

# THE HIGH COST OF MANDATORY ARBITRATION

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## INTRODUCTION

Traditionally, the Supreme Court has been wary of permitting the resolution of civil rights disputes through arbitration, finding arbitrators to be a poor substitute for the judicial system when interpreting civil rights statutes and complex case law.<sup>1</sup> In the last twenty years, however, the Supreme Court has generally permitted arbitration as a fast and effective way to resolve workplace disputes, even if the outcomes of those disputes affect Americans' civil rights.<sup>2</sup> This change in the high court's attitude towards arbitration came in 1991 in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>3</sup> wherein an employee of the securities industry brought suit for age discrimination, in contravention of a mandatory arbitration agreement.<sup>4</sup> In a 7–2 ruling, the Supreme Court held that an agreement to arbitrate a workplace dispute could require the employee to arbitrate statutory protections provided under the Age Discrimination in Employment Act (ADEA).<sup>5</sup> The Court reasoned that arbitration agreements were merely forum selection clauses, and that mandatory arbitration of civil rights disputes would have no adverse effects on workers' rights.<sup>6</sup>

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<sup>1</sup> See *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 743 (1981) (holding that petitioners' wage claims under the FLSA were not barred by the prior submission of their grievances to the contractual dispute resolution procedures).

<sup>2</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>3</sup> *Id.*

<sup>4</sup> See *id.*

<sup>5</sup> See Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?*, 44 WAYNE L. REV. 1619, 1619 (1999) (citing *Gilmer*, 500 U.S. at 20).

<sup>6</sup> See Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 821 (2009) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

This Note traces the development of voluntary and mandatory arbitration in the United States, including the reasons for the rise in arbitration and the implications for Americans' civil rights. In voluntary arbitration, an employee agrees to arbitrate a workplace dispute instead of litigating a claim.<sup>7</sup> Mandatory arbitration, in contrast, "requires an employee, as a condition of employment, to forego all access to a jury trial and use arbitration in place of a judicial forum for resolving statutory and contractual claims."<sup>8</sup> The use of mandatory arbitration, particularly in employment disputes arising under Title VII, has increased dramatically since 1991 as a result of the enhanced remedies provided under the Civil Rights Act of 1991.<sup>9</sup> In addition to explaining why arbitration has become more common, this Note includes an overview of Supreme Court case law and federal statutes related to mandatory arbitration. This Note then provides arguments in favor of and against mandatory arbitration, ultimately averring that the problems associated with mandatory arbitration far outweigh its perceived benefits. For instance, supporters of mandatory arbitration claim this is a fast and cost-effective way to settle workplace disputes.<sup>10</sup> In response, opponents contend that arbitration erodes employees' rights while sacrificing justice in the name of efficiency.<sup>11</sup> Arguing that compulsory arbitration threatens to harm employees' basic civil rights protections, this Note ultimately posits that the need for arbitral reform is clear. Finally, this Note suggests that allowing the courts to assist in discovery, or permitting them to overturn an arbitral award if there is a serious irregularity, can permit the continued use of arbitration, while still preserving Title VII protections. These changes must be implemented immediately if our statutory and civil rights are to remain intact.

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<sup>7</sup> See Adams, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> See Robert J. Landry, III & Benjamin Hardy, *Mandatory Pre-Employment Arbitration Agreements: The Scattering, Smothering and Covering of Employee Rights*, 19 U. FLA. J.L. & PUB. POL'Y 479, 481 (2008). The 1991 version of the law:

raises the stakes for intentional employment discrimination. Under the Civil Rights Act of 1964, the remedies generally available were limited to injunctions, back pay with a maximum of two years, and reasonable attorney fees. The Civil Rights Act of 1991 adds compensatory and punitive damages and expert witness fees to this list. It also provides for jury trials.

Janelle Kurtz, Wayne Wells & Elaine Davis, *The Civil Rights Act of 1991: What Every Small Business Needs to Know*, 31 J. SMALL BUS. MGMT. 103 (1993).

<sup>10</sup> See generally Edna Sussman, *Why Arbitrate? The Benefits and Savings*, 81 N.Y. ST. B.A. J. 21 (2009).

<sup>11</sup> See Landry & Hardy, *supra* note 9.

## I. BACKGROUND

Before delving into the political and social ramifications of arbitration, it is important to establish what comprises a mandatory arbitration agreement. A mandatory arbitration agreement, also referred to as a compulsory or forced arbitration agreement, refers to a “binding agreement between an employer and an employee to arbitrate future employment disputes,”<sup>12</sup> usually consisting of parties trading statutory protections in exchange for monetary benefits.<sup>13</sup> Often, this trade-off consists of employees waiving their rights to a jury trial. Such agreements can be included in employment contracts, employee handbooks, or can act as standalone agreements.<sup>14</sup> Generally, mandatory arbitration agreements are entered into before a dispute arises, and before an employee even begins work.<sup>15</sup> Sometimes these agreements are inserted into employment applications,<sup>16</sup> and are usually offered on a “take it or leave it basis,” meaning that the employee often has little or no bargaining power concerning the terms of the agreement.<sup>17</sup> Post-dispute arbitration agreements, which parties enter *after* a workplace dispute occurs, will not be discussed in this Note, as they do not involve the same problems as pre-dispute agreements.<sup>18</sup>

The Seventh Amendment right to a trial by jury has historically been one of the fundamental elements of our judicial system.<sup>19</sup> Ratified in 1791, the Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved

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<sup>12</sup> Marcela Noemi Siderman, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Provisions*, 47 UCLA L. REV. 1885, 1891 (2000) (citing Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 594 (1995)).

<sup>13</sup> See *id.* (citing Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1334, 1350 (1997)).

<sup>14</sup> See *id.* (citing *Developments in the Law—Employment Discrimination—Mandatory Arbitration of Statutory Employment Disputes*, 109 HARV. L. REV. 1670, 1671 (1996)).

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* (citing EEOC Notice Number 915.002, July 10, 1997, available in U.S. Equal Employment Opportunity Comm’n, (last visited July 13, 2000), <http://www.eeoc.gov/docs/mandarb.txt>).

<sup>17</sup> See Landry & Hardy, *supra* note 9, at 482. See generally Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004) (discussing the facts of jury trial waivers and the implications for arbitration).

<sup>18</sup> See Siderman, *supra* note 12.

<sup>19</sup> See Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 671 (2001).

....”<sup>20</sup> The jury trial is valued for its protection of the common man and its check on the power of judges.<sup>21</sup> Mandatory arbitration exists as a dispute resolution option because the jury-trial right is alienable, meaning that a party may choose to give up the right to have his case heard by a jury of his peers.<sup>22</sup> One way to relinquish this right is by entering into an arbitration contract that requires an arbitrator, rather than a court, to resolve a dispute.<sup>23</sup> Notably, the standards of consent in arbitration are often considerably lower than the standards implicated in judicial proceedings that concern jury-waiver clauses.<sup>24</sup> For example:

While jury trial rights under the Seventh Amendment are admittedly subject to waiver, waiver is tightly constrained by the following principles: (1) jury trial waivers may not be lightly implied; (2) courts look at a whole host of factors to determine whether the waiver was voluntary, knowing, and intentional; (3) many courts provide that the party seeking waiver bears the burden of proof; (4) courts’ holdings render suspect the use of unsigned or uninitialed documents to support the finding of a jury trial waiver; (5) in interpreting purported jury trial waivers, courts have stated that they must be narrowly construed. These waiver principles apply in cases between two private parties, and, thus “no state action” must be proven to show a violation of jury trial rights.<sup>25</sup>

In complete contrast to litigants’ Seventh Amendment protections, arbitration clauses are often upheld, and the party opposing arbitration has the burden of proof.<sup>26</sup> Further, signing an arbitration agreement means consenting to all of its terms,<sup>27</sup> failing to read or understand the terms is insufficient to make those terms unenforceable.<sup>28</sup> The differences between the waiver standards utilized in arbitration versus litigation are particularly distressing because these lax arbitration criteria are applied to civil rights disputes, even though the highest level of consent should be used when civil rights protections are at stake. Even so, the courts have typically upheld mandatory arbitration agreements.<sup>29</sup>

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<sup>20</sup> U.S. CONST. amend. VII.

<sup>21</sup> See Sternlight, *supra* note 19.

<sup>22</sup> See Ware, *supra* note 17, at 169.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at 170.

<sup>25</sup> Sternlight, *supra* note 19, at 673.

<sup>26</sup> See *id.* at 673.

<sup>27</sup> See Ware, *supra* note 17, at 171.

<sup>28</sup> See *id.*

<sup>29</sup> See Landry & Hardy, *supra* note 9.

