

MANDATORY ARBITRATION: PRIVATIZING PUBLIC RIGHTS, COMPELLING THE UNWILLING TO ARBITRATE

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In the last twenty years, the Supreme Court has reinterpreted the Federal Arbitration Act (FAA) of 1925¹ after suddenly discovering that the statute did more than place arbitration agreements “upon the same footing as other contracts”² The statute, said the Court in 1983, in words since tirelessly repeated, established a “liberal federal policy favoring arbitration agreements”³ that impelled lower courts to generously interpret arbitration agreements, liberally construe statutes to allow arbitration of rights created by those statutes, and deferentially review arbitration awards under a “manifest disregard”⁴ standard. As a result, contractual provisions requiring arbitration of all future disputes, including statutory claims, have proliferated. These provisions have become commonplace in standard-form adhesion contracts governing employment, consumer credit, installment sales, service, finance, banking, medical care, and many other areas.⁵

The effect of these contracts has been to privatize justice, substituting privately constructed arbitration for publicly established courts. This becomes particularly problematic when the rights being adjudicated are not contractual rights created by the parties, but statutory rights created by

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1. Pub. L. No. 68-401, 43 Stat. 883 (1925) (current version at 9 U.S.C. §§ 1-16 (2000)).

2. H.R. REP. NO. 68-96, at 1 (1924) (“An arbitration agreement is placed upon the same footing as other contracts, where it belongs.”).

3. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

4. *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

5. Jean R. Sternlight, *Is the U.S. out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 834 & n.29 (2002); see also *id.* at 844-50 (finding that the use of these contractual provisions seems to be a uniquely American practice; the European Union clearly prohibits such provisions in consumer contracts and probably prohibits them in employment contracts).

Congress, or legal rights established by common law. I want to outline some of the consequences of this privatizing of public rights, to inquire why it has occurred, and to suggest what might be done about it. My focus is on the use of arbitration provisions in individual employment contracts, but many of the same problems and considerations apply to arbitration provisions in other standard-form adhesion contracts.

I start with the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,⁶ for it is both a seminal decision and a paradigm of the problem. Robert Gilmer was hired by Interstate/Johnson Lane Corporation in 1981. As a condition of his employment, he was required to register as a securities representative with the New York Stock Exchange (NYSE). His application to register included a provision that he "agree[d] to arbitrate any dispute, claim or controversy"⁷ that may arise between him and Interstate. Six years later, when he was terminated at the age of sixty-two, he sued in federal court, claiming that his termination violated the federal Age Discrimination in Employment Act (ADEA).⁸ Interstate filed a motion to compel him to arbitrate his statutory age discrimination claim in the private arbitration process established by the exchange under the FAA.⁹ Mr. Gilmer argued that he could not be required to arbitrate his ADEA claim, "rais[ing] a host of challenges to the adequacy of arbitration procedures"¹⁰ to enforce his statutory rights and to "further important social policies"¹¹ of the ADEA. The Supreme Court, in words that have become the mantra in subsequent cases, rejected all of his arguments: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."¹² Furthermore, "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."¹³

The *Gilmer* arbitration clause had three basic characteristics that are common to all employment contracts which seek to substitute private arbitration processes for public judicial processes. *First*, the arbitration

6. 500 U.S. 20 (1991). The volume of scholarly output on the topic of mandatory arbitration in the wake of the *Gilmer* decision has been titanic. See, e.g., Symposium, *Mandatory Arbitration Clauses*, 38 U.S.F. L. REV. 1 (2003).

7. *Id.* at 23 (alteration in original).

8. *Id.* at 23-24; Pub. L. No. 90-202, 81 Stat. 602 (1968) (codified at 29 U.S.C. §§ 621-634 (2000)).

9. *Gilmer*, 500 U.S. at 24.

10. *Id.* at 30.

11. *Id.* at 27.

12. *Id.* at 26 (alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

13. *Id.* at 28 (alteration in original) (quoting *Mitsubishi*, 473 U.S. at 637).

provisions were not negotiated by the parties; they were constructed by the employer, or its lawyers, with an eye toward protecting and furthering the interests of the employer¹⁴ and were presented in a standard-form contract which the employee had to accept without change if he wanted to work. *Second*, the employee is frequently not made aware of an arbitration provision buried in the fine print or in an employee handbook.¹⁵ In *Gilmer*, the provision was not even in the employment contract, but in the exchange's registration application that the employee was required to sign before being hired. Even when the provision is visible, the employee may not understand its impact or the rights that he is waiving. *Third*, the employee has no practical choice but to agree to the employer's prescribed terms if he wants to obtain or retain the job.¹⁶ The choice is between agreeing and being unemployed, for other potential employers may have equivalent contract clauses. In *Gilmer*, refusal to sign would have effectively barred Mr. Gilmer from working in the securities industry. The increasing commonness of these provisions in other industries significantly affects job opportunities. These employer-designed arbitration structures

14. See Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1, 5 n.11 (2003) (citing applicable NYSE rules); CONSTITUTION AND ARBITRATION RULES art. XI R. 601(f) ("The dispute, claim or controversy shall be submitted to a single public arbitrator . . . selected by the Director of Arbitration."), R. 607(a)(1) ("In all arbitration matters . . . the Director of Arbitration shall appoint an arbitration panel . . .") (Dep't of Arbitration, N.Y. Stock Exch. 2003), available at <http://www.nyse.com/pdfs/Rules.pdf> (last visited Jan. 31, 2004).

15. Plaintiffs frequently protest that they were not aware of the arbitration agreement. See, e.g., *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 733, 735 (7th Cir. 2002) (concerning a plaintiff who did not remember receiving or seeing the arbitration program brochure that had been stuffed into the employees' payroll envelopes); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) (regarding employee handbook that had arbitration clause on the last page). In *Patterson*, page three of the employee handbook stated "[This handbook] is not intended to constitute a legal contract with any employee . . ." *Id.* at 834 (alteration in original). On page thirty-one, the acknowledgment form stated "no written statement or agreement in this handbook concerning employment is binding . . ." *Id.* But this form also stated, "I also understand that as a condition of employment . . . [I] agree to abide by and accept the final decision of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment . . ." *Id.* at 834-35. In both cases, the court held that the employee was bound.

16. The Ninth Circuit, in an opinion since reversed, held that discharge of an employee for refusal to sign a mandatory arbitration agreement is not a violation of Title VII. *EEOC v. Luce, Forward, Hamilton, & Scripps*, 303 F.3d 994, 1008 (9th Cir. 2002), *rev'd*, 345 F.3d 742, 748 (9th Cir. 2003) (en banc) (explaining that "[a]ll of the other circuits have concluded that Title VII does not bar compulsory arbitration agreements."); see also *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1317 (11th Cir. 2002) (finding that a plaintiff's refusal to sign employer's arbitration agreement was not a statutorily protected activity under Title VII, the ADEA, or the ADA). Cf. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297-98 (2002) (holding that the employee's signing does not foreclose the EEOC from pursuing relief such as reinstatement, backpay, and damages).

are properly described by the Court as "mandatory arbitration."¹⁷ They are more descriptively characterized as "take-it-or-leave-it" contracts.¹⁸

I emphasize that my concern here is with employment agreements to arbitrate disputes before a dispute arises, not with agreements to arbitrate after a dispute arises, particularly with predispute agreements which are contracts of adhesion. Postdispute arbitration agreements raise few of the problems discussed here for they are not contracts of adhesion, but are simply a means for settling an existing dispute. The Supreme Court has casually equated predispute agreements with the settlement of commercial disputes,¹⁹ but settlement agreements are bargained-for contracts, not contracts of adhesion, because the moving party has the bargaining leverage of a legal claim. He can refuse to settle and then litigate his claimed right in court.

I. JUST ANOTHER FORUM?

The Court's rationale in *Gilmer* was that arbitration is just another forum, one in which the party does not forgo substantive rights afforded by the statute. The quite visible premise was that the choice of forum has no impact on substantive rights, a proposition that every legislator, judge, and lawyer knows is palpably false.²⁰ Legislators, in designing regulation, deliberately designate the enforcement forum: in federal or state courts, in an administrative agency, or in a named government office. Judges develop additional rules concerning the appropriate forum and venue. Lawyers commonly engage in forum shopping to select the forum which they consider most favorable.²¹ The Court's premise that the choice of forum has no impact on substantive rights is clearly nonsense as a general

17. The Supreme Court first used the term "mandatory arbitration" in a majority opinion in 2002. *Waffle House*, 534 U.S. at 283; see also Alleyne, *supra* note 14, at 16-17 n.70 (referring to *Waffle House* as the first case in which a Supreme Court majority used the term "mandatory arbitration").

18. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1477 (D.C. Cir. 1997); Alleyne, *supra* note 14, at 50.

19. The language in the *Gilmer v. Interstate/Johnson Lane Corp.* opinion about the indistinguishability between an arbitral forum and a court, 500 U.S. 20, 26 (1991), was quoted from a case that addressed an agreement to settle commercial disputes by arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 617 (1985).

20. Compare *Gilmer*, 500 U.S. at 26 ("[P]arty . . . only submits to their resolution in an arbitral, rather than a judicial, forum.") with *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 359-60 (1971) ("This Court has always recognized that the choice of forums inevitably affects the scope of the substantive right to be vindicated before the chosen forum. In particular, where arbitration is concerned, the Court has been acutely sensitive to these differences.").

21. See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990) (allowing for creative use of 28 U.S.C. § 1404(a) transfer provisions to escape state-law time bar).

proposition. The more pointed question is whether it is true in those cases where employees are seeking to enforce their statutory rights and where the alternative fora are either arbitration or the courts.

I want to explore some of the differences between these two fora and their procedures to determine the effect of those differences on practical consequences. The focus here will be on the individual employee's ability to enforce his statutory rights and to further the policies of the statute. I will concentrate on seven differences, some that are inherent in the procedures and others that are commonly imposed by the employer's construction of the process.

A. *Judge and Arbitrator*

In principle, both judges and arbitrators are neutral, but as every lawyer knows, some are more neutral than others. Judges and arbitrators have idiosyncratic predispositions in how they weigh the facts and interpret the law, and these predispositions may, in varying degrees, consciously or subconsciously, affect their judgments. The outcome of a case may depend on who is chosen to sit in the judgment seat. In the federal courts, the judge for a case is chosen from panels by the neutral mechanics of case assignments, with no consideration of their predisposition or competence for the issues in the particular case.²² In arbitration, arbitrators are commonly chosen by the parties from a panel provided by an arbitration agency like the American Arbitration Association (AAA) or the National Arbitration Forum (NAF).²³ They are chosen by the parties with consideration of their competence and assumed predisposition, with the parties seeking opposite predispositions. The employer seeks an arbitrator who will tend to see the case from the employer's viewpoint; the employee seeks an arbitrator who will tend to see the case from the employee's viewpoint. If the parties are equally informed about the arbitrators, those with known predispositions will be rejected by one of the parties with the likely result that an arbitrator who is relatively neutral will be selected.

But in most individual arbitration cases, the parties will not be equally

22. 28 U.S.C. § 137 (2000) ("Division of business among district judges"); *see, e.g.*, LOCAL R. S.D. & E.D.N.Y. R. 1 (applying to S.D.N.Y. only), R. 50.2(b) (applying to E.D.N.Y. only) (2003), *available at* <http://www.nysd.uscourts.gov/rules/rules.pdf> (last visited Feb. 10, 2004). *See generally* Jonathan L. Entin, *The Sign of "The Four": Judicial Assignment and the Rule of Law*, 68 *Miss. L. J.* 369, 372 (1998) ("The relevant federal statutes do not require any particular method of judicial assignment to cases.").

23. NAT'L RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES R. 12(b) (Am. Arbitration Ass'n 2004) [hereinafter AAA EMPLOYMENT RULES], *available at* <http://www.adr.org> (last visited Feb. 22, 2004); CODE OF PROCEDURE R. 21(B) (Nat'l Arbitration Forum 2003) [hereinafter NAF CODE], *available at* <http://www.arb-forum.com/code/070103.pdf> (last visited Jan. 31, 2004).

informed. The employer and its law firm are repeat players,²⁴ and through their various associations may know an arbitrator's record and indications of his predispositions. The individual, a one-time player, knows nothing about an arbitrator except what is revealed on his resume, which will studiously accent his neutrality. The employee's lawyer may be equally uninformed. In larger cities, there might be an organization for employee-plaintiff's lawyers such as the National Employment Lawyers Association;²⁵ if an individual finds her way into their hands, she may be on a more equal footing. The parties will then be more likely to agree on an arbitrator who is relatively neutral, knowledgeable, and experienced in the legal issues.

There is an additional advantage for the repeat player. Arbitrators know that employers are repeat players and will be familiar with competing arbitrators' records. To continue their acceptability, arbitrators may, consciously or subconsciously, tend to avoid a record which employers will view as unfavorable.²⁶

The potential for submerged bias, however, may precede the parties choosing an arbitrator from a panel; the potential bias may be built into the naming of the panel from which the arbitrators are chosen. In *Hooters of America, Inc. v. Phillips*,²⁷ the employer compiled the list of approved arbitrators from which complaining employees were required to choose; "a mechanism," observed the Fourth Circuit, "crafted to ensure a biased decisionmaker."²⁸ The court pointed out that "Hooters is free to devise lists of partial arbitrators" and "nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list."²⁹

24. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189, 191 (1997) (making an empirical study of the repeat-player effect). At least one court has recognized this effect. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1476 (D.C. Cir. 1997).

25. Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen's Jeremiaad on the "Costs of Arbitration"*, DISP. RESOL. J., Nov. 2002-Jan. 2003, at 8, 13 ("The National Employment Lawyers Association (NELA), a plaintiffs' counsel group with chapters in all major legal centers, maintains a database of arbitrators.").

26. See Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 783 (2001); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 43 (1996). But cf. *Cole*, 105 F.3d at 1485 (explaining that "there are several protections against the possibility of arbitrators systematically favoring employers because employers are the source of future business.").

27. 173 F.3d 933 (4th Cir. 1999).

28. *Id.* at 938; see also *McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004) (finding bias inherent in employer's procedure that "uses the same panel of five to seven arbitrators in each arbitration hearing in which it participates in the state of Michigan.").

29. *Hooters*, 173 F.3d at 939.

In *Gilmer*, employer control was only one step removed from Hooters' direct employer control; the panel was selected by officers of the stock exchange who had been elected by the employers.³⁰ However, the Court "decline[d] to indulge the presumption that the parties . . . will be unable or unwilling to retain competent, conscientious and impartial arbitrators."³¹ The Court was apparently not informed that the pool of arbitrators was 97% white and 89% male, but that 92% of sexual-harassment plaintiffs are women, and 84% of racial discrimination plaintiffs are African-American.³²

Arbitration through private agencies, such as the AAA, NAF, and Employer Dispute Services (EDSI), does not eliminate, but rather obscures the potential for systemic bias.³³ These arbitration agencies compete to sell their services to employers; and in mandatory arbitration, it is the employer who unilaterally chooses the agency. The agencies have a financial and institutional interest in offering arbitrators that are acceptable to employers; the agency which is considered to have the most favorable list of arbitrators will have a competitive advantage.

