The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration

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I. INTRODUCTION

The notion that employees and consumers should be subject to unregulated market forces ostensibly has been dead for more than fifty years.[1] Recent trends in arbitration law, however, have resurrected the argument that "freedom of contract" principles are an effective substitute for government regulation.[2] This has created considerable tension in federal arbitration law.

The United States Supreme Court has long held that the Federal Arbitration Act (FAA)[3] enshrines freedom of contract, and that courts should liberally enforce the arbitration agreements agreed to by private parties.[4] This approach—commonly referred to as the contractualist approach—was appropriate for the first fifty years of the statute's existence, when the statute was understood as applying only to disputes arising between commercial enterprises and as not applying to statutory claims.[5] The contractualist approach is far less appropriate, however, now that the Supreme Court has extended the FAA to statutory claims[6] raised by employees and consumers.[7]

Many companies have taken full advantage of this new, unregulated arbitration market. Waving the freedom of contract banner and using the Supreme Court's contractualist interpretations of the FAA as a shield, these companies have drafted lopsided arbitration agreements that, for example, waive the employee/consumer's right to recover punitive damages and attorneys' fees, cap the amount of consequential damages

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1. *See, e.g.*, Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933) (recognizing the need for government intervention in certain types of markets, such as the labor market).

2. *See, e.g.*, Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999) (noting that modern arbitration law has had the effect of privatizing public law).

3. 9 U.S.C. §§ 1–16 (2000).

4. *E.g.*, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (the FAA's enactment was "motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) ("The 'liberal federal policy favoring arbitration agreements' manifested by [9 U.S.C. § 2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'" (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 25 n.32 (1983))).

5. *See infra* notes 25–87 and 161–62 and accompanying text.

6. *Cf.* Ware, *supra* note 2, at 732–33 (arguing that the statutory/common law distinction should be replaced by a mandatory/default distinction).

7. *E.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (requiring arbitration of employee's age discrimination claim).

well below the amount permitted by statute, impose shortened statutes of limitation, impose filing fees and other prohibitive costs on would-be claimants, require employees and consumers to submit their claims to arbitration while leaving the company free to litigate, forbid class actions, restrict or eliminate discovery, and give the company unilateral authority to appoint arbitrators.[8] Claims of contractual freedom often are chimerical,[9] as when arbitration "agreements" are given in English to Spanish-speaking employees,[10] or when the "agreements" are not disclosed at the time of a consumer's purchase but become effective shortly after delivery,[11] or when the "agreements" are given to a long-term employee on an accept-it-or-be-fired basis.[12]

The federal circuit courts generally have agreed that the most egregious of these lopsided agreements should not be enforced. The circuits are split, however, on the proper source of authority for refusing enforcement. Some circuits rely on state-law breach-of-contract principles.[13] Other circuits, again looking to state law, find that lopsided agreements are unenforceable because they are unconscionable.[14] A third group of circuits relies on the federal statutory law giving rise to the claim, reasoning that lopsided arbitration agreements are unenforceable because they are inconsistent with, for example, the federal antidiscrimination laws.[15]

In addition to this source-of-authority split, the federal circuits also are split on the point at which an arbitration agreement becomes sufficiently "egregious" to merit nonenforcement. There is, for example, considerable variation among the circuits on the enforceability of arbitration agreements that require cost-splitting, that limit certain types of damages, that impose filing fees, that alter statutes of limitation, that limit discovery, that forbid class actions, that apply to employee/consumer claims but not to company claims, and that give one party the unilateral right to modify the arbitration agreement.[16]

The result is a tremendous amount of legal indeterminacy on the enforceability of consumer and employment arbitration agreements.

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8. *See infra* notes 190–205 and accompanying text.

9. *Cf.* Stephen J. Ware, *Consumer Arbitration As Exceptional Consumer Law (With A Contractualist Reply To Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998) (defending the contractualist approach to arbitration law).

10. *See, e.g.*, Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937 (S.D. Tex. 2001).

11. *See, e.g.*, Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000).

12. *See, e.g.*, Hightower v. GMRI, Inc., 272 F.3d 239 (4th Cir. 2001).

13. *See infra* Part III.A.

14. *See infra* Part III.B.

15. *See infra* Part III.C.

16. *See infra* notes 335–42 and accompanying text.

This indeterminacy in turn has spawned several subsidiary problems. The first is that many of the traditional benefits (e.g., low cost, speedy resolution) of arbitration are lost as employees and consumers who have signed lopsided arbitration agreements must first litigate whether they can litigate their statutory claims before they ever get to argue the merits.[17]

The second subsidiary problem is that the indeterminacy is likely to induce consumers and employees to abandon their claims altogether.[18] Take, for example, a consumer arbitration agreement containing a Washington choice-of-forum provision.[19] Most Illinois residents probably would abandon their claim upon learning that they would have to travel to Washington to attend an arbitral hearing. Even if they thought that a court ultimately would strike the choice-of-forum provision, the cost of litigating the enforceability issue probably would far exceed the value of the underlying claim. And even if the consumer were willing to gamble and litigate the enforceability issue, the court might well decide (as one federal court has) that the clause is not sufficiently lopsided to warrant nonenforcement.[20] Under these circumstances, a rational consumer faced with a lopsided agreement would forego her claim. The result is the effective nullification of federal consumer protection and antidiscrimination law: without enforcement, there is no protection.

This Article is not a diatribe against consumer and employment arbitration. To the contrary, I have argued consistently that arbitration provides a dispute resolution forum to employees and consumers who cannot afford to pay for litigation out-of-pocket and whose claims are too small to attract an attorney willing to take the case on a contingency basis.[21] Access to an arbitral tribunal is worthless, however, if the

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17. *See, e.g.*, PaineWebber Inc. v. Hartman, 921 F.2d 507, 511 (3d Cir. 1990) ("If . . . the court determines that an agreement exists and that the dispute falls within the scope of the agreement, it then must refer the matter to arbitration without considering the merits of the dispute.").

18. *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 662 (6th Cir. 2003) ("If we do not know who will prevail on the ultimate cost-splitting question until the end, we know who has lost from the beginning: those whom the cost-splitting provision deterred from initiating their claims at all.").

19. *See In re* RealNetworks, Inc., No. 00C 1366, 2000 WL 631341, at *5–6 (N.D. Ill. May 8, 2000) (enforcing arbitration agreement that contained Washington choice-of-forum provision against consumer who resided in Illinois).

20. *Id.*

21. *See, e.g.*, RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 154–57 (1997) (discussing the high costs of employment dispute claims and the various reasons attorneys are reluctant to take such cases on a contingency fee arrangement).

arbitrator is chosen by and beholden to the company, if the arbitrator is prohibited from awarding meaningful damages, and if the consumer/employee must pay a prohibitively high fee for the "privilege" of access.[22]

This Article proposes that Congress fill the laissez-faire void by amending the FAA to create an arbitration "bill of rights" to govern arbitration agreements when statutory rights are at issue and one party has been presented with an arbitration agreement without a meaningful opportunity to negotiate its terms. Targeting employment and consumer arbitration together is appropriate because both present similar rationales for intervention: they involve adhesive take-it-or-leave-it contracts, drafted by a party with vastly superior bargaining power, that frequently involve statutory issues. Such an amendment would protect employees and consumers from lopsided arbitration agreements, while at the same time preserving the freedom of commercial entities to structure their commercial dispute resolution mechanisms as they see fit.

Part II of this Article presents a history of the arbitration of statutory claims under the FAA. It discusses the interplay between federal and state law pertaining to the enforceability of arbitration agreements, the Supreme Court's contractualist interpretation of the FAA, and the continued prevalence of lopsided arbitration agreements. Part III describes the split of authority in the federal circuit courts on the proper source of authority for refusing to enforce lopsided arbitration agreements, and the resulting circuit splits on which types of lopsided clauses justify nonenforcement. Part IV proposes that Congress resolve these problems by amending the FAA to create an "arbitration bill of rights." Such an amendment, however, should be limited to consumer and employment arbitration agreements that cover statutory claims, where the employee/consumer has been presented with an arbitration agreement without a meaningful opportunity to negotiate its terms. Part V concludes.

22. *See, e.g.*, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("At a minimum, statutory rights include both a substantive protection *and* access to a neutral forum in which to enforce those protections.").

II. BACKGROUND: CONSUMER AND EMPLOYMENT ARBITRATION[23]

A. *The Early Years of Statutory Arbitration*

At common law, an arbitration agreement was revocable by either party any time before the arbitrator issued an award.[24] The FAA, enacted in 1925[25] and re-codified in 1947,[26] however, required courts to enforce arbitration agreements related to commerce and maritime transactions.[27] Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[28] Section 3 permits a party to an arbitration agreement to obtain a stay of proceedings in federal court when an issue is referable to arbitration.[29] Section 4 permits such a party to obtain an order compelling arbitration when another party has failed, neglected, or refused to comply with an arbitration agreement. It also authorizes judicial enforcement of arbitration awards.[30]

In the 1953 decision of *Wilko v. Swan*,[31] the Supreme Court held that a buyer of securities, who had sued the seller claiming fraud in violation of section 12(2) of the Securities Act of 1933,[32] could not be compelled

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23. I have extensively discussed the history of employment arbitration elsewhere, and therefore will include only an abbreviated version here. *See* BALES, *supra* note 21, at 16–31; Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 596–605 (1995) [hereinafter Bales, *A Practical Guide*]; Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 10–19 (1999); Richard A. Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 LAB. LAW. 511, 511 (1998); Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 719–42 (1997) [hereinafter Bales, *The Discord*]; Richard A. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1881–1901 (1994).

24. *See, e.g.*, Or. & W. Mortgage Sav. Bank v. Am. Mortgage Co., 35 F. 22, 23 (C.C.D. Or. 1888); Jones v. Harris, 59 Miss. 214, 215–16 (1881), *overruled by* IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96 (Miss. 1998); Allen v. Watson, 16 Johns. 205, 208–10 (N.Y. Sup. Ct. 1819); Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746); Vynior's Case, 77 Eng. Rep. 595 (K.B. 1609).

25. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (originally enacted as The United States Arbitration Act, ch. 213, §§ 1–15, 43 Stat. 883, 883–86 (1925)).

26. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (stating that the FAA was "reenacted and codified in 1947 as Title 9 of the United States Code").

27. 9 U.S.C. § 2.

28. *Id.*

29. *Id.* § 3.

30. *Id.* § 4.

31. 346 U.S. 427 (1953).

32. 15 U.S.C. § 77 (1994).

to arbitrate the claim pursuant to an arbitration clause in the sales contract.[33] The Court voided the arbitration clause as an invalid waiver of the substantive law created by the statute.[34] Lower federal courts subsequently interpreted *Wilko* as creating a defense to the enforcement of arbitration agreements under the FAA when statutory claims were at issue.[35] This "public policy defense" was premised on the assumptions that: (1) courts could enforce statutory rights better than arbitrators, (2) public policy prohibited the enforcement of pre-dispute agreements to arbitrate statutory rights, and (3) arbitration's informality made it difficult for courts to correct arbitral errors in statutory interpretation on judicial review.[36]

B. Section 301, Lincoln Mills, *and the* Steelworkers *Trilogy*

While lower federal courts relying on *Wilko* were proclaiming the inferiority of arbitration for resolving statutory claims, the Supreme Court was ensconcing arbitration as a mechanism for resolving labor disputes arising under collective bargaining agreements.[37] Beginning in the late 1940s, parties seeking to compel arbitration pursuant to arbitration clauses in collective bargaining agreements increasingly began looking to federal law, both to avoid the common law rule in most states that arbitration agreements were revocable and unenforceable,[38] and in the hope that either the attitude of the federal judiciary or the provisions of the FAA would permit enforcement.[39]

Section 1 of the FAA, however, excludes "contracts of employment"[40] from the substantive provisions of the Act, and several federal courts held that this provision made the FAA inapplicable to

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33. *Wilko*, 346 U.S. at 438.

34. *Id.*

35. *See* G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on* Shearson/American Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397, 404 (1988); Michael G. Holcomb, Note, *The Demise of the FAA's "Contract of Employment" Exception?*, 1992 J. DISP. RESOL. 213, 216.

36. *See, e.g.*, American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968); Hunt v. Mobil Oil Corp., 444 F. Supp. 68, 70–71 (S.D.N.Y. 1977).

37. *See* Susan A. FitzGibbon, *Reflections on* Gilmer *and* Cole, *in* 1 EMPLOYEE RTS. & EMPL. POL'Y J. 221, 222 (1997).

38. *See, e.g.*, *Ex Parte* Birmingham Fire Ins. Co., 172 So. 99, 101 (Ala. 1937); Key v. Norrod, 136 S.W. 991, 992 (Tenn. 1911).