Despite the obvious drawbacks to subjecting our civil rights to the arbitration standards of consent, the courts have become increasingly receptive toward allowing civil rights disputes to be decided by arbitration.<sup>30</sup>

In the 1990s there was a massive, now well-documented, increase in arbitration. From 1995 to 1997, the General Accounting Office found that the percentage of employers using arbitration for employment disputes increased from 10 percent to 19 percent. From 1997 to 2001, the number of employment cases filed with the American Arbitration Association (AAA) increased 60 percent, from 1,347 to 2,159.<sup>31</sup>

This dramatic increase in the use of mandatory arbitration can be attributed to the enhanced remedies, such as punitive damages, provided under the Civil Rights Act of 1991.<sup>32</sup> The growth of mandatory arbitration can also be ascribed to companies' fear of massive jury awards and protracted litigation, as "[e]mployers flocked to arbitrators to further distance themselves from juries, despite the fact that rather little was known about the relative performance of arbitrators."<sup>33</sup> For many companies, compulsory arbitration provides a less risky, and usually less expensive, alternative to resorting to a judicial proceeding. Despite the supposed cost reductions, however, serious doubts remain about the application of mandatory arbitration to civil rights cases.

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<sup>30</sup> See Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitration Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 *LAW & CONTEMP. PROBS.* 55, 56 (2004) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132 (2001)).

<sup>31</sup> Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 *DISP. RESOL. J.* 44, 44 (2004).

<sup>32</sup> See Landry & Hardy, *supra* note 9. Under the Civil Rights Act of 1964, the remedies generally available were limited to injunctions, back pay with a maximum of two years, and reasonable attorney fees. The Civil Rights Act of 1991, however, adds additional remedies, such as compensatory and punitive damages and expert witness fees to this list. The Act also provides for jury trials. See Kurtz, Wells & Davis, *supra* note 9.

<sup>33</sup> Eisenberg & Hill, *supra* note 31, at 44; see also The National Workrights Institute, *Private Justice: Employment Arbitration and Civil Rights*, [http://www.workrights.org/issue\\_dispute/adr\\_columbia\\_article.html#top](http://www.workrights.org/issue_dispute/adr_columbia_article.html#top) (last visited Sept. 18, 2009).

## A. Statutes Related To Mandatory Arbitration

### 1. Civil Rights Act of 1991

The Civil Rights Act of 1991 deals specifically with employment law and employee rights.<sup>34</sup> The purpose of the 1991 Act is to strengthen and improve federal civil rights laws and to award victims punitive damages if intentional employment discrimination is found.<sup>35</sup> Another goal of the Act was to respond to then-recent Supreme Court decisions.<sup>36</sup> Congress took action by enlarging the protections of relevant civil rights statutes and affording adequate remedies to discrimination victims.<sup>37</sup>

In terms of the Act's connection to mandatory arbitration, supporters argue that the Act implicitly permits the arbitration of civil rights disputes, even though the stated purpose of the statute is to afford additional compensation to discrimination victims. Regardless, arbitration proponents point to Section 118 of the Act, which provides: "[w]here appropriate, and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title . . .".<sup>38</sup> Even though at first blush this argument seems to carry the day, mandatory arbitration critics urge its proponents to look at the legislative history of the Act, which evinces the intent not to authorize compulsory arbitration.<sup>39</sup> As critic Mark L. Adams writes, "Section 118's legislative history unambiguously demonstrates that

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<sup>34</sup> See Equal Employment Opportunity Commission, *The Civil Rights Act of 1991*, <http://www.eeoc.gov/policy/cra91.html> (last visited Oct. 25, 2009) [hereinafter EEOC, The Civil Rights Act].

<sup>35</sup> See EEOC, The Civil Rights Act, *supra* note 34.

<sup>36</sup> These cases include Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that an employee may not sue for damages related to sexual harassment that occurred on the job); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (requiring an employee to identify a specific and facially neutral policy or requirement that led the employer's personnel practices to have a discriminatory and disparate effect in order for employee to sustain a claim for discrimination); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that even after an employee proved that an unlawful consideration played a role in the employer's decision, an employer may still have a complete defense to a discrimination suit if the employer could show that his decision would have been the same, absent the unlawful consideration); Martin v. Wilks, 490 U.S. 755 (1989) (allowing white firefighters in Alabama who had not been party to litigation that created a consent decree related to the hiring of African-American firefighters to challenge that decree in court).

<sup>37</sup> See EEOC, The Civil Rights Act, *supra* note 34.

<sup>38</sup> See Adams, *supra* note 5, at 1630-31 (1999) (citing Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071, 1073 (1991)).

<sup>39</sup> See *id.* at 1647.

Congress' goal was to . . . .”<sup>40</sup> adopt the *Alexander v. Gardner-Denver* precedent,<sup>41</sup> not the standard laid out in *Gilmer v. Interstate/Johnson Lane Co.*,<sup>42</sup> thereby prohibiting the enforcement of a compulsory arbitration clause governing Title VII claims.<sup>43</sup> Even more strikingly, it is clear that Congress did not intend to codify the *Gilmer* holding,<sup>44</sup> as the legislature “specifically rejected a proposition that would have permitted the enforcement of compulsory arbitration agreements.”<sup>45</sup> Further buttressing critics’ anti-mandatory arbitration stance are floor statements by members of Congress, wherein they explain that Section 118 encourages “arbitration only ‘where the parties knowingly and voluntarily elect to use these methods.’”<sup>46</sup> In light of the Act’s goals and legislative history, it is clear that Congress did not intend to make compulsory arbitration agreements enforceable,<sup>47</sup> and that the Civil Rights Act of 1991 stands squarely in favor of civil rights protection and allowing the courts to review mandatory arbitration agreements.

## 2. Federal Arbitration Act of 1947

Congress first enacted the Federal Arbitration Act (FAA) in 1925, but then “re-enacted and codified it as Title IX of the United States Code in 1947.”<sup>48</sup> The goal of the 1947 law “was to reverse the longstanding judicial hostility to [sic] arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts.”<sup>49</sup> Relevant to the discussion of mandatory arbitration is Section 2 of the FAA, which “provides that arbitration agreements ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for

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<sup>40</sup> *Id.*

<sup>41</sup> *Alexander v. Gardner-Denver*, 415 U.S. 36, 38 (1974) (stating that an employee’s statutory right to trial *de novo* under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement).

<sup>42</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991) (holding that an employee’s claim under the ADEA may be resolved through mandatory arbitration).

<sup>43</sup> See *Adams*, *supra* note 5, at 1647–48.

<sup>44</sup> See *id.* at 1651 (citing *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1198 (9th Cir. 1998)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1649 (quoting 137 CONG. REC. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole)).

<sup>47</sup> See *id.* at 1651 (citing *Duffield*, 144 F.3d at 1198).

<sup>48</sup> *Id.* at 1634.

<sup>49</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

the revocation of any contract.’’<sup>50</sup> In contrast, however, Section 1 of the Act provides a notable exception to Section 2, stating: ‘‘nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.’’<sup>51</sup> Parties bound by mandatory arbitration frequently argue that they are exempt because Section 1 of the FAA does not cover any employment contracts facilitating or affecting commerce.<sup>52</sup> This argument, however, has not prevailed since ‘‘the federal courts of appeals have consistently found that Section 1 of the FAA exempts *only* the employment contracts of workers engaged in the movement of goods *across interstate commerce*.’’<sup>53</sup> Courts base this tenuous interpretation of Section 1 ‘‘on two well-established canons of statutory construction.’’<sup>54</sup> The first canon states that courts ‘‘should avoid a reading [of statutory language] which rends some words altogether redundant.’’<sup>55</sup> With that notion in mind, Mark L. Adams writes ‘‘extending the end clause of Section 1 . . . to all workers whose employment has any impact on commerce would render the specific exclusion of seamen and railroad workers unnecessary,’’<sup>56</sup> thereby violating the first canon of construction. The second canon of construction, *ejusdem*

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<sup>50</sup> Adams, *supra* note 5, at 1634 (quoting 9 U.S.C. § 2 (1994)). Section 2 states:

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

*Id.*

<sup>51</sup> 9 U.S.C. § 1 (1994) (‘‘Maritime transactions, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; commerce, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.’’).

<sup>52</sup> See Adams, *supra* note 5, at 1634 (emphasis added).

<sup>53</sup> *Id.* at 1634–35 (emphasis added).

<sup>54</sup> *Id.* at 1635 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

*generis*,<sup>57</sup> “limits general terms which follow specific ones to matters similar to those specified.”<sup>58</sup> Thus, under this rule, Section 1 only exempts “‘those other classes of workers who are *actually engaged* in the movement of interstate or foreign commerce, or work so closely related thereto as to be in practical effect part of it.’”<sup>59</sup> Because of courts’ adherence to these canons of construction, workers have argued unsuccessfully that they are exempt under Section 1 of the FAA.