In *Floss v. Ryan's Family Steak Houses, Inc.*,³⁴ the employer chose EDSI to administer its arbitration process and the parties alternately struck names from the list submitted by EDSI until only one remained.³⁵ The Sixth Circuit recognized that, because EDSI had a financial interest in maintaining its arbitration contracts with employers, "the potential for bias

30. See Alleyne, *supra* note 14, at 5 n.11. In *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), the court recognized that the National Association of Securities Dealers (NASD) has been singled out for criticism because of the role that the NASD plays in determining the pool of arbitrators who hear claims against member firms. *Id.* at 202. The pool is selected by the National Arbitration Committee appointed by the Board of Governors, and the panels are named by the Director of Arbitration also appointed by the Board of Governors. The Director may allow the Executive Committee to appoint a panel directly. *Id.* at 202-03. The plaintiff challenged the fairness of this procedure but the court found it unnecessary to reach this issue. *Id.* at 203; see also *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 212 (D. Mass. 1998) (finding that the NYSE's forum is "inadequate to vindicate Rosenberg's ADEA and Title VII rights"), *rev'd*, 170 F.3d 1, 16 (1st Cir. 1999) (criticizing the district court's determination, instead finding that the evidence "establishes no basis to invalidate the NYSE arbitral scheme.").

31. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985)).

32. See Julian J. Moore, *Arbitral Review (or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572, 1590-91 (2000).

33. See Cliff Palefsky, *NELA Executive Board Denounces AAA's Stance on Mandatory Arbitration*, THE EMPLOYEE ADVOCATE, Winter 2000-2001, at 68 (criticizing the AAA's stance on the issue of mandatory arbitration, especially with respect to the AAA's filing of an amicus brief in the U.S. Supreme Court on behalf of an employer); see also *id.* at 70 (reprinting the resolution, to the same effect, passed by the Executive Board of the National Employment Lawyers Association in September 2000).

34. 211 F.3d 306 (6th Cir. 2000).

35. See *id.* at 314 n.7.

exists.”³⁶ The Sixth Circuit stated, “[i]n light of EDSI’s role in determining the pool of potential arbitrators, any such bias would render the arbitral forum fundamentally unfair.”³⁷

In *Murray v. United Food and Commercial Workers Local 400*,³⁸ the arbitration agreement provided that an arbitrator should be chosen from “a list of arbitrators provided by the [Local 400] President’s office.”³⁹ The Fourth Circuit refused “to enforce an agreement so ‘utterly lacking in the rudiments of even-handedness.’”⁴⁰ Even though the employer-union had no list of its own—instead obtaining its list from the AAA—the agreement, as written, was held unenforceable.

Courts repeatedly declare that arbitrators should be impartial, but they place the burden on the employee to prove actual partiality.⁴¹ This contrasts with the strict standard applied to federal judges that requires them to avoid even the appearance of partiality.⁴² Claims of potential bias of arbitrators are often summarily brushed aside, as in *Gilmer*.⁴³ Courts have not confronted the problems inherent in choosing an arbitrator, such as the repeat-player issue and the potential bias arising from the arbitrator’s interest in future selections. Except for the *Floss* case, courts have not recognized the potential for bias when the employer unilaterally chooses the agency that provides the panel from which the employee must choose.⁴⁴

36. *Id.* at 314.

37. *Id.*

38. 289 F.3d 297 (4th Cir. 2002).

39. *Id.* at 300 (alteration in original).

40. *Id.* at 303 (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 935 (4th Cir. 1999)).

41. See, e.g., *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 4, 14 (1st Cir. 1999) (reversing the district court’s finding of “structural bias,” instead holding that there was “no showing of actual bias” and emphasizing that the district court “explicitly found that there was no conclusive evidence of bias”).

42. See CODE OF CONDUCT FOR U.S. JUDGES Canon 2A (Admin. Office of the U.S. Courts 2000) (requiring that federal judges “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”), available at <http://www.uscourts.gov/guide/vol2/ch1.html> (last visited Feb. 21, 2004); see, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 111-16 (D.C. Cir. 2001) (finding that trial judge’s public comments created an appearance of partiality); Alleyne, *supra* note 14, at 36 nn.166-73.

43. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (rejecting the presumption of bias on the part of arbitration panels). Professor Alleyne has argued that if the arbitrator’s fee is paid by the employer, this creates an appearance of bias. Alleyne, *supra* note 14, at 37-40. But cf. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (citing three factors that operate to prevent “arbitrators systematically favoring employers”). The appearance of bias disappears, however, if the employer is legally required to pay the arbitrator. In any case, the appearance of bias pales beside the employer’s establishment of the rules of the arbitration process and the choice of the agency that supplies the panels from which the arbitrator is picked.

44. See *supra* text accompanying notes 36-37; Martin H. Malin, *Privatizing Justice*—

B. *Jury Trial and Arbitrations*

Title VII of the Civil Rights Act of 1964 (Title VII)⁴⁵ originally did not provide a right to a jury trial in discrimination cases. When it was amended by the Civil Rights Act of 1991,⁴⁶ the right to jury trial was explicitly guaranteed. The ADEA also expressly provides for a jury trial.⁴⁷ Additionally, employee suits in state court for wrongful discharge, intentional causing of emotional distress, and defamation all are tried by jury.⁴⁸ Compelling arbitration deprives the employees of their rights to a jury trial. Congress consciously decided that the availability of a jury trial made a significant difference, and that the objectives of Title VII would be better served if determination of the facts and damages were made by a jury.⁴⁹ Professor Sternlight has made a persuasive case that, apart from the explicit provisions of these statutes, the Seventh Amendment of the United States Constitution guarantees the right to jury trial in these cases.⁵⁰

There is a common assumption by both employer and employee lawyers that juries are more favorable to employees than are arbitrators and award larger compensatory and punitive damages.⁵¹ Statistical studies have both confirmed this assumption and questioned it. The studies are

But by How Much? Questions Gilmer Did Not Answer, 16 OHIO ST. J. ON DISP. RESOL. 589, 609-11 (2001).

45. Pub. L. No. 88-352, 78 Stat. 241, 253 (1965) (codified at 42 U.S.C. § 2000e (2000)); see also DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 1117-18 (3d ed. 2002) (outlining broad landscape of jury trials under Title VII).

46. Pub. L. No. 102-166, § 102, 105 Stat. 1070, 1073 (1992) (codified at 42 U.S.C. § 1981a(c) (2000)).

47. 29 U.S.C. § 626(c)(2) (2000). This provision was added by the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 4(a), 92 Stat. 189, 190 (1978).

48. See, e.g., R.I. GEN. LAWS § 28-5-24.1(b) (2003) (guaranteeing a jury trial, upon request of either party, in suits under Rhode Island's fair employment practices provisions); Gregory Gelfand, *Smith v. University of Detroit: Is There a Viable Alternative to Beacon Theatres?*, 45 WASH. & LEE L. REV. 159, 168-72 (1988) (cataloging state laws on jury trial).

49. See, e.g., 137 CONG. REC. H9505-01 (daily ed. Nov. 7, 1991) (statement of Rep. William D. Ford), 1991 WL 229644 (Cong Rec) *84-85 (citing several cases that were intended to be overturned by the Civil Rights Act of 1991).

50. See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 731-32 (2001) [hereinafter Sternlight, *Seventh Amendment*].

51. See, e.g., David H. Gibbs, *Employment Survey Says that Major Companies Increasingly Use Tailored Programs and Processes*, ALTERNATIVES TO THE HIGH COSTS OF LITIGATION, Nov. 2001, at 237 (reporting that "one out of every eight plaintiffs' verdicts in federal courts in employment discrimination cases is for more than \$1,000,000."); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 317 n.11 (2003) [hereinafter Maltby, *Frying Pan*] (discussing employer fear of punitive damage judgments).

unreliable because they mix grievance arbitration and employment arbitration, two quite different processes.⁵² Nor are they limited to mandatory arbitration of statutory rights. Reliable statistics for comparing jury and arbitration outcomes in statutory cases are simply not available because arbitration proceedings are confidential and, in employment arbitration, there is almost never a published opinion. The most telling test is the view of the parties involved: employers impose arbitration mainly because they believe it will result in fewer and smaller awards;⁵³ employees resist mandatory arbitration for the same reason. Both agree with Congress that the choice of forum makes a difference and that the arbitral forum produces outcomes less favorable to the employee.⁵⁴

Although there is a constitutional right to jury trial, that right can be waived, but it must be a "knowing and voluntary waiver."⁵⁵ The arbitration

52. See, e.g., *Arbitration vs. Lawsuits: What Courts, Case Outcomes and Public Perception Show About How Contractual Arbitration Compares to the Litigation System*, FORUM WHITEPAPER SERIES (Nat'l Arbitration Forum, Minneapolis, Minn.), Sept. 2003, at 2-4 & 9 n.11 [hereinafter *Arbitration Whitepaper*] (concluding that employees who pursue their claims in arbitration fare better in terms of monetary recovery and time elapsed than workers who seek enforcement in federal court), available at <http://www.arb-forum.com/articles/whitepapers/fr903.pdf> (last visited Feb. 21, 2004) (citing Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, CONFLICT MGMT. (Am. Bar Ass'n, Chicago, Ill.), Winter 2003, at 1, available at <http://www.arb-forum.com/articles/pdfs/Kleiner-Delikat%20study.pdf> (last visited Feb. 21, 2004)); Donald Wittman, *Lay Juries, Professional Arbitrators, and the Arbitrator Selection Hypothesis*, 5 AM. L. & ECON. REV. 61, 81 (2003) (finding awards by arbitrators and juries are similar). All of these studies are less than convincing because the data used is not comparable: (1) outcomes in grievance arbitration are not a reliable proxy for outcomes in individual employment arbitration; and (2) outcomes of jury verdicts are not a reliable proxy for total outcomes as settlements are omitted. See AM. ARBITRATION ASS'N, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION 27 (2003) [hereinafter AAA FAIR PLAY] ("[T]he existing data appear to show nothing conclusive with regard to outcome comparisons."), available at <http://www.adr.org/upload/livesite/Resources/EduResources/Arbitration%20Issues%201-03.pdf> (last visited Mar. 19, 2004).

53. The employers' main concern is the fear that runaway juries will award devastatingly large damages to employee-plaintiffs. See Maltby, *Frying Pan*, *supra* note 51, at 317 n.11.

54. Cf. *Overview of Contractual Mandatory Binding Arbitration: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Comm. on the Judiciary of the U.S. Senate*, 106th Cong. (2000).

55. See *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.*, 56 F. Supp. 2d 694, 706 (E.D. La. 1999) ("The Supreme Court . . . has long recognized that a private litigant may waive its right to a jury in civil cases."); see also *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 13, 17-18 (1st Cir. 1999) (discussing various standards of knowing and voluntary); Grodin, *supra* note 26, at 36-39. See generally Christine M. Reilly, Comment, *Achieving Knowing*

provision is frequently embedded in a job application or an employee handbook that employees, though instructed to read, often do not read.⁵⁶ Even if employees do read the provision, most will not realize they are waiving their right to a jury trial. Seldom is there anything in the agreement warning the employee that she is making such a waiver. Even if specifically warned, she may still be unaware of the practical consequences of such a waiver. Also, there is a substantial question as to whether there can be a "knowing" waiver in an employment contract *before* there is even a dispute and without any knowledge of the facts or legal issues that may be involved. As a district court said in *Penn. v. Ryan's Family Steakhouses, Inc.*,⁵⁷ "[t]his court is hard-pressed to believe that the average job applicant at Ryan's competing for a job washing dishes or waiting tables could possibly pick-up on the intricacies of the Agreement and understand the contractual scenario involved"⁵⁸

It is even more difficult to accept that a waiver should be considered voluntary when the employee must assent in order to obtain a job or to retain her existing job. The Equal Employment Opportunities Commission (EEOC) has adopted a presumption that there cannot be a voluntary waiver when an employee is required to sign as a condition of employment.⁵⁹ Requiring a person already employed to sign raises an additional consideration. Dismissal, a near-certain consequence of the refusal to sign, would be a black mark on the worker's record when applying for another job. Logically, it would seem the discharge of an employee for refusal to sign away statutory or constitutional rights would be contrary to public policy, making the discharge wrongful in most states.⁶⁰

Professor Sternlight has extensively demonstrated that, outside the arbitration context, courts show a readiness to invalidate waivers of jury

and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment, 90 CAL. L. REV. 1203 (2002); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 110-22.

56. See, e.g., *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1301, 1305 (9th Cir. 1994) (mentioning that the employee signed the standard U-4 forms of the NASD without an opportunity to read them; no mention was made of arbitration and no copy of the NASD manual was ever provided; and the court held there had not been a knowing waiver).

57. 95 F. Supp. 2d 940 (N.D. Ind. 2000).

58. *Id.* at 954 (footnote omitted).

59. See *EEOC Policy Statement on Mandatory Arbitration*, Daily Lab. Rep. (BNA) No. 133 at E-4 (July 11, 1997) (§ V(B)), available at <http://www.eeoc.gov/policy/docs/mandarb.html> (last visited Feb. 17, 2004).

60. A public-policy exception to at-will employment has been found when an employer fires an employee for complying with a summons to jury duty. See *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975) (finding "substantial 'societal interests' in having citizens serve on juries."); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119, 121 (Pa. Super. Ct. 1978) ("[T]he necessity of having citizens freely available for jury service is . . . [a] 'recognized facet of public policy'"); *Alleyne*, *supra* note 14, at 50 n.233.

trial, taking into account whether it is presented on a take-it-or-leave-it basis, the conspicuousness of the waiver, the disparity of bargaining power, and the sophistication of the person signing the waiver.⁶¹ Courts which have ruled on the issue of the burden of proof have placed it on the party seeking to enforce the waiver, reasoning that the right to jury trial is “fundamental,” and should not be waived absent clear evidence.⁶² Because the right is fundamental, the courts indulge every presumption against waivers.

But when mandatory arbitration has the effect of waiving the right to a jury trial, the courts’ approach is entirely different. The fact that the arbitration clause in question was not negotiated;⁶³ that it was not conspicuous, not read, not even available;⁶⁴ and that there was a gross disparity in the bargaining power or sophistication of the parties⁶⁵ will not prevent the arbitration clause from waiving the statutory or constitutional right to jury trial. The arbitration clause will be interpreted broadly and the employee claiming the right to jury trial has the burden of showing that Congress intended to preclude waivers of jury trials or that the contract was unconscionable.⁶⁶ Instead of a presumption against the waiver of statutory or constitutional rights, there is a presumption in favor of arbitration which works as a waiver of the statutory or constitutional right to a jury trial.⁶⁷ Such aggressive reading of the FAA does more than place arbitration contracts on an equal footing with other contracts,⁶⁸ it places arbitration contracts on a footing above other contracts, indeed above statutorily and constitutionally declared rights.

C. Court Filing Fees vs. Arbitration Tribunal Costs

In federal district courts, the fee for filing is a minimal \$150.⁶⁹ The filing fee of the AAA for arbitration of grievance arbitration and individual employment cases is \$125,⁷⁰ and for employer-promulgated plans in individual employment contracts, the employee’s filing fee is capped at \$125, but the employee must pay the remainder, including a case service

61. See Sternlight, *Seventh Amendment*, *supra* note 50, at 674, 677-89.

62. *Id.* at 674, 677.

