Articles and Essays

ARBITRATORS’ FEES: THE DAGGER IN THE HEART OF MANDATORY ARBITRATION FOR STATUTORY DISCRIMINATION CLAIMS

Reginald Alleyne†

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† Visiting Professor of Law, Boston College Law School and Professor of Law Emeritus, University of California Law School at Los Angeles. I have had much assistance in preparing this article for publication. It was read by several academics who I knew would proceed with a fiercely critical eye: Mark Brodin, Alvin Goldman, Leo Kanowitz, Thomas Kohler, and Aviam Soifer. Arbitrator Arnold Zack provided helpful comments. Ramzi Abadou, then a third-year student at Boston College Law School, provided able research assistance at the beginning and middle stages of the article. So did Matthew Freeman, a second-year student at Boston College Law School, at the important end-stage of work on the article. I accepted much, but not all, of my readers’ sought critiques. Analytical and other flaws that remain in the article are mine, not theirs. I thank the Boston College Law School for providing the funds required for research assistance. I also thank those Boston College Law School faculty members who asked probing questions and made insightful comments during a colloquium on the topic of the article.
Employers in the United States may empower themselves to remove from the courts any statutory claim their employees may file against them. They can compel employees to accept as substitutes for jury trials an arbitration process governed by their own unilaterally designed rules. Employers are able to accomplish these remarkable ends by means of mandatory-arbitration agreements that are non-negotiable conditions of employment. They may refuse to hire employment applicants who refuse to sign them and, it follows, terminate incumbent employees for their refusals. Mandatory-arbitration agreements are antithetical to arbitration's long history and usage as a voluntary undertaking. They create a tension with a national "policy against discrimination" by their frequent coverage...
of statutory claims of unlawful discrimination.\(^5\) No other industrial democracy similarly permits employers to escape unconditionally the jurisdiction conferred by the legislature on its courts.\(^6\)

This article offers a new approach to the already abundant criticism of the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*,\(^7\)

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\(^5\) There appears to be no limit to the kinds of statutes held subject to mandatory arbitration. *See*, e.g., *O’Neil*, 115 F.3d at 275 (holding that a Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654, claim is subject to mandatory arbitration).

\(^6\) In Germany, for example, the substitution of even voluntary arbitration for a labor court’s jurisdiction over a wrongful termination claim is precluded by Section 101(2) of the Labor Court Act. *See* Michael Kittner & Thomas C. Kohler, *Conditioning Expectations: The Protection of the Employment Bond in German and American Law*, 21 COMP. LAB. L. & POL’Y J. 263, 321 (2000).

\(^7\) Numerous articles criticize the Supreme Court’s *Gilmer* decision holding the waiver agreement enforceable. *See*, e.g., Reginald Alleyne, *Statutory
holding that the waiver agreement was enforceable. If the mandatory-
arbitration agreement requires that the employee and employer share the arbitrator’s fee, the employee may be unable to afford it and other arbitration costs, as the Supreme Court has recently acknowledged.\(^9\) Fresh empirical data indicate that arbitration is not, as it is conventionally thought to be, an inexpensive means of resolving statutory disputes.\(^10\) And if, as the nearly sole alternative to a shared-fee arrangement, the employer pays the entire arbitrator’s fee, as the mandatory-arbitration agreement in \textit{Gilmer} provided, the arbitrator will convey an appearance of partiality: a paid piper who plays the tune called by the employer. Partiality concerns are compounded when, as in \textit{Gilmer}, an employer unilaterally may both select and compensate the arbitrator.\(^11\) Both applicants for employment and contract containing the pre-dispute agreement as part of its terms. All labor-arbitration agreement clauses in collective-bargaining agreements between unions and employers are pre-dispute agreements. \textit{See Basic Patterns in Union Contracts} 33-39 (Collective Bargaining Negotiations and Contracts eds., 14th ed. 1995) [hereinafter Basic Patterns]. Labor arbitration is a model of fair arbitration processes, with agreements to arbitrate reached voluntarily, mutual selection of the arbitrator, mutual agreement on the procedures governing the arbitration proceedings, and relatively equal bargaining power between institutional entities. Voluntary pre-dispute agreements for non-statutory claims do not involve any deprivation of the right to trial by jury. I also strongly favor the voluntary arbitration of statutory claims. It provides for both employers and employees the opportunity to weigh the advantages and disadvantages of arbitration over judicial proceedings. All references to mandatory arbitration in this article, unless otherwise noted, are to the pre-dispute arbitration of statutory claims pursuant to an agreement that an employee must accept as a condition of employment.


10. \textit{See} \textit{Public Citizen, The Costs of Arbitration} 3 (2002) (concluding that “in the vast majority of cases, arbitration will necessarily increase the transaction costs of litigation.”). \textit{Contra} Samuel Estreicher & Matt Ballard, \textit{Affordable Justice Through Arbitration: A Critique of Public Citizen’s Jeremaiad on the “Costs of Arbitration,”} \textit{Disp. Resol. J.}, Nov. 2002-Jan. 2003, at 8, 10 (arguing that the Public Citizen report fails to make its case and that “the [forum fee] costs to the employee are relatively low, and often zero—either as a consequence of employer-promulgated plan design or reallocation by the arbitrator.”). The upfront arbitrator’s fee, often required in mandatory-arbitration cases and its effect on employees, is discussed \textit{infra} in Section IV(B). \textit{See} \textit{How to Save Time & Money in Arbitration—Users Speak Up,} \textit{Disp. Resol. J.}, Aug.-Oct. 2002, at 27, 28 (comment by lawyer Richard Raysman) (“One of the objections from clients of arbitration is it can be as expensive as litigation without the right to appeal.”).

incumbent employees, on signing mandatory-arbitration agreements, are usually bound to existing and unilaterally promulgated arbitration rules. This arbitration-forum scenario has no counterpart in any American court, nor would any be tolerated.


12. On May 26, 1981, eight days after he was hired by Interstate, Mr. Gilmer completed and signed a “Uniform Application for Securities Industries Registration Transfer”, Gilmer, 500 U.S. at 23, paragraph five of which provided:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register . . . .


The applicable “rule” for Mr. Gilmer was Rule 347 of the N.Y. Stock Exchange, governing employment disputes:

Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

Id.

13. See Michel G. Picher et al., The Arbitration Profession in Transition: Preliminary Results from a Survey of the National Academy of Arbitrators, 52 NAT'L ACAD. ARB. 241, 260 app. B (1999) The survey statement posed was: “If fees are paid entirely by one party, the arbitration process is compromised.” The results were that 15% of respondents strongly disagreed, 30% disagreed, 21% neither disagreed nor agreed, 21% agreed, and 14% strongly agreed. Id. at 262 fig.15. Of the NAA’s 599 members, 77%, participated in the survey. Sixty-four members (11%) had been inactive over the four years immediately preceding the survey and so were not eligible to participate in it; thus, 86% of eligible members participated. Id. at 245-46.

Some respondent arbitrators made revealing statements about their knowledge of distinctions between the appearance of partiality and actual partiality. Those who responded that the source of fees does not matter commented as follows:

I don’t have a problem with who pays—I call it the way I see it as long as I get paid for it by someone.

Perception of fairness is not the same as arbitrator’s neutrality and integrity.

Integrity is integrity.

Id. at 261.

Other respondents who said that the source of fees does matter relied almost exclusively on the appearance factor:
Accepting that adherence contracts are, nevertheless, enforceable,¹⁴ this article posits that the adhesive nature of mandatory-arbitration agreements is an element to be considered in determining congressional intent concerning their enforcement. I argue that the consequences of judicial enforcement of mandatory-arbitration agreements also have a bearing on the issue of congressional intent; mandatory-arbitration agreements are so demonstrably bizarre that Congress could not have intended their enforcement.¹⁵ This article further seeks to demonstrate how a textualist approach to statutory interpretation can fail:¹⁶ the Federal Arbitration Act, heavily relied upon by the Gilmer court, was never intended to cover involuntary arbitration of any kind, and particularly involuntary arbitration agreements governing the interpretation of statutes.¹⁷ The very term

The appearance of undue influence by one party taints the process.
Who pays the piper calls the tune.

... You don't bite the hand that feeds you.

Even if an arbitrator is scrupulously fair, he or she must retain the appearance of neutrality by equal division of the fee.

Id.

¹⁴. But see Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173 (1983); W. David Slawson, Mass Contracts: Lawful Fraud in California, 48 S. Cal. L. Rev. 1 (1974) (arguing that adherence contracts amount to fraud in many cases). Professor Rakoff's view, that adherence contracts should be presumptively unenforceable, has not found favor in the courts, and the small number of pre-Gilmer cases that had held mandatory-arbitration agreements unenforceable on adherence contract grounds have since been overruled by Gilmer. See Rakoff, supra, at 1266 n.279 and accompanying text (citing Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775 (Cal. Ct. App. 1976); Bd. of Educ. v. W. Harley Miller, Inc., 236 S.E.2d 439 (W. Va. 1977)).

¹⁵. See Hickman v. Taylor, 329 U.S. 495, 514 (1947) ("And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result."). The "harsh and unwarranted result" in Hickman would have been the discovery of a lawyer's "files and mental processes" by the lawyer's adversaries. Id. The Hickman decision is now codified in part as Fed. R. Civ. P. 26(b)(3).


¹⁷. The Federal Arbitration Act (FAA), a 1925 statute, codified at 9 U.S.C. §§ 1-14 (2000), provides for the enforcement of agreements to arbitrate but is entirely silent on the
“mandatory arbitration” is a contradiction that falls outside the definition of arbitration as supported by its history and common usage. Finally, the article posits that courts, through the enforcement of mandatory-arbitration agreements, are not empowered to override congressional commands on federal court venue, subject matter jurisdiction, judicial rules of civil procedure, and the right to trial by jury as guaranteed by statute and the Constitution.22

I. THE GILMER CASE

Interstate/Johnson Lane Corp. fired six-year employee Robert Gilmer from his position as Senior Vice President, Manager of Mutual Funds, when he was sixty-two years old. Following the text of the federal Age enforcement of mandatory-arbitration agreements. In Gilmer, the Court did not address Justice Stevens’ dissenting view that the FAA does not cover involuntary agreements to arbitrate, 500 U.S. at 42 (Stevens, J., dissenting) (“In my opinion, arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA, and for that reason [employer] cannot ... compel petitioner to submit his claims arising under the [ADEA] to binding arbitration.”) Id. at 36.

18. See FLEMING, supra note 3, at 29 (“[A]bitration’ in the industrial context clearly means grievance arbitration. With rare exceptions ... it is voluntary, ...”). From the perspective of an employee covered by a collective-bargaining agreement, arbitration might appear to be non-voluntary in the sense that the union controls the decision whether to arbitrate. But the collective-bargaining agreement is between the union and the employer, not the employer and the employee. See Vaca v. Sipes, 386 U.S. 171 (1967) (holding that only in the extraordinary circumstance of a union’s breach of its obligation to fairly represent employees may an employee bring an action against the employer for breach of the collective-bargaining agreement).

21. E.g., The Age Discrimination In Employment Act of 1967, 29 U.S.C. § 626(c)(2) (2000) (“[A] person shall be entitled to a trial by jury of any issue of fact in any such action ...”); the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f) (providing for federal court jurisdiction). Most of the discrimination statutes that generate disputes over mandatory-arbitration clauses provide for the right to a trial by jury. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 11.6 (3d ed. 1999) (“Congress clearly has the power to confer broader jury trial rights than those guaranteed by the Seventh Amendment.”). In addition, state statutory and constitutional provisions that confer employment and consumer rights often provide for the right to a jury trial. See, e.g., Kloss v. Edward D. Jones & Co., 54 P.3d 1, 8-9 (Mont. 2002) (providing an eight-factor test to determine whether an arbitration clause that waives a state constitutional right is an adhesion contract).
22. U.S. CONST. amend. VII.
Discrimination in Employment Act of 1967 (ADEA), which provides for federal court venue and federal court subject matter jurisdiction over ADEA cases, Mr. Gilmer filed an age discrimination claim in federal district court. He sought lost wages and benefits, reinstatement, and attorney’s fees. He also demanded a jury trial. Interstate filed a motion to dismiss the complaint and to compel arbitration on the basis of Mr. Gilmer’s signed registration application, in which, among other things, he agreed to arbitrate any claims he had against his employer. The federal district court denied the motion. The Court of Appeals for the Fourth Circuit reversed, and the Supreme Court affirmed.

The Court determined that the right to a federal court forum and jury trial for a federal age-discrimination claim could be waived by an employee’s prior agreement to arbitrate the claim and that, like the Federal Arbitration Act, nothing in the ADEA precluded enforcement of the agreement. That the agreement was offered as a condition of employment...
is not discussed in the opinion. Nor does the opinion discuss the ramifications of the employer's ability to select unilaterally the candidates for the panel from which the arbitrator would be chosen. Finally, it does not discuss the employer's self-conferred authority to compensate the arbitrator and make the rules governing the arbitration proceeding.  

Mr. Gilmer, the Court held, would not be harmed by the agreed-upon switch to arbitration because his arbitrator would be bound to follow substantive federal age-discrimination law, and the procedures unilaterally set up by the employer to govern the arbitration proceedings were not unfair. There was no inequality of bargaining power, in part because Mr. Gilmer was an "experienced businessman." The Court was

37. Id. at 33.
38. Id. Evidence that anyone has ever negotiated their way out of a mandatory-arbitration agreement is either scarce or nonexistent. Indeed, employers are advised not to negotiate over the terms of mandatory-arbitration clauses. In an article designed to provide employers with help drafting mandatory-arbitration clauses, one attorney advises "[t]he employer should not negotiate any terms of the arbitration agreement. . . . Any requests to modify or eliminate the arbitration agreement should be flatly rejected, with the explanation that it is a company-wide policy that cannot be adjusted for any individual employee."