### 3. Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 (ADEA) protects employees and job applicants who are forty years old or older from employment discrimination.<sup>60</sup> Specifically, the ADEA makes it illegal for an employer to discriminate against a person because of age “with respect to any term, condition, or privilege of employment, such as hiring, firing, promotion, layoff, compensation, benefits, jobs, assignments, and training.”<sup>61</sup> The ADEA applies to employers with twenty or more employees, including state and local governments.<sup>62</sup> The Act also pertains to the federal government.<sup>63</sup> Notably, the law permits employers to favor older workers, even when doing so adversely affects a younger worker.<sup>64</sup> Additionally, the Act makes it illegal to retaliate against an employee for opposing employment practices that discriminate based on age.<sup>65</sup> It is also unlawful for an employer to retaliate against a worker for filing an age discrimination complaint, testifying, or par-

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<sup>57</sup> [Latin “of the same kind or class”]. BLACK’S LAW DICTIONARY 236 (3d pocket ed. 2006) (emphasis added). *Eiusdem generis* is defined as:

A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animal*, the general language *or any other farm animal*—despite its seeming breadth—would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.

*Id.* (emphasis added).

<sup>58</sup> Gooch v. United States, 297 U.S. 124, 128 (1936).

<sup>59</sup> Adams, *supra* note 5, at 1636 (quoting Asplundh Tree Expert Co. v. E Bates, 71 F.3d 592, 598 (quoting Tenney Eng’g Inc. v. United Elec. Radio & Mach. Workers of Am., Local 437, 207 F.2d 450, 452 (3d Cir. 1953)) (emphasis added).

<sup>60</sup> See U.S. Equal Employment Opportunity Comm’n, *Facts About Age Discrimination*, <http://www.eeoc.gov/facts/age.html> (last visited Jan. 12, 2010) [hereinafter EEOC, Age Discrimination].

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

ticipating in an investigation, proceeding, or litigation under the ADEA.<sup>66</sup>

The ADEA also permits an individual to waive his right to pursue an age discrimination claim in court.<sup>67</sup> For example, “[a]n employer may ask an employee to waive his/her rights or claims under the ADEA either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program.”<sup>68</sup> The amended version of the ADEA, however, lists specific minimum standards that must be met in order for a waiver to be knowing and voluntary, and thus, valid and enforceable.<sup>69</sup> For a waiver to be valid pursuant to the ADEA, the following requirements must be met: the waiver provision must be in writing and be understandable; the waiver must also refer specifically to ADEA rights or claims; the waiver may not relinquish rights or claims that may arise in the future; the waiver has to be in exchange for valuable consideration; the individual has to be advised in writing to consult an attorney before signing the waiver; finally, the waiver has to allow the individual at least twenty-one days to consider the agreement, and at least seven days to revoke the agreement after signing it.<sup>70</sup> Whether these requisite conditions for a valid waiver have been satisfied is often an issue in ADEA claims.

#### 4. Americans with Disabilities Act of 1990

Title I of the Americans with Disabilities Act of 1990 (ADA) makes it illegal for private employers, state and local governments, employment agencies and labor unions to discriminate against qualified, disabled individuals in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.<sup>71</sup> The ADA pertains to employers with fifteen or more employees, including state and local governments. Under the ADA, employers are required to make reasonable accommodations for the known disability of a qualified applicant or employee.<sup>72</sup> Reasonable accommodations

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<sup>66</sup> See EEOC Age Discrimination, *supra* note 60.

<sup>67</sup> See *id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See U.S. Equal Employment Opportunity Comm'n, *Facts About the Americans with Disabilities Act*, <http://www.eeoc.gov/facts/fs-ada.html> (last visited Jan. 13, 2010) [hereinafter EEOC, ADA].

<sup>72</sup> See *id.*

are defined under the Act as “adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities.”<sup>73</sup> An employer, however, does not have to provide a reasonable accommodation if it imposes an undue hardship, which includes a significant difficulty or expense “when considered in light of factors such as an employer’s size, financial resources, and the nature and structure of its operation.”<sup>74</sup> Additionally, the law does not require an employer to lower quality or production standards as part of an accommodation, nor does the Act require an employer to provide personal use items such as glasses or hearing aids.<sup>75</sup> Finally, the ADA makes it “unlawful to retaliate against an individual for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADA.”<sup>76</sup> These are important protections aimed at providing disabled Americans with equal access to employment opportunities.

## B. Case Law

### 1. *Alexander v. Gardner-Denver Co.*

Several Supreme Court cases have applied the Federal Arbitration Act (FAA) to mandatory pre-employment arbitration agreements,<sup>77</sup> which will be the focus of the case law below. In *Alexander v. Gardner-Denver Co.*,<sup>78</sup> the high court was asked to decide whether employees may give up their Title VII rights as part of a collective bargaining agreement.<sup>79</sup> In a blow to supporters of mandatory arbitration agreements, the Supreme Court “refused to ignore an employee’s right to a trial of a Title VII claim even though the employee’s claim was submitted to arbitration under a collective bargaining agreement.”<sup>80</sup> The Court based its ruling on the idea that allowing such important rights to be waived would severely impede the powers of the federal courts to enforce civil

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See id.*

<sup>76</sup> *Id.*

<sup>77</sup> See Landry & Hardy, *supra* note 9, at 486.

<sup>78</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 36 (1974).

<sup>79</sup> See Landry & Hardy, *supra* note 9, at 486 (citing *Gardner-Denver Co.*, 415 U.S. at 38).

<sup>80</sup> *Id.* (citing Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Considered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 496 (2001)).

rights laws.<sup>81</sup> Even though the *Gardner-Denver* claim involved a collective bargaining agreement with a mandatory arbitration provision, rather than a mandatory arbitration agreement entered into by an individual employee, the case still represents the idea that “individual employment contracts with prospective waivers of Title VII rights should not eliminate an employee’s right to seek redress in federal courts.”<sup>82</sup> Although the Supreme Court would later overrule *Gardner-Denver*, the case remains an important symbol of the Court’s previous reluctance to allow civil rights disputes to be resolved through mandatory arbitration.

## 2. *Barrentine v. Arkansas-Best Freight Systems, Inc.*

Continuing the trend against the enforceability of arbitration agreements in connection with Title VII claims, the Court in *Barrentine v. Arkansas-Best Freight Systems, Inc.*<sup>83</sup> took *Gardner-Denver* one step further, ruling that the Fair Labor Standards Act (FLSA)<sup>84</sup> could not “be abridged by contract or otherwise waived . . .”<sup>85</sup> In *Barrentine*, the respondent claimed that the submission of an employee’s claim to arbitration waived the employee’s rights to bring a separate, judicial proceeding for the payment of wages under the FLSA.<sup>86</sup> In rejecting that argument, and striking a chord in favor of employee rights, the Court noted, “we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.”<sup>87</sup> The Court further reasoned that “many arbitrators may not be conversant with the public law considerations underlying the FLSA,”<sup>88</sup> and that allowing arbitrators to decide the fate of Title VII protections could leave them fatally weakened. This part of the Court’s reasoning highlights one of the many drawbacks to arbitrating Title

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<sup>81</sup> See Landry & Hardy, *supra* note 9, at 486 (citing *Gardner-Denver Co.*, 415 U.S. at 56).

<sup>82</sup> *Id.*

<sup>83</sup> 450 U.S. 728, 728 (1981).

<sup>84</sup> U.S. Department of Labor, *Compliance Assistance–Fair Labor Standards Act (FLSA)*, <http://www.dol.gov/whd/Flsa/index.htm> (last visited Jan. 12, 2010) (“The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. Covered nonexempt workers are entitled to a minimum wage of not less than \$7.25 per hour effective July 24, 2009. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.”).

<sup>85</sup> *Barrentine*, 450 U.S. at 740.

<sup>86</sup> See Sabbath & Vladeck, *supra* note 6, at 811.

<sup>87</sup> *Barrentine*, 450 U.S. at 740.

<sup>88</sup> *Id.* at 743.

VII claims: because FLSA claims typically involve complex case law as well as questions of law and fact, the *Barrentine* majority recognized that arbitrators may lack the skills needed to understand intricate legal issues, thus making these individuals a poor substitute for the courts.<sup>89</sup>

### 3. *McDonald v. City of West Branch*

Further rounding out the Supreme Court case law barring the use of arbitration agreements to settle civil rights claims, the Court in *McDonald v. City of West Branch*<sup>90</sup> held that the “submission of a civil rights claim to an arbitrator under a collective bargaining agreement did not waive a municipal employee’s right to bring a claim under Section 1983,”<sup>91</sup> which deals with a civil action for deprivation of rights.<sup>92</sup> Similar to *Gardner-Denver* and *Barrentine*, the *McDonald* case also involved an employee who wanted to bring a statutory claim following an arbitrator’s rejection of his contract suit.<sup>93</sup> The Supreme Court, summarizing its past rulings in *Gardner-Denver* and *Barrentine*, stated that its rejection of arbitration agreements was grounded in Congress’s intention to give the statutory protections teeth. That goal would be severely undermined if the Court did not permit the judicial enforcement of those statutes.<sup>94</sup> This particular stance “applied with special force to Section 1983 actions because the statute’s ‘very purpose’ was ‘to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law.’”<sup>95</sup> Taken together, this

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<sup>89</sup> See *Sabbeth & Vladeck*, *supra* note 6, at 811 (quoting *Barrentine*, 450 U.S. at 743).