39. Archibald Cox, *Grievance Arbitration and the Federal Courts*, 67 HARV. L. REV. 591, 591 (1954).

40. 9 U.S.C. § 1 ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

arbitration clauses found in collective bargaining agreements.[41] Perhaps for this reason, the Court, in *Textile Workers Union v. Lincoln Mills*,[42] looked elsewhere for a peg upon which to hang its arbitration hat, and settled upon section 301 of the Labor-Management Relations Act of 1947 (LMRA).[43]

Section 301 appears on its face to be a purely procedural provision giving federal courts the jurisdictional authority to decide breach-of-contract *lawsuits* by an employer or labor organization against the other for breach of a collective bargaining agreement.[44] The statute nowhere mentions "arbitration," and its legislative history likewise is silent (and arguably even negative) toward arbitration.[45] Nonetheless, the Supreme Court, in the 1957 *Lincoln Mills* decision, held that in enacting section 301, Congress granted federal courts the authority to order specific performance of an arbitration agreement contained in a collective bargaining agreement.[46]

Moreover, the *Lincoln Mills* Court also held that section 301 authorizes federal courts to create a body of federal contract law for the enforcement of these collective bargaining agreements, including specific performance of arbitration agreements.[47] This new federal

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41. *See, e.g.*, Lincoln Mills of Ala. v. Textile Workers Union, 230 F.2d 81, 86 (5th Cir. 1956), *rev'd*, 353 U.S. 448 (1957); Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, Local Div. 1210 v. Pa. Greyhound Lines, 192 F.2d 310, 313 (3d Cir. 1951). *But see* Local 19, Warehouse, Processing & Distributive Workers Union v. Buckeye Cotton Oil Co., 236 F.2d 776, 781 (6th Cir. 1956) (collective bargaining agreements are not "contracts of employment" within the meaning of the FAA and, therefore, are not excluded from the application of the FAA); Local 205, United Elec., Radio & Mach. Workers v. Gen. Elec. Co., 233 F.2d 85, 99 (lst Cir. 1956) (same); Hoover Motor Express Co. v. Teamsters Local Union 327, 217 F.2d 49, 53 (6th Cir. 1954) (same); Tenney Eng'g, Inc. v. United Elec. Workers Local 437, 207 F.2d 450, 452–54 (3d Cir. 1953) (en banc) (holding that the exclusion applies only to workers directly engaged in foreign or interstate commerce such as seamen and railroad employees, and that it therefore does not apply to employees producing goods for subsequent resale in interstate commerce). The Supreme Court ultimately adopted the *Tenney* interpretation of the clause. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (discussed *infra* notes 177–80 and accompanying text).

42. 353 U.S. 448 (1957).

43. *Id.* at 457–58.

44. 29 U.S.C. § 185 (1996). The pertinent provision of section 301 is as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

45. Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919, 922–23 (1998); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 583 (1983).

46. 353 U.S. at 455–57.

47. *Id.* at 450–51, 456–57.

contract law would emanate from "the penumbra of express statutory mandates" and, when no statutory provision was anywhere near on point, "judicial inventiveness" would be required to divine this law from the policies underlying the statutes.[48] State law principles inconsistent with the new federal contract principles would be preempted.[49] Otherwise, the Court reasoned in *Local 174, Teamsters v. Lucas Flour Co.*,[50] varying interpretations of the terms of a collective bargaining agreement under various state laws would disrupt the negotiation and administration of labor contracts,[51] resulting in labor unrest.[52] *Lincoln Mills* and its progeny resulted in the complete federalization of arbitration law under section 301.[53]

In three 1960 cases known collectively as the *Steelworkers* Trilogy,[54] the Court again ignored the FAA and relied instead on section 301 of the Labor-Management Relations Act[55] for a strong endorsement of labor

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48. *Id.* at 456–57.

49. *Id.* at 457. *See also* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985) (finding that state law tort claims that are "inextricably intertwined with consideration of the terms of the labor contract" are preempted even if they are superficially labeled as tort claims rather than claims for breach of contract); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23 (1983) (restating that state law claims for breach of a collective bargaining agreement are removable to federal court even if alternative actions are pleaded in the complaint); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 559–61 (1968) (holding that section 301 preemption is so expansive that claims based exclusively on state contract law not only are preempted, but also become from their inception federal question claims, and any state law cause of action for violation of a collective bargaining agreement is entirely displaced by section 301); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102–04 (1962) (holding that the Supremacy Clause of the United States Constitution requires this body of federal law to displace any state law regarding the interpretation and enforcement of labor contracts).

50. 369 U.S. 95 (1962).

51. *Id.* at 103–04. The Court explained:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. . . . [T]he process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.

Id.

52. *Id.* at 105 ("[A] contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare.").

53. *See* cases cited *supra* note 49.

54. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960).

55. 29 U.S.C. § 185 (2000).

arbitration.[56] The holdings of the Trilogy were that arbitrators, not courts, are to decide the arbitrability of grievances;[57] that courts should refuse to order arbitration only if the arbitration clause "is not susceptible of an interpretation that covers the asserted dispute";[58] and that courts should not review the merits of an arbitration award so long as the award "draws its essence" from the collective bargaining agreement.[59]

The *Steelworkers* Court distinguished *Wilko* on the basis that the *Steelworkers* cases arose in the unique context of labor relations.[60] Whereas the alternative to arbitrating statutory claims was judicial resolution of those claims "with established procedures or even special statutory safeguards,"[61] the alternative to arbitrating labor claims was "industrial strife."[62] The *Steelworkers* Court's fear of labor unrest was not applicable to the statutory cases which, until 1974, did not arise in the employment context.

Because the Court distinguished rather than overruled *Wilko*, the twin products of the *Steelworkers* Trilogy—a strong presumption of arbitrability and a cabined role for the courts—applied only to arbitration provisions in collective bargaining agreements.[63] Lower federal courts continued to apply *Wilko* to statutory claims,[64] creating a dichotomy in which collective bargaining issues were arbitrable but statutory issues were not. This dichotomy was challenged by the 1974 case of *Alexander v. Gardner-Denver Co.*[65]

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56. *Enter. Wheel*, 363 U.S. at 596–99; *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–85; *Am. Mfg. Co.*, 363 U.S. at 566–69.

57. *Am. Mfg. Co.*, 363 U.S. at 567–68.

58. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–83.

59. *Enter. Wheel*, 363 U.S. at 597.

60. *Warrior & Gulf Navigation Co.*, 363 U.S. at 578.

61. *Id.*

62. *Id.*; *see also* David E. Feller, *Arbitration and the External Law Revisted*, 37 ST. LOUIS U. L.J. 973, 974 (1993) ("Arbitration under a collective bargaining agreement, unlike commercial arbitration, was not an alternative forum for determining issues which would otherwise be litigated, but was developed as a substitute for the strike.").

63. *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 758 (1990) ("To extend the special status that arbitration enjoys under the *Trilogy* . . . to settings where collective bargaining does not take place would be to divorce the Court's doctrine from its underlying justification.").

64. *See, e.g.*, Romyn v. Shearson Lehman Bros., 648 F. Supp. 626, 632 (D. Utah 1986) (RICO); Breyer v. First Nat'l Monetary Corp., 548 F. Supp. 955, 959 (D.N.J. 1982) (Commodities Exchange Act); Aimcee Wholesale Corp. v. Tomar Prods., Inc., 237 N.E.2d 223, 227 (N.Y. 1968) (Sherman Antitrust Act).

65. 415 U.S. 36 (1974).

C. Alexander v. Gardner-Denver Co.

Gardner-Denver presented the issue of whether an employee's arbitration of a contractual discrimination claim foreclosed subsequent litigation of a statutory discrimination claim based on the same facts.[66] Harrell Alexander, discharged ostensibly for producing too many defective parts,[67] grieved his discharge pursuant to a collective bargaining agreement provision that prohibited discrimination and required that discharges be only for just cause.[68] Alexander testified at the arbitration hearing that he had been fired because of his race.[69] The arbitrator found that there had been just cause for discharge and ruled for the employer, but did not address the discrimination claim.[70] Alexander then filed a Title VII discrimination suit in federal court.[71] The district court granted summary judgment for the employer, finding that the discrimination claim had been submitted to and resolved by the arbitrator.[72] The Tenth Circuit affirmed.[73]

The Supreme Court reversed, holding that an employee does not forfeit his Title VII discrimination claim by first pursuing a grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement.[74] The Court presented five reasons why labor arbitration was inappropriate for the final resolution of Title VII claims. First, the Court stated that labor arbitrators lack the experience to resolve Title VII claims.[75] The "specialized competence of arbitrators," the Court noted, "pertains primarily to the law of the shop, not the law of the land."[76] Second, the Court stated that arbitrators lack the authority to decide statutory claims.[77] An arbitrator's power derives from contract, and if the collective bargaining agreement only gives the arbitrator the authority to decide issues arising under the contract, the arbitrator would

66. *Id.* at 38.
67. *Id.*
68. *Id.* at 39.
69. *Id.* at 38, 42.
70. *Id.* at 42.
71. *Id.* at 39, 42–43.
72. *Id.* at 43.
73. *Id.*
74. *Id.* at 49–50.
75. *Id.* at 57.
76. *Id.*
77. *See id.* (stating that "the resolution of statutory or constitutional issues is the primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts").

exceed her authority by relying on a source of law outside the contract such as statutory law.[78] Any resulting award would be unenforceable.[79]

Third, the Court characterized arbitration hearings as relatively informal as compared to judicial proceedings, and concluded that arbitral fact-finding procedures were inadequate to protect employees' Title VII rights.[80] Fourth, the Court pointed out that arbitrators are under no obligation to issue written opinions.[81] Fifth, the Court noted the union's exclusive control over the manner and extent to which an employee's grievance is presented.[82] The Court was concerned that a union's duty to represent employees collectively might interfere with its pursuit of an individual employee's claim.[83] Thus, the Court held that an employee's arbitration of a claim arising under a collective bargaining agreement did not preclude later litigation of a statutory claim predicated on identical underlying facts.[84]

The *Steelworkers* Trilogy and *Gardner-Denver* seemed to stand for the proposition that arbitration was an appropriate mechanism for resolving issues arising under the "law of the shop,"[85] but was not appropriate for resolving issues arising under the "law of the land."[86] Following this reasoning, several lower courts ruled that arbitration clauses contained in individual employment contracts, instead of in collective bargaining agreements, would not preclude subsequent suits under anti-discrimination laws.[87]

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78. *Id.* at 53.

79. *Id. See also* United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960) (an arbitrator's "award is legitimate only so long as it draws its essence from the collective bargaining agreement").

80. *See Gardner-Denver*, 415 U.S. at 56–58. *But cf.* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 376 (4th ed. 1985) ("'Courts aren't right more often than arbitrators and the parties because they are wiser. They are "right" because they have the final say.'" (quoting James E. Westbrook, *The End of an Era in Arbitration: Where Can You Go if You Can't Go Home Again* (1980) (unpublished manuscript))).

81. *Gardner-Denver*, 415 U.S. at 58.

82. *Id.* at 58 n.19.

83. *Id.* A union, for example, might be willing to drop an individual employee's discrimination claim in return for a wage increase that benefited all employees.

84. *Id.* at 59–60.

85. *See* Bales, *The Discord*, *supra* note 23, at 726. *See also* John Wiley & Sons v. Livingston, 376 U.S. 543, 550 (1964) ("'The collective [bargaining] agreement . . . calls into being . . . the common law of a particular industry or of a particular plant.'" (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578–79 (1960))).

86. Bales, *The Discord*, *supra* note 23, at 726.

87. *See, e.g.*, Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (Title VII); Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 227–28 (3d Cir. 1989) (ADEA); Swenson v. Mgmt. Recruiters Int'l, Inc.; 858 F.2d 1304, 1307 (8th Cir. 1988) (Title VII); Jones v. Baskin, Flaherty, Elliott & Mannino, P.C., 670 F. Supp. 597, 604 (W.D. Pa. 1987) (ADEA); Steck v. Smith Barney,

D. The Mitsubishi *Trilogy*

While lower courts after *Gardner-Denver* refused to compel arbitration of statutory claims in the employment context, the Supreme Court issued three decisions approving arbitration of statutory claims arising under antitrust,[88] securities,[89] and racketeering[90] laws. In these cases, collectively known as the *Mitsubishi* Trilogy after the name of the first case, the Court interpreted the FAA as creating a presumption that statutory claims are arbitrable, and made this presumption refutable only upon a showing by the party opposing arbitration that Congress specifically intended otherwise.[91] Moreover, the Court explicitly rejected challenges to the competence of arbitrators and the sufficiency of arbitral procedures.[92]

The Court predicated this new presumption of arbitrability on two assumptions, both of which were a marked departure from prior precedent. The first assumption, articulated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[93] was that an arbitration agreement involves no waiver of substantive rights:

> By 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. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[94]

Harris Upham & Co., 661 F. Supp. 543, 544–47 (D.N.J. 1987) (ADEA); Horne v. New England Patriots Football Club, Inc., 489 F. Supp. 465, 467–70 (D. Mass. 1980) (ADEA). *But see* Pihl v. Thompson McKinnon Sec., 48 Fair Empl. Prac. Cas. (BNA) 922, 924–26 (E.D. Pa. 1988) (holding that ADEA claims are subject to compulsory arbitration).

88. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (compelling enforcement of a private contract to arbitrate claims arising under the Sherman Antitrust Act).

89. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 479, 484–85 (1989) (compelling enforcement of a private contract to arbitrate claims arising under section 12(2) of the Securities Act of 1933).

90. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238, 242 (1987) (compelling enforcement of a private contract to arbitrate claims arising under both RICO and section 10(b) of the Securities Exchange Act of 1934).

91. *McMahon*, 482 U.S. at 226; *Mitsubishi*, 473 U.S. at 628.

92. *See McMahon*, 482 U.S. at 232 ("[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."); *Mitsubishi*, 473 U.S. at 628 (stating that a party does not give up substantive rights by agreeing to arbitrate a statutory claim).

93. 473 U.S. 614 (1985).

94. *Id.* at 628.

Similarly, in the second case of the *Mitsubishi* Trilogy, *Shearson/American Express, Inc. v. McMahon*,[95] the Court stated that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."[96]

The second new assumption emanating from the *Mitsubishi* Trilogy was that arbitrators are capable of deciding complex statutory issues. Noting that the parties may appoint arbitrators with particular statutory expertise and that the arbitrator or the parties may employ experts, the Court concluded that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[97] In the third case of the *Mitsubishi* Trilogy, *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[98] the Court expressly overruled *Wilko*.[99]

The *Mitsubishi* Trilogy represented a transformation of the Supreme Court's attitude toward arbitration outside the union context. Before the *Mitsubishi* Trilogy, statutory claims were not arbitrable; afterward, they were arbitrable so long as they did not arise in the employment setting. It was in this context that the Court granted certiorari in a case raising the issue of the arbitrability of statutory employment claims.

E. Gilmer v. Interstate/Johnson Lane Corp.[100]

In *Gilmer*, the Court held for the first time that pre-dispute arbitration agreements between employers and employees are enforceable even when statutory discrimination rights are at issue. This case represents the extension of arbitration from the commercial and labor settings to the employment and consumer settings.

Robert Gilmer was discharged from his job as manager of financial services at Interstate/Johnson Lane Corp.[101] He subsequently sued, alleging he had been fired because of his age in violation of the Age

95. 482 U.S. 220 (1987).

96. *Id.* at 232.

97. *Mitsubishi*, 473 U.S. at 626–27. The "well past" language seems hyperbolic, since just one year before, the Court had stated that an arbitrator may lack the competence required to resolve the complex legal issues involved in a case brought under 42 U.S.C. § 1983. McDonald v. City of West Branch, 466 U.S. 284, 284–85 (1984).

98. 490 U.S. 477 (1989).

99. *Id.* at 483–84.

100. 500 U.S. 20 (1991).

101. *Id.* at 23.

Discrimination in Employment Act (ADEA).[102] The employer moved to compel arbitration pursuant to an arbitration agreement contained in Gilmer's registration agreement with the New York Stock Exchange (NYSE), in which Gilmer had "agree[d] to arbitrate any dispute, claim or controversy" between him and his employer "arising out of the employment or termination of [his] employment."[103] The district court, relying on *Gardner-Denver*, denied the motion.[104] The Fourth Circuit reversed, "finding 'nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements.'"[105]

The Supreme Court agreed, and ordered Gilmer to arbitration.[106] The Court began by invoking the cases of the *Mitsubishi* Trilogy, which the Court characterized as collectively standing for the proposition that the FAA makes statutory claims arbitrable.[107] The Court quoted with approval the statement in *Mitsubishi* that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum.'"[108]

The Court also rejected five broad arguments supporting Gilmer's claim that the arbitration clause should not preclude his ADEA suit: first, that an arbitral forum is inadequate to protect an employee's statutory employment rights;[109] second, that arbitration is inconsistent with the statutory purposes and framework of the ADEA;[110] third, that employment arbitration agreements should not be enforced because they are coercive as a result of unequal bargaining power between employers and employees; fourth, that an FAA provision excluding "contracts of employment" rendered the FAA inapplicable;[111] and fifth, that *Gardner-Denver* stood for the proposition that an employee could not be required to arbitrate his statutory claims.[112]

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102. *Id.* The ADEA is codified at 29 U.S.C. §§ 621–634 (2000).
103. *Id.* (quoting Respondent's Brief at 1, 18).
104. *Gilmer*, 500 U.S. at 24.
105. *Id.* (quoting Gilmer v. Interstate/Johnson Corp., 895 F.2d 195, 197 (4th Cir. 1990)).
106. *Id.* at 24.
107. *Id.* at 26.
108. *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
109. *Id.* at 30.
110. *Id.* at 29, 33.
111. *Id.* at 25.
112. *Id.* at 33.

First, noting that the *Mitsubishi* Trilogy had rejected this argument as "'far out of step with our current strong endorsement'" of arbitration,[113] the Court rejected Gilmer's claim that the arbitral forum was inadequate to protect his statutory employment rights. Gilmer further attacked arbitral adequacy on the ground that arbitral discovery was more limited than that available through federal courts.[114] Noting that NYSE rules permitted "document production, information requests, depositions, and subpoenas,"[115] the Court rejected Gilmer's argument and declared that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"[116]

As a separate attack on arbitral adequacy, Gilmer argued that arbitrators are not required to issue written opinions, and that this would reduce public accountability for employer discrimination, hamper effective judicial review, and stifle development of the law.[117] In rejecting this argument, the Court asserted that NYSE arbitration rules do require arbitrators to issue written awards.[118] The Court further reasoned that courts would continue to issue judicial opinions in employment discrimination cases because not all employers and employees are likely to sign binding arbitration agreements.[119] Finally, the Court noted that

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113. *Id.* at 30 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).

114. *Id.* at 31.

115. *Id.*

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

117. *Id.*

118. *See id.* at 31–32. Such an award, however, did little more than state who shall receive what and when the individual will receive it. *See* UNIF. ARBITRATION ACT §§ 8–16, 7 U.L.A. 202–429 (1997) (describing the procedures and content of an arbitration award). *See also* GEORGE GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 57–60 (2d ed. 1983) (same). The arbitrator was not required to issue an opinion giving reasons for the award. Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 413–14 (1996). *See also* Peter M. Mundheim, Comment, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of* Mastrobuono, 144 U. PA. L. REV. 197, 202 (1995) (stating "there is typically no written opinion in a securities arbitration case").

In June 1998, the Securities and Exchange Commission voted to permit the securities exchanges such as the NYSE to amend their U-4 forms (the registration forms, signed by employees, that contain the arbitration provision) to exclude employment discrimination claims from the arbitration agreement. 63 Fed. Reg. 35,299 (June 22, 1998). The NYSE has since amended its U-4 form accordingly. *See* 64 Fed. Reg. 30,081 (June 4, 1999).

119. *Gilmer*, 500 U.S. at 32.

settlement agreements, which the ADEA encourages, similarly fail to produce written opinions.[120]

Second, the Court rejected Gilmer's argument that arbitration was inconsistent with the statutory purposes and framework of the ADEA, and that this inconsistency rebutted the presumption of arbitrability created by the *Mitsubishi* Trilogy.[121] The Court responded that the arbitral forum was consistent with the ADEA and adequate to protect the statute's important social policies, and that nothing in the ADEA evinced congressional intent to preclude arbitration with sufficient clarity to rebut the *Mitsubishi* presumption.[122] The Court also rejected Gilmer's argument that arbitration would undermine the role of the EEOC in enforcing the ADEA by not requiring employees to file a charge of discrimination before arbitrating their claims.[123] The Court responded that an arbitration agreement would not preclude an employee from filing an EEOC charge, and that the agreement therefore would not necessarily exclude the EEOC from the dispute resolution process.[124]

Third, the Court rejected Gilmer's argument that courts should not enforce arbitration agreements because they often are the product of employer coercion as a result of unequal bargaining power between employers and employees.[125] The Court flatly rejected this argument, stating that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[126] Instead, the Court held that such agreements would be enforced absent "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any

120. *Id.*

121. *Id.* at 32–33.

122. *Id.* at 32–33, 35.

123. *Id.* at 28.

124. *Id.* The Court stated that an inability to file a private judicial action would not prevent an employee from filing a charge with the EEOC. *Id.* It further stated that the EEOC's role in fighting discrimination was not dependent on individual employees filing a charge. *Id.* First, the EEOC can investigate claims even when a charge is not filed. *Id.* The Court also asserted that "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes." *Id.* Finally, the Court, noting the Securities Exchange Commission's involvement in enforcing securities statutes, stated that the mere involvement of an administrative agency in the enforcement of a statute does not preclude compulsory arbitration. *Id.* at 28–29.

125. *Id.* at 32–33. *But see Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce; and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 9 (1931) (statement of Senator Walsh) (using employment arbitration agreements as an example of adhesion contracts).

126. *Gilmer*, 500 U.S. at 33.

contract,'"[127] and that "claim[s] of unequal bargaining power [are] best left for resolution in specific cases."[128]

Fourth, the Court rejected the argument of several *amici curiae* that an FAA provision excluding "contracts of employment" rendered the FAA and its presumption of arbitrability inapplicable to Gilmer's case.[129] The Court concluded that because the arbitration agreement was contained in Gilmer's registration application with the NYSE and not in his employment contract with Interstate, it was not part of the "contract of employment" with his employer.[130]

Fifth, the Court distinguished *Gardner-Denver* from *Gilmer* in three ways.[131] First, the Court noted that unlike a labor arbitrator whose authority is limited to interpreting the collective bargaining agreement at issue,[132] the arbitrator deciding Gilmer's case would be given explicit authority to resolve "any dispute, claim or controversy" arising out of Gilmer's employment.[133] Second, the Court pointed out that Gilmer—unlike the plaintiff in *Gardner-Denver*—was not dependent on a union to enforce his statutory claims.[134] Third, noting that *Gardner-Denver* was not decided under the FAA, the Court applied the statute and the *Mitsubishi* presumption of arbitrability to the employment context of *Gilmer*.[135] Thus, the Court, applying the FAA for the first time in a labor/employment case, held that an employee who had agreed to arbitrate prospective statutory claims was precluded from litigating those claims.

F. The FAA and State Law

After *Gilmer*, the Supreme Court's new-found affinity for arbitration under the FAA began to look strikingly similar to its historical affinity

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127. *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).

128. *Id.*

129. *Id.* at 25 n.2.

130. *Id.* The Court also noted that Gilmer had not presented, and the courts below had not considered, the effect of this provision on Gilmer's case. *Id.* The Court resolved this issue in a later case by holding that the exclusionary clause applies only to workers directly engaged in foreign or interstate commerce such as railroad employees and truck drivers. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113 (2001) (discussed *infra* notes 177–80 and accompanying text).

131. *Gilmer*, 500 U.S. at 33–35.

132. *Id.* at 34.

133. *Id.* at 23, 35.

134. *Id.* at 35.

135. *Id.*

for arbitration under section 301 of the LMRA. This has made it appear that, for all practical purposes, there is a single "doctrine" of arbitration, albeit a doctrine that emanates from different sources of law. There remains, however, at least one major difference between arbitration under the LMRA and arbitration under the FAA: the degree to which the Court has federalized the law governing contract formation.

