Lutz v. Linthicum, 33 U.S. (8 Peters) 165 (1834); Carey v. Wilcox, 6 N. H. 177, 180 (1883)); *see also id.* (citing Johnshon's Ex'rs v. Ketchum, 3 Green's Ch. Rep. 364, expressing the rule "[w]here an account has been settled by arbitrators, and a bond and mortgage given for the sum awarded to be due, the court will not, except in case of gross wrong, permit the account to be re-investigated, or the validity of the award to be contested."). This principle preserved the finality of arbitrator awards. Other courts agreed with this idea but phrased it differently. *See id.* (citing Armstrong v. Robinson, 5 *G. & J.* 412, 419 (Md. 1833) ("[An award] must pursue the submission, or it is void.")); *see also id.* ("Arbitrators are presumed to have pursued the submission, and the award is valid until the contrary appears.") (citing *Carey*, 6 N. H. at 177).

[72] *Id.* (citing Tankersley v. Richardson, 2 Stew. 130 (Ala. 1829)).

[73] *Id.* (citing McRae v. Buck, 2 Stew. & P. 155 (Ala. 1832)).

[74] *Id.*

[75] *See* Brush v. Fisher, 38 N.W. 446, 448 (Mich. 1888) (expressing this rationale for enforcing arbitration awards):

> They are made by a tribunal of the parties' own selection, who are usually, at least, expected to act on their own view of law and testimony more freely and less technically than courts and regular juries. They are also generally expected to frame their decisions on broad views of justice, which may sometimes deviate from the strict rules of law.

Id.

[76] Campbell v. Western, 3 Paige Ch. 124, 138 (N.Y.Ch. 1832):

believed that parties had a right to enter into contracts to resolve their disputes, and therefore deferred to the parties' choice of an arbitrator.[77] Judges respected the finality that parties intended by using this process.[78] The Michigan Supreme Court summarized this supportive philosophy: "[T]here is power in a court of equity to relieve against awards in some cases where there has been fraud and misconduct in the arbitrators, or they have acted under some manifest mistake . . . . But it is evident that there are greater objections to any general interference by courts with awards."[79]

Nineteenth century courts were far from unanimous in treating arbitration agreements. Indeed, many courts put limits on the use of arbitration. However, few if any courts completely rejected arbitration. Instead, they monitored this process for abuses. When considering the following cases, recall that arbitration was often the product of a predispute agreement. As a result, courts applied common law contract doctrines to ensure minimum standards of fair conduct and accountability to the law—for example, the duty to execute contracts without violating a law or public policy, the prohibition against taking undue advantage of a weaker party, and the like.

> If every party who arbitrates, in relation to a contested claim, to save trouble and expense, is to be subjected to a chancery suit, and to several hundred dollars cost, if the arbitrators happened to err upon a doubtful question as to the admissibility of a witness, the sooner these domestic tribunals of the parties' own selection are abolished, the better. Such a principle is wholly inconsistent with common sense, and cannot be the law of a court of equity. There is, therefore, nothing in the proceedings before the arbitrators which could justify any court in setting aside those proceeding for fraud, or improper conduct, or any other irregularity.

[77] *E.g.*, Neely v. Buford, 65 Mo. 448, 451 (1877) ("[C]ourts are disposed to regard with favor these tribunals of the parties' own selection.").

[78] *See* Port Huron & N.W. Ry. Co. v. Callanan, 34 N.W. 678, 679 (Mich. 1887) ("It is not expected that after resorting to such private tribunals either party may repudiate their action and fall back on the courts.").

[79] *Brush*, 38 N.W. at 447–48. The court elaborated:

> It is a well-settled rule in equity . . . that an award of arbitrators of the parties' own choosing,unless outrageously excessive on the face of it, and such as would induce every honest man at first blush to cry out against it, cannot be set aside, unless there be corruption, partiality, misconduct, or the use of an excess of power in the arbitrators, or fraud upon the opposite party.

Id. at 450 (quoting Van Cortlandt v. Underhill, 17 Johns. 405, 420 (N.Y. Sup. Ct. 1819)). Knowing that the losing party at arbitration might be tempted to back down from its original promise to abide by the arbitrator's award, the court observed that "the office of arbitrator is one voluntarily assumed, and is many times a thankless task, and parties often feel aggrieved at their findings." *Id.*

To begin, a particular line of cases supports the conventional view that early courts protected their jurisdiction from competition with arbitrations.[80] Some judges theorized that an agreement to arbitrate a dispute could not "oust" a court of its jurisdiction.[81] Joseph Story, who co-held positions as Associate Justice of the U.S. Supreme Court and Professor of Law at Harvard, reported this rule of non-divestiture in his influential treatise, *Commentaries on Equity Jurisprudence*.[82] Non-divestiture was also used with the contract doctrine that a duty to arbitrate is a condition precedent to filing a lawsuit.[83] By similar reasoning, some courts held that a party's participation in an arbitration did not waive her right to sue.[84]

Even in the 1800s, arbitration was widely appreciated for its cost-saving advantages.[85] However, this did not stop a few courts from preserving access to courts, even when a reluctant litigant intended to limit dispute resolution costs. To illustrate, a person who signed a predispute arbitration agreement claimed that he was harmed when the other party sued because the resulting trial increased his lawyer fees by a ten-fold factor. The court was unsympathetic to this argument. Citing the doctrine of non-divestiture, it refused to enforce the expectancy of lower dispute resolution costs by denying recovery of attorney fees

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[80] Reviewing a variety of earlier decisions, *U.S. Asphalt Ref. Co.*, 222 F. at 1010–11, summarized this view: "The courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute."

[81] *See* Gray v. Wilson, 4 Watts 39 (Pa. 1835); Randel v. Chesapeake & Del. Canal Co., 1 Del. (1 Harr.) 233 (Super. Ct. 1833); Allen v. Watson, 16 Johns. 205 (N.Y. Sup. Ct. 1819); Rowley v. Young, 3 Day 118 (Conn. 1808); Allegre v. Maryland Ins. Co., 6 H. & J. 408 (Md. 1825); Aspinwall v. Towsey, 2 Tyl. 328 (Vt. 1803).

[82] JOSEPH STORY, 2 COMMENTARIES ON EQUITY JURISPRUDENCE, § 1457(a) (courts will not specifically enforce arbitration agreements if the effect is to divest the ordinary jurisdiction of the common tribunals of justice).

[83] *See* Stephenson v. Piscataqua Ins. Co., 54 Me. 55, 70 (1866), stating:

> While parties may impose, as a condition precedent to application to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. . . . Such stipulations are repugnant to the rest of the contract and assume to divest courts of their established jurisdiction. As conditions precedent to an appeal to the courts, they are void.

[84] *See* Pierce v. Kirby, 21 Wis. 124 (1866) (stating that a party who replies to a complaint at arbitration, but otherwise asserts that the arbitrators lack jurisdiction, does not forgo his right to a judicial forum).

[85] *See In re* Grening, 26 N.Y.S. 117, 119 (N.Y. Gen. Term 1893) (referring to arbitration as among "simple and inexpensive methods of quieting disputes growing out of business transactions").

incurred in litigating a matter that had been set for arbitration.[86]

Some judges applied the revocation doctrine to preserve a disputant's access to courts. This allowed a party to withdraw from arbitration and sue in court. In the most common case, a person who agreed to arbitration could lawfully revoke her delegation of power to an arbitrator before a dispute was actually submitted.[87] The earliest American decisions applied this principle broadly, allowing a disputant to withdraw from arbitration after a private hearing. These courts reasoned that the objecting party effectively retracted its submission prior to the arbitrator entering into an award.[88] Likewise, some courts held that public policy prohibits arbitration agreements from precluding litigation because private tribunals could not otherwise be held accountable under the law.[89]

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[86] *See* Munson v. Straits of Dover S.S. Co., 99 F. 787 (S.D.N.Y. 1900). In a dispute over compensation for detention of a steamship beyond the contract period, the parties had agreed in advance to arbitrate their differences. Nevertheless, the ship's owner refused to submit to arbitration and sued. His lawsuit was dismissed. The respondent was still unhappy because he spent $555 in legal fees to enforce the arbitration agreement. He contended that the cost of legal representation at arbitration would have been only $50. Thus, he sued to recover this expenditure. The court dismissed this lawsuit, concluding that the first party had a right to contest the arbitration agreement, even if he lost, noting: "[A]n allowance of the costs and expenses in the prior suit, seems to be wholly inconsistent with the defendant's undoubted legal right to bring that action." *Id.* at 792. This ruling was not novel. Chief Justice Shaw explained in *Reggio v. Braggiotti*, 61 Mass. (7 Cush.) 166, 170 (1851):

> But the counsel fees cannot be allowed. These are expenses incurred by the party for his own satisfaction, and they vary so much with the character and distinction of the counsel that it would be dangerous to permit him to impose such a charge upon an opponent; and the law measures the expenses incurred in the management of a suit by the taxable costs.

See also Miller v. Hays, 26 Ind. 380 (1866) (holding that expenses for attorney and counsel fees were not recoverable upon an arbitration bond).

[87] *See* Smith v. Compton, 20 Barb. 262 (N.Y. Gen. Term 1855); Peters's Adm'r v. Craig, 36 Ky. (6 Dana) 307 (1838); Jones v. Harris, 59 Miss. 214 (1881), *overruled by* IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 103 (Miss. 1998) ("right of either party to revoke a submission before award made, where the submission is not a rule of court, or regulated by statute changing the common law, is well settled and universally recognized"); Oregon & W. Mortg. Sav. Bank v. Am. Mortg. Co., 35 F. 22 (C.C. Or. 1888).

[88] *See* Aspinwall v. Towsey, 2 Tyl. 328 (Vt. 1803) (stating that "either party may revoke such submission before the award made and published, and by such revocation he annuls all contracts as relative to the submission conditioned in the bond"); *see also* Allen v. Watson, 16 Johns. 205 (N.Y. Sup. Ct. 1819) (reasoning that "there can be no doubt that the defendant could revoke the powers conferred by the arbitration bond").

[89] *See, e.g.*, Hurst v. Litchfield, 39 N.Y. 377, 379 (1868) (stating that "stipulations [for arbitration] are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts"). *See also* Prince Steam-Shipping Co. v. Lehman, 39

Occasionally, the method of an arbitrator's appointment caused courts to vacate awards. Even if such selection did not bias the arbitrator, courts viewed it as an inherent conflict of interest.[90]

By another approach, some judges did not preclude arbitrations that resulted from a predispute agreement, but treated them as a condition precedent to a judicial proceeding to enforce an arbitrator's ruling. This allowed courts to suspend a pending lawsuit to see whether an agreed-upon arbitration procedure would settle the matter.[91] They delayed jurisdiction until the disputants first made a reasonable effort to resolve their problem in a private forum.[92]

Fed. 704 (S.D.N.Y. 1889) (remarking that arbitration "agreements have repeatedly been held to be against public policy, and void"). The best explanation for the policy is in *Greason v. Keteltas*, 17 N.Y. 491, 496 (1858):

> It is well settled that courts of equity will never entertain a suit to compel parties specifically to perform an agreement to submit to arbitration [citations omitted].To do so, would bring such courts in conflict with that policy of the common law which permits parties in all cases to revoke a submission to arbitration already made. This policy is founded in the obvious importance of securing fairness and impartiality in every judicial tribunal. Arbitrators being selected, not by law, but by the parties themselves, there is danger of some secret interest, prejudice or bias in favor of the party making the selection; and hence the opposite party is allowed, to the latest moment, to make inquiries on the subject.

[90] *See* Herrick v. Estate of Belknap, 27 Vt. 673, 678 (1854) (The court determined that a civil engineer employed by a railroad to administer excavation contracts—and who thereby functioned as an arbitrator or umpire—improperly denied payment to a contractor who was to be paid according to the amount of earth he removed. Denying effect to this internal dispute resolution process, the court stated that the "injury has been caused by the fraud or neglect of their officers . . . . It was for the interest of the company to have short estimates; and under these circumstances no actual fraud need be proved."); *see also* Mansfield & Sandusky City R.R. Co. v. John P. Veeder & Co., 17 Ohio 385 (1848) (Here, the contract provided for a professional engineer employed by railroad company to exercise impartial and independent judgment in determining whether an excavator's claim for payment on a job should be made. Since the evidence showed that the engineer was mistaken in denying a claim for payment, the court ruled that this contract worker was entitled to equitable relief from Ohio courts.).

[91] Many courts held that a submission of a pending suit to arbitration suspended the cause of action. *E.g.*, *Ex parte* Wright, 6 Cow. 399, 399 (N.Y. Sup. Ct. 1826); People v. Onondaga, 1 Wend. 314, 315 (N.Y. Sup. Ct. 1828); Larkin v. Robbins, 2 Wend. 505, 506 (N.Y. Sup. Ct. 1829); Towns v. Wilcox, 12 Wend. 503, 504 (N.Y. Sup. Ct. 1834); Green v. Patchin, 13 Wend. 293, 294 (N.Y. Sup. Ct. 1839); and Wells v. Lain, 15 Wend. 99, 100 (N.Y. 1835).

[92] Perkins v. U.S. Electric Light Co., 16 F. 513, 515 (C.C.N.Y. 1881) provided this statement of the law:

> It is familiar doctrine that a simple agreement inserted in a contract, that the parties will refer any dispute arising thereunder to arbitration, will not oust courts of law of

While judges limited arbitrations, they still permitted them to occur. This can hardly be said to constitute judicial hostility. And that is about as difficult as American courts in the 1800s were on arbitration. The boundary that separated autonomous from regulated arbitrations was marked by key jurisdictional phrases in predispute agreements.[93] If a contract expressly provided for judgment on the award, courts asserted jurisdiction and functioned as an appellate tribunal.[94] But if the agreement submitted the matter to arbitration, this was treated as a discontinuance of the right to sue.[95] By extension, some courts reasoned that

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> their ordinary jurisdiction. Either party may sue the other upon the contract without having offered to arbitrate. He may be liable for damages for a breach of his agreement to arbitrate; but the agreement will not bar his suit. If, however, the contract stipulates that the arbitration is to be a condition precedent to the right to sue upon the contract, or if this may be inferred upon construction, no suit can be maintained unless the plaintiff has made all reasonable effort to comply with the condition. But under the agreement here there is no cause of action upon the facts as they exist. The agreement which creates the obligation of the defendant provides the mode by which the extent of the obligation is to be ascertained.

Id.

[93] This is demonstrated by the technical usage in *Camp v. Root*, 18 Johns. 22, 23 (N.Y.Sup. Ct. 1820) (emphasis added):

> This is plainly a case of *submission* to arbitration; it is, in no respect, a *reference* under the statute. The parties chose to enter their submission upon the minutes of the court, and to direct the arbitrator to make report to the court; but all this does not vary the rights of the parties, nor authorize the court to give judgment immediately on the award. The submission to arbitration was a discontinuance of the suit.

See also Ex Parte Wright, 6 Cow. 399, 399 (N.Y.Sup. Ct. 1826) ("A general submission of a cause to arbitration is a discontinuance; but not where the parties agree that a judgment may be entered on the report. And in such a case, if the submission be revoked, the court may proceed with the cause to trial, notwithstanding the submission.").

[94] *See Green*, 13 Wend. at 296, holding:

> [I]n all actions not referrible [sic] under the statute, if the parties refer the cause toreferees, by stipulation or rule, or both, and merely provide that the referees report, such reference is an arbitration, and operates as a discontinuance. But if the stipulation of the parties provides that a judgment shall be entered upon the report or award, and judgment is entered accordingly, the parties are concluded by their own agreement . . . .

[95] *See* Roger's Heirs v. Nall, 25 Tenn. (6 Hum.) 28, 28 (1845) (stating that "[i]f parties to a suit in court, by bond, submit the cause to the decision of arbitrators, without making any provision in the submission to continue the jurisdiction of the court, such reference will not work a discontinuance"). The doctrine appears to have originated in *Larkin*, 2 Wend. at 506:

> The reason that the submission operates as a discontinuance, is not because the subject of the suit is otherwise disposed of than by the decision of the court in which it was prosecuted; but because the parties have selected another tribunal for

commencement of a lawsuit did not constitute a submission to arbitration.[96]

Courts that perceived unique advantages to arbitration as a dispute resolution method added to the case law that allowed this private process to resolve disputes. Arbitration was perceived as superior for resolving price[97] or damages[98] disputes. Similarly, courts deferred to arbitrators with unique expertise or trustworthiness.[99] In a related development, courts affirmed the use

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> the trial of it. The court will not look to the proceedings of that tribunal to determine whether the suit is gone beyond its jurisdiction. It is sufficient that the parties have selected their arbitrators, and concluded their agreement to submit to them. It is this agreement which withdraws the cause from the court, and effects the discontinuance of the suit.

[96] *E.g.*, Van Antwerp v. Stewart, 8 Johns. 125, 125 (N.Y. Sup. Ct. 1811).

[97] *See* Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 50 N.Y. 250, 262–63 (1872):

> This was, in substance and effect, a provision for establishing the rate of toll to be charged and collected, in case of a difference between the parties, and equivalent to an agreement in words that, in case the parties should differ, arbitrators should be chosen who should, by the rules and formula prescribed, establish and determine the rate of additional toll, and that their award should be final. The subject-matter in view was peculiarly fit and proper for submission to the arbitrament of experts and practical business men rather than courts and juries; and the manner agreed upon was a provident and reasonable provision for the adjustment of rights and differences, which, in their nature, could not be as well or satisfactorily settled and determined in any other way. The relation of the parties to each other and the character and extent of the business contemplated under the contract called for an amicable and speedy adjustment of the rate of toll, and the charges which should be imposed upon the property of one for the benefit of the other.

See also Faunce v. Burke & Gonder, 16 Pa. 469, 482 (1851) (referring to "quantity, quality, and value" of disputed work).

[98] *E.g.*, *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U.S. 242, 243 (1890), shows the common feature in an insurance policy by which arbitrators were to ascertain the amount of loss or damage to an insured property. These contracts permitted insurers to withhold payment on any loss, without legal recourse, until an award was obtained. Thus, Justice Gray observed that neutral appraisal or arbitration was a condition precedent to any lawsuit:

> Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country.

Id. at 255.

[99] *See, e.g.*, Forshey v. Galveston, Houston, & Henderson R.R. Co., 16 Tex. 516, 519–20 (1856). An arbitration panel, created by a contract between a civil engineer and railroad company, awarded the former $2270 in unpaid wages. *Id.* The Texas Supreme Court remarked that "courts always regard with peculiar favor trials of this character by judges of

of arbitration for construction disputes.[100]

Many courts not only held parties to their promise to arbitrate, but prevented them from reneging. A pre-Civil War case concluded that an arbitrator's mistake was insufficient grounds to vacate the award.[101] A particularly deferential court stated that awards should be enforced even upon evidence that the arbitrator was biased, as long as the arbitrator's partiality was known to the parties during the proceeding and the losing party did not withdraw the submission.[102]

Finally, the notion that pre-FAA courts were hostile to arbitration ignores evidence that many states institutionalized arbitration. There is no suggestion that these laws were passed to reverse judicial hostility to arbitration. It appears, instead, that arbitration was established by law to enable businesses to avoid messy lawsuits. Courts in Texas,[103] New York,[104] Iowa,[105] Louisiana,[106]

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the parties' own choosing, and that no ordinary or slight cause will induce the courts to disregard the award, and that awards, in the absence of fraud or gross mistake, have the conclusive effect of judgments." *Id.* at 524.

[100] *E.g.*, Schwartz v. Cronan, 30 La. Ann. 993, 997 (1878) (statute provided for arbitration in construction disputes); Colter v. Frese, 45 Ind. 96, 99 (1873) (statute provided for arbitration between contractors, workmen, furnishers of materials, and other employees and creditors); S.S. & W. Wood v. Donaldson, 17 Wend. 550, 553–54 (N.Y. Sup. Ct. 1837) (statute provided for arbitration in dispute involving contractor and creditors); and Turcott v. Hall, 8 Ala. 522, 524–25 (1845) (Mobile, Alabama provided for arbitration in dispute involving contractor and workmen).

[101] *See* Byrd v. Odem, 9 Ala. 755, 766 (1846) (citations omitted):

> That arbitration and award was recognized at the common law, as a mode of adjusting matters in dispute, especially such as concerned personal chattels, or personal wrongs, is a clear proposition. And whenever the thing in dispute may be passed without writing, an oral submission and an award, has all the effect of a written one. A misjudgment of arbitrators, (although it may be a misapprehension of law,) on a case fairly before them, is not alone sufficient cause for setting aside an award. It has accordingly been held, that if an action of slander be submitted, and the arbitrators award a sum of money for words which are not actionable, the court will not interfere to set it aside.

[102] *See* Fox v. Hazelton, 27 Mass. (10 Pick.) 275, 278 (1830) (holding that since objecting party "was content to proceed with the knowledge of the fact, relying upon the strength of his cause, or the capacity and firmness of the other referees, he must be deemed to have waived his exceptions").

[103] *See* Henderson v. Beaton, 52 Tex. 29, 34–36 (1879) (upholding the constitutionality of a Texas statute enacted in 1879 that provided for a board of referees or arbitrators to dispose of civil actions by the consent of parties).