<sup>90</sup> 466 U.S. 284 (1984).

<sup>91</sup> *Sabbeth & Vladeck*, *supra* note 6, at 812 (quoting *McDonald*, 466 U.S. at 292).

<sup>92</sup> See 42 U.S.C. § 1983 (2008):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.*

<sup>93</sup> See *Sabbeth & Vladeck*, *supra* note 6, at 812.

<sup>94</sup> See *id.*

<sup>95</sup> *Id.* (quoting *McDonald*, 466 U.S. at 290).

trifecta of cases demonstrates the Supreme Court's past hostility to the idea that arbitration is a suitable replacement for the litigation of civil rights claims.<sup>96</sup>

#### 4. *Gilmer v. Interstate/Johnson Lane Co.*

Unfortunately, changes in Supreme Court membership, which included the appointments of Justices Sandra Day O'Connor, Antonin Scalia and Anthony Kennedy,<sup>97</sup> led to a major shift in how the Court adjudicated appeals involving mandatory arbitration agreements. The end of the non-waivability era effectively came to a close in 1991 with the case of *Gilmer v. Interstate/Johnson Lane Corp.*<sup>98</sup> At issue in *Gilmer* was a security industry registration form that included an arbitration agreement.<sup>99</sup> After signing the agreement, Gilmer was fired, and he brought a claim based on the ADEA.<sup>100</sup> The employer was able to convince the Court that the arbitration agreement should be enforced, and for the first time, the Court held that a plaintiff's ADEA claim could be subject to a mandatory arbitration agreement.<sup>101</sup> In distinguishing *Gardner-Denver, Barrentine* and *City of West Branch*, the Supreme Court noted that these cases were "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method [arbitration] of resolving disputes."<sup>102</sup> Arbitration agreements, the Court noted, were nothing more than forum selection clauses, with no adverse impact on claimants' rights.<sup>103</sup> Even though the arbitration agreement at issue in *Gilmer* was a security industries form and not part of an employment contract, many lower federal courts have relied on *Gilmer* to enforce mandatory arbitration provisions in employment contracts.<sup>104</sup>

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<sup>96</sup> See *id.*

<sup>97</sup> See U.S. Supreme Court, *Members*, <http://www.supremecourtus.gov/about/members.pdf> (last visited Jan. 31, 2010).

<sup>98</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991).

<sup>99</sup> See *Landry & Hardy, supra* note 9, at 487 (citing *Gilmer*, 500 U.S. at 23).

<sup>100</sup> See *id.*

<sup>101</sup> See *id.* (citing *Gilmer*, 500 U.S. at 24).

<sup>102</sup> *Gilmer*, 500 U.S. at 30.

<sup>103</sup> See *Sabbeth & Vladeck, supra* note 6, at 821 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 614 (1985)).

<sup>104</sup> See *Landry & Hardy, supra* note 9, at 487 (quoting Rebecca K. Beerling, Comment, *Left Out of the Balance—The Public's Need for Protection Against Workplace Discrimination: Waffle House and Kidder Peabody Attempt to Limit the Remedies Available to the EEOC by Balancing Policies Not in Conflict*, 25 HAMLINE L. REV. 295, 311 (2002)).

### 5. *Circuit City Stores, Inc. v. Adams*

*Gilmer* left unresolved the issue of whether the FAA applies to employment contracts.<sup>105</sup> Recognizing the significant benefits of enforcing arbitration provisions in employment contracts, the Supreme Court in *Circuit City Stores, Inc. v. Adams*<sup>106</sup> ruled that the FAA applied to all employment contracts, unless the contract was explicitly exempt under the FAA.<sup>107</sup> The dissent, however, found “many faults with the majority’s reading of the Act,”<sup>108</sup> but concentrated mostly on the majority’s refusal to recognize fully the Act’s legislative history, which showed that Congress did not intend Section 2 of the FAA to apply to employment contracts.<sup>109</sup> In fact, as the dissent noted,

The history of the Act shows that ‘the potential disparity in bargaining power between individual employees and large employers was the source of organized labor’s opposition to the Act, which it feared would require courts to enforce unfair employment contracts. That same concern . . . underlay Congress’ exemption of contracts of employment from mandatory arbitration.’<sup>110</sup>

Following *Circuit City*, it has become common for courts to enforce boilerplate, mandatory arbitration provisions, even where there is a clear disparity in bargaining power that prevented employees from rejecting mandatory arbitration.<sup>111</sup>

### 6. *Equal Employment Opportunity Commission v. Waffle House*

Despite some setbacks for employee rights, a glimmer of hope emerged in 2002 when the Supreme Court ruled that the FAA did not apply to federal agencies, and that the Equal Employment Opportunity Commission (EEOC) was free to pursue employment cases against companies, even if an employee had previously agreed to arbitrate.<sup>112</sup> In *Equal Employment Opportunity Commission v. Waffle House*,<sup>113</sup> an employee consented, as a condition

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<sup>105</sup> See *Sabbeth & Vladeck, supra* note 6, at 818.

<sup>106</sup> 532 U.S. 105 (2001).

<sup>107</sup> See *Landry & Hardy, supra* note 9, at 488 (quoting Henry S. Kramer, *Alternative Dispute Resolution in the Workplace*, § 1.02, <http://westlaw.com> (retrieved Sept. 21, 2008)).

<sup>108</sup> *Sabbeth & Vladeck, supra* note 6, at 818.

<sup>109</sup> See *Circuit City Stores*, 532 U.S. at 128.

<sup>110</sup> *Sabbeth & Vladeck, supra* note 6, at 819 (quoting *Circuit City Stores*, 532 U.S. 105 at 132–33).

<sup>111</sup> See *id.* at 819.

<sup>112</sup> See *Landry & Hardy, supra* note 9, at 490.

<sup>113</sup> 534 U.S. 279 (2002).

of employment, that any dispute or claim would be resolved by binding arbitration.<sup>114</sup> After beginning work at Waffle House, the employee suffered a seizure at work and was fired shortly thereafter.<sup>115</sup> Opting not to initiate arbitration over termination, the employee filed a discrimination complaint with the EEOC, arguing that that he was fired in violation of the Americans with Disabilities Act of 1990.<sup>116</sup> After the EEOC tried unsuccessfully to settle the dispute with Waffle House, the Commission filed an action in federal court, stating that the company unlawfully terminated an employee because of his disability.<sup>117</sup> The lower court denied Waffle House's request to arbitrate, and the court of appeals held that "the EEOC was not permitted to seek victim-specific relief in light of the arbitration agreement."<sup>118</sup> The court of appeals noted, however, "when the EEOC is seeking to pursue injunctive relief, the public interest overrides the arbitration agreements, and the EEOC is permitted to seek injunctive relief even if the employee has entered into a valid arbitration agreement."<sup>119</sup> The Court further underscored this point, noting that "mandatory arbitration provisions 'in employment contracts cannot preclude the EEOC from pursuing relief on behalf of a complaining employee . . . .'"<sup>120</sup>

*Waffle House* has several important ramifications. First, the case seems "to be a break in the line of decisions that favored mandatory arbitration provisions in the employment context . . . ."<sup>121</sup> This shift may not be a cause for optimism, however. Robert Landry and Benjamin Hardy caution that *Waffle House* may lead to more negative results for employee rights, instead of positive outcomes, as the decision is generally supportive of mandatory arbitration, and the *Waffle House* ruling is only applicable to cases with similar facts.<sup>122</sup> In such cases, while a mandatory arbitration agreement would not preclude the EEOC from bring-

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<sup>114</sup> See *id.* at 283.

<sup>115</sup> See *id.*

<sup>116</sup> See Landry & Hardy, *supra* note 9, at 489 (quoting *Waffle House*, 534 U.S. at 282).

<sup>117</sup> See *id.* (quoting *Waffle House*, 534 U.S. at 283).

<sup>118</sup> *Id.* (quoting *Waffle House*, 534 U.S. at 284–85).

<sup>119</sup> *Id.* (quoting *Waffle House*, 534 U.S. at 284–85).

<sup>120</sup> *Id.* at 490 (quoting Barry A. Naum, *EEOC v. Waffle House, Inc.*, 18 OHIO ST. J. ON DISP. RESOL. 225, 227 (2002)).