63. See Alleyne, *supra* note 14, at 13-16 (Part II(A)).

64. See *supra* text accompanying notes 15, 56.

65. See Sternlight, *Seventh Amendment*, *supra* note 50, at 704-05.

66. See *id.* at 673, 695-96.

67. See *id.* at 674, 695-710.

68. H.R. REP. NO. 68-96, at 1 (1924).

69. 28 U.S.C. § 1914(a) (2000).

70. AAA EMPLOYMENT RULES, *supra* note 23, at heading “Administrative Fee Schedule” and subheading “Filing Fees” following R. 42 (specifying fees for employer-promulgated plans). The filing fee was set at \$125 in 2002. AAA *Reduces Arbitration Costs to Be Paid by Employers*, DISP. RESOL. J., Nov. 2002-Jan. 2003, at 5.

fee scaled by the amount in controversy. The AAA's scale of fees is indicated by the following table; the fees of other agencies are roughly comparable.⁷¹

Table 1. AAA Fees for Employer-Promulgated Plans

Amount in Dispute	Initial Filing Fee	Case Service Fee	Total
Up to \$10,000	\$500	\$200	\$700
<\$75,000	\$750	\$300	\$1050
<\$150,000	\$1500	\$750	\$2250
<\$300,000	\$2750	\$1250	\$4000
<\$500,000	\$4250	\$1750	\$6000

Most discrimination cases include compensatory and punitive damages which may range from \$50,000 to \$300,000;⁷² thus, the total claim, including front pay and backpay, will frequently range from \$75,000 to \$400,000.⁷³ As can be seen from Table 1, this indicates that total fees will typically be between \$2,250 and \$4,000. Arbitration agreements commonly call for equal division of forum fees,⁷⁴ so an employee must pay a substantial charge just for admission to the hearing room. This however, is but the beginning; the arbitrators must also be paid.

A plaintiff-employee who brings suit in court to vindicate her statutory rights does not, of course, have to pay the judge for services: the provision of justice is a public responsibility. But arbitration agreements normally provide that the employee will be required to pay half of the arbitrator's fees.⁷⁵ Arbitrators generally charge lawyers' rates ranging from \$200-\$600 per hour for all time spent in prehearing conferences, during the

71. AAA EMPLOYMENT RULES, *supra* note 23, at heading "Administrative Fee Schedule" and subheading "Fees" following R. 42; *see also* NAF CODE, *supra* note 23, app. C, at 37-46 (specifying the fee schedule for the National Arbitration Forum).

72. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1070, 1073 (1992) (codified at 42 U.S.C. § 1981a(b)(3) (2000)); *see also* Gibbs, *supra* note 51, at 237 (reporting that about twenty percent of jury verdicts for plaintiffs in employment discrimination cases include punitive damages).

73. Typical front pay and backpay awards range from \$25,000 to \$100,000. *See, e.g.*, John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2587 n.18 (1994) ("The average monetary judgment per plaintiff was \$135,574 in pure ADEA cases . . ."); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 21 (1996) (finding an "average recovery for age discrimination cases of \$24,826").

74. *See* Alleyne, *supra* note 14, at 28-35 (Part IV).

75. *See, e.g.*, Blair v. Scott Specialty Gases, 283 F.3d 595, 598 (3d Cir. 2002) (stating that the arbitration agreement in question "required [the employee] to pay one-half of the arbitrator's fees."); Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234 (10th Cir. 1999) (noting that employee "had to pay for one-half of the arbitrator's fees.").

hearing, for study, and for the writing of the award. Cases commonly consume fifteen to forty hours of billable time.⁷⁶ In ordinary cases, the arbitrator's fees range from \$3,000 to \$25,000 and in difficult cases they can be multiples of this.⁷⁷

Congress has vested workers with various civil rights that can be adjudicated by the payment of \$150; employers have imposed on workers a substitute forum in which they can get their rights adjudicated only by the payment of thousand of dollars. Some courts, led by Judge Edwards in *Cole*, have held that the arbitration agreement cannot require fee-splitting.⁷⁸ Judge Edwards caustically observed: "[i]ndeed, 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."⁷⁹ But other federal courts, following the Supreme Court's opinion in *Green Tree Financial Corp.-Alabama v. Randolph*,⁸⁰ have held that such fee splitting is valid "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum"⁸¹ The employee must pay the tribunal fees and expenses unless she can prove that she is not financially able to pay.⁸² In short, an employee must prove poverty to avoid the increased costs of vindicating her statutory rights in the employer-imposed arbitration forum.

D. Attorney's Fees

Mandatory arbitration clauses commonly provide that the arbitration shall be under the rules of an arbitration agency like the AAA and those rules provide that unless the parties agree otherwise, each party shall pay its own lawyer and litigation expenses.⁸³ Such costs are always substantial,

76. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997).

77. *Id.* (noting that in an "average" arbitration case, costs may range from \$3,750 to \$14,000, but observes that "fees of \$500 or \$600 per hour are not uncommon.").

78. *Id.* at 1484 ("[I]t is unacceptable to require [employee] to pay arbitrators' fees, because such fees are unlike anything that he would have to pay to pursue his statutory claims in court."); see *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir.) (finding that an arbitration agreement containing a cost-splitting provision was unconscionable), *cert. denied*, 535 U.S. 1112 (2002).

79. *Cole*, 105 F.3d at 1484.

80. 531 U.S. 79 (2000).

81. *Id.* at 90 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)); see also *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 217 (3d Cir. 2003) (noting that while fee-splitting arrangements are not per se invalid, affirmed district court finding that this particular provision effectively prohibited plaintiff's opportunity to vindicate her statutory rights); *accord Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 355 (S.D.N.Y. 1999) (rejecting the argument that a fee-splitting provision was invalid without evidence regarding the plaintiff's ability to pay).

82. See *Randolph*, 531 U.S. at 90-91; *Spinetti*, 324 F.3d at 213-14, 217.

83. See, e.g., *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 680 (7th Cir.), *reh'g*

and in some cases, such as FLSA cases, may far exceed the plaintiff's damages.⁸⁴ Both Title VII⁸⁵ and the ADA⁸⁶ provide that a prevailing plaintiff may be awarded attorney's fees and costs, and the courts, as a matter of course, award such fees and costs.⁸⁷ The Fair Labor Standards Act of 1938 (FLSA),⁸⁸ the ADEA,⁸⁹ and the Family and Medical Leave Act (FMLA)⁹⁰ require that the prevailing plaintiff be awarded attorney's fees and costs. The purpose of these provisions is two-fold: (1) to make an employee more able to obtain a lawyer to realize her rights in small and uncertain claims; and (2) to further the plaintiff's function as a private attorney general serving the public interest in enforcing the statute. In the words of the Supreme Court, "the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'"⁹¹ If the prevailing plaintiff is not awarded attorney's fees and costs, then the plaintiff's remedy is significantly reduced and the public purpose sought by Congress is not fulfilled.

Some arbitration agreements or arbitration agency rules give the arbitrator discretion to assess some or all of these costs against the employer.⁹² This is less than half-a-loaf, for most arbitrators are reluctant

denied, No. 00-2839, 2002 U.S. App. LEXIS 21668 (7th Cir. Oct. 11, 2002) (specifying in arbitration clause that, "[e]ach party may retain legal counsel and shall pay its own costs and attorneys' fees, regardless of the outcome of the arbitration.").

84. *See, e.g.,* DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 820 (2d Cir. 1997) (concerning an age discrimination case where the complainant obtained an arbitration award of \$220,000 in damages and claimed attorney's fees and costs of \$249,050.10).

85. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(k), 78 Stat. 241, 261 (1965) (codified at 42 U.S.C. § 2000e-5(k) (2000)) (providing that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . .").

86. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 505, 104 Stat. 327, 371 (1990) (codified at 42 U.S.C. § 12205 (2000)) (providing that "the court, or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . .").

87. The Court has made clear that, in spite of the discretionary language, the prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978) (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)).

88. Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938) (codified at 29 U.S.C. § 216(b) (2000)) ("The court in such action shall, in addition to any judgment awarded to plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.").

89. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7(b), 81 Stat. 602, 604 (1968) (codified at 29 U.S.C. § 626(b) (2000)) ("[T]he court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . .").

90. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 107(a)(3), 107 Stat. 6, 16 (1994) (codified at 29 U.S.C. § 2617(a)(3) (2000)) ("The court in such an action shall . . . allow a reasonable attorney's fee . . . to be paid by the defendant."). Unlike Title VII, the wording of the FMLA is mandatory.

91. *Christiansburg Garment Co.*, 434 U.S. at 418 (quoting *Newman*, 390 U.S. at 402).

92. The AAA rules provide, "[a]ll expenses of the arbitration, including required travel

to exercise such discretion because the employer, on whom the arbitrator's future business prospects depend, may feel that this is pouring salt into the wound of an already unfavorable decision. Although the arbitrator may ultimately assess costs against the employer, the wronged employee has no advance assurance, and the risk of large expenses will discourage her from pursuing the enforcement of her rights and from serving as a private attorney general.

E. Class Actions

Class actions are generally available in the courts for violation of statutory rights of individual employees,⁹³ whether they are suits for violation of Title VII,⁹⁴ the Equal Pay Act,⁹⁵ FLSA,⁹⁶ ADEA,⁹⁷ ADA,⁹⁸ or FMLA.⁹⁹ The availability of class actions significantly increases the ability

and other expenses of the arbitrator, AAA representatives, and any witness and the costs relating to any proof produced at the direction of the arbitrator, shall be borne by the employer . . ." AAA EMPLOYMENT RULES, *supra* note 23, at R. 39; *see also* R. 34(e) (allowing arbitrator to award reimbursement of representative's fees). However, under the heading "Administrative Fee Schedule" (following R. 42) and its subheading "Administrative Fee," for employer-promulgated plans, the Rules provide 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." If the employee's choice to pay is the same as her choice to agree to arbitrate, it becomes the employer's de facto choice made during the drafting of the arbitration agreement. *See also* Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 366 (7th Cir. 1999) ("[U]nder NYSE and NASD rules, it is standard practice in the securities industry for employers to pay all of the arbitrators' fees.").

93. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 28-37 (2000) [hereinafter Sternlight, *Class Action Survive?*] (providing a comprehensive discussion of arbitration and class actions).

94. *See generally* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305.

95. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d) (2000)); *see, e.g.*, *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 81 (1981) (involving class action by female flight attendants under Equal Pay Act).

96. As a result of amendments to the FLSA contained in the Portal-to-Portal Act of 1947, members of the class must now individually file their written consent in court. Pub. L. No. 80-49, § 5, 61 Stat. 84, 87 (1948) (codified at 29 U.S.C. § 216(b) (2000)). Therefore, a representative action under the FLSA is not a true class action under FED. R. CIV. P. 23(b) but rather an "opt in" procedure.

97. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7(b), 81 Stat. 602, 604 (1968) (codified at 29 U.S.C. § 626(b) (2000)) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section[] . . . 216 . . . of this title [29] . . .").

98. *See, e.g.*, *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 447-58 (N.D. Cal. 1994) (discussing class action certification procedures under ADA using FED. R. CIV. P. 23(b)).

99. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 107(a)(2)(B), 107 Stat. 6, 16 (1994) (codified at 29 U.S.C. § 2617(a)(2)(B) (2000)).

of individuals to obtain a lawyer who will enforce their rights and, as attorneys general, to further the public purpose of the statute. Attorneys will refuse to take many individual discrimination cases where they are less than certain of winning because the prospective damages are too small to risk accepting the representation on a contingency fee basis. Reliance on statutory attorney fees is a gamble because they get nothing if they lose. Class actions are attractive to the plaintiffs' bar because of the potentially large damages and the ability to settle uncertain claims—the settlement including attorney's fees and costs.

Arbitration agreements can provide for class actions, but they seldom do. More often, these agreements are silent as to the availability of any form of collective plaintiff procedure and courts generally refuse to imply such a provision. In *Adkins v. Labor Ready, Inc.*,¹⁰⁰ sixty-three manual laborers who worked on a per diem basis brought suit for violation of the FLSA because they were not paid for waiting time, travel time, and training, which would entitle them to overtime.¹⁰¹ Workers who applied for Labor Ready's pool were required to sign an application that included a mandatory arbitration clause silent as to the availability of class actions or representative suits. Labor Ready, on the basis of this application, moved to dismiss the suit and sought an order forcing Adkins to arbitrate his individual claim.¹⁰² Adkins contended that the arbitration costs were so high, and the amount any individual could recover so small, that no individual would be willing to gamble on the victory necessary to reimburse them for their lawyer's fees and costs.¹⁰³

The Fourth Circuit rejected this argument, hypothesizing that a successful plaintiff could recover attorney's fees and costs,¹⁰⁴ blithely ignoring that this arrangement left the plaintiff at risk of losing and not able to proceed except in the near-certain case. The Fourth Circuit read the silence in the arbitration clause as barring a class action or representative suit and ordered Adkins to arbitrate his individual claim.¹⁰⁵ The decision thereby precluded him from a collective action either in court or arbitration. His sole recourse for vindicating his statutory rights, and the public interest, was an arbitration process that would risk costs far beyond the underpayment claimed.

This result is contrary to normal rules of contract interpretation for it effectively deprives the plaintiff of his statutory remedy both in court *and* in arbitration—a result certainly not intended by the plaintiff. If such a

100. 303 F.3d 496 (4th Cir. 2002).

101. *Id.* at 499.

102. *Id.* at 499-500.

103. *Id.* at 502.

104. *Id.* at 502 n.1.

105. *Id.* at 503.

deprivation *were* intended by the defendant, knowing that the plaintiff did not so intend, this would constitute fraud.¹⁰⁶ Where Congress has allowed class actions to enforce statutory rights,¹⁰⁷ and arbitration is agreed upon as a substitute to enforce those rights, the contract should be interpreted as allowing class actions in court, unless the arbitration provision explicitly allowed class-action arbitration. The court might better read an ambiguous or silent provision as allowing the plaintiff to proceed in either.

In *Green Tree Financial Corp. v. Bazzle*,¹⁰⁸ a plurality of the Supreme Court expressed the view that a determination as to whether the arbitration agreement permitted or prohibited collective action was a matter of interpretation for the arbitrator.¹⁰⁹ This promises little protection for victimized employees. As a plaintiffs' lawyer said in a 2003 panel discussion before the Federalist Society, "[a]n arbitrator who wants to be chosen again by an employer is going to be reluctant to subject an employer to large claims."¹¹⁰ It is the employer-customer who must be satisfied with the lists of arbitrators submitted by the arbitration agencies.

The trend is for employers to expressly exclude class actions in their mandatory arbitration provisions as a precaution against a court or arbitrator sensibly interpreting silence.¹¹¹ One employer member of the Federalist Society panel stated that he counseled employers that the primary advantage of arbitration is not that it is cheaper, quicker, or less burdensome than litigation, but rather that it allows employers to avoid class actions: "[d]espite the potential disadvantages to employers who require arbitration, the primary question asked by companies considering arbitration is: 'Can we cut off class and collective actions by requiring arbitration?'"¹¹²

106. See, e.g., *Lipsit v. Leonard*, 315 A.2d 25, 28 (N.J. 1974) (quoting WILLIAM L. PROSSER, *LAW OF TORTS* § 109 (4th ed. 1971)).