But a recent decision affirmed a motion to compel arbitration and found no adhesion contract because the plaintiff had an opportunity to ask questions about it and consult an attorney:

The employment application was not offered on a take-it-or-leave-it basis. Defendant gave plaintiff an opportunity to ask questions about the application and to take it with her for further quiet review or, perhaps, consultation with family, friends, or a professional such as an attorney. Plaintiff herself was an educated person who was experienced in the field of human resources. Nothing in the record indicates that plaintiff asked to alter any terms of the application or that Sandvik would have refused to consider her for the position if she did not assent to the arbitration provision as presented. Accordingly, we are not persuaded that plaintiff was forced to sign an inflexible contract of adhesion in the circumstances of her completion of the Application for Employment.

Martindale v. Sandvik, Inc., 800 A.2d 872, 881 (N.J. 2002). The opinion avoids the key question: having consulted with family, friends, and an attorney, could the plaintiff have negotiated her way out of the mandatory-arbitration agreement or any of its terms? As the Supreme Court did in Gilmer, the court confused inability to understand an agreement with ability to negotiate the terms of the agreement. Many terms of computer program agreements are understandable but entirely non-negotiable; one must either click on "I agree" or the installation process is terminated.

In Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), a contract providing the basis for personal jurisdiction was attacked by the defendants on grounds of inequality of bargaining power. The Court rejected the argument and approved the lower court's appraisal of defendants as "experienced and sophisticated businessmen," noting that one of
accurate in premising that arbitrators in statutory-claim cases are bound by the substantive law of the statute in dispute.\textsuperscript{39} But important procedural norms—like liberal discovery,\textsuperscript{40} can sometimes govern substantive outcome.\textsuperscript{41} Yet, they were scarcely discussed in \textit{Gilmer}.\textsuperscript{42}

In one of the cases cited in \textit{Gilmer}, the Court said that “[n]othing . . . prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.”\textsuperscript{43} The statement is tantamount to an adhesion contract disclaimer. It might have been validly made in the employer-employer context presented in the \textit{Mitsubishi}\textsuperscript{44} case, but no such statement can be validly made about the negotiation of mandatory arbitration agreements covering an individual’s employment or consumer rights.\textsuperscript{45}

\begin{itemize}
  \item them “for five months conducted negotiations with Burger King over the terms of the franchise and lease agreements . . . .” \textit{Id.} at 484-85. In \textit{The Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1 (1972), the Court considered whether to enforce an agreement containing a forum-selection clause. It found the agreement to have been “freely negotiated” and that there was no “overweening bargaining power.” \textit{Id.} at 12. No such findings were made, nor could they likely have been made, in \textit{Gilmer}.
  \item \textit{Gilmer}, 500 U.S. at 26.
  \item \textit{Id.} at 31; cf. \textit{Fed. R. Civ. P. 26}.
  \item The scope of allowed discovery, for example, can have a particularly heavy bearing on the outcome of statutory discrimination claims, in which required proof elements of motive and intent can only be met through extensive discovery. See Deborah R. Hensler, \textit{Judging Arbitration}, 54 \textit{Nat’l Acad. Arb.} 123 (2001) (examining how individuals are attentive to procedural characteristics in judging the fairness of a dispute resolution process); Cass R. Sunstein, \textit{Lessons from a Debacle: From Impeachment to Reform}, 51 \textit{Fla. L. Rev.} 599, 613 (1999) (explaining the impact of discovery on the substantive outcome in sexual harassment cases); see also 28 U.S.C. § 2072 (2000) (authorizing the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . .”). It makes all rules that “abridge, enlarge or modify any substantive right” a nullity. \textit{Id.} Employers who unilaterally craft mandatory-arbitration clauses are not similarly restrained.
  \item The dissenting opinion in \textit{Gilmer} is mainly confined to the FAA’s inapplicability. 500 U.S. 36.
  \item \textit{Id.}
\end{itemize}
The power to not hire those who refuse to sign mandatory-arbitration agreements makes it unnecessary for employers to negotiate over them.\textsuperscript{46} \textit{Gilmer} is silent on these issues: fundamental and important distinctions between different kinds of arbitration proceedings are not discussed in the opinion. The Court was also silent on the question whether arbitration over the interpretation of contract or statutory terms can ever be anything but voluntary, at least in the absence of an authorizing statute.

II. ARBITRATION PARLANCE

Neither the term labor arbitration nor employment arbitration appears in the Supreme Court's four decisions on mandatory arbitration.\textsuperscript{47} \textit{Gilmer} takes the positive attributes of labor arbitration, involving institutional parties on both sides and procedural rules mutually negotiated by employers and unions, and apparently equates them with the entirely distinct mandatory-arbitration process. By not acknowledging distinctions between different kinds of arbitration processes,\textsuperscript{48} the Court was able to reconcile its rejection, in 1974, of the voluntary labor arbitration model as a forum for statutory claims,\textsuperscript{49} with its acceptance, seventeen years later in \textit{Gilmer}, of mandatory arbitration as a forum for statutory claims.\textsuperscript{50} For example, the Supreme Court has described the arbitration of a statutory antitrust dispute between two corporations as an elected trade of "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."\textsuperscript{51} This sweeping description of arbitration does not seem to acknowledge that it would scarcely be possible to resolve a complex antitrust case simply and expeditiously by agreeing to its resolution by arbitration. The massive amounts of evidence often required to prove or defend against an antitrust claim would be the same in both an arbitration and a judicial forum. When arbitration proceedings are

\textsuperscript{46} EEOC v. Luce, Forward, Hamilton, & Scripps, 303 F.3d 994, 1006 (9th Cir. 2002), vacated in part and rev'd en banc in part by Nos. 00-57222 & 01-55321, 2003 U.S. App. LEXIS 20007 (9th Cir. 2003).


\textsuperscript{49} See Alexander v. Gardner-Denver, 415 U.S. 36, 49 (1974) ("Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration . . . .")

\textsuperscript{50} In the intervening line of cases, decided after \textit{Gardner-Denver} and before \textit{Gilmer}, the Court expressly found no adhesion element in the disputed arbitration agreements. See, e.g., McMahon, 482 U.S. at 234; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 624-28 (1985).

\textsuperscript{51} Mitsubishi, 473 U.S. at 628.
those in which "simplicity, informality, and expedition" prevail,\textsuperscript{52} it is not for the reason that complex cases become simple cases because they are arbitrated. Rather, it is the relative simplicity of the issues ordinarily submitted to arbitration.\textsuperscript{53} Labor arbitration, for example, is a process designed for relatively simple cases. Arbitration generally, and of necessity, becomes a complex process when used for complex cases.\textsuperscript{54}

\section*{A. Labor, Employment, and Mandatory Arbitration Compared}

The gap separating labor, employment, and mandatory arbitration is both wide and deep.\textsuperscript{55} Labor arbitration is the voluntary arbitration of disputes between unions and employers pursuant to terms negotiated by equally qualified participants. Unlike mandatory arbitration, the attributes of labor arbitration are almost uniformly regarded as positive.\textsuperscript{56} The misused analogy might in part explain why the \textit{Gilmer} Court found mandatory arbitration sufficiently attractive for compelled use in the resolution of statutory claims. Voluntary employment arbitration and

\begin{footnotesize}

\footnote{52. \textit{Id.} Typical labor arbitration issues are those involving disciplinary warnings, suspensions and discharges, overtime pay, working out of classification, and seniority. \textit{See BASIC PATTERNS, supra} note 8, at 33-39.}

\footnote{53. Typical labor arbitration issues over the interpretation of collective-bargaining agreements include discharge and discipline cases. \textit{BASIC PATTERNS, supra} note 8, at 35. Many involve disciplinary warnings and suspensions, overtime work, lunch rest and cleanup provisions, eligibility for holiday pay, vacation pay, unpaid sick leave, and seniority. \textit{Id.} at vii-xi (Table of Contents). These constitute the "major types of provisions and their frequency in collective bargaining contracts." \textit{Id.} at v.}


\footnote{55. The American Arbitration Association maintains a set of rules for different kinds of arbitration, among them rules for labor arbitration and employment arbitration. \textit{See LABOR ARBITRATION RULES} (Am. Arbitration Ass'n 2002), \textit{at http://www.adr.org} (last visited Oct. 27, 2003); \textit{NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES} (Am. Arbitration Ass'n 2002), \textit{at http://www.adr.org} (last visited Oct. 28, 2003) \textit{[hereinafter RULES FOR EMPLOYMENT DISPUTES]}. The employment arbitration rules suggest their applicability to four different kinds of employment arbitration: "pre-dispute, voluntary final and binding arbitration; pre-dispute, mandatory non-binding arbitration; pre-dispute, mandatory final and binding arbitration; or post-dispute, voluntary final and binding arbitration." \textit{RULES FOR EMPLOYMENT DISPUTES supra}, at heading "Designing an ADR Program".}

\footnote{56. \textit{See Getman, supra} note 48, at 916 ("It is understandable that labor arbitration is widely admired."). Professor Getman's article challenges the assumption that labor arbitration can be "routinely applied, with only minor adjustments, in other situations." \textit{Id.} at 917 (footnote omitted). Praise for the labor arbitration process and labor arbitrators generally is replete in the Supreme Court's \textit{Steelworkers' Trilogy} cases. \textit{See United Steelworkers of Am. v. Enter. Wheel & Car Corp.}, 363 U.S. 593 (1960); \textit{United Steelworkers of Am. v. Warrior & Gulf Navigation Co.}, 363 U.S. 574 (1960); \textit{United Steelworkers of Am. v. Am. Mfg. Co.}, 363 U.S. 564 (1960).}
\end{footnotesize}
mandatory arbitration for statutory disputes also have a widely different character.

Voluntary employment arbitration, as distinguished from voluntary labor arbitration, is ordinarily the arbitration of disputes between employers and employees who are not represented by unions. Labor arbitration, employment arbitration, and mandatory arbitration have different cultures, and they employ different arbitrators with different experiences, for different kinds of cases. They operate under different kinds of procedures, including starkly different means of compensating arbitrators. Labor arbitration parties have an ongoing relationship involving the administration of their collective-bargaining agreement through negotiations for its formation and day-to-day governance under its terms, including the grievance-arbitration processes, to resolve disputes over its meaning. Labor arbitration avoids judicial trials of contractual grievances. It also has the objective of avoiding strikes, lockouts, boycotts, and other disruptive activities over grievances. Employment arbitration parties have a different relationship. Voluntary employment arbitration is not part of an on-going adversarial relationship as is labor arbitration. It is ad hoc for particular disputes having little or nothing to do with an underlying contractual relationship, as typified by a collective-bargaining agreement.

Distinctions between labor arbitration and mandatory arbitration are more stark. They evolved for different reasons. Unions were attracted to labor arbitration as an expeditious means of resolving disputes over collective-bargaining agreement terms with which judges had little experience. Employers offered virtually no resistance, having gained the reciprocal advantage of a no-strike clause during the life of the collective-bargaining agreement. The Supreme Court has described labor arbitrators as experts in the "law of the shop," meaning that through training and

57. Labor arbitrators, for example, are compensated on a per diem basis. Employment arbitrators are generally compensated on an hourly basis.


59. See Flemming, supra note 3, at 31-32. ("Indeed, it is apparent that the decisions of the Supreme Court which have so greatly enhanced labor arbitration... are in large part based on the theory that the arbitration clause is the quid pro quo for the no-strike clause." (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)).

60. See Charles S. Lacugna, An Introduction to Labor Arbitration 2 (1988) ("Arbitration, by definition, is voluntary because parties freely agree to arbitrate a labor dispute.").

61. Flemming, supra note 3, at 31-32.
experience they tend to be experts in the subject matter of disputes limited to interpretation of collective-bargaining agreements. 62 Mandatory-arbitration agreements are unilaterally crafted by employers primarily to protect them from the consequences of jury trials for statutory claims. 63 Most labor arbitration cases are heard and decided by a core body of seasoned experts. They are almost never attorneys who practice labor or employment law. 64 Many are members of the National Academy of Arbitrators, an organization that conditions membership on labor arbitration experience and adherence to its Code of Professional Responsibility. 65 Labor arbitrators nearly always resolve disputes over the meaning of collective-bargaining agreements. They only occasionally interpret statutes, and only when the collective-bargaining agreement authorizes them to do so. Voluntary employment arbitration, by definition, never involves the interpretation of collective-bargaining agreements. 66

Contrary to the prevailing view outside the labor and employment bar, labor arbitrators are not the dominant players in employment arbitration cases. Employment arbitrators, including those who hear and decide statutory-claim, mandatory-arbitration cases, tend not to be drawn entirely

63. See Barry A. Macey, Response to Theodore J. St. Antoine and Michael C. Harper, 76 IND. L.J. 135, 136 (2001) ("Employers impose these [mandatory] arbitration arrangements for one reason and one reason only—to avoid jury trials."); Mei L. Bickner et al., Developments in Employment Arbitration, DISP. RES. J., Jan. 1997, at 8, 10-11 (reporting that interviewed employers prefer arbitration over trials because they fear jury trials for employment cases and want to avoid the time and expense of litigation). It is undisputed that as between juries and arbitrators, juries provide larger damages awards than arbitrators. See Susanne Craig, Prudential Unit Faces Payout for Damages, WALL ST. J., Oct. 14, 2002, at C1 ("A $250 million punitive-damage award levied ... against Prudential Securities Inc. by a state-court jury is a vivid example of why the securities industry long has pushed to get most investor disputes into private arbitration.").
64. See Picher et al., supra note 13, at 246-47, 252-55.
67. It is settled that labor arbitration grievances not covered by the collective-bargaining agreement are not within the scope of a typical labor-arbitration clause and are not arbitrable. See discussion of Steelworkers' Trilogy cases, supra note 56.
from labor arbitrator ranks. They are often law firm associates or partners who are not labor law specialists. This different source from which statutory-claim arbitrators are drawn for employment cases creates dramatically different arbitrator compensation structures for labor arbitration and mandatory-arbitration processes. In ad hoc voluntary employment arbitration, an employee who voluntarily agrees to arbitrate a statutory claim or other employment-related claim voluntarily agrees to bear the costs of the employment arbitration, including the known fees of the mutually chosen arbitrator. The voluntary nature of labor arbitration means, similarly, that both union and employer parties have consented to bear the selected arbitrator’s known per diem fees and other related expenses.