<sup>121</sup> *Id.* (quoting Barry A. Naum, *EEOC v. Waffle House, Inc.*, 18 OHIO ST. J. ON DISP. RESOL. 225, 233 (2002)).

<sup>122</sup> See Robert J. Landry, III & Benjamin Hardy, *Mandatory Pre-Employment Arbitration Agreements: The Scattering, Smothering and Covering of Employee Rights*, 19 U. FLA. J.L. & PUB. POL'Y 479, 490 (2008) (quoting Barry A. Naum, *EEOC v. Waffle House, Inc.*, 18 OHIO ST. J. ON DISP. RESOL. 225, 23–34 (2002)).

ing suit, it remains unsettled “whether other public agencies can use the *Waffle House* decision to enforce other statutory rights when there is a valid arbitration agreement between the employee and the employer.”<sup>123</sup> Another reason that *Waffle House* may not prove to be a beacon of hope for employee rights is that the EEOC does not litigate most of the cases filed.<sup>124</sup> In reality, “the EEOC files . . . less than one percent of enforcement suits annually.”<sup>125</sup> Finally, the ruling alters the role of the EEOC, which, in the past, unequivocally opposed mandatory arbitration of workplace disputes.<sup>126</sup> Now, the possibility arises that the EEOC will become more amenable to mandatory workplace arbitration and may even issue guidelines regarding mandatory arbitration in the workplace,<sup>127</sup> instead of remaining a steadfast opponent of the practice.

### C. Recent Developments in the Law

#### 1. *14 Penn Plaza LLC v. Pyett*

Recent developments in Supreme Court case law suggest that the high court is becoming increasingly amenable to the use of mandatory arbitration agreements to resolve civil rights disputes. The case of *14 Penn Plaza LLC v. Pyett*<sup>128</sup> involved a collective bargaining agreement that required union members to arbitrate ADEA claims.<sup>129</sup> The facts of the case are as follows: petitioner owned and operated an office building where respondent Pyett and other members of his union worked.<sup>130</sup> Penn Plaza, with the consent of petitioners’ union, hired another company to provide security guard services at the building and reassigned respondents to lighter duties.<sup>131</sup> The union, at the request of respondents, challenged the reassessments, alleging that Penn Plaza reassigned respondents because of their age.<sup>132</sup> The union later brought suit

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<sup>123</sup> *Id.* (quoting Barry A. Naum, *EEOC v. Waffle House, Inc.*, 18 OHIO ST. J. ON DISP. RESOL. 225, 234 (2002)).

<sup>124</sup> *See id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See id.* at 491 (quoting Gary Mathiasen & George Wood, *Waffle House: Long View*, 24 NAT’L L.J. A23, 82 (2002)).

<sup>127</sup> *Id.* at 491.

<sup>128</sup> 129 U.S. 1456 (2009).

<sup>129</sup> *See* Debra L. Raskin, *Year in Review: Supreme Court Decisions: Pleading, ADEA, Title IX, Arbitration, Counsel Fees, Union Charges*, 801 PRACTISING L. INST. 221, 234 (2009).

<sup>130</sup> *Id.* at 234–35.

<sup>131</sup> *Id.* at 235.

<sup>132</sup> *Id.*

under the ADEA and state and local law.<sup>133</sup> In reversing the Second Circuit, the high court held, in a 5–4 opinion, that an arbitration clause in a collective bargaining agreement *could* waive union members' rights to pursue judicial relief for violations of the ADEA.<sup>134</sup> In its ruling, the Court explained that because respondents' union "collectively bargained in good faith and agreed that employment-related discrimination claims, including those brought under the ADEA, would be resolved in arbitration,"<sup>135</sup> the Court would honor this agreement, and deemed the arbitration agreement enforceable. The Court also criticized respondents' overly broad interpretation of *Gardner-Denver*, stating that respondents relied upon "a misconceived view of arbitration that this Court has since abandoned."<sup>136</sup> Although Justice Thomas's opinion denies explicitly overruling the *Gardner-Denver-Barrentine-McDonald* trilogy of cases, at the very least, the Thomas opinion makes it quite clear that those cases "are on their last legs,"<sup>137</sup> a clear blow to employment and civil rights.

*Penn Plaza* may also prove gravely important "because of the question of agency at play in the context of the collective bargaining agreement."<sup>138</sup> The courts have already been willing to enforce employment agreements entered into by individual employees, "but it is another step altogether to find consent on the part of an employee when someone else bargained away his access to court."<sup>139</sup> This development in mandatory arbitration is especially troubling "because workers who join unions do so to enlist the unions' aid in matters of collective bargaining and resolution of contract-based disputes, not to cede control over their statutory rights."<sup>140</sup> The potential impact of *Penn Plaza* is significant, "not only because of the more than sixteen million workers in the United States who are members of labor unions authorized to negotiate collectively on their behalf, but also because of other situations in which an agency relationship may be inferred and rights waived."<sup>141</sup>

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<sup>133</sup> See *id.* (quoting *14 Penn Plaza*, 129 U.S. at 1461–62).

<sup>134</sup> See Sabbath & Vladeck, *supra* note 6, at 819.

<sup>135</sup> *14 Penn Plaza*, 129 U.S. at 1464.

<sup>136</sup> Raskin, *supra* note 129, at 236 (quoting *14 Penn Plaza*, 129 U.S. at 1469–70).

<sup>137</sup> Sabbath & Vladeck, *supra* note 6, at 819.

<sup>138</sup> *Id.* at 819.

<sup>139</sup> *Id.* at 820.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

## 2. The Arbitration Fairness Act of 2009

In light of the many concerns associated with mandatory arbitration provisions in employment contracts, Congress has drafted legislation aimed at safeguarding workers' rights. Legislation introduced in the House of Representatives in February 2009 by Representative Henry Johnson (D-GA) "declares that no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights."<sup>142</sup> The Arbitration Fairness Act (AFA), if signed into law, would also "void any predispute agreement that required arbitration of a dispute arising under any statute intended to regulate contracts or transactions between parties of unequal bargaining power."<sup>143</sup> Additionally, the AFA would require that a court, applying federal law, decide the validity of an arbitration agreement.<sup>144</sup> This provision breaks with the current practice of allowing an arbitrator to rule on the validity of an arbitration agreement.<sup>145</sup> Finally, the Arbitration Fairness Act exempts collective bargaining agreements from regulation.<sup>146</sup> This Act, if passed by Congress, does much to remedy the many problems arising from mandatory arbitration agreements, and will undeniably demonstrate congressional intent to prohibit the forced arbitration of civil rights disputes.

## II. ARGUMENTS IN FAVOR OF MANDATORY PRE-EMPLOYMENT ARBITRATION

### A. Efficiency

Supporters of mandatory arbitration tout this practice as a fast and efficient way to resolve employment disputes.<sup>147</sup> Instead of relying on the judiciary to settle a dispute, mandatory arbitration

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<sup>142</sup> Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2d Sess. 2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=H111-1020&tab=summary> [hereinafter H.R. 1020].

<sup>143</sup> Sandra Brown Strong and W. Thomas Siler, Jr., *What to Expect from Congressional "Tinkering" with Employment Law*, 76 DEF. COUNS. J. 484, 486-87 (2009).

<sup>144</sup> See H.R. 1020, *supra* note 142.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See generally Siderman, *supra* note 12.

reduces court dockets<sup>148</sup> by allowing an arbitrator in place of a judge and jury to resolve a conflict. Additionally, because arbitration is a “creature of contract, parties can design the process to accommodate their respective needs,” thereby doing away with lengthy motions and appeals, and making arbitration a flexible alternative to litigation.<sup>149</sup> Finally, efficiently resolving workplace disputes can save employment relationships, which are likely to suffer and even completely erode if they are subject to drawn-out and confrontational litigation.”<sup>150</sup>

### B. Accessibility and Cost

Proponents also argue that arbitration makes dispute resolution more accessible, especially to parties who cannot afford the usually expensive price tag of litigation.<sup>151</sup> Costly litigation also affects which cases lawyers will accept, as attorneys often “take only the very few cases that promise the highest returns,”<sup>152</sup> thereby limiting the number of cases that can be resolved through the courts and effectively shutting claimants out of the system.<sup>153</sup> Additionally, even if a case comes before a court, an appeal can take three to eight years before a final outcome is reached, further raising the price of litigation.<sup>154</sup> Supporters of mandatory arbitration highlight, however, that these burdensome costs can easily be avoided if an arbitrator decides a dispute instead of a judge.

### C. Expertise

Arbitration, its supporters claim, is an effective way to ensure that the trier of fact is skilled in the subject matter at issue in the dispute. In her article *Why Arbitrate? The Benefits and Savings*,

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<sup>148</sup> See Landry & Hardy, *supra* note 9, at 483.