107. See, e.g., 29 U.S.C. § 216(b) (2000) (allowing FLSA plaintiffs to file action "in behalf of himself or themselves and other employees similarly situated."); see also *Carter v. Countrywide Credit Indus.*, 189 F. Supp. 2d 606, 621 (N.D. Tex. 2002) (finding that employees' class action suit to recover overtime compensation from their former employers under the FLSA was subject to binding arbitration under the FAA, but that the fee arrangement was void), *aff'd*, No. 03-10484, 2004 U.S. App. LEXIS 4310 (5th Cir. Mar. 5, 2004).

108. 123 S. Ct. 2402 (2003).

109. *Id.* at 2407 (plurality opinion). Justice Stevens would not have reached the question of who should be the decisionmaker. *Id.* at 2408 (Stevens, J., concurring).

110. *Class Action Bans in Arbitration Pacts Could Create Limits on Substantive Rights*, 72 U.S.L.W. No. 19, at 2294 (Nov. 25, 2003) [hereinafter *Class Action Bans*] (reporting comment by Richard T. Seymour, Esq.).

111. See Sternlight, *Class Action Survive?*, *supra* note 93, at 90-91; Jacqueline E. Mottek, *Analysis & Perspective, The Impact of Mandatory Arbitration Clauses on Class Certification*, 69 U.S.L.W. No. 20, at 2307 (Nov. 28, 2000).

112. *Class Action Bans*, *supra* note 110, at 2294 (reporting comment by Robert P. Davis, Esq.).

Courts, by enforcing those exclusionary clauses, permit employers to deny employees access to class actions which would be available in the courts. This is in the face of a statute that sought to facilitate limited class action in order to enable employees to enforce their rights and to encourage them and their lawyers to serve as private attorneys general.¹¹³ Contrary to the reassuring words of *Gilmer*, arbitration requires the employee to “forgo the substantive rights afforded by the statute,”¹¹⁴ and the statute will no longer “serve both its remedial and deterrent function.”¹¹⁵

So long as the availability of class action in arbitration depends on the terms of the arbitration provisions mandated by the employer, lawyers representing employers will include provisions which will deprive employees of the advantages of class actions. As Professor Sternlight points out in her comprehensive analysis, “[t]he most critical question . . . is whether companies do or should have the power to eliminate entirely the class action remedy”¹¹⁶ In practice, many claims can only be brought as class action suits; without the class action procedure, individual rights will go unrealized, wrongful conduct will be undeterred, and the public interest will go unfulfilled.

F. Public Knowledge and Precedent

Judicial proceedings are open to the public and judges explain, in published opinions, the reasons for their decisions. Those decisions are subject to examination and criticism by other judges, lawyers, and scholars. Arbitration proceedings, on the other hand, are confidential and arbitration rules and practices, except in grievance arbitration,¹¹⁷ do not require a publicly available opinion explaining the reason for the decision.¹¹⁸ They

113. See, e.g., Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. § 4(a) (2003); H.R. REP. NO. 108-144, at 35 (2003) (explaining that the act intends to preserve federal court jurisdiction over “so-called ‘private attorney general’ suits such as those in which an individual seeks to recover on behalf of the general public.”). This act was passed in the House by a 253-170 vote on June 12, 2003, and then referred to the Senate Judiciary Committee, where it has sat since. Juliet Eilperin, *House Backs Bill to Curb Class Action Suits*, WASH. POST, June 13, 2003, at A8.

114. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

115. *Id.* at 28 (citing *Mitsubishi*, 473 U.S. at 637).

116. Sternlight, *Class Action Survive?*, *supra* note 93, at 79.

117. See, e.g., LABOR ARBITRATION RULES R. 38 (Am. Arbitration Ass’n 2002) (“The award shall be in writing and shall be signed either by the neutral arbitrator or by a concurring majority if there is more than one arbitrator.”), available at <http://www.adr.org/> (last visited Feb. 17, 2004).

118. NAF CODE, *supra* note 23, at R. 37(G) (“An Award shall not include any reasons, findings of fact or conclusions of law unless required by prior written agreement of the Parties or requested in writing by a Party before the beginning of any Hearing.”). *But cf.* AAA EMPLOYMENT RULES, *supra* note 23, at R. 34(c) (providing that “[t]he award shall be

are thus shielded from examination and criticism by other arbitrators or anyone else. Arbitration awards without published opinions are shrouded law.

This lack of published arbitration opinions has four substantial consequences. First, the parties are unable to know their rights and duties, for there are no precedents to guide them; indeed, one of the traditional rules in arbitration is that there is no *stare decisis*. Lawyers, therefore, cannot reliably advise the parties. Second, prospective employees can gain only limited knowledge of an employer's *practices*, as contrasted with the platitudes contained in the employee handbook. Thus, the employer is shielded from the reputational effects of its actions. One of the reasons that employers prefer arbitration is because it avoids potentially unfavorable publicity, thereby limiting consumers,' and others,' ability to know whether they are patronizing a lawbreaker. Third, and more important, when statutory rights are at stake, the public needs to know how these statutes are, in practice, being interpreted and applied. This is essential for the public to make any sensible political judgments as to whether, and how, the statute should be amended. Fourth, and perhaps most important, the lack of opinions stunts the growth of the law. Arbitrators working from the bare words of a statute cannot build a body of precedent systematically elaborating the statute. One need only compare the poverty of the bare words of Title VII with the richness and complexity of the body of law that now surrounds it, including protection from harassment, responsibility for supervisors' conduct, shifting burdens of proof, recognition of disparate impact, and affirmative action remedies. Finally, there is an effective denial of judicial review in the arbitration forum, which will be discussed next in Part I(G).

The harm caused by the lack of reasoned opinions is further aggravated by the rule that arbitration proceedings in their entirety are confidential unless the parties agree to make them public.¹¹⁹ The practical effectiveness of the statute is hidden in unpublished and opinionless awards. The public may thus be kept ignorant of what arbitrators are doing

in writing . . . and shall provide the written reasons for the award . . ."). However, the names of the parties and witnesses will not be publicly available unless a party expressly agrees. *Id.* at R. 34(b).

119. See AAA EMPLOYMENT RULES, *supra* note 23, at R. 18 ("The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise . . ."); NAF CODE, *supra* note 23, at R. 4 ("Arbitration proceedings are confidential, unless all Parties agree otherwise. . . . A Party who improperly discloses confidential information shall be subject to Sanctions."); see also *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826-28 (2d Cir. 1997) (noting that the arbitration agreement may include a confidentiality agreement which requires all court files to be sealed except the court opinions and orders).

in the name of the statute. Whether justice is being done is kept secret. This may be tolerable when only the parties' contractual issues are implicated, but it is intolerable when the stakes involve both an individual's civil and statutory rights as well as the public interest.

Movement of cases from the courts to the arbitration forum, which lacks written opinions, precludes creation of the body of precedent necessary to develop and articulate any generally accepted interpretation of the statute. The parties cannot know the law that is to guide their conduct and the public cannot know whether the public purpose is being served. It is true that not all cases will go to arbitration, thereby allowing the courts to establish precedents and elaborate the statute. However, with employers' increasing imposition of predispute arbitration in employment contracts, court decisions may soon be, if not already, the minority, and the growth of the law will be stunted or deformed. There may not be any court decision on the issue in the particular case to guide the arbitrator, who must then make the law applicable to that case. Even if there are applicable court decisions, the arbitrator may not be bound by them, as will be developed in the next section. The arbitrator will focus primarily on the interests of the parties before him, largely ignoring the public interest. These employment rights statutes are an expression of the public will for public purposes and thus the controlling law should be developed and defined by the courts, not by private arbitration tribunals unguided by others' judgments and unbound by precedent.

G. *Judicial Review*

An arbitrator's decision enjoys an invulnerability not conferred on any judge's ruling, jury verdict, or administrative agency's decision.¹²⁰ Decisions by trial courts and administrative agencies can be appealed to appellate courts. Their determinations of fact can be rejected if not supported by the evidence;¹²¹ a trial judge's application of the law can be displaced by an appellate court's independent determination;¹²² and an administrative agency's decisions sometimes receive the limited deference of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹²³ Even jury verdicts can be overruled by the trial judge on question of law.¹²⁴ In

120. See generally Moore, *supra* note 32, at 1583-88 (discussing how arbitral decisions are rarely reviewed by the judiciary).

121. See FED. R. CIV. P. 52(a).

122. See 28 U.S.C. § 1291 (2000) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . .").

123. 467 U.S. 837, 842-45 (1984); see also Administrative Procedures Act of 1946, Pub. L. No. 79-404, § 10(e), 60 Stat. 237, 243-44 (1947) (codified at 5 U.S.C. § 706 (2000)) (specifying scope of judicial review of administrative agency decisions).

124. See FED. R. CIV. P. 50(b)

contrast, section 10 of the FAA limits the grounds for vacating an arbitrator's award to proven corruption, fraud, partiality, or misconduct by the arbitrator.¹²⁵ It provides no review for the arbitrator's determinations of fact or application of law.

In *Wilko v. Swan*, the Supreme Court added a common law ground, stating that an arbitrator's award could also be vacated for "manifest disregard" of the law.¹²⁶ The Court has never defined the meaning of these words, and the lower courts have never settled on a definition. A common statement is that the arbitrator: must know of the governing legal principle, yet refused to apply it or ignored it altogether; and the law ignored by the arbitrator was "well defined, explicit, and clearly applicable."¹²⁷

Obviously, judicial review under "manifest disregard" is extremely deferential, and even more limited than the review of a grievance arbitration where the "award is legitimate only so long as it draws its essence from the collective bargaining agreement."¹²⁸ In *DiRussa*, the arbitrators found a violation of the ADEA, and awarded DiRussa, the plaintiff, \$220,000 in damages, but refused to award him attorney's fees and costs of \$249,050, although they had been requested and were explicitly required by the statute.¹²⁹ DiRussa sued to modify the award and obtain the statutorily provided attorney fees. The Second Circuit refused to modify the award; quoting from an earlier opinion, the court defined "manifest disregard of law" in these terms:

The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.¹³⁰

125. Federal Arbitration Act of 1925, Pub. L. No. 68-401, § 10, 43 Stat. 883, 885 (1925) (codified at 9 U.S.C. § 10(a) (2000)).

126. *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

127. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986); see also Moore, *supra* note 32, at 1585-88 (discussing definition of "manifest disregard" of the law standard). Courts may also overturn arbitration decisions on the grounds that they conflict with "public policy," are "arbitrary and capricious," or "completely irrational," but "manifest disregard" is the dominant test. *Id.* at 1585. The court in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) proposed a much more searching judicial review. The "standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied" the law and "the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct." *Id.* at 1487.

128. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

129. *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 820 (2d Cir. 1997).

130. *Id.* at 821 (quoting *Bobker*, 808 F.2d at 933).

Although DiRussa had indicated several times to the court that he was entitled to attorney's fees under the statute, and had put into evidence the amount of these fees, along with an argument as to how those fees should be calculated, the court explained, "there is no persuasive evidence that the arbitrators actually knew of—and intentionally disregarded—the mandatory aspect of the ADEA's fee provision."¹³¹ The court concluded, "[i]n view of DiRussa's failure to inform the arbitrators" that the statute mandated attorney's fees, "we are hard-pressed to infer that they consciously disregarded the ADEA's provisions."¹³² Despite *Gilmer's* expression of confidence that the parties and the arbitral body conducting a proceeding will "retain competent, conscientious and impartial arbitrators,"¹³³ the manifest ignorance of the law and indifference to inquiry of a "person qualified to serve as an arbitrator"¹³⁴ is apparently not enough to be manifest disregard of law.

The standard is not always so mindlessly applied.¹³⁵ Delfina Montes, a workaholic sales assistant, sued Shearson Lehman for overtime pay under the FLSA—the employer's defense was that she was an exempt employee.¹³⁶ In the arbitration, Shearson's lawyer, in his opening statement stated that the arbitrators were not required to follow case law precedent and should instead do what is "fair and just and equitable."¹³⁷ In his closing statement, Shearson's lawyer renewed his argument that the arbitration board "should do what is right and just and equitable," but that "in this case this law is not right," and asked the arbitrators, "not to follow the FLSA."¹³⁸ The arbitration board apparently accepted the lawyer's argument that it was not obligated to enforce the employee's statutory rights and found that Montes was an exempt employee and not entitled to the overtime.¹³⁹ The Eleventh Circuit examined the evidence and found that the entirety of the evidence did not show that she was an exempt employee. The court then stated that "in light of the express urging to deliberately disregard the law, the lack of support in the facts for the ruling and the absence in the decision, or otherwise in the record, indicating that the arbitrators rejected

131. *Id.* at 822.

132. *Id.* at 823.

133. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985)).

134. *DiRussa*, 121 F.3d at 821 (quoting *Bobker*, 808 F.2d at 933).

135. *See, e.g., Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 762 (5th Cir. 1999) (using the phrase "manifest disregard of law," but bypassing the word "disregard" when stating that, "it is not manifest that the arbitrators acted contrary to the applicable law . . .").

136. *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1458 (11th Cir. 1997).

137. *Id.* at 1459.

138. *Id.*

139. *Id.* at 1458.

Shearson's plea to manifestly disregard the law, we REVERSE"¹⁴⁰ and instructed the lower court to refer the case to another arbitration panel.

Judicial check on arbitrary, willful, or incompetent arbitrators is even less than the articulated standard, "manifest disregard," might suggest because the arbitration procedure makes it difficult for a court to penetrate the basis of the arbitrator's decision. As discussed above, arbitrators are not required to write opinions stating their findings of fact or explaining the reasons for their decisions. In commercial and employment cases, they almost never write opinions, and the arbitration agencies discourage writing opinions.¹⁴¹ There may be no transcript of the testimony,¹⁴² so there is no reliable way for the court to know what facts were presented to the arbitrator. All the court has to review is the submission and the award, illuminated by inconsistent or contradictory testimony as to what transpired at the hearing. Even with a transcript, if there is no opinion relating the evidence to the statutory provisions, it is very difficult, if not impossible, in many cases to determine whether the arbitrators have "manifestly disregarded" the law. As Justice Douglas said:

An arbitral award can be made without explication of reasons and without development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable The loss of the proper judicial forum carries with it the loss of substantial rights.¹⁴³

It is generally said that there is no appellate review of facts;¹⁴⁴ the absence of a transcript would make review of facts impossible, in any case. However, even if there is a transcript, but no opinion relating the facts to the decision, the court may feel the need to scrutinize the facts. In *Halligan v. Piper Jaffray, Inc.*, the plaintiff-employee claimed that he had been terminated in violation of the ADEA.¹⁴⁵ There was no dispute as to the applicable law; the only dispute concerned the factual question of whether

140. *Id.* at 1464.

141. See, e.g., NAF CODE, *supra* note 23, at R. 37(G) ("An Award shall not include any reasons, findings of fact or conclusions of law unless required by prior written agreement of the Parties").