As discussed above in Part II.B, the Court in *Lincoln Mills* and its preemption progeny resulted in the complete federalization of arbitration law under section 301.[136] This has not occurred under the FAA, however, because the statute's express terms create room for state law. Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"[137] Thus, notwithstanding the FAA's creation of a federal policy in favor of arbitration[138] and a federal common law of arbitrability which preempts state law disfavoring arbitration,[139] state contract law controls whether an arbitration agreement is valid.[140]

State law is somewhat constrained by federal law, because in determining the validity of an arbitration agreement, federal courts "should apply ordinary state-law principles that govern the formation of contracts."[141] For example, in *Doctor's Associates, Inc. v. Casarotto*,[142] the Supreme Court considered a Montana statute[143] that required arbitration contracts to contain a "notice of arbitration" typed in underlined capital letters on the front page of the contract.[144] A franchise agreement did not comply with this statute because the arbitration clause was on page nine, in ordinary type.[145] The Supreme Court held that the Montana statute was preempted by the FAA because the Montana statute "condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally."[146] The FAA "precludes States from singling out arbitration

136. *See supra* notes 42–53 and accompanying text.
137. 9 U.S.C. § 2 (2000) (emphasis added).
138. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).
139. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).
140. *See, e.g.*, Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931 (9th Cir. 2001) (applying Montana law to decide whether arbitration clause was valid).
141. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
142. 517 U.S. 681 (1996).
143. MONT. CODE ANN. § 27-5-114(4) (1995).
144. *Casarotto*, 517 U.S. at 688.
145. *Id.* at 683–84.
146. *Id.* at 687.

provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'"[147] Thus, although "courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions,"[148] general state-law contract defenses such as fraud, duress, or unconscionability may be used to invalidate arbitration agreements.

G. The FAA's Contractualism

The Supreme Court has consistently interpreted the FAA as resolutely contractualist.[149] For example, in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[150] the Court held that parties to an arbitration contract could agree that California law, rather than the FAA, would govern.[151] The Court emphasized the contractual nature of arbitration agreements and the purpose of the FAA to enforce such agreements.[152] The principal purpose of Congress in enacting the FAA, stated the Court, was to "ensur[e] that private arbitration agreements are enforced according to their terms."[153] Arbitration under the FAA "is a matter of consent, not

147. *Id.* (quoting Scherk v. Alberto-Culver Co., 414 U.S. 506, 511 (1974)) (internal quotation marks omitted).

148. *Id. See also* EEOC v. Waffle House, Inc., 534 U.S. 279, 293 (2002) ("The FAA directs courts to place arbitration agreements on equal footing with other contracts . . . .").

149. STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 2.4, at 22 (2001); Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 500 (1998); Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 OHIO ST. J. ON DISP. RESOL. 151, 182–85 (2002); Note, *An Unnecessary Choice of Law:* Volt, Mastrobuono, *and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2250 (2002) ("[P]arties dictate the terms of their own contracts, and the FAA does no more than ensure that those terms are enforced."). *See also* Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) ("The 'liberal federal policy favoring arbitration agreements' . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'" (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 25 n.32 (1983) (citation omitted))); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (stating that the FAA's enactment was "motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered").

150. 489 U.S. 468 (1989).

151. *Id.* at 479.

152. *Id.*

153. *Id.*

coercion, and parties are generally free to structure their arbitration agreements as they see fit."[154]

The Court reached a similar conclusion in *Mastrobuono v. Shearson Lehman Hutton, Inc.*[155] An arbitration agreement between investors and their securities broker contained a New York choice-of-law clause.[156] A dispute arose and went to arbitration; the arbitrator ruled in favor of the investors and awarded both compensatory and punitive damages.[157] New York law at the time did not permit arbitrators to award punitive damages.[158] Nonetheless, the Court interpreted the arbitration agreement as giving the arbitrator the contractual authority to award punitive damages.[159] The Court held that the terms of the arbitration agreement were controlling and that where an agreement includes punitive damages among the issues to be arbitrated, the FAA ensures enforcement even if state law otherwise would have excluded such claims from arbitration.[160]

This contractualist approach to arbitration agreements is not surprising, given the statute's genesis as a law designed to promote arbitration of *commercial* disputes.[161] The contractualist approach also made sense for the next sixty years, during which the statute was understood as applying to commercial (but not employment or consumer) disputes and as not applying to statutory claims.[162] A contractualist approach also made sense in the context of section 301 labor arbitration, where unions were presumed to give employees the bargaining power and legal savvy to negotiate (and jointly enforce with

154. *Id.*
155. 514 U.S. 52, 64 (1995).
156. *Id.* at 53.
157. *Id.* at 54.
158. *Id.* at 55.
159. *Id.* at 58–64.
160. *Id.*
161. Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 296 (1996) [hereinafter *"Workers' Contracts"*]; Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS., at Part IV (forthcoming Winter/Spring 2004). The statute originally was proposed by the American Bar Association's Committee on Commerce, Trade, and Commercial Law. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 21 (1924). In response to an objection that the bill would be used to compel arbitration of labor disputes, the Chair of the American Bar Association's Committee stated that the intent of the statute was "to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 9 (1923).
162. *See, e.g.*, Utley v. Goldman Sachs & Co., 883 F.2d 184, 186 (1st Cir. 1989); Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 230 (3d Cir. 1989); Swenson v. Mgmt. Recruiters Int'l, Inc., 858 F.2d 1304, 1309 (8th Cir. 1988).

employers) agreements that were fundamentally fair.[163] This contractualist, laissez-faire approach to arbitration agreements makes much less sense, however, when the agreements are between parties of grossly disparate bargaining power[164] (such as with employment and consumer arbitration) and when the claims subject to arbitration include statutory claims grounded in public policy.[165]

H. Recent Supreme Court Developments

In the 1998 decision of *Wright v. Universal Maritime Service Corp.*,[166] the Court punted on the issue of whether an arbitration clause in a collective bargaining agreement could prospectively waive an employee's right to litigate a statutory discrimination claim (i.e., whether *Gilmer* had effectively overruled *Gardner-Denver*). The Court held that such a waiver, *if* permitted at all, must be "clear and unmistakable," and because the one at issue in *Wright* was not, the Court found no waiver.[167]

Wright notwithstanding, most of the recent arbitration decisions from the Supreme Court have been decidedly pro-arbitration. For example, in the 2000 decision of *Green Tree Financial Corp.-Alabama v. Randolph*,[168] the purchaser of a mobile home sued the lender which had

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163. *See, e.g.*, Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423 (1993) (stating that "[w]hile the diminished bargaining power of individual workers vitiated the normative force of their voluntary choice to submit to the authority of the large-scale enterprise, collective bargaining would empower workers sufficiently to cleanse that choice of duress"); Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1000 (1955) (explaining that the National Labor Relations Act established a "bare legal framework [that] is hardly an encroachment on the premise that wages and other conditions of employment be left to autonomous determination by employers and labor"). *See also* 29 U.S.C. § 151 (2000) (citing the "inequality of bargaining power" between centralized employers and employees "who do not possess full freedom of association or actual liberty of contract" as a reason that the NLRA was needed); 78 CONG. REC. 3678 (1934) (statement of Sen. Wagner), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 20 (1959) (arguing that there must be equality of bargaining power, which is accomplished through the employees' right to participate in collective bargaining).

164. *See generally* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999) [hereinafter *Rustic Justice*] (arguing that privatization of law through arbitration is bad, particularly when the parties occupy vastly different positions of bargaining power).

165. *See* Leona Green, *Mandatory Arbitration of Statutory Employment Disputes*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173, 197–205 (1998) (criticizing arbitration of statutory employment claims as failing to protect the social interest in antidiscrimination legislation).

166. 525 U.S. 70 (1998).

167. *Id.* at 82.

168. 531 U.S. 79 (2000).

financed the purchase,[169] asserting claims under the Truth in Lending Act (TILA)[170] and Equal Credit Opportunity Act.[171] The Eleventh Circuit had determined that the arbitration agreement failed to provide the minimum procedures that would guarantee that the purchaser could vindicate her statutory rights under the TILA.[172] Critical to this determination was the court's observation that the arbitration agreement was silent with respect to payment of filing fees, arbitrators' costs, and other arbitration expenses.[173] The Supreme Court, however, reversed, because the purchaser had presented no evidence that prohibitively high costs would prevent her from asserting her statutory claims.[174] Where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive," the Court held, "that party bears the burden of showing the likelihood of incurring such costs."[175] The purchaser's failure to do so in this case made her argument for excessive costs "speculative," and did not justify a refusal to enforce the arbitration agreement.[176]

Another strongly pro-arbitration case was the 2001 decision of *Circuit City Stores, Inc. v. Adams*,[177] in which the Court resolved the "contracts of employment" issue which the Court expressly had avoided in *Gilmer*.[178] The Court held that the FAA's exclusion of "contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate commerce" excluded only the employment contracts of those workers actually engaged in interstate transportation, like truck drivers.[179] Four dissenting Justices argued that the FAA's legislative history suggested a broader interpretation of the exclusion.[180]

In the 2002 decision of *EEOC v. Waffle House, Inc.*,[181] the Court held that the EEOC has the independent statutory authority to pursue in court a discrimination claim against an employer, even if the employee

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169. *Id.* at 82–83.
170. 15 U.S.C. §§ 1601–1693 (2000).
171. *Id.* §§ 1691–1691f.
172. *Randolph*, 531 U.S. at 84.
173. *Id.*
174. *Id.* at 90–91.
175. *Id.* at 92.
176. *Id.* at 91.
177. 532 U.S. 105 (2001).
178. Gilmer v. Interstate/Johnson Lane Co., 500 U.S. 20, 25 n.2 (1991).
179. *Adams*, 532 U.S. at 119.
180. *Id.* at 124–40 (Souter, J., and Stevens, J., dissenting). *See also* Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 329, 334–35 (1997) (arguing that the exclusion was intended broadly, to preclude application of the FAA to any employment relationship); Finkin, *"Workers' Contracts," supra* note 161, at 289–98.
181. 534 U.S. 279 (2002).

who filed the initial charge of discrimination had signed an arbitration agreement.[182] And finally, in the 2003 decision of *Green Tree Financial Corp. v. Bazzle*,[183] the Court held that whether a particular arbitration agreement prohibited class-wide arbitration was a question for the arbitrator to decide.[184]

I. The Curious Persistence of Lopsided Arbitration Agreements

Shortly after the Supreme Court's *Gilmer* decision, this author noted that some employer-drafted arbitration agreements were "overreach[ing]" by, for example, giving the employer the unilateral authority to control arbitral selection and limiting the power of the arbitrator to award punitive damages.[185] Nonetheless, I cautioned against legislative intervention, reasoning that courts would solve this problem by refusing to enforce lopsided arbitration agreements, and that employers would react by implementing fundamentally fair agreements.[186]

However, nearly a decade later, as companies continue to implement arbitration programs (covering both employees[187] and consumers[188]) with increasing frequency, many companies have drafted arbitration agreements that are exceptionally lopsided. They can do so because arbitration agreements are by nature contractual,[189] and because many employees who want to keep their jobs (and consumers who want to

182. *Id.* at 296–98.

183. 123 S. Ct. 2402 (2003).

184. *Id.* at 2408.

185. Rick Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 LAB. L.J. 627, 631–34 (1994).

186. *Id.* at 635. *See also* Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 618 (1995) (noting that "agreements requiring arbitration of statutory claims must be scrupulously fair to ensure judicial enforcement").

187. *See, e.g.*, Marc A. Altenbernt, Note, *Will* EEOC v. Waffle House, Inc. *Signal the Beginning of the End for Mandatory Arbitration Agreements in the Employment Context?*, 3 PEPP. DISP. RESOL. L.J. 221, 221 (2003) (noting that arbitration has grown exponentially as an alternative for the adjudication of employment disputes).

188. *Rustic Justice*, *supra* note 164, at 934 (noting that arbitration clauses have become prevalent in a wide variety of consumer transactions, including routine product purchase forms, residential leases, housing association charters, medical consent forms, banking and credit card applications, and employee handbooks).

189. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

purchase a product) usually have no choice but to accept the agreements.[190]

Examples abound. In *Prevot v. Phillips Petroleum Co.*,[191] the employer gave arbitration agreements—written in English—to Spanish-speaking employees, and pressured the employees to sign the agreements immediately.[192] In *Morrison v. Circuit City Stores, Inc.*,[193] the employer imposed a one-year cap on back pay, a two-year cap on front pay, and a $5000 cap on punitive damages in most cases.[194] The employer also required employees to share the out-of-pocket costs of arbitration, which the court estimated at between three and fifty times the out-of-pocket costs of litigation.[195] In *McCaskill v. SCI Management Corp.*,[196] the employer prohibited the arbitrator from awarding attorneys' fees to employees who brought successful discrimination claims.[197] In *Ferguson v. Countrywide Credit Industries, Inc.*,[198] the employer limited depositions of employer representatives (but not depositions of plaintiff-employees) to "no more than four designated subjects."[199] In *Armendariz v. Foundation Health Psychare Services, Inc.*,[200] the employer required employees, as a condition of employment, to submit all employment claims to arbitration, but the employer retained the right to litigate any claims it might have against the employees.[201] In *Ingle v. Circuit City Stores, Inc.*,[202] the employer imposed a statute of limitations much shorter than the limitations period imposed by law, prohibited class actions, and required employees to pay a "filing fee" directly to the employer as a prerequisite for bringing a claim.[203] In *Hooters of*

190. *See, e.g.*, Hightower v. GMRI, Inc., 272 F.3d 239, 242 (4th Cir. 2001) (holding that where an employer conditioned continued employment on the employee's acceptance of an arbitration agreement, the employee's decision to keep working demonstrated acceptance of the agreement).

