disputes out of the court system may be answered with a proposed employment arbitration bureau placed in either the Justice or Labor departments. Such a bureau would be a neutral government forum to assist employers in writing enforceable employment agreements and to assist employees in fully understanding their rights in any employment dispute they may have with their employers.

II. The Ghosts of Arbitration Past, Present, and Yet To Come: Insights About the Arbitration Fairness Act, A Management Perspective

Philip A. Miscimarra* and John R. Richards**

"I will live in the Past, Present and the Future. The Spirits of all Three shall strive within me. I will not shut out the lessons that they teach."

—Ebenezer Scrooge, in Charles Dickens, *A Christmas Carol* (1843)

"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. . . . Innumerable children have been born into the cause; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties . . . without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world."

—Description of protracted litigation, *Jarndyce and Jarndyce*, in Charles Dickens, *Bleak House* (1853)

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"If he had lived in the present day he would no doubt have been more courteous, and have submitted the matter to arbitration. . .

—Charles Dickens, *All The Year Round: A Weekly Journal* (July 19, 1873)

Ebenezer Scrooge is the central figure in *A Christmas Carol*, the holiday classic written by Charles Dickens. As many readers will recall, Scrooge has a multiplicity of faults, among them being a miserable, penny-pinching, and intolerant employer. After a terrifying encounter with the ghost of his former business partner (Marley), Scrooge is subjected to visits by three spirits: the Ghosts of Christmas Past, Present, and Yet to Come. Only as a result of these visits does Scrooge obtain the insight needed to stave off disaster for all eternity. After his transformation, Scrooge improves working conditions[1] and he gives a pay raise to employee Bob Cratchit. As a result, Cratchit's overall compensation will be sufficient to support the Cratchit family, including his ailing child (Tiny Tim). At the story's end, Scrooge becomes "as good a friend, as good a master, and as good a man, as the good old city knew, or any other good old city, town, or borough, in the good old world."[2]

It turns out that Charles Dickens also had insight about arbitration. Dickens published a journal, *All the Year Round*, in which he equated "arbitration" with being "courteous."[3] In his letters, Dickens referred to himself as possibly being a "peace and arbitration man."[4] Dickens even practiced what he preached when it came to arbitration: a mandatory arbitration provision was included in Dickens' publication agreement with his publisher, Chapman & Hall.[5] And it is no surprise that Charles Dickens would favor arbitration as a means of dispute resolution, given Dickens'

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[1]At the conclusion of *A Christmas Carol*, Scrooge tells Bob Cratchit to purchase a new coal-scuttle, with the implication that Cratchit will no longer be required to work in zero-degree temperatures indoors.

[2]Charles Dickens, *A Christmas Carol* (Chapman & Hall 1843).

[3]Charles Dickens, *All The Year Round: A Weekly Journal* (July 19, 1873).

[4]Story & Fielding, eds., The Letters of Charles Dickens, Vol. 5, 1847–1849 (Oxford Univ. Press 1981), at 505.

[5]The Chapman & Hall publication agreement with Dickens provided that any "dispute," "doubt," or "question" would be "referred to the arbitration of two indifferent persons," one named by each side, and in case the two arbitrators could not agree, the matter would then be "referred to the umpirage or arbitration of such one person as the said two Referees shall by writing under their hands appoint so that every such reference shall be made within forty days next after such dispute doubt or question shall arise." Madeline House and Gaham Storey, eds., The Letters of Charles Dickens, Vol. 2, 470 (1840-1841).

prominence as an advocate for broad-based social reform in 19th century England.[6]

In sharp contrast to Scrooge's transformation for the better, much of what we know about employment and arbitration would be changed, for the worse, by the Arbitration Fairness Act (AFA).[7] The AFA would invalidate all "pre-dispute" arbitration agreements that relate to employment law issues, other employer commitments, and civil rights issues. Thus, the AFA would bar the arbitration of discrimination claims with the sole exception of leaving intact the arbitration provisions contained in collective bargaining agreements.[8] In this respect, the AFA would reverse decades of law that has strongly favored the arbitration of employment disputes, including the broad array of arbitration agreements enforceable under the Federal Arbitration Act (FAA), which was first enacted in 1925.[9]

The National Academy of Arbitrators (NAA) has its own long track record of devoting meaningful attention to the standards governing employment arbitration, including non-labor FAA arbitration that has expanded so dramatically in recent years. Of immense importance, in particular, has been the NAA's role in developing the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. The Due Process Protocol was promulgated in 1995 and established standards of fairness that have had a profound impact on the arbitration of statutory employment claims. The Due Process Protocol is described more fully below.

Perhaps because of the NAA's own rich history,[10] Charles Dickens dispatched three spirits—the Ghosts of Arbitration Past, Pres-

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[6]For one early biography of Charles Dickens—also published by Chapman & Hall—see Crotch, Charles Dickens Social Reformer: The Social Teachings of England's Great Novelist (Chapman & Hall 1913).

[7]The Arbitration Fairness Act of 2009 was introduced in Congress as H.R. 1020, 111th Cong., 1st Sess. (Feb. 12, 2009). In the prior Congress, the AFA was introduced as S. 1782, 110th Cong., 1st Sess. (July 12, 2007) and H.R. 3010, 110th Cong., 1st Sess. (July 12, 2007). References to the AFA in the remainder of this paper are to H.R. 1020 as introduced in the 111th Congress.

[8]For convenience, this essay uses the phrase "employment arbitration" to mean the arbitration of statutory employment disputes *not* involving collective bargaining agreements (i.e., excluding what many human resources professionals refer to traditional labor arbitration).

[9]9 U.S.C. §1 et seq.

[10]The NAA was founded in 1947 and excellent descriptions abound concerning the NAA's development and important work since then. *See, e.g.*, Killingsworth, *Twenty-Five Years of Labor Arbitration—And the Future: Part I, Arbitration Then and Now*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1973), at 11–27; McDermott, *Twenty-Five Years of Labor Arbitration—And the Future: Part II, Some*

ent, and Yet to Come—whose troubling revelations have shown the authors, more vividly than words can describe, how the AFA would negatively affect employment dispute arbitration, and employment claim adjudications generally.[11]

Some revelations have been so disturbing as to prevent their detailed description here. Yet, in the hope of sparing others the unfortunate consequences that would follow from the AFA, we recount below those critical insights that are evident from evaluating: (1) the *historical role* played by arbitration in shaping the development and evolution of our national employment policies; (2) the *present treatment* of employment dispute arbitration under existing law; and (3) the *future consequences*, all negative, that would soon result if the AFA somehow became law. After a review of the AFA and the law's development in the following section, these three perspectives are successively addressed. This paper ends with a few concluding remarks—including some final observations concerning 19th century authors.

Developments in the History of the National Academy of Arbitrators, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1973), at 27–35; Murphy, *Academy History: Highlights and Sidelights: Part I, Introduction*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), at 30; Oldham, *Academy History: Highlights and Sidelights: Part II, Our Fifty-Year Past: Rummaging and Rumination*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), at 31–44.

[11]We have been unable to definitively establish that Charles Dickens, who lived from 1812–1870, dispatched the apparitions appearing before the authors concerning the implications of the AFA. However, our research—though conducted in a state of great anxiety—reveals so many parallels with the collected works of Charles Dickens as to support no other plausible explanation. Adding to the weight of this evidence is the fact that two of the most famous film adaptations of Dickens' novels—*Great Expectations* (directed by David Lean) and *Nicholas Nickleby* (directed by Alberto Cavalcanti)—were released in 1947, the year in which the NAA was founded, with *Great Expectations* winning Academy Awards for best cinematography (black-and-white) and best art direction (black-and-white). *See, e.g.,* http://www.en.wikipedia.org/wiki/20th_Academy_Awards (describing 20th annual academy awards, presented March 20, 1948, for 1947 films). However, Dickens biographer W. Walter Crotch was born in 1874 and died in 1947, again the year in which the NAA was founded. *See, e.g.*, http://www.nla.gov.au/nla.catvn2276277 (National Library of Australia Catalogue entry). Because W. Walter Crotch wrote so many books devoted to Dickens, including *The Soul of Dickens* (Chapman & Hall 1916) and *Charles Dickens Social Reformer: The Social Teachings of England's Great Novelist* (Chapman & Hall 1913), one cannot dismiss the possibility that the apparitions were attributable to biographer Crotch. As noted at the conclusion of the essay, there is also evidence of possible involvement by other literary figures, albeit with ongoing connections to Charles Dickens.