Unlike both voluntary employment arbitration and mandatory arbitration, labor arbitration contestants are always institutions. Though employment arbitration lacks the uniform institutional-contestants character of labor arbitration, negotiations of some kind ordinarily precede the agreement to arbitrate. This impetus for employer-employee negotiations differs from that of labor-management negotiations for a collective-bargaining agreement. The employment-arbitration agreement is ad hoc and between parties who may never again have a dispute of any kind with each other. In all of these respects, the collective-bargaining agreement is the polar opposite of the non-negotiated and unilaterally imposed mandatory-arbitration agreement, particularly with respect to the manner of compensating the arbitrator.

B. Compulsory and Mandatory Arbitration Compared

The words “mandatory arbitration” do not appear in the Gilmer decision. Instead, the Court substituted for them the term “compulsory arbitration.” This may suggest the Court’s unfamiliarity with arbitration’s

69. See Picher et al., supra note 13, at 254 tbl.1 (presenting results of survey of members of National Academy of Arbitrators).

70. In Gilmer, the Supreme Court described the question presented in the case as “whether a claim under the [ADEA] can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application.” Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (emphasis added). The Court also read Mr. Gilmer’s argument as asserting “that compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA.” Id. at 29. In Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 218 (1962) (Brennan, J., dissenting), the dissenting opinion used the term “mandatory arbitration” to describe a statutory provision requiring arbitration under the Railway Labor Act. In Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) the opinion of the Court does not use the term “mandatory arbitration,” but the dissenting opinion does. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002), appears to be the first Supreme Court opinion in which the opinion for the Court uses the term “mandatory arbitration.” The majority opinion, written by Justice Stevens, one of the
Compulsory arbitration in the United States means arbitration commanded by statute. What is now labeled mandatory arbitration has a pervasive element of compulsion. It otherwise differs dramatically from what is commonly understood in the labor-management relations community to be “compulsory arbitration.” Mandatory-arbitration agreements are created by adhesion contract. Compulsory arbitration is always created by statute. Compulsory arbitration, as so ordered by statute, commands arbitration over contract formation disputes, rarely for grievance disputes, and usually those for public sector safety personnel. Mandatory arbitration, as ordered by adhesion contract, commands arbitration over the meaning of statutes that protect individual rights. 

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71. In a 1974 speech to a bar group, then Associate Justice William Rehnquist said, “If you had wanted a speaker who was highly knowledgeable in the nuances of arbitration, you most assuredly would not have chosen me.” William H. Rehnquist, A Jurist’s View of Arbitration, 32 ARB. J. 1 (1977).

72. See LACUGNA, supra note 60 at 2 (noting as a generalization that arbitration is voluntary and that “compulsory arbitration” is an exception). Compulsory arbitration statutes require “the determination of wages, hours, and working conditions by a third party other than representatives of employers and employees, and provisions requiring that such determination be final and binding for a specified period of time.” HERBERT R. NORTHRUP, COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES 9 (1966). One author’s book about mandatory arbitration has the title, COMPULSORY ARBITRATION. See RICHARD A. BALES, COMPULSORY ARBITRATION (1997). The author defines arbitration as a proceeding “voluntarily chosen by parties.” Id. at 3. He then immediately defines a “compulsory employment arbitration agreement” as “an agreement between employer and employee to resolve future employment disputes by arbitration.” Id. The book does not acknowledge either in this definition or anywhere in the book that a mandatory-arbitration agreement (“compulsory” in his terms) must be signed as a condition of employment, except as suggested in a chapter on the drafting of “compulsory arbitration agreements.” Id. at 116-20.

73. Before the proliferation of public sector collective-bargaining statutes, beginning in the late 1960’s, compulsory arbitration was limited to efforts to limit strikes in vital industries during the two World Wars. It was also limited to five states, Florida, Indiana, New Jersey, Pennsylvania and Wisconsin, all seeking to limit strikes by public utilities employees. See NORTHRUP, id. at 15-34.

74. Id.
for individual employee grievances is a rarity in the United States. Compulsory arbitration in the absence of an authorizing statute is unknown. In sum, and ironically as a result of Gilmer, forced arbitration over the meaning of contracts requires an authorizing statute. Forced arbitration over the meaning of statutes, however, requires no authorizing statute. It only requires, according to Gilmer, the absence of a prohibiting statute.

Apart from important questions of statutory authorization, there are structural differences between compulsory and mandatory arbitration. They bear on both the question of mandatory arbitration's fundamental fairness and its utility. Unlike compulsory arbitration, mandatory arbitration in employment cases provides for employers the advantage of structuring the procedures governing the arbitration, including those that bear on statutory substantive outcome. When parties are forced to arbitrate under compulsory arbitration statutes, the basic rules governing the arbitration are generally created by the statute, certainly not by one of the parties to the arbitration.

III. REACTION TO GILMER

A. Lower Courts

Several lower court decisions illustrate a pattern of judicial unease with Gilmer. One lower court decision is so critical of Gilmer that the dissenting opinion criticizes the majority opinion for its criticism of Gilmer. Another court struck down a statutory-claim mandatory-arbitration agreement on the ground that it was procedurally unfair for the

75. Bales, supra note 72, at 16.
77. E.g., supra note 11 (specifying the unilaterally promulgated N.Y. Stock Exchange arbitrator rules).
78. E.g., Northrup, supra note 73, at 9 ("Compulsory arbitration statutes set forth a procedure for invoking arbitration, for selecting the arbitrator (either on an ad hoc, or case-by-case basis, or establishment of a permanent arbitrator or arbitration board), and usually also provide . . . for refusal to abide by them.").
79. See supra note 7, where some cited commentators discuss the opinions narrowly interpreting Gilmer.
employer unilaterally to select the arbitrator. Though the decision may fairly be viewed as a totality-of-circumstances decision, it did consider the single element of unilateral arbitrator selection by the employer as a procedure "that is crafted to ensure a biased decision maker." A finding of arbitrator bias is always a basis for vacating an arbitrator's award. In *Gilmer*, the employer also unilaterally selected the arbitrator, but the Supreme Court did not equate unilateral selection of the arbitrator with a per se finding of arbitrator bias.

Of the many mandatory-arbitration procedural issues emanating from *Gilmer*, lower court decisions suggest that the arbitrator-fee issue presents the most serious challenge to *Gilmer's* premise that the switch from a judicial forum to an arbitration forum is no more than a transfer of forum. Post-*Gilmer* decisions have held the shared-arbitrator-fee portion of the mandatory-arbitration agreement unenforceable in statutory-claim cases. As a remedy, they have substituted a requirement that the employer pay the entire arbitrator's fee. Other courts have used the shared-arbitrator-fee clause as a partial basis for concluding that the entire mandatory-arbitration

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82. Id. at 938.
85. Id.
clause is unenforceable. No lower court decision could strike down an arrangement for compensation of the mandatory arbitrator on the ground that the employer paid the entire arbitrator’s fee. To do so would be in direct conflict with Gilmer. Also, some post-Gilmer mandatory-arbitration issues treated by lower courts were not before the Supreme Court in Gilmer. For example, the question of whether employees covered by mandatory-arbitration agreements can be compelled to pay a share of the mandatory arbitrator’s fee has split lower circuit courts. Mr. Gilmer’s employer paid the entire arbitrator’s fee, thus removing the issue of shared arbitrator fees from the Court’s consideration.

B. Commentators

Not surprisingly, the Gilmer decision produced large amounts of academic and other commentary. Most of it was at first critical of the decision. In addition, the federal Equal Employment Opportunity Commission criticized the decision. This was an unusual pronouncement from an agency created to play a key role in the administration of the Civil Rights Act of 1964 and subsequently enacted employment discrimination statutes. The National Academy of Arbitrators, an organization whose members would derive economic benefit from the implementation of mandatory-arbitration agreements covering employment disputes, also criticized the decision.

The original wave of critics drew criticism from commentators who


87. See Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234-35 (10th Cir. 1999) (agreement not enforceable because it required employee to pay a shared fee he could not afford); Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (agreement not enforceable, but only to the extent that it required a shared-fee arrangement); Armendariz, 6 P.3d at 689 (agreement not enforceable because it required a shared-fee arrangement). But cf. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999) (shared fee affordable therefore fee clause enforceable).

88. See, e.g., Alleyne, supra note 7; Feller, supra note 7; Grodin, supra note 7.


argued that *Gilmer* was correctly decided. The critics focus on the various procedural problems inherent in the mandatory-arbitration setting. Apart from the re-user issue, not many of them comment on a connection between the manner in which arbitrators are compensated and the fairness of mandatory arbitration in statutory-claim contexts. Few do more than accept the Court's analysis of Congressional intent.

1. The Commentator Critics

Central to critical commentary on *Gilmer* is discussion of the Court's never-explained shift, over a seventeen-year span, from criticism to acceptance of arbitration as a forum for the resolution of statutory claims. The *Gilmer* Court merely noted that "generalized attacks on arbitration 'rest 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 disputes.'" The opinion does not say why its new view of arbitration should prevail over that expressed in the Court's *Gardner-Denver* line of cases, holding that completion of labor arbitration involving a parallel statutory claim does not bar future judicial trial of the statutory claim.

As the term "mandatory arbitration" connotes, there is ordinarily no negotiation over mandatory-arbitration terms as there are in voluntary agreements to arbitrate. Ordinarily, parties to arbitrated disputes

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93. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court held that an employee who lost a contractual racial discrimination grievance in labor arbitration was not precluded from pursuing a statutory racial discrimination claim in federal court. The rationale for the decision was based in part on the relative inadequacy of labor arbitration and labor arbitrators in statutory-claim cases, as distinguished from collective-bargaining-agreement claims. *Gardner-Denver*, 415 U.S. at 56-58; see also Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728, 743 (1981) (holding similarly, except that the involved statute was the minimum wage provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19).


95. *Supra* note 93.
voluntarily agree to arbitrate and voluntarily agree to the terms of their arbitration agreements, including selection of the arbitrator and the manner of compensating the arbitrator.\textsuperscript{96} For mandatory-arbitration agreements, the employee, in order to work or remain employed, must "take-it [the mandatory-arbitration clause] -or-leave-it."\textsuperscript{97}

Commentator criticism includes the absence of effective discovery,\textsuperscript{98} employers' superior familiarity with the cadre of arbitrators who decide statutory employment law claims—the "repeat player" syndrome,\textsuperscript{99} denial of the right to a jury trial,\textsuperscript{100} larger awards from juries than from arbitrators.\textsuperscript{101} Another criticism of\textsuperscript{102} Gilmer centers on the private nature of the arbitration forum and, as a result, the inhibition on the development of a body of public law through published decisions.

\begin{itemize}
\item \textsuperscript{96} BASIC PATTERNS, supra note 8, at 37-39.
\item \textsuperscript{97} The Court could certainly have relied on the well-settled view that adhesion contracts are generally enforceable, perhaps on the now pragmatic ground that they have become part and parcel of commercial life in the United States. For example, new computer programs may not be installed unless the user clicks on the "Accept" box. See discussion supra note 38. Adhesion contracts like these are, as one commentator has noted, "ubiquitous in modern commercial life, but their proper legal treatment remains in doubt." See Rakoff, supra note 14, at 1174 (appearing in the prefacing summary paragraph by the law review editors).
\item \textsuperscript{100} Sternlight, Mandatory Binding Arbitration, supra note 7, at 695-710.
\item \textsuperscript{101} See Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) ("[V]arious studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration system."); see also William M. Howard, Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?, DISP. RESOL. J. Oct.-Dec. 1995, at 40, 42-43 (comparing jury trial and employment arbitration findings of liability and damages awards, and concluding that employees have a 30% higher success rate in jury trials and higher damages awards).
\item \textsuperscript{102} Only a small percentage of labor arbitration decisions is published in a source that is available to the public. The Labor Arbitration Report, a service published by the Bureau of National Affairs, contains a selection of significant labor arbitration decisions from around the nation. There is no equivalent source of publication for voluntary employment arbitration decisions and mandatory-arbitration decisions. In Gilmer, the Supreme Court appeared to confuse publication of an award with publication of an opinion, the former being required by the governing N.Y. Stock Exchange rules, but not the latter. Virtually all arbitration proceedings are privately conducted. See Adrian Lanni, Case Note, Protecting Public Rights in Private Arbitration, 107 YALE L.J. 1157, 1160 (1998) (criticizing Cole for ignoring "an element crucial to a fair arbitration process: public access to arbitration awards."). Lanni explains that mandatory arbitrations "display two of the four characteristics cited by Owen Fiss as inappropriate for private resolution: 'significant distributional inequalities' between the parties and 'a genuine social need for an
2. The Counter-Critics

Professor Samuel Estreicher succinctly summarizes the case for *Gilmer* proponents:

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.¹⁰³

Professor Estreicher, reflecting the general view of *Gilmer* supporters, takes as a premise the well-founded assumption that arbitration has many advantages over judicial litigation: it is less expensive, faster, more informal,¹⁰⁴ and better geared to the kinds of small statutory claims that lawyers might be reluctant to take through the expensive processes of judicial litigation. In his view and those of other *Gilmer* proponents, all of these advantages will inure to the benefit of parties to the process and the public, if mandatory-arbitration processes are “properly designed.” Estreicher counters *Gilmer* critics who assert inequality of bargaining power in the formation of mandatory-arbitration agreements. He suggests that job applicants can make the choice between mandatory-arbitration employers and non-mandatory-arbitration employers. At the same time, he concedes the obvious: “Where all employers in a given industry require predispute arbitration agreements as a condition of employment, the authoritative interpretation of law.”” *Id.* at 1161 n.25 (discussing Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087 (1984)).