[104] *See* Howard v. Sexton, 1 Denio 440, 441 (N.Y. Sup. Ct. 1845) (finding that an arbitration tribunal established under New York law is not defective even if arbitrators fail to take oath as established by law); *see also Wood*, 17 Wend at 553–54 (statute providing for arbitration in dispute involving contractor and creditors).

Indiana,[107] and Alabama[108] upheld these statutes.

B. *Common Law Regulation of Individual Employment Arbitration*

Common law regulation of predispute arbitration also grew out of employment controversies. The earliest example appears to be an 1838 Kentucky case.[109] A novice artist who was employed to paint family portraits signed a predispute arbitration agreement with his employer. The employer accepted the paintings and hung them in his house but refused payment to the artist, claiming that the portraits bore no resemblance to his family.[110] The artist sued to recover $65, but the employer simultaneously submitted the matter to arbitration. Acting before a trial was held, the arbitrators denied payment to the artist.[111] Applying the revocation doctrine, the Kentucky court refused to enforce the award.[112]

Courts also reviewed ecclesiastical arbitrations of employment disputes. In *Fain v. Goodwin*, an individual who worked as a bookkeeper and salesman sued under his employment contract.[113] His termination for negligence and poor performance was previously arbitrated by a Baptist church.[114] Dual proceedings produced conflicting outcomes: an arbitration ruling for the employer, and a

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[105] *See* Conger v. Dean, 3 Iowa 463, 465–66 (1856) (holding that a state statute did not provide common law right to submit controversies to arbitration, but prescribed procedures for judicial enforcement of arbitration awards).

[106] *See* Schwartz v. Cronan, 30 La. Ann 993, 997 (1878) (arbitration in construction disputes).

[107] *See* Colter v. Frese, 45 Ind. 96, 99 (1873) (arbitration between contractors, workmen, furnishers of materials, and other employees and creditors).

[108] *See* Turcott v. Hall, 8 Ala. 522, 524–25 (1845) (arbitration in dispute involving contractor and workmen).

[109] *See* Peters's Adm'r v. Craig, 36 Ky. (6 Dana) 307, 307 (1838).

[110] *Id.*

[111] *Id.*

[112] *See id.* at 308. The court reversed the arbitrators' award because it saw no evidence that the parties agreed to be bound by it:

> From any thing appearing, their object may have been only to ascertain the opinion of the two referees as a mere auxiliary to a settlement by themselves. Nor does it appear that, if there had been a binding submission, there was not a revocation of it before the award was made; for this suit was brought the day after the reference, and the evidence does not show that the award had been regularly made and completed before that time. Such a submission might have been revoked by either party prior to a binding award; and the institution of this suit was an implied revocation, unless the award had been conclusively made before the suit was commenced.

[113] Fain v. Goodwin, 35 Ark. 109, 110 (1879).

[114] *Id.* at 113.

court judgment for the bookkeeper.[115] The Arkansas Supreme Court negated the arbitration by affirming the monetary judgment for the plaintiff.[116]

While these two courts abrogated private forms of workplace dispute resolution, others did not interfere. *Perry v. Wheeler* is a case in point.[117] After a minister believed he was not paid fully under his employment contract, he refused to handover the rectory and church grounds.[118] This standoff was submitted to a church board that exercised adjudicatory powers after the minister's employment was terminated.[119] The Kentucky Court of Appeals saw no difference between an arbitration panel and this ecclesiastical board since the latter was expressly established by the national church charter to resolve employment disputes between ministers and their individual rectors or churches, and disputants were allowed to nominate and also strike persons from a five-member panel.[120] The court upheld this private method, reasoning that "the right of the contracting parties to have this relief existed from the beginning, and grew out of the very nature of their contract."[121] It concluded that "the board acting in this case was legally organized, and . . . within the scope of its powers, and hence that its recommendations, approved, as they have been, by the bishop of the diocese, must be respected by the civil tribunals."[122]

Courts upheld the use of arbitration in other work settings. In *Perkins v. United States Electric Light Co.*[123] the Circuit Court for the Southern District of New York denied an employee's motion to enjoin an arbitration of his patent claims against his employer. The court remarked that:

> [T]he parties here selected the means of determining what price should be allowed for property, the value of which is always more or less speculative and conjectural. The case is one where it is peculiarly appropriate that they should be held to their contract according to its terms and intent.[124]

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[115] *Id.* at 112.

[116] *Id.* at 113.

[117] Perry v. Wheeler & Co., 75 Ky. (12 Bush) 541, 556 (1877).

[118] *Id.* at 547–48.

[119] *Id.* at 546–47.

[120] *Id.* at 554.

[121] *Id.* at 556.

[122] *Id.*

[123] Perkins v. U.S. Elec. Light Co., 16 F. 513, 515–16 (C.C.S.D.N.Y. 1881).

[124] *Id.* at 516.

[125] *E.g.*, Forshey v. Galveston, Houston, & Henderson R.R. Co., 16 Tex. 516, 520–21 (1856); and Choctaw & Memphis R.R. Co. v. Newton, 140 F. 225, 248–49 (8th Cir. 1905).

More often, disputes arose between excavation workers and railroads who employed them.[125] These parties were bound by arbitration clauses that named civil engineers employed by the railroad as umpires to resolve contractual disputes over the amount of excavated earth. In *Herrick v. Estate of Belknap*, Chief Justice Redfield explained why these agreements should be enforced:

> We think there can be no question that this stipulation does bind the parties to abide the decision of the arbitrator named, as much as that of any other umpire or arbitrator. And, in one sense, the submission to the determination of the engineer is more obligatory than any ordinary submission, inasmuch as being upon consideration, is not revocable, and the obligation upon the defendants to pay, does not, by the terms of the contract, arise, until the estimates are made by the engineers.[126]

He also reasoned, however, that the special nature of this employment contract required court supervision to prevent abuse of process or unjust results:

> But, this being a peculiar species of contract, so far as the umpirage is concerned, that being referred to the agents and servants of one of the contracting parties, persons in the employ, under the control, and in the pay of that party, it seems, from necessary implication, to impose upon that party the obligation to employ competent, upright, trustworthy persons, in this service—and to see to it that they did this service in the proper time, and in the proper manner.[127]

To summarize, this research shows that early American courts were not hostile to arbitration. They did, however, regulate its use to the point of careful supervision. What, therefore, is the basis for the idea that courts resisted

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Cf., Mansfield & Sandusky City R.R. Co. v. John P. Veeder & Co., 17 Ohio 385, 388 (1848).

[126] Herrick v. Estate of Belknap, 27 Vt. 673, 679–80 (1854).

[127] *See id.* at 680. The court concluded by taking this sensible middle ground approach:

> [T]hese estimates, when made, are, no doubt, entitled to the common presumption in their favor . . . . But, being of a nature where perfect accuracy is attainable, or nearly so, and made by a class of persons altogether in the interest and under the control of one of the contracting parties, it would impose, doubtless, some duty of watchfulness, as to the persons employed, and, also, in regard to abstaining from all attempts . . . at influencing them in their action in the premises . . . . It must be obvious to all, that, the parties must have felt the necessity of such an umpirage, or they would not have provided for it,—and that, having provided for it, by the express stipulations of their contract, they must now abide by it, and not expect a court of equity to relieve them from the probable consequence of their contract, however disastrous it may possibly have proved, to their reasonable or unreasonable anticipations.

Id.

arbitration? That question is now taken up.

C. *The Fallacy That Common Law Doctrines Were Hostile to Arbitration*

The impression that courts were unfriendly to arbitration is not without foundation. This Part traces the source of this idea and demonstrates that it resulted from a distorted reading of key precedents that adjusted the balance between private and public adjudication.

Several early Supreme Court decisions contributed to the current misunderstanding that courts were hostile to arbitration. Consider, however, that two of these cases involved an exceptional conflict between arbitration and admiralty courts—the latter known for its jurisdictional singularity. In *Hobart v. Drogan*[128] and *Potomac Steam Boat Co. v. Baker Salvage Co.*,[129] the Court denied effect to predispute arbitration agreements that it deemed "valueless" in the presence of this special body of law.[130] The fact that the Supreme Court gave

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[128] Hobart v. Drogan, 35 U.S. (10 Pet.) 108, 118–19 (1836).

[129] Potomac Steamboat Co. v. Baker Salvage Co. (*In re* The Excelsior), 123 U.S. 40, 49–51 (1887). The Court ruled that an agreement to arbitrate the amount of compensation for saving a vessel and cargo would not bar jurisdiction in a lawsuit for salvage. It explained:

> This, however, was valueless as an agreement. It could not have been pleaded as any answer to an action for salvage brought in the ordinary way in the Admiralty Division, and if effect could have been given to it at all, it would only have been by bringing an action upon it for not submitting to arbitration.

Id. at 51 (*quoting In re* The Raisby, 10 P.D. 114 (1885)).

[130] *See generally In re* The Excelsior, 123 U.S. 40, 49–51 (1887). The captain of a salvage company and owner of a sunken ship agreed to arbitrate any dispute arising out of a contract to raise the stricken vessel. The salvor responded to an urgent telegram from the captain of a sunken steamer to remove her cargo, pump her out, and tow her safely into port after the steamer sank in a collision with a large tug boat. *Id.* at 41. Just as the salvor was beginning to work on the steamer, the captain of the sunken vessel asked what it would cost to recover the vessel, to which the captain of the salvors replied, "I do not know." *Id.* at 43. The captain replied, "This is not a salvage service," appearing to imply he simply wanted a tow to safe harbor. The salvage captain answered, "Call it what you please, so I get my pay." *Id.* The facts suggest that the vessel could not be towed without making certain repairs. Nevertheless, after the captain repeated, "It is no salvage service," the men agreed to submit the amount to be paid to arbitration, in case the salvage company and the owners of the vessel could not agree upon a fair price. *Id.* After successfully raising, patching, and towing the steamer to port, the salvage company billed the steamer for an amount that the latter considered too high. *Id.* at 48. The owner of the stricken vessel sought to arbitrate the claim, but the salvage company successfully sued on an admiralty claim in federal court. *Id.* In denying the steamship owner's claim for arbitration, the Supreme Court relied on admiralty law that regarded arbitration agreements as "valueless." *Id.* at 51.

primacy to admiralty law is scarcely a good reason to conclude that the Court broadly condemned arbitration as a worthless form of dispute resolution.[131]

Then there is the influential case *Home Insurance Co. of New York v. Morse*,[132] expressing doubt that a person who consents to arbitration irrevocably waives the right to a judicial forum. This decision enumerated early English decisions that supported the anti-arbitration doctrine of ouster. *Home Insurance* reported that American judges were influenced by the Lord Chancellor's dictum, previously reported in *Scott v. Avery* and *Kill v. Hollester*, that rejected arbitration as an unlawful intrusion upon judicial authority:

> There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago [referring to *Kill v. Hollester*]. That case was an action on a policy of insurance in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided there that an action would lie, although there had been no reference to arbitration.[133]

The U.S. Supreme Court expanded upon these English precedents to

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[131] Reinforcing this point, consider that Congress created special procedures under Section 8 of the FAA for arbitrations that occurred in admiralty ("If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then . . . the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel . . . and the court shall then have jurisdiction . . . ."). 9 U.S.C. § 8 (2000).

[132] Home Ins. Co. of New York v. Morse, 87 U.S. 445 (1874). In this frequently cited case, Wisconsin law required out-of-state insurance companies to waive their right of removal to federal court and consent to exclusive state jurisdiction for future lawsuits. A New York company who consented to state jurisdiction sought federal jurisdiction under the Judiciary Act of 1789 in a lawsuit filed by a policyholder to recover a property loss. Reversing the Wisconsin Supreme Court's ruling that upheld the state law, the *Home Insurance* majority reasoned that a person could not be compelled to waive his right to a judicial forum. In a passage that had negative implications for predispute arbitration agreements—but also, did not rule on such a contract—the Court said, "[a]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." *Id.* at 451. The opinion continued:

> In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

Id.

[133] *Id.* at 451–52.

conclude that "[e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights."[134]

Isolating this excerpt from *Home Insurance*, one can appreciate why certain courts resisted arbitration. Nevertheless, recall that *Home Insurance* did not apply judicial ouster to a predispute arbitration agreement, but rather, an agreement to consent to state jurisdiction in lieu of federal court. More interesting, numerous courts discredited attempts to extend *Home Insurance*'s theory of judicial ouster to predispute arbitration agreements.

Park Construction Co. v. Independent School District No. 32, Carver County[135] exemplified courts that carefully researched *Scott v. Avery*'s negative treatment of arbitration, and contrary to *Home Insurance*, raised critical questions about this English precedent:

> The historical and only basis for the opinion that executory agreements to arbitrate all issues to arise under a contract are void, as against public policy, is open to serious question. There is eminent authority (Lord Campbell, in *Scott v. Avery* . . .), that the rule was the product of judicial jealousy rather than judicial reasoning. He said that it arose in the time when 'the emoluments of the Judges depended mainly, or almost entirely, upon fees.' In those days they had no fixed salary and so 'there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble . . . for the division of the spoil.' In consequence, 'they had great jealousy of arbitrations . . . . Therefore they said that the Courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so.'[136]

To be clear, the *Park Construction* majority perceived that English courts in the 1700s protected their jurisdiction against encroachments by arbitration—not for principles, but for naked self-interest. Once this economic disincentive was removed, courts ended their jealousy. A dissenter in *Park Construction* went further in asserting that *Scott v. Avery*'s theory of judicial ouster never diminished judicial support for arbitration because of an abiding Anglo-American norm to allow for privately contracted forms of dispute resolution:

> Lord Campbell's assertion appears to be groundless. He does not substantiate his statement with any evidence or citation. The available evidence

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[134] *Id.* at 451.

[135] Park Contr. Co. v. Indep. Sch. Dist. No. 32, Carver County, 296 N.W. 475 (Minn. 1941) (citation omitted).

[136] *Id.* at 477.

> is against him. In 1648, which was . . . over 200 years before the decision in *Scott v. Avery*, March stated in his treatise on Slander and Arbitraments . . . *that the law seemed favorable to arbitration. Referring to the act of 1698, Blackstone said that the legislature encouraged arbitration because of 'the great use of these peaceable and domestic tribunals.'*[137]

Most pre-FAA courts either ignored or greatly minimized Lord Campbell's well publicized theory of judicial ouster, and were persuaded to follow the "modern" trend—by this time, in place for centuries!—to enforce predispute arbitration agreements. While *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.* recognized that "[i]t appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration, will not oust a court of law or equity of jurisdiction,"[138] the court applied this negative doctrine only to a predispute arbitration agreement "induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly, or undue pressure ... ."[139] Otherwise, the court believed that:

> [W]hen the parties stand on an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign, at this day, any good reason why the contract should not stand, and the parties made to abide by it and the judgment of the tribunal of their choice.[140]

This led to the conclusion that:

> Were the question *res nova* . . . a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon."[141]

Numerous courts went further by completely rejecting the ouster doctrine. In *Hood v. Hartshorn*,[142] Massachusetts's Chief Justice Chapman remarked that

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[137] *Id.* at 486 (emphasis added) (citations omitted). Justice Peterson continued: "The enforcement by common-law judges of contracts to arbitrate in the same manner as other contracts were enforced and of bonds given to secure performance of such contracts is a complete refutation of Lord Campbell's claim of judicial jealousy." *Id.*

[138] Delaware & Hudson Canal Co. v. Penn. Coal Co., 50 N.Y. 250, 258 (1872).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] Hood v. Hartshorn, 100 Mass. 117 (1868).

"there is no policy of law in this Commonwealth adverse to the settlement of controversies or questions between parties by arbitration. . . ."[143] He added that "judicial tribunals are provided by the government to enable parties to enforce their rights when other means fail, but not to hinder them from adjusting their differences themselves, or by agents of their own selection."[144] In an employment arbitration case, *White v. Middlesex Railroad Co.*, the court expressly refused to adopt a per se rule that restated the theory of judicial ouster.[145] *Hurdle v. Stallings* broadly approved the use of predispute arbitration agreements, declaring that "the settlement of controversies by arbitration is looked on with great favor by the courts."[146]

The foregoing historical analysis moderates key claims made by advocates and critics of mandatory arbitration. As is shown below, arbitration proponents rely on a passage in the FAA House of Representatives Report that asserts congressional intent to end judicial hostility to arbitration. Our research shows, to the contrary, that American courts were not opposed to arbitration, but either embraced it or placed reasonable limits on its use. We do not know if FAA supporters in the 1920s relied on faulty research, or used this argument as a straw man to mobilize support for their legislation. Our study suggests, however, that if courts today were to follow a completely laissez-faire approach to mandatory arbitration they would violate two hundred years of common law experience in which their predecessors used basic contract doctrines to protect against unfair dealings or unjust outcomes.

Our research also undercuts a current complaint of mandatory arbitration. Critics believe that courts today are institutionally biased in their preference for private over public forms of dispute resolution. Furthermore, they perceive *Gilmer* and *Circuit City* as pernicious examples of a new tradition that closes courthouse doors to hopeful litigants. These shortsighted critics err by treating *Gilmer* and *Circuit City* as innovations. American courts have generally allowed individuals over the past two centuries to determine their own adjudicatory method for settling disputes. Critics also overstate the permissive tendencies of American courts when they are presented with a controversy over a predispute arbitration agreement. Judges do not rubber-stamp these agreements. Since the early 1800s, they have enforced minimum due process standards regarding the selection of arbitrators and the exercise of arbitral powers. Moreover, courts have

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[143] *Id.* at 122.

[144] *Id.*

[145] White v. Middlesex R.R. Co., 135 Mass. 216, 220 (1883).

[146] Hurdle v. Stallings, 13 S.E. 720, 721 (N.C. 1891); *see also* Lusk v. Clayton, 70 N.C. 184 (1874) (North Carolina Supreme Court upheld the authority of arbitrators to enter into awards).

understood that an arbitrator could render an award that conflicts with law or public policy, and have guarded against this encroachment.

III. THE FEDERAL ARBITRATION ACT AND PREDISPUTE EMPLOYMENT ARBITRATION AGREEMENTS

Judicial oversight of employment arbitration takes place under conflicting statutory regimes. Federal discrimination laws, for example, provide for federal jurisdiction of claims, and set forth judicial powers and procedures.[147] Other employment laws—for instance, the False Claims Act, a whistleblower protection law—provide even more detailed procedures and court powers.[148] This grant of judicial powers is so specific that one may infer that private adjudication of these disputes is foreclosed.

As this Part explains, the FAA sets up a contrary regime, one in which courts are to exercise very limited powers to review private adjudication of employment claims. By providing federal courts jurisdiction to enforce arbitration agreements, it precludes lawsuits that would otherwise occur in federal courts and refers these disputes to a private forum. In short, the FAA is in tension, to varying degrees, with the jurisdictional provisions of federal employment laws. Adding to this conflict, recent employment discrimination laws provide for federal jurisdiction

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[147] To illustrate, Title VII of the Civil Rights Act of 1964 authorizes federal courts to award attorneys' fees to "prevailing parties" under 42 U.S.C. § 2000e-5(k) (1964). According to the Supreme Court, Congress granted courts this special power to federal courts "to facilitate the bringing of discrimination complaints." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980). The "legislative history and purpose of § 706(k)" of Title VII was to make "clear that one of Congress' primary purposes in enacting the section was to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'" *Id.* (internal citation omitted).

[148] *See* 31 U.S.C. § 3730(h) (2000) (providing that "[a]n employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection"). This provision continues:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, *shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.*

Id. (emphasis added).

to adjudicate claims, while also encouraging the use of ADR methods.[149] When these laws say they encourage arbitration where appropriate, does this apply to mandatory arbitration or only voluntary agreements?

Federal courts become involved in employment arbitration disputes when an individual sues his or her employer. Often, a person is challenging a termination decision,[150] but the controversy can involve any aspect of the employment relationship, such as pay or working conditions. In our sample cases, the employer usually files a motion to compel arbitration of a predispute employment arbitration agreement. These motions are intended to deny employees a trial on their legal claims, and substitute private arbitration as an exclusive forum.

The FAA provides federal courts jurisdiction to enforce arbitration agreements.[151] However, this simple jurisdictional law is plagued by an interpretive puzzle. On one hand, Congress passed the FAA to promote court enforcement of arbitration agreements.[152] It justified this policy by attacking the

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[149] *See* The Americans with Disabilities Act of 1990, 42 U.S.C. § 12212 (2000) (as amended); The Civil Rights Act of 1991, Pub. L. 102-166, § 118, 105 Stat. 1081 (codified as amended 42 U.S.C. § 1981 (2000)). Both laws state: "Where appropriate . . . the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter." *Id.* More recent examples of ADR initiatives are The Civil Justice Reform Act, 28 U.S.C. § 471 (2000) (authorizing more ADR programs to be administered by federal courts to alleviate problems with cost and delay); The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–58 (2000); The Administrative Dispute Resolution Act, enacted in 1990, 5 U.S.C. § 572(a) (2000) (enabling all federal agencies to implement ADR policies for internal disputes).

[150] In our sample, sixty-five percent of cases involved employee terminations.