Background: The AFA and the Law's Development

The Arbitration Fairness Act—In General

The AFA would amend and substantially narrow the FAA[12] by invalidating all "pre-dispute" arbitration agreements that relate either to an "employment" dispute (defined as a "a dispute between an employer and employee arising out of a relationship of employer and employee as defined by the Fair Labor Standards Act") or "a dispute arising under any statute intended to protect civil rights" (effectively barring any pre-dispute arbitration of discrimination claims).[13]

Significantly, the AFA provides that it shall not "apply to any arbitration provision in a collective bargaining agreement," thereby appearing to leave intact and unaffected the arbitration of labor-management disputes that has long been a central focus of the Academy. The AFA's invalidation of "pre-dispute" arbitration agreements is defined as including every arbitration agreement concerning "disputes that had not yet arisen at the time of the making of the agreement."[14] As to whether enforceability of any arbitration agreement should be resolved in court or by the arbitrator, the AFA squarely places this issue into the courts. The AFA section 4 adds a new FAA provision stating:

> An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.[15]

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[12]9 U.S.C. §1 et seq.

[13]AFA §4 (amending FAA §2, 9 U.S.C. §2, renamed "Validity and Enforceability"), §3 (amending FAA §1, renamed "Definitions"). In addition to the invalidation of all pre-dispute arbitration agreements concerning employment and civil rights disputes, the AFA would render unenforceable other types of pre-dispute arbitration agreements, including those pertaining to "consumer" or "franchise" disputes. *Id.* This paper is limited to the FAA's impact on employment and civil rights disputes.

[14]AFA §3 (amending FAA §1, renamed "Definitions").

[15]AFA §4 (amending FAA §2, 9 U.S.C. §2). The issue of whether questions concerning arbitrability should be resolved in the courts or by the arbitrator has received substantial attention over the years, resulting in a long-recognized distinction between substantive and procedural arbitrability, with substantive arbitrability generally relegated to the courts, and with procedural arbitrability generally being evaluated in arbitration itself. *See, e.g.,* AT&T Techs., Inc. v. 'Communications Workers of Am., 475 U.S. 643, 649 (1986); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546 (1964); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960).

Employment Arbitration in the Courts—A Brief Survey

For decades the federal court system has been favorably disposed toward arbitration as a viable alternative for the resolution of various employment-related disputes. This area is also characterized by a surprisingly high number of relevant decisions by the U.S. Supreme Court, although a multitude of questions—especially pertaining to the enforceability of non-labor arbitration agreements—has continued to require case-by-case resolution in the lower courts.[16]

***Alexander v. Gardner-Denver* (1974).** For many years, the Supreme Court's most important pronouncement on the resolution of legal claims in arbitration was *Alexander v. Gardner-Denver Co.*[17] After an employee discharge grievance was arbitrated (and decided in favor of the company), the employee filed a discrimination claim under Title VII of the Civil Rights Act of 1964, likewise challenging his employment termination. The employer argued that the Title VII claim was foreclosed by the fact that the plaintiff's employment termination had already been the subject of a grievance resolved in final and binding arbitration, pursuant to the collective bargaining agreement's grievance arbitration procedure.

The Supreme Court held that the employee's statutory rights under Title VII were distinct from the contractual rights submitted to arbitration pursuant to the employer's collective bargaining agreement. The Supreme Court stated:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. *The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.*[18]

The Supreme Court suggested that an arbitrator possessed limited authority—at least in grievance arbitration conducted pursuant to a collective bargaining agreement—to resolve statutory issues. The Court characterized the arbitrator's task as "to effectuate the intent of the parties" without having the "general authority to invoke public laws that conflict with the bargain between the

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[16]This paper provides only an abbreviated summary of mandatory arbitration in the courts. For a more detailed discussion, from which some material in the text has been derived, see Miscimarra & Bear, Trading Spaces: What the Courts Say Now About Mandatory Arbitration (Amer. Empl. L. Council 2003).

[17]415 U.S. 36 (1974).

[18]*Id.* at 49–50 (emphasis added).

parties."[19] The Court emphasized that, by comparison, "in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right *independent of the arbitration process.*"[20] The Court also expressed a fear that, in grievance arbitration conducted under a collective bargaining agreement, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."[21]

For a time, the *Gardner-Denver* decision was regarded as a suggestion that the Supreme Court was generally hostile to the notion that an employee's statutory rights could be conclusively resolved in arbitration. The arbitration in *Gardner-Denver*, however, was conducted under the labor agreement, involving a contractual dispute, and the existence of a prior arbitration award was raised as a defense in the employee's subsequent Title VII action. Therefore, the *Gardner-Denver* case did *not* involve the application of the FAA, a factor subsequently relied upon by the Supreme Court when it determined in *Gilmer* that the FAA could be invoked to enforce the arbitration of statutory disputes.[22]

***Gilmer v. Interstate/Johnson Lane* (1991).** In *Gilmer v. Interstate/Johnson Lane Corp.*,[23] the Supreme Court enforced a private agreement that required the arbitration of an employee claim under the federal Age Discrimination in Employment Act[24] (ADEA).

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[19] *Id.* at 53.

[20] *Id.* at 54 (emphasis added).

[21] *Id.* at 58 n.19. The Supreme Court's *Gardner-Denver* decision does not preclude the possible introduction of an arbitration award—upholding a claimant's employment termination—as persuasive (i.e., non-controlling) evidence that the employer did not engage in unlawful discrimination. *See, e.g., Collins v. New York City Transit Auth.*, 305 F.3d 113 (2d Cir. 2002), where the court of appeals upheld the lower court's entry of summary judgment in an employer's favor, resulting in the dismissal of the employee's Title VII claims, resulting from the employee's employment termination after he punched his supervisor in the face. The court of appeals held that the entry of summary judgment in the employer's favor was supported by the fact that an arbitration board upheld the employee's discharge, after conducting an evidentiary hearing that lasted three days, where the employee was fairly represented, and where the arbitration board issued a 14-page "reasoned" opinion. The court concluded:

> A negative arbitration decision rendered under a [collective bargaining agreement] does not preclude a Title VII action by a discharged employee. . . . However, a decision by an independent tribunal that is not itself subject to a claim of bias will attenuate a plaintiff's proof of the requisite causal link. Where, as here, that decision follows an evidentiary hearing and is based on substantial evidence, the Title VII plaintiff, to survive a motion for summary judgment, must present strong evidence that the decision was wrong as a matter of fact—e.g., new evidence not before the tribunal—or that the impartiality of the proceeding was somehow compromised.

Id. at 119 (citations omitted).

[22] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

[23] *Id.*

[24] 29 U.S.C. §621 et seq.

The Supreme Court agreed with the Fourth Circuit, and held that the ADEA claim had to be resolved in arbitration, based on the arbitration procedure outlined in the rules of the New York Stock Exchange and referenced in Gilmer's securities industry registration application. The Court read the FAA to reflect a "liberal federal policy favoring arbitration agreements," and concluded that statutory claims—such as those under the ADEA—could be the subject of arbitration agreements enforceable under the FAA.[25] The Supreme Court thus upheld the dismissal of Gilmer's lawsuit, resting its conclusion on section 2 of the FAA, which provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[26]

The Court read the FAA to reflect a "liberal federal policy favoring arbitration agreements," and concluded that statutory claims—such as those under the ADEA—could be the subject of arbitration agreements enforceable under the FAA.[27] Further, in reference to the enforcement role played by the Equal Employment Opportunity Commission (EEOC), the Court emphasized:

> We . . . are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Indeed, Gilmer filed a charge with the EEOC in this case. In any event, the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination. *See* 29 CFR 1626.4, 1626.13 (1990).[28]

The Supreme Court in *Gilmer* rejected both the arguments that arbitration was ill-suited to the resolution of statutory claims and that arbitration was procedurally inadequate in comparison to judicial litigation. Here, the Court dismissed claims that arbitration panels would be biased, that discovery was unduly limited, that arbitrators might sometimes not issue written opinions, and that arbitration did not provide for broad equitable relief or class

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[25] *Gilmer,* 500 U.S. at 25.
[26] 9 U.S.C. §2.
[27] *Gilmer,* 500 U.S. at 25.
[28] *Id.* at 27–29 (citations omitted).

actions. The Supreme Court also discounted—although not rejecting out of hand—Gilmer's argument that arbitration agreements could result from "unequal bargaining power between employers and employees."[29] The Court stated:

> Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we nevertheless held . . . that agreements to arbitrate in that context are enforceable.As discussed above, the FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[30]

The *Gilmer* decision did not specifically address whether mandatory arbitration arrangements would be enforceable if they arose in an employment contract.[31] Moreover, section 1 of the FAA states that the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[32]

Thus, in the several years after *Gilmer*, courts across the country struggled to determine whether the FAA applied to employment contracts entered into by an employer and its employees.[33]

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[29] *Id.* at 32–33.

[30] 9 U.S.C. §2.

[31] *See Id.* at 25 n.2.