191. 133 F. Supp. 2d 937 (S.D. Tex. 2001).

192. *Id.* at 940.

193. 317 F.3d 646 (6th Cir. 2003) (en banc).

194. *Id.* at 655. Punitive damages were limited to "the greater of $5000 or [an amount equal to] the sum of a claimant's back pay and front pay awards." *Id.* at 672. *See also* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 267 (3d Cir. 2003) (striking arbitration agreement that, among other things, limited damages to reinstatement and "net pecuniary damages").

195. *Id.*

196. 285 F.3d 623 (7th Cir. 2002).

197. *Id.* at 626.

198. 298 F.3d 778 (9th Cir. 2002).

199. *Id.* at 781.

200. 6 P.3d 669 (Cal. 2000).

201. *Id.* at 675.

202. 328 F.3d 1165 (9th Cir. 2003).

203. *Id.* at 1175–77. *See also Alexander*, 341 F.3d at 266 (striking arbitration provision that, among other things, required employees to notify the employer "within thirty days of the event providing the basis of the claim").

America, Inc. v. Phillips,[204] the employer required that arbitrators be chosen from a panel created exclusively by the employer (which would have permitted the employer to place its own managers on the list), and reserved the right to amend the arbitration rules at any time with no notice (which would have permitted the employer to change the rules of arbitration in the middle of an arbitration proceeding).[205] Nor are overreaching employers likely to limit themselves to only one or two types of overreaching: in many of the cases cited above, courts refused to enforce the arbitration agreement because the agreement overreached in as many as eight different ways.[206] And while the cases cited above all are employment arbitration cases, consumer arbitration cases provide a similar litany.[207]

Courts generally agree that exceptionally lopsided arbitration agreements, such as the ones cited above, should not be enforced.[208] There is a wide range of variation, however, on the point at which an arbitration agreement becomes sufficiently lopsided to justify non-enforcement.[209] Courts also differ on the source of authority that gives courts the power to refuse to enforce such agreements. The next part examines the various sources of authority to which courts have turned.

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204. 173 F.3d 933 (4th Cir. 1999).

205. *Id.* at 938–39.

206. *See, e.g.*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003).

207. *See, e.g.*, Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (refusing to enforce arbitration agreement which was not disclosed to consumer at time of purchase, but became effective shortly after delivery of the product); *In re* RealNetworks, Inc., No. 00 C 1366, 2000 WL 631341, at *5–6 (N.D. Ill. May 8, 2000) (enforcing arbitration agreement that contained Washington choice-of-forum provision against consumer who resided in Illinois); Arnold v. United Cos. Lending Corp., 511 S.E.2d 854, 862 (W. Va. 1998) (refusing to enforce arbitration agreement by which consumer, but not company, waived the right to judicial review); Flores v. Transamerica Homefirst, Inc., 113 Cal. Rptr. 2d 376 (Ct. App. 2001) (striking adhesive consumer contract where borrower was required to arbitrate future claims, but lender could litigate). *See also Rustic Justice*, *supra* note 164, at 936–38 (describing lopsided consumer arbitration agreements); Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173 (2003) (lamenting the tendency of courts to enforce lopsided consumer arbitration agreements); David A. Szwak, *Uniform Computer Information Transactions Act (U.C.I.T.A.): The Consumer's Perspective*, 63 LA. L. REV. 27, 35–36 (2002) (noting that consumer arbitration clauses frequently appoint a particular arbitration provider, thus making the arbitration provider beholden to the company).

208. In all of the cases cited at notes 191–205, the court either struck the arbitration clause entirely or severed the offending provision(s).

209. *See infra* notes 335–42 and accompanying text.

III. SOURCES OF AUTHORITY

Courts generally have refused to enforce egregiously lopsided and adhesive agreements. Courts have differed, however, on the authority under which they have refused enforcement. One group of courts relies on state contract law, and finds that lopsided agreements constitute a breach of the arbitration agreement itself. A second group of courts, again relying on state contract law, relies on the contract doctrine of unconscionability to refuse enforcement. A third group of courts relies on federal law. Although most of the cases discussed below are employment arbitration cases (because the case law is more developed), the principles apply equally to consumer arbitration cases.

A. State: Breach of Contract

The first group of courts relies on state contract law to find that egregiously lopsided arbitration agreements constitute a breach of the arbitration agreement itself. An example is the Fourth Circuit decision of *Hooters of America, Inc. v. Phillips*.[210] In this case, Annette Phillips quit her job with Hooters and threatened to file a sexual harassment suit.[211] Hooters preemptively sued to compel arbitration under the FAA.[212] The district court refused to compel arbitration,[213] and the circuit court, finding that Hooters "set up a dispute resolution process utterly lacking in the rudiments of even-handedness," affirmed.[214]

The bulk of the court's opinion details the myriad ways that Hooters attempted to tilt the playing field in its favor. Hooters gave Phillips an arbitration agreement, and gave her five days to accept or reject it, but never gave her a copy of the arbitration rules and procedures to which she was putatively agreeing.[215] These rules required employee-claimants to give Hooters notice of all claims, including "the specific act(s) or omission(s)" complained of, but did not require Hooters to file a responsive pleading or to provide notice of its defense.[216] The rules required employee-claimants to give Hooters a list of fact witnesses, including fact summaries, but did not require Hooters to reciprocate.[217]

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210. 173 F.3d 933 (4th Cir. 1999).
211. *Id.* at 935.
212. *Id.*
213. *Id.* at 936.
214. *Id.* at 935.
215. *Id.* at 936.
216. *Id.* at 938.
217. *Id.*

Hooters' arbitration rules required that arbitrators be selected from a pool of arbitrators created exclusively by Hooters.[218] There were no restrictions on who Hooters could appoint to or remove from the pool; the court found that Hooters could appoint its own managers to the pool, and could punish arbitrators who ruled against Hooters by removing them from the pool.[219]

Hooters could expand the scope of arbitration to "any matter"; employee-claimants were limited to the scope of the issues raised in their original pleadings.[220] Hooters, but not employee-claimants, could move for summary disposition.[221] Hooters, but not employee-claimants, could record the arbitral proceedings by audiotape, videotape, or stenographer.[222] Hooters, but not employee-claimants, could sue in court to vacate an arbitral award, using a "preponderance of the evidence" standard.[223] Hooters, but not employee-claimants, could cancel the arbitration agreement.[224] Hooters, but not employee-claimants, could change the arbitration rules at any time without notice, including in the middle of an arbitral proceeding.[225]

The court held that Hooters, by promulgating such biased rules, had "breache[d] the contract entered into by the parties."[226] The court explained:

> The parties agreed to submit their claims to arbitration—a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.[227]

Thus, because Hooters had failed to perform its contractual obligation to create a fair system of arbitration, Phillips was excused from performing her contractual promise to arbitrate prospective claims.[228]

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218. *Id.* at 938–39.
219. *Id.* at 939.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 940.
227. *Id.*
228. *Id.*

In addition to finding that Hooters had breached its contract with Phillips, the court also found that Hooters had violated the contractual duty of good faith. "By agreeing to settle disputes in arbitration," the court found, "Phillips agreed to the prompt and economical resolution of her claims. She could legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck."[229] The court concluded that the lopsided nature of Hooters' rules constituted bad faith and justified rescission of the agreement to arbitrate.[230]

B. State: Unconscionability

A second group of courts, like the first, relies on state contract law as authority for refusing to enforce egregiously lopsided arbitration agreements.[231] This second group, however, relies on the contract doctrine of unconscionability, rather than on doctrines of breach or bad faith. Both the Ninth Circuit[232] and the California state courts[233] have frequently taken this approach.

An example is the Ninth Circuit decision of *Circuit City Stores, Inc. v. Adams*.[234] Saint Clair Adams completed an employment application for work as a sales clerk at a Circuit City store in California.[235] The employment application contained an arbitration clause which incorporated by reference a set of "Dispute Resolution Rules and Procedures" written by Circuit City.[236] These rules limited back pay damages to one year, front pay damages to two years, and punitive damages to the greater of front pay plus back pay, or $5000.[237] The rules required the employee to split all costs of arbitration, including the arbitrator's fee, the cost of a court reporter for the arbitration hearing, and the expense of renting a room for the hearing.[238] The rules contained a one-year statute of limitations, which would effectively deprive

229. *Id.*
230. *Id.*
231. *E.g.*, Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 264–69 (3d Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893–95 (9th Cir. 2002); Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 680–82 (8th Cir. 2001); Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937, 939 (S.D. Tex. 2001).
232. *E.g.*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1169–71 (9th Cir. 2003).
233. *E.g.*, Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000).
234. 279 F.3d 889 (9th Cir. 2002).
235. *Id.* at 891.
236. *Id.*
237. *Id.*
238. *Id.*

employees of the benefit of the continuing violation doctrine[239] in discrimination claims.[240] The rules required employees to arbitrate their claims against Circuit City, but permitted Circuit City to litigate its claims against employees.[241] Finally, signing the arbitration clause was a condition of employment; Circuit City would not consider for employment an applicant who had not signed the arbitration clause.[242]

Adams sued Circuit City in state court for sexual harassment.[243] Circuit City filed a petition in federal court to stay the state court proceedings and to compel arbitration.[244] The district court granted the petition.[245] The Ninth Circuit reversed, holding that the arbitration agreement was an employment contract and therefore not subject to the FAA.[246] The Supreme Court reversed. It held that the FAA's exclusionary clause applies narrowly—that is, only to workers directly engaged in interstate commerce, like interstate truck drivers.[247] The case then was remanded to the Ninth Circuit for further proceedings.

The Ninth Circuit again refused to enforce the arbitration agreement, this time relying on state-law contract formation doctrine. The court explained that under California law, applicable because Adams had applied for employment in California, a contract is unenforceable if it is both procedurally and substantively unconscionable.[248] Procedural unconscionability describes the process of contract formation, and focuses on the relative bargaining power between the parties and on whether the drafting party attempted to hide some of the terms of the contract.[249] Substantive unconscionability refers to "whether the terms of

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239. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002) (holding that employee could recover on hostile work environment theory for acts occurring outside the statute of limitations period, as long as acts were part of same hostile work environment and at least one occurred within the limitations period).

240. *Circuit City*, 279 F.3d at 894–95.

241. *Id.* at 891.

242. *Id.* at 891–92.

243. *Id.* at 892.

244. *Id.*

245. *Id.*

246. Circuit City Stores, Inc. v. Adams, 194 F.3d 1070, 1071–72 (9th Cir. 1999).

247. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

248. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892–93 (9th Cir. 2002).

249. *Id.* at 893; *see also* Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 145 (Ct. App. 1997) ("'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms."). The *Hooters* case discussed in Part III.A is a good example of this, because Hooters required Phillips to sign the arbitration agreement without first giving her access to the arbitration rules which were incorporated by reference into the arbitration agreement. *See supra* note 215 and accompanying text.

the contract are unduly harsh or oppressive."[250] California courts use a sliding scale of procedural and substantive unconscionability: the more substantively unconscionable the contract, the less evidence of procedural unconscionability is required before courts will void a contract as unenforceable, and vice-versa.[251]

The Ninth Circuit held that Circuit City's arbitration agreement was procedurally unconscionable because it was a contract of adhesion: a standardized contract, imposed and drafted by a party of superior bargaining power, relegating to the other party only the opportunity to adhere to the contract or to reject it.[252] The court explained that under California law, contracts of adhesion are procedurally unconscionable.[253] This rule applies equally to employment arbitration agreements: the California Supreme Court stated in *Ingle v. Circuit City Stores, Inc.* that "it is procedurally unconscionable to require employees, as a condition of employment, to waive their right to seek redress of grievances in a judicial forum."[254] Therefore, because Circuit City's arbitration agreement was a prerequisite for employment, and because there was no room for negotiating the terms of the arbitration agreement, the Ninth Circuit found that the agreement was procedurally unconscionable.[255]

The court similarly found that Circuit City's arbitration agreement was substantively unconscionable.[256] It concluded that the lack of a reciprocal obligation to arbitrate and the extensive limitations on remedies independently justified a finding of substantive unconscionability.[257] Because the arbitration agreement was both procedurally and substantively unconscionable, the court refused to enforce it.[258]

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250. *Circuit City*, 279 F.3d at 893 (citing *Stirlen*, 60 Cal. Rptr. 2d at 145).

251. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (citing 15 WILLISTON ON CONTRACTS § 1763A, at 226–27 (3d ed. 1972)).

252. *Circuit City*, 279 F.3d at 893 (citing *Stirlen*, 60 Cal. Rptr. 2d at 145–46); *see also* Neal v. State Farm Ins. Cos., 10 Cal. Rptr. 781, 784 (Dist. Ct. App. 1961); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174 (1983) (contracts of adhesion are "standard form contracts presented on a take-it-or-leave-it basis").

253. *Circuit City*, 279 F.3d at 893 ("The [arbitration agreement] is procedurally unconscionable because it is a contract of adhesion. . . .").

254. 328 F.3d 1165, 1172 (9th Cir. 2003).

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

256. *Id.* at 893–94.

257. *Id.*

258. *Id.* at 896.

C. *Federal: Effectuating Statutory Rights*

A third group of courts has focused on federal law, rather than state law, to justify a refusal to enforce egregiously lopsided arbitration agreements.[259] An example is the D.C. Circuit decision of *Cole v. Burns International Security Services*.[260] Clinton Cole was a security guard for Burns Security.[261] Burns Security required Cole, as a condition of employment, to sign an arbitration agreement.[262] Two years later, Burns Security fired Cole.[263] Cole sued in federal court on various discrimination claims.[264] The district court dismissed the complaint and ordered the parties to arbitration.[265]

Cole appealed, arguing that the FAA's exclusionary clause precluded enforcement of his arbitration agreement, and that the arbitration agreement was unconscionable.[266] The D.C. Circuit rejected both arguments.[267] At oral argument, however, the court raised the issue of who would pay for the costs of arbitration (including the arbitrator's fee), an issue on which the arbitration agreement was silent.[268] The circuit court's opinion focused largely on this issue.

The court, in an opinion authored by Chief Judge Harry T. Edwards,[269] began by quoting the *Gilmer* Court's statement that parties to arbitration do not waive substantive rights: "'[b]y agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an

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259. *See, e.g.*, Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 220 (3d Cir. 2003) (focusing on federal law to determine the legality of the contract so that reference to arbitration can be made); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 676 (6th Cir. 2003) (holding that Supreme Court precedent resolves doubts in arbitrability in favor of arbitration); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1470–88 (D.C. Cir. 1997) (applying federal law to find the arbitration agreement enforceable).

260. 105 F.3d 1465 (D.C. Cir. 1997).

261. *Id.* at 1469.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 1470.

266. *Id.* at 1489 n.3 (Henderson, J., concurring in part and dissenting in part).

267. *Id.*

268. *Id.* at 1489.

269. Judge Edwards is no stranger to arbitration. *See* Harry T. Edwards, Advantages of Arbitration Over Litigation: Reflections of a Judge, *in* PROCEEDINGS OF THE 35TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 16 (James L. Stern & Barbara D. Dennis eds., 1983); Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (1999).

arbitral, rather than a judicial, forum.'"[270] The D.C. Circuit pointed out that it is well-established law that employees may not prospectively waive their substantive rights under Title VII[271] or other employment discrimination statutes.[272] An employer cannot, for example, condition employment on an employee's promise never to assert a discrimination claim, or pay a wage premium on condition that the employee tolerate sexual harassment.[273] Even if an employer and employee signed an otherwise-valid contract with such terms, the contract would be unenforceable if the employee were later to sue for discrimination or harassment.[274]

Similarly, reasoned the D.C. Circuit, an employer could not require an employee, as a condition of employment, to waive the right to bring discrimination claims in any forum, or to waive the right to bring such claims in a neutral forum.[275] Although technically these would be waivers of procedural rather than substantive rights, substantive rights depend for their enforcement upon the existence of at least minimal procedures.[276] At a minimum, then, "statutory rights include both a substantive protection *and* access to a neutral forum in which to enforce those protections."[277] A lopsided arbitration agreement that effectively waived the employee's ability to enforce the statutory antidiscrimination law therefore effectively would waive the employee's substantive rights, contrary to the Supreme Court's prescription in *Gilmer*.[278]

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270. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1481 (D.C. Cir. 1997) (alterations in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

271. 42 U.S.C. § 2000e-4 (2000).

272. *Cole*, 105 F.3d at 1482 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)). Although parts of the *Gardner-Denver* opinion were thrown into question after *Gilmer*, as discussed earlier in notes 166–67 and accompanying text, courts universally have agreed that this part of *Gardner-Denver* remains intact. *See, e.g.*, Lapine v. Town of Wellesley, 304 F.3d 90, 106 (1st Cir. 2002) (holding that there can be no prospective waiver of rights under the Veterans' Reemployment Rights Act); Adams v. Philip Morris, Inc., 67 F.3d 580, 584 (6th Cir. 1995) ("It is the general rule in this circuit that an employee may not prospectively waive his or her rights under either Title VII or the ADEA."); Kendall v. Watkins, 998 F.2d 848, 851 (10th Cir. 1993) ("'[T]here can be no prospective waiver of an employee's rights under Title VII.'" (quoting *Gardner-Denver*)); *see also* McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972) ("[E]mployment contracts cannot be used to waive protections granted to employees by an Act of Congress.").

273. *See, e.g.*, Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 117 (2d Cir. 2000) ("[A] firm cannot buy from a worker an exemption from the substantive protections of the anti-discrimination laws because workers do not have such an exemption to sell, and any contractual term that purports to confer such an exemption is invalid.").

274. *Cole*, 105 F.3d at 1482.

275. *Id.*

276. *Id.*

277. *Id.* (citing Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1246–48 (9th Cir. 1994) and JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 144–45 (1983)).

278. *Cole*, 105 F.3d at 1482.

The D.C. Circuit also quoted language from *Gilmer* stating that "'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'"[279] Both of these functions would be undermined, the court reasoned, if arbitration agreements required employees to pay a substantial part of the costs of arbitration, because this would deter employees from bringing claims and thereby remove the disincentive for employers to discriminate.[280] Because the arbitration agreement at issue in this case was silent regarding the allocation of costs, the court interpreted the agreement as requiring Burns Security to pay for the entire cost of arbitration.[281] The court therefore enforced the arbitration agreement on this condition.[282]

The Sixth Circuit's 2003 *en banc* decision of *Morrison v. Circuit City Stores, Inc.*[283] presented a similar issue. Circuit City required employees to sign an arbitration agreement that allowed the arbitrator to force the losing party to pay all arbitration costs.[284] This rule was mitigated somewhat by the caveat that if the losing employee was assessed the costs and she was able to pay her entire share within 90 days, her share of the costs would be limited to the greater of either five hundred dollars or three percent of her most recent annual salary.[285] Notwithstanding this caveat, the Circuit City agreement required employees to pay far more than would be permissible under the D.C. Circuit's *Cole* decision. The agreement also put a one-year cap on back pay, a two-year cap on front pay, and a $5000 cap on punitive damages in most cases.[286]

The Sixth Circuit first looked to Ohio law to determine whether the arbitration agreement was unconscionable.[287] The court ruled the agreement was not unconscionable, and that it therefore was enforceable

279. *Id.* at 1481 (alteration in original) (quoting 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))).

280. *Id.* at 1484.

281. *Id.* at 1485.

282. *Id.* at 1488.

283. 317 F.3d 646 (6th Cir. 2003).

284. *Id.* at 655.

285. *Id.*

286. *Id.* Punitive damages were limited to "the greater of $5000 or an amount equal to the sum of the front and back pay awards." *Id.*

287. *Id.* at 666–68. The court also examined, and rejected, the argument that the arbitration agreement was unenforceable for lack of consideration and mutuality. *Id.* The Ninth Circuit, by contrast, considered this issue as one of substantive unconscionability. *Supra* notes 256–58 and accompanying text.

under Ohio law.[288] Next, the court picked up where *Cole* had left off: with whether there were federal grounds for refusing to enforce an arbitration agreement with a cost-sharing provision.

On the cost-sharing issue, the Sixth Circuit, like the D.C. Circuit in *Cole*, quoted *Gilmer*'s prescription that an employee must be able to vindicate her statutory rights in an arbitral forum so that the statute could continue to serve its remedial and deterrent functions.[289] The court reasoned from this that cost-sharing provisions in arbitration agreements must not "deter a substantial number of potential litigants from seeking any forum for the vindication of their rights"; permitting this would "fatally undermine the federal anti-discrimination statutes, as it would enable employers to evade the requirements of federal law altogether."[290] The court held that the cost-allocation clause in Circuit City's arbitration agreement was unenforceable because it would deter a significant number of persons from seeking to vindicate their statutory rights.[291]

On the damage-cap issue, the court quoted *Gilmer*'s prescription that parties to arbitration do not waive their substantive rights, but merely agree to a change of forum for vindicating those rights.[292] The court found that Circuit City's arbitration agreement "would require Morrison to forego her substantive rights to the full panoply of remedies under Title VII."[293] The court similarly found that the damage-cap clause would undermine the remedial principles of Title VII by preventing Morrison from being fully compensated for any harms she might have suffered as a result of discrimination.[294] Finally, the court found that the damage-cap clause would undermine the deterrent purposes of Title VII by limiting employees' access to punitive damages.[295] The court observed that because the prospect of monetary damages (and particularly punitive damages) discourages employers from engaging in unlawful discrimination,[296] any limitations on those damages would remove the statutory disincentive for employers to discriminate.[297] Thus,

288. *Id.* For further discussion of this issue, see *infra* notes 311–23 and accompanying text.
289. *Id.* at 658 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991)).
290. *Id.*
291. *Id.* at 669–70.
292. *Id.* at 670 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).
293. *Id.*
294. *Id.* at 672.
295. *Id.*
296. *Id.* (citing Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999)); EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 466 (6th Cir. 1999); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995).
297. *Morrison*, 317 F.3d at 670.

because the court found that Circuit City's arbitration agreement was inconsistent with Title VII, the court refused to enforce the agreement.[298]

IV. ANALYSIS

As discussed in Part III, courts have articulated three different sources of authority for refusing to enforce egregiously lopsided arbitration agreements. The first source of authority, illustrated by the Fourth Circuit's case of *Hooters of America, Inc. v. Phillips*,[299] relies on state breach-of-contract theory. The second source of authority, illustrated by the Ninth Circuit's case of *Circuit City Stores, Inc. v. Adams*,[300] relies on the state contract doctrine of unconscionability. The third source of authority, illustrated by the D.C. Circuit's case of *Cole v. Burns International Security Services*[301] and the Sixth Circuit's case of *Morrison v. Circuit City Stores*,[302] reasons that lopsided agreements are unenforceable because they are inconsistent with the organic statutes that create the underlying statutory rights, such as Title VII.

Although the various courts have relied on different sources of authority, these sources are not necessarily mutually exclusive.[303] A court's source of authority may, for example, simply reflect the differing arguments advanced by counsel in that particular case. Moreover, the different approaches may simply reflect the way that the common law almost always has reacted to a new legal issue: early inconsistency followed by a gradual trend toward uniformity. Nevertheless, there is still a significant degree of inconsistent authority, not only on the issue of what the proper source of authority for refusing to enforce one-sided arbitration agreements should be, but also on the issue of which arbitration agreements go "over the line" and are unenforceable.

A. State: Breach of Contract

As discussed in Part III.A, some courts, such as the Fourth Circuit in *Hooters*, have refused to enforce lopsided arbitration agreements based on state-law breach-of-contract theory. The problem with this theory,

298. *Id.* at 673.
299. 173 F.3d 933, 940 (4th Cir. 1999).
300. 279 F.3d 889, 893 (9th Cir. 2002).
301. 105 F.3d 1465, 1472–79 (D.C. Cir. 1997).
302. 317 F.3d at 673.
303. I am indebted to Professor Dennis R. Nolan for his thoughts on this subject.

however, is that it only works for a narrow category of cases. In *Hooters*, for example, the arbitration agreement itself was silent concerning arbitral procedures; the arbitral rules were contained in a separate document to which Phillips and other employees were not given access until after a dispute had arisen.[304] Under these circumstances, the Fourth Circuit essentially implied into the arbitration agreement a promise by Hooters to create a fair arbitral process; the court found that the lopsided rules drafted by Hooters breached this implied promise.[305]

It is unclear, however, what the court would have done with the case if Hooters had informed Phillips up front of the lopsided rules to which she was putatively agreeing. If the lopsided rules had been attached to and made a part of the arbitration agreement when Phillips signed it, it would have been much more difficult for the court to have implied a promise to create a fair process, because the implied promise would have been negated by the express terms of the agreement.