<sup>149</sup> Sussman, *supra* note 10.

<sup>150</sup> Siderman, *supra* note 12, at 1893.

<sup>151</sup> See *id.* at 1893–94 (citing Garry G. Mathiason, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, Q227 A.L.I.-A.B.A., Jan. 27, 1994, at 23, 41).

<sup>152</sup> *Id.* at 1894.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 1893–94 (citing Garry G. Mathiason, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, Q227 A.L.I.-A.B.A., Jan. 27, 1994, at 23, 41)).

Edna Sussman points to the subject knowledge of arbitrators as one of the many benefits for choosing arbitration over litigation.<sup>155</sup> She notes that “arbitration permits the parties to choose adjudicators with the expertise necessary to decide complex issues that often require such industry-specific expertise.”<sup>156</sup> As litigation and the subject matter involved become more complex, there will be a heightened need for arbitrators to have specialized knowledge in order to understand the case at bar and to make an informed, reasoned decision.<sup>157</sup>

#### D. Freedom of Contract

Supporters of mandatory arbitration also argue that employees should be able to “waive their right to a judicial forum for the adjudication of statutory claims [because] arbitration provisions constitute merely ‘forum-selection clauses’ that in no way compromise substantive rights.”<sup>158</sup> Furthermore, proponents argue that if individuals in criminal cases are permitted to waive their jury trial rights, the same option should be available at the civil level, such as in the case of employment law.<sup>159</sup> In a similar vein, Chief Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit stated that there are no “rights so fundamental that they may not be bargained away.”<sup>160</sup> He further noted that “one aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly.”<sup>161</sup> Mandatory arbitration supporters encourage its critics to give employees the freedom to bargain away their rights, no matter the impact on the rights of the rest of the country.

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<sup>155</sup> See Sussman, *supra* note 10.

<sup>156</sup> *Id.*

<sup>157</sup> *See id.*

<sup>158</sup> Sabbeth & Vladeck, *supra* note 6, at 827 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991)).

<sup>159</sup> See *Ware*, *supra* note 17, at 181.

<sup>160</sup> Sabbeth & Vladeck, *supra* note 6, at 837.

<sup>161</sup> *Id.*

### E. Sufficient Safeguards Already Exist

Advocates of mandatory arbitration contend that the practice has various safeguards to protect employees from exploitation.<sup>162</sup> In response to critics' demands for arbitration agreements to be enforced only when rights are knowingly waived, mandatory arbitration supporters are quick to point out that "courts have applied a much less demanding waiver standard"<sup>163</sup> to mandatory arbitration, citing the administrative infeasibility of requiring a *scienter* standard for entering binding employment arbitration agreements.<sup>164</sup> Supporters also argue that basic contract remedies, such as unconscionability, are sufficiently protective of the party with less bargaining power.<sup>165</sup> Additionally, arbitration supporters contend that as long as compulsory arbitration provisions are not concealed in contracts, these agreements should be permitted and enforced.<sup>166</sup> Clearly, proponents of mandatory arbitration value these agreements' efficiency and ease of enforcement more highly than they value the protections afforded under the traditional judicial system.

### F. Confidentiality

A final benefit of arbitration is that these proceedings may be kept confidential.<sup>167</sup> Unlike court trials, arbitration is usually private, and parties can agree to keep proceedings confidential.<sup>168</sup> The option of confidentiality is particularly attractive when the dispute involves highly sensitive information, such as trade secrets.<sup>169</sup>

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<sup>162</sup> See Ware, *supra* note 17, at 184.

<sup>163</sup> Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 496 (1981).

<sup>164</sup> See Ware, *supra* note 17, at 184.

<sup>165</sup> See *id.* at 171.

<sup>166</sup> See *id.*

<sup>167</sup> See Sussman, *supra* note 10, at 20–21.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.* at 20.

### III. ARGUMENTS AGAINST MANDATORY PRE-EMPLOYMENT ARBITRATION

#### A. Lack of Legal Expertise

Civil rights legislation seeks to eliminate discrimination, and the laws mentioned above aim to eradicate discrimination in the workplace. Discrimination in employment has historically entailed the preferential treatment of men over women, and the privileging of Caucasian workers over ethnic and racial minorities, such as African-Americans and Latinos.<sup>170</sup> Civil rights laws created in the 1960's, such as the Civil Rights Act, were intended to abolish job segregation and unequal pay, by providing special protections under Title VII to women and racial minorities.<sup>171</sup> When mandatory arbitration is used to settle Title VII claims, these protections can be severely diminished.<sup>172</sup> One of the problems with compulsory arbitration is that many arbitrators are not lawyers and have no legal expertise,<sup>173</sup> creating the fear that arbitrators will lack the competence to analyze and decide legal questions equitably and accurately.<sup>174</sup> Equally disturbing is the fact that arbitrators in the securities industry, for example, are not even required to do legal research before ruling on a case, and are not expected to understand discrimination or employment law.<sup>175</sup> These concerns make it clear that we should not put the safety of our civil rights in the hands of unqualified interpreters, but rather, should maintain the courts' clearly defined role in deciding issues that touch on our most precious rights.

#### B. Exploitation

Another problem with forced arbitration is the risk of employee exploitation, particularly among immigrants who do not speak English. The United States has the largest immigrant popu-

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<sup>170</sup> See Carlos Antonio Lopez, *Revoking an Employer's License to Discriminate*, 56 RUTGERS L. REV. 513, 530 (2004).

<sup>171</sup> See *id.*

<sup>172</sup> Landry & Hardy, *supra* note 9, at 484.

<sup>173</sup> See Adams, *supra* note 5, at 1666 (citing Richard H. Block and Elizabeth A. Barasch, *Practical Ramifications of Arbitration of Employment Discrimination Claims*, PROC. OF THE N.Y.U. 44TH ANN. CONF. ON LAB. 281 (1991)).

<sup>174</sup> See *id.*

<sup>175</sup> See *id.* at 1666-67.

lation of any country in the world, and by all accounts, this population will continue to grow.<sup>176</sup> For that reason, the issue of immigrant exploitation in mandatory arbitration remains particularly relevant. Mandatory arbitration clauses in employment contracts have the potential to result in the exploitation of countless immigrants because these individuals tend not to speak English and often lack a strong knowledge of their statutory rights or the American judicial system.<sup>177</sup> Unfortunately, the limited English proficiency of these workers puts them at a huge disadvantage when entering employment contracts or arbitration agreements.<sup>178</sup> According to Carlos Antonio Lopez, “when an immigrant worker signs an arbitration agreement in an employment contract he or she will most likely not understand that the right to litigate an employment discrimination claim is being waived.”<sup>179</sup> By agreeing to arbitrate a discrimination claim, immigrants become prone to exploitation and may unknowingly give their employer a “license to discriminate.”<sup>180</sup>

### C. Lack of a Jury

The absence of a jury is another problem presented by mandatory arbitration.<sup>181</sup> The right to have your case heard by a jury of your peers is an important constitutional protection that ensures fairness, leads to impartiality, and limits the power of a judge.<sup>182</sup> If mandatory arbitration is used to resolve workplace disputes, employees’ rights are at the mercy of a possibly unfair and petty arbitrator, instead of being adjudicated by a larger, more diverse group of individuals who are more likely to understand the plight of the petitioner. Allowing a single individual, who may not be attuned to the concerns of the claimant, to have so much power over the future of Americans’ civil rights was not intended by the Constitution’s Framers or by the drafters of the Civil Rights Act, and strikes right at the heart of those protections.

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<sup>176</sup> See Lopez, *supra* note 170.

<sup>177</sup> See *id.* at 530.

<sup>178</sup> See *id.* at 532.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Landry & Hardy, *supra* note 9, at 484 (quoting Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Prosecution*, 47 UCLA L. REV. 1885, 1914–15 (2000)).

<sup>182</sup> See Sternlight, *supra* note 19.

#### D. Limited Discovery

Involved in any discussion of arbitration is the issue of limited discovery. Discovery tools, such as interrogatories, requests for admissions and mental examinations, are often not used in arbitration.<sup>183</sup> “Depositions of parties are common in arbitration, but depositions of nonparties are rare and somewhat controversial.”<sup>184</sup> Because many civil rights claims are complex and challenging to prove without substantial, time consuming discovery, many of these claims “are lost in the arbitration process due to a lack of evidence.”<sup>185</sup> While an arbitral proceeding may appear to be a fast and efficient way to resolve workplace disputes, this argument fails to recognize that many of these conflicts are disposed of quickly because the claimant never had sufficient opportunity to prove his case. Moreover, limited discovery is not an exclusive benefit of arbitration—the same option is available to litigation in judicial proceedings; for example, “nothing in the Federal Rules forbids the parties from agreeing to limit discovery, to try a case to a judge or magistrate judge instead of a jury, or to forego an appeal.”<sup>186</sup> Supporters of mandatory arbitration should not be too quick to confuse an aspect of both litigation and arbitration as a benefit of only the latter.