¹⁰³ Estreicher, *supra* note 91, at 1349.


I also think that some courts still subscribe to the fond, but misguided, view that employment arbitration is invariably quick and cheap. The simple truth is it just ain’t necessarily so. When we researched the subject in connection with the appeal in *Cole*, we found that the [American Arbitration Association] cited $700 per day as the average arbitrator’s fee. JAMS/Endispute arbitrators charged an average of $400 per hour, but fees of $500 or $600 per hour were not uncommon. *Id.* at 306-07 (footnotes omitted). The difference between the then $700 per day fee and the $400-$600 per hour fee reflects more than different organizations setting different fee structures, as a reader unfamiliar with arbitrator fee structuring might surmise on reading Chief Judge Edwards' statement. The $700 per day figure is an average fee in labor arbitration cases, where unions and employers voluntarily arbitrate and voluntarily agree on the selection of the arbitrator and to share the arbitrator’s fee. The $400-$600 per hour fee is unheard of in labor arbitration cases. Rather, these fees are charged by arbitrators in mandatory-arbitration cases.
employee’s practical ability to shop for employers that will not require arbitration is substantially diminished.”105 Estreicher conspicuously avoids the words “mandatory arbitration.” He substitutes for them the term “pre-dispute agreements.” The substitution appears to be more than a mere semantical choice. It reflects Gilmer’s casual—indeed, almost nonexistent—treatment of mandatory arbitration’s compulsory qualities and how radically different they make a process that has always featured the voluntary agreement as its core attribute. This is demonstrated by Estreicher’s manner of treating “voluntariness.” He states that “a ‘voluntariness’ test injects an additional element of uncertainty—on top of the doubts under existing law over whether these agreements are binding.” He adds that “[t]his additional layer of uncertainty will have the effect of discouraging such agreements.”106 Estreicher’s rationale takes the premise that mandatory-arbitration agreements are not voluntarily entered into, reconstructs the premise as an abstract uncertainty, and then discards it because of the purported uncertainty. Thus reconstructed, the premise no longer stands in the way of a conclusion that the involuntary nature of mandatory-arbitration agreements may be a partial basis on which to conclude that mandatory-arbitration agreements are unenforceable.

Professor Estreicher raises the question of “whether improvements in benefits could be exchanged for agreements to submit future disputes to arbitration.”107 The invalid assumption inherent in the question is that mandatory-arbitration agreements are preceded by negotiations over their terms. Generally, there are no such negotiations, and it seems fanciful to assume otherwise. The absence of an employee’s opportunity to negotiate the agreement’s terms, coupled with their job-contingent nature, makes mandatory-arbitration agreements indisputably involuntary.

Another commentator, Professor Theodore St. Antoine, acknowledges the arguments of Gilmer opponents and, in large part, concedes their validity. But he also sees “another side to the story.”108 He cites crowded EEOC and court dockets, the lengthy time it takes to obtain a jury trial, and

105. Estreicher, supra note 91, at 1354 n.30.
106. Id. at 1358. The substitution of euphemisms for “mandatory arbitration” appears to be a favorite tactic of Gilmer proponents. See, e.g., Dennis R. Nolan, Employment Arbitration After Circuit City, 41 BRANDEIS L.J 853 (2003). The article supports the Gilmer decision without ever using the words “mandatory arbitration.” The term “employment arbitration” is substituted for “mandatory arbitration,” thus making voluntary and involuntary arbitration indistinguishable. The Ninth Circuit, for example, is described in the article as “ideologically and idiosyncratically anti-arbitration,” rather than “anti-mandatory arbitration.” Id. at 865. Consistent with this approach, the Nolan article does not inform the reader that the signing of a mandatory arbitration agreement is generally an exacted condition of employment, as illustrated in EEOC v. Luce, Forward, Hamilton, & Scripps, 303 F.3d 994 (9th Cir. 2002).
107. Id.
108. St. Antoine, Changing Role, supra note 24, at 91.
ARBITRATORS' FEES

the high likelihood of cases being dismissed before trial. He emphasizes that, in the employment law context, plaintiffs' attorneys turn down a high percentage of individuals seeking their assistance, and that mandatory arbitration provides a forum for those claims that would otherwise not be heard in any forum, because they are too small to attract lawyers who will take them to court. St. Antoine concedes that the same lawyers who decline to take small-claim employment cases to court will also sometimes decline to take them to arbitration, thus leaving the mandatory-arbitration claimant without representation “in this much less formal and intimidating [arbitration] forum.”

St. Antoine also cites what he describes as empirical evidence that plaintiffs in employment cases win more often in the arbitration forum than they do in the judicial forum. However, his analysis is based on a mix of cases that leaves his conclusion open to question. The cited studies compare employment arbitration cases, both statutory and non-statutory, and labor arbitration cases with all statutory employment claims cases filed in court. For arbitrated employment termination claims not based on

109. Id. at 92. The premise that plaintiffs face formidable hurdles in their efforts to pursue statutory discrimination claims in court cannot be challenged. See Jess Bravin, U.S. Courts Are Tough on Job-Bias Suits, WALL ST. J., July 16, 2001, at A2 (citing Eisenberg & Schwab report on how discrimination plaintiffs fare on appeal, as compared with other kinds of claims); Theodore Eisenberg & Stuart J. Schwab, Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals, July 16, 2001 (report commissioned by Mehri & Skalet, PLLC), at http://www.findjustice.com/ms/pdf/double-standard.PDF (last visited Oct. 28, 2003). Through my experiences and conversations with other arbitrators with employment arbitration experience, I have recognized that unlike labor arbitration, many employment mandatory arbitration proceedings use the array of motions, including motions for summary judgment, that are available in federal court proceedings. Thus, a claim that is not likely to survive a defendant's motion for summary judgment in a federal judicial proceeding will likely not survive a similar motion made in an arbitration proceeding.

110. St. Antoine, Changing Role, supra note 24, at 92.

111. Id. at 91.

112. Id. at 92 n.55 and accompanying text. Professor St. Antoine's empirical argument draws heavily on Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 COLUM. HUM. RTS. L. REV. 29 (1998). It is likely that a failure to distinguish between statutory and non-statutory claims in arbitration accompanies a failure to distinguish between voluntary and mandatory arbitration. Maltby's cited studies demonstrate that employees have a favorable view of voluntary arbitration and an unfavorable view of mandatory arbitration. In the conclusion of his article, Maltby states: “Arbitration should never be a condition of employment.” Id. at 64.

113. See Lanni, supra note 102, at 1162 n.36 and accompanying text (criticizing the empirical literature for not distinguishing between statutory and non-statutory claims). The cited studies are valuable contributions to employment law literature. I have no criticism of them, except to whatever extent they suggest a premise in support of mandatory arbitration. With the exception of the Maltby article, the cited studies do not purport to reach conclusions concerning the fairness of mandatory arbitration. Maltby, supra note 112. Professor St. Antoine's premise, drawn from the studies, is that "mounting empirical
discrimination covered by statute, the claimant need only prove that the termination was arbitrary in some way. For the statutory discrimination claim filed in court, a plaintiff will not prevail, even if the termination was arbitrary, so long as it was not for discriminatory reasons made unlawful by statute. For example, the discipline-termination standard in collective-bargaining agreements is a "just-cause" standard. The labor arbitrator, in order to find for the union, need only determine that the employer acted arbitrarily. Typically, failure to note these kinds of distinctions contributes to a widely held impression that all of the positive attributes of procedurally fair arbitration processes—labor arbitration, for example—are also attributes of mandatory arbitration for statutory claims. Manifestly, they are not. Other studies find that employees do not do as well before
arbitrators as they do in court, both as to liability and damages issues.\textsuperscript{116} In support of mandatory arbitration, St. Antoine cites the avoidance of juries “likely to render volatile verdicts,”\textsuperscript{117} meaning verdicts awarding plaintiffs what he would presumably regard as excessively high damages.\textsuperscript{118} The argument can be turned around and used to support the position of Gilmer’s critics: what Gilmer proponents describe as the jury-avoidance advantage may not be the irrational verdict that a trial judge could overturn,\textsuperscript{119} but rather the high-damages plaintiff’s verdict that is within the range of permitted jury discretion and hence not capable of being overturned.\textsuperscript{120} Employers likely perceive that arbitrators are less inclined to award damages that juries could return without being reversed by the trial judge or by an appeals court, because the verdicts were within the range of the jury’s discretion. Constitutional and statutory rights to jury trials are qualified by judicial control over jury verdicts.\textsuperscript{121}

Neither Professor St. Antoine nor Professor Estreicher discusses whether Congress intended to permit the enforcement of mandatory-arbitration agreements covering federal statutory claims. Like the Gilmer Court, they avoid the key arguments that make their perceptions of the beneficial consequences of mandatory arbitration largely irrelevant. When Congress enacted statutes prohibiting discrimination, it was presumably aware, for example, that some small statutory discrimination claimants would be unable to attract lawyers to represent them; that as an offset, large jury awards in statutory-claim cases would increase employer incentives to

\textsuperscript{116} PUBLIC CITIZEN, supra note 10, at 68 (concluding and citing data indicating that “arbitrators simply do not render awards as high as do judges and juries.”). \textsuperscript{117} See Reilly, supra note 4, at 1211 nn.32-35 and accompanying text (citing polls indicating a “nearly sixty percent win rate for plaintiffs [in court]” but a thirty percent win rate for plaintiffs in arbitration cases involving discrimination). Reilly reports that “[t]he mean damages awarded by arbitrators from 1993 to 1995 was $49,030 compared to $530,611 by district courts,” id. at 1211-12 n.37 and accompanying text, and that “arbitrators rarely award punitive damages” in contrast to the median punitive damages award of $2,689,033 in employment cases from 1985-1994. Id. at 1212 & nn.37-44.

\textsuperscript{118} St. Antoine, Changing Role, supra note 24 at 98-99 (citing jury awards of “$20 million, $4.7 million, $3.25 million, $2.75 million, $2 million, $1.5 million, $1.19 million, and $1 million.”).

\textsuperscript{119} Id.

\textsuperscript{120} See FED. R. CIV. P. 50(b) (empowering a federal district judge to overturn a jury verdict). Decisions have long interpreted the rule to mean that a judge may overturn a jury verdict, or take away from the jury the opportunity to render a decision that no reasonable jury would render. See Neely v. Martin K. Eby Construction Co., Inc., 386 U.S. 317, 321 (1967); Galloway v. United States, 319 U.S. 372, 389-90 (1943). On reconciling the right to a jury trial with a judge’s ability to overturn a jury verdict, see JACK H. FRIEDENTHAL ET AL., supra note 21, § 12.3.

comply with the statutes.

IV. ARBITRATORS’ FEES

A. The Influence of Cole v. Burns International Security Services

Not until Cole v. Burns International Security Services did a court take up the issue of shared arbitrators’ fees in mandatory-arbitration proceedings. Neither party in the case addressed the arbitrator-compensation issue. On its own, the Cole court determined that an employee relegated to mandatory arbitration could not be contractually required to pay a share of the arbitrator’s fee, there being no similar requirement in a judicial proceeding. As a remedy, the court interpreted the arbitration agreement’s silence on arbitrator compensation as an employer-pays-all arbitrator compensation arrangement. The remainder of the mandatory-arbitration clause was held to be enforceable. The question of whether the employee resisting arbitration could afford to pay a one-half share of the arbitrator’s fee was not considered. The decision may be read to take the approach that the shared-fee arbitrator compensation arrangement is per se unenforceable and that no arbitration case litigant should suffer when neither the decision to arbitrate nor the determination of how and by whom the arbitrator should be compensated is voluntarily reached.

Then Chief Judge Edwards’s opinion in Cole has all the hallmarks of a judge who disagrees with, but must conform to, a binding higher court’s decision. At length, his decision cites problems with the enforcement of mandatory-arbitration agreements. This is followed by the acknowledgement, introduced by a connecting “Nonetheless,” that the

122. 105 F.3d 1465 (D.C. Cir. 1997).
123. See Cole, 105 F.3d 1465, 1489 (LeCraft Henderson, J., concurring in part and dissenting in part) (noting that the issue of fees and costs was “posed by the panel sua sponte during oral argument”). Since Cole, the shared-fee issue has been raised in other cases. Federal circuit courts are now divided on the question. See Morrison v. Circuit City Stores, 317 F.3d. 646, 657-65 (6th Cir. 2003) (finding that cost-splitting provision in mandatory-arbitration agreement not enforceable).
124. Cole, 105 F.3d at 1484 (“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.”)
125. Id. at 1484-85.
126. Id. at 1472-79. In particular, Edwards points out that “mandatory arbitration agreements in individual employees’ contracts often are presented on a take-it-or-leave-it basis; there is no union to negotiate the terms of the arbitration agreement. Thus, employers are free to structure arbitration in ways that may systematically disadvantage employees.” Id. at 1476.
Supreme Court had announced another view in the *Gilmer* case. In published articles Judge Edwards has emphasized distinctions between the arbitration of private and public disputes. For disputes involving the interpretation of statutes, he has expressed skepticism about the utility of arbitration and arbitrators. He has also bluntly identified a judicial-caseload motive for judicial decisions holding the mandatory-arbitration process to be an appropriate means of resolving statutory disputes. In his most recent article on mandatory arbitration, Judge Edwards flatly concludes that he is still uncertain about the utility of mandatory arbitration.

Social norms of privacy concerning arbitrators' compensation may at least partially explain why the linkage of mandatory arbitrators' fees and the fairness of mandatory-arbitration proceedings have so seldom been argued. Professional fees are generally avoided as topics of social discourse. In many job contexts, it is widely regarded as indiscreet to raise inquiries for which answers might reveal how much money other individuals earn, particularly in occupations—arbitration among them—where income variations hinge on an indeterminate combination of experience, reputation, and skill. Labor arbitrators, for example, may have known per diem rates, but very few labor arbitrators are positioned to know

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130. *Id.* at 299 ("With all due respect, it appears that, in retrospect, the Supreme Court may have overestimated the virtues of arbitration in *Gilmer*. "). The dissenting opinion in *Cole* criticizes the court's opinion for its criticism of *Gilmer*:

> Of more significance, owing to its impropriety, is the majority's statement that "it is perhaps misguided to mourn the Supreme Court's endorsement of the arbitration of complex and important public law claims." It is more than misguided—it is wrong. We are not in the business of lamenting or celebrating decisions of the United States Supreme Court. We are to follow them. Period.