[151] United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended under 9 U.S.C. § 2 (2000)). The law applies to the following arbitration agreements:

> [That] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2, 43 Stat. at 883.

Section 3 provides jurisdiction in "any suit or proceeding . . . brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration . . . ." 9 U.S.C. § 2, 43 Stat. at 883.

[152] The House Report states that Congress intended to place arbitration agreements "upon the same footing as other contracts, where it belongs." H.R. REP. NO. 68-96, at 1 (1924).

perceived jealousy between civil law courts and various arbitration systems.[153] Congress's main concern was with businesses who wanted freedom to enter into contracts to resolve their commercial disputes privately.[154] Businesses also wanted access to an economical dispute resolution process, with a public policy assurance that courts would not later interfere with their private arrangements.[155]

Up to this point, there is nothing puzzling about the FAA. The difficulty begins, however, with Section 1 of the statute—an oddly placed provision that sets forth exceptions to the law's coverage. Section 1 was a response to labor union concerns.[156] It excluded "seamen, railroad employees, or any other class of

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[153] Our research findings in Part II.C take issue with this key excerpt from the FAA House Report:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

Id. at 1–2.

[154] *See* 65 CONG. REC. 1931 (1924) ("It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in *commercial* contracts and in admiralty contracts." When the bill was introduced in the House, its sponsor, Rep. Mills, explained that it "provides that where there are *commercial* contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract." 65 CONG. REC. at 11,080 (emphasis added)).

[155] *See* H.R. REP. NO. 68-96, at 1–2 (1924). Congress believed the procedural simplicity of arbitration would "reduc[e] technicality, delay, and [keep] expense to a minimum and at the same time safeguard the rights of the parties." *Id.* at 2; *see also* S. REP. NO. 68-536, at 3 (1924) (stating that the FAA, by avoiding "the delay and expense of litigation," would appeal "to big business and little business . . . corporate interests [and] . . . individuals").

[156] Secretary of Commerce Herbert Hoover "suggested that '[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce."'" Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 127 (2001) (Stevens, J., dissenting) (citation omitted) (alteration in original). Labor union objections were traced to the president of the International Seamen's Union of America, who addressed the matter at the 1926 annual convention of his union:

> [T]his bill provides for reintroduction of forced or involuntary labor, if the freeman through his necessities shall be induced to sign. Will such contracts be signed? Esau

workers engaged in foreign or interstate commerce," thereby preserving their access to courts and protecting them from submitting to compulsory arbitration. The puzzle is, what did Congress mean by the expression "any other class of workers engaged in foreign or interstate commerce?"

This enigma is rooted in congressional understanding of compulsory forms of arbitration agreements. Congress believed that businesses were able to enter these contracts more or less voluntarily, but some legislators questioned even this point.[157] As for employees, it was understood that workers had no choice to decline or bargain over an arbitration agreement imposed by their employer.[158] The puzzle, then, is whether Congress intended the FAA to be only a commercial dispute resolution law, or that *and* also a law for workplace dispute resolution. Judging from this review of legislative history, which makes explicit references to commercial arbitration, it appears that Congress intended only the former. Other clear evidence shows that lawmakers wanted businesses who preferred a private method to be able to work out their own disputes without engaging in expensive and time-consuming lawsuits.[159]

> agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the *seaman*, and the hunger of the wife and children of the *railroad man* will surely tempt them to sign, and so with *sundry other workers in 'Interstate and Foreign Commerce.'*

Id. at 126–27 (citation omitted) (alteration in original).

[157] Even though there was no serious debate that businesses voluntarily entered into predispute arbitration agreements, Senator Walsh noted that some businesses did not have real power to negotiate contract terms:

> The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract.

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 Senate Comm. on the Judiciary, 67th Cong. 9 (1923) (statement to Senator Walsh of Montana).

[158] *Id.* noting that

> It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

[159] H.R. REP. NO. 68-96, at 1–2 (1924). Congress believed the procedural simplicity of arbitration would "reduc[e] technicality, delay, and [keep] expense to a minimum and at the same time safeguard the rights of the parties." *Id.* at 2; *see also* S. REP. NO. 68-536, at 3 (1924) (stating that the FAA, by avoiding "the delay and expense of litigation," would appeal "to big business and little business . . . corporate interests [and] . . . individuals").

Thus, the FAA broadly directed courts to enforce rulings from these forums.[160] Use of the FAA expanded in the 1940s and 1950s to enforce a different kind of employment arbitration award—those involving the voluntary submission of a dispute by labor unions and employers.[161] The Supreme Court ended this role for the statute, however, in *Lincoln Mills*.[162]

The FAA reemerged as a workplace dispute resolution law in 1991. In *Gilmer*,[163] a securities broker sued his employer for age discrimination. The Supreme Court ruled that the FAA applied to a predispute arbitration agreement that Gilmer signed. This meant that he was compelled to arbitrate his dispute.[164]

In two respects, *Gilmer* created uncertainty for lower courts. Since the

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[160] After providing federal courts jurisdiction to hear controversies over arbitration agreements, the FAA states that a court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3 (2000). Following the arbitration, the FAA prescribes:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9 (2000).

The Act further provides very narrow grounds for a court to deny enforcement to an award:

> (1) where the award was procured by corruption, fraud, or undue means;(#2) where there was evident partiality or corruption in the arbitrators, or either of them;(#3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or(#4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2000).

[161] *See generally* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1 (1957); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); Donald Wollett & Harry H. Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445 (1955).

[162] Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456–57 (1957). The Court ruled that federal jurisdiction to enforce collective bargaining agreements under the NLRA, including arbitration provisions, arises under Section 301 of the Labor-Management Relations Act of 1947, and not the FAA. *Id.*

[163] Gilmer v. Insterstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

[164] *Id.* at 26.

plaintiff's employment as a stock broker was terminated, allegedly because of his age,[165] his discrimination claim was like those presented in ADEA (Age Discrimination in Employment Act) lawsuits. Importantly, Gilmer did not have an employment arbitration agreement, but a broker agreement imposed by the National Association of Securities Dealers (NASD).[166] For many years, the NASD required all brokers under its purview to sign these agreements as a condition of affiliation. When the Court decided *Gilmer*, very few NASD arbitrations involved employment discrimination.[167] Most dealt with customer complaints against dealers, which in turn implicated the supervisory functions of a broker's employer and the NASD.[168] So, one uncertainty was whether lower courts would distinguish more conventional types of employment agreements from *Gilmer* by regarding the Supreme Court decision as a commercial arbitration precedent. Second, *Gilmer* resulted in a narrow ruling and reserved the much broader issue of interpreting Section 1 of the FAA,[169] while its tone and dicta were expansive and very favorable to mandatory arbitration of employment disputes.

American employers paid more attention to *Gilmer*'s pro-arbitration signal than its narrow ruling. They perceived strong encouragement to emulate the NASD model for resolving workplace disputes.[170] Much in Justice White's majority opinion spurred them to embrace mandatory arbitration. First, he

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[165] *Id.* at 23.

[166] *See id.* at 25.

[167] *See* EMPLOYMENT DISCRIMINATION-HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES (March 30, 1994) GAO/HEHS 94-17, 1994 WL 836270. The GAO study reported that only eighteen employment discrimination arbitrations occurred in the securities industry between August 1990 and December 1992.

[168] *Id.* (reporting that among the NASD, 1,110 arbitrations that took place in calendar year 1991 and 1992, most were customer complaints against brokers).

[169] Section 1 of the FAA excludes coverage of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2000). By treating Gilmer's agreement as a broker rather than employment contract, the *Gilmer* majority avoided the issue of whether this arbitration agreement was excluded under Section 1. It then reserved the much more important issue of whether employment contracts in general are excluded by this provision in the FAA. *See Gilmer*, 500 U.S. at 25 n.2 ("[I]t would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment.").

[170] *See* Bickner, *supra* note 12, at 78 (reporting a massive increase in the use of arbitration in nonunion workplaces following the Supreme Court's *Gilmer* decision in 1991); *See also Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, DAILY LAB. REPT., No. 93 (May 14, 1997), at A-4 (surveying 530 Fortune 1000 companies, this study found that 79 percent of employers use arbitration).

emphatically rejected Gilmer's argument that an individual cannot be compelled in an arbitration agreement to waive access to a court.[171] Congress, he reasoned, did not preclude this type of waiver when it passed the ADEA.[172]

He also dismissed several public policy arguments advanced by Gilmer, specifically, that a private proceeding would deprive employees of a judicial forum,[173] thwart the ADEA's policy of eradicating age discrimination,[174] and undermine the role of the EEOC.[175] Justice White observed that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[176] Arbitration was an acceptable substitute for litigation to "further broader social purposes" of employment discrimination laws.[177]

Finally, he did not "perceive any inherent inconsistency" between the EEOC's role in administering discrimination policies and judicial enforcement of agreements to arbitrate age discrimination claims.[178] His opinion emphasized that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[179]

These expansive policy pronouncements would have sufficed to send a strong arbitration signal to employers, but this opinion added more by denying Gilmer's challenge to the fairness of mandatory arbitration procedures:

> Such generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving

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[171] The majority based this conclusion on Supreme Court precedents involving mandatory arbitration of legal claims arising under various federal statutes. *Gilmer*, 500 U.S. at 26.

[172] The majority said, "we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." *Id.* The Court ultimately concluded that Gilmer failed to prove that Congress intended to prohibit the arbitration of these claims. *Id.* at 35.

[173] *Id.* at 29.

[174] *Id.* at 27.

[175] *Id.* at 28.

[176] *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrystler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[177] *Gilmer*, 500 U.S. at 28.

[178] *Id.* at 27.

[179] *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

disputes.'[180]

Continuing, the opinion dismissed specific procedural concerns about mandatory arbitration.[181]

This sweeping decision set two forces in motion. Many employers inaugurated employment arbitration programs.[182] The scale of this development is revealed in an American Arbitration Association report stating that "more than 500 employers and five million employees" were covered by its employment arbitration programs in 2000.[183] This single provider of arbitration services rivaled smaller federal circuits by substituting its arbitrators and private procedures for judges and the Federal Rules of Civil Procedure. Second, courts rapidly extended *Gilmer* on two broad fronts: (1) to arbitration agreements involving occupations outside the securities industry, and (2) to federal employment statutes other than the ADEA.[184] These decisions amplified

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[180] *Id.* at 30 (quoting Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)). The Court also observed that the FAA was enacted to curb judicial resistance to arbitration: "Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Id.* at 24.

[181] Although Gilmer contended that mandatory arbitration panels would be biased in favor of employers, the majority said "we decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Id.* at 30 (quoting *Mitsubishi*, 473 U.S. at 634). Gilmer objected to the fact that discovery is more limited in arbitration than in federal courts, but again, the majority dismissed this concern, noting that "[i]t is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims." *Id.* at 31. The majority also rejected concerns that NASD arbitrators often fail to issue written opinions, thus depriving Gilmer and similarly situated complainants an opportunity for effective appellate review. Gilmer noted that this also stifles development of the law. *Id.* Finally, Gilmer complained that his agreement resulted from unequal bargaining power. The Court showed little sympathy for this argument, concluding that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at 33.

[182] *See* Bickner, *supra* note 12, at 78.

[183] American Arbitration Association, *Proud Past, Bold Future*, 2000 ANN. REP. 28 (2001). The AAA is a leading ADR service provider in this market.

[184] *See* McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998); O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 356–58 (7th Cir. 1997); Cole v. Burns Int'l. Sec. Servs., 105 F.3d 1465, 1470–72 (D.C. Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 747–48 (5th Cir. 1996); and Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 596–601 (6th Cir. 1995).

Gilmer's loud and clear arbitration signal to employers.

Only the Ninth Circuit Court of Appeals defied this trend.[185] In *Craft v. Campbell Soup Co.*,[186] this court struck at the heart of *Gilmer*. Just as *Gilmer* made policy pronouncements far beyond the disputed legal issue, *Craft*'s majority stretched facts to achieve its own purpose.[187] Its focus was the elastic

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[185] The Ninth Circuit first limited *Gilmer* in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1189–90 (9th Cir. 1998). The court determined that Congress intended, in passing the Civil Right Act of 1991, to preclude an employee's prospective waiver of his or her right to a judicial forum for Title VII claims. Giving a narrow interpretation to provisions in the 1991 law that encouraged arbitration "where appropriate and to the extent authorized by law," the court concluded that Congress intended to prevent an employee from waiving his or her Title VII rights before a dispute arose. *Id.* Shortly after data collection ended for this Article, the Ninth Circuit declared that "[I]n *Circuit City*, the Supreme Court so directly undermined the reasoning behind *Duffield*, that we conclude it has lost its status as valid precedent." E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994, 1002 (9th Cir. 2002). However, even though *Duffield* is no longer good law in the Ninth Circuit, its impact on cases in this study cannot be overlooked.

[186] Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999).

[187] The plaintiff, an employee who was represented by a union, filed a grievance and a lawsuit respectively alleging contractual and statutory violations of non-discrimination duties. *Id.* at 1084. At the labor-management arbitration, "the arbitrator decided that Craft's claims under the [labor agreement] were so intertwined [with state and federal discrimination laws] that the Union had to submit the entire grievance to arbitration or withdraw it." *Id.* at n.2. After Craft pursued the matter in federal district court, Campbell Soup was granted summary judgment on Craft's state law claims; but the court also held that arbitration of Craft's Title VII claims could not be compelled. Thus, Campbell Soup was not allowed to block Craft's race discrimination lawsuit. *Id.* at 1094. By the time the Ninth Circuit decided the employer's appeal, the U.S. Supreme Court had decided Wright v. Universal Maritime Service Corp., 525 U.S. 70, 79 (1998). There, the Supreme Court declined to consider the applicability of the FAA in a case that presented the question whether a general arbitration clause in a collective-bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990. Instead, the *Wright* Court ruled that an employee is entitled to arbitrate and separately litigate a discrimination claim because contract and statutory rights are analytically distinct. *Id.* This reaffirmed the Court's treatment of arbitration arising under collective bargaining agreements in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. West Branch*, 466 U.S. 284 (1984); and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

If it preferred less controversy, the Ninth Circuit could have created the same outcome for Craft by treating him under *Gardner-Denver* and its progeny. This more cautious approach would have entailed the court exercising its jurisdiction under Section 301 of the LMRA. Instead, the Ninth Circuit "*assume[d]* that Campbell Soup's motion for summary judgment was a *de facto* petition under 9 U.S.C. § 4 [the FAA] for an order to compel arbitration ." *Craft*, 177 F.3d at 1084 n.4 (emphasis added). Thus, the Ninth Circuit stretched the facts to treat Craft as though he was a nonunion employee who was forced to sign a

clause in the exclusion section of the FAA—"or any other class of workers engaged in foreign or interstate commerce"—that followed the expressly covered group, "seamen (and) railroad employees."[188]

Craft examined federal regulation of the employment relationship under Congress's commerce powers when the FAA was enacted. Seeing that Congress regulated only a handful of employment relationships—those in the maritime and railroad industries—*Craft* reasoned that when Congress also excluded employment contracts of "workers engaged in foreign or interstate commerce," it meant to exclude the employment agreements of workers whose industries would come under federal regulation in the future.[189] Thus, as post-FAA labor and employment laws—for example, the National Labor Relations Act,[190] Fair Labor Standards Act,[191] Title VII of the 1964 Civil Rights Act,[192] and Americans with Disabilities Act[193]—expanded federal regulation of most private sector employers, the FAA's employment exclusion grew commensurately. By interpreting Section 1's exclusion clause so broadly, *Craft* narrowed *Gilmer* to its

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predispute employment arbitration contract, as was the case with Robert Gilmer.

[188] *Craft*, 177 F.3d. at 1085.

[189] *See id.* at 1086, stating:

> The FAA, however, is not a modern statute. As noted above, the FAA, including §§ 1 and 2, was enacted in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce in the 1930s. Thus, to understand whether Congress intended for the FAA to apply to employment contracts, we need to understand Congress' commerce power in 1925.

The Ninth Circuit then concluded:

> Thus, when Congress drafted the FAA in 1925, the Act did not apply to any labor or employment contracts (citation omitted).... [I]nterstate commerce at the time the FAA was enacted was generally understood to be limited to maritime and railroad transactions. Thus, when Congress excluded employment contracts of maritime and railroad workers, it resulted in voiding the power to enforce arbitration clauses of most employment contracts. With the addition of the catch-all phrase 'or any other class of worker engaged in foreign or interstate commerce,' all employment contracts would have been excluded from thearbitration enforcement power of the FAA .

Id. at 1087 (emphasis omitted) (quoting *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117, 123 (N.D. Miss. 1995)).

[190] National Labor Relations Act of 1935, Ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (2001)).

[191] The Fair Labor Standards Act of 1938, Ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–19 (2001)).

[192] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, codified at 42 U.S.C. §§ 2000e-17 (2001)).

[193] The Americans with Disabilities Act of 1990, Ch. 225, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101, *et. seq.* (2001)).

original work setting—the securities industry.

Thus, the Ninth Circuit decided the broad issue that the Supreme Court reserved in *Gilmer*.[194] In doing so, it went beyond disagreement with other circuits. *Craft* rebelled against *Gilmer* and effectively condemned mandatory employment arbitration.[195] As a consequence, it set a strong new precedent to deny enforcement of arbitration clauses, thus clearing the way to litigate a wide range of employment disputes.[196]

The revolt spread to the California state courts.[197] In a key decision, *Armendariz v. Foundation Health Psychcare Services, Inc.*,[198] the California Supreme Court held that a mandatory employment arbitration agreement was unconscionable,[199] violated the state's public policy against employment discrimination,[200] and unlawfully limited recovery for statutory damages.[201] In finding that the arbitration procedure was an adhesion contract, the California Supreme Court contradicted *Gilmer*'s broad approval of this ADR method.[202]

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[194] *Compare Gilmer*, 500 U.S. at 25 n.2 (stating "it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment"), *and Craft*, 177 F.3d at 1083–84 ("Our jurisdiction therefore hinges on the proper interpretation of [§ 1] of the FAA in relation to employment contracts, which is a question of first impression in our circuit.").

[195] *See 1999 Perspectives*, 10 WORLD ARB. & MEDIATION REP. 19, 27 (Jan. 1999) (offering this strong rebuke: "The appellate court's reasoning on this matter is so obviously strained and distortive that it nearly defies commentary. . . . It is now clear that the Ninth Circuit has drawn the proverbial 'line in the sand. . . . '"); Paul J. Dubow, *Tweaking Arbitration—Can the RUAA Fill the Gaps in the FAA?*, 9 BUS. L. TODAY (Sept./Oct. 1999) at 46 (complaining that "[t]he biggest (and perhaps most surprising) encroachment on the FAA's dominance was made last December by the Ninth Circuit when it decided that the FAA did not apply to employment contracts."); Beth E. Sullivan, Note, The High Cost of Efficiency: Mandatory Arbitration in The Securities Industry, 26 FORDHAM URB. L.J. 311, 339 (1999) (adding "[g]iven that the FAA has long been interpreted as being the most persuasive legal support for mandatory arbitration, the Ninth Circuit's holding can be viewed as a giant step backwards for alternative dispute resolution ('ADR') proponents").

[196] *E.g.*, Circuit City, Inc. v. Banyasz, No. C-01-3106 WHO, C-1-3107 WHO, 2001 WL 1218406, at *3 (N.D. Cal. Oct. 11, 2001); Melton v. Philip Morris, Inc., No. Civ. 01-93-KI, 2001 WL 1105046, at * 3 (D. Or. 2001).

[197] *E.g.*, Gonzalez v. Hughes Aircraft Employees Fed. Credit Union, 83 Cal. Reptr. 2d 763 (Cal. App. 1999), *review dismissed by* 990 P.2d 504 (Cal. 1999).

[198] Armendariz v. Found. Health Psychare Servs., 6 P.3d 669 (Cal. 2000).

[199] *Id.* at 698.

[200] *Id.* at 680–81.

[201] *Id.* at 683.

[202] *See id.* at 690:

> It was imposed on employees as a condition of employment and there was no opportunity to negotiate . . . . [T]he economic pressure exerted by employers on all but

The United States Supreme Court swiftly answered *Craft*'s provocation. By a 5–4 vote in *Circuit City Stores, Inc. v. Adams*, [203] it held that the FAA's exclusion applies only to transportation workers who are employed in interstate commerce.[204] The majority reasoned that if this exclusion was so broad as to cover all employment contracts, there would be no point in its specific reference to maritime and rail workers.[205] They also interpreted the FAA's exclusion in light of its "engaged in commerce" provision.[206] Finally, in a muted response to *Craft*'s broadside of the Court's support for mandatory arbitration, Justice Kennedy blandly answered that a "variable standard for interpreting common, jurisdictional phrases would contradict our earlier cases and bring instability to statutory interpretation."[207]

Circuit City ended serious discussion of whether most individual employment arbitration agreements are enforceable under the FAA. However, this did not flash a constant green light for the enforcement of mandatory arbitration agreements. Departing from its string of pro-arbitration rulings, the Court held that the EEOC is not precluded from suing even if an individual waives her right to sue.[208] More significant, as is shown below, federal courts

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the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.