[32] 9 U.S.C. §1.

[33] When Congress enacted the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166, 105 Stat. 1071 (1991), the statute suggested that Congress intended to facilitate the arbitration of discrimination claims under federal statutes. Thus, CRA section 118 provides that: Where 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. CRA §118, 105 Stat. 1071, 1081 (1991). The Report of the House Committee on Education and Labor on the CRA provides a bit more detail concerning the congressional intent underlying CRA section 118, and states:

> This section is intended to encourage alternative means of dispute resolution that are already authorized by law.
>
> The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.("Gardner-Denver")*, 415 U.S. 36 (1974). The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.

H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. at 97 (Apr. 24, 1991) (emphasis in original), reprinted in U.S.C.C.A.N., 102d Cong., 1st Sess. at 635 (1991). *See also* H.R. Rep. No. 102-40(II), 102d Cong., 1st Sess. at 41 (May 17, 1991) (emphasis in original), *reprinted in* U.S.C.C.A.N., 102d Cong., 1st Sess. at 735 (1991). In *EEOC v. Luce, Forward, Hamilton &*

Numerous claimants argued that the FAA did not apply to their employment disputes because, in their view, section 1 of the FAA imposed a broad exemption on all contracts of employment. Several courts of appeals agreed.[34] Other courts of appeals held that FAA section 1 exempted only contracts of employment of workers actually engaged in the movement of goods in interstate commerce. Under this interpretation of the FAA, mandatory arbitration provisions in employment agreements were broadly enforceable under the FAA, except for narrow circumstances (i.e., when the employment agreement arose in certain transportation-related industries).[35]

***Circuit City Stores v. Adams* (2001).** The enforceability of mandatory arbitration arrangements in employment contracts remained in doubt for 10 years in the *Gilmer* decision's wake. The Supreme Court resolved this uncertainty, however, in *Circuit City Stores, Inc. v. Adams*.[36] The Court broadly endorsed the enforceability of mandatory arbitration arrangements—even if they were incorporated into contracts of employment—and narrowly construed the exemption set forth in FAA section 1.

In *Circuit City*, Adams, an unrepresented employee, signed a "Dispute Resolution Agreement" (DRA) that bound him to submit all claims—including those that arose under federal, state, and local statutory or common law—to mutually binding arbitration as a condition of obtaining employment. Two years into his employment, Adams brought suit against Circuit City asserting multiple state law claims.[37]

Circuit City responded by suing in federal court to enjoin the state court action and to compel arbitration pursuant to the FAA. In April 1998, the district court enjoined the action, concluding that Adams was obligated by the arbitration agreement to submit

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Scripps, 345 F.3d 742, 745 (9th Cir. 2003) (en banc), the Court of Appeals for the Ninth Circuit held that the CRA did not preclude employers from requiring employees to arbitrate future Title VII claims as a condition of employment.

[34] *See, e.g.*, Craft v. Campbell Soup Co., 161 F.3d 1199 (9th Cir.), *amended*, 177 F.3d 1083 (9th Cir. 1998); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1120 (3d Cir. 1993); Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1067–68 (4th Cir. 1993).

[35] *See, e.g.*, McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997), *cert. denied*, 522 U.S. 912 (1997); O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir. 1997); Rojas v. T.K. Comm'ns, Inc., 87 F.3d 745 (5th Cir. 1996); Ashplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Dickstein v. Du Pont, 443 F.2d 783, 785 (1st Cir. 1971).

[36] 532 U.S. 105 (2001).

[37] *Id.*

his claims against Circuit City to binding arbitration.[38] The district court ruled that the arbitration agreement was valid because it bound both parties, and although it contained some limitations on recovery, the limitations did not amount to the one-sidedness required to make a contract unconscionable.[39] It cited state and federal policies in favor of arbitration in support of its conclusion.[40]

Adams appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the district court, finding that it lacked the authority, as a matter of substantive law, to compel arbitration because the FAA did not apply to employment contracts.[41]

Circuit City appealed, arguing that the Ninth Circuit's conclusion had been rejected by every other Court of Appeals that had addressed the question.[42] The Supreme Court granted certiorari to resolve the issue.

On March 21, 2002, in a 5–4 decision, the Supreme Court handed down *Circuit City Stores, Inc. v. Adams*.[43] The Court held that the exemption found in section 1 of the FAA was confined to transportation workers and, thus, the FAA did *not* exempt all employment contracts from its coverage.

The Court first recognized that "Congress enacted the FAA . . . [as] a response to [the] hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice."[44] The Court noted that the FAA's expansive coverage is explicit in its language and held that "the text of Section 1 precludes interpreting the exclusion provision to defeat the language of Section 2 as to all

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[38] *See* Circuit City Stores, Inc. v. Adams, No. C98-0365 CAL, 1998 U.S. Dist. LEXIS 6215 at Ex. A (N.D. Cal. 1998), *rev'd*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *rev'd & remanded*, 532 U.S. 105 (2001).

[39] *Id.* The DRA also contained a set of "Dispute Resolution Rules and Procedures." These rules defined the claims subject to arbitration, discovery rules, allocation of fees, and available remedies. Under the rules, the amount of damages that Adams could receive was restricted. In addition, the rules required that Adams split the costs of arbitration, including fees for the arbitrator, the court reporter, and the hearing room rental expenses. Significantly, the rules in the DRA did not require Circuit City to arbitrate any of the claims it might have against Adams. The rules also did not require Circuit City to pay the Adams's share of arbitration related costs unless the arbitrator ordered it to do so if Adams prevailed.

[40] *Id.*

[41] The Ninth circuit relied on its prior holding in *Craft v. Campbell Soup Co.*, 161 F.3d 1199 (9th Cir.), *amended*, 177 F.3d 1083 (9th Cir. 1998), which held that the FAA did not apply to labor or employment contracts. The court held that Circuit City's arbitration agreement was an employment contract notwithstanding the disclaimer in the DRA, which stated that "neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and [Adams]." 194 F.3d at 1070.

[42] 532 U.S. at 110–11.

[43] 532 U.S. 105 (2001).

[44] *Id.* at 111.

employment contracts. Section 1 exempts from the FAA *only* contracts of employment of transportation workers."[45]

The *Circuit City* majority rejected a variety of other challenges to mandatory arbitration arrangements in employment agreements.[46] The Attorney Generals of 22 states objected to any narrow reading of the FAA section 1 exclusion—these Attorney Generals favored a broad interpretation of the exclusion (i.e., finding the FAA inapplicable to employment contracts generally) because, if the FAA applied to most employment contracts, then this would broadly preempt state laws limiting the ability of employers and employees to enter into arbitration agreements. The Attorney Generals argued that the Court should not interfere with the states' traditional role in regulating employment relationships that, they urged, would improperly undermine the ability of the states to prevent employers from requiring arbitration of state law discrimination claims.

The Supreme Court noted that, in *Southland Corp. v. Keating*,[47] it had already held that "Congress intended the FAA to apply in state courts, and to pre-empt state anti[-]arbitration laws to the contrary"[48] and this had been reaffirmed by the Court in *Allied-Bruce Terminix Cos. v. Dobson*.[49] In addition, the Court declared, "it would be incongruous to adopt . . . a conventional reading of the FAA's coverage in Section 2 in order to implement pro[-]arbitration policies and an unconventional reading of the reach of Section 1 in order to undo the same coverage."[50]

Significantly, the Court attached great weight to the major benefits of enforcing arbitration provisions, noting that they allowed parties to avoid costly litigation, which would be a great advantage in employment litigation because these cases often involve

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[45] *Id.*

[46] For example, Adams argued that the court's narrow reading of the FAA exemption attributed an irrational intent to Congress because "'those employment contracts *most* involving interstate commerce, and thus most assuredly within the Commerce Clause power in 1925 . . . are *excluded* from [the] Act's coverage; while those employment contracts having a *less* direct and less certain connection to interstate commerce . . . would come *within* the Act's affirmative coverage and would not be excluded.'" *Id.* at 120 (citations omitted) (emphasis in original). The Court found that, contrary to Adam's contention, Congress could have excluded the employment contracts of seamen, railroad employees, and other transportation workers because it had already enacted statutes that were specific to them under their undoubted authority to govern their employment relationships. *Id.* at 120–21. In fact, the Court noted that Congress had already passed laws governing employment disputes between seamen and railroad employees. *Id.*

[47] 465 U.S. 1 (1984).

[48] *Circuit City*, 532 U.S. at 122.

[49] 513 U.S. 265 (1995).