*Cole*, 105 F.3d at 1489 n.1 (Henderson, J., concurring in part and dissenting in part) (internal citation omitted).

131. For example,

Most people, however, prefer that their incomes not be revealed . . . Why is this privacy so important? In some cases, we may feel that we are not making as much as we should, and we prefer not to make others know of our shortcomings. In other cases, we may fear that people will become envious or angry if they learn the size of our incomes.

other arbitrators' billable days per year.132

B. Prohibitive and Potentially Prohibitive Costs

The prevailing view that arbitration litigation133 costs less than judicial litigation is under attack—and for sound reasons.134 Even when arbitration litigation costs less than judicial litigation, the timing of some required arbitration costs, such as upfront fees for the arbitrator, can make it likely that the arbitration-plaintiff will be unable to proceed in that forum.135 When arbitration filing and forum fees are added to the arbitrator's fees, arbitration can cost more, so much more that a claimant can be discouraged from using arbitration when it is voluntary. When this happens in mandatory-arbitration settings, the mandatory-arbitration clause bars the plaintiff from the judicial forum and arbitration costs bar the plaintiff from

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132. Labor arbitrators' fees have been topics of discussion at meetings of the National Academy of Arbitrators. See Hensler, supra note 41, at 134-35; Picher et al., supra note 13, at 260-62. Support for the stated conclusion that arbitrators tend not to reveal their income to other arbitrators is based on the author's over twenty-five years of attending various meetings of the National Academy of Arbitrators and other kinds of organizations with large numbers of arbitrators as members, many of whom are close friends and acquaintances.

133. I use the term "arbitration litigation" as a counter to the sometimes held view that arbitration, like mediation, is an alternative to litigation, even though the prevailing arbitration process involves direct examination and cross-examination of witnesses, opening arguments, closing arguments and, unlike judicial litigation, goes further in the direction of formality by permitting parties to file post-hearing briefs for the arbitrator to consider before making a decision. See generally Martin Domke, Commercial Arbitration (1965) (exploring the arbitration process). Based upon the author's conversations with numerous employment arbitrators and parties involved in voluntary employment arbitration, the governing procedural rules are sometimes the Federal Rules of Civil Procedure.

134. See generally Public Citizen, supra note 10.

135. In a malpractice case against a law firm, the arbitrator denied the defendant law firm's motion for summary judgment but then conditioned going forward with the arbitration on payment of additional arbitration fees by the parties. The arbitrator wrote:

I have concluded that the parties are best served by a determination of the merits as to Claimant's claims. This is provided, of course, the parties "pay for" this administration of justice. It is regrettable perhaps, but the AAA [American Arbitration Association] and its arbitrators do not provide their services for free.

As a condition then of continuing this arbitration proceeding, Claimant must pay all sums due [to] the AAA forthwith. Additionally, the parties must commit to deposit with the AAA an additional $3750. That sum is calculated at nine hours of arbitration time six hours of pre- and post arbitration activity . . . at my discounted fee of $250 per hour.

If the previously owing sums, plus half of the deposit are not paid by Claimant to the AAA by May 12, 2000, this matter will be dismissed with prejudice for the reasons stated in Respondent's brief.

the arbitration forum. It follows that when statutory claims are involved in a mandatory-arbitration process, a plaintiff with a judicial forum prescribed by the legislature can unwillingly end up with no forum.

Employment arbitrators who are attorneys, including those who serve as arbitrators in mandatory-arbitration proceedings involving statutory claims, tend to set their fees at the same, or close to the same, level of the fees they charge clients for legal services. The fees are generally based on hourly rates ranging from $200 to $400.\textsuperscript{136} Virtually no labor arbitrator sets hourly-rate fees in a labor arbitration case.\textsuperscript{137} Their per diem rates are generally much lower than employment arbitrators' hourly rates, when converted to per diem rates.\textsuperscript{138} However, when labor arbitrators serve as employment arbitrators, including mandatory-arbitration employment disputes, they also command compensation by the hour. In addition to paying arbitrators' fees, parties who use the services of the American Arbitration Association (AAA) for the administration of their dispute must pay an "Initial Administrative Fee" of $175.\textsuperscript{139} Until November 1, 2002, AAA rules for employment disputes, including mandatory-arbitration cases required the employee to pay several different kinds of fees: a filing fee of $125;\textsuperscript{140} a postponement/cancellation fee of up to $120; and administrative fees ranging from $500 to $13,000, depending upon the size of the employee's claim.\textsuperscript{141} All of these upfront fees are nonrefundable.\textsuperscript{142} In an implicit but major acknowledgment of problems concerning the cost of mandatory arbitration for individual employees, effective November 1, 2002, these rules were amended to require employers to pay all administrative and filing fees and all of the arbitrators' fees in mandatory-arbitration cases.\textsuperscript{143} The AAA has announced that the new rules making the

\textsuperscript{136} Id. at 14. \textit{See} Letter from Elaine McLaughlin to R. Gerald Barris (Aug. 8, 2000), \textit{in id.} at 22-23.

\textsuperscript{137} \textit{See} LABOR ARBITRATION RULES, \textit{supra} note 55. The unnumbered section in the rules, following Rule 46, is entitled "Administrative Fees." Under the sub-title, "Arbitrator Compensation," it provides: "Unless mutually agreed otherwise, the arbitrator's compensation shall be borne equally by the parties, in accordance with the fee structure disclosed in the arbitrator's biographical profile submitted to the parties."

\textsuperscript{138} \textit{See} Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997).

\textsuperscript{139} LABOR ARBITRATION RULES, \textit{supra} note 55, at "Administrative Fees".

\textsuperscript{140} RULES FOR EMPLOYMENT DISPUTES, \textit{supra} note 55, at "Administrative Fee Schedule".

\textsuperscript{141} Id.

\textsuperscript{142} Id. \textit{But see} Estreicher & Ballard, \textit{supra} note 10, at 10 (challenging existence of any negative impact from upfront mandatory-arbitration fees).

\textsuperscript{143} Mandatory-arbitration cases are described in the Amended Rule as "employer-promulgated plans." RULES FOR EMPLOYMENT DISCRIMINATION, \textit{supra} note 55. The unnumbered section entitled "Administrative Fee Schedule" provides that "[u]nless the employee chooses to pay a portion of the arbitrator's compensation, such compensation shall be paid in total by the employer." \textit{Id.} The immediately preceding sentence provides that "[a]rbitrator compensation is not included in this schedule" of administrative fees, even
employer responsible for the arbitrator's entire fee were promulgated by "recent case law developments."\textsuperscript{144}

Arbitrator fees, routinely paid by the employer alone, are virtually unknown in both labor arbitration\textsuperscript{145} and voluntary employment arbitration of statutory disputes.\textsuperscript{146} Grievance-arbitration clauses in collective-bargaining agreements almost always provide that the union and employer will share the mutually selected arbitrator's self-determined fees.\textsuperscript{147} A labor arbitrator's fee typically will include a per diem rate set by the arbitrator, encompassing both hearing and decision-writing days.\textsuperscript{148} A labor arbitrator's fees also include accrued travel time, transportation costs, and fees for cancellations or postponements of scheduled arbitration hearing dates. Union labor arbitration costs, including fees of union counsel, are, like most union expenditures, paid for from funds collected from union members' dues payments. The employee-grievant pays no arbitrator fees or any other costs associated with the arbitration.

Arbitrator appointing agencies, like the Federal Mediation and Conciliation Service and the American Arbitration Association, provide labor arbitration parties with lists of arbitrators from which they can mutually agree on a procedure for choosing one of the listed arbitrators.\textsuperscript{149} Biographical data on each arbitrator is provided, including a statement of the arbitrator's per diem fee.\textsuperscript{150} Collective-bargaining agreements typically provide that the union and employer will mutually select the arbitrator and will mutually compensate the arbitrator for the time spent hearing and deciding a case at what is now an average per diem rate of $720.75 per day.\textsuperscript{151} Decision-writing time includes the time spent studying the record

\textsuperscript{144} Employment Rules Modified: Fairness for Employees in Arbitration is AAA Goal, DISP. RESOL. TIMES, Oct.-Dec. 2002, at 1 [hereinafter Employment Rules Modified]. The change was also likely influenced by the Public Citizen report on the cost of arbitration. PUBLIC CITIZEN, supra note 10.

\textsuperscript{145} Some collective-bargaining agreements require that the party who loses the arbitration pay the arbitrator's entire fee. See BASIC PATTERNS, supra note 8, at 39.

\textsuperscript{146} ELKOURI & ELKOURI, HOW ARBITRATION WORKS 24-25, 186 (Marlin M. Volz & Edward P. Goggins eds., 5th ed. 1997).

\textsuperscript{147} See BASIC PATTERNS, supra note 8, at 39 (noting that 92% of collective-bargaining agreements sampled mention arbitration expenses and 91% of these provisions provide for equally shared arbitrator fee).

\textsuperscript{148} ELKOURI & ELKOURI, supra note 146, at 24-25.

\textsuperscript{149} See LABOR ARBITRATION RULES, supra note 55, R. 12 & 14.


\textsuperscript{151} FED. MEDIATION AND CONCILIATION SERV., id.at 31.
made in the case. Currently, the average ratio of a labor arbitrator's study-and-writing-time to hearing time is nearly two to one. Thus, on average, a labor arbitrator who hears a case for one day will bill the parties for three days at the arbitrator's per diem rate. The labor arbitrator's average bill for such a labor arbitration case is $2100. Labor arbitration per diem fees that are shared by the employer and the union range from $500 to $1000 per day. Employees compelled to arbitrate under mandatory-arbitration agreements thus must often bear arbitrator-fee costs that far exceed what a union party would pay for the representation of a bargaining-unit employee. In addition to sharing the arbitrators' fees at $200 to $400 per hour, employees in mandatory-arbitration cases are compelled to pay arbitration filing fees of $500, plus a share of forum fees ranging from $1500 to $3000 including one recorded forum fee of $82,000. Upfront payment of forum and arbitrators' fees under mandatory-arbitration clauses may provide an inherent disincentive to use the arbitration process for fear that it will be unaffordable, even if it should turn out not to be.

The mandatory arbitrator shared-fee structure does more than set fees at a rate some employees are unable to afford. It also provides a counter to the argument that mandatory arbitration provides for employees with small statutory claims a forum they would otherwise not have, because of the small size of their claims. If a statutory claim is too small to attract a lawyer willing to represent the claimant, the claim may be too small to make it worthwhile to arbitrate, to pay a share of an arbitrator's fee, and any upfront forum fees a provider of arbitration services might require. The following hypothetical is illustrative:

In a mandatory-arbitration setting, an employee has a $500 Social

152. Id.
153. Id. If a labor arbitration case is postponed or cancelled before a hearing, the arbitrator may be paid for all scheduled hearing days if the cancellation takes place within the cancellation period established by the arbitrator. Typically, labor arbitrator cancellation periods for fee purposes are between two weeks and thirty days.
154. Id.
Security Act claim. After a six-hour hearing and four hours of decision-writing time, the arbitrator awards the employee $500. The arbitrator's fee for hearing and deciding the case is $4000, based on ten hours of work at $400 per hour. Under a shared-fee billing arrangement, the arbitrator bills the employer and the employee $2000 each. This would be a net loss of $1500 for the employee. The *Gilmer*-proponent position on individuals with small statutory claims merely shifts a small-claim plaintiff's judicial-forum problem to an equally serious arbitration-forum problem of a different character. Foreseeing this kind of result, a plaintiff would likely abandon arbitration and be left with no remedy, not even a possible small-claims court remedy.

Until the *Cole* case was decided, plaintiffs who resisted motions to dismiss and to compel mandatory arbitration had not attacked fee-sharing clauses. Nor has the employment plaintiffs' bar attacked the alternative means of compensating the arbitrator, with fees paid entirely by the employer. From the perspective of its members, the shared fee is perhaps regarded as the more acceptable fee-arrangement alternative, because it avoids the potential for arbitrator bias that is appropriately associated with the unilaterally employer-paid fee. Plaintiffs can at least sometimes afford the shared mandatory-arbitration fee. The unilaterally employer-paid fee almost invariably generates an appearance of partiality. Yet, until the *Cole* decision, the employment plaintiffs' bar appears to have accepted both the mandatory shared-arbitrator fee and the mandatory unilaterally employer-paid arbitrator fee. Though the post-*Cole* approach has generated attacks on the shared mandatory fee, challenges to the unilaterally employer-paid arbitrator fee remain rare if not nonexistent.

If and when a mandatory-arbitration plaintiff challenges the shared arbitrator fee and the employer-paid arbitrator fee as an unacceptable alternative, the Supreme Court may have to decide whether a mandatory-arbitration agreement is enforceable when either arbitrator compensation procedure is part of the mandatory-arbitration agreement. The response

158. 105 F.3d 1465 (D.C. Cir. 1997).
159. See Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234-35 (10th Cir. 1999) (rendering agreement not enforceable because it required employee to pay a shared fee that he could not afford); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1483-86 (D.C. Cir. 1997) (finding agreement not enforceable, but only to the extent that it required a shared-fee arrangement); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000) (rendering agreement not enforceable because it required a shared-fee arrangement). But see Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999) (noting that because the shared fee was affordable, the fee clause was enforceable).
160. The now hypothetical case could arise in several different contexts: (1) a plaintiff's challenge to a mandatory-arbitration, shared-fee arrangement in which the shared-fee is directly attacked on the rationale of the *Cole* case, and the *Cole*-case type remedy of converting the shared-fee clause to an employer-paid-fee clause is also attacked on the
of substituting a unilaterally employer-paid fee for the shared mandatory-arbitration fee, as at least one major provider of arbitration services has done,\textsuperscript{161} may be a leap from the frying pan of shared arbitrator fees to the fire of the employer-paid fee and its generated ethical issues.