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<sup>183</sup> See W. Scott Simpson & Omer Kesikli, *The Contours of Arbitration Discovery*, 67 ALA. L. FOUND. 280, 280 (2006).

The *Commercial Arbitration Rules of the AAA* are among the most widely used arbitration rules in the country. The *Commercial Rules* set forth a variety of rules that establish the contours of discovery among the parties. Nonparties are not strictly bound by these rules because the rules are a matter of contract arising out of an arbitration agreement that incorporates the rules. Under the *Commercial Rules*, an arbitrator has broad powers to order discovery between the parties. Although arbitrators technically conduct discovery in arbitration, it is common for the parties to handle discovery themselves as a practical matter. One of the most important rules is Rule 30, which vests the arbitrator with the power to conduct the proceedings as he sees necessary. The power to direct the proceedings includes the power to control discovery as well. Under Rule 31, an arbitrator has the ability to decide what evidence is material, relevant and necessary. This rule also gives an arbitrator the power to subpoena witnesses and documents. Rule 33 gives an arbitrator the power to conduct an inspection or investigation. It does not expressly permit an arbitrator to order the physical or mental examination of a party, which is permitted in court under Federal Rule of Civil Procedure 35.

*Id.* at 284.

<sup>184</sup> *Id.*

<sup>185</sup> Landry & Hardy, *supra* note 9, at 484 (quoting Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Prosecution*, 47 UCLA L. REV. 1885, 1913 (2000)).

<sup>186</sup> Sabbeth & Vladeck, *supra* note 6, at 832.

### E. High Costs

The benefits of arbitration are further outweighed when an employee is required to pay all or part of an arbitrator's fee.<sup>187</sup> Even though supporters tout arbitration as an inexpensive alternative to litigation, supporters are too quick to characterize arbitrators' fees as easily affordable.<sup>188</sup> The American Arbitration Association states that the average arbitrator's *daily* fee is \$700, a sum that could be prohibitively expensive for many workers, especially if an employee has been fired or discharged.<sup>189</sup> Employees may also be required to pay a filing fee of around \$500 in order to file an arbitration claim with the American Arbitration Association, cover administrative fees and room rental fees.<sup>190</sup> Suddenly, arbitration does not seem like such an inexpensive option for resolving workplace disputes. If employees are unable to cover the costs of arbitration, options for resolution are scarce, leaving an issue unresolved and an employee without justice, as he has relinquished his right to sue. Additionally, "if arbitration is to serve as a substitute for a judicial forum, requiring employees to pay for the service of an arbitrator when they would never be required to pay for a judge in court conflicts with Congress's intent to make discrimination claims easier to bring and prove in federal court."<sup>191</sup> Even assuming, *arguendo*, that arbitration is less costly than a court proceeding, should we not be asking ourselves if there is something fundamentally wrong with a legal system based on the idea that lawyers, discovery and other aspects of due process are reserved only for a certain class of society?<sup>192</sup> Congress and the Framers did not envision a justice system where civil and procedural protections were to be enjoyed only by a few privileged Americans.

### F. Repeat Offender Problem

If an employer requires arbitration of disputes as a condition of employment, it seems expected that "the arbitrator's fee should

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<sup>187</sup> See Adams, *supra* note 5, at 1671.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.* (citing Kenneth May, *Arbitration: Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, DAILY LAB. REP. (BNA) No. 13, at d-16 (Feb. 15, 1996)).

<sup>190</sup> See *id.* at 1672.

<sup>191</sup> *Id.*

<sup>192</sup> Sabbeth & Vladeck, *supra* note 6, at 832.

be born solely by the employer,” who is often in a better position economically to shoulder the cost.<sup>193</sup> This arrangement, however, does not always prove true, forcing an employee whose job may be at risk or even nonexistent to foot the arbitrator’s bill.<sup>194</sup> Even if we were to remove the requirement that an employee pay for mandatory arbitration, other problems arise when employers foot the bill. Forced arbitration involves what critics of arbitration call the repeat offender problem.<sup>195</sup> This problem arises when an arbitrator favors the employer, “in order to ensure that the arbitrator will be selected for future arbitration.”<sup>196</sup> Problems arise with impartiality when employers cover the cost of arbitration, but forcing a discharged employee to pay the bill is equally problematic, ultimately rendering mandatory arbitration a poor avenue for dispute resolution.

#### G. No Deterrence

An additional criticism of mandatory arbitration is the lack of deterrence that results when arbitrators handle civil rights disputes. While decreasing the time and money dedicated to dispute resolution may be beneficial to employers and employees alike, arbitration will do away with the fear of the huge costs associated with civil rights disputes.<sup>197</sup> If we take away the fear of costly litigation and punitive damages, an additional protection against discrimination is lost, leaving employees only able to hope that their employers will treat them fairly.

### IV. SOLUTIONS TO THE MANDATORY ARBITRATION PROBLEM

#### A. Recommendations

Despite the recent inclination of American courts to enforce mandatory arbitration agreements, “the trend may be to move towards a system of voluntary rather than compulsory arbitration.”<sup>198</sup>

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<sup>193</sup> See Adams, *supra* note 5, at 1673.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.*

<sup>196</sup> *Id.*

<sup>197</sup> See Sabbath & Vladeck, *supra* note 6, at 831.

<sup>198</sup> Adams, *supra* note 5, at 1676.

The Financial Industries Regulatory Authority (FINRA), the largest independent regulatory organization charged with protecting U.S. investors,<sup>199</sup> made an important change in 1999 to its rules governing mandatory arbitration of civil rights claims. Specifically, FINRA added Rule 10216 to address concerns regarding the “bifurcation of employment cases.”<sup>200</sup> This rule allows employee discrimination claims, which would otherwise be decided through mandatory arbitration, to proceed in court, while allowing other employment claims subject to arbitration to proceed.<sup>201</sup> Additionally, “if a discrimination claim is filed in court and related claims subject to mandatory arbitration are filed in arbitration, a respondent in the arbitration proceeding has the option to move to combine all claims in court.”<sup>202</sup> This is an important change to the way workers’ civil rights claims are resolved; instead of automatically subjecting Americans’ Title VII rights to mandatory arbitration, Rule 10216 allows the courts to hear discrimination suits, while permitting the arbitration of less sensitive and fundamental claims. If Americans’ civil rights claims are to remain robust, additional changes to Rule 10216 must be implemented, however. Instead of only allowing the respondent, usually the employer, to decide whether to combine all claims in court, the employee should have a say. Ultimately, greater power must be given to employees, and more industries should adopt this revised FINRA rule; in fact, this proposed method would be the best of both worlds—allowing minor employment claims to be resolved quickly and inexpensively through arbitration, while applying judicial expertise to resolve sensitive civil rights claims.

Finally, *voluntary* arbitration remains an important and viable alternative for dispute resolution, but the problems associated with mandatory or forced arbitration must not be overlooked. Employers should not interpret the right to choose arbitration *voluntarily* as a blank check that permits them to require that employees submit civil rights claims to mandatory arbitration.<sup>203</sup>

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<sup>199</sup> See FINRA.org, *About the Financial Industry Regulatory Authority*, <http://www.finra.org/AboutFINRA/> (last visited Jan. 31, 2010).

<sup>200</sup> Employment Arbitration Rules, NASD NOTICE TO MEMBERS 99-96, Jan. 18, 2000, at 737–38, available at <http://www.finra.org/Industry/Regulation/Notices/1999/P004041> [hereinafter Rules].

<sup>201</sup> See Rules, *supra* note 200.

<sup>202</sup> *Id.* at 738.

<sup>203</sup> See Mara Kent, *Forced vs. Compulsory Arbitration of Civil Rights Claims*, 23 LAW & INEQ. 95, 115 (2005).

## B. Ideas from Abroad

### 1. England: Arbitration Act of 1996

Mandatory arbitration of discriminatory practices puts Americans' civil rights in a precarious position, making the need for reform clear. Many countries use arbitration as a way to resolve disputes, so there is a wealth of knowledge available from around the world that can be applied to improve the American system of mandatory arbitration. In England, for example, arbitration has become the preferred method of resolving disputes in the construction and engineering fields,<sup>204</sup> even though English courts historically "have not looked favorably on arbitration, and various enactments have attempted to regulate the process."<sup>205</sup> Similarly to the U.S., arbitration has become a more accepted route to dispute resolution in England.<sup>206</sup> This change can be observed in the English Arbitration Act of 1996.<sup>207</sup> "The Act is a significant departure from previous enactments and recognizes the developments in international arbitration."<sup>208</sup>

Sections 67 through 69 of the Arbitration Act, for instance, allow the courts to play a role in arbitration as a check on the power of arbitrators.<sup>209</sup> Under Section 67 of the Act, "a party to arbitral proceedings may . . . apply to the court . . . challenging any award of the arbitral tribunal as to its substantive jurisdiction or for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction."<sup>210</sup> Although this remedy is available only when jurisdiction is in dispute,<sup>211</sup> a similar remedy could be made available in the United States when a party to mandatory arbitration objects to the decision of an arbitrator, particularly when the decision affects civil rights. This solution would allow mandatory arbitration to continue, while still protecting civil rights and carving out a role for judicial review. Section 67 of the English

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<sup>204</sup> See Atkinson-law.com, *Arbitration or Adjudication?*, [http://www.atkinson-law.com/DisputeResolution/Arbitration/Arbitration\\_Article\\_002.htm](http://www.atkinson-law.com/DisputeResolution/Arbitration/Arbitration_Article_002.htm) (last visited Jan. 19, 2010) [hereinafter Atkinson Law].