[203] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[204] *See id.* at 114–15 (stating that "[t]he wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words'").

[205] *Id.*

[206] *See id.* at 115:

> Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction. The application of the rule *ejusdem generis* in this case, however, is in full accord with other sound considerations bearing upon the proper interpretation of the clause. For even if the term 'engaged in commerce' stood alone in § 1, we would not construe the provision to exclude all contracts of employment from the FAA. Congress uses different modifiers to the word 'commerce' in the design and enactment of its statutes. The phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause.

[207] *Id.* at 117.

[208] Equal Employment Opportunity Comm'n v. Waffle House, 534 U.S. 279, 291 (2002). The Court considered whether an employee's agreement to arbitrate disputes with his employer prevented the EEOC from suing the employer on his behalf to obtain victim-specific relief, such as backpay or reinstatement. The Court concluded that the EEOC was not prevented from filing suit or seeking any remedy that would otherwise be available. *Id.*

continue to deny enforcement to mandatory employment arbitration agreements when these contracts create forum barriers for employees or otherwise inhibit pursuit of a claim at arbitration.[209] In short, although it would be reasonable to suppose that federal courts enforce a high percentage of pre-arbitration agreements in response to *Gilmer* and *Circuit City*, the reality is not so predictable.

IV. RESEARCH METHODS

The research literature has been dominated by vocal critics of mandatory arbitration, and a smaller but also strident group of arbitration advocates. Both sides score points with good arguments. Opponents fault employers for controlling too much of the arbitration process to their sole advantage.[210] They contend that structural incentives such as employer selection of neutrals and the repeat-player phenomenon lead to arbitrator bias.[211] Arbitration critics assume that litigation is better than arbitration for vindicating employee rights.

However, a growing body of empirical evidence challenges these assumptions. Although the EEOC has initial jurisdiction of most employment

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[209] *See* Part VII.

[210] *E.g.*, Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479 (2001) (commercial and employment arbitrations involve different power relationships); Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000) (current forms of arbitration involve one party who is more sophisticated than the other in managing the dispute resolution process); Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857 (predispute arbitration agreements are distorted by one party seeking advantage over the other); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination*, 56 WASH. & LEE L. REV. 395 (1999) (employers adopt mandatory arbitration to avoid enforcement of Title VII); and Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036 (1996) (comparing mandatory contracts for employment arbitration to "yellow dog" contracts of a century ago that compelled employees to agree not to join or form a union).

[211] *See* Lisa B. Bingham, *On Repeat Players, Adhesion Contracts, and the Use of Statistics on Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 258–59 (1998); Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining* Alexander v. Gardner-Denver *in the Wake of* Gilmer v. Interstate/Johnson Lane Corp., 1997 BYU L. REV. 591, 619–24 (1997) (discussing the advantages repeat-player employers have when negotiating contracts and later participating in dispute resolution with one-time player employees); Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

discrimination claims, it sues on less than one percent of all complaints.[212] Thus, every year tens of thousands of complaints exit this process with only a right-to-sue letter.[213] But plaintiff lawyers take just five percent of these employment discrimination complaints.[214] For the few complainants who succeed in finding legal representation, their next access problem is the congestion of court dockets.[215] Then, assuming this plaintiff group has the same success as other

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[212] *See* "EEOC Enforcement Statistics and Litigation" for the U.S. Equal Employment Opportunity Commission, *available at* www.eeoc.gov/stats/enforcement.html (last visited Oct. 24, 2002) (noting that the agency received between 72,000 and 91,000 complaints in recent years, but sued on only a tiny fraction of these complaints). *Compare* "Charge Statistics," *id.* at 2 (showing that the agency handled 72,302 complaints in 1992; 87,942 complaints in 1993; 91,189 complaints in 1994; 87,529 complaints in 1995; 77,990 complaints in 1996; 80,680 complaints in 1997; 79,591 complaints in 1998; 77,444 complaints in 1999; 79,896 complaints in 2000; and 80,840 complaints in 2001), *with* "Litigation Statistics," *id.* at 15 (showing that the agency filed 447 lawsuits in 1992; 481 lawsuits in 1993; 425 lawsuits in 1994; 373 lawsuits in 1995; 193 lawsuits in 1996; 338 lawsuits in 1997; 405 lawsuits in 1998; 465 lawsuits in 1999; 329 lawsuits in 2000; and 431 lawsuits in 2001).

[213] *See* 29 C.F.R. § 1601.28(b)(1):

> Where the Commission has found reasonable cause to believe that Title VII or the ADA has been violated, has been unable to obtain voluntary compliance . . . and where the Commission has decided not to bring a civil action against the respondent, it will issue a notice of right to sue on the charge . . . .

[214] A survey of attorneys who represent plaintiffs in employment discrimination disputes found that respondents accepted five percent of the cases in which their legal services were requested. *See* Howard, *supra* note 3, at 44.

[215] *See* Sharon E. Grubin & John M. Walker, Jr., *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 11, 87–88. "[S]ome judges surveyed expressed their belief that the proliferation of small cases involving individual claimants, including employment discrimination cases, clog the federal courts and divert the attention of judges away from larger, more significant civil cases." *Id.* at 153. This judicial report cautioned that "these cases draw heavily on the time of the judiciary. From 1970 to 1989, the number of employment discrimination cases filed in federal courts increased by 2166%, as compared with a 125% increase in the overall civil caseload." *Id.* at n.153.

Another source of pertinent statistics is the annual report of the Administrative Office of the United States Courts. Trends for 1993–1997 appear in the 1997 *Annual Report of the Director*, Table C-2A (Cases Commenced, by Nature of Suit, 1993 Through 1997, at 2, under "Civil Rights" heading), *available at* http://www.uscourts.gov/judicial_business/c2asep97.pdf (noting that lawsuits filed in federal courts varied from 12,962 in 1993; 15,965 in 1994; 19,059 in 1995; 23,152 in 1996; 23,796 in 1997). The most recent reporting appears in the 2001 *Annual Report of the Director*, Table C-2A (Cases Commenced, by Nature of Suit, 1997 Through 2001 at 2, under "Civil Rights" heading), *available at* http://www.uscourts.gov/judbus2001/appendices/c02asep01.pdf, showing that lawsuits filed

civil complainants, less than five percent have their case go to trial and result in a verdict.[216] A typical employment lawsuit takes more than two years to reach this terminal point, and costs the parties over $50,000.[217] Even then, federal appeals courts reverse forty-four percent of cases won by employees.[218] In contrast, complainants in a study of American Arbitration Association cases from 1993–1995 won sixty-three percent of their cases.[219]

While advocacy articles and position papers dominate the current debate over mandatory arbitration, there is a need for more empirical research. Professor Samuel Estreicher set the tone for this research:

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in federal courts ranged from 23,735 in 1998; 22,490 in 1999; 21,032 in 2000; to in 2001, 21,157.

[216] *See* Gauvey, *supra* note 3, at 41 (reporting that the rate of civil cases that go to trial in federal courts has steadily declined (8.4 % in 1975, 4.7 % in 1985, 3.5 % in 1995, and 2.3 % as of June 30, 2000)); *see also* Marika Litras, *Bureau of Justice Statistics Report on Civil Rights, Complaints Filed in U.S. District Courts*, DAILY LAB. REP., No. 14 (Jan. 20, 2000), at E-10, for a study of employment discrimination lawsuits in the federal courts finding that the proportion disposed of by trial declined from nine percent in 1990 to five percent in 1998. This study also found that the median time for processing an employment discrimination case from filing to verdict was eighteen months in 1998. *Id.*

[217] *See* Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 552 (4th Cir. 2001): "[T]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve." *See also* Scheehle v. Justices of Supreme Court of State of Arizona, 257 F.3d 1082 (9th Cir. 2001) for an emerging trend that may promote wider accessibility to low-cost arbitration. The Ninth Circuit found no violation of the Fifth Amendment Takings Clause in Arizona state and county court arbitration rules that require attorneys to serve as arbitrators in civil cases. *Id.* at 1085. Attorneys are required to hear cases two days a year, with their pay capped at $75 per day. *Id.* at 1084.

[218] *See* Jess Bravin, *U.S. Courts Are Tough on Job-Bias Suits*, WALL ST. J., July 16, 2001, at A2. After analyzing nine years of federal trial statistics, Professors Stewart J. Schwab and Theodore Eisenberg concluded that federal appeals courts are less sympathetic to workers who allege job discrimination than they are to almost any other type of plaintiff. Appeals courts reversed victories for plaintiffs in 44 percent of cases, compared to a plaintiff-win reversal rate of only 33 percent for defendants who appealed their losses. Moreover, employee job-bias suits were less likely than other types of suits to win at trial. About 30 percent of the 7575 job-bias suits that were tried resulted in a win for the employee, compared to a plaintiff win rate of 43 percent in all 57,878 civil trials. The authors concluded that "appellate courts have a double standard . . . harshly scrutinizing employee victories at trial while gazing benignly" when an employer wins. Their study used data from the Administrative Office of the U.S. Courts, and included lawsuits brought under federal discrimination laws (*e.g.*, the ADEA, Title VII of the 1964 Civil Rights Act, and the ADA).

[219] Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189, 213 (1997).

> [A]rbitration of employment disputes should be encouraged as an alternative, supplementary mechanism—in addition to administrative agencies and courts—for resolving claims arising under public laws as well as contracts. It is an alternative that offers the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy. Private arbitration will never, and should not, entirely supplant agency or court adjudication. But if properly designed, private arbitration can complement public enforcement and, at the same time, satisfy the public interest objectives of the various statutes governing the employment relationship.[220]

Richard Bales, who produced a case study of a model employment arbitration system, concluded that if this ADR method is designed and implemented carefully, it can benefit all disputants.[221]

We join this empirical inquiry by questioning the widely held assumption that federal courts broadly implement *Gilmer*'s and *Circuit City*'s strong arbitration signals. Since these decisions announce a clear and dominant public policy to enforce mandatory arbitration agreements, one would reasonably expect a very high and uniform percentage of FAA lawsuits across the country to result in court orders enforcing these contracts—thereby diverting disputes from litigation.

Although this reasoning is logical, on closer inspection it is questionable for several cogent reasons. The complainants in *Gilmer* and *Circuit City* were covered by arbitration policies that were carefully designed. In *Gilmer*, the

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[220] Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment*, 72 N.Y.U. L. REV. 1344, 1349 (1997).

[221] *See* RICHARD A. BALES, LABOR AND EMPLOYMENT LAW COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 169 (1997), examining a progressive arbitration system at Brown & Root, a nonunion construction company with 30,000 employees:

> Compulsory employment arbitration offers tremendous benefits to both employers and employees. It can reduce significantly the costs and time involved in resolving disputes. It also provides a forum for adjudicating grievances to employees currently shut out of the litigation system. Finally, it presents an opportunity for parties to resolve their differences in a way that promotes, rather than discourages, maintaining the employment relationship. . . .
>
> Employment arbitration is not a panacea, however, for disputes arising in the nonunionized workplace. The dangers of employer abuse require courts to be vigilant in ensuring that arbitration agreements do not become a vehicle for eliminating employees' legal protections. Nonetheless, given the litigation system's current inability to provide any meaningful forum to so many employees who feel they have suffered legal wrongs in the workplace, compulsory arbitration, properly implemented, can be a significant improvement over litigation.

Id.

arbitration policy and procedures had been in place for over a century[222] and applied in thousands of disputes.[223] Although both systems are maligned, one of their best features is responsiveness to criticism. The NASD system is no longer mandatory,[224] and Circuit City revised its policy to allow individuals to opt-out of the arbitration system.[225] These dispute resolution programs are not free of any more objectionable features, but they are evolving to accommodate employee preferences.

However, as cases from the database we compiled illustrate, mandatory arbitration takes many forms. This implies that *Gilmer* and *Circuit City* are more distinguishable on their facts than is widely assumed. More to the point, some employers overreach in their ADR practices. For example, a janitorial firm implemented an arbitration program that required a low-wage worker to pre-pay several thousand dollars in forum fees.[226] An airport security company had an arbitration program that created cost barriers for an hourly employee.[227]

In short, mandatory arbitration is more varied than critics or proponents acknowledge. Some systems strive to be fair in substance and form by replicating

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[222] *See* GAO, *supra* note 167 (recalling that in 1872, the New York Stock Exchange became the first securities exchange to provide arbitration as an alternative to litigation in resolving disputes).

[223] *See id.* The GAO Report noted that thirty-four discrimination complaints were filed at NYSE between January 1990 and December 1992, from which eighteen resulted in arbitration. Yet, during calendar years 1991 and 1992, NYSE arbitrated a total of 1,110 cases. Among these, 798 involved customer complaints, and 312 were employment cases that did not have a discrimination element (*e.g.*, a pay dispute).

[224] Recently, the NASD voluntarily curtailed the use of compulsory employment arbitration. The Securities and Exchange Commission, on June 29, 1998, approved a proposed rule change offered by the broker group that abolished mandatory arbitration of statutory employment discrimination claims. *See* Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed.Reg. 35,299, 35,303 (June 29, 1998) (rule became effective on Jan 1, 1999). In a separate action, on December 29, 1998, the SEC amended NYSE Rules 347 and 600 "to exclude claims of employment discrimination, including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen." *See* SEC Release No. 34-40858, Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration Rules (January 7, 1999) 64 FR 1051-01, 1999 WL 3315 (F.R.).

[225] *See* Luong v. Circuit City Stores, Inc., No. SACV 00-763 AHS (EEX), 2001 WL 935317 (C.D. Cal. March 28, 2001); Wright v. Circuit City Stores, Inc., 82 F. Supp. 2d 1279 (M.D. Ala. 2000); and Circuit City Stores, Inc. v. E.E.O.C, 1998 WL 743937 (E.D. Va. Oct. 1, 1998).

[226] *See* Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999).

[227] *See* Perez v. Globe Airport Sec. Serv., Inc., 253 F.3d 1280 (11th Cir. 2001).

outcomes that would occur in court.[228] Yet others are so biased as to be judged as "egregiously unfair."[229] Professor Martin Malin astutely noted that *Gilmer* and its progeny created numerous "fallout" issues that are now occupying many lower courts, such as repeat-player bias, discovery, filing deadlines, remedies, and cost allocation.[230] His point was that *Gilmer* approved a wide-ranging dispute resolution system without defining due process safeguards.

Our research provides statistical evidence of how courts are working through these unsettled issues. Making extensive use of Westlaw's online service, we researched all federal court decisions that dealt with mandatory employment arbitration. To generate our sample, we applied the following criteria:

•We used only federal court decisions. Thus, a large number of state court decisions on this subject were excluded.[231]

•The sample included only decisions involving predispute arbitration

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[228] *See* Susanne Craig, *Waddell & Reed Ordered to Pay Most of Damages*, WALL ST. J., June 10, 2002, at C16 (reporting that a New York court confirmed most of a record $27.6 million arbitration award against Waddell & Reed Financial Inc, a mutual fund company. The company was assessed this punitive award by an NASD panel of arbitrators for smearing a broker's reputation before his customers as an outgrowth of an employment dispute.).

[229] *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 936 (4th Cir. 1999). The court refused to enforce a *Gilmer*-type employment arbitration agreement because the dispute resolution system imposed on the complainant by Hooters was "egregiously unfair." *Id.* at 938. The court reasoned: "We hold that the promulgation of so many biased rules—especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties. . . . By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty." *Id.* at 940.

[230] Martin H. Malin, *Privatizing Justice But By How Much? Questions* Gilmer *Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 592 (2001).

[231] *E.g.*, Quigley v. KPMG Peat Marwick, LLP, 749 A.2d 405 (N.J. Super. Ct. App. Div. 2000); Bryant v. Am. Express Fin. Advisors, Inc., 595 N.W. 2d 482 (Iowa 1999); Johnson v. Piper Jaffray, Inc., 515 N.W.2d 752 (Minn. Ct. App. 1994); Armendariz v. Found. Health Psychcare Serv., Inc., 6 P.3d 669 (Cal. 2000); Kindred v. Second Judicial Dist. Ct. *ex rel.* County of Washoe, 996 P.2d 903 (Nev. 2000); Skewes v. Shearson Lehman Bros., 829 P.2d 874 (Kan. 1992); Freeman v. Minolta Bus. Sys., Inc., 699 So. 2d 1182 (La. Ct. App. 1997); Gunby v. Equitable Life Assur. Soc. of U.S., 971 S.W.2d 7 (Tenn. Ct. App. 1997); Pony Express Courier Corp. v. Morris, 921 S.W.2d 817 (Tex. Ct. App. 1996); Lee v. Tech. Integration Group, 82 Cal. Rptr. 2d 387 (Cal. Ct. App. 1999); Spellman v. Sec., Annuities & Ins. Serv., Inc., 8 Cal. App. 4th 452 (Cal. Ct. App. 1992); Rembert v. Ryan's Family Steak Houses, Inc., 235 Mich. Ct. App. 118 (Mich. Ct. App. 1999); Rushton v. Meijer, Inc. *(On Remand)*, 225 Mich. App. 156 (1997); Fletcher v. Kidder, Peabody & Co., Inc., 584 N.Y.S.2d 838 (N.Y. App. Div. 1992).

agreements with individual employees.[232] This excluded many employment discrimination claims asserted by union-represented employees in which the employer contended that these claims should be resolved at arbitration.[233] This approach reflects the Supreme Court's repeated statement that unionized employees may pursue employment claims in arbitration and in court.[234] Since these employees have "two bites at the apple," they do not face the same dilemma of nonunion employees who are compelled to arbitrate their claims. For nonunion workers, court is not an option unless a judge rules otherwise in these FAA cases.

• For a case to be included, a party to a predispute agreement had to oppose arbitration. If an employee voluntarily proceeded to arbitration, and also accepted the outcome of that proceeding, no FAA controversy occurred.[235] While over ninety-five percent of our sample consists of cases involving an employee's initial resistance to arbitration, a few had employees submit their dispute to arbitration and later challenge the arbitrator's award (*i.e.*, ruling). The latter is also an emerging type of challenge to mandatory arbitration.[236]

• Cases that occurred before *Gilmer* were included as long as they involved a predispute mandatory arbitration agreement. Using *Gilmer* as a cutoff would be arbitrary since this was not the first Supreme Court decision to deal with individual employment arbitration.[237] Two small discoveries were made by keeping the time frame open. First, mandatory employment arbitration has a

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[232] An unusual case in the sample involved a union-represented employee. In *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997), a worker who received a kidney transplant claimed that his employer violated his ADA rights. The union did not grieve the matter, believing it should be handled as a lawsuit. The employer sued to compel arbitration, but notably the basis for this employer motion was an individual agreement—apart from the collective bargaining agreement—to arbitrate discrimination claims. Thus, Nelson was like a nonunion employee who signed a mandatory arbitration agreement. We therefore included this case in the sample.

[233] *E.g.*, Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir. 1996).

[234] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974).

[235] See Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999) for another close case in the sample. Here, the plaintiff voluntarily proceeded to arbitrate his claim, without litigating the mandatory arbitration agreement, until a high down-payment requirement prompted him to contest the enforceability of this contract. *Id.* at 1232.

[236] *See generally* Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RESOL. 19 (2001). These cases included *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997); *LaPrade v. Kidder, Peabody & Co.,Inc.*, 94 F. Supp. 2d 2 (D.C. 2000); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).

[237] *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 199 (1956).

longer history than is recognized.[238] Also, in a few cases an *employee* moved to compel arbitration, after the *employer* tried to resist its own mandatory arbitration procedures by suing.[239]

• Cases involving public-sector employment were included, although they were rare. *Boyd v. Town of Hayneville* is an example.[240] An African-American police chief sued after his governmental employer dismissed him.[241] Like the private sector employees in the sample, Boyd was compelled to sign a predispute arbitration agreement.[242]

The sample was generated by using two case finding methods in Westlaw®'s online research service. We began with *Gilmer*, *Circuit City*, and *Green Tree Financial Corp.-Alabama v. Randolph*,[243] and used the "Table of Authorities" and "KeyCite" features to identify previous and subsequent cases associated with these milestones. Other decisions were disregarded because the litigants involved a union, or one corporation suing another, or irrelevant procedural issues.

As cases were included in the sample, they were listed in a roster.[244] The multi-tasking ability of computers simplified this research. As a potential new case was identified during online research, it was checked against a growing roster of data-coded cases on a simultaneously running word processing program. This ensured unduplicated additions to the sample. By June 1, 2002, this methodology produced 396 cases.

We extracted data for seventy-eight variables from each decision. To summarize the main groupings of these variables, we coded data by (a) year of decision, (b) type of employment, (c) demographic characteristics of the employee, (d) type of legal claim asserted by party resisting arbitration (*e.g.*, Title VII race discrimination), (e) legal argument used to resist arbitration (*e.g.*,

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[238] *E.g.*, *Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971) was decided twenty years before the Supreme Court ruled in *Gilmer*.

[239] These cases typically involved an apparently successful stockbroker who accepted employment with a rival firm, prompting the former employer to seek an injunction, notwithstanding the contractual requirement to arbitrate employment disputes. *E.g.*, Legg, Mason & Co. v. Mackall & Coe, Inc., 351 F. Supp. 1367 (D.D.C. 1972).