V. \textsc{Appearance of Partiality}

A. \textit{The Judiciary}

John Adams, the second president of the United States, was admitted to the Massachusetts Bar in 1759. The justice of the peace before whom he argued his first case was the father of the lawyer he opposed.\textsuperscript{162} No lawyer at that time could have challenged a judge on the ground of a blood relationship between opposing lawyer and judge. Recusal motions for judicial bias were unknown at common law in England,\textsuperscript{163} and none would exist in federal courts until 1911.\textsuperscript{164} Judge-litigant relationships were tolerated on the probable rationale that a judge could put the relationship aside and fairly decide a case. There was no standard of appearance of partiality, and none would exist in federal courts until 1974.\textsuperscript{165} Eighteenth-century American judges were perceived to be experts in the law who would always apply it in the only available correct manner, even when the judge was the father, other relative or close friend of a lawyer representing one of the litigants. The prevailing outlook of the time was that a judge knew what the law was or knew where to find it in the law books; that having found it, or having learned it so well that no search for it was required, the judge would apply the law in the single certain way it ought to be applied.

Federal and state court judges are today bound by Codes of Judicial Conduct requiring disqualification when their impartiality might reasonably

\textsuperscript{161.} See Employment Rules Modified, supra note 144, at 1, 18 (noting that the AAA is taking steps to reduce arbitration costs for employees).

\textsuperscript{162.} DAVID MCCULLOUGH, JOHN ADAMS 44-45 (2001).

\textsuperscript{163.} See Liteky v. United States, 510 U.S. 540, 543 (1994) ("[R]equired judicial recusal for bias did not exist in England at the time of Blackstone.").

\textsuperscript{164.} The original statute, now in its current form, is codified at 28 U.S.C. § 144 (Historical and Revision Notes following § 144).

be questioned.¹⁶⁶ The standard has been almost uniformly interpreted to be an objective standard that prohibits even an appearance of partiality.¹⁶⁷ Judges are generally obliged to recuse themselves when the standard is breached. The requirement that an impartial judge preside over judicial proceedings has been elevated to a constitutionally protected status, grounded in the importance of maintaining public confidence in judicial proceedings.¹⁶⁸

The obligation to recuse has been found to include judicial remarks on or off the bench,¹⁶⁹ presiding over a prior related¹⁷⁰ or unrelated case,¹⁷¹ presiding over former clients' or former opponents' cases, family, social or business relationships, and personal connection with the proceedings.¹⁷² If a party to a civil case paid a judge to decide the case, criminal proceedings for bribery would be likely if the payment were covert. Recusal would be nearly automatic and never tolerated in the unimaginable overt case. A criminal conviction violates constitutional due process if a small part of the presiding judge's income consists of court fees collected from convicted defendants.¹⁷³ If it is unconstitutional for a judge to be compensated by

¹⁶⁶. The American Bar Association's Model Code of Judicial Conduct has been adopted in some form in forty-nine states. Leslie W. Abramson, Appearances of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned," 14 GEO. J. LEGAL ETHICS 55, 55 (2000). Canon 1 of the 1990 Code provides that "[a]n independent and honorable judiciary is indispensable to justice in our society." MODEL CODE OF JUDICIAL CONDUCT Canon 1(A) (1990). Canon 2 of the 1990 Code imposes on judges a duty to "avoid impropriety and the appearance of impropriety in all of the judge's activities." Id. Canon 2; see also Abramson, supra, at 56 & nn.2-3 (2000). A challenged judge is presumed to be qualified and impartial, thus casting upon the moving party seeking recusal the burden of proving that the judge could not be impartial. Id. at 70.


¹⁶⁸. See Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (noting that a defendant who is tried before a biased judge is deprived of Fourteenth Amendment rights).

¹⁶⁹. See Abramson, supra note 166, at 76 n.102, and accompanying text (indicating a number of cases in which side comments by judges have led to a finding of bias); Charles Lane, High Court to Consider Pledge in Schools: Scalia Recuses Himself from California Case, WASH. POST, Oct. 15, 2003, at A1 (noting that Justice Scalia recused himself after motion for recusal had been filed objecting to comments made by the justice at a public rally in Fredericksburg, Va.).

¹⁷⁰. Abramson, supra note 166, at 76.

¹⁷¹. See Pride v. Harris, 882 P.2d 381, 385 (Alaska 1994) (noting that prejudgment of a party in an unrelated case could possibly require recusal); James v. People, 727 P.2d 850, 857 (Colo. 1986) (admitting possibility that prejudice displayed against party in an unrelated case can be grounds for recusal).

¹⁷². See Abramson, supra note 166 at 86 n.148 (noting that judge's personal reactions in court can be grounds for recusal); Charles Lane, Stevens Gives Rare Glimpse of High Court's "Conference," WASH. POST, Oct. 19, 2003, at A3 (detailing speech given by Justice Stevens in which he justified decision not to recuse himself in case involving former law clerk).

¹⁷³. See Tumey v. Ohio, 273 U.S. 510, 535 (1927) (noting that when a defendant is before a judge with conflicting interests, there has necessarily been a denial of due process).
defendants in criminal cases, it is unethical at best, and unlawful at worst, for an arbitrator to be compensated exclusively by one party to a statutory-claim dispute before the arbitrator. The unilaterally paid arbitrator compensation that Gilmer permits is a breach of Gilmer’s announced judicial-parity principle that a switch to arbitration for resolution of a statutory claim is no more than a transfer of forum.

B. The Arbitration Forum

Mandatory-arbitration arbitrators who decide statutory claims are bound by more than the substantive law of the statutes they interpret. Arbitrators are bound by “elementary requirements of impartiality taken for granted in every judicial proceeding . . . when the parties agree to resolve a dispute through arbitration,” and the arbitrator is obliged to “avoid even the appearance of bias.” When labor arbitrators resolve disputes between unions and employers, they are also bound by a self-policing Code of Professional Responsibility. It requires that labor arbitrators avoid the appearance of partiality. If an appearance-of-impartiality standard

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174. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 146-47 (1968). In Commonwealth Coatings a neutral arbitrator on a tri-partite panel had been a paid consultant for one of the parties to the arbitration. The Court determined that the award issued by the panel should be vacated as required by the Federal Arbitration Act’s “evident partiality” standard. 9 U.S.C. § 10 (2000). Canon 2 of the Model Code for Judicial Conduct sets the standard for appearance of partiality by mandating that a “judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) (emphasis added). The commentary to Canon 2 discusses the importance of public confidence in the judiciary and how public confidence is eroded by the mere appearance of a judge’s partiality. Id. at Canon 2(A) cmt.

175. Commonwealth Coatings, 393 U.S. at 150.

176. A Code of Professional Responsibility binds labor arbitrators who are members of the National Academy of Arbitrators (NAA). See CODE OF PROF'L RESPONSIBILITY, supra note 66. Three entities involved in the arbitrator selection process are signatories to the NAA’s Code, one private and two public: The American Arbitration Association (AAA), the Federal Mediation and Conciliation Service (FMCS), and the National Mediation Board (NMB). Even though the Code is applicable to NAA members only, it effectively covers many non-member labor arbitrators. Many labor arbitrators receive arbitration assignments as a result of being chosen from a list of arbitrators provided by private or public appointing agencies, like the AAA, FMCS, and the NMB. Each appointing agency is empowered to apply the Code’s standards in determining who is eligible to be and to remain on the rosters of arbitrators used to provide parties with names of arbitrators. Section 2.B.3 of the NAA Code provides as follows:

An Arbitrator must not permit personal relationships to affect decision-making.

Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator’s impartiality.

CODE OF PROF'L RESPONSIBILITY, supra note 66, at § 2.B.3 (emphasis added); see also NAA
governs both commercial and labor arbitration proceedings in their voluntary contexts, in cases usually not involving statutory claims, at least the same or perhaps greater scrutiny ought to be generated in statutory-claim, mandatory-arbitration proceedings.

_Gilmer_ professes that the employee remanded to arbitration under an adhesive arbitration agreement has merely substituted forums, with no loss of substantive rights. A major flaw in the premise is that the mandatory-arbitration procedures that control arbitrator compensation make the arbitration forum very much unlike a judicial forum, where no plaintiff would ever face a similar kind of appearance-of-partiality problem. If a judge who is paid from defendants' fines conveys an appearance of favoring the prosecution for income-supplementing purposes, the unilaterally paid arbitrator in a mandatory-arbitration statutory-claim case conveys the appearance of bias in favor of the employer who pays the arbitrator's entire fee under the employer's own unilaterally imposed rules.

Commentators also have suggested the existence of a repeat player syndrome: employer knowledge about the pool of available arbitrators is superior to that of employees and some arbitrators will know this and take it into account in deciding cases, particularly when the employer pays the arbitrator's entire fee. On the assumption that all arbitrators are sufficiently honorable to avoid being so influenced, any debate over actual arbitrator bias, as generated by a purported repeat player syndrome in statutory-claim cases, need not be resolved. The relevant question is whether the unilaterally-compensated arbitrator procedure generates the appearance of a repeat player syndrome. The syndrome aside, would a reasonable observer view the unilaterally-compensated arbitrator, known to be working pursuant to a unilaterally structured arbitration agreement, as one who appears to have ruled for the employer—with future arbitration

Comm'n on Prof'l Responsibility and Grievances, Formal Op. 9 (1981) in GRUENBERG ET AL., supra note 66, at 371, 386-87 app. D (interpreting § 2.B.3 to require an arbitrator to disclose that his wife had contracted to act as library consultant for the law firm representing the employer in a case before him).

The words "might reasonably raise a question as to the arbitrator's impartiality" parallel those in the statute governing disqualification of federal judges, requiring that a judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). It is settled that under the quoted federal statute, "what matters is not the reality of bias or prejudice but its appearance." Liteky v. United States, 510 U.S. 540, 548 (1994).

177. See Tumey, 273 U.S. at 535 (noting that when a defendant is before a judge with conflicting interests, there has necessarily been a denial of due process).

178. See Bingham, Effect, supra note 99, at 190-91 (discussing the notion that employers, as repeat players in arbitration, will be systematically advantaged); Tia Schneider Denenberg & R.V. Denenberg, The Future of The Workplace Dispute Resolver, Disp. RESOL. J., June 1994, at 48, 50 (noting that the employer's experience with arbitration affords an advantage in future arbitrations).
assignments in mind? Inescapably, the answer would seem to be yes.

Apart from repeat player syndrome, an observer of mandatory arbitration might reasonably view the arbitrator's unilaterally paid compensation as at least some consideration for a decision in favor of the employer. Arbitrators themselves have expressed concern that unilaterally paid arbitrator fees can compromise the arbitration process.\(^\text{179}\) This is likely less so, but still so, when the parties to a mandatory-arbitration proceeding mutually select the arbitrator.

In an effort to achieve consensus on the procedural requirements for a fair mandatory-arbitration proceeding, two respected and influential groups in the mid-1990's drafted non-binding procedural guidelines for statutory, mandatory-arbitration proceedings. The Dunlop Report, commissioned by the federal government, recommends as part of a package of fair procedural guidelines, "cost-sharing between the employer and the employee to ensure arbitrator neutrality."\(^\text{180}\) The ABA's Due Process Protocol makes similar recommendations regarding fee sharing.\(^\text{181}\)

Despite the relevance of the appearance issue in mandatory-arbitration proceedings, courts and commentators tend to limit discussion of arbitrator bias issues to actual bias. For example, in *Cole v. Burns International Security Services*,\(^\text{182}\) after holding a mandatory-arbitration, shared-fee clause unenforceable, the court discussed the alternative of the employer paying the entire arbitrator's fee. This reflected the court's understandable sensitivity to the then well-understood view that the shared-fee avoided arbitrator neutrality problems associated with the unilaterally employer-paid mandatory arbitrator fee. The court thus felt compelled to defend the employer-paid fee, having struck down the governing shared-fee clause. It took up the arbitrator-neutrality issue, but without extending the analysis to its appearance component. Then Chief Judge Edwards wrote, "[i]t is doubtful that arbitrators care about who pays them, so long as they are paid for their services."\(^\text{183}\)

It may be assumed that Chief Judge Edwards' statement provides an answer to the question: is an arbitrator who is paid entirely by one party to a mandatory-arbitration proceeding likely to suffer actual bias as a result? One may further assume, for argument's sake, that the answer to that question is no; that arbitrators, as stated in the *Cole* case, do not care who

\(^{179}\) See Picher et al., *supra* note 13, at 260-62.


\(^{181}\) See DUE PROCESS PROTOCOL, *supra* note 83, at § C(6) ("Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator.").

\(^{182}\) 105 F.3d 1465 (D.C. Cir. 1997).