One option for a court faced with this issue would be to enforce the arbitration agreement as written. Judge Richard Posner, writing in the context of a defamation claim by a securities broker against his firm, has argued that similarly lopsided agreements should be enforced:

> [S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract. For that matter, parties to adjudication have considerable power to vary the normal procedures, and surely can stipulate that punitive damages will not be awarded.[306]

However, given the adhesive nature of most employment (and consumer) arbitration agreements, this approach seems akin to giving employers free license to discriminate. If employers can draft arbitration agreements whose procedures are so lopsided as to make it impossible (or very unlikely) that employees will attempt to enforce their substantive statutory rights, then employees as a practical matter have no substantive rights at all. It is not difficult to imagine, for example,

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304. *Hooters*, 173 F.3d at 936.

305. *Id.* at 940–41.

306. Baravati v. Josephthal, Lyon, & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) (citations omitted). Note, however, that Judge Posner's comments came in a section of the opinion approving an arbitrator's award of punitive damages in a defamation claim. It is not at all clear whether Judge Posner, much less the Seventh Circuit, would have enforced an arbitration agreement that, for example, forbade the arbitrator to award punitive damages on an employment discrimination claim.

employers drafting one-day statutes of limitation, one dollar damage caps, no employee discovery, and the like.

A second option for the court would be to announce that arbitration is *by definition* a fair process. If an arbitration agreement contains lopsided rules, then those rules are inconsistent with the very notion of arbitration itself. However, this does not necessarily solve the problem. Contracts containing terms that are inconsistent on their face are considered by courts to be "ambiguous."[307] When faced with interpreting an ambiguous contract, courts look to the intent of the parties,[308] and give greater deference to specific terms than to general terms.[309] Both of these considerations point toward enforcing the lopsided arbitration rules.

A third option for the court would be to find that the lopsided arbitration rules are inherently unfair and unenforceable. A court cannot, however, simply refuse to enforce a contract because the court does not like the contract's terms—the court needs the peg of a legal doctrine upon which to hang its hat. The contract-law doctrine dealing with unfair terms is unconscionability, which is discussed in the next section.

B. State: Unconscionability

As discussed in Part III.B, some courts, such as the Ninth Circuit in *Adams*, have refused to enforce lopsided arbitration agreements based on the state-contract-law doctrine of unconscionability. As discussed in Part II.F, this approach has textual support in section 2 of the FAA, so long as courts apply the unconscionability doctrine to arbitration agreements in the same way courts apply the doctrine to other contracts.[310] The problem with this approach, however, is that it leads to inconsistent results.

An example is the Sixth Circuit's *Morrison* decision, discussed in Part III.C. The *Morrison* court ultimately held that part of Circuit City's arbitration agreement was unenforceable because it was inconsistent with

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307. *E.g.*, Suffolk Constr. Co. v. Lanco Scaffolding Co., 716 N.E.2d 130, 133 (Mass. App. Ct. 1999); Fraternal Order of Police, Lodge No. 69 v. Fairmont, 468 S.E.2d 712, 716 (W. Va. 1996).

308. *See, e.g.*, INB Banking Co. v. Opportunity Options, Inc., 598 N.E.2d 580, 582 (Ind. Ct. App. 1992).

309. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981) ("[S]pecific terms and exact terms are given greater weight than general language[.]").

310. *See supra* notes 142–49 and accompanying text (describing unconscionability as it relates to arbitration agreements).

the federal antidiscrimination statutes.[311] Before doing so, however, the court considered, but rejected, the argument that the agreement was unconscionable under Ohio law.[312] The Ohio black-letter law of unconscionability, as described in *Morrison*, is almost identical to the California black-letter law of unconscionability as described in *Adams*: contracts are unconscionable if they are both substantively and procedurally unconscionable.[313] Nonetheless, despite the similarity in law between Ohio and California, and despite the fact that the arbitration agreement at issue in *Morrison* was virtually identical to the arbitration agreement in *Adams* (Circuit City was the employer-defendant in both cases), the Sixth Circuit held that under Ohio law, the *Morrison* agreement was not unconscionable.[314]

On the issue of procedural unconscionability, the Sixth Circuit found that the arbitration agreement was not "open to negotiation."[315] Under California law, this by itself would have compelled a finding of procedural unconscionability.[316] Under the *Morrison* court's interpretation of Ohio law, however, the status of the weaker party is a factor in a court's determination of procedural unconscionability.[317] The Sixth Circuit, despite finding unequal bargaining power,[318] held that because Morrison was a "highly educated" graduate of the Air Force Academy with a master's degree in administration, the arbitration agreement could not have been procedurally unconscionable.[319]

Similarly, the Sixth Circuit considered whether Circuit City's unilateral ability to terminate the arbitration agreement upon thirty days' notice, together with its requirement that employees (but not Circuit City) submit their claims to arbitration, made the agreement unenforceable for lack of consideration and mutuality.[320] The court held

311. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 675, 677–78 (6th Cir. 2003).

312. *Id.* at 666–68.

313. *Id.* at 666 (citing Jeffrey Mining Prods. v. Left Fork Mining Co., 758 N.E.2d 1173, 1181 (2001)); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892–93 (9th Cir. 2002).

314. *Morrison*, 317 F.3d at 666–67.

315. *Id.* at 666.

316. *See* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003) ("[B]ecause Circuit City presented the arbitration agreement to Ingle on an adhere-or-reject basis, we conclude that the agreement is procedurally unconscionable."); *Adams*, 279 F.3d at 893 (noting that contracts of adhesion are procedurally unconscionable under California law).

317. *Morrison*, 317 F.3d at 667 (citing Collins v. Click Camera & Video, Inc., 621 N.E.2d 1294, 1300 (Ohio 1993) (finding no procedural unconscionability where Harvard graduate with "'extensive business and contracting experience'" saw the relevant clause but did not read its contents)).

318. *Morrison*, 317 F.3d at 666.

319. *Id.* at 667.

320. *Id.*

that under Ohio law, these provisions did not render the agreement unenforceable, because the 30-day notice requirement was a "detriment" constituting both consideration and mutuality.[321] Under California law, however, either of the unilateral-termination[322] and claims-subject-to-arbitration[323] provisions *alone* would have rendered the arbitration agreement *per se* substantively unconscionable.

Thus, application of the state law unconscionability doctrine yields inconsistent enforcement of arbitration agreements: the arbitration agreement that is unconscionable and unenforceable under California law may be fully enforceable under Ohio law. Such inconsistency has long been anathema to the Supreme Court in the context of labor arbitration; recall from Part II.B that the Court interpreted section 301 of the LMRA as federalizing the law of labor arbitration because the Court feared that inconsistent state court interpretations of collective bargaining agreements would discourage collective bargaining and thereby foment labor unrest.[324] This poses the issue of whether the specter of inconsistent interpretations of arbitration agreements outside the labor context is an equally pressing concern.

The Court's endorsement of arbitration over the past twenty years has certainly been every bit as strong as its historical endorsement of labor arbitration. Indeed, virtually every Supreme Court opinion in the last two decades dealing with arbitration has noted the strong federal policy favoring arbitration as a dispute resolution method.[325] Based on this, one could certainly make the argument that a uniform body of federal law governing the formation of non-labor arbitration agreements would further the federal policy favoring arbitration by encouraging more parties to sign arbitration agreements, just as a uniform body of federal law governing labor arbitration did a half century ago.

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321. *Id.* (citing Harmon v. Philip Morris, Inc., 697 N.E.2d 270 (Ohio 1997); Century 21 Am. Landmark, Inc. v. McIntyre, 427 N.E.2d 534 (Ohio 1980)).

322. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1179 (9th Cir. 2003) ("[W]e conclude that the provision affording Circuit City the unilateral power to terminate or modify the contract is substantively unconscionable.").

323. *Adams*, 279 F.3d at 893 (holding that arbitration agreements in which the employer, but not the employee, is required to arbitrate claims are substantively unconscionable) (citing Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 675, 692 (Cal. 2000)); *Ingle*, 328 F.3d at 1174–75 ("Circuit City's arbitration agreement expressly limits its scope to claims brought by employees, which alone renders it substantively unconscionable.").

324. *See supra* notes 44–53 and accompanying text.

325. *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91 (2000); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

However, there are three reasons why non-labor arbitration law should *not* be completely federalized in the way that labor arbitration law was under section 301. First, there appears to be no need for it—plenty[326] of employers (some would argue far too many) already are adopting arbitration programs without need for the inducement of a federalized arbitration law governing contract formation.[327] Second, uniformity is less critical because, whereas a single collective bargaining agreement can cover a thousand employees working in many different states, employment arbitration agreements are signed by workers individually—i.e., there are a thousand different agreements, even if each agreement contains identical terms. Third, whereas section 301 of the LMRA presented the Supreme Court with a blank slate upon which to fashion its vision of arbitration, the FAA does not. The Court is constrained by the statutory language of section 2 of the FAA, which explicitly preserves a role for state law on the issue of contractual enforceability.[328]

Thus, just as the same employment contract (or sales contract or any non-labor type of contract) might be interpreted differently by courts in different states, so too might non-labor arbitration agreements. Uniformity might be desirable from an efficiency perspective, but that would be equally true for any contract doctrine, and absent a preemptive federal statute, contract law is governed by state law. In federal courts, state law is messy in a post-*Erie* world.[329]

C. *Federal: Effectuating Statutory Rights*

As discussed in Part III.C, some courts, such as the D.C. Circuit in *Cole* and the Sixth Circuit in *Morrison*, have held that the federal

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326. *See, e.g.*, Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER U. L. REV. 1017 (1996).

327. *See, e.g.*, Altenbernt, *supra* note 187, at 221 (noting that arbitration has grown exponentially as an alternative for the adjudication of employment disputes); Jonathan H. Peyton, Note, *What Arbitration Clause?: The "Appropriate" Standard for Measuring Notice of Binding Arbitration to an Employee*, 36 SUFFOLK U. L. REV. 745, 745 (2003); Beth M. Primm, Note, *A Critical Look At The EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMP. L. 151, 151 (1999); Julie L. Waters, Note, *Does the Battle Over Mandatory Arbitration Jeopardize The EEOC's War In Fighting Workplace Discrimination?*, 44 ST. LOUIS U. L.J. 1155, 1156 (2000); *see also* Brief of Amicus Curiae Am. Arbitration Ass'n at 5–6, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (noting that more than 500 companies have alternative dispute resolution programs that culminate in binding arbitration).

328. *See* 9 U.S.C. § 2 (2000) (stating that arbitration clauses are enforceable "save upon such grounds as exist at law or in caring for the revocation of any contract").

329. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938) ("Persistence of state courts in their own opinions on questions of common law prevented uniformity . . . .").

antidiscrimination statutes such as Title VII provide courts with a source of legal authority for refusing to enforce lopsided arbitration agreements. These courts reason that lopsided agreements constitute an invalid waiver of statutorily-conferred substantive rights, and that such agreements are inconsistent with the remedial and deterrent functions of the underlying statutes.

There are two potential drawbacks to this approach. The first is that because the federal approach is an independent rather than preemptive source of authority for refusing to enforce lopsided agreements, it does nothing to ameliorate the lack of uniformity grounded in section 2's preservation of a role for state law on the issue of contract enforceability. It therefore does not provide a justification for requiring enforcement of an arbitration agreement that, for example, the Ninth Circuit says is unenforceable under California law. This problem is constrained, however, by the Supreme Court's interpretation of section 2 that forbids states from applying one set of contract-formation rules to arbitration contracts and another set of contract-formation rules to other contracts.[330] Nonetheless, as the discussion of *Cole* and *Morrison* in Part IV.B illustrates, there is still substantial room for variance among the states.

The second and more significant problem is that it is standardless. While most courts and commentators would agree that an adhesive arbitration agreement that is overwhelmingly lopsided in a dozen different ways undermines the underlying antidiscrimination statute, there is considerable room for disagreement over whether an arbitration agreement that is "just a little unfair" has the same effect and should not be enforced.

For example, in the 2002 case of *Ferguson v. Countrywide Credit Industries, Inc.*,[331] the Ninth Circuit considered an arbitration agreement that limited depositions of employer representatives (but not depositions of plaintiff-employees) to "no more than four designated subjects."[332] The court found that this provision was not, by itself, unconscionable.[333] Nonetheless, the court found that the agreement as a whole was unconscionable because the "entire agreement" created an "insidious

330. *See supra* notes 141–48 and accompanying text.

331. 298 F.3d 778 (9th Cir. 2002).

332. *Id.* at 781.