142. See, e.g., AAA EMPLOYMENT RULES, *supra* note 23, at R. 15 (putting burden on party desiring a transcript to hire the stenographer to record proceedings).

143. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 532 (1974) (Douglas, J., dissenting) (footnote omitted).

144. See U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); FED. R. CIV. P. 52(a) (prescribing standards of review for factual determinations by courts).

145. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 198 (2d Cir. 1998).

he was terminated because of his age or had voluntarily retired.¹⁴⁶ An arbitrator, after extensive hearings, denied plaintiff's requested relief, but provided no rationale. The employee appealed, claiming manifest disregard, but the district court affirmed the award.¹⁴⁷ The Second Circuit examined the record and found, "Halligan presented overwhelming evidence that Piper's conduct . . . was motivated by age discrimination."¹⁴⁸ The appeals court determined that "Halligan presented powerful evidence of his performance" and also "made a very strong showing that he did not choose the 'option' of quitting but was fired. . . . In addition, the circumstantial evidence . . . is consistent only with a finding that Halligan was pushed out of his job."¹⁴⁹ The court vacated the arbitrator's award, saying: "where a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifested disregard."¹⁵⁰ The court, in effect, held that it would examine the facts, and that an arbitrator's manifest disregard of the facts may constitute "manifest disregard of law."¹⁵¹

Regardless of how the standard of review is stated or applied, it is manifest that review of an arbitrator's award is much narrower than that of a trial court. The private arbitrator's decision on a public, statutory right has what borders on absolute finality even when the arbitrator is manifestly ignorant of the well-known terms of the statutes, as the arbitrator apparently was in *DiRussa*.¹⁵² It seems incongruous that a decision determining an individual's public rights by a private tribunal, tailored by one of the parties and imposed on the other, gets much less scrutiny than decisions by publicly constituted tribunals—judge, jury, or

146. *Id.* at 199.

147. *Id.* at 200.

148. *Id.* at 203.

149. *Id.*

150. *Id.* at 204.

151. *Cf. Neary v. Prudential Ins. Co. of Am.*, 63 F. Supp. 2d 208 (D. Conn. 1999). The arbitration panel granted summary judgment against Neary. The court examined the record and held that the arbitration panel manifestly disregarded the standard for summary judgment.

The record in this case provides overwhelming evidence to support an inference that Neary was wrongfully terminated. . . . These facts undeniably raise a genuine issue of material fact in regard to Prudential's motivation for terminating Neary

. . . The failure of the arbitration panel to explain its decision in this case also buttresses this Court's determination.

Id. at 210.

152. *See supra* text accompanying notes 129-32.

administrative agency.

This lack of judicial oversight does not necessarily favor one party more than the other. It may result in a distortion of the statute in the particular case, but not distort the statute overall in favor of either the employer or the employee, for the arbitrator can misinterpret in either direction. It may, in fact, favor the employer because the employer has more resources to appeal an unfavorable arbitration and has more interest in blocking the development of unfavorable precedents.¹⁵³ Also, because the employer controls the method of selection of arbitrators in these cases,¹⁵⁴ there is a greater possibility that the arbitrator will err on the side of the employer.

Comparison of these seven differences between court adjudication and arbitration of individual statutory rights makes plain that arbitration is not just another forum. Contrary to the *Gilmer* mantra, the employer, by requiring employees to agree to arbitrate, compels the employee, in practical and realistic terms, to “forgo the substantive rights afforded by the statute.”¹⁵⁵ The guarantee of a completely neutral tribunal is lost, for the employer’s unilateral control of the selection an arbitrator has an inevitable potential for bias in favor of the employer. The employee loses the perceived advantages of a jury trial, may be saddled with heavy tribunal fees, be required to pay the judge, and be deprived attorney’s fees and costs as a prevailing plaintiff. The class action, which may be the only practical procedure for pursuing small claims, may be barred and appeals from manifestly erroneous decisions are nearly non-existent. All of these factors work to the substantial disadvantage of the employee. In addition, the public purpose of the statute will not be fully served. This scarcely meets the test required by *Gilmer* that only “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”¹⁵⁶ Professor Grodin has summarized the point well:

But it does seem odd that we as a society should be willing, in the name of contract, to entrust the implementation of public policy as important as that embodied in our anti-discrimination laws to a procedure unilaterally promulgated by the party whose conduct is sought to be regulated. It seems odder still that we would allow the regulatee to designate the decision maker, or the method by

153. See, e.g., Bingham, *supra* note 24, at 195 (cataloging advantages of employer “repeat player”).

154. See *supra* text accompanying notes 14, 28, 36-37.

155. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

156. *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637) (alteration in original).

which that person is chosen . . . then, allow that person's decision to be kept from public view, and in the end accord it a degree of finality we are not willing to accord the decisions of our designated public tribunals.¹⁵⁷

II. ARBITRATION'S ADVANTAGES?

As this catalogue of differences between court proceedings and arbitration makes apparent, these are not merely differences of form, but of substance. They significantly affect the substantive rights of the parties and the ability of the state to achieve its social purposes. The Supreme Court's dismissal of the substitution of arbitration for court proceedings as nothing more than a change from "an arbitral, rather than a judicial, forum"¹⁵⁸ is so removed from reality that it cannot explain the Court's decision. One must ask what unspoken considerations might have moved the Court to overlook the obvious and thereby undermine the statutory rights of workers?

A. *Overloaded Docket?*

One explanation, articulated by Judge Harry Edwards, is the desire to relieve the federal courts of the burden of these cases.¹⁵⁹ Suits to enforce statutory rights of individual employees make up nearly ten percent of the civil cases filed in the federal courts¹⁶⁰ and federal judges, led by the continuing crusade of Supreme Court Chief Justice Rehnquist,¹⁶¹ have protested that they are overloaded. Moving these cases to a private forum would provide substantial docket relief. However, to do this at the expense of important individual statutory rights is difficult to justify. The onus, however, cannot be put solely on the judges, assuming that they are, in fact, overworked; the primary responsibility must be placed on Congress for not

157. Grodin, *supra* note 26, at 50.

158. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

159. Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 306 (1999).

160. The relevant figures are:

Title VII Employment Cases	20,881
FLSA Cases	3,529
Total Cases	268,071

ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY—JUNE 30, 2002 28-30 tbl. C-2 ("U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending June 30, 2002"), at <http://www.uscourts.gov/judiciary2002/tables/c02jun02.pdf> (last visited Feb. 15, 2004).

161. See Alleyne, *supra* note 14, at 44 n.208.

providing a sufficient number of judges. This situation is due, in part, to the political deadlock that has caused continuing vacancies,¹⁶² but is more a product of Congress's failure to create more seats for budgetary reasons. It is an example of the all-too-common practice of declaring statutory rights but not providing adequate funds to enforce them.

B. Analogy to Grievance and Commercial Arbitration?

A second, and more important, factor in the Court's trend is its reflexive embrace of arbitration. This "national policy favoring arbitration"¹⁶³ has evolved because of arbitration's success in resolving grievances under collective agreements and settling disputes in commercial transactions. Grievance arbitration has proven preferable to litigation or strikes and has been almost universally accepted;¹⁶⁴ commercial arbitration is not as widely accepted, but it has proved useful.¹⁶⁵ The Court seems to have relied on these images of arbitration, blindly assuming arbitration of grievances and business disputes are the same as arbitration of individual statutory rights.¹⁶⁶ On the contrary, there are a number of significant differences. Agreements to arbitrate grievances and business disputes are bargained contracts, not contracts of adhesion imposed by one party on another who has little choice and is largely unaware of the consequences. Grievance arbitration deals only with interpretation and application of the contract as illumined by industrial practices and the "law of the shop."¹⁶⁷ Commercial arbitration deals primarily with the interpretation of the contract and the application of industry custom. In both grievance and commercial arbitration, the arbitrator is jointly chosen, not selected from a list provided by one party or by an agency beholden to one party, and is chosen because of his familiarity with those contracts and customs.¹⁶⁸ Neither grievance nor commercial arbitration historically have served to determine individual rights under statutes created to serve a public purpose, nor are such rights decided by arbitrators who may have no specialized

162. Mike Allen, *GOP Plan "Marathon" on Judges: Debate to Spotlight Blocked Nominees*, WASH. POST, Nov. 8, 2003, at A1.

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

164. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1473-79 (D.C. Cir. 1997) (describing unique features of collective bargaining arbitration that minimize the risk of unfairness and noting that many commentators have questioned the logic of extending arbitration beyond collective bargaining).

165. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 674-97 (1996) (questioning whether binding commercial arbitration is beneficial).

166. See Alleyne, *supra* note 14, at 12-18 (Part II).

167. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

168. See, e.g., LABOR ARBITRATION RULES, *supra* note 117, at RR. 11-14.

knowledge of the statute, or not be sympathetic to its goals.¹⁶⁹

C. *Simple, Speedy, and Inexpensive?*

The appropriateness and usefulness of arbitration depends on the kinds of disputes being arbitrated, and the arbitration process must be specially designed for the kinds of disputes it resolves. The *Gilmer* Court imagined arbitration to be a simple, speedy, and inexpensive process—virtues attributed to grievance and commercial arbitration.¹⁷⁰ However, the arbitration proceedings described in *LaPrade v. Kidder, Peabody & Co.*,¹⁷¹ might caution us against overstating the ease with which these virtues might transfer over to arbitration of individual statutory rights. In this arbitration involving claims of sex discrimination, the proceedings, conducted under National Association of Securities Dealers (NASD) procedures, lasted five years, involved seventy-four arbitration sessions, and incurred forum fees totaling \$69,800.¹⁷² In another NASD sex-discrimination dispute, *Sobol v. Kidder, Peabody & Co.*,¹⁷³ the arbitration proceedings lasted four years, required sixty-two hearings, and resulted in forum fees of \$50,400.¹⁷⁴ The district court in *Sobol* cited an unreported case which had fifty-six sessions and \$82,800 in forum fees.¹⁷⁵ These examples certainly cannot be described as either speedy or inexpensive. Not all arbitrations, of course, are so slow and expensive, but the average cost of tribunal and arbitrator's fees is more than \$5,000.¹⁷⁶

It must be remembered that these arbitration fees are assessed on top of litigation costs, such as attorney's and witness fees, that—in arbitration proceedings—are not significantly smaller than those experienced in lawsuits. Typical of the fractured logic used to demonstrate that arbitration is cheaper is a statement found in a NAF promotions publication: "courts have recognized that arbitration is much less costly than litigation. For example, fees associated with litigating an employment case can be expected to cost at least \$50,000. By contrast, fees in an employment arbitration run from a low of only \$3,000 to a high of

169. See *supra* text accompanying notes 136-38.

170. Edwards, *supra* note 159, at 306 ("[S]ome 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.").

171. 246 F.3d 702 (D.C. Cir. 2001).

172. *Id.* at 705.

173. 49 F. Supp. 2d 208 (S.D.N.Y. 1999).

174. *Id.* at 213.

175. *Id.* at 224 (citing *Wolfe v. Schwab*, NYSE Arbitration Docket No. 1993-003197 (Aug. 19, 1994), at <http://scan.cch.com/aad/199408/1993-003197.pdf> (last visited Feb. 26, 2004)); see also Alleyne, *supra* note 14, at 13 n.54 & 33 n.156.

176. See *supra* text accompanying note 77.

\$14,000.”¹⁷⁷

In federal district court, there is no tribunal fee except a \$150 filing fee,¹⁷⁸ while in arbitration, the tribunal fees (filing and arbitrator fees) run from \$3,000 to \$14,000 in ordinary cases, but \$60,000 or \$70,000 in others.¹⁷⁹ In both court and in arbitration, the parties will have attorney’s fees and other litigation costs. Because the nature of the issues and the potential liability in statutory rights cases will be the same in litigation and arbitration, the costs will not be significantly different.

There are a number of other factors that raise questions about the presumed advantages of arbitration. First, choosing an arbitrator and scheduling hearings can cause substantial delays. The arbitration agency must send a list of names to the parties, and each must indicate the ones it deems acceptable. If none are mutually acceptable, another list will be sent. After two or three rounds, each may be limited in the number of names that can be stricken, so one or more will remain. This process may take weeks or even months. In *Engalla v. Permanente Medical Group*,¹⁸⁰ a California state appeals court stated that, due to Permanente’s stalling, in only one percent of the cases in which defendant was a party was a neutral arbitrator appointed within sixty days, and on average it took 674 days to appoint a neutral arbitrator.¹⁸¹

Second, hearing dates must then be scheduled by agreement between the arbitrators, the parties and their representatives, normally all of whom are busy lawyers with full schedules. They may have no common open date for two or three months; in *Engalla*, the court noted that it took an average of 863 days to reach a hearing¹⁸²—and additional hearings will certainly bring further delays. The arbitrator, unlike a judge, cannot set a date for trial and require the parties and their lawyers to appear. The *Engalla* case is, of course, extreme, but it points to an additional problem: arbitration increases the ability of the employer to delay, increase the costs, and further discourage the employee from pursuing her statutory rights.

Third, and most important in weighing the claimed advantages of arbitration over litigation, is that claims of discrimination made in court,

177. *Arbitration Whitepaper*, *supra* note 52, at 1 (footnotes omitted).

178. 28 U.S.C. § 1914(a) (2000).

179. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997); *see also* *Brown v. Wheat First Sec., Inc.*, 257 F.3d 821, 824 (D.C. Cir. 2001) (noting that costs assessed against the employee were \$6365); *supra* text accompanying notes 172, 174.

180. 43 Cal. Rptr. 2d 621 (Cal. Ct. App. 1995), *rev’d*, 938 P.2d 903 (Cal. 1997).

181. *Id.* at 629; *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 551 (4th Cir. 2001) (twenty months from the filing for arbitration and the issuing of the award); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 820 (2d Cir. 1997) (thirty-four months between the demotion and the arbitration award with seven days of hearings and the employee’s legal fees were nearly \$250,000).

182. *Engalla*, 43 Cal. Rptr. 2d at 629.

unlike claims that go to arbitration, have already been subjected to a repeated weeding process before reaching trial. Complaints filed by an employee are subjected to an investigation by the EEOC and, if reasonable cause is found, an effort may be made by the EEOC to conciliate or mediate the case.¹⁸³ Should the EEOC not find reasonable cause,¹⁸⁴ the employee can still sue, but such a finding discourages many from proceeding. If the suit is brought, the case may be subjected to court-annexed mediation and arbitration and then settled.¹⁸⁵ Finally, a substantial number are decided on summary judgment without a trial. In 2003, EEOC received nearly 81,300 complaints,¹⁸⁶ but only filed 393 lawsuits;¹⁸⁷ less than one-half of one percent of complaints filed result in suit being filed by the EEOC on the complainant's behalf.¹⁸⁸ Similarly, of the 20,906 employment rights lawsuits terminated in federal district courts in FY2002, only 839, or four percent, reached the trial stage before concluding.¹⁸⁹ Grievance arbitration within a collective-bargaining context also has an effective weeding process inherent in its procedures, with the result that less than one percent of grievances end in arbitration.¹⁹⁰

Individual arbitration customarily has none of these weeding

183. 42 U.S.C. § 2000e-5 (2000).