\(^{183}\) Id. at 1485.
pays them so long as someone pays them, meaning they suffer no actual bias by virtue of being paid solely by the employer. The court's statement may be taken as an accurate description of arbitrators' subjective views on arbitrator compensation sources. It has no bearing on the objective-standard consideration of "whether a reasonable and informed observer would question the [arbitrator's] impartiality." 184

Some academic commentary on mandatory arbitration similarly employs the subjective-standard of actual bias in lieu of an objective-standard analysis. Professor St. Antoine, for example, in viewing the positive side of mandatory arbitration, argues that "[o]ne has to count primarily on the inherent integrity of the great body of arbitrators—and on their knowledge that recognition of that integrity in the labor-management community is indispensable for their capacity to practice". 185 If, however, "inherent integrity" were a sufficient response to a claim of appearance of impropriety, there would be no appearance-of-partiality standard. Counsel would have to rely on the judge's "inherent integrity", even if the judge were lead counsel's parent or spouse. 186

VI. THE PROCEDURAL CHOICE ADVANTAGE

Gilmer noted that the securities industry procedures "provide protections against biased [arbitration] panels." 187 The cited "protections" were entitlement to the employment histories of the arbitrators, the exercise of one peremptory challenge, unlimited challenges for cause, required disclosures of conflicts of interest by the panel arbitrators, and the right to challenge the arbitrator's award in court on a showing of "evident partiality

184. See United States v. Microsoft Corp., 253 F.3d 34, 114 (D.C. Cir. 2001) (discussing federal statute which requires disqualification of judge only when judge's impartiality might reasonably be questioned); Int'l Ins. Co. v. Schrager, 593 So. 2d 1196, 1197 (Fla. Dist. Ct. App. 1992). In Schrager, an employer invoked "appearance of neutrality" as a problem for a unilaterally paid arbitrator compensation arrangement, in seeking to gain acceptance for a shared-fee arbitrator compensation arrangement. The court resolved the issue of actual arbitrator bias, citing Cole, but said nothing about the appearance-of-bias issue raised by the employer. See Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1235 (10th Cir. 1999) (dismissal a suggestion of actual bias when the mandatory arbitrator is unilaterally paid by the employer, without addressing the issue of appearance of bias).

185. St. Antoine, Changing Role, supra note 24, at 89 n.45. The statement appears to assume that the arbitrators who hear mandatory-arbitration cases are mainly labor arbitrators, a doubtful assumption. See David Sherwyn et al., supra note 83, at 121 n.262 (citing GAO study indicating arbitrators lack of training in labor law). The distinction is important. The advocate-attorneys who make up the bulk of arbitrators in mandatory-arbitration cases do not "practice" arbitration, so much as they practice law.

186. See, e.g., Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 817 (1986) (finding a due process violation when an Alabama Supreme Court judge cast deciding vote at the same time that he was litigating, as a plaintiff, a parallel issue in lower court).

or corruption in the arbitrators." It was of no procedural concern to the Court that the employer both picked and paid the arbitrator. The cited New York Stock Exchange rules could scarcely be useful in ferreting out actual arbitrator bias. It is hardly possible to find evidence of actual bias by reading an arbitrator’s employment history. A single peremptory challenge to an arbitration panel composed solely of employer-selected arbitrators simply reduces the number of employer-selected arbitrators on the panel. Proving the “evident partiality or corruption” of a unilaterally selected arbitration panel member is a near impossibility and, indeed, is rarely an issue in any arbitration proceeding.

Apart from the issue of whether certain unilaterally promulgated arbitration rules are per se so unfair as to void the arbitration proceedings, mandatory arbitration provides for employers the advantage of crafting even objectively fair rules to their advantage. They can decide unilaterally, for example, whether hearing proceedings will be recorded, whether briefs will be filed, and in what time frame, and where the arbitration will be held. Their rules can also dictate the scope of discovery. By comparison, federal judicial forum rules, for example, are created pursuant to an act of Congress that confers on the Supreme Court the authority to write the federal rules of civil procedure for federal trial courts.

The current trend in judicial decisions and academic commentary is to validate the enforcement of mandatory-arbitration clauses if the associated arbitration procedures meet minimum “due process” standards. This means that mandatory-arbitration procedural rules will fail only if, individually or in the aggregate, they are so one sided as to provide a blatant employer advantage. This is why rules governing dispute resolution proceedings are ordinarily mutually crafted by involved parties, as they are for labor arbitration proceedings, or they are crafted by non-parties with the public’s general interests in mind, as are the procedural rules governing trials in federal and state courts.

The unilaterally imposed rules governing mandatory-arbitration proceedings are most often in place when the employee elects to sign a mandatory-arbitration agreement rather than lose a job or a job opportunity. Typically, mandatory-arbitration agreements do not spell out the procedures that will govern the imposed arbitration proceedings. Rather, they bind employees to whatever procedures the employer has created or will later create. Both classes of procedural rules—those that meet and

188. Id. at 30-31 (citing 9 U.S.C. § 10(b)).
190. DUE PROCESS PROTOCOL, supra note 83.
191. Supra note 189.
192. See supra notes 11-12.
those that do not meet minimal due process standards—may well influence the substantive outcome of a statutory-claim dispute in a mandatory-arbitration forum. They differ only in the degree to which they might have a bearing on substantive outcome.

Procedural rules are either party-neutral or designed to protect the interests of plaintiffs or defendants. For example, notice requirements strongly favor defendants' interests. Plaintiffs' interests are favored by the rule that certain defenses, such as improper venue and lack of jurisdiction over the person, are waived unless raised by motion or in pleadings. Procedural rules governing summary judgment are facially neutral. Yet they really favor defendants, who need only show the presence of a genuine issue as to a material fact with respect to any single element of a multi-element claim, while plaintiffs must demonstrate the absence of fact issues with respect to each element of its claim. The rules governing post-verdict motions are party-neutral. One party's ability to control the rulemaking process confers on that party the opportunity to allocate unilaterally the mix of employer-advantage, employee-advantage, and party-neutral rules. Indeed, a party possessing that authority may confine its rulemaking authority to promulgation of employer-advantage rules, none of which may objectively be viewed as in violation of "due process" norms. Indeed, a function of the employer defendants' bar is to design unilaterally for employer clients the rules governing mandatory-arbitration proceedings.

VII. THE UNARTICULATED CASELOADS PREMISE

A. Judicial Caseloads

Federal judges have long had a reputation for working hard. Any caseload-reduction motives they harbor may appropriately be grounded in a desire to devote more effective time to smaller numbers of cases or, at least, to make their caseloads more manageable. The problem with an unarticulated premise like caseload reduction is that it might provide the governing rationale for a decision which, without the unarticulated premise, might have been decided another way. Was the Gilmer decision substantially motivated at least in part by caseloads considerations? All indicators point to an affirmative answer. Judicial caseloads are

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193. E.g., FED. R. CIV. P. 4 (service of process and notice to the opposing party).
194. E.g., FED. R. CIV. P. 12(g)-(h) (waiver of defenses).
195. E.g., FED. R. CIV. P. 56 (motions for summary judgment).
196. See generally Estreicher & Ballard, supra note 10 (describing how, as counsel for employers, they recommend how mandatory-arbitration agreements should be structured).
197. See Charles J. Coleman & Gerald C. Coleman, Toward a New Paradigm of Labor
enormously high and growing. Arbitration has long been regarded as a possible remedy for high judicial caseloads.\textsuperscript{198} The temptation to downplay differences between mandatory and voluntary arbitration in accepting mandatory arbitration as a remedy for the judicial caseloads problem had to have been overwhelming given the nature of the caseloads problem and the subtlety with which mandatory and voluntary arbitration distinctions can be understated, as they were in the \textit{Gilmer} decision.

When the \textit{Gilmer} case was decided in 1991, the caseloads of federal judges had burgeoned to what has been described as a "crisis" level.\textsuperscript{199} Caseloads of federal district court judges, federal circuit court judges, and the Supreme Court had increased, respectively, by approximately 250, 700, and 115 percent.\textsuperscript{200} They have continued to rise since the \textit{Gilmer} decision in 1991\textsuperscript{201} and it appears that the rise in caseloads has not been proportionately matched by increases in the number of federal judges.\textsuperscript{202} The problem is not easily solved. Adding additional judges, though an effective remedy at the trial level, can actually be counterproductive at the intermediate level of United States Courts of Appeals, for example. As Judge Posner has written, "beyond a certain point there are too many judges to deliberate effectively."\textsuperscript{203} He wrote that the judicial caseloads

\begin{quote}
\textit{Arbitration in the Federal Courts,} 13 HOFSTRA LAB. L. J. 1, 66 (1995) (suggesting that the \textit{Gilmer} decision resulted from desire to control caseloads of U.S. courts).
\end{quote}


\textsuperscript{200} Arthur D. Hellman, \textit{Courting Disaster}, 39 STAN. L. REV. 297, 299 (1986) (book review). As the quoted caseload percentage rise demonstrates, the most critical problem was the rise in the caseloads of U.S. Circuit Court of Appeals judges. See Baker & Hauptly, supra note 199, at 97 (discussing the dramatic increase in the federal appellate caseload).

\textsuperscript{201} Federal judicial caseloads have been rising steadily since 1940. See Burger, supra note 198, at 275 ("From 1940 to 1981 annual federal district court civil case filings increased from about 35,000 to 180,000. ... From 1950 to 1981 annual court of appeals filings climbed from over 2,800 to more than 26,000.").

\textsuperscript{202} Cf. Hellman, supra note 200, at 305-06 (discussing the option of increasing the number of federal appellate judges to deal with the increased caseload).

\textsuperscript{203} Posner, supra note 199, at 9. Chief Justice Charles Evans Hughes opposed President Franklin D. Roosevelt's plan to enlarge the Supreme Court. Responding to the President's use of a supposed backlog of Supreme Court cases as a basis for the plan, the Chief Justice responded:

\begin{enumerate}
\item The Supreme Court is fully abreast of its work. . . .
\item ...\end{enumerate}

\begin{enumerate}
\item An increase in the number of Justices of the Supreme Court ... would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to
crisis in 1985 was of a magnitude that defied solution, except by reducing the number of cases entering federal trial courts. In his view, that would not be accomplished by structural or procedural reform but by rethinking jurisdictional and substantive doctrine, much of which would "clearly implicate ideological and political concerns." The two areas of substantive law he would cut back from the federal case docket are federal statutory and constitutional civil rights claims and federal habeas corpus claims challenging state court convictions on federal statutory or constitutional grounds. Judge Posner, never shy about expressing controversial views on many areas of the law, articulated a judicial-caseloads position that may fairly be presumed to be the unarticulated view of many other judges. If judges are willing to shape procedural and jurisdictional law with judicial caseloads in mind, they would likely shape law on the enforcement of mandatory-arbitration agreements—with judicial caseloads in mind.

B. Arbitration as a Judicial Caseload Remedy

In a landmark speech before the American Bar Association in 1982, Chief Justice Warren Burger said "[o]ne reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties." Much of his speech promoted what he viewed as the caseload overload remedy of "a system of voluntary arbitration," and with good reason. If widespread acceptance of voluntary arbitration was substituted for judicial case filings, judicial caseloads would certainly be reduced dramatically. Chief Justice William H. Rehnquist, like his immediate predecessor, Chief Justice Burger, has also expressed an interest in partially substituting arbitration for the judicial forum. In 1977, then-Associate Justice Rehnquist cited "the increasing load on courts at all levels in state and federal judicial systems" as a reason for the improved prospects of the "increased use of arbitration as a means of settlement of disputes . . . ." Both Chief Justices spoke of


204. Hellman, supra note 200, at 311.

205. See, e.g., RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 4 n.10, 54-55 (1999) (arguing that there was enough evidence to warrant Clinton's indictment—providing an example of a federal judge prejudging the merits of a possible future federal criminal trial).


207. Id. at 277 (emphasis added).

voluntary arbitration—Chief Justice Burger explicitly, Rehnquist by implication.

Though Chief Justice Burger did not explicitly state that increases in federal legislation providing individual rights were a factor contributing to rising federal judicial caseloads, that was implicit in his reference to a society more able to use the courts. Voluntary arbitration was then and remains now a potentially effective judicial caseload overload remedy. But voluntary arbitration means a consensual agreement to arbitrate. Not many Americans, in 1982, would have been willing to take a large damages claim to an arbitrator rather than a jury. Literature on public attitudes toward arbitration is scant. Arbitration is still an esoteric subject for many Americans, some of whom are hard pressed to offer a distinction between arbitration and mediation. However, it is perhaps telling that in overwhelming numbers, individuals with claims in federal court prefer jury trials to non-jury trials. It is doubtful that in 1982 many parties to a judicial statutory-claim proceeding in federal court would have consented to substitute arbitration for the right to a judicial trial. The goal of substituting voluntary arbitration for significant numbers of judicial proceedings could not have been accomplished without overcoming the daunting problem of how to make the arbitration of statutory claims more acceptable to potential courtroom plaintiffs. For employment disputes, at least, employers developed mandatory-arbitration agreements. Their enforcement via Girmer converted a process that had long been associated with volition to one simply imposed by an adhesion contract. The volition element thus posed a dilemma for proponents of arbitration as a remedy for excessive judicial caseload. That dilemma was very likely overcome, at least in part, by simply ignoring arbitration's history of volition. Judges would hardly be prone to admit that judicial caseloads influenced a decision. But one federal judge, at least, has been quite candid about it:

One might ask why, in the light of some of the difficulties found with arbitration of statutory claims, some courts are still singing the praises of the arbitral forum. One reason is self-interest. Many judges are relieved not to be burdened by a docket consisting of a high volume of cases founded on employment disputes. These are often tedious cases, involving angry parties and mostly fact-bound disagreements. It is not the kind of litigation that most judges prefer to manage.\footnote{210}

One court, in the course of overturning an arbitrator's award, took the caseload motive out of the realm of the unarticulated premise. It cited "reduction of the caseload of the federal courts" as one of the objectives to


\footnote{210. See Edwards, Where Are We Heading?, supra note 104, at 306.}
be achieved in limiting judicial review of arbitrators’ decisions. While confessed judicial caseload motives are rare, the fact that any exist is revealing. The encouragement of voluntary arbitration as a remedy for judicial caseloads problems and the absence of convincing rationale for the Gilmer result make a fair case that Gilmer was motivated mainly by judicial caseloads considerations.

C. Mandatory Arbitration Satellite Litigation

Developing law on the enforceability of mandatory-arbitration agreements is now moving in the direction of fashioning guidelines for determining the procedural fairness of particular mandatory-arbitration agreements and proceedings. The American Arbitration Association, a prominent provider of arbitration services, has recently changed its rules to provide “additional safeguards for employees involved in the [mandatory-] arbitration process.” The Supreme Court has determined that an employee may not be compelled to use a prohibitively expensive mandatory-arbitration proceeding. These developments have opened a potentially vast area for costly and time-consuming satellite litigation at the discovery stage. It will supplement the already growing area of satellite litigation on the enforceability of mandatory-arbitration agreements covering statutory claims. It will thus become satellite litigation over satellite litigation.