[50] *Circuit City*, 532 U.S. at 122.

smaller sums of money than disputes concerning commercial contracts.[51] The Court noted that difficult choice-of-law questions that often arise in employment disputes tend to compound litigation costs and the burden to courts of law.[52] It concluded that Adams' construction of section 1 of the FAA would "call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's pro[-]arbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'"[53]

The Court reiterated its view that FAA enforcement of employment arbitration agreements was not contrary to the congressional statutes giving employees specific protection against discrimination.[54] As it previously stated in *Gilmer*, the Court indicated that "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."[55]

***EEOC v. Waffle House* (2002).** In *EEOC v. Waffle House, Inc.*,[56] the Supreme Court elaborated on the interaction between mandatory arbitration and the enforcement authority of the EEOC. Notwithstanding mandatory employment arbitration, the Court in *Waffle House* held that not only did individual employees retain the right to file discrimination charges with the EEOC, an arbitration agreement did not prevent the EEOC from filing its own lawsuit on behalf of employee-parties to the agreement. Citing the general principle that a contract cannot bind a nonparty, the Supreme Court ruled that a private arbitration agreement between a South Carolina restaurant and its employee did not bar the EEOC from pursuing victim-specific relief such as back pay, reinstatement, and damages on behalf of the employee under the Americans with Disabilities Act.

The Court stated that, once a charge is filed with the EEOC, the Commission "is in command of the process" and is not bound by an arbitration agreement to which it was not a party. The majority also emphasized the statutory role of the EEOC and its responsibility to vindicate the public interest. Here, the Court held that

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[51] *Id.* at 123.
[52] *Id.*
[53] *Id.* (citing *Allied-Bruce*, 513 U.S. at 275).
[54] *Id.*
[55] *Id.* (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (internal citation omitted)).
[56] 534 U.S. 279 (2002). *But see* 534 U.S. 298 (Thomas, J., dissenting, joined by Chief Justice Rehnquist and Justice Scalia).

"the pro-arbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so."[57] Significantly, the Supreme Court majority specifically rejected the courts of appeals' ruling that, when an individual was party to a mandatory arbitration agreement, the EEOC was limited in its own litigation to "large-scale injunctive relief" and was prohibited from seeking "victim-specific relief in court. . . ."[58] Rather, the Court observed:

> [W]henever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function.[59]

***Green Tree Financial v. Bazzle* (2003).** Another Supreme Court ruling involving the scope of mandatory arbitration—although not in the context of employment arbitration—was issued in *Green Tree Financial Corp. v. Bazzle*.[60] In *Bazzle*, the Supreme Court evaluated whether the arbitration clause in a commercial lending contract could be interpreted as permitting the equivalent of a class action proceeding. After initial legal proceedings, which addressed whether the lending dispute was subject to mandatory arbitration, the parties' dispute was referred to an arbitrator who, apparently after a class was certified by the court,[61] heard the dispute, and ruled in favor the class, awarding the class $9.2 million in statutory damages in addition to attorneys' fees.[62] The South Carolina Supreme Court later ruled that the lending contracts were silent concerning the appropriateness of class arbitration, and thus class arbitration was appropriate.[63] The U.S. Supreme

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[57] 534 U.S. at 294.
[58] *Id.* at 295–96 (footnotes and citations omitted).
[59] *Id.*
[60] 539 U.S. 444 (2003).
[61] The Supreme Court noted it appeared that the "trial court" granted class certification, and the arbitrator merely "administered" the subsequent class arbitration proceedings, although the defendants denied that "class" treatment had been imposed on the arbitrator by the Court. 539 U.S. at 453. The Supreme Court remanded the case for a determination by the arbitrator of whether "class" treatment was permitted under the arbitration provision. *Id.*
[62] *Id.* at 449–50.
[63] *Id.*

Court then reviewed the decision for purposes of ensuring consistency with the FAA.[64]

The Supreme Court noted that courts were empowered to decide "certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."[65] The Court held, however, that whether a mandatory arbitration procedure permitted class claims was a "disputed issue of contract interpretation" for resolution by the arbitrator.[66] Justice Breyer elaborated: "Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide."[67]

***14 Penn Plaza LLC v. Pyett* (2009).** The Supreme Court in *14 Penn Plaza LLC v. Pyett*[68] upheld the enforceability of a collective bargaining agreement provision that mandated the arbitration of statutory claims, including an ADEA claim brought by union members. The Supreme Court majority, in a 5–4 decision, relied on the reasoning in *Gilmer* to support a conclusion that the ADEA does not preclude the arbitration of claims brought under the statute.[69] According to the Court, however, the agreement to arbitrate such statutory claims must be explicitly stated in the collective bargaining agreement.[70] The Court held that a collective bargaining agreement provision that "clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."[71] The Court majority also stated that *Gardner-Denver* and its progeny were inapplicable,[72] and the Court explained that they "do not control the outcome where, as is the case here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimi-

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[64] *Id.* at 450.
[65] *Id.* at 452. The Supreme Court has generally referred to these "gateway matters," which are appropriate for court resolution as opposed to resolution by the arbitrator, as involving substantive rather than procedural arbitrability. *See, e.g.,* AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546 (1964); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960).
[66] *Id.*
[67] *Id.*
[68] 129 S. Ct. 1456 (2009).
[69] *Id.* at 1465 (quoting *Gilmer,* 500 U.S. at 26–29).
[70] *Id. See* discussion at 129 S. Ct. at 1463–66.
[71] *Id.* at 1474.
[72] *Id.* at 1466–69.

nation claims" and "those decisions instead 'involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.'"[73]

The Supreme Court in *Pyett* also took the opportunity to further explain why a contrary result was not required by "broad dicta" in *Gardner-Denver* and similar cases that appeared to be "highly critical of using arbitration to vindicate statutory antidiscrimination rights."[74] The Court majority in *Pyett* offered three responses.

First, the Supreme Court stated that *Gardner-Denver* "erroneously assumed" that arbitration involved the waiver of statutory rights. By comparison, similar to the view of arbitration embraced in *Gilmer*, the Court in *Pyett* stated that the decision to resolve ADEA claims by way of arbitration instead of litigation does *not* waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance.[75]

Second, the Supreme Court in *Pyett* indicated that it had "corrected" a mistaken suggestion in *Gardner-Denver* that certain informal features of arbitration made it "a comparatively inappropriate forum for the final resolution of [employment] rights."[76]

Third, in relation to the concern expressed in *Gardner-Denver* that a union in arbitration might subordinate an individual employee's interests to the collective interests of all bargaining unit employees,[77] the Supreme Court in *Pyett* stated that such a fear did not warrant introducing a qualification to the ADEA that was not evident from the statute itself. The Court also asserted that such a conflict-of-interest argument amounted to an unsustainable collateral attack on the National Labor Relations Act (NLRA), and that Congress had provided for the resolution of such conflicts in several ways (i.e., union members could bring a duty of fair representation claim against the union; a union could be subjected to direct liability under the ADEA if it discriminated on the basis of age; and union members could also file age-discrimination claims with the EEOC and the National Labor Relations Board).[78]

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[73] *Id.* at 1465 (quoting *Gilmer*, 500 U.S. at 35).
[74] *Id.* at 1466–69.
[75] *Id.* at 1468–69
[76] *Id.* at 1471 (quoting *Gardner-Denver*, 415 U.S. at 56, and citing Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987)).
[77] 415 U.S. at 58 n.19.
[78] *Id.* at 1472–73.

Ongoing Employment Arbitration Safeguards—The Role of State Law

An important characteristic of mandatory arbitration under the FAA—in relation to the enforcement of mandatory arbitration arrangements—is the FAA's broad preemption of any state laws that disfavor the arbitration of legal claims, whether the claims themselves arise under federal or state law.[79] Section 2 of the FAA, however, provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds that exist at law or in equity for the revocation of any contract.*"[80]

Thus, notwithstanding the FAA's articulation of a broad policy favoring the enforcement of arbitration agreements, the statute nonetheless makes an arbitration agreement vulnerable to challenge under state law, depending on the jurisdiction, provided that the particular legal challenge is applicable to contracts generally, rather than arbitration specifically. As recognized by the Ninth Circuit Court of Appeals, "although 'courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions,' general contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements."[81]

Post–*Circuit City* cases demonstrate that the mandatory arbitration of employment law claims does, in fact, remain subject to important safeguards, applicable under state contract law; the absence of which has prompted courts to invalidate arbitration agreements in a substantial number of cases. A non-exhaustive list of areas that have received attention in the decided cases, though with a variety of outcomes, includes the following:

1. **Unconscionability.** Cases involving mandatory employment arbitration have continued to focus on whether the arbitration procedure satisfies fundamental standards of fairness,

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[79] Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265 (1995); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[80] 9 U.S.C. §2 (emphasis added). The AFA seemingly leaves intact the impact of state law on the FAA enforceability of mandatory arbitration agreements (although, as noted above, all "pre-dispute" employment and civil rights arbitration agreements would be invalidated). The current FAA §1 language, however, referring to state law ("save upon such grounds that exist at law or in equity for the revocation of any contract") would become "to the same extent as contracts generally, except as otherwise provided in [this] title." AFA §4 (amending FAA §2, 9 U.S.C. §2).