<sup>205</sup> *Id.*

<sup>206</sup> *See id.*

<sup>207</sup> *See id.*

<sup>208</sup> *Id.*

<sup>209</sup> See Arbitration Act 1996, ch. 23, § 67 (Eng.), available at <http://www.jus.uio.no/lm/england.arbitration.act.1996/landscape.pdf> [hereinafter Section 67].

<sup>210</sup> *Id.*

<sup>211</sup> *See id.*

Arbitration Act of 1996 also allows a court to modify an arbitrator's award, or to set aside the award entirely or in part,<sup>212</sup> again preserving a way for the courts to intervene if justice has not been served.

Another recommendation for mandatory arbitration in the U.S. comes from Section 68 of the English Arbitration Act. This section allows parties to challenge an arbitral award due to a serious irregularity, which includes, among other problems, the "failure by the tribunal to comply with [the general duties of a tribunal], the tribunal exceeding its powers; failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; [and] failure by the tribunal to deal with all the issues that were put to it . . . ."<sup>213</sup> If a serious irregularity is found, Section 68 allows the courts to step in and remit the award or set it aside.<sup>214</sup> Similarly, Section 69 also allows a party to arbitration to appeal a decision, but in this case, "on a point of law,"<sup>215</sup> rather than on a jurisdictional issue. Section 69 thereby reserves a role for the courts to scrutinize the legal validity of an arbitrator's ruling.

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<sup>212</sup> See *id.*

<sup>213</sup> Arbitration Act 1996, ch. 23, § 68 (Eng.), available at [http://www.opsi.gov.uk/acts/acts1996/wkpga\\_19960023\\_en\\_1](http://www.opsi.gov.uk/acts/acts1996/wkpga_19960023_en_1) [hereinafter Section 68]. Additional irregularities under Section 68 of the Act include:

any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; uncertainty or ambiguity as to the effect of the award; the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; failure to comply with the requirements as to the form of the award; or any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

*Id.*

<sup>214</sup> See *id.* Additional actions that the courts may undertake include the power to:

declare the award to be of no effect, in whole or in part. The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied, that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

*Id.*

<sup>215</sup> Arbitration Act 1996, ch. 23, § 69 (Eng.), available at <http://www.jus.uio.no/lm/england.arbitration.act.1996/landscape.pdf>. Furthermore, Section 69 states that:

unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

*Id.*

Although The English Arbitration Act of 1996 does not eliminate all the problems created by mandatory arbitration, there is a lot to learn from this piece of legislation. The Act takes a best-of-both-worlds approach to arbitration, in that the practice is still allowed, even encouraged, but the courts can still step in if there has been a serious miscarriage of justice. If the U.S. continues to allow compulsory arbitration, particularly for civil rights disputes, the U.S. should follow England's lead and fashion legislation that permits the judiciary to intervene if there has been a serious error. This new approach will allow mandatory arbitration to continue, without completely jeopardizing our civil rights.

## 2. Japan's Arbitration Law No.138 of 2003

Since the end of World War II, arbitration has developed rapidly in Japan, and has frequently been used to settle international business disputes.<sup>216</sup> In 1950, various Japanese agencies, such as the Japan Chamber of Commerce and Industry and the Japan Foreign Trade Council, organized the International Commercial Arbitration Committee (now, the Japan Commercial Arbitration Association), which was created "to settle commercial disputes and promote international trade, thereby contributing to the development of the Japanese economy."<sup>217</sup> To deal with the burgeoning arbitration industry, the Japanese government created detailed laws regulating the industry, such as Law No.138 of 2003.<sup>218</sup> Notably, Article 35 of this law allows an arbitral body to ask the courts for assistance in gathering evidence and taking witness testimony, among other auxiliary functions.<sup>219</sup> Even though the arbitrator ultimately chooses whether to involve the courts,<sup>220</sup> Article 35 represents an important step in carving out a role for the courts to play in compulsory arbitration. Even though some critics of this law

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<sup>216</sup> See History, Japan Commercial Arbitration Association, <http://www.jcaa.or.jp/e/jcaa-e/history.html> (last visited Jan. 20, 2010).

<sup>217</sup> *Id.*

<sup>218</sup> *Kaiketsu kisoku* [Arbitration Laws], Law No.138 of 2003.

<sup>219</sup> See *Kaiketsu kisoku* [Arbitration Laws], Law No.138 of 2003, ch. 2, art. 35 [hereinafter Article 35], which states:

The arbitral tribunal or a party may apply to a court for assistance in taking evidence by any means that the arbitral tribunal considers necessary as entrustment of investigation, examination of witnesses, expert testimony, investigation of documentary evidence (excluding documents that the parties may produce in person) or inspection (excluding that of objects the parties may produce in person) prescribed in the Code of Civil Procedure. Provided, this shall not apply in the case where the parties have agreed not to apply for all or some of these means.

*Id.*

<sup>220</sup> See *id.*

may argue that the benefit of arbitration is to sidestep the courts and avoid a long, drawn out judicial proceeding, it is vital to involve the courts in mandatory arbitration, particularly if our most important rights and protections are at stake. Another benefit of Article 35 is that it alleviates one of the major drawbacks to arbitration: inadequate discovery and investigation.<sup>221</sup> As stated above, because many civil rights claims are complex and challenging to prove absent substantial discovery, many of these claims “are lost in the arbitration process due to a lack of evidence.”<sup>222</sup> If this situation starts to emerge, an arbitrator may ask the courts for assistance in investigating a claim under Article 35,<sup>223</sup> thereby ensuring that the employee’s claim does not fail simply due to a lack of proof. While mandatory arbitration raises serious issues about the preservation of Americans’ civil rights, implementing a version of Japan’s Law No.138 can help the U.S. ensure that these rights are not eroded.

## CONCLUSION

Arbitration is an important avenue for resolving disputes, but not if the arbitration is forced in settling civil rights claims. Until 1991, the Supreme Court was distrustful of permitting civil rights disputes to be resolved through arbitral proceedings, noting that arbitrators lack the necessary skills requisite for understanding detailed civil rights statutes and complex case law.<sup>224</sup> In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that a mandatory arbitration agreement could be enforced in cases involving an ADEA claim.<sup>225</sup> This change in the Supreme Court’s treatment of mandatory arbitration, however, has come even in the face of the numerous drawbacks to arbitration, including the lack of deterrence and judicial oversight. Solutions to the problem of mandatory arbitration of civil rights claims do exist, however. For instance, a party to arbitration may go to court to challenge an ar-

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<sup>221</sup> See *id.*

<sup>222</sup> Landry & Hardy, *supra* note 9, at 484 (quoting Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Prosecution*, 47 UCLA L. REV. 1885, 1913 (2000)).

<sup>223</sup> See Article 35, *supra* note 219.

<sup>224</sup> See *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 743 (1981) (holding that petitioners’ wage claims under the FLSA were not barred by the prior submission of their grievances to the contractual dispute resolution procedures).

<sup>225</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

bitral award due to a serious irregularity, which includes, among other problems, the failure by the arbitrator to comply with the general duties of a tribunal.<sup>226</sup> Additionally, Rule 10216, promulgated by the Financial Industry Regulatory Authority, allows employee discrimination claims to proceed in court, while permitting other employment claims unrelated to Title VII protections to be arbitrated.<sup>227</sup> As we saw above, the trend in other developed nations, as well as in the U.S. financial industry, has been to create additional safeguards for claimants' rights and interests. Courts and legislatures in the U.S. must take notice and ensure that mandatory arbitration does not erode Americans' civil rights.

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<sup>226</sup> See Section 68, *supra* note 213. Additional irregularities under Section 68 of the Act include:

any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; uncertainty or ambiguity as to the effect of the award; the award being obtained by fraud or the way in which it was procured being contrary to public policy; failure to comply with the requirements as to the form of the award; or any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

*Id.*

<sup>227</sup> See Rules, *supra* note 200.