Approval of satellite litigation on affordability issues means that the affordability issues must be resolved on a case-by-case basis. This will place a heavy and sometimes impossible burden on some plaintiffs. Given the settled arbitration practice of billing for both hearing time and decision-

211. See Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, 843 F.2d 357, 359 (9th Cir. 1988).
212. A caseloads motive for Gilmer is often assumed in non-academic literature. E.g., Ashlea Ebeling, Better Safe Than Sorry, FORBES MAG., Nov. 30, 1998, at 162 (“The basic idea [of mandatory arbitration] was a good one: Arbitrating employment disputes would help unclog the court system.”).
213. See Cole, Uniform Arbitration, supra note 45, at 766 (discussing the focus of reform efforts addressing mandatory arbitration after Gilmer).
214. Employment Rules Modified, supra note 144, at 1; see also AAA Reduces Arbitration Costs to be Paid by Employees, DISP. RESOL. J., Nov. 2002-Jan. 2003, at 5 (noting that the administrative fee for employees has a $125 cap).
215. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000) (holding that a plaintiff seeking to invalidate an arbitration agreement on the ground that it is prohibitively expensive bears the burden of proving such expense). The decision might be read to overrule lower court decisions upholding shared-fee arrangements in mandatory-arbitration agreements. But the mandatory-arbitration agreement in the case was silent on arbitration fees, as the Court noted and considered in determining that the plaintiff’s concerns about arbitration costs were prematurely registered. Id. at 90-92. The question presented in Cole was not decided.
writing time, arbitrators' fees are not easily gauged in advance. To
determine in advance the size of an arbitrator's bill would require both
advance knowledge of how long it will take the arbitrator to hear the case
and how long it will take the arbitrator to decide the case and write a
decision. It would be impossible to determine in advance how often a
hearing date might be rescheduled, triggering the cancellation and
postponement fees that are a staple of arbitration practice. Institutional
parties can bear these uncertainties and the ultimate costs. Individual
employees going against their employers may not be able to do so.

Further compounding the problem for plaintiffs, the mandatory
arbitration affordability issue is subject to discovery by an employee
plaintiff seeking to meet its burden of proof on the "prohibitively
expensive" standard. The obvious irony is that discovery is often the
most expensive stage of litigation. Inevitably, some plaintiffs will spend
enough money on affordability discovery so as to make arbitrators' fees
and other arbitration costs ultimately unaffordable. Those plaintiffs who
succeed in demonstrating in a judicial forum their inability to afford
mandatory arbitration would then face the prospect of judicial-forum
litigation with their resources having been reduced by the expenditures
required to prove arbitration unaffordable. Rather than face such a
prospect, many potential plaintiffs will never become statutory-claim
plaintiffs. Others having claims will be forced to abandon them. Could
Congress have so intended?

VIII. CONGRESSIONAL INTENT

A. Enforcement of Mandatory-Arbitration Agreements

The Gilmer decision concluded that "Gilmer has not met his burden of
showing that Congress, in enacting the ADEA, intended to preclude
arbitration of claims under that Act." The Court also noted the absence
of inhibiting language "deducible from [the ADEA's] text or legislative

216. See Blair v. Scott Specialty Gases, 283 F.3d 595, 610 (3rd Cir. 2002) (reversing the
district court's dismissal of the plaintiff's claims and remanding for additional discovery to
determine whether arbitration was prohibitively expensive).

217. See Letter from Judge Paul V. Niemeyer, Chair, Advisory Committee on Civil
Rules, to Judge Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and
Procedure (June 30, 1998), in Proposed Amendments to the Federal Rules of Civil

218. See generally John S. Beckerman, Confronting Civil Discovery's Fatal Flaws, 84
Minn. L. Rev. 505 (2000) (discussing the problematic aspects of civil discovery practice).

Having not addressed the ethical implications of appearing before a decision-maker paid by one’s opposition, the Court was unable to conclude, as it should have, that the burden of demonstrating Congressional intent to permit that unusual consequence had shifted to the employer. The Court did not consider the basic question of whether the FAA’s use of the word “arbitration” meant voluntary arbitration, and no more, which would have been consistent with arbitration’s history and usage up to the time of the FAA’s adoption.

The legislative history of the ADEA is silent on the topic of enforcing agreements to arbitrate ADEA claims. But there is a reason for the silence. Congress could not have intended the enactment of the ADEA to apply to mandatory arbitration, because mandatory arbitration for the resolution of statutory claims did not exist until the securities industry invented it long after the FAA, the ADEA, and other employment-rights statutes were enacted. The demonstrably bizarre consequences generated by mandatory-arbitration agreements covering statutory claims are such that congressional silence should have been taken to mean that Congress could not have intended their enforcement. Only positive approval by Congress could justify their judicial enforcement. This would be true even if Congress had never expressed its views on the voluntary nature of arbitration—but it has.

B. Court-Annexed Arbitration

Congress’ treatment of court-annexed arbitration for the voluntary arbitration of statutory disputes is further evidence that Congress could not have intended the judicial enforcement of mandatory-arbitration agreements. In 1988, Congress authorized alternative dispute resolution, including arbitration, for “any civil action... if the parties consent to arbitration.” In a section entitled “Safeguards in Consent Cases” it is

220. Id. at 29 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

221. Failure to denote how mandatory arbitration differs from other kinds of legitimate voluntary arbitration is a common one in mandatory-arbitration literature. See, e.g., Reilly, supra note 4, at 1213. See supra note 4 for explanation of Reilly’s imprecise reading of Gardner-Denver.

222. See supra note 15 and accompanying text.


required that the arbitration procedures ensure that: "(1) consent to arbitration is freely and knowingly obtained; and (2) no party or attorney is prejudiced for refusing to participate in arbitration."\textsuperscript{225}

The statute certainly does not directly override \textit{Gilmer}'s enforcement of mandatory-arbitration agreements. It reveals, however, that Congress had in mind for Court-annexed arbitration the certain retention of arbitration's traditionally voluntary character. If Congress commanded that limited amounts of voluntary, court-annexed arbitration may not be based on a consent-defying condition,\textsuperscript{226} Congress could not have intended the judicial enforcement of involuntary, statutory-dispute arbitration under adhesion contracts, the signing of which is a condition of employment.

The court-annexed arbitration statute demonstrates something more vital: whether the arbitration of statutory disputes can be substituted for judicial trials in federal court, and if so under what circumstances, is a matter of congressional and not judicial concern.\textsuperscript{227} The authority to create magistrates, empower them to "hear and determine any pretrial matter pending before [a federal district] court," and to enter a sentence for low-grade criminal offenses, is exclusively a power of Congress.\textsuperscript{228} The statute on court-annexed arbitration demonstrates Congress' intent to dominate the entire field of arbitration as a substitute for civil actions committed to federal court jurisdiction. Its intent is further demonstrated by congressional enactment of a statute prohibiting mandatory pre-dispute arbitration in contracts between motor vehicle manufacturers and dealers.\textsuperscript{229} Even textualists would apparently consider congressional intent in the face of congressional silence. The ADEA, interpreted in \textit{Gilmer}, is silent on arbitration of any kind. When that is combined with the inapplicability of the FAA to involuntary arbitration, a class of arbitration that had no existence when the FAA was enacted, the case for ignoring congressional intent is materially, and perhaps fatally, weakened.

\textit{C. Congressional Conferral of the Right to Jury Trial}

Certain individual constitutional and statutory rights may be waived,\textsuperscript{230}
including the right to jury trial, but the question of whether there was an effective waiver requires a court to determine whether contract terms were inappropriately induced. It should follow that the kinds of inducements used to exact the waiver of so important a right as the right to jury trial are open to careful scrutiny. Whether they should include an employer’s take-it-or-leave-it offer of jury trial waiver as a condition of employment could be considered as open to debate. Whether Congress intended to take one step forward, by expressly granting the right to jury trial in certain employment statutes, including the ADEA and Title VII of the Civil Rights Act of 1964, and then take a step back by permitting employers to take away the right through mandatory-arbitration clauses, seems not open to question. A fair presumption ought to be that Congress, having positively granted the right to jury trial in statutes now covered by mandatory-arbitration clauses, did not intend the enforcement of agreements that induce waiver of the right as a condition of being employed.

D. Congressional Authority to Confer Subject Matter Jurisdiction

Congress would likely have spoken with the kind of clarity it employed, for example, in requiring a discrimination claimant’s use of the federal Equal Employment Opportunity Commission’s processes as a condition precedent to filing a federal statutory discrimination claim in federal district court. If satisfaction of a condition precedent to filing

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231. FED. R. CIV. P. 38(d) provides that the failure of a party to demand a jury trial constitutes waiver. See Segal v. Am. Cas. Co., 250 F. Supp. 936 (D. Md. 1966) (holding that a jury trial is waived unless demanded following removal to federal court).


233. State courts have relied upon a public policy justification to hold that some constitutional rights cannot be waived in any employment situation. For example, an employer may not fire an employee for complying with a summons to jury duty. See Nees v. Hocks, 536 P.2d 512 (Or. 1975); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. Super. Ct. 1978). But cf. Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986) (citing cases from Second and Sixth Circuits for proposition that “[t]he Seventh Amendment right... can be knowingly and intentionally waived by contract.”); Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc., 56 F. Supp. 2d 694, 706 (E.D. La. 1999) (“The Supreme Court, however, has long recognized that a private litigant may waive its right to a jury in civil cases.”).

234. 42 U.S.C. § 2000e-5 creates and defines the powers of the Equal Employment Opportunity Commission. It makes the filing of a charge with the EEOC the first required step in the process of filing a claim under Title VII of the Civil Rights Act. 42 U.S.C. § 2000e-5(f)(3) (providing that “[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.”).
was commanded with such specificity, Congress would almost certainly have been equally specific in conferring on employer defendants in statutory-claim cases the opportunity not merely to delay but to avoid entirely the exercise of federal court jurisdiction.

The statutes defining federal court subject matter jurisdiction tend to demonstrate that its conferral is exclusively a matter of congressional and not judicial discretion. The Gilmer decision transfers a sizeable portion of this power to employers. The decision's approved "waiver" might be viewed as but one of several conditions an employee or job applicant must meet in order to gain employment or to remain employed. But federal court venue, subject matter jurisdiction, and the statutory right to jury trial can hardly be equated with legitimately imposed conditions of employment, such as the obligation to work eight hours per day, or a night shift.

That Congress could not have intended judicial enforcement of statutory-claim, mandatory-arbitration clauses is further demonstrated by envisioning a regime in which all employers used statutory-claim, mandatory-arbitration clauses. This would be tantamount to a congressional amendment repealing the subject matter jurisdiction of federal courts for all federal statutes providing employee rights, including the Family and Medical Leave Act, the Fair Labor Standards Act, among others, as well as statutes providing protection against invidious discrimination. The hypothetical amendment would provide that employer defendants in statutory-claim cases may, at their option, move cases from federal court to an arbitration forum in which all governing procedural rules are established unilaterally by the employer. So extraordinary a result could only be achieved through the legislative process.

IX. CONCLUSION

So long as arbitrators do not routinely hear statutory-claim cases on a pro bono basis, mandatory-arbitration processes for statutory claims cannot


236. In both the consumer and employment contexts, mandatory-arbitration clauses are on the rise. See Charles Haddad & Aixa M. Pascual, When You Want To Sue—But Can't, BUS. WEEK, June 10, 2002, at 46.

be "properly designed." The plainly involuntary nature of the agreements; employers' unilateral authority to structure the governing procedural format; the shared, but potentially unaffordable, arbitrator's fee; and the appearance of partiality associated with arbitrator fees paid entirely by the employer are each, alone, and surely in the aggregate, structural elements that lack fundamental fairness. Attempts to create elements of "due process" in statutory-claim mandatory arbitration amount to irrelevant tinkering. Even if they were somehow binding on mandatory-arbitration parties—as they are not—they would be unable to address effectively these core elements of irremediable structural unfairness. Even if the federal rules of civil procedure were in some way made applicable to all mandatory-arbitration proceedings, arbitrators hearing these cases would still have to be compensated either by a shared fee or solely by the employer. When the procedural infirmities inherent in mandatory-arbitration processes are added, the case in support of the Gilmer result collapses under its own weight. Congress can reclaim its Article I constitutional authority to define the subject matter jurisdiction of federal courts by amending the Federal Arbitration Act so as to make clear what should have been obvious: arbitration, within the meaning of the statute, means voluntary arbitration.

Mandatory-arbitration regimes for statutory disputes also likely discourage incentives to promote their resolution by voluntary arbitration or other alternatives to judicial trials that might be used to resolve them. For example, special courts or commissions with exclusive jurisdiction over various employment claims might more seriously be considered but for the lack of incentive to do so in a mandatory-arbitration regime. Mandatory arbitration thus takes away from both employers and employees the opportunity to sort out the kinds of statutory-claim cases for which voluntary arbitration would be a mutually advantageous substitute for judicial litigation. Yet, vast numbers of individuals' employment

238. Estreicher, supra note 91, at 1349.
239. See, e.g., Paul H. Haagen, New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration, 40 ARIZ. L. REV. 1039, 1044 (1998) (stating that the best solution is to make mandatory arbitration as fair as possible).
241. The American Arbitration Association (AAA), with its strong emphasis on dispute resolution education, has played a major role in promoting voluntary arbitration over litigation, even though, somewhat inconsistently, it supports mandatory arbitration for
disputes would fall within a range of being mutually arbitration-attractive to both employers and employees. Mandatory arbitration stands in the way of what might have been—and could yet be—an institutional education campaign, supported by private and governmental entities, on the virtues of voluntary arbitration for the resolution of statutory claims.