[240] Boyd v. Town of Hayneville, 144 F. Supp. 2d 1272 (M.D. Ala. 2001).

[241] *Id.* at 1274.

[242] *Id.*

[243] Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79 (2000). Although *Green Tree* involved a mandatory arbitration agreement between a lender and borrower, the issue was identical to one presented in employment cases: whether the cost-allocation provision in a mandatory agreement that shifted forum costs to an individual who claimed inability to pay for arbitration fees abrogated her duty to arbitrate. Since this decision is widely cited by courts that review employment arbitration agreements, we included it in our search.

[244] *See infra* App. I.

arbitration agreement was unenforceable because it was an adhesion contract), (f) party (employee or employer) who prevailed at district and circuit court, (g) district and circuit court ruling, and (h) length of time to litigate this arbitrability dispute.

V. RESEARCH FINDINGS: COMPARISON OF PRE-GILMER, POST-GILMER, AND POST-CIRCUIT CITY DECISIONS

The empirical results presented here answer these questions: (1) Have federal court rulings to enforce predispute arbitration agreements changed over time? This question allows us to assess court behavior over three contemporary periods of Supreme Court regulation. Results for this time analysis are reported in this Part. (2) Among legal challenges to these agreements, which issues have diverted cases from arbitration, thereby opening the door to public adjudication? In Part VI, findings for these legal issues are presented.

To begin, the sample consisted of 396 contemporary federal court decisions. This total was comprised of 297 district and 99 appellate cases. After an initial analysis, thirty-three district and three appellate cases were found to be unusable, yielding samples of 264 district and ninety-six circuit court decisions (Tables 1 and 2, respectively at manuscript pages 301 and 302). Cases were unusable when they were not published as decisions but summarized in the body of an appellate opinion without indicating a district court decision date. Thus, these district cases could not be put in a specific time-frame for analysis. Also, the court ruling variable for a few district and appeals decisions was unusable because the order had nothing to do with compelling or denying arbitration (*e.g.*, a decision on whether to impose sanctions for improper conduct by lawyers).

Tables 1 and 2 subdivide rulings into three critical periods: (a) before *Gilmer* (hereafter, pre-*Gilmer*), (b) after *Gilmer* and before *Circuit City* (hereafter, post-*Gilmer*), and (c) after *Circuit City* (hereafter, post-*Circuit City*).

A. *At the district court level, the lowest rate of judicial enforcement of arbitration agreements occurred before Gilmer.*

In the pre-*Gilmer* period (1954–1991), federal district courts enforced only fifty-one percent of the contested arbitration agreements. Often, the facts and issues in these cases differed from those after *Gilmer*. Many were commission or bonus disputes for stockbrokers.[245] Also, a few cases involved a role reversal.

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[245] *See, e.g.*, Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978); Muh v. Newberger, Loeb & Co., 540 F.2d 970 (9th Cir. 1976); Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 523 F.2d 433 (6th Cir. 1975); Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971); Legg, Mason & Co. v. Mackall & Coe Inc., 351 F. Supp. 1367 (D.D.C. 1992); Fox v. Merrill

Employers sought to escape their own arbitration agreements in favor of litigation when an employee quit to join a competitor.[246] The employer sued to restore the former employment relationship, prevent direct competition, or order the broker not to take clients.[247]

B. *District court enforcement of arbitration agreements substantially increased in the post-*Gilmer *period, but appellate court enforcement dropped sharply.*

Unlike pre-*Gilmer* cases, most of these decisions involved discrimination claims. Although the observation period was much shorter (1991–2001), there were many more cases (among district decisions, 171 compared to 39, and for appellate decisions, 61 compared to 20). While the district court enforcement rate rose from 51 percent to 66 percent, the rate at which courts allowed individuals to proceed with a lawsuit, instead of arbitration, declined only slightly (*e.g.*, district court dismissals of arbitration fell from 31 percent to 28 percent). The gain in the percentage of cases referred by court order to arbitration came from a sharp reduction in partial arbitration rulings. Before *Gilmer* ten percent of district courts denied enforcement of an agreement to arbitrate a federal employment claim, but compelled arbitration of a pendent state claim. However, these mixed rulings comprised only one percent of the post-*Gilmer* sample.

In a remarkable development, appellate courts registered a marked decline in enforcing arbitration agreements. Employees were ordered to arbitrate their disputes in only forty-nine percent of these cases. This was an eleven percent drop compared to pre-*Gilmer* decisions. In apparent disregard for *Gilmer*, appellate courts dismissed almost forty-three percent of employer motions to compel arbitration. This more than doubled the percentage of cases in which appellate courts denied enforcement to predispute arbitration agreements.

Lynch & Co. 453 F. Supp. 561 (S.D.N.Y. 1978); Lewis v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271 (E.D. Pa. 1977).

[246] These cases typically involve an apparently successful stockbroker who accepted employment with a rival firm, prompting the former employer to seek an injunction, notwithstanding a mutual promise to arbitrate employment disputes. *E.g.*, *id*; *see also* Downing v. Merrill, Lynch, Pierce, Fenner, & Smith, Inc., 725 F.2d 192 (2d Cir. 1984).

[247] A recent case involved a different kind of role-reversal. In *UBS PaineWebber Inc. v. Stone*, No. CIV. A. 02-471, 2002 WL 377664 (E.D. La. Mar. 8, 2002), a NASD dealer and employee submitted an employment dispute to mandatory arbitration. Believing that the employee's attorney might testify at the arbitration hearing, and citing professional rules that bar attorneys from testifying in hearings where they are also advocates, UBS PaineWebber sued to disqualify the attorney. The district court denied this motion, stating that federal policy significantly limits judicial intrusion in arbitration proceedings.

C. *District court enforcement of arbitration agreements remained unchanged following Circuit City, while the appellate court enforcement rate rose sharply.*

The post-*Circuit City* sample was smaller due to the shorter measurement period (March 22, 2001–June 1, 2002). Still, this sub-sample contained sixty-nine decisions [fifty-four district and fifteen appellate cases]—over twenty-five percent of the volume for the entire post-*Gilmer* period. District court enforcement was essentially unchanged at sixty-seven percent, while the rate slightly declined for court decisions that allowed employees to proceed with lawsuits (dismissal of arbitration fell from twenty-eight percent to twenty-four percent). In apparent response to *Circuit City*, appellate courts registered a sharp gain in enforcement rulings (from forty-nine percent to seventy-three percent). However, this finding is based on a very small sub-sample of fifteen cases. Three cases (twenty percent) denied arbitration.

D. *Enforcement of arbitration agreements varied widely by federal circuits after Gilmer, without exhibiting a geographic pattern.*

We also analyzed court ruling variation by judicial circuits over the entire period. There is a distinct limitation in this approach, however. Although this analysis examined all decisions from 1954–2002, the number of decisions in some circuits was small. Thus, the following ranking should be viewed with this serious caveat in mind.

CHART 1: District Court Enforcement of Predispute Arbitration Agreements, 1954–2002

(1) Eighth Circuit (77.8% [14 of 18 cases])
(2) Second Circuit (71.6% [53 of 74 cases])
(3) Third Circuit (69.0% [20 of 29 cases])
(4) Sixth Circuit (68.8% [11 of 16 cases])
(5) Ninth Circuit (68.6% [24 of 35 cases])
(6) D.C. Circuit (66.7% [8 of 12 cases])
(7) Seventh Circuit (65.4% [17 of 26 cases])
(8) Fifth Circuit (64.3% [18 of 28 cases])
(9) Eleventh Circuit (61.1% [11 of 18 cases])
(10) Fourth Circuit (47.4% [9 of 19 cases])
(11) First Circuit (44.4% [5 of 9 cases])
(12) Tenth Circuit (30.8% [4 of 13 cases])

In presenting the appellate rankings, we note that some differed from district courts. For example, district courts in the Ninth Circuit ranked in the middle, enforcing arbitration agreements in 68.6% of their decisions. The appeals court sharply deviated from this pattern, however, by enforcing only 38.9% of arbitration agreements. There were also noticeable inconsistencies for district and appellate courts in the Second Circuit (17.8% difference in rate of enforcing arbitration agreements), where the largest number of cases occurred; D.C. Circuit (26.7%difference); Eleventh Circuit (22.2% difference); and Fourth Circuit (15.1%difference).

CHART 2: Appellate Court Enforcement of Predispute Arbitration Agreements, 1955–2002

(1) Eleventh Circuit (83.3%[5 of 6 cases])
(2) Fifth Circuit (75.0% [6 of 8 cases])
(3) Eighth Circuit (66.7% [6 of 9 cases])
(4) Third Circuit (66.7% [4 of 6 cases])
(5) Fourth Circuit (62.5% [5 of 8 cases])
(6) Sixth Circuit (60.0% [3 of 5 cases])
(7) Seventh Circuit (57.1% [4 of 7 cases])
(8) Second Circuit (53.8% [7 of 13 cases])
(9) First Circuit (50.0% [2 of 4 cases])
(10) D.C. Circuit (40.0% [2 of 5 cases])
(11) Ninth Circuit (38.9% [7 of 18 cases])
(12) Tenth Circuit (25.0% [1 of 4 cases])

TABLE 1

Judicial Enforcement of Mandatory Employment Arbitration Agreements
U.S. District Court Decisions (1954–2002)

	Pre-*Gilmer* (N=39)	Post-*Gilmer*/Post-*Circuit City* (N=171)	Pre-*Circuit City* (N=54)
Order Arbitration	20 (51.3%)	113 (66.1%)	36 (66.7%)
Dismiss Arbitration	12 (30.8%)	48 (28.1%)	13 (24.0%)
Mixed Ruling [Component Figures Below]	7 (17.9%)	10 (6.1%)	5 (9.1%)
•Mixed Ruling 1 Dismiss Arbitration of Federal Claim/ Compel Arbitration of State Claim	4 (10.2%)	2 (1.2%)	1 (1.9%)
•Mixed Ruling 2 Dismiss Arbitration of State Claim/ Compel Arbitration of Federal Claim	0	1 (0.6%)	1 (1.9%)
•Mixed Ruling 3 Other Partial Arbitration Ruling	3 (7.7%)	5 (2.9%)	1 (1.9%)
•Mixed Ruling 4 Employer Ordered to Pay Forum Costs While Dispute Is Referred to Arbitration	0	2 (1.2%)	2 (3.7%)

TABLE 2

Judicial Enforcement of Mandatory Employment Arbitration Agreements
U.S. Circuit Court Decisions (1955–2002)

	Pre-*Gilmer* (N=20)	Post-*Gilmer*/Post-*Circuit City* (N=61)	Pre-*Circuit City* (N=15)
Order Arbitration	12 (60.0%)	30 (49.2%)	11 (73.3%)
Dismiss Arbitration	4 (20.0%)	26 (42.6%)	3 (20.0%)
Mixed Ruling [Component Figures Below]	4 (20.0%)	5 (8.1%)	1 (6.7%)
•Mixed Ruling 1 Dismiss Arbitration of Federal Claim/ Compel Arbitration of State Claim	3 (15.0%)	1 (1.6%)	0
•Mixed Ruling 2 Dismiss Arbitration of State Claim/ Compel Arbitration of Federal Claim	1 (5.0%)	0	0
•Mixed Ruling 3 Other Partial Arbitration Ruling	0	3 (4.9%)	1 (6.7%)
•Mixed Ruling 4 Employer Ordered to Pay Forum Costs While Dispute Is Referred to Arbitration	0	1 (1.6%)	0

VI. RESEARCH FINDINGS: COMPARISON OF DECISIONS THAT DENY ARBITRATION BY LEGAL ISSUE

This Part continues analysis of the three periods that are discussed in Part V. However, a new dimension is added: the legal issue associated with court orders to deny enforcement to arbitration agreements. The percentages in Table A and Table B (*infra*, manuscript page 310 and 312) were derived from cases in which

employees persuaded a court not to enforce an arbitration agreement. These tables report results for district and appellate court decisions, respectively.

A. *The two most effective employee issues prior to* Gilmer*—mandatory agreements as adhesion contracts and precluded statutory enforcement of rights—declined in effectiveness after* Gilmer*, but remained potent.*

In pre-*Gilmer* district court decisions, the preclusion argument was highly effective (six of thirteen decisions, or 46.2 percent, denied arbitration when this argument was raised),[248] while the adhesion issue was moderately successful for employees (three of ten, or thirty percent, resulted in an order denying arbitration).[249] These rates fell noticeably in the post-*Gilmer* period, but did not entirely lose their potency. Individuals prevailed on a preclusion argument in eleven of fifty-six decisions (19.6 percent), and in six of thirty-three adhesion cases (18.2 percent). The decline for the adhesion issue appears to have reflected the *Gilmer* majority's admonition that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[250]

Since there are fewer appellate decisions, trends are harder to identify. However, these cases essentially followed district court tendencies. The statutory preclusion argument was successful for employees in two of five decisions (forty percent) before *Gilmer* and remained effective in the post-*Gilmer* period (five of eighteen decisions, or 27.8 percent). However, in contrast to district court results, adhesion arguments were not successful at the appellate level. None was successful before *Gilmer*, and only one in ten favored employees in the post-*Gilmer* period.

B. *The post-*Gilmer *period marked the emergence of successful contract-formation and due process challenges.*

After *Gilmer*, employees raised a cluster of challenges to the process of forming an arbitration agreement, and to the substantive terms of these contracts. They also challenged procedural aspects of convening and conducting the arbitration hearing. To provide useful background for understanding these results, we note that there is no single legislative or judicial source at the federal

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[248] For the best example of this kind of argument, see *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998); *see also infra* note 351 and accompanying text.

[249] *See infra* notes 340–46 and accompanying text.

[250] *Gilmer*, 500 U.S. at 33.

level that regulates arbitration proceedings. Perhaps the most comprehensive treatment of this matter appeared in Judge Harry Edwards' opinion in *Cole v. Burns International Security Services*.[251] Beginning with the *Gilmer* principle that "an employee cannot be required as a condition of employment to waive access to a neutral forum in which statutory employment discrimination claims may be heard,"[252] he extrapolated the following procedural rights for a valid, mandatory arbitration agreement. The contract must (1) provide for neutral arbitrators, (2) allow for more than minimal discovery, (3) require a written award, (4) afford all the types of relief that would otherwise be available in court, and (5) protect employees from unreasonable costs.[253]

For employees, the best argument was that no agreement existed to arbitrate a dispute. This issue was never litigated before *Gilmer*, but was presented to fifty-six district courts in our post-*Gilmer* sample. Table A shows that the issue was effective for employees on eighteen occasions (32.1 percent). Coding for this issue reflected several closely related but distinct arguments. For example, our results here overlapped with all the adhesion cases, since these contracts are unenforceable.

In addition, numerous cases considered whether a mandatory arbitration policy embedded in an employee handbook constituted an enforceable contract. Where a handbook policy demonstrated a detriment to the employer as well as the individual, courts found enough consideration to form a contract.[254] However, where handbook promises were vague,[255] or changeable only by

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[251] Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1470–72 (D.C. Cir. 1997).

[252] *Id.* at 1482.

[253] *Id.*

[254] *E.g.*, Kreimer v. Delta Faucet Co., No. IP99-1507-C-TG, 2000 WL 962817 (S.D. Ind. June 2, 2000). The employee challenged the validity of her arbitration agreement because it was only a policy in a handbook. After the employer sought to enforce this agreement under the FAA, Kreimer argued that she could not be held to it because the policy lacked consideration. In rejecting this contention, the court observed: "Delta Faucet's agreement to pay the expenses and fees of mediation and the entire arbitrator's fee in the event of arbitration, demonstrate a detriment to Delta Faucet that can constitute consideration." *See also* Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997) (holding that the arbitration clause was separate and distinct from the employee handbook and constituted an enforceable contract).

[255] *See* Dumais v. Am. Golf Corp., 150 F. Supp. 2d 1182 (D. N.M. 2001), stating:

> [The court forum] to resolve disputes is a fundamental right that may not be relinquished without consideration. In the case of an arbitration agreement unsupported by consideration, issues surrounding the method of dispute resolution must be clear, unequivocal and apply mutually to both sides before that agreement may be enforced. The alleged arbitration agreement in this case was ambiguous,

employer prerogative,[256] courts ruled these to be illusory agreements. Similarly, some courts found that an agreement was unenforceable because the arbitration procedures were too indefinite—and therefore, illusory.[257] Table B shows that employees were remarkably successful at the appellate level on the issue of whether an agreement existed, prevailing in nine of fifteen cases (post-*Gilmer*, sixty percent).

The waiver issue was another significant development. Barely litigated before *Gilmer*, and scarcely successful (*see* Table A, reporting that only one in seven decisions favored an employee), this issue enabled employees in seven of thirty-two post-*Gilmer* decisions (21.9 percent) to avoid arbitration. This argument was effective when courts used the knowing and voluntary standard. This finding may seem to be at odds with *Gilmer*, insofar as the Court rejected the plaintiff's waiver argument.[258] Recall, however, that the Court was influenced by the fact that Gilmer was an experienced businessman. Many cases in this study presented different fact patterns. Mandatory arbitration quickly spread in the 1990s beyond the securities industry to a wide variety of workplaces, including those with Spanish-speaking,[259] low-wage,[260] poorly educated,[261] and minor workers.[262] Thus, the pattern observed among lower

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> illusory, not mutual, and unsupported by consideration. For these reasons, the alleged arbitration agreement is unenforceable. Plaintiff should not be compelled to arbitrate her claims brought herein.

Id. at 1194.

[256] *See* Trumbull v. Century Mktg. Corp., 12 F. Supp. 2d 683 (N.D. Ohio 1998), stating:

> To give effect to this language and hold that a valid contract exists would be to create a contract where only one party is bound. The plaintiff would be bound by all the terms of the handbook while defendant could simply revoke any term (including the arbitration clause) whenever it desired.

Id. at 686. The court continued: "plaintiff's signing the 'acknowledgment of receipt of handbook' . . . does nothing to make the handbook an enforceable contract. Additionally, there is no evidence of consideration for the alleged arbitration agreement." *Id.*

[257] *E.g.*, Pruett v. Travelers Ins. Co., No. 3:00-CV-422, 2000 WL 33249826 (E.D. Tenn. Oct. 30, 2000).

[258] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

[259] *See* Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937 (S.D. Tex. 2001).

[260] *See* Giordano v. Pep Boys—Manny, Moe & Jack, Inc., No. Civ. A 99-1271, 2001 WL 484360 (E.D. Pa. Mar. 29, 2001) (employee subjected to cost-sharing arrangement earned $400 per week).

[261] *E.g.*, Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) (plaintiffs in sexual harassment suit held only General Equivalency Diplomas).

[262] *Compare* Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985, 997–99 (S.D. Ind. 2001) (explaining that high school-educated employees could not execute a

courts may not reflect so much disagreement with *Gilmer* as it does a change in employees' business sophistication. The waiver issue was even more potent at the appeals court level, where seven of fourteen cases (*see* Table B) were decided in favor of employees in the post-*Gilmer* period.

The cost-allocation issue also changed after *Gilmer*. According to Table A (*see* "Forum Costs Shifted to Employee"), only one case presented the issue before 1991, but forty cases were observed in the post-*Gilmer* period. Eight of these cases (twenty percent) favored employees. Again, the observed change may reflect a new wrinkle since *Gilmer* in predispute employment agreements—inclusion of an aggressive cost-shifting provision that compelled an employee to bear some or all of the expense of an arbitration. Table B shows that the issue was remarkably powerful for employees at appellate courts, where they prevailed in six of ten post-*Gilmer* rulings.

Scope of the arbitration agreement also developed into a moderately fertile issue for employees. Data-coding of this issue covered several distinct arguments. In agreements that derived from handbooks, and applied only to disputes involving arbitration of the employer's rules or policies, some courts held that the scope of the arbitration contract did not include statutory discrimination claims.[263] Alternatively, others ruled that the duty to arbitrate was enforceable only for federal but not state claims.[264] Another scope issue also overlapped with the doctrines of adhesion and illusory contracts—lack of bilateral obligations. This occurred in contracts that subjected a comprehensive list of potential employee legal claims to arbitration, but expressly excluded all potential employer causes of action from a duty to arbitrate.[265] Employees succeeded on fourteen of sixty-five occasions they raised this type of issue (Table A, 21.5 percent). Table B indicates that their success rate doubled to 44.4 percent in eight of eighteen cases at appellate courts.

Adequacy of arbitral remedy was litigated only once before *Gilmer*. However, Table A shows that employees raised the issue in ten district cases and prevailed three times in post-*Gilmer* decisions. This issue took two distinct

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knowing and voluntary waiver), *and* Sheller by Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150, 153 (N.D. Ill. 1997) (rejecting application of the infancy doctrine, thereby denying litigation of sexual harassment claim and enforcing mandatory arbitration agreement entered into by a teenage employee).

[263] *E.g.*, Rudolph v. Alamo Rent-A-Car, Inc., 952 F. Supp. 311, 318 (E.D. Va. 1997).

[264] *E.g.*, DiCrisci v. Lyndon Guar. Bank of N.Y., 807 F. Supp. 947, 953 (W.D.N.Y. 1992) (plaintiff's state claim for punitive damages severed from the other arbitrable claims).