[81] *Circuit City Stores, Inc.*, 279 F.3d 889, 892 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1966)).

and/or whether it favors the employer, procedurally and substantively, so disproportionately as to be unconscionable.[82]

2. **Mutuality.** Numerous cases in FAA arbitration have regarded mutuality (i.e., whether the arbitration agreement requires arbitration of various employer claims as well as the employee's claims against the employer) as relevant to the question of whether an employment arbitration agreement is enforceable.[83]

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[82] *See, e.g.*, *Circuit City Stores, Inc.*, 279 F.3d at 892, the remand of the Supreme Court *Circuit City* ruling, where the Ninth Circuit declared unenforceable the arbitration agreement, relative to an applicant for employment, where the agreement ostensibly "function[ed] as a thumb on Circuit City's side of the scale"; it was deemed "procedurally unconscionable" as a "contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power" (*id.* at 893); the arbitration agreement lacked mutuality (i.e., it failed to have the "modicum of bilaterality" required for a valid contact) based on the failure to require Circuit City to arbitrate claims it might have against the employee (*id.*); it limited the available damages to one year of back pay, up to two years of front pay, compensatory damages, and punitive damages in an amount up to the greater of the amount of back pay and front pay awarded or $5,000, substantially less than potential damages under the California Fair Employment and Housing Act (FEHA) (*id.* at 894); it required cost-sharing (unlike conventional litigation that gave prevailing plaintiffs the right to be awarded a full recovery of costs); and the arbitration agreement imposed a strict one-year statute of limitations (which the court held deprived plaintiffs of the "continuing violation doctrine available in FEHA suits"). *Id.* For similar reasons, the Ninth Circuit also invalidated Circuit City's mandatory arbitration program relative to an incumbent employee, not merely an applicant, who applied for and was accepted for employment conditioned on the mandatory arbitration of employment disputes. *See* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004); *see also* Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1262 (9th Cir. 2005) (applying Washington state law); *cf.* Circuit City Stores, Inc. v. Ahmed, 195 F.3d 1131 (9th Cir. 1999), *vacated and remanded*, 532 U.S. 938 (2001), *on remand*, 283 F.3d 1198 (9th Cir. 2002), where the incumbent employee (Ahmed) worked for approximately one month, at which time Circuit City adopted an employment arbitration program giving incumbent employees 30 days in which to mail in an "opt-out" form; the employee did not mail in the "opt-out" form, and the mandatory arbitration procedure was upheld by the Ninth Circuit, because the arbitration agreement "allowed employees a meaningful choice not to participate in the program," which the court found "to be dispositive" (195 F.3d at 1199).

[83] *See, e.g.*, Seawright v. American Gen. Fin. Servs., Inc., 507 F.3d 967, 974 (6th Cir. 2007) (upholding employment arbitration agreement, applying Tennessee state contract law, finding that "the arbitration process was binding on both employer and employee, regardless of who requested arbitration," and that "employer and employee were equally obligated to arbitrate those disputes falling within coverage of the plans"); Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) (upholding arbitration agreement notwithstanding lack of mutuality and potential unequal bargaining power, among other things); Bennett v. Cisco Sys., Inc., 63 Fed. Appx. 202, 2003 U.S. App. LEXIS 7948 (6th Cir. Apr. 22, 2003) (unpublished) (upholding arbitration agreement and arbitrator's award of more than $5.3 million in favor of Cisco Systems against former employee accused of engaging in illegal kickback scheme; court concluded agreement contemplated arbitration of disputes initiated by either party); Circuit City Stores Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002) (upholding arbitration arrangement notwithstanding no requirement that the employer arbitrate its claims against employees, but where employees were given the chance to "opt out" of the program). *But see Circuit City Stores, Inc.*, 279 F.3d at 892 (lack of mutuality of numerous factors responsible for court's determination that employment arbitration arrangement was unenforceable); *Ingle*, 328 F.3d

3. **Short Claim-Filing Limitations Period.** Courts have also evaluated the imposition of unduly short claim-filing limitations periods when deciding whether employment arbitration agreements are enforceable.[84]
4. **Notice, Consideration, and Related Issues.** Other cases, applying state contract law as required under the FAA, have also addressed whether employees have been afforded adequate notice of mandatory employment arbitration, and whether the circumstances otherwise support the existence of a binding obligation for employees to arbitrate their legal claims against the employer.[85]

1165 (same); Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 784–85 (9th Cir. 2002) (mandatory arbitration arrangement deemed substantively unconscionable because it compelled arbitration of claims that employees would ordinarily bring, such as anti-discrimination, federal, and state claims, but excluded claims traditionally brought by employers, such as trade secrets, intellectual property, and unfair competition); Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 759–60 (7th Cir. 2001) (no mutuality where employer had employee enter into an agreement with a third-party arbitration service, to which it was not a party, whereby employee agreed to use arbitration service's forum, rules, and procedures to arbitrate employee's claims against employer and the arbitration service made vague and illusory promises to employee regarding its commitment to hear and decide all of his claims against employer).

[84]This was a factor in *Circuit City Stores, Inc. v. Adams*, 279 F.3d at 892, where the court held that a one-year limitations period unfairly rendered unavailable the "continuing violation doctrine" available under California state law (279 F.3d at 894). *See also* Davis v. O'Melveny & Myers, 485 F.3d 1066, 1076–78 (9th Cir. 2007) (same); *Ingle*, 328 F.3d 1165 (same); Alexander v. Anthony Int'l L.P., 341 F.3d 256, 263 (3d Cir. 2003) (30-day time limitation and other objectionable provisions rendered arbitration agreement "fundamentally unconscionable" and not severed from arbitration agreement deemed unenforceable).

[85] *See Seawright*, 507 F.3d at 972; Tinder v. Pinkerton Sec., 305 F.3d 728 (7th Cir. 2002) (finding the employer's implementation of a mandatory arbitration plan accompanied by continued employment was sufficient consideration for the arbitration program to be enforceable); Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (Circuit City arbitration arrangement upheld, in part, because the 30-day advance written notice limitation on Circuit City's right to terminate or modify the program was deemed adequate consideration for the employee's arbitration commitment, and reserving the right to terminate or modify the arbitration program did not render it unenforceable); Circuit City Stores Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002) (mandatory arbitration arrangement enforced where, among other things, the employee failed to utilize the offered "opt-out" procedure); Hightower v. GMRI Inc., 272 F.3d 239 (4th Cir. 2001) (applying North Carolina law, and finding there to be "mutual assent" to arbitrate employment discrimination claims, where employees were informed about the new dispute resolution program, which included binding arbitration, and the plaintiff signed an attendance sheet acknowledging his presence and his receipt of materials describing the program, followed by the plaintiff's continued employment); Circuit City Stores, Inc. v. Ahmed, 195 F.3d 1131 (9th Cir. 1999), *vacated & remanded*, 532 U.S. 938 (2001), *on remand*, 283 F.3d 1198 (9th Cir. 2002) (upholding employment arbitration program was upheld, notwithstanding its adoption one month *after* the employee commenced working, but where the employee was given 30 days to "opt-out" of the program by sending in a written "opt-out" notice (195 F.3d at 1199). *But see* Skirchak v. Dynamics Research Corp., 508 F.3d 49, 60–61 (1st Cir. 2007) (invalidating arbitration class action waiver, finding that "[t]he timing, the language, and the format" of the employer's presentation of its arbitration program "obscured . . . the waiver of class rights," the waiver "lacked both prominence and clarity," there was inadequate notice, and dissemination of the entire program via e-mail

5. **Arbitration Costs.** Numerous cases evaluating the FAA enforceability of employment arbitration agreements have scrutinized the imposition of various costs on individual claimants, under a variety of employment arbitration procedures. Indeed, this was a factor in the Ninth Circuit remand from the Supreme Court's *Circuit City* ruling, where the court of appeals invalidated the employment arbitration agreement, in part, because it imposed various costs on the employee without providing for the recovery of costs as would occur for prevailing plaintiffs in conventional litigation.[86]

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the Tuesday before Thanksgiving, without requiring a response, all "raise unconscionability concerns"); *Ingle,* 328 F.3d at 1179 (invalidating arbitration program where the plaintiff was an incumbent employee whose employment, from the commencement of employment, had been conditioned on mandatory arbitration and because, among other things, Circuit City had the right to modify or terminate "unilaterally" the arbitration procedure whereas "the arbitration agreement afford[ed] no such power to employees"); Owen v. MBPXL Corp., 173 F. Supp. 2d 905 (N.D. Iowa 2001) (holding arbitration agreement unenforceable absent sufficient evidence that agreement was actually received by or known to the employee-plaintiff). *Cf. Circuit City Stores*, 279 F.3d at 892 (involving an applicant's legal claims under an arbitration arrangement raising "identical" issues but without any employee "opt-out" opportunity, which prompted the court to declare the arbitration program unenforceable (citations omitted); Dumais v. Am. Golf Corp. d/b/a/ Paradise Hills Golf Club, 299 F.3d 1216, 1219 (10th Cir. 2002) (finding conflicting handbook provisions to render an arbitration agreement unenforceable, because the employee handbook could be interpreted as allowing the employer to modify a mandatory arbitration agreement without notice).