333. *Id.* at 787 ("[W]e . . . find that [the employer]'s discovery provisions may afford [the plaintiff-employee] adequate discovery to vindicate her claims.").

pattern" that consistently "til[ted] the playing field" in the employer's favor.[334]

Because the *Ferguson* court relied on state-law unconscionability doctrine, it is not surprising that different circuits applying different states' contract-law doctrines have reached different conclusions. However, such variation is also pervasive among courts using the federal approach, because there is no meaningful federal standard for determining when an arbitration agreement is so lopsided that it is inconsistent with the remedial and deterrent functions of the underlying antidiscrimination statutes. There is, for example, considerable variation among the circuits on the enforceability of arbitration agreements that require cost-splitting,[335] that limit certain types of damages,[336] that impose filing fees,[337] that alter statutes of limitation,[338] that limit discovery,[339] that forbid plaintiff-employee class actions,[340] that apply to

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334. *Id.* at 787.

335. *Compare, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 658 (6th Cir. 2003) (cost-splitting provisions are permissible only if they do not "deter a substantial number of potential litigants from seeking any forum for the vindication of their statutory rights"), *with* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (cost-splitting provisions are per se invalid). *See also* Campbell v. Cantor Fitzgerald & Co., 21 F. Supp. 2d 341 (S.D.N.Y. 1998) (refusing to vacate arbitration award in which arbitrators ruled against employee without explanation and assessed employee $45,000 in hearing fees).

336. *E.g.*, Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 267 (3d Cir. 2003) (striking arbitration clause which limited plaintiff's relief to reinstatement and "net pecuniary damages"); Gannon v. Circuit City Stores, Inc., 262 F.3d 677 (8th Cir. 2001) (severing provision that limited punitive damages); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054 (11th Cir. 1998) (striking the arbitration clause and allowing the entire claim to be litigated); Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997) (permitting arbitrator to decide whether to award the relief); Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994) (enforcing arbitration clause that limited punitive damages); *see also* Trumbull v. Century Mktg. Corp., 12 F. Supp. 2d 683, 688 (N.D. Ohio 1998) ("Because the arbitration procedure proposed by the defendant would limit the remedies available to the plaintiff under Title VII, it is not an acceptable replacement for a judicial forum."); DiCrisci v. Lyndon Guar. Bank of N.Y., 807 F. Supp. 947 (W.D.N.Y. 1992) (severing the claim for relief which the arbitrator was not permitted to resolve, requiring the parties to submit the remaining claims to arbitration, and staying the non-arbitrated claim for resolution by the court after arbitration); Armendariz v. Found. Health Psychcare Servs., Inc., 80 Cal. Rptr. 2d 255 (Ct. App. 1998) (severing and discarding unconscionable restrictions on available remedies).

337. *Compare, e.g.*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003) (imposing $75 filing fee rendered arbitration agreement unenforceable), *with* Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752 (5th Cir. 1999) (enforcing arbitral award which, among other things, imposed $3150 in "forum fees" on plaintiff).

338. *Compare, e.g.*, *Ingle*, 328 F.3d at 1175 (arbitration agreement that imposed one-year statute of limitations is unenforceable), *with* Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 230–32 (3d Cir. 1997) (arbitration agreement that imposed one-year statute of limitations is enforceable).

339. *Compare, e.g.*, *Peacock*, 110 F.3d at 230–32 (stating that limitations on discovery did not render arbitration agreement unenforceable), *and* DeGroff v. MascoTech Forming Techs., Inc., 179 F. Supp. 2d 896 (N.D. Ind. 2001) (enforcing arbitration agreement that limited parties to single deposition each), *with* Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778 (9th Cir. 2002)

employee claims but not to employer claims,[341] and that give the employer the unilateral right to modify the arbitration agreement.[342]

Judge Frank Easterbrook has criticized Congress and the courts for using balancing approaches as a legal test because of the resulting indeterminacy: a legal approach telling judges to examine all the facts and balance them avoids formulating a decisional rule.[343] Here, however, there is not even a list of factors for courts to consider; the only "standard" is whether an arbitration agreement is so lopsided that it undermines the underlying federal statute. It should come as no surprise, then, that the courts, groping in the dark, are handing down inconsistent decisions.

Unfortunately, while courts are searching for nonexistent standards to guide their decisions, consumers and employees are being subjected to a laissez-faire labor market for arbitration. Presented with take-it-or-be-fired "offers" and lacking the bargaining power to walk away, consumers and employees are increasingly agreeing to lopsided "agreements" that all but sign away the statutory rights ostensibly conferred on them by the consumer-protection and antidiscrimination statutes. The judiciary's refusal to enforce some of the most egregious agreements only masks the fact that lopsided agreements deter employees and consumers from

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(limitations on discovery, together with other lopsided provisions, rendered arbitration agreement unenforceable).

340. *Compare, e.g.*, Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101 (9th Cir. 2003) (waiver of class actions renders arbitration clause unenforceable), *with* Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002) (waiver of class actions does not render arbitration clause unenforceable). *See also* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

341. *Compare, e.g.*, Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3d Cir. 1999) (finding arbitration agreement enforceable where one party had option of litigating in court but other party was required to arbitrate), *with Mantor*, 335 F.3d at 1108 (even where arbitration clause requires both parties to arbitrate, because the possibility of the employer initiating an action against the employee is "so remote," arbitration clauses are unenforceable unless employer can show the arbitration clause is bilateral), *and* Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997) (refusing to enforce agreement by which employee, but not employer, agreed to arbitrate all future claims).

342. *Compare, e.g.*, Floss v. Ryan's Family Steakhouses, Inc., 211 F.3d 306 (6th Cir. 2000) (ability to choose nature of forum and alter arbitration without notice or consent renders arbitration agreement unenforceable), Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (arbitration agreement that gave employer unilateral right to modify arbitral procedures was unenforceable), *and* Dumais v. Am. Golf Corp., 299 F.3d 1216 (10th Cir. 2002) (arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory), *with* Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002) (arbitration agreement that gave employer unilateral right to modify arbitral procedures upon notice to employee was enforceable).

343. Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

pursuing valid claims. For every case in which a circuit court has invalidated a lopsided arbitration agreement, there probably are dozens if not hundreds of employees and consumers who never filed a claim at all because they correctly perceived that the playing field was irrevocably tilted against them, or that the cost of leveling the playing field (by litigating the enforceability issue) far exceeded the value of the underlying claim.[344] No doubt this is why Circuit City continues to litigate the same[345] basic lopsided arbitration agreement despite *three* Ninth Circuit decisions,[346] as well as the *Morrison* decision from the Sixth Circuit,[347] holding it unenforceable.

This is not to say that arbitration in general is a bad deal for consumers and employees. To the contrary, arbitration provides a dispute resolution forum to consumers and employees locked out of the courtroom by high litigation costs and the difficulty of finding an affordable attorney.[348] Similarly, the reported cases no doubt reflect a disproportionately high percentage of lopsided arbitration agreements; consumers and employees are far less likely to challenge arbitration agreements that offer fundamentally fair procedures. Nonetheless, the large number of lopsided agreements described in the reported decisions, plus the inconsistent response of federal courts to those agreements, indicates the need for federal intervention.

V. PROPOSAL

What is needed is a clear federal standard for the enforceability of arbitration agreements when statutory rights are at issue and one party has been presented with an arbitration agreement without a meaningful opportunity to negotiate its terms. This Article proposes that Congress amend the FAA to create an arbitration "bill of rights" to govern consumer and employment arbitration agreements when statutory rights are at issue and one party has been presented with an arbitration

344. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 662 (6th Cir. 2003) ("Deterrence occurs early in the process. If we do not know who will prevail on the ultimate cost-splitting question until the end, we know who has lost from the beginning: those whom the cost-splitting provision deterred from initiating their claims at all.").

345. *See* Circuit City Stores v. Mantor, 335 F.3d 1101, 1107 (9th Cir. 2003) ("Many of the terms we have already held to be substantively unconscionable in earlier versions of Circuit City's arbitration agreement remain in the 2001 version we review in this case.").

346. *Id.* at 1101; Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002).

347. *Morrison*, 317 F.3d at 646. *But see* Gannon v. Circuit City Stores, Inc., 262 F.3d 677 (8th Cir. 2001) (enforcing arbitration agreement).

348. BALES, *supra* note 21, at 154–57.

agreement without a meaningful opportunity to negotiate its terms. Targeting employment and consumer arbitration together is appropriate because both present similar rationales for intervention: they involve adhesive take-it-or-leave-it contracts, drafted by a party with vastly superior bargaining power, that frequently involve statutory issues.

The proposed amendment should be a limited one. Arbitration between commercial entities, where bargaining power is more evenly distributed and meaningful negotiation over contract terms is the norm rather than the exception, does not present the same need for regulation. To paraphrase Richard Posner's colorful description, if parties to a commercial transaction decide they want to resolve their disputes by submitting them "to a panel of three monkeys,"[349] the law should allow them to do so. The law should not, however, allow an employer to condition continued employment on its employees' willingness to do the same. The amendment should protect employees and consumers from lopsided arbitration agreements, while at the same time preserving the freedom of commercial entities to structure their commercial dispute resolution mechanisms as they see fit.

Moreover, the proposed amendment should not displace the role of state law in governing contract-formation issues under section 2 of the FAA. States still should be permitted to set a contract-formation threshold for arbitration agreements so long as that threshold is consistent with the state's threshold for other types of contracts. A uniform federal standard for enforceability, however, would significantly reduce the need to turn to state law contract doctrines. For example, if the federal standard makes it clear that companies cannot retain the unilateral and unfettered authority to appoint arbitrators to their own consumer and employment cases, there is no need to consider whether such a provision is unconscionable under a given state's law.

The issue remains of what the arbitration "bill of rights" should look like. A good starting place would be the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship.[350] The Protocol was drafted in 1995 by a task force composed of representatives from the American Bar Association, the Society of Professionals in Dispute Resolution, the National Academy of Arbitrators, the Federal Mediation and Conciliation Service,

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349. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

350. Arnold M. Zack, *The Evolution of the Employment Protocol*, 50 J. DISP. RESOL. 36, 36 (1995).

the National Employment Lawyers' Association, the American Civil Liberties Union, and other groups who met to devise minimum standards of fairness for the arbitration of employment disputes.[351] For example, participants agreed that employment arbitrators ought to be qualified to decide statutory disputes, that employees should have a right to counsel in arbitration proceedings, that discovery should be available but expedited, and that arbitrators should be empowered to award the full panoply of damages permitted by law.[352] The Consumer Due Process Protocol,[353] drafted a few years after the Employment Protocol, similarly provides a good starting point.

The final "bill of rights," however, should be far more extensive and specific[354] than the Employment and Consumer Protocols. Congress, in addition to looking to the Protocols for guidance, also should look to the myriad circuit splits on the enforceability of certain arbitration clauses.[355] I believe, for example, that the "bill of rights" should strictly limit cost-splitting, should reject filing fees payable from consumers and employees to companies and employers, should reject alterations to statutory statutes of limitation, should permit class actions in arbitration on the same basis as class actions currently are permitted in court, should limit the ability of the company or employer to unilaterally modify the arbitration agreement and the underlying arbitral procedures, and should guarantee the selection of neutral arbitrators. Notwithstanding my opinion on how each of these issues should be resolved, the statute should instead reflect the give-and-take of input from various constituencies as part of the political process.

VI. CONCLUSION

The Supreme Court's contractualist approach to the Federal Arbitration Act has led to a laissez-faire arbitration market that threatens to undermine the viability of public-oriented statutes such as the federal antidiscrimination statutes and consumer protection laws. Many courts

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351. *Id.*

352. *Id.*

353. National Consumer Disputes Advisory Committee, *Consumer Due Process Protocol* (Apr. 17, 1998), *available at* http://www.adr.org.

354. For example, the Employment Protocol expressly leaves unresolved the issue of whether employers should be permitted to condition employment on employees' assent to predispute employment arbitration agreements. A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP, § A (May 9, 1995), *available at* http://www.adr.org.

355. *See supra* Part IV.

have reacted by refusing to enforce egregiously lopsided arbitration agreements, but courts have not agreed on a single source of authority, much less a consistent standard, for doing so. The resulting legal indeterminacy has led to circuit splits on issues such as the enforceability of arbitration agreements that contain fee-splitting clauses, that impose filing fees, that impose restrictions on discovery, that prohibit class actions, that alter statutes of limitation, that limit punitive and other damages, and more. As courts unsuccessfully grope toward a coherent standard, employees and consumers are deterred from pursuing legitimate claims by the prospect of doing so on a playing field that often gives companies every possible advantage.

This Article proposes that Congress resolve this problem by amending the FAA to create an arbitration "bill of rights." This amendment would be limited to employment and consumer arbitration, and would not affect the ability of commercial entities to structure commercial arbitration as they see fit. Congress should draft minimum standards governing the enforceability of statutory employment and consumer arbitration agreements to ensure that the antidiscrimination and consumer protection promises extant in existing federal legislation do not ring hollow.