[265] *Compare* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 936 (4th Cir. 1999) (denying enforcement to arbitration agreement), *with* Quinn v. EMC Corp., 109 F. Supp. 2d 681, 687 (S.D. Tex. 2000) (granting enforcement to arbitration agreement).

forms. Some arbitration agreements expressly limited the arbitrator's remedial authority, for example, by curtailing statutory damages that the law permits as a recovery to a successful complainant.[266] Second, some employees challenged the customary practice of many employment arbitrators to deny attorneys' fees to prevailing complainants, a tendency that contrasted with the approach taken by most courts.[267] Some employees prevailed in the award but owed more to their attorneys than their damages were worth, and thus gained nothing from arbitrating—and winning—a meritorious claim.[268]

C. *After* Gilmer, *employees were moderately successful in persuading courts that their arbitration agreement was excluded under Section 1 of the FAA.*

Predictably, the issue reserved in *Gilmer*—interpretation of the FAA's residual phrase in the exclusion clause of Section 1B was widely litigated. In thirty-three district cases, employees prevailed in ten rulings (Table A, 30.3 percent). This statistic is misleading, however, for two reasons. A number of cases involved close calls about whether certain jobs or occupations that are directly connected to interstate transportation are so similar to "seamen" and "railroad employees" as to be excluded under Section 1. These jobs were airline mechanic,[269] technical writer for an airline,[270] car rental agent,[271] and police

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[266] *E.g.*, Johnson v. Circuit City Stores, Inc., 148 F.3d 373, 378 (4th Cir. 1998) (arbitration agreement prevents award of additional damages in a civil rights suit).

[267] *E.g.*, DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459, 470 (S.D.N.Y. 1997) (plaintiff should have been granted attorney's fees as the prevailing party).

[268] *See id.* at 461. An arbitration panel awarded DeGaetano, a sex discrimination complainant, $90,355 in damages and interest, equal to one year of pay, but denied her petition for attorney fees. *Id.* at 461. While this amount was not reported it was probably substantial because the hearing phase of her arbitration took ten days. *Id.* DeGaetano sued to vacate the fee portion of her award, basing her challenge on Title VII's provision for court authority to "allow the prevailing party . . . a reasonable attorney's fee." *Id.* In ruling for DeGaetano, the court observed that "[a]lthough not couched in mandatory terms, this statute establishes a presumptive entitlement to an award of attorney's fees for prevailing parties." *Id.* at 462. Concluding that DeGaetano's award must have been based on a finding of employment discrimination, the court reasoned that she was a prevailing plaintiff under Title VII and therefore entitled to recover attorney fees. *Id.* at 462–63.

[269] *See, e.g.*, Stanley v. Wings Holdings, Inc., No 3-96-1141, 1997 WL 826175 (D. Minn. Sept. 23, 1997) (granting enforcement to arbitration agreement).

[270] *See, e.g.*, Mason v. Northwest Airlines, Inc., No. 1:98-CV-1795-TWT, 1998 WL 953741 (N.D. Ga, Nov. 23, 1998) (denying enforcement to arbitration agreement, reasoning that employee was not contractually engaged in transportation of goods in interstate commerce).

officer for a metropolitan railway that crossed state borders.[272] Second, this result was partly driven by the Ninth Circuit's anomalous ruling in *Craft*,[273] which, in contrast to all other circuits, construed Section 1 expansively. Ninth Circuit rulings after *Craft* excluded a broad range of employment contracts from FAA coverage.[274]

D. *Following* Circuit City, *three employee challenges to arbitration remained effective—whether a contract was formed, or a statute precluded arbitration, or forum costs were improperly shifted to an individual—while FAA exclusion challenges lost much of their potency.*

Circuit City did nothing to slow the employee argument that a contract was unenforceable. In nineteen of these cases, individuals prevailed six times (Table A, 31.6 percent). By itself, this finding suggests judicial resistance to the pro-arbitration signal sent in *Circuit City*. However, on closer inspection, this high figure mostly reflects poor judgment by certain employers. For example, one court ruled that an agreement was unenforceable because the employer used high-pressure tactics to compel employees to sign.[275] The same result was observed where an employer compelled a fast-food worker with annual earnings of $7,000 to sign an agreement that was found to be procedurally and substantively unconscionable.[276]

Cost-shifting remained an effective issue for employees, succeeding in five of twenty-one cases (Table A, "Forum Costs Shifted to Employees," 23.8 percent). Again, however, this reveals more about employer overreaching than judicial resistance to arbitration. An agreement that required a high school

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[271] *See, e.g.*, Rudolph v. Alamo Rent-A-Car, Inc., 952 F. Supp. 311, 314 (E.D. Va. 1997) (denying enforcement to arbitration agreement).

[272] *See, e.g.*, Jones v. Washington Metro. Area Transit Auth., No. Civ. A. 95-2300-LFO, 1997 WL 198114, at *1 (D.D.C. Apr. 10, 1997) (police officer for transit authority is not subject to the FAA because her employer was engaged in interstate transportation by virtue of operating rail lines in Maryland, the District of Columbia, and Virginia).

[273] *Supra* notes 186–88.

[274] *See, e.g.*, Chappel v. Lab. Corp. of Am., 232 F.3d 719, 725 (9th Cir. 2000) (medical lab employee is not subject to FAA); Circuit City Stores, Inc. v. Ahmed, 195 F.3d 1131, 1132 (9th Cir. 1999) (consumer electronics store employee is not subject to FAA); Sussman v. Lenscrafters, No. 98-15156, 1999 WL 402446, at *1 (9th Cir. Jun. 11, 1999) (eye-care employee is not subject to FAA).

[275] *See* Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 382 (S.D.N.Y. 2002).

[276] *See* Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771, 778 (M.D. Tenn. 2002).

restaurant worker to pre-pay forum fees of $2,000 as a condition for having an arbitration was denied enforcement.[277] In another case, an arbitration award was vacated after a local radio announcer was compelled to arbitrate and she was billed $2,600 in forum fees.[278] Still, most courts enforced cost-shifting agreements, even for day-laborers.[279]

The argument that an agreement unlawfully precludes an employee's statutory rights remained resilient, enabling individuals to avoid arbitration in six of twenty cases (Table A, post-*Circuit City*, thirty percent). However, as we explain in more detail below, these employee victories were limited to cases arising under the Ninth Circuit's questionable *Duffield* decision,[280] or a statute that is very specific in providing federal jurisdiction over whistleblower claims.[281] Thus, like the preceding categories, the results for this issue give a misleading impression of its overall potency.

Meanwhile, the direct effect of *Circuit City*'s holding became immediately evident. Table A indicates that only one in seven cases resulted in a ruling that an arbitration agreement was excluded under Section 1 of the FAA. Since this exceptional case involved a worker on a deep sea oil rig in the Gulf Coast, the ruling conformed to *Circuit City*'s view that the FAA's exclusion only applies to workers who are like "seamen."[282]

E. *After* Circuit City, *new procedural issues shortened filing limits, unavailability of class actions, and forum inconvenience—emerged as effective employee challenges to arbitration agreements.*

New issues emerged in the jurisprudence of arbitration agreements, but were derived from too few cases to set a trend. The fact that employees prevailed at least once on each issue signals a possible breakthrough in their efforts to add limits to mandatory arbitration. Some cases show that employers write strict time limits for filing a claim. In two of six cases where these limits were shorter than

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[277] *See* Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985, 997 (S.D. Ind. 2001).

[278] *See* Ball v. SFX Broad. Inc., 165 F. Supp. 2d 230, 240 (N.D.N.Y. 2001).

[279] *See* Adkins v. Labor Ready, Inc., 185 F. Supp. 2d 628, 645–46 (S.D. W.Va. 2001).

[280] *See* E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994, 1002 (9th Cir. 2002) ("Since our *Duffield* decision in 1998, our Sister Circuits as well as the Supreme Courts of California and Nevada have unanimously repudiated its holding . . . *Duffield*, like Bikini Atoll, now sits ignominiously alone waiting remediation.") (citations omitted); Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).

[281] *See* Nguyen v. City of Cleveland, 121 F. Supp. 2d 643, 647 (N.D. Ohio 2000).

[282] *See* Buckley v. Nabors Drilling USA, Inc., 190 F. Supp. 2d 958, 965–66 (S.D. Tex. 2002).

provided by statute, courts ruled for employees (Table A, 33.3 percent).[283] A different case involved a strange time limit. There, the arbitration agreement required an employee to give the CEO notice within ten days of filing a claim or the dispute would be permanently time-barred. In this case of first impression, the Ninth Circuit denied enforcement of the agreement.[284] Inconvenient venue for arbitration[285] and unavailability of class actions[286] were was also litigated with some success for employees.

TABLE A

Issues Associated With Court Orders to Deny Enforcement of Arbitration Agreements
U.S. District Court Decisions (1954–2002)

	Pre-*Gilmer*	Post-*Gilmer*/Post-*Circuit City*	Pre-*Circuit City*
Unlawful Waiver of Right to Sue:	1/7 (14.3%)	7/32 (21.9%)	1/11 (9.1%)
Adhesive Arbitration Agreement:	3/10 (30.0%)	6/33 (18.2%)	2/15 (13.3%)
Agreement Unlawfully Precludes Statute:	6/13 (46.2%)	11/56 (19.6%)	6/20 (30.0%)
Dispute Not Within Scope of Agreement:	2/13 (15.4%)	14/65 (21.5%)	2/9 (22.2%)
No Bargaining Over Agreement:	0/3 (0%)	2/6 (33.3%)	0/1 (0%)
No Employee Choice Over Arbitrator:	0 (0%)	3/8 (37.5%)	0 (0%)
Arbitrator Traits (Older White Males):	0 (0%)	1/3 (33.3%)	0 (0%)

[283] *E.g.*, Louis v. Geneva Enters., Inc., 128 F. Supp. 2d 912, 914, 917 (E.D. Va. 2001) (sixty-day filing limit in arbitration agreement unlawfully conflicts with three year statute of limitations for FLSA claims).

[284] *See* Soltani v. Western & Southern Life Ins. Co., 258 F.3d 1038, 1047 (9th Cir. 2001).

[285] *See* Bailey v. Ameriquest Mortg. Co., No. CIV. 01-545 (JRTFLN) 2002 WL 100391, at *6 (D. Minn. Jan. 28, 2002).

[286] *Id.* at *6–7.

Forum Costs Shifted to Employee:
0/1 (0%) 8/40 (20.0%) 5/21 (23.8%)

No Representation for Employee:
0 (0%) 0 (0%) 0/1 (0%)
No Discovery:
0/1 (0%) 3/6 (50.0%) 0 (0%)
No Written Arbitration Decision:
0 (0%) 0 (0%) 0 (0%)
No Agreement to Arbitrate
0 (0%) 18/56 (32.1%) 6/19 (31.6%)

Shorter Filing Period Than Law:
0/1 (0%) 2/6 (33.3%)
Unavailability of Class Actions:
0/1 (0%) 1/4 (25.0%)
Inconvenient Forum:
0 (0%) 1/3 (33.3%)
Employer Waived Arbitration by Suing:
0 1/1 (100%) 0 (0%)

Inadequate Remedies in Arbitration:
1/1 (100.0%) 3/10 (30.0%) 0/3 (0%)
Arbitration Process Lasts Too Long:
1/1 (100%) 0 (0%)
Right to Jury Precluded by Arbitration:
1/1 (100.0%) 0/2 (0%) 1/1 (100%)
Meaning of Agreement Obscure:
0 (0%) 0/4 (0%) 1/3 (33.3%)

Employee Occupation Not Within FAA:
1/5 (20.0%) 10/33 (30.3%) 1/7 (14.3%)
Dispute Not In FAA's Commerce Clause:
0 (0%) 1/3 (33.3%) 0 (0%)

TABLE B

Issues Associated With Court Orders to Deny Enforcement of Arbitration Agreements
U.S. Circuit Court Decisions (1955–2002)

Pre-*Gilmer*Post-*Gilmer*/Post-*Circuit City*/Pre-*Circuit City*

Unlawful Waiver of Right to Sue:
0/2 (0%) 7/14 (50.0%) 1/1 (100%)
Adhesive Arbitration Agreement:
0/4 (0%) 1/10 (10.0%) 2/2 (100%)
Agreement Unlawfully Precludes Statute:
2/5 (40.0%) 5/18 (27.8%) 0/1 (0%)
Dispute Not Within Scope of Agreement:
1/8 (12.5%) 8/18 (44.4%) 0/3 (0%)

No Bargaining Over Agreement:
0/1 (0%) 1/2 (50.0%) 0 (0%)
No Employee Choice Over Arbitrator:
0 (0%) 1/1 (100%) 0/1 (0%)
Arbitrator Traits (Older White Males):
0 (0%) 1/3 (33.3%) 0 (0%)
Forum Costs Shifted to Employee:
0 (0%) 6/10 (60.0%) 1/3 (33.3%)

Shorter Filing Period Than Law:
0/2 (0%) 1/1 (100%)
Unavailability of Class Actions:
0/1 (0%) 0/1 (0%)
Inconvenient Forum:
0 (0%) 0 (0%)
Employer Waived Arbitration by Suing :
0/1 (0%)

No Representation for Employee:
0 (0%) 0 (0%) 0 (0%)
No Discovery:
0 (0%) 2/3 (66.7%) 0 (0%)

No Written Arbitration Decision:		
0 (0%)	0/1 (0%)	0 (0%)
No Agreement to Arbitrate:		
0 (0%)	9/15 (60.0%)	0/2 (0%)
Inadequate Remedies in Arbitration:		
0/1 (0%)	2/3 (66.7%)	0/1 (0%)
Arbitration Process Lasts Too Long:		
0/1 (0%)	0 (0%)	
Right to Jury Precluded by Arbitration:		
0/1 (0%)	0/1 (0%)	0 (0%)
Meaning of Agreement Obscure:		
0 (0%)	0 (0%)	0 (0%)
Employee Occupation Not Within FAA:		
1/3 (33.3%)	5/11 (45.5%)	2/2 (100%)
Dispute Not In FAA's Commerce Clause:		
0/2 (0%)	1/1 (100%)	0 (0%)

VII. CONCLUSIONS

Our historical research and empirical findings shed new light on mandatory employment arbitration. Courts do not automatically follow the strong and favorable arbitration signals sent by *Gilmer* and *Circuit City*. This is not surprising considering that the Justices were sharply divided in these decisions.[287] *Gilmer*'s pronouncement to lower courts that there is a "liberal policy favoring [enforcement of] arbitration agreements"[288] has confronted the reality that this ADR method requires considerable regulation. The only issue

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[287] A prime example of this rancor appears in Justice Stevens' *Circuit City* dissent, where he asserts that the majority was "[p]laying ostrich to the substantial history" behind the FAA. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 128 (2001). He suggested that his fellow Justices ignored legislative history to usurp the lawmaking functions of Congress:

> A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.

Id. at 133.

[288] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (quoting Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)); *see also supra* note 180.

that has been conclusively decided since *Gilmer* and *Circuit City* is the scope of the FAA's Section 1.[289] Meanwhile, important new issues have emerged and remain unresolved.

Our first conclusion is that federal courts continuously regulate a dispute resolution process that is inadequately addressed by the FAA and Supreme Court precedents.

• One-Sided Obligation to Arbitrate Disputes. *Ferguson v. Countrywide Credit Industries, Inc.*[290] demonstrates that courts increasingly articulate a bilateral duty to arbitrate disputes. The *Ferguson* court refused to enforce an arbitration agreement because it "impose[d] an unfair unilateral obligation on employees to arbitrate their claims against the employer."[291] The agreement required individuals to submit a wide variety of employment disputes to arbitration,[292] but excluded disputes that the employer preferred to litigate.[293] Rejecting this "heads I win, tails you lose" formula, the court concluded:

> Although the agreement purports to create a mutual arbitration obligation, employment disputes likely to be initiated by defendants—such as claims that an employee defaulted on mortgage loan serviced by defendants, unfairly competed with defendants or divulged confidential information—need not be

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[289] *See Circuit City*, 532 U.S. at 105.

[290] Ferguson v. Countrywide Credit Industr., Inc., No. CV 00-13096 AHM, 2001 WL 867103 (C.D. Cal. Apr. 23, 2001).

[291] *Id.* at * 5.

[292] The Agreement required arbitration of:

> claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination or harassment on bases which include but are not limited to race, sex, sexual orientation, religion, national origin, age, marital status, disability or medical condition; claims for benefits . . . , and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy.

Id., at *4.

[293] Under "Claims Not Covered by This Agreement," the contract excluded:

> claims for workers' compensation or unemployment compensation benefits; claims resulting from the default of any obligation of the Company or the Employee under a Mortgage loan which was granted and/or serviced by the Company; claims for injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information; or claims based upon an employee pension or benefit plan that either (1) contains an arbitration or other non-judicial resolution procedure, in which case the provisions of such plan shall apply, or (2) is underwritten by a commercial insurer which decides claims.

Id., at *4.

> arbitrated, whereas most claims likely to be initiated by an employee must be arbitrated. (The arbitration agreement in this case lacks mutuality in this sense because . . . [a]n employee terminated for stealing trade secrets, for example, must arbitrate his or her wrongful termination claim under the agreement while the employer has no corresponding obligation to arbitrate its trade secrets claim against the employee.).[294]

• Shortened Filing Periods. More courts are policing arbitration agreements that provide shorter time limits for filing claims than a corresponding law. In *Chappel v. Laboratory Corp. of America*,[295] an employee's claim for reimbursement of medical expenses under a health benefit plan was denied because the individual did not demand arbitration within sixty days of the plan administrator's unfavorable decision.[296] Thus, the employer attempted to avoid the arbitration procedure it required its employee to use in place of litigation, leaving the individual with neither a trial nor private tribunal. The court, noting that ERISA provides a four-year statute of limitations for an action to recover benefits under a written contract, ruled that the plan administrator breached its fiduciary duty by adopting a mandatory arbitration clause that set a sixty-day time limit in which to demand arbitration.[297] The judge further admonished the employer, stating that

> [i]t would have been a simple matter, when the Plan administrator sent a letter to Chappel notifying him of its denial of his appeal, for the administrator to have notified Chappel in that same letter of the arbitration clause and its required procedures. If the administrator had done that, it would have fulfilled its fiduciary duty to Chappel.[298]

• Unilateral Selection of the Arbitrator. The court in *Penn v. Ryan's Family Steakhouses, Inc.*[299] voided an arbitration agreement because its procedures for selecting an arbitration panel were judged to be biased and unfair. The ADR program utilized a panel of three adjudicators—a "respected attorney" who served as the neutral, a "neutral employee," and "neutral manager."[300] Observing that the system appeared to be impartial, the court probed further and revealed that under the employer's procedures, two of these arbitrators were contractually

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[294] *Id.*, at *5 (citation omitted).

[295] Chappel v. Lab. Corp. of Am., 232 F.3d 719 (9th Cir. 2000).

[296] *Id.* at 723.

[297] *Id.* at 726–27.

[298] *Id.* at 727.

[299] Penn v. Ryan's Family Steakhouses, Inc., 95 F. Supp. 2d 940 (N.D. Ind. 2000).

[300] *Id.* at 947.

linked to the arbitration service provider, a firm named EDS.[301] In evaluating the defense of this procedure, the court characterized the arbitration service provider's

> spin on Article IX to really mean that this third list of potential arbitrators is composed exclusively of EDS-friendly attorneys—attorneys with a huge incentive to favor EDS in the arbitration hearing in order to secure future employment as a name placed on this third list of EDS arbitrators."[302] Seeing this as a conflict-of-interest, the court stated that "all three members of the arbitration panel have an incentive to 'scratch' the back of EDS in the hope that EDS will return the favor in the future.[303]

• Excessive Fee-Shifting to Individual Employees. This has been the most serious and contentious issue since *Gilmer* triggered a surge in mandatory arbitration. The D.C.,[304] Tenth,[305] and Eleventh[306] Circuit Courts of Appeal have

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[301] *Id.* The arbitration service provider, EDS, compiled one list of employee arbitrators. These individuals were also subject to a mandatory arbitration agreement administered by EDS. A similar procedure was used to generate another arbitrator; only these individuals were managers who were also signatories to an EDS-administered arbitration agreement.

[302] *Id.*

[303] *Id.*

[304] *Cole v. Burns Int'l. Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), is a leading decision that articulates a forum substitution theory. A security guard at Union Station in Washington, D.C. was required to sign a mandatory arbitration agreement that provided cost-sharing of arbitration forum fees. While the exact amount of the fee was not pre-determined, the parties stipulated that it would range from $500 to $1000 or more per day. *Id.* at 1480. The court agreed with Cole that this cost sharing provision created an unlawful barrier to a dispute resolution forum. Judge Edwards stated: "Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case." *Id.* at 1484. In his view, since *Gilmer* stated that "arbitration is supposed to be a reasonable substitute for a judicial forum," Congress could not have intended to require employees to arbitrate employment discrimination claims *and* "pay for the services of an arbitrator when they would never be required to pay for a judge in court." *Id.* He enforced the arbitration agreement, but only after dropping its cost-shifting provision and requiring Burns to pay all forum costs. *Id.* at 1485–86.