[86] *See Circuit City Stores*, 279 F.3d at 893–94; *see also Ingle*, 328 F.3d at 1177 (finding under California law an arbitration agreement "cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court") (citation omitted); Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (cost-sharing provision in arbitration program unenforceable, but deemed severable from balance of program, which court deems enforceable); Spinetti v. Service Corp. Int'l, 324 F.3d 212, 217 (3d Cir. 2003) (cost-sharing provision in mandatory arbitration agreement deemed unenforceable under Title VII and the ADEA, which both authorize attorneys' fees and costs to the prevailing party, but cost-sharing provision was deemed severable, and court enforced remainder of arbitration agreement); Ferguson v. Countrywide Credit Indus, Inc., 298 F.3d 778, 784–85 (9th Cir. 2002) (arbitration agreement deemed unenforceable where, among other things, it made the employee pay expenses beyond the normal costs associated with bringing a court action); Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002) (arbitration dispute remanded for evaluation of plaintiff's claimed inability-to-pay for arbitration, where arbitration agreement provided for employee to pay one-half of the costs). *Accord:* McCaskill v. SCI Mgmt. Corp., 298 F.3d 677 (7th Cir. 2002); Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230, 240 (N.D.N.Y. 2001). *But see* Alexander v. Anthony Int'l L.P., 341 F.3d 256, 263 (3d Cir. 2003) (cost-sharing and other objectionable provisions not severed, and arbitration agreement declared unenforceable); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997) (upholding a pre-employment "Pre-Dispute Resolution Agreement" mandating the arbitration of legal claims, but the court stated "an employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure the resolution of statutory claims under Title VII (any more than an employee can be made to pay a judge's salary). If there is any risk that an arbitration agreement can be construed to require this result, this would surely deter the bringing of arbitration and constitute a de facto forfeiture of the employee's statutory rights."). *Cf.* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (non-employment arbitration case where arbi-

6. **Limitations on Damages.** As one might expect, restrictions on the damages recoverable in employment arbitration for statutory violations has been strongly disfavored in many cases where courts have declared unenforceable company employment arbitration procedures.[87]
7. **Limitations on "Class" Claims.** As noted above, the Supreme Court in *Green Tree Financial Corp. v. Bazzle*[88] held that whether a mandatory arbitration procedure permitted "class" claims was a question of contract interpretation for resolution by the arbitrator. Although *Bazzle* might suggest "class" treatment is *not* a prerequisite to enforceability of an arbitration agreement (i.e., by holding that the question of "class" treatment depended on *whether* arbitration agreement permitted it), various employment arbitration cases have dealt in a variety of ways with claims that arbitration agreements should be deemed unenforceable when they include a waiver of "class" arbitration proceedings.[89]

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tration agreement deemed enforceable, though silent on the allocation of arbitration costs, where plaintiff did not establish that arbitration-related costs would be prohibitively high); Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1260 (11th Cir. 2003) (affidavit with no supplementary documentation deemed too speculative to prove likelihood of incurring "prohibitive" costs forcing the plaintiff to relinquish his claim under Title VII).

[87] *See, e.g.*, *Circuit City Stores*, 279 F.3d at 893–94 (available damages were limited to one year of back pay, up to two years of front pay, compensatory damages, and punitive damages in an amount up to the greater of the amount of back pay and front pay awarded or $5,000, substantially less than potential damages under the California FEHA); *see also Ingle*, 328 F.3d 1165 (same); *Morrison*, 317 F.3d 646 (damages limitations in arbitration program unenforceable, but deemed severable from balance of program, which court deems enforceable); *Alexander*, 341 F.3d at 263 (restrictions on recoverable damages, among other objectionable provisions not severed, invalidating arbitration agreement).

[88] 539 U.S. 444 (2003).

[89] In *Skirchak*, 508 F.3d at 59–60, the First Circuit held that the arbitration agreement's waiver of "class" claims, asserting violations of the Fair Labor Standards Act (FLSA), was unenforceable based on the specific circumstances presented, applying Massachusetts law, and reasoning that the waiver resulted in "oppression and unfair surprise to the disadvantaged party." Slightly more than one month prior to the Supreme Court's *Bazzle* decision, the Ninth Circuit in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d at 1175, stated the failure to permit class arbitration claims was "patently one-sided," thereby providing further support for the court's substantive unconscionability ruling. According to the Ninth Circuit in *Ingle*: "Circuit City, through its bar on class-wide arbitration, seeks to insulate itself from class proceedings while conferring no corresponding benefit to its employees in return. This one-sided provision proscribing an employee's ability to initiate class-wide arbitration operates solely to the advantage of Circuit City. Therefore, because Circuit City's prohibition of class action proceedings in its arbitral forum is manifestly and shockingly one-sided, it is substantively unconscionable." 328 F.3d at 1175–76 (footnotes and citations omitted). In *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), *cert. denied*, 128 S. Ct. 1743 (2008), the California Supreme Court evaluated the "class" arbitration waiver in Circuit City's employment arbitration agreement, and held that "at least in some cases, the prohibition of class-wide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws. Accordingly, such class arbitration waivers should not be enforced if

8. **Agency Charges and Investigations.** As noted above, the Supreme Court decided in *EEOC v. Waffle House, Inc.*[90] that an arbitration agreement not only could not preclude employees from filing charges of discrimination with the EEOC, the agreement could not bar the EEOC from pursuing individual-specific relief such as back pay, reinstatement, and damages, on behalf of the employee. Such restrictions involving agency-related access and investigations have continued to be a factor in other cases involving employment arbitration agreements that have been deemed unenforceable.[91]
9. **Confidentiality.** Arbitration proceedings tend to be less public than conventional court litigation. Thus, courts have invalidated restrictive provisions broadly requiring confidentiality and unduly limiting claimant contact with potential witnesses and others.[92]
10. **Selection of the Arbitrator.** Although arising with less frequency than other issues, courts have also addressed questions concerning arbitrator selection in a number of cases involving mandatory arbitration.[93]

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a trial court determines . . . that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." 42 Cal. 4th at 450. For other cases finding class action arbitration waivers to be unenforceable, *see* Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976, 984 (9th Cir. 2007) (applying California law); Powertel, Inc. v. Bexley, 743 So. 2d 570, 576–77 (Fla. Dist. Ct. App. 1999) (applying Florida law). *Contra* Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004); Adkins v. Labor Ready, 303 F.3d 496, 503 (4th Cir. 2002).

[90] 534 U.S. 279 (2002).

[91] *See, e.g.*, Davis v. O'Melveny & Myers, 485 F.3d 1066, 1081–83 (9th Cir. 2007) (holding that arbitration agreement is unenforceable where, among other things, it permitted the filing of charges with the EEOC and any "fair employment practices" agency, but otherwise barred any "administrative action," thereby prohibiting the filing of FLSA complaints with the Department of Labor).

[92] *See, e.g.*, *Davis*, 485 F.3d at 1078–79 (indicating that "confidentiality provisions in arbitration agreements" were *not* "per se unconscionable under California law," but the court declared invalid an arbitration agreement that contained confidentiality restrictions that would prevent the employee "from contacting other employees to assist in litigating (or arbitrating) an employee's case," and would place the employer "in a far superior legal posture" by preventing plaintiffs from accessing precedent); *see also* Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) ("confidentiality provisions usually favor companies over individuals"); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (same).

[93] *See, e.g.*, Brook v. Peak Int'l, Ltd., 294 F.3d 668, 672–73 (5th Cir.), *corrected*, 2002 U.S. App. LEXIS 13647 (5th Cir. 2002) (procedural irregularities concerning arbitrator's selection, based on American Arbitration Association (AAA) procedures rather than those set forth in Chief Executive Officer's employment agreement held not to warrant invalidating resulting arbitration decision, where employee acquiesced in arbitrator's selection and failed to object in a timely manner); *Morrison*, 317 F.3d at 678–79 (case remanded for consideration of claimant's argument that AAA failed to adhere to arbitrator selection procedures set forth in arbitration agreement).