184. 42 U.S.C. § 2000e-5(f)(1) (2000) (allowing that if the EEOC either fails to take up the complaint, or if it dismisses any charges, that the complainant be notified and that "within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . .").

185. See Alleyne, *supra* note 14, at 48-49 (Part VIII(B)).

186. U.S. Equal Employment Opportunity Commission, Charge Statistics: FY 1992 Through FY 2003 (2004), at <http://www.eeoc.gov/stats/charges.html> (last visited Mar. 20, 2004).

187. U.S. Equal Employment Opportunity Commission, EEOC Litigation Statistics, FY 1992 Through FY 2003 (2004), at <http://www.eeoc.gov/stats/litigation.html> (last visited Mar. 20, 2004).

188. See David M. Kinnecome, Note, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B.U. L. REV. 745, 769 (1999) ("[T]he EEOC files suit in less than one percent of the claims brought before it."); Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135, 184 n.291 (2000) (concluding that the EEOC files suits "in only one-half of one percent of all charges filed with the agency.").

189. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY—JUNE 30, 2002 37-39 tbl. C-4 ("U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending June 30, 2002"), at <http://www.uscourts.gov/judiciary2002/tables/c04jun02.pdf> (last visited Apr. 2, 2004). The subtotals of the three categories of interest are: United States cases (1695), federal question cases (18,294), and diversity cases (917). Note that EEOC-initiated litigation does not exhaust the "United States cases" category.

190. Cf. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 525 n.424 (1992) (relating data from 1950s indicating that 4% of grievances filed went to arbitration).

provisions. Most employers have no effective grievance procedure; once arbitration is requested, there is no built-in conciliation or mediation process and there is no summary judgment.¹⁹¹ The parties may, of course, settle the case before the hearing, or the plaintiff may decide not to proceed.

In the grievance arbitration context, the Federal Mediation and Conciliation Service (FMCS) had more than 19,039 issues for arbitration panels in FY2003, made about 8595 arbitrator appointments, and reported 2746 awards.¹⁹² That means roughly fourteen percent of the arbitration proceedings initiated, and 32% of the cases in which an arbitrator was appointed, went to the award stage. Thus, the fraction of arbitration cases that go to decision after arbitrators have been appointed (32%) is about eight times greater than the fraction of employment lawsuits that reach trial (4%). Statistical evidence as to the fraction of initiated individual arbitration cases that go to hearing is not available, but the impression of those involved is that about half of them progress to the hearing stage.

The weeding process also radically affects the comparative time required by the two processes to resolve the case. In litigation, the following figures hold with respect to the time required to close a case:¹⁹³

<u>Litigation Stage</u>	<u>Median Time Until Case Closed</u>
If no court action	6.6 months
Resolved before pretrial	7.4 months
Resolved during or after pretrial	13.4 months
Goes to trial	20.1 months

Because such a large proportion are resolved at early stages of litigation, the overall median time to resolve the dispute is 8.4 months after the suit is filed. This evidence indicates that litigation takes much less time than is required for individual arbitration.

Arbitration proceedings are unquestionably less formal than are court

191. See Malin, *supra* note 44, at 609 ("Arbitration, on the other hand, eliminates the motion for summary judgment.").

192. FED. MEDIATION & CONCILIATION SERV., ANNUAL REPORT 35-38 (2003), available at http://fmcs.gov/assets/files/annual%20reports/FY2003_Annual_Report.doc (last visited Feb. 25, 2004). The AAA data shows less screening than the FMCS report. While 14% of the FMCS cases opened go to a final decision, fully 23% of the AAA employment cases go to decision. AAA FAIR PLAY, *supra* note 52, at 26 n.76.

193. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY—JUNE 30, 2002 40 tbl. C-5 ("U.S. District Courts—Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending June 30, 2002"), at <http://www.uscourts.gov/judiciary2002/tables/c05jun02.pdf> (last visited Apr. 2, 2004).

trials. There is no need for elaborate pleadings, no jury to impanel and instruct, and little quibbling about the admissibility of evidence. But there is an assumed image of arbitration that, built in part on experiences with grievance arbitration, unconsciously misleads. This image ignores the reality that, in arbitration of employees' statutory rights, the legal and factual issues are the same as they would be in court. Lawyers must conduct the same factual investigation, do the same legal research, and prepare the same presentation of fact and law as they would in court. If they fail to do so, they breach their responsibility to their client,¹⁹⁴ and may be guilty of malpractice.¹⁹⁵

The major source of cost and delay in litigation is often the discovery process.¹⁹⁶ In grievance arbitration, discovery is practically unknown. This is partly because the parties learn most of the facts and contentions through the grievance procedure prior to arbitration, and partly because of the kinds of issues involved.¹⁹⁷ Arbitration of individual statutory rights, however, is quite different. In a Title VII case, the need for discovery in an arbitration proceeding, particularly for the employee, is as great as in litigation.¹⁹⁸ Those lawyers handling an arbitration claim will usually have a practice that includes litigation of similar lawsuits in court; they will, out of habit, if not necessity, demand the same discovery in arbitration as they would in court.¹⁹⁹ Arbitrators, like judges, have discretion to limit discovery and they are allowed to be more restrictive in granting depositions.²⁰⁰ Most of them, however, being lawyers or former judges, are not likely to be much more restrictive than sitting judges. Indeed, they may be less restrictive because of their concern with receiving a future appointment as an arbitrator.

It is not clear that taking cases to arbitration is either speedier or less

194. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003) ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101(A)(2) (1980) ("A lawyer shall not . . . [h]andle a legal matter without preparation adequate in the circumstances.").

195. See, e.g., *Smith v. Lewis*, 530 P.2d 589 (Cal. 1975) (finding liability in damages for ineffective representation).

196. See, e.g., Alleyne, *supra* note 14, at 47 (terming discovery "the most expensive stage of litigation"); Franklin R. Garfield, *Unbundling Legal Services in Mediation: Reflections of a Family Lawyer*, 40 FAM. CT. REV. 76, 78 (2002) (calling discovery "the single most expensive component of litigation").

197. See Alleyne, *supra* note 14, at 13-16 (Part II(A)).

198. Joseph D. Garrison, *Discovery in Employment Arbitration*, DISP. RESOL. J., Oct.-Dec. 1995, at 15 (noting that employees have special need for discovery in discrimination cases).

199. See Edwards, *supra* note 159, at 309 ("Arbitration of statutory claims invariably tends to produce processes that replicate traditional litigation . . .").

200. See, e.g., AAA EMPLOYMENT RULES, *supra* note 23, at R. 7; NAF CODE, *supra* note 23, at R. 29.

costly than litigation. Arbitration may, in fact, be more costly to the parties than litigation because of substantial tribunal fees and arbitrator's fees.²⁰¹ The cost for the lawyer's time may be reduced because there is no jury, but this will be far more than offset by the lack of a weeding process, including an EEOC investigation, court mediation and arbitration, and summary judgment. Indeed, it is clear that predispute arbitration as a method of resolving statutory employment disputes may be *more* costly than relying on normal legal procedures because of the lack of weeding processes in arbitration.²⁰² The Supreme Court's misguided assumption that arbitration of employees' statutory rights is speedy, simple, and inexpensive fails to take into account the special nature of these cases.

III. LIMITATIONS ON MANDATORY ARBITRATION

In *Gilmer*, the Court's premise that the arbitration of statutory claims "only submits to their resolution in an arbitral, rather than a judicial, forum,"²⁰³ was prefaced by the statement that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute"²⁰⁴ Although stated as a fact, it also carries the negative inference that if arbitration fails to provide the "substantive rights afforded by the statute," then it is not an acceptable forum. This is reinforced by the subsequent often-quoted mantra, "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."²⁰⁵

The Court indicated that the potentially limiting term, "substantive rights," was not used in a narrow, technical sense. The Court proceeded to discuss, but reject, the plaintiff's objections to arbitration: the potential bias of the arbitrators, limitations on discovery, lax requirement for written opinions, confidentiality of proceedings, and constraints on collective proceedings.²⁰⁶ Although the Court found no invalidating problems in the NYSE arbitration system, its discussion of these potential problems

201. See generally PUBLIC CITIZEN, THE COSTS OF ARBITRATION (2002) (concluding that arbitration is far more expensive for employees than litigation), available at <http://www.citizen.org/documents/ACF110A.PDF> (last visited Feb. 26, 2004). But cf. Estreicher & Ballard, *supra* note 25, at 10, 12 (arguing that arbitration costs for employees are modest and decreasing).

202. See, e.g., Edwards, *supra* note 159, at 309 n.50 (presenting a survey of leading litigators where only forty-six percent said arbitration is quick and cost effective, and forty-one percent of in-house counsel said arbitration saves time and money).

203. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

204. *Id.* (quoting *Mitsubishi*, 473 U.S. at 628) (alteration in original).

205. *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637 (1985)) (alteration in original).

206. *Id.* at 30-32.

implicitly recognized that the ADEA protections included procedural rights, the denial of which would reduce the effectiveness of the intended statutory remedy.

Following this lead, some federal courts have limited mandatory arbitration by refusing to compel arbitration when provisions in the arbitration agreement interfered with the ability of a statute to “serve both its remedial and deterrent function.”²⁰⁷ For example, in *Perez v. Globe Airport Security Services, Inc.*,²⁰⁸ a sex discrimination case under Title VII, the mandatory arbitration agreement was interpreted by the court as barring the arbitrator from awarding attorney’s fees and costs to a winning plaintiff as provided by the statute. The Eleventh Circuit held that the arbitration agreement was unenforceable and refused to compel arbitration, explaining:

Congress determined that to remedy and effectively deter discrimination, a party prevailing on a Title VII claim would be permitted to receive fees and costs. By denying access to a remedy Congress made available to ensure violations of the statute are effectively remedied and deterred, the Agreement eroded the ability of arbitration to serve those purposes as effectively as litigation.²⁰⁹

Similarly, in *McCaskill v. SCI Management Corporation*,²¹⁰ a Title VII suit for sexual harassment, the arbitration agreement required each party to pay its own costs and attorneys’ fee regardless of the outcome of the arbitration; the employer conceded on appeal that this made the agreement unenforceable.²¹¹ Judge Rovner of the Seventh Circuit, concurring that the arbitration agreement was unenforceable, pointed out that,

[A] plaintiff in any civil rights suit acts “not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest importance” The right to attorney’s fees therefore is integral to the purposes of the statute and often is central to the ability of persons to seek redress from violations of Title VII.²¹²

207. *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637 (1985)).

208. 253 F.3d 1280 (11th Cir. 2001), *vacated by* 294 F.3d. 1275 (11th Cir. 2002).

209. *Id.* at 1287 (citations omitted).

210. 298 F.3d 677 (7th Cir.), *reh’g denied*, No. 00-2839, 2002 U.S. App. LEXIS 21668 (7th Cir. Oct. 11, 2002).

211. *Id.* at 680.

212. *Id.* at 684-85 (Rovner, J., concurring) (quoting *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 873 n.13 (7th Cir. 1995)).

Mandatory arbitration provisions can be invalidated not only when they are inconsistent with federal statutes, but also when they are unconscionable under state contract law. The FAA preempts any state limitation on the enforceability of arbitration clauses that are applicable only to employment contracts, but does not preempt state law applicable to contracts generally.²¹³ Arbitration agreements, therefore, can be limited by state law on grounds of lack of consideration, lack of mutuality, unconscionability, fraud, or duress.²¹⁴

In *Ferguson v. Countrywide Credit Industries, Inc.*,²¹⁵ an employee brought suit in federal district court for sexual harassment under Title VII and the California Fair Employment and Housing Act.²¹⁶ The Ninth Circuit refused to compel arbitration under the mandatory arbitration clause because it was unconscionable according to California state law.²¹⁷ For a contract to be unconscionable under California law, as established by the California Supreme Court, it must be both procedurally and substantively unconscionable.²¹⁸ The contract in question was procedurally unconscionable because of “[o]ppression” arising from “an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice.”²¹⁹ Procedural unconscionability is “where an arbitration clause is part of a contract of adhesion in which an employee is presented with an employment contract on a ‘take it or leave it’ basis.”²²⁰ Substantive unconscionability focuses on specific terms of the agreement and “whether those terms are so one-sided as to *shock the conscience*.”²²¹ The Ninth Circuit then explained what would shock the California conscience. The Ninth Circuit found that the arbitration provisions were “unfairly one-sided and, therefore, substantively unconscionable,”²²²

213. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 678-80 (Cal. 2000) (discussing the relationship between the FAA and the California Arbitration Act).

214. See *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984); see also *Mottek*, *supra* note 111, at 2308-09.

215. 298 F.3d 778 (9th Cir. 2002).

216. *Id.* at 780-81.

217. *Id.* at 788.

218. *Id.* at 782-83 (citing *Armendariz*, 6 P.3d at 690).

219. *Id.* at 783 (quoting *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145 (Cal. Ct. App. 1997)).

220. *Id.* at 783-84 (quoting *Stirlen*, 60 Cal. Rptr. 2d at 146).

221. *Id.* at 784 (citation omitted). For a more colorful, but no more illuminating definition, “an unconscionable contract is one, such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other . . .” *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 947 (8th Cir. 2001) (citation omitted).

222. *Ferguson*, 298 F.3d at 785 (citing *Mercuro v. Superior Court*, 116 Cal. Rptr. 2d 671, 679 (Cal. Ct. App. 2002), *appeal denied*, S105424, 2002 Cal. LEXIS 3328 (Cal. May 15, 2002)).

because they covered practically all claims that an employee was likely to bring against the employer—tort, contract, federal and state statute—but excluded from arbitration the claims that the employer was most likely to bring against the employee—intellectual property violation, unfair competition, and disclosure of trade secrets.²²³ Provisions requiring the employee to share half of some of the tribunal costs were also unconscionable because the California Supreme Court had held that a provision requiring an employee to bear “any expense beyond the usual costs associated with bringing an action in court”²²⁴ was unenforceable. The discovery provisions were unbalanced but “may afford Ferguson adequate discovery to vindicate her claims,”²²⁵ and alone were not unconscionable. However, “in the context of an arbitration agreement which unduly favors Countryside at every turn, we find that their inclusion reaffirms our belief that the arbitration agreement as a whole is substantively unconscionable.”²²⁶

Similarly, in *Alexander v. Anthony International, L.P.*,²²⁷ the Third Circuit, applying the law of the U.S. Virgin Islands, found that the requirement of procedural unconscionability was satisfied because it was a contract of adhesion, “one which is prepared by the party with excessive bargaining power who presents it to the other party for signature on a take-it-or-leave-it basis.”²²⁸ The contract was substantively unconscionable on four different grounds: it required claims to be filed within thirty days; it limited damages to “net pecuniary damages;” it prevented a prevailing employee from recovering attorney’s fees; and, it required the losing party to pay all of the arbitrator’s fees and costs.²²⁹

These two limitations on the enforcement of mandatory arbitration clauses—violation of a federal statute and unconscionability under state law—are largely overlapping. Indeed, an arbitration provision which failed to give an employee the full benefit of the federal statute, and therefore violated federal law, could be considered unconscionable under state law. This seems to be the result in California.²³⁰ But the two grounds for invalidating an arbitration provision are independent, so that if either

223. *Id.* at 784-85.