[305] The employer in *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999), a janitorial firm, imposed an arbitration on employees that required equal cost-sharing of forum fees. *Id.* at 1231–32. After the company sought to compel arbitration of Shankle's race discrimination claim, the employee was informed by the arbitration service that he would have to provide a down-payment of one-half of the anticipated $6,000 cost of arbitration in order to initiate proceedings against the company. *Id.* at 1232. An indignant Tenth Circuit denied enforcement to the entire agreement, stating that although a strong

taken the strongest positions against mandatory cost-shifting provisions, while the First Circuit[307] has taken a contrary tack by continuing to allow cost-shifting in arbitration agreements. The Third,[308] Fourth,[309] Fifth,[310] and Seventh[311]

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national policy favors arbitration, *Gilmer* emphasized:

> [A]rbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition, falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.

Id. at 1234 (citation omitted).

[306] An airport gate security agent signed a predispute employment arbitration agreement that had several cost-shifting provisions in *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1281 (11th Cir. 2001). After Perez filed a sex discrimination lawsuit, Globe moved to compel arbitration of her claim. The court ruled that Globe imposed unlawful cost barriers to arbitration in its mandatory agreement. *Id.* at 1283. The Eleventh Circuit was particularly critical of the arbitration agreement that Globe forced Perez to sign:

> If an employer could rely on the courts to sever an unlawful provision and compel the employee to arbitrate, the employer would have an incentive to include unlawful provisions in its arbitration agreements. Such provisions could deter an unknowledgeable employee from initiating arbitration, even if they would ultimately not be enforced. It would also add an expensive procedural step to prosecuting a claim; the employee would have to request a court to declare a provision unlawful and sever it before initiating arbitration. Including an unlawful provision would cost the employer little, particularly where, as here, the arbitration agreement provides the employee must bear the employer's court costs and attorneys' fees incurred defending the agreement if arbitration is challenged and the employer prevails.

Id. at 1287.

[307] In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 4 (1st Cir. 1999), the First Circuit addressed a sex discrimination plaintiff's claim that the arbitral forum was biased. In this context, the court rejected two arguments that cost was a prohibitive barrier: (1) arbitrators often refuse to award statutory attorneys' fees, and (2) arbitration panels often require complainants to pay some or all of the forum fees. The court said that just because "arbitrators may sometimes do undesirable things in individual cases does not mean the arbitral system is structurally inadequate." *Id.* at 15. The court's point was that NYSE rules do not require arbitrators to order complainants to pay forum fees. Thus, the cost-sharing aspect of Rosenberg's argument failed because "such outcomes [are not] necessary concomitants of the NYSE arbitral system." *Id.* Second, the court reached a preliminary conclusion "that it does not appear to be the usual situation that a plaintiff is asked to bear forum fees." *Id.* Finally, the court stated that "[c]ontrary to Rosenberg's arguments, arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court." *Id.* at 16.

[308] A female employee sued her employer for alleged sexual harassment in *Blair v. Scott Speciality Gases*, 283 F.3d 595, 597 (3d Cir. 2002). She claimed financial inability to pay for arbitration, but did not present specific evidence to support this assertion. The Third Circuit rejected her position that "the mere existence of a fee-splitting provision in an

Circuits have avoided broad policies in preference to fact-specific grounds for

agreement would satisfy the claimant's burden to prove the likelihood of incurring prohibitive costs . . . ." *Id.* at 610. Nevertheless, the court remanded the matter to the district court for further inquiry into Blair's affidavit of her limited financial capacity. The court offered this guidance: "Limited discovery into the rates charged by the AAA and the approximate length of similar arbitration proceedings should adequately establish the costs of arbitration, and give Blair the opportunity to prove . . . that resort to arbitration would deny her a forum to vindicate her statutory rights." *Id.*

[309] *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 550 (4th Cir. 2001) adopted a case-by-case approach to determine whether fee-splitting renders an agreement unenforceable. The court rejected a broad per se rule against all fee-splitting. *Id.* at 556. The Fourth Circuit noted that:

> [The] appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.

Id.

The court found that Bradford failed to prove he was unable to pay or that he was deterred from arbitration since he had initiated arbitration before litigation and proceeded through a full arbitration hearing on the merits of his claim. The court also relied upon evidence that he earned a salary of $115,000 in addition to yearly bonuses prior to his discharge. *Id.* at 558 n.6.

[310] A securities broker was fired in *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 755 (5th Cir. 1999) after he ranked last in sales and owed his employer $29,613 for advances on future commissions and a loan for the purchase of a computer. After Williams sued for age discrimination, the Fifth Circuit ordered him to arbitrate his claim pursuant to NASD rules and a predispute arbitration agreement he had signed. Williams lost his arbitration claim and was ordered to repay his former employer, whereupon he sued to vacate this award. *Id.* at 755–57. One of his contentions was that the award's order that he pay one-half of the forum costs (in this case, his share was $3,150) violated public policy. *Id.* at 764. The Fifth Circuit dismissed this argument, noting that there was "no evidence that the prospect of incurring forum fees hampered or discouraged Williams in the prosecution of his claim." *Id.* at 765.

[311] *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623, 623–24 (7th Cir. 2002), involving an employee's Title VII claim against her employer, did not raise the issue of allocation of direct forum costs. However, it involved the related matter of attorneys' fees. The arbitration agreement prevented McCaskill from ever recovering her attorneys' fees, even if the arbitrator ruled in her favor. *Id.* at 624. This departed from the litigation model in which the judicial norm is to order employers to pay the attorneys' fees of prevailing Title VII plaintiffs. The Seventh Circuit agreed with McCaskill's contention that such an arrangement undermined the deterrent function of Title VII: "The right to attorney's fees therefore is integral to the purposes of the statute and often is central to the ability of persons to seek redress from violations of Title VII." *Id.* at 626. Thus, the agreement was held to be unenforceable. *Id.* at 627.

denying enforcement to agreements that shift forum costs to employees.

• Statutory preclusion of predispute arbitration agreements. Although *Gilmer* broadly stated a principle against statutory preclusion of mandatory arbitration agreements, courts have found ways around this principle. This has been especially true in discrimination cases that rely upon the Civil Rights Act of 1991. The Ninth Circuit held that this law precludes compulsory arbitration of employee claims.[312] It is important to note, however, that no other appellate court has joined the Ninth Circuit in this ruling.[313]

The False Claims Act—federal law protecting employees from retaliatory discharge when they "blow the whistle" to protect U.S. governmental interests from fraud or similar harm—has been held to preclude mandatory arbitration.[314] This law differs from others by specifying that federal courts have jurisdiction of these claims,[315] and must follow detailed remedial procedures if they find evidence of whistle-blowing retaliation.[316] However, at least two courts have made conflicting rulings, finding that the False Claims Act does not expressly preclude the use of mandatory employment arbitration.[317]

• Inconvenient forum. In addition to specifying the arbitral forum, mandatory agreements increasingly specify the hearing location. Courts are divided on

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[312] *See* Duffield v. Robertson, Stephens & Co., 144 F.3d 1182, 1202 (9th Cir. 1998).

[313] *See* Borg-Warner Protective Servs. Corp. v. E.E.O.C., 245 F.3d 831, 835 (D.C. Cir. 2001) ("The Ninth Circuit is the only court of appeals to hold that Title VII disputes cannot be made subject to compulsory arbitration agreements.").

[314] *See* Nguyen v. City of Cleveland, 121 F. Supp. 2d 643, 647 (N.D. Ohio 2000) (explaining that "given the policies of the FCA, an employee who brings a claim against his employers as relator on behalf of the federal government should not be forced by unequal bargaining power to accept a forum demanded as a condition of employment by the very party on which he informed").

[315] *See* 31 U.S.C. § 3730(h) (2000) (providing that "[a]n employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection").

[316] *See id.* stating:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 [sic]times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

[317] *See* Orcutt v. Kettering Radiologists, Inc., 199 F. Supp. 2d 746, 746 (S.D. Ohio 2002); United States *ex rel.* Mikes v. Straus, 897 F. Supp. 805, 806 (S.D.N.Y. 1995).

agreements that require individuals to travel long distances at considerable personal expense.[318] Also, at least one situs provision backfired on an employer, resulting in an arbitration it wanted to avoid.[319]

• Unavailability of class action relief. Arbitration agreements that deny class action relief appear to be an increasing subject of litigation, especially when the substantive claim involves the Fair Labor Standards Act (FLSA). A majority of courts conclude that this does not impair the rights of employees.[320] These courts rely heavily upon a single sentence in *Gilmer*'s expansive dicta: "[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."[321] However, since FLSA and the ADEA claims in *Gilmer* are fundamentally different,[322] this analogy is questionable. One type of FLSA violation—where employers short-change wages to many employees in

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[318] *Compare* Klinedinst v. Tiger Drylac U.S.A., Inc., No. 2001 DNH212, 2001 WL 1561821, at *15 (D.N.H. Nov. 28, 2001) (ordering arbitration where New Hampshire individual who earned $23,000 annually was compelled to arbitrate claim in San Bernadino County, California, and where the agreement also required each party to bear own arbitration expenses), *and* Poole v. L.S. Holding, Inc., No. 2001-57, 2001 WL 1223748 (D.V.I. Aug. 20, 2001) (rejecting contention by Virgin Islands employee that Massachusetts is a prohibitively expensive venue to arbitrate claim), *with* Bailey v. Ameriquest Mortg. Co., No. 145 Lab. Cas. P 34,473, No. Civ. 01-454 (JRTFLN), 2002 WL 100391, at *1 (D. Minn. Jan. 23, 2002) (holding agreement to compel Minnesota employees to arbitrate claims in California to be unenforceable).

[319] *E.g.*, Becker v. DPC Acquisition Group, No. 00 Civ. 1035 WK, 2001 WL 246385, at *1 (S.D.N.Y. Mar. 13, 2001) (holding employment agreement that required arbitration in New York to be enforceable against Brazilian joint-employer who contended that cost and lack of contact in jurisdiction should result in transfer of venue).

[320] *E.g.*, Adkins v. Labor Ready, Inc., 185 F. Supp. 2d 628, 645–46 (S.D.W.Va. 2001) ("There is no language in the FLSA which expressly prohibits an individual from contractually waiving his right to assert FLSA claims via a class action mechanism."); Horenstein v. Mortg. Market, Inc., 9 Fed. Appx. 618 (9th Cir. 2001) ("Appellants' contention that the arbitration clause in the Employment Agreements may not be enforced because it eliminates their statutory right to a collective action, is insufficient to render an arbitration clause unenforceable."); Marzek v. Mori Milk & Ice Cream Co., No. 01 C 6561, 2002 WL 226761, *3 (N.D. Ill. Feb. 13, 2002) ("[P]laintiff has given no reason for why the arbitration agreement he signed should not be accorded the same consideration as the agreement in *Gilmer*.").

[321] *Gilmer*, 500 U.S. at 32 (quoting from a dissenting opinion in Nicholson v. CPC Int'l., Inc., 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)).

[322] The FLSA specifically provides for class actions "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (2000).

amounts too small to matter to individuals[323]—is not comparable to an ADEA claim because underpayment can be measured in dollars and cents, while discrimination cannot be quantified so precisely. Perceiving this difference, a recent court refused to enforce an agreement that bars class relief.[324]

• Termination for not agreeing to arbitrate a claim. Almost all of the cases in our sample involved individuals who contested mandatory arbitration agreements after they signed such an agreement, or after a unilateral policy became effective. However, in *Weeks v. Harden Mfg. Corp.*, an employer issued a new handbook that required all employees to arbitrate workplace disputes as a condition of continued employment.[325] When a group of employees refused to agree to the new arbitration policy, the company fired them solely for this reason.[326] In suing to challenge their terminations, the former employees relied upon the EEOC's policy that prohibits terminations for failure to sign an arbitration agreement.[327]

In a case of first impression, the district court found that although the arbitration provision may have been lawful, the plaintiffs reasonably believed that the arbitration provision was unenforceable.[328] Thus, the court held that discharge of the plaintiffs constituted actionable retaliation under Title VII, the

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[323] *See* Landaas v. Canister Co., 188 F.2d 768, 771 (3d Cir. 1951). The court rejected the employer's argument for application of the maxim, *de minimis non curat lex*, to employees' claims for overtime compensation. With individual claims ranging from $21.67 to $256.88 over a three year period, the contested amount of daily underpayment was extremely small. Nevertheless, the Third Circuit concluded:

> The employer gets encouragement from certain words about trivial delays in the portal-to-portal case discussions. We think there is nothing to this point. It has been said that the maxim *de minimus* does not apply to money demands. . . . The consideration of plaintiffs' claims does not take the court into the realm of the picayune or hypertechnical.

Id. at 771.

[324] *See* Bailey v. Ameriquest Mortg. Co., No. Civ. 01-545 (JRTFLN), 2002 WL 100391, at *1 (D.Minn. Jan. 23, 2002) (concluding that "the deprivation of procedural rights guaranteed by Congress can have a real and detrimental impact on an individual's ability to effectively vindicate his or her substantive statutory rights"). *Id.* at *6. Noting that plaintiffs' ability to pursue class action relief was especially important in this case, the court continued: "As plaintiffs emphasize, the size of each individual plaintiff's claim for overtime wages is relatively small. Absent the procedural safeguards guaranteed by Congress, most, if not all, the plaintiffs will likely forego pursuing their claims." *Id.*

[325] Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1310 (11th Cir. 2002).

[326] *Id.*

[327] *See id.* at 1311 (citing E.E.O.C. Notice No. 915.002, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (July 10, 1997) (*available at* 1997 WL 33159163)).

[328] *Id.* at 1311.

ADA, and ADEA.[329] The Eleventh Circuit reversed this ruling, however, by reasoning that the employees could not have had an objective belief that predispute employment arbitration agreements are unenforceable.[330] Noting that "[a]lthough previously disfavored by the courts, arbitration agreements to resolve disputes between parties have now received near universal approval,"[331] the appellate court concluded:

> We see no reason to depart from our own precedent, the mandate of the Supreme Court, and the holdings of almost every other circuit to find that compulsory arbitration agreements constitute an unlawful employment practice. We are not persuaded that the plaintiffs in this case could have "reasonably believed" that such agreements were an unlawful employment practice at the time they refused to agree to the policy in 1999.[332]

This case has important implications for mandatory employment arbitration. No other case in this study's large sample involved an employer action of this magnitude. The closest comparison is *Desiderio v. National Association of Securities Dealers.*[333] Suntrust Bank offered to hire Susan Desiderio on the condition that she sign a predispute arbitration agreement.[334] When she stated she would work only if the mandatory arbitration clause was removed, the NASD informed her prospective employer, Suntrust Bank, that she could not work as a registered securities broker.[335] Suntrust then revoked its offer of employment.[336]

In *Harden* the employer went further by ending an established employment relationship. It is also distinct from cases in which an employer unilaterally adopted an arbitration policy and made it a contractual term and condition of employment by inserting it in an employee handbook. In some cases, the employee signed reluctantly,[337] or the policy was implemented without requiring individual assent.[338] It is also important to note that *Harden* conflicts with

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[329] *See id.* at 1311.

[330] *Id.* at 1315.

[331] *Id.* at 1312.

[332] *Id.* at 1315.

[333] Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198 (2d Cir. 1999).

[334] *Id.* at 200.

[335] *See id.*

[336] *Id.*

[337] *E.g.*, Kreimer v. Delta Faucet Co., No. IP99-1507-C-TG, 2000 WL 962817, at *1 (S.D.Ind. June 2, 2000); Nghiem v. NEC Electronic, Inc., 25 F.3d 1437 (9th Cir. 1994).

[338] *E.g.*, Dumais v. Am. Golf Corp., 150 F. Supp. 2d 1182, 1192 (D.N.M. 2001) (plaintiff asserted that she never received a copy of the employee handbook, which included

rulings stating that employees do not knowingly agree to arbitrate employment discrimination claims when they sign an acknowledgment in an employee handbook.[339]

• Procedural Unconscionability. More courts are examining the conditions under which employees are compelled to enter into arbitration agreements. Where employers engage in blatant coercion, such as limiting individuals to fifteen minutes to read and sign an agreement,[340] or requiring Spanish-speaking workers to sign agreements only written in English,[341] courts have denied or curtailed enforcement of predispute arbitration agreements. Questions have begun to arise, too, concerning the authenticity of employee signatures on predispute arbitration agreements.[342]

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a provision for mandatory arbitration); McClendon v. Sherwin Williams, Inc., 70 F. Supp. 2d 940, 943 (E.D. Ark. 1999) ("Plaintiff accepted the PRP by choosing to remain an employee with Sherwin-Williams after having received the employee handbook and by continuing to stay on the job.").

[339] *See* Kummetz v. Tech Mold, Inc., 152 F.3d 1153, 1155 (9th Cir. 1998). The employer issued an "Information Booklet and an Information Booklet Acknowledgment," which the employee signed. *Id.* at 1154. The acknowledgment declared that: "I understand and agree that I am covered by and must abide by the contents of this Booklet. I also understand and agree that this Booklet in no way constitutes an employment contract and that I remain an at-will employee . . . ." *Id.* The Booklet also noted that the policies, practices and benefits set forth in it were subject to change at any time and without prior notice at the sole and unlimited discretion of the Company. *Id.* Although the Booklet contained a mandatory arbitration provision, the employee acknowledgment did not specifically refer to it. *Id.*

[340] *See* Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 383 (S.D.N.Y. 2002) (reporting that when the company's lawyer addressed employees he "used high pressure tactics to coerce the employees into signing the Agreement," by giving the employees "no more than fifteen minutes to review a sixteen-page single-spaced document, and never mention[ing] or suggest[ing] that the employees could review the Agreement at home or with an attorney").

[341] *See* Prevot v. Phillips, 133 F. Supp. 2d 937, 940 (S.D.Tex. 2001):

> The arbitration agreements were written in English. Plaintiffs testify in sworn affidavits presented to the Court that they could not read English at the time that they signed the arbitration agreement. The affidavits also state that the documents were not translated for them and that they did not know the nature of the agreement into which they were entering. According to Plaintiffs, their superiors told them not to worry about it and to quickly sign the documents so they could get back to work.

[342] *See* Prevost v. Burns Intern. Sec. Servs. Corp., 126 F. Supp. 2d 439, 441–42 (S.D.Tex. 2000) (noting that an agreement cannot exist without a valid employee signature; and seeing preliminary evidence that employee's signature did not match signature on arbitration agreement, the court ordered hearing to determine validity of employee signature); and Alcaraz v. Avnet, Inc., 933 F. Supp. 1025, 1026 n.2 (D.N.M. 1996) ("Plaintiff claims that he has never seen the original arbitration agreement and . . . in the

• Substantive Unconscionability. An unlikely source, the Fourth Circuit Court of Appeals, decided the leading case on substantive unconscionability.[343] The *Hooters* court concluded that the employer's rules, which included unilateral selection of the arbitrator, were "so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith," and found that the only possible purpose of these rules was "to undermine the neutrality of the proceeding."[344] In a stinging rebuke, Judge Wilkinson said:

> We hold that the promulgation of so many biased rules—especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties. The parties agreed to submit their claims to arbitration—a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.[345]

A growing number of courts have reached similar conclusions.[346]

• Timing of Arbitration Hearing. It is no longer an axiom that arbitration hearings convene sooner and take less time than trials. In one case, an employee sued to abrogate his duty to arbitrate an employment contract claim, and thereby pursue his complaint in court, after the arbitration process ran three years without reaching a conclusion.[347] The court was sympathetic to his argument but

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past, Avnet has forged his signature on a company document; therefore, he is hesitant to concede to the authenticity of his signature on the Agreement.").

[343] *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 941 (4th Cir.1999).

[344] *Id.* at 938.

[345] *Id.* at 940.

[346] *E.g.*, Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771, 780 (M.D. Tenn. 2002):

> [T]he agreement was still drafted by KFC, and imposed on a prospective employee precisely at the time that he or she is most willing to sign anything just to get a job. Although the KFC Arbitration Agreement binds both parties, only the Defendant is aware of the ramifications of the agreement[.]

See also, e.g., Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 384 (S.D.N.Y. 2002) ("[T]he EDRP is unreasonably favorable to Bally because . . . its terms allow Bally to unilaterally modify the contract at any time, thus binding employees to a contract they may never have seen."); Geiger v. Ryan's Family Steakhouses, Inc., 134 F. Supp. 2d 985, 999 (S.D.Ind. 2001) (one-sided arbitration agreement with employees holding only a high school diploma is unconscionable).

[347] *See* Folse v. Richard Wolf Med. Instruments Corp., 56 F.3d 603, 606 (5th Cir. 1995).

compelled him to continue with the arbitration.[348] Timing can also be intertwined with other issues. A requirement that a claim be presented at an arbitration hearing within one year, or forever be time-barred, was held not to be unconscionable even though the individual contended that a hearing might be delayed beyond the deadline for reasons outside of her control.[349] A case that took six years and seventy-four hearings to arbitrate raised a different time issue—an employee's ability to pay her share of very large forum costs.[350]

Our second conclusion is that federal courts are mostly inclined to permit employers to unilaterally impose or require their employees to forgo litigation of employment disputes, and to refer these matters to arbitration. Nevertheless, we find surprising evidence of judicial resistance to these mandatory arrangements, even after *Circuit City* reinforced *Gilmer*'s unambiguous signal to courts to enforce these agreements. Courts denied enforcement to these contracts in about thirty percent of all litigated cases since *Gilmer*, with only slight fluctuation after *Circuit City*.