11. **Limited Rights of Appeal.** It is in the nature of mandatory arbitration that the resulting decision is expected to be "final and binding." And any losing party in arbitration has an extremely difficult, and usually insurmountable, uphill battle attempting to overturn the award in subsequent court proceedings, based on the extraordinary deference afforded the arbitrator's decision and the extremely narrow standard of review that will be applied in any proceeding to vacate the award.[94] There is some support, however, for the proposition that an arbitrator's application of relevant legal principles may receive greater scrutiny when cases involve statutory rights. In *Cole v. Burns International Security Services*,[95] the court stated that the "nearly unlimited deference paid to arbitration awards in the context of collective bargaining is not required, and not appropriate, in the context of employees' statutory claims" and that, under Supreme Court case law, "arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance

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[94]As the Supreme Court stated in one of the well-known *Steelworkers Trilogy* cases: "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator." USWA v. American Mfg. Co., 363 U.S. 564, 567–68 (1960); *see also* USWA v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); USWA v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). The same principle was reaffirmed even more broadly by the Supreme Court in Paperworkers v. Misco, Inc., 484 U.S. 29 (1987), where the Court stated:

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. . . So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.

Id. at 37–38 (citations omitted). The Supreme Court in *Misco* went so far as to indicate that "grievous error" and "improvident, even silly fact-finding," even if established by the record evidence, would be "hardly a sufficient basis" for disregarding the arbitrator's ruling at least as to relevant factual questions. *Id.* at 39. Notwithstanding the obstacles, it remains possible in particular cases to overturn an arbitration award if, for example, the arbitrator exceeds the authority conferred under the applicable arbitration agreement. *See*, *e.g.*, Anheuser-Busch, Inc. v. Beer Drivers, Local Union No. 744, Int'l Brotherhood of Teamsters, 280 F.3d 1133 (7th Cir. 2002), *cert. denied*, 537 U.S. 885 (2002); Poland Spring Corp. v. UFCW Local 1445, 314 F.3d 29 (1st Cir. 2002), *cert. denied*, 540 U.S. 818 (2003).

[95]105 F.3d 1465, 1468–69 (D.C. Cir. 1997).

with statutory law" and "the courts will always remain available to ensure that arbitrators properly interpret the dictates of public law."[96]

The Ghosts of Arbitration Past, Present, and Yet To Come

Armed with the context provided above, the implications of the AFA, and its departure from fundamental values that have long shaped public policy, can be most easily examined by evaluating certain aspects of arbitration's past, present, and future, which are discussed below.

The Ghost of Arbitration Past

Arbitration's (Well-Deserved) Illustrious History. When evaluating the AFA as a departure from fundamentals that have long shaped our national employment laws, the first stopping point in our journey highlights the admiration that has so long been bestowed on employment-related arbitration.

If arbitration has such onerous perils, pitfalls, and shortcomings, in comparison to conventional courtroom litigation, this prompts one to ask why Congress could ever have been so short-sighted as to enact a Federal Arbitration Act in the first place. Indeed, when answering this question, one learns that the hostility towards arbitration, which lies at the heart of the AFA, would be premised on a public policy that was *rejected* in the United States more than eight decades ago.

The policies underlying the FAA, resulting in its enactment in 1925, were described by the Court of Appeals for the Sixth Circuit in *Seawright v. American General Financial Services, Inc.*[97] The court stated:

> It has been over eighty years since the FAA was originally enacted. Its purpose was to *reverse the longstanding judicial hostility towards arbitration agreements and to place arbitration agreements upon the same footing as other contracts*. . . . Congress has asserted a national policy favoring arbitration and the Supreme Court has found that "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 judicial, forum." . . . While it is unjust to bind a party to agreement in the absence of assent or to enforce a contract that is unconscionable, *it betrays an unfounded hostility towards arbitration when courts actively*

[96] *Id.* at 1469.
[97] 507 F.3d 967 (6th Cir. 2007).

> *seek to void substantively reasonable agreements procured through fair procedure.* The Supreme Court has "rejected generalized attacks on arbitration *that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.*"....*Even claims "arising under a statute designed to further important social policies" may be arbitrated provided that "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.*"[98]

Following enactment of the FAA, in 1935 Congress passed the National Labor Relations Act (NLRA),[99] which broadly preempts state laws, forming the cornerstone of national labor policy in the United States. And by the time Congress passed the Labor Management Relations Act (LMRA) in 1947, arbitration had become so prominent in the resolution of workplace disputes that the LMRA explicitly stated "[f]inal adjustment by a method agreed upon by the parties *is hereby declared to be the desirable method* for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement...."[100] Significantly, the LMRA acknowledged arbitration's rightful place in the resolution of workplace disputes, *even though* a different LMRA provision vested jurisdiction *in the federal courts* to resolve disputes over any "violation of contracts between and employer and a labor organization...."[101]

For all of arbitration's imperfections (i.e., no discovery, no formal rules of pleading, little or no "motion" practice, and extremely loose evidentiary standards), arbitration was doing enough things right by 1947 to make it "the desirable method" for resolving workplace disputes, even though the LMRA gave the federal courts jurisdiction over much of the same territory.

Nor did arbitration's prominence escape the attention of the U.S. Supreme Court. In the well-known *Steelworkers Trilogy* cases—*USWA v. American Manufacturing Co.*,[102] *USWA v. Warrior & Gulf Navigation Co.*,[103] *USWA v. Enterprise Wheel & Car Corp.*[104]—the Supreme Court gave a three-fold endorsement to arbitration as a trusted vehicle for workplace adjudication.

In *Warrior & Gulf*, Justice William O. Douglas described the unique function played by arbitration and arbitrators. He

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[98] *Id.* at 979 (emphasis added) (citing *Gilmer*, 500 U.S. at 21, 26; Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 89–90 (2000)) (other citations omitted).
[99] 29 U.S.C. §§151 *et seq.*
[100] LMRA §203(d), 29 U.S.C. §173(d) (emphasis added).
[101] LMRA §301, 29 U.S.C. §185(a) (emphasis added).
[102] 363 U.S. 564 (1960).
[103] 363 U.S. 574 (1960).
[104] 363 U.S. 593 (1960).

explained: "[a]rbitration is the means of *solving the unforeseeable* by molding *a system of private law for all the problems which may arise and to provide for their solution* in a way which will generally accord with the variant needs and desires of the parties."[105] According to Justice Douglas, "[t]he labor arbitrator *performs functions which are not normal to the courts*; the considerations which help him fashion judgments *may indeed be foreign to the competence of courts*."[106] Justice Douglas then expounded on the unique skills and expertise relevant to the resolution of workplace disputes:

> *The labor arbitrator's source of law is not confined to the express provisions of the contract*, as the industrial common law—the practice of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . *The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.*[107]

When the NLRA was adopted—and even when the Supreme Court handed down the *Steelworkers Trilogy* cases—Congress still had not enacted *any* of the additional employment laws that have since become so well known.[108] Consequently, when arbitration became the preferred method for resolving disputes, it was not merely entrusted with our national *labor* policy, it was effectively responsible for the day-to-day administration of our national *employment* policy.

The later emergence of our enormous patchwork of federal, state, and local employment laws means, obviously, that the demands on our courts have only increased—dramatically—from the 1930s, 1940s, 1950s, and early 1960s. So if there ever existed a reason to favor arbitration in the past (i.e., based on arbitration's speed, reliability, predictability, and inexpensiveness), then Congress at the present time has all the more reason to enhance

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[105] 363 U.S. at 581 (emphasis added).
[106] *Id.* (emphasis added).
[107] *Id.* at 581–82 (emphasis added).
[108] To name only a few examples, the Equal Pay Act, 29 U.S.C. §206(d), was enacted in 1963; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000 et seq., was enacted in 1964; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621 et seq., was enacted in 1967; the Employee Retirement Income Security Act, 29 U.S.C. §§1001 et seq., was enacted in 1974; the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§2101 et seq., was enacted in 1988; the Americans with Disabilities Act, 42 U.S.C. §§12101 et seq., was enacted in 1991; and the Family and Medical Leave Act, 29 U.S.C. §§2601 et seq., was enacted in 1993.

arbitration's role in our present regulatory system.[109] The AFA—by undermining the role played by arbitration—goes in the wrong direction.