224. *Id.* at 785 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d. 669, 687 (Cal. 2000)).

225. *Id.* at 787.

226. *Id.*

227. 341 F.3d 256 (3d Cir. 2003).

228. *Id.* at 265 (quoting *Trailer Marine Transp. Corp. v. Charley’s Trucking, Inc.*, 20 V.I. 282, 284 (1984)).

229. *Id.* at 266-68.

230. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d. 669, 678-79 (Cal. 2000) (discussing the relationship of federal law and state law in enforcing arbitration agreements).

ground is applicable, the provision, and potentially the whole arbitration agreement, is unenforceable. This is the result whether the proceedings are in federal or state court.

The courts are in disagreement on what provisions are unenforceable on one or another of these grounds, but a brief summary of the decisions may give some rough picture of what limitations the courts have placed on mandatory arbitration.

A. *Potential Bias of Tribunal*

Obviously the courts will not enforce arbitration before a biased tribunal. The question is how closely the courts will look to find bias. In the previously discussed *Hooters* case, the choice of arbitrators had been limited to a list created and maintained by the employer, Hooters.²³¹ The Fourth Circuit refused to compel arbitration saying, "the selection of an impartial decision maker would be a surprising result."²³² And in *Floss*, the panel was constituted by EDSI, an arbitration agency.²³³ The Sixth Circuit found potential bias in the fact that EDSI "has a financial interest in maintaining its arbitration service contracts with employers."²³⁴ However, as we have seen, the Supreme Court in *Gilmer* saw no bias in the NYSE arbitration panel appointed unilaterally by a board of employers.²³⁵ Likewise, arbitration through other arbitration agencies, such as the AAA or the NAF, has not been questioned, even though their procedure is essentially the same as EDSI.²³⁶

231. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999); *see also* *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004) (finding a *Hooters* violation employer's arbitration panels).

232. *Hooters*, 173 F.3d at 939. In *Murray v. United Food & Commercial Workers Local 400*, 289 F.3d 297 (4th Cir. 2002), the court followed *Hooters* in holding that a provision allowing the president of the employer, a union, to name the panel was unconscionable even though the union president obtained the list of arbitrators from the AAA. *Murray*, 289 F.3d at 303.

233. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313-14 (6th Cir. 2000).

234. *Id.* at 314.

235. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-31 (1991); *see also* *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 14 (1st Cir. 1999) (rejecting the district court's conclusion that the NYSE arbitration procedures were "dominated by the securities industry," because the district court based this on "a generalized inquiry" and "no conclusive evidence of bias").

236. *Compare Floss*, 211 F.3d. at 314 n.7 (discussing EDSI's procedures) with AAA EMPLOYMENT RULES, *supra* note 23, at R. 12(b), and NAF CODE, *supra* note 23, at R. 21(B).

B. Tribunal Costs

When mandatory arbitration imposes costs on the employee in administrative or arbitrator's fees greater than would be imposed in judicial proceedings, some courts treat this as per se prohibited or unconscionable.²³⁷ In *Cole*, the D.C. Circuit emphatically rejected the idea that persons seeking to enforce their rights under a federal statute could be required to pay for the services of a judge to hear their cases.²³⁸ The Ninth Circuit, in *Ingle v. Circuit City Stores, Inc.*,²³⁹ applying the California Supreme Court's measure of unconscionability, stated that "when an employer imposes mandatory arbitration . . . the arbitration agreement . . . cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court."²⁴⁰ Even a seventy-five dollar filing fee was a problem for the court because there was no waiver provision for indigence as there was for court filing fees.²⁴¹

Most courts find the arbitration agreement unenforceable only if those costs are large enough to preclude or discourage a plaintiff from vindicating her statutory rights, but the measure of how much is too much varies widely. The Supreme Court in *Green Tree Financial Corp.-Alabama v. Randolph* rejected the per se position of Judge Edwards but acknowledged both that large arbitration costs could be prohibitive and that this could force a plaintiff to forgo seeking enforcement of her statutory rights.²⁴² However, said the Court, "where, as here, a party seeks to

237. See generally Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143 (2002) (surveying federal court decisions on cost shifting).

238. Judge Edwards wrote:

[W]e 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. Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1484 (D.C. Cir. 1997).

239. 328 F.3d 1165 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1169 (2004).

240. *Id.* at 1177 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 687 (Cal. 2000)).

241. *Id.*

242. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92 (2000).

invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”²⁴³ The Court refused to say how detailed the showing of prohibitive expense must be, but said that Randolph’s “stray” and “unsupported statements” as to the average costs of arbitration “provide[d] no basis on which to ascertain the actual costs and fees to which she would be subject in arbitration.”²⁴⁴ The Court found that “neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.”²⁴⁵

The courts of appeals continue to disagree on how to interpret and apply *Randolph*. The Fourth Circuit, in *Bradford v. Rockwell Semiconductor Systems, Inc.*, said that the court should focus, “among other things, upon the claimant’s ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.”²⁴⁶ The court held that Bradford had “failed to demonstrate any inability to pay the arbitration fees and costs, much less prohibitive financial hardship”²⁴⁷ Bradford’s share of the fees was \$4,470.88;²⁴⁸ before his discharge he earned \$115,000 a year plus sales incentives.²⁴⁹ The court said that there was no evidence that litigation would cost him less than arbitration,²⁵⁰ although in litigation he would have had only minimal filing fees and no arbitration fees.

In 1999, Diane Blair resigned from Scott Specialty Gases, claiming that she could no longer tolerate the sexual harassment in her work environment.²⁵¹ When she sued, the employer moved to dismiss on the basis of a mandatory-arbitration provision in the employee handbook which required her to pay half the arbitrator’s fees.²⁵² Blair submitted an affidavit stating that she could not afford the costs of arbitration because “her monthly bills exceed her monthly income by \$182 per month and her debt exceeds her assets by \$57,000.”²⁵³ The district court rejected this affidavit because she did not submit any documents, such as bank statements and bills, to support it, saying “conclusory, self-serving affidavits are

243. *Id.* at 92.

244. *Id.* at 91 n.6.

245. *Id.* at 92.

246. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (citing *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 764 (5th Cir. 1999)).

247. *Id.* at 558.

248. *Id.*

249. *Id.* at 558 n.6.

250. *Id.*

251. *Blair v. Scott Specialty Gases*, 283 F.3d 595, 598 (3d Cir. 2002).

252. *Id.*

253. *Id.* at 608.

insufficient to withstand a motion for summary judgment.”²⁵⁴ She did not submit any evidence on the costs of arbitration, arguing that her negative income and insolvency showed that she could not afford any arbitration costs, no matter how small. The Third Circuit affirmed the district court, saying “we need greater proof in order to find Blair’s burden satisfied.”²⁵⁵ However, the court did not dismiss Blair’s suit, but remanded it to give Blair an opportunity to produce the required evidence.²⁵⁶

Not all courts of appeals have been so demanding of hard evidence. The Tenth Circuit declared an arbitration agreement unenforceable with only an assumption that arbitration would cost between \$1,875 and \$5,000 and that the plaintiff, a janitor shift manager, “could not afford such a fee, and it is unlikely other similarly situated employees could either.”²⁵⁷ The Eleventh Circuit, with no hard evidence of the cost of arbitration or the employee’s ability to pay, stated that “half the hefty cost of an arbitration” including, in this case, a \$2,000 filing fee, was of such “magnitude” that it served as a “legitimate basis for a conclusion that the clause does not comport with statutory policy.”²⁵⁸

Determination on a “case-by-case” basis was given a new meaning by the Sixth Circuit in *Morrison v. Circuit City Stores, Inc.*,²⁵⁹ where it recast the test, focusing on the deterring impact of the presence of a cost-sharing provision on the class of workers involved, not the ability of the particular employee to pay. The *Morrison* test asks not only whether an individual claimant would be precluded from effectively vindicating his rights in the specific case, but also whether “the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum.”²⁶⁰ A cost-splitting provision should be held unenforceable whenever it would have a “chilling effect” of deterring a substantial number of “similarly situated potential litigants”²⁶¹ from seeking to vindicate their statutory rights. As Professor Malin has emphasized, the deterrent impact is double-layered, for it includes the cost of challenging the cost-sharing.²⁶² Invalidating the cost-

254. *Id.*

255. *Id.*

256. *Id.* at 610.

257. *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999).

258. *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998).

259. 317 F.3d 646 (6th Cir. 2003).

260. *Id.* at 663.

261. *Id.* The Third Circuit rejected *Morrison*’s deterrence test in *Spinetti v. Services Corporation International*, 324 F.3d 212, 223 (3d Cir. 2003), with the elusive logic that “[i]t would compel the impecunious employee to resort to the courts—the only alternative to arbitration in dispute adjudication.”

262. Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 *BRANDEIS L.J.* 779, 791-95 (2003).

sharing provision does nothing to discourage an employer from including such a clause because it will deter others who lack the resources to challenge it in court. The court in *Morrison* held the cost-splitting provision unenforceable, stating that for a terminated managerial employee, costs equal to three percent of annual salary, or \$1,622, “may not appear prohibitive, but . . . the potential litigant must continue to pay for housing, utilities, transportation, food, and the other necessities of life in contemporary society despite losing her primary, and most likely only, source of income.”²⁶³

Some courts seem blindly tolerant of arbitration provisions which heavily burden employees’ vindication of their statutory rights. In *Adkins v. Labor Ready, Inc.*, manual day-laborers brought a collective action for violation of the FLSA.²⁶⁴ The court ordered the plaintiffs to proceed individually in arbitration and rejected the argument that “arbitration costs are so high and the amounts at stake for each individual plaintiff so low that no plaintiff would be willing to gamble on victory in arbitration.”²⁶⁵ The court’s blinkered response was that “Adkins does not, however, argue that he would pay more in fees than he could receive in damages”²⁶⁶ if he won. This ignores the reality that, for a day-laborer, the possibility of losing the suit and being assessed thousands of dollars of costs would be an insuperable bar to the vindication of his statutory rights.

In other cases, courts have dismissed the claim that requiring fee splitting was not unconscionable on the unproven, and questionable, assumption that “arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court.”²⁶⁷ Likewise, it has been claimed that “there is no evidence that allowing him to pursue his litigation in court would cost him any less than the amount of money that he has already spent in arbitration.”²⁶⁸ The courts blindly ignore the fact that arbitration imposes thousands of dollars in forum fee costs, particularly arbitrators’ fees, that court litigation does not impose. The screw was given an added turn in *LaPrade v. Kidder, Peabody & Co.* When Ms. LaPrade sued for gender discrimination, the court ordered arbitration for which she was then assessed \$8,376 in forum fees.²⁶⁹ The court upheld the award, stating that Ms. LaPrade had “not met her burden of demonstrating that the arbitration panel acted in manifest disregard of the law or in

263. *Morrison*, 317 F.3d at 669.

264. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 499 (4th Cir. 2002).

265. *Id.* at 502.

266. *Id.* at 502 n.1.

267. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999).

268. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 558 (4th Cir. 2001).

269. *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 705 (D.C. Cir. 2001).

violation of public policy.”²⁷⁰

A few courts have refused to rule on whether the potential arbitration costs are too great, instead ordering arbitration and waiting to see what actual costs the arbitrators finally assess against the employee.²⁷¹ This course has three defects. First, it does not reduce the deterrent effect of the employee’s risk of substantial loss. For this reason it was explicitly rejected in *Morrison*.²⁷² Second, it confronts an employee with a Catch-22;²⁷³ if he goes forward with the arbitration, this fact then becomes evidence that its cost is not prohibitively expensive for him.²⁷⁴ Third, the arbitrator’s denial of costs can be challenged only for manifest disregard of law.²⁷⁵

C. Attorney’s Fees and Remedies

The courts are in general agreement that mandatory arbitration provisions cannot limit the remedy provided by the statute. Thus, as previously illustrated in *Perez* and *McCaskill*, where the statute provides

270. *Id.* at 707 (citation omitted).

271. See, e.g., *Rosenberg*, 170 F.3d at 16 (“[I]f unreasonable fees were to be imposed on a particular employee, the argument . . . could be presented by the employee to the reviewing court.”); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366 (7th Cir. 1999) (citing, with corrected pagination, *Rosenberg*, 170 F.3d at 16).

272. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 662 (6th Cir. 2003) (“The issue is whether the risk of incurring the potential costs of arbitration is great enough to deter the plaintiff from bringing her statutory claims.”).

273. See *id.* at 662-63 (“Just as Yossarian could not escape flying combat missions by claiming that he was crazy . . . potential litigants cannot escape arbitration by claiming that the costs are prohibitive . . .”).

274. See *id.* at 662 (“After the plaintiff has arbitrated her claims, reviewing courts will not likely determine that this risk deterred the plaintiff; after all, the plaintiff has already arbitrated her claims.”).

275. *Id.* (“[J]udicial review of arbitration awards is very narrow. . . . Thus, it is not altogether clear that judicial review can adequately protect statutory rights in such cases.”). In *Musnick v. King Motor Co.*, 325 F.3d 1255 (11th Cir. 2003), the arbitration agreement required that the loser pay all costs, including filing fees and reasonable attorney’s fees. The employee sought to avoid arbitration because he feared he might be compelled to pay the high fees charged by the employer’s lawyer. The court rejected his argument saying that this risk is “simply too ‘speculative’ to render his agreement to arbitrate unenforceable At this point Plaintiff has not been assessed with any fees, nor is it certain that he ever will be.” *Id.* at 1260 (citation omitted). The court never mentions *Morrison*, ignoring the obvious impact of deterrence, nor does the court discuss the standard of review for the arbitrator’s assessment of costs. *Musnick* was followed by *Summers v. Dillards, Inc.*, 351 F.3d 1100, 1101 (11th Cir. 2003), where the arbitration agreement limited the right of a winning plaintiff to recover attorney’s fees and added that the plaintiff must show that the burden added would preclude him from effectively vindicating his statutory rights. *Accord Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 824 (8th Cir. 2003) (noting that “the arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement . . .”).

that a prevailing plaintiff is entitled to attorney's fees and costs, the arbitration agreement must, either expressly or impliedly, provide for an equal recovery. A remedy that "Congress made available to ensure violations of the statute are effectively remedied and deterred"²⁷⁶ was "integral to the purposes of the statute."²⁷⁷ Further, "[b]ecause the provision prevents her from effectively vindicating her rights in the arbitral forum by preemptively denying her remedies authorized by Title VII, the arbitration agreement is unenforceable."²⁷⁸ Similarly, a clause limiting damages to "net pecuniary damages,"²⁷⁹ putting a cap on backpay or front pay, or restricting compensatory or punitive damages to an amount less than what is provided for in the statutes may make the arbitration agreement invalid.²⁸⁰ Likewise, clauses imposing time limits shorter than the period allowed by the statute are unenforceable.²⁸¹

D. Class Actions

Clauses denying the availability of class action suits may invalidate an arbitration agreement, depending on the court. In *Ingle*, the arbitration agreement directed the arbitrator not to consolidate claims of different employees and generally prohibited the arbitrator from hearing a case as a class action.²⁸² The court pointed out that this was manifestly one-sided because it operated only to the advantage of the employer and declared that "because Circuit City's prohibition of class action proceedings in its arbitral forum is manifestly and shockingly one sided, it is substantively unconscionable."²⁸³ However, in *Adkins*, sixty-three day-laborers brought a collective action for failure to pay overtime and for waiting time.²⁸⁴ The court held that they had waived their right to a class action by signing the mandatory arbitration agreement which did not provide for class or collective actions.²⁸⁵ The court seems to have been blind to the obvious result that it thereby deprived the employees of any effective remedy for

276. *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), *vacated by* 294 F.3d 1275 (11th Cir. 2002); *see also supra* text accompanying notes 208-09.