Before these results are misinterpreted by others to mean that courts are hostile to mandatory employment arbitration, we offer four empirically grounded conclusions to account for the apparent anomaly revealed in our results.

First, note that this study does more than measure judicial behavior. It also measures employer conduct in devising and administering mandatory arbitration procedures. After reading nearly 400 of these decisions, we believe that some employers in the post-*Gilmer* period are testing the limits of self-advantage that can be written into a mandatory arbitration agreement. They do not appear to be content to have a basic predispute arbitration agreement that substitutes the arbitral forum for court. Instead, they formulate such self-serving provisions that the observer would be justified in concluding that the drafter's intent was to provoke litigation. Examples include requiring employees around the nation to arbitrate in a particular California county, requiring exorbitant pre-payment of arbitration services, providing for the employer's unilateral selection of the arbitrator, or subjecting all employee claims to arbitration but expressly preserving litigation as an option for all employer claims against employees. These are matters that neither *Gilmer* nor *Circuit City* confronted in concrete terms or even imagined in a hypothetical scenario. In sum, we believe much

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[348] *Id.* (stating "the arbitration of this dispute should have never reached this point in time . . . . And, it is more than unfortunate that the arbitration process, designed to resolve disputes in a timely and cost-efficient manner, has failed the expectations of at least one, if not both, of the parties" and continuing "[n]onetheless, our directive in this case is clear: these facts do not permit us to intervene until the parties see this arbitration through to a final award.").

[349] *See* Farac v. Permanente Med. Group, 186 F. Supp. 2d 1042, 1047 (N.D. Cal. 2002).

[350] *See* LaPrade v. Kidder, Peabody & Co., 94 F. Supp. 2d 2, 8 (D.D.C. 2000).

higher rates of judicial enforcement would be observed if employers did not include such red flag provisions in mandatory agreements.

Second, the anomalous post-*Gilmer* and post-*Circuit City* figures are partly attributable to the Ninth Circuit's running battle with the Supreme Court. Courts in that circuit continue to ascribe vitality to *Duffield*,[351] even when others outside the circuit recognize that *Circuit City* effectively repudiated that decision.[352] Adding to this obstinacy, in the brief time since *Circuit City* stated that the doctrine of *ejusdem generis* must be used to construe the FAA's exclusion section, the Ninth Circuit has ruled that a package delivery driver is just like a seaman or railroad worker.[353] One might say that if an employee uses any

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[351] *See* Circuit City Inc. v. Banyasz, No. C-01-3106 WHD, 2001 WL 1218406, at * 3 (N.D. Cal. Oct. 11, 2001) ("*Duffield* remains controlling authority in the Ninth Circuit despite the United States Supreme Court's recent decision in *Circuit City Stores, Inc. v. Adams*."); Melton v. Philip Morris, Inc., No. Civ. 01-93 KI, 2001 WL 1105046, at * 3 (D. Or. Aug. 9, 2001) ("Until the Ninth Circuit makes this determination, and because nothing in *Circuit City* addresses the statutory basis for *Duffield* or its holding, I apply *Duffield* and the relevant body of law to this case."); Ferguson v. Countrywide Credit Undus. Inc., No. CV 00-13096 AHM, 2001 WL 867103, at *2 (C.D. Cal. Apr. 23, 2001):

> The fact that the *Circuit City* Court quoted with approval language from *Gilmer* . . . does not alter the analysis; *Duffield* itself expressly acknowledged and distinguished *Gilmer*. Moreover, defendants' emphasis on the fact that the Ninth Circuit is alone in holding Title VII claims to be immune from compulsory arbitration is misplaced; this Court is indisputably bound by Ninth Circuit precedent, whether it is buttressed by other Circuits or not.

But see Farac v. Permanente Med. Group, 186 F. Supp. 2d 1042, 1045 (N.D. Cal. 2002); Scott v. Burns Intern. Sec. Services, Inc., 165 F. Supp. 2d 1133, 1137–38 (D. Haw. 2001).

[352] *See* Borg-Warner Protective Servs. Corp. v. E.E.O.C., 245 F.3d 831, 835 (D.C. Cir. 2001) ("The Ninth Circuit is the only court of appeals to hold that Title VII disputes cannot be made subject to compulsory arbitration agreements."); Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1315 (11th Cir. 2002) ("We see no reason to depart from our own precedent, the mandate of the Supreme Court, and the holdings of almost every other circuit to find that compulsory arbitration agreements constitute an unlawful employment practice."); Meyer v. Starwood Hotels & Resorts Worldwide, Inc., No. 00 CIV. 8339 (JSR), 2001 WL 396447, at *1 n.1 (S.D.N.Y. Apr. 18, 2001) ("*Duffield*, if followed here, would preclude arbitration . . . . This Court, however, agrees with the courts of the Third and Fifth Circuits . . . who have expressly rejected *Duffield* and found the OWBPA's requirements to apply only to waivers of substantive rights under the ADEA . . . ."); Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771, 775 (M.D. Tenn. 2002) ("[T]he Sixth Circuit has held that the employees may be required, as a condition of employment, to waive their right to bring future Title VII claims in court . . . . Almost every other Circuit to consider this issue has agreed with the Sixth Circuit." (isolating *Duffield* in n.2 as the only exception)).

[353] *See* Harden v. Roadway Package Systems, Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) ("As a delivery driver for RPS, Harden contracted to deliver packages 'throughout the

mechanical conveyance while at work anywhere in the Ninth Circuit, her arbitration agreement is excluded under the FAA.

Third, mandatory employment arbitration agreements arouse suspicion in some judges. In contrast, there is much less controversy over labor arbitration. This institution grows out of collective bargaining agreements entered into by labor unions and employers. The Supreme Court praised labor arbitration unambiguously in the *Steelworkers Trilogy*.[354] Interestingly, this method is nearly identical to individual employment arbitration, except that it is voluntarily agreed upon by the parties and is also understood to be limited to matters of contract application and interpretation. It is therefore much less problematical for judges.[355]

Individual employment arbitration differs on one or both of the following dimensions: (1) the arbitrator has authority to make an adjudicatory ruling on a statutory right, as distinguished from a private contractual right, and (2) one of the disputants imposes this process on the other. Fifty years ago, in a securities case that presented both of these dimensions, the Supreme Court disapproved the use of arbitration.[356] Since then, the Court has changed its view, but not without liberal and conservative Justices expressing serious reservations about the private adjudication of public rights.[357] Mandatory employment arbitration falls in this

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United States, with connecting international service.' Thus, he engaged in interstate commerce that is exempt from the FAA.").

[354] *See Steelworkers Trilogy*, *supra* note 15.

[355] *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (noting that the arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept . . . . He is rather part of a system of self-government created by and confined to the parties.") (quoting Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1995)). In this vein, "[t]he labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." *Id.* at 582.

[356] *See* Wilko v. Swan, 346 U.S. 427, 438 (1953). The Court held that a predispute agreement to arbitrate claims that arise under § 12(2) of the Securities Act of 1933 was not enforceable. *Id.* Relying upon § 14 of the Securities Act of 1933, which declares "void" any "stipulation" waiving compliance with any "provision" of the Securities Act, the Court found that an agreement to arbitrate amounted to a stipulation that waived the right to seek a judicial remedy. *Id.* at 436, 438. The Court reached a turning point twenty years later when, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515 (1974), the Court took a different approach in addressing a claim that arose under § 10(b) of the Securities Exchange Act of 1934 because the provisions of the 1934 Act differs so much from the 1933 Act.

[357] *See* Allied Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting) ("I . . . stand ready to join four other Justices in overruling . . . *Southland*"); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Blackmun, J.,

pattern, insofar as it entails involuntary agreements to privately adjudicate statutory rights. Thus, it is like these other uses of arbitration, where a strong economic actor steers unwilling individuals away from court.[358] The concerns

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dissenting):

> [I]n light of today's decision compelling the enforcement of predispute arbitration agreements, it is likely that investors will be inclined, more than ever, to bring complaints to federal courts that arbitrators were partial or acted in 'manifest disregard' of the securities laws. . . . It is thus ironic that the Court's decision, no doubt animated by its desire to rid the federal courts of these suits, actually may *increase* litigation about arbitration.

See also Mitsubishi Motors Corp. v. Soler-Chrystler Plymouth, Inc., 473 U.S. 614, 647 (1985) (Stevens, J., dissenting):

> But this is the first time the Court has considered the question whether a standard arbitration clause referring to claims arising out of or relating to a contract should be construed to cover statutory claims that have only an indirect relationship to the contract. In my opinion, neither the Congress that enacted the Arbitration Act in 1925, nor the many parties who have agreed to such standard clauses, could have anticipated the Court's answer to that question.

Southland Corp. v. Keating, 465 U.S. 1, 36 (1984) (O'Connor, J., dissenting) ("Although arbitration is a worthy alternative to litigation, today's exercise in judicial revisionism goes too far."); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 30 (1983) (Rehnquist, J., dissenting) ("In its zeal to provide arbitration for a party it thinks deserving, the Court has made an exception to established rules of procedure."); *Scherk*, 417 U.S. at 529 (Douglas, J., dissenting) ("The arbitration clause could appear in the fine print of a form contract, and still be sufficient to preclude recourse to our courts, forcing the defrauded citizen to arbitration in Paris to vindicate his rights.").

[358] *Compare* Chief Judge Bennett's manifesto in *Hoffman v. Cargill, Inc.*, 142 F. Supp. 2d 1117, 1117–18 (N.D. Iowa 2001) (citing *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462–63 (8th Cir. 2001), involving a mandatory arbitration agreement imposed by a multi-billion dollar food processor on an individual farmer:

> This matter comes before me pursuant to reversal by the Eighth Circuit Court of Appeals . . . . In the August 2, 1999, decision, I concluded, *inter alia*, that Hoffman had established that the arbitration award was "completely irrational" and that the arbitration proceedings under the NGFA arbitration rules were not "fundamentally fair." Therefore, I denied Cargill's motion to confirm the arbitration award and instead granted Hoffman's motion to vacate the award. However, the Eighth Circuit Court of Appeals reversed my decision and remanded with instructions to confirm the arbitration panel's award favoring Cargill . . . . I will, of course, unflinchingly follow the mandate of the Eighth Circuit Court of Appeals in this case. However, as George Bernard Shaw once wrote, "All great truths begin as blasphemies." I believe that among the things lost in the decision of the Eighth Circuit Court of Appeals are fundamental fairness and legal principles concerning adhesion contracts in a case involving arbitration between an individual farmer and one of the largest grain dealers in the world. If anyone thinks that Mark Hoffman had any possible hope of negotiating the arbitration clause out of hisboilerplate agreement with Cargill, then that person lives in a world different from

expressed by Justices of every ideological stripe in these other forms of mandatory arbitration were reflected in our sample.[359] This, in turn, lowered the enforcement rate of these arbitration agreements.

Finally—and most important—the evidence of judicial resistance we observed following *Gilmer* and *Circuit City* is consistent with court behavior dating to the nineteenth century, and even earlier. The lessons of our historical and empirical research are merged: Most courts are neither friends nor foes of arbitration. Whether they enthusiastically favor it or barely tolerate it, they permit individuals to enter into contracts that refer their disputes to a private forum, as long as the process of contract formation and dispute resolution methods are free of abuses.

Our historical and empirical research have important implications for moderating the excessively pro-arbitration policy set forth in *Gilmer* and *Circuit City*, and the equally overwrought criticism that these precedents are pernicious. *Gilmer* and *Circuit City* err in concluding that pre-FAA courts were hostile to arbitration. Of course, the legislative history of the FAA provides textual support for this view—and here we emphasize that this support is an unconvincing, brief

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> the one I perceive . . . . I believe that, at a minimum, arbitration should not be fundamentally unfair, which I continue to believe it so clearly was in this case. In light of what is likely to be a rising tide of arbitration of disputes in our society, . . . there is a real potential that literally hundreds of thousands of citizens will be deprived of their Seventh Amendment right to trial by jury in federal courts by insertion of arbitration clauses in what are often, in my view, classic adhesion contracts. In these circumstances, courts should be particularly vigilant not to abdicate their responsibility to review arbitration proceedings for rationality and fundamental fairness. It is my fervent hope that the views expressed in my opinion about why fundamental fairness was so sorely lacking here, while deemed by the Eighth Circuit Court of Appeals to be nearly blasphemous, will someday be recognized for their truth.

[359] The District Court in Maine recently said in *Snow v. BE & K Constr., Co.*, 126 F. Supp. 2d 5, 15 (D. Me. 2001):

> Defendant, who crafted the language of the booklet, was trying to "have its cake and eat it too." Defendant wished to bind its employees to the terms of the booklet, while carving out an escape route that would enable the company to avoid the terms of the booklet if it later realized that the booklet's terms no longer served its interests.

A similar theme appears in Penn v. Ryan's Family Steakhouses, Inc., 269 F.3d 753, 761 (7th Cir. 2001): "Above his signature this agreement states that Penn signed it 'knowingly and voluntarily.' We doubt it could have been 'knowingly' in view of its complexities, or even 'voluntarily.' Had he questioned its meaning and its complexities, it is doubtful that Penn would have been hired." Finally, we call attention to the tone of this passage from the Second Circuit in Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 276 (E.D. Pa. 1977): "It is thus reasonable to assume that in passing ERISA Congress intended to protect plan participants from arbitration and similar agreements, often unilaterally imposed, which 'snip and whittle' at federally granted rights . . . ."

passage from a congressional report. Ironically, by failing to conduct their own inquiry of the history of judicial enforcement of predispute arbitration agreements, pro-arbitration Justices miss a more valuable point: that courts since the seventeenth century, and authorities such as Blackstone, encouraged arbitration because of "'the great use of these peaceable and domestic tribunals.'"[360] Our point is that there is much fiction in the idea that Anglo-American courts were hostile to arbitration. The rationale for promoting arbitration in *Gilmer* and *Circuit City* would be more persuasive if it were posited in this common law tradition.

But if a more informed historical analysis strengthens the pro-arbitration rationale in *Gilmer* and *Circuit City,* it also provides important evidence to calm the concerns of ADR critics. The main lesson here is that while courts were not hostile to arbitration, they were not laissez-faire in sanctioning its use. Nor are they today in applying the pro-arbitration signal sent in *Gilmer* and *Circuit City.* Again, our historical and empirical results are mutually reinforcing. When arbitration agreements in the 1840s and 1850s provided one party exclusive power to name the arbitrator, courts disapproved these one-sided deals.[361] The same is true today.[362] An 1870s court broadly upheld the use of predispute arbitration contracts, but not if they were "induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly, or undue pressure . . . ."[363] In varied circumstances, current courts agree.[364] If anything, our research showing that courts today deny enforcement to a sizeable percentage of contested arbitration agreements is impressive evidence that the federal judiciary does not blindly toe the *Gilmer* and *Circuit City* line. We conclude by observing that the direction of judicial enforcement of arbitration agreements is not adequately

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[360] Park Constr. Co. v. Indep. Sch. Dist. No. 32, Carver County, 296 N.W. 475, 486 (1941) (Peterson, J., dissenting) (quoting 2 Blackstone, Bk. 3, pp. 15–17).

[361] *See* Herrick v. Belknap's Estate, 27 Vt. 673, 683–84 (1855) (indicating courts of equity will intervene when the arbitrator is the appointee of one of the parties); *see also* Mansfield & Sandusky City R.R. Co. v. Veeder & Co., 17 Ohio 385, 395–96 (1848).

[362] *See* Penn v. Ryan's Family Steakhouses, Inc., 95 F. Supp. 2d 940 (N.D. Ind. 2000) (revoking an arbitration agreement based partly on the fact that the arbitration panel was biased in favor of one party).

[363] Delaware & Hudson Canal Co. v. Pa. Coal Co., 50 N.Y. 250, 258 (1872).

[364] *See e.g.*, Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937, 940–41 (S.D. Tex. 2001) (declaring an arbitration agreement unconscionable); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938–39 (4th Cir. 1999) (denying Motion to Compel Arbitration due to potential for bias resulting from one party's ability to select the entire arbitral panel); Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234–35 (10th Cir. 1999) (denying Motion to Compel Arbitration on grounds that arbitration agreement failed to provide accessible forum).

foretold by the latest Supreme Court decisions, as commentators often assume. Rather, this path is more fully revealed in ancient patterns which show that courts today, in ruling on a growing number of fallout issues from *Gilmer* and *Circuit City*, are turning back to the future.

APPENDIX I:

FEDERAL DECISIONS INVOLVING CHALLENGES TO MANDATORY EMPLOYMENT ARBITRATION

-A-

Acre v. Cotton Club of Greenville, Inc., 883 F. Supp. 117 (N.D. Miss. 1995).
Albert v. Nat'l Cash Register, Co., 874 F. Supp. 1328 (S.D. Fla. 1994).
Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990).
Arakawa v. Japan Network Group, 56 F. Supp. 2d 349 (S.D.N.Y. 1999).
Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793 (10th Cir. 1995).
Aspar v. Pharmacia & Upjohn, Inc., 990 F. Supp. 523 (W.D. Mich. 1997).
Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir. 1985).
Asplundh Tree Expert v. Bates, 71 F.3d 592 (6th Cir. 1995).
Aynes v. Space Guard Products, Inc., No. IP99-1299-C-BS, 2000 WL 962826 (S.D. Ind. July 3, 2000).

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Bailey v. Ameriquest Mortgage Co., No. Civ. 01-545(JRTFLN), 2002 WL 100391 (D. Minn. Jan. 23, 2002).
Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230 (N.D.N.Y. 2001).
Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985).
Bauer v. Morton's of Chicago, No. 99 C 5996, 2000 WL 149287 (N.D. Ill. Feb. 9, 2000).
Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992).
Benested v. Interstate/Johnson Lake Corp., 946 F.2d 1546 (11th Cir. 1991).
Bernhardt v. Polygraphic Co. of Am., 218 F.2d 948 (2d Cir. 1955).
Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091 (E.D. Mich. 1996).
Bierdeman v. Shearson Lehman Hutton, Inc., 963 F.2d 378 (9th Cir. 1992).
Bishop v. Smith Barney, Inc., No. 97 Civ. 4807 (RWS), 1998 WL 50210 (S.D.N.Y. Feb. 6, 1998).
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Borenstein v. Tucker, 757 F. Supp. 3 (D. Conn. 1991).
Borg-Warner Protective Servs. Corp. v. E.E.O.C., 245 F.3d 831 (D.C. Cir. 2001).
Boyd v. Town of Hayneville, 144 F. Supp. 2d 1272 (M.D. Ala. 2001).
Bradford v. KFC Nat'l Mgmt. Co., 5 F. Supp. 2d 1311 (M.D. Ala. 1998).
Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001).

Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000).
Brown v. Wheat First Secs., Inc., 257 F.3d 821 (D.C. Cir. 2001).
Buchignani v. Vining-Sparks, IBG, 208 F.3d 212 (6th Cir. 2000).
Buckley v. Nabors Drilling U.S.A., Inc., 190 F. Supp. 2d 958 (S.D. Tex. 2002).
Burns v. New York Life Ins. Co., 202 F.3d 616 (2d Cir. 2000).

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Campbell v. Cantor, Fitzgerald & Co., 21 F. Supp. 2d 341 (S.D.N.Y. 1998).
Caporale v. Nat'l Ass'n of Secs. Dealers, No. Civ. A. 90-4070, 1991 WL 281890 (D.N.J. May 10, 1991).
Carey v. Conn. Gen. Life Ins. Co., 93 F. Supp. 2d 165 (D. Conn. 1999).
Chanchani v. Salomon/Smith Barney, Inc., No. 99 Civ 9219 RCC, 2001 WL 204214 (S.D.N.Y. Mar. 1, 2001).
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Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).
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E.E.O.C. v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999).
E.E.O.C. v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998).
E.E.O.C. v. Luce, Forward, Hamilton & Scripps, L.L.P., 122 F. Supp. 2d 1080 (C.D. Cal. 2000).
E.E.O.C. v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999).
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Gonzalez v. Toscorp., Inc., No. 97 Civ. 8158 (LAP), 1999 WL 595632 (S.D.N.Y. Aug. 5, 1999).
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Ludwig v. Equitable Life Assur. Soc'y of U.S., 978 F. Supp. 1379 (D. Kan 1997).
Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001).

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Mago v, Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992).
Mahant v. Lehman Bros., No. 99 Civ. 4421 MBM, 2000 WL 1738399 (S.D.N.Y. Nov. 22, 2000).
Malison v. Prudential Bache Secs., Inc., 654 F. Supp. 101 (W.D.N.C. 1987).
Malone v. Bechtel Int'l Inc., No. Civ. 2001/142, 2002 WL 84601 (D.V.I. Jan. 22, 2002).
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Maye v. Smith Barney, Inc., 897 F. Supp. 100 (S.D.N.Y. 1995).
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McGill v. Rural/Metro Corp., No. 2:00CV192-B, 2001 WL 484796 (N.D. Miss. Feb. 20, 2001).
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