Arbitration has never been single-handedly responsible for administering our national employment policies. For example, federal employment law's development in the United States has also been a primary responsibility of the National Labor Relations Board (NLRB or Board). Here as well, the past teaches a need to appreciate the distinctive nature of work-related problems and issues, which warrants specialized expertise when resolving them. Thus, in *NLRB v. J. Weingarten, Inc.*,[110] the court of appeals determined—contrary to the NLRB—that employees had no "need" for union assistance at investigative interviews. The court's failure to afford deference to the Board resulted in the following Supreme Court rebuke:

> *The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. . . . It is the province of the Board, not the courts, to determine whether or not the "need" exists [for representation] in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations.* For the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life," . . . and *its special competence in this field is the justification for the deference accorded its determination.*[111]

Certainly, it is true—as one might expect AFA proponents to point out—that much of arbitration's rich history has been devoted to the interpretation of collective bargaining agreements,

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[109]Using arbitration to resolve contract disputes and statutory claims is materially different from the proposed role that arbitration would play in legislation introduced as the Employee Free Choice Act (EFCA). *See* S. 560, 111th Cong., 1st Sess. §3 (2009); H.R. 1409, 111th Cong., 1st Sess. §3 (2009). Under EFCA, arbitration could be substituted for collective bargaining in new employer-union relationships after approximately 130 days of bargaining, resulting in arbitrator-imposed employment terms that would be binding for a 2-year period. *Id.* Among other problems associated with such an arrangement, this role for arbitration would dramatically depart from the longstanding principle that federal law governs the *process* of collective bargaining, and that substantive contract terms *cannot* be forced on unions, employees, or employers in the absence of an agreement. *See* NLRA §8(d), 29 U.S.C. §158(d) (the obligation to bargain under the NLRA "does not compel either party to agree to a proposal or require the making of a concession"); H.K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970) ("while the [NLRB] does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision . . . ").

[110]420 U.S. 251 (1975).

[111]NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266–67 (1975) (emphasis added) (citing NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)). *See also* American Ship Building Co. v. NLRB, 380 U.S. 300, 316 (1965); NLRB v. Brown, 380 U.S. 278, 291 (1965); NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957) (other citations omitted); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196–97 (1941).

rather than the resolution of statutory issues. The NAA itself has carefully evaluated, in the past, whether it is even appropriate for labor arbitrators to consider "external law" when rendering a decision interpreting collective bargaining agreements.[112]

The fact that labor arbitration has, historically, been devoted to labor contract interpretation belies four more fundamental points, all of which favor employment law arbitration.

First, many, if not most, employment law claims turn on factual questions indistinguishable from those that have long been grist for the mill of arbitration. As to these employment-related factual issues, there is abundant evidence that arbitration, in many respects, is equal or superior to the courts for accomplishing a fair adjudication.

Second, many legal issues arising under federal and state statutes have, literally, been addressed for decades by arbitrators as contract interpretation questions. Examples include contractual non-discrimination and anti-retaliation provisions that, especially since the 1960s, have routinely encompassed prohibitions against discrimination based on sex, race, color, national origin, religion, age, and handicap or disability. Likewise, many statutory claims asserted under the Employee Retirement Income Security Act (ERISA) involve the same types of contractual determinations under collective bargaining agreements and benefit plans that have long been addressed in arbitration.

Third, even to the extent one regards arbitration as traditionally involving contract interpretation rather than the application of statutory rights, one can make a reasonably strong case there is not much material difference between the two. Contract and statutory interpretation both require giving force and effect to relevant language, relevant history, and underlying policies and objectives. One refinement that has possible merit, in the context of non-labor employment arbitration, is a party's right to obtain the same type of appellate review—with the same standard of review—from arbitrated employment law disputes. This has

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[112] *See, e.g.*, Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), at 1; Mittenthal, *The Role of Law in Arbitration*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), at 43; Sovern, *When Should Arbitrators Follow Federal Law*, in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1970), at 70. *See also* Scheinholtz & Miscimarra, *The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration*, 40 Arb. J. 55 (1985).

received some attention in the courts,[113] and can be constructively addressed without undercutting the other positive tradeoffs associated with employment arbitration.

Fourth, and most important, a key factor responsible for arbitration's success has been the ability of arbitrators to apply their extensive experience addressing "real world" realities at work. Such a perspective can all too easily get lost amidst the sheer weight of conventional court litigation. In *Enterprise Wheel & Car*, the Supreme Court referred to the possibility that a visitor might regard many places of work as akin to "another world" especially where "tradition and technology have strongly and uniquely molded the ways [employees] think and act when at work," amounting to a "miniature society" that both "differs from" and "parallels the world outside in social classes, folklore, ritual, and traditions."[114] Though originally describing industrial mills and factories, these words still aptly describe many contemporary workplaces. This is the stuff that experienced arbitrators can uniquely appreciate, more so than can be discerned by years of court litigation.

The Misplaced "Inequality" Debate—Back to the Future. Another insight gleaned from past experience concerns the misplaced premise underlying the AFA—that all pre-dispute nonlabor employment arbitration procedures must be prohibited because there is "inequality" of bargaining power between the employers who adopt such procedures and the employees who choose to work for such employers (or continue employment following the arbitration procedure's adoption).[115]

Precisely the same ill-fated "inequality" argument was raised in the 1980s when plaintiffs' rights groups attempted, unsuccessfully, to have all forward-looking waiver and release agreements

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[113] *See* the text accompanying notes 94–95, *supra*, (and cases discussed therein).

[114] 363 U.S. at 596 n.2 (quoting Walker, *Life in the Automatic Factory*, 36 Harv. Bus. Rev. 111, 117 (1958)).

[115] The authors believe, although *post-dispute* arbitration would ostensibly be permitted under the AFA, post-dispute arbitration would be agreed upon only in a very small number of situations, because: (1) once a dispute has already arisen, arbitration would most likely be sought by a party only if he or she would uniquely be advantaged, in which case arbitration would likely be opposed by the disadvantaged party; and (2) in the absence of a preexisting, established arbitration procedure, the consideration of post-dispute arbitration would cause yet another layer of negotiation and posturing concerning whether arbitration should take place, what it should involve, what arbitrator(s) should be selected, and other variables. Even if litigants or potential litigants under the AFA occasionally resorted to arbitration, there is little question this type of arbitration would involve only a small fraction of the employees and employers who could be covered by pre-dispute arbitration arrangements in the absence of the AFA.

deemed invalid for purposes of the federal ADEA. Thus, in opposition to the EEOC's rule permitting "knowing and voluntary" unsupervised age discrimination waiver agreements, Senator John Melcher (D., Mont.)—then Chairman of the Senate Special Committee on Aging—stated that unsupervised waivers were objectionable "because of the *inherently different bargaining power of employers and employees*. There will always be employees who feel that if they do not sign a waiver they will not only be out of a job, but also will forfeit any present or future benefits to which they may otherwise be entitled."[116] Based on these and similar arguments, the Age Discrimination in Employment Waiver Protection Act[117] was introduced in Congress, which would have effectively invalidated unsupervised waivers of federal age discrimination claims.

The parallels are striking between current AFA claims and those presented by the "waiver-invalidation" advocates in the 1980s. Similar to the AFA assault on "pre-dispute" arbitration agreements, the waiver-invalidation advocates opposed all waivers entered into before a "bona fide claim" of age discrimination had been asserted. Similar to the AFA's relegation of all employment law disputes to the courts, the waiver-invalidation advocates argued that it should be mandatory to have court review and approval (or EEOC review and approval) before any forward-looking waivers could be adopted. Just as the current AFA arguments are contrary to the position taken by the courts themselves (which uphold predispute arbitration agreements, as long as they satisfy FAA and state contract law standards), the waiver-invalidation arguments in the 1980s were contrary to the EEOC's own preexisting rule that permitted "knowing and voluntary" unsupervised waivers.[118]

There are several fundamental flaws in the "inequality" arguments asserted by AFA proponents, just like similar flaws in the arguments presented by waiver-invalidation advocates in the 1980s.

First, as noted above, to the extent that "inequality" bears on whether an employment arbitration agreement should be enforced, existing case law reveals that the courts have been

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[116]133 Cong. Rec. S14383 (Oct. 15, 1987) (quoted in Sen. Rep. No. 79, 101st Cong., 1st Sess. 7 (1989) (Senate Report accompanying the "Age Discrimination in Employment Waiver Protection Act of 1989," reported as S. 54, 101st Cong., 1st Sess. (1989))) (emphasis added).

[117]S. 54, 101st Cong., 1st Sess. (1989).

[118]For the EEOC's rule permitting "knowing and voluntary" unsupervised waivers, *see* 52 Fed. Reg. 32,293 (Aug. 27, 1987); *see also* Sen. Rep. No. 79, 101st Cong., 1st Sess. 6 (1989).

extremely vigilant, invalidating arbitration agreements that are substantively and/or procedurally "unconscionable," which takes into account not only the parties' relative bargaining equality, but also the actual content of any resulting arbitration arrangement.

Second, there is no necessary correlation between bargaining "equality" among private parties and what constitutes good public policy. Obviously, employment