277. *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 684-85 (7th Cir.) (Rovner, J., concurring), *reh'g denied*, No. 00-2839, 2002 U.S. App. LEXIS 21668 (7th Cir. Oct. 11, 2002); *see also supra* text accompanying notes 210-12.

278. *Id.* at 685 (Rovner, J., concurring).

279. *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 260, 271 (1st Cir. 2003).

280. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir.), *cert. denied*, 535 U.S. 1112 (2002).

281. *Alexander*, 341 F.3d at 263, 271; *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1169 (2004).

282. *Ingle*, 328 F.3d at 1175.

283. *Id.* at 1176 (footnote omitted).

284. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 499 (4th Cir. 2002).

285. *Id.* at 503.

violation of their statutory rights.

E. Severability

When a court finds an unenforceable or unconscionable provision in an arbitration agreement, a potential question arises as to whether this makes the whole arbitration agreement unenforceable or whether the unenforceable provision can be severed and the remainder enforced.²⁸⁶ In most cases, severability is never discussed and the whole arbitration agreement is declared unenforceable. Where several objectionable provisions must be severed, the court may say that this goes “beyond mere excision to rewriting the contract, which is not the proper role of this Court”²⁸⁷ or that, “a court may, in its discretion, ‘refuse to enforce the contract as a whole if it is permeated by the unconscionability.’”²⁸⁸ But *McCaskill* held that denial of attorney’s fees, the single right of a winning plaintiff, was sufficient to make the whole arbitration agreement unenforceable.²⁸⁹

There are strong reasons, beyond the “general rule that courts should not rewrite contracts,”²⁹⁰ not to sever an unenforceable clause to save an illegal contract, but rather to hold that any substantial unenforceable provision makes the entire arbitration agreement unenforceable. In *Perez*, the arbitration agreement had an unenforceable fee sharing provision. The court refused to sever the unenforceable clause, reasoning that:

If an employer could rely on the courts to sever an unlawful provision and compel the employee to arbitrate, the employer would have an incentive to include unlawful provisions in its arbitration agreements. Such provisions could deter an

286. Severance is a matter of discretion for the court. The California Supreme Court has provided some unhelpful guidance on the subject:

Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.

Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 696 (Cal. 2000).

287. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 896 (9th Cir.), *cert. denied*, 535 U.S. 1112 (2002).

288. *Ferguson v. Countrywide Credit Inds., Inc.*, 298 F.3d 778, 787 (9th Cir. 2002) (quoting a state legislative committee comment).

289. *McCaskill v. SCI Mgmt Corp.*, 298 F.3d 677, 680 (7th Cir.), *reh’g denied*, No. 00-2839, 2002 U.S. App. LEXIS 21668 (7th Cir. Oct. 11, 2002).

290. *Fowler v. Boise Cascade Corp.*, 948 F.2d 49, 56 (1st Cir. 1991).

unknowledgeable employee from initiating arbitration, even if they would ultimately not be enforced.²⁹¹

Not surprisingly, the courts are not in agreement on this issue. In *Morrison*, the Sixth Circuit held unenforceable various provisions in arbitration agreement which required cost-splitting, limited backpay to one year, front pay to two years, and punitive damages to an amount equal to the total of backpay and front pay, and allowed attorney's fees only at the discretion of the arbitrator.²⁹² Relying on a questionable severability clause in the arbitration agreement and the federal policy of resolving doubts in favor of arbitration, the court held that these clauses could be severed and arbitration enforced without them, thereby substantially rewriting the arbitration agreement to eliminate the objectionable provisions.²⁹³ This, of course, did not deprive the employer of its ill-gotten gain—the *in terrorem* effect of these provisions on those deterred from pursuing their claims—a rather surprising result when the court had explicitly measured the enforceability of these provisions according to their deterrent effect on others similarly situated.²⁹⁴

Those who proceed to arbitration—voluntarily or by compulsion of the court—expecting that the arbitrator will have sufficient discretion to provide a proper remedy, may be sadly disappointed. In *LaPrade*, the employee-plaintiff filed suit claiming sex discrimination along with a number of other statutory and common law claims, but the district court compelled arbitration under a mandatory arbitration agreement.²⁹⁵ The arbitration panel ordered Kidder Peabody to pay LaPrade \$65,000, but assessed her \$8,376 in forum fees.²⁹⁶ After the district court confirmed the award, which the arbitration panel had not explained, the D.C. Circuit affirmed, saying that LaPrade “has not met her burden of demonstrating that the arbitration panel acted in manifest disregard of the law”²⁹⁷

These judicially imposed limits on mandatory arbitration are potentially significant, but much less substantial than they appear. The limitations discussed are enforced only by some, not all or even a majority of courts. The major providers of arbitration services, the AAA, NAF, NYSE, and JAMS, have scarcely noticed the potential for institutionalized bias that is introduced when the arbitration panel is named by arbitration

291. *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), vacated by 294 F.3d 1275 (11th Cir. 2002).

292. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 654-55 (6th Cir. 2003).

293. *Id.* at 674-75.

294. *Id.* at 679-80.

295. *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 704 (D.C. Cir. 2001).

296. *Id.* at 705.

297. *Id.* at 707.

providers who compete for employer clients.²⁹⁸ The denial of class actions, even when a multitude of small claims are involved, seems to have irritated few courts. Requiring employee-plaintiffs to pay substantial forum fees in order to get their statutory claims heard, and to pay arbitrator's fees to get them decided and enforced, is allowed so long as it is not "prohibitively expensive."²⁹⁹ Only a denial of remedies equivalent to those available under the statute, including the right of a prevailing plaintiff to attorney's fees, are generally held illegal or unconscionable, but such provisions may be severed, preserving their *in terrorem* effect.³⁰⁰ No courts have questioned the standard of review over arbitration awards, endorsing without discussion the inadequate "manifest disregard of law" standard. Courts have failed to move mandatory arbitration toward becoming, in fact, just another forum, or in construing and applying the provisions so that "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,"³⁰¹ thereby assuring that "the statute will continue to serve both its remedial and deterrent function."³⁰²

IV. WHAT TO DO?

The cures for this sick body of law, which deprives employees of the full measure of their statutory rights, are surprisingly simple and obvious, even if courts will not change their holdings and employers will not change

298. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 14 (1st Cir. 1999), the district court concluded that "dominance of an arbitral system by one side in the dispute does not comport with any model of arbitral impartiality," but the court of appeals quibbled with the finding and concluded that there were sufficient safeguards against bias. A hopeful note was struck in *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 232 & nn. 40-42 (3d Cir. 1997), JAMS (formerly Judicial Arbitration & Mediation Services) refused to accept the case for arbitration because the procedure did not meet JAMS standard of fairness. The arbitration agreement limited the time in which the claim must be made and barred all punitive damages. JAMS EMPLOYMENT ARBITRATION RULES AND PROCEDURES R. 29(b) (2003) ("If an arbitration is based on a clause or agreement that is required as a condition of employment, the only fee that an employee may be required to pay is the JAMS Case Management Fee."), available at http://www.jamsadr.com/images/PDF/Employment_Arbitration_Rules-2003.PDF (last visited Feb 25, 2004). But cf. JAMS Policy on Employment Arbitration: Minimum Standards of Procedural Fairness (2003) (containing note at bottom of each page stating, "[t]hese Minimum Standards do not apply if the agreement to arbitrate was individually negotiated by the employee and employer and the employee was represented or advised by counsel during the negotiations."), available at http://www.jamsadr.com/images/PDF/Employment_Arbitration_Min_Std-2003.PDF (last visited Feb. 25, 2004).

299. *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 764 (5th Cir. 1999).

300. See *supra* text accompanying note 294.

301. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)) (alteration in original).

302. *Id.* (quoting *Mitsubishi*, 473 U.S. at 637).

their practices. The FAA could be amended to say explicitly what it was originally intended to say, that it did not apply to contracts of employment, legislatively overruling *Circuit City Stores, Inc. v. Adams*.³⁰³ More appropriately, the FAA might be amended to render unenforceable mandatory arbitration provisions in all adhesion contracts, so as to reach consumer, credit, and service contracts where mandatory arbitration similarly deprives plaintiffs of their statutory rights. These changes in the FAA, by their terms, would apply only to *predispute* arbitration contracts, and not to agreements to arbitrate *after* a dispute has arisen.³⁰⁴ Where statutory rights are involved, the statute also needs to be amended to provide for a standard of review of the arbitrator's decision that is equivalent to the standard a trial court would receive. Otherwise, there is no assurance that arbitration will equally protect statutory rights and the social purposes that they serve. In the words of *Cole*, "the arbitration of statutory claims [is] valid only if judicial review . . . is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law."³⁰⁵

Even without statutory changes, the institutional providers of arbitration services could significantly alleviate the problems of mandatory arbitration by refusing to administer arbitration where costs were imposed beyond what the employee would face in a court³⁰⁶ or where the arbitration failed to provide all the remedies to which the employee would be entitled in a court proceeding.³⁰⁷ This would include an equivalent statute of

303. 279 F.3d 889 (9th Cir.), *cert. denied*, 535 U.S. 1112 (2002). This might be jumping from "the frying pan, into the fire," for employment arbitrations would then be governed by state law rather than by federal law. Maltby, *Frying Pan*, *supra* note 51, at 313. State legislatures and state courts might be even less sensitive to individual rights than Congress or federal courts.

304. This solution is advocated by many and a strong case has been made for it by Professor Grodin, *supra* note 26, at 51-53. Maltby argues that would make arbitration practically unavailable because employers would not agree to arbitration after a dispute arose except when it would clearly be advantageous to the employer because of the danger of a large jury verdict, and then the employee would refuse to arbitrate. Maltby, *Frying Pan*, *supra* note 51, at 317-18. The NASD amended their rules as of Jan. 1, 1999, to provide that "statutory employment-related discrimination claims are arbitrable if the parties agree to arbitration *after* the dispute has been raised, but, absent such agreement, arbitration is not compulsory." *Koveleskie v. SBC Capital Mkts., Inc.* 167 F.3d 361, 363 n.1 (7th Cir. 1999).

305. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

306. *Id.* at 1484 & n.12.

307. *Id.* at 1482. Professor Gorman has suggested various standards of review which the Court might embrace, such as the "public policy" standard of *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43-45 (1987), the "clearly repugnant," standard that the NLRB gives to arbitration awards, or the *Chevron* standard of deference given to interpretation of statutes by administrative agencies. Robert A. Gorman, *The Gilmer Decision and Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 671-73. He apparently would accept a congressional amendment that would enshrine a "error of

limitations and availability of class actions. Where statutory rights are involved, a transcript of the hearing should be made and the arbitrator should be required to write an opinion stating the facts and reasoning on which the award is based. The arbitration provider's rule might also specify a standard of review equivalent to that applicable to a decision by an administrative agency or trial court. Some arbitration providers have made steps, small steps, in this direction.³⁰⁸

Arbitration providers cannot, of course, avoid the problem of potential bias when compiling their list of arbitrators because the providers feel they must continue to satisfy the employers who designate the providers. The most obvious cure for this would be the use of a public agency—such as the FMCS—or state mediation agencies to provide panels of arbitrators. Currently, the FMCS maintains a large panel of arbitrators for grievance arbitration from which it provides lists to the parties. It could have a second panel of those to be used in individual employment cases, with arbitrators being able to be on both panels. With these changes by the institutional providers, the implication of the Supreme Court—that arbitration is just another forum—could, without any statutory changes, become true in almost all respects. The one difference between courts and arbitration that cannot be matched is the availability of a jury to find facts and assess damages.

V. CONCLUSION

The Supreme Court, enamored with arbitration as a method of relieving court dockets, and entranced with the assumption that arbitration is cheap, fast, and efficient, has articulated and implemented a national policy strongly favoring arbitration.³⁰⁹ In carrying this policy to an extreme, the Court has unthinkingly undermined fundamental social policies articulated by Congress to protect workers' rights. It has thinly disguised this weakening of protections by insisting that arbitration is just another forum—a bromide that it must know is not true. The differences between vindicating rights in arbitration and in the courts are obvious, multiple, and fundamental, all to the disadvantage of the individual

law" standard that apparently would be the same standard as used by an appellate court when reviewing a decision of a trial court. *Id.* at 672-73.

308. Federal appeals courts are divided on the question whether the parties can contract for a higher standard of review. The Third, Fifth, and Ninth Circuits have held that the parties can so contract; the Seventh and Tenth have held that they cannot; and the Eighth has expressed doubt but said that if they could, the parties intent to have courts apply the heightened scrutiny must be "clearly and unmistakably" expressed. *See Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788-89 (8th Cir. 2003), *cert. denied*, 158 L. Ed. 2d 81 (2004).

309. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983); *see Alleyne, supra* note 14, at 2-3 n.4.

employee seeking to enforce his statutory rights. Employers exploit their court-bestowed advantages by increasingly imposing mandatory arbitration provisions designed to discourage or defeat employees who would seek to enforce statutes enacted to ensure their rights and to promote broad social policies against discrimination, starvation wages, and unfair treatment.

The courts have, with only small and unsure baby steps, limited the potential abuses of mandatory arbitration. They have failed in their responsibility to shape the evolving law to make arbitration just another forum. The actions of private institutions have also fallen far short. After *Gilmer*, representatives of the most relevant institutions, including the American Bar Association, the National Lawyers Association, the AAA, and the FMCS, agreed upon a Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship.³¹⁰ The Protocol dealt with only part of one of the issues discussed here: that an arbitrator should issue an award setting out the issues and the damages requested.³¹¹ But even here, the Protocol makes no mention of the more critical elements, such as requiring findings of fact and legal reasoning to support the award. Perversely, the Protocol endorsed the use of arbitration providers, with no mention of how they should compile their panels, and recommended that the parties should share the fees.³¹² The emptiness of the Protocol may be excused because it was agreed upon so shortly after *Gilmer* when there was lack of full awareness of the problems in store. It is now time, indeed past time, for those private institutions to rewrite the Protocol, and for the providers of arbitration services to revise their standards in order to meet, in full measure, the demonstrated need, until that hoped-for day when Congress amends the FAA to say what it thought it said 80 years ago.

310. DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (Am. Bar Ass'n, Chicago, Ill. 1995), available at <http://www.bna.com/bnabooks/ababna/special/protocol.pdf> (last visited Feb. 25, 2004).

311. *Id.* at 3.

312. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 39-43 (1998) (discussing what the Protocol provides and does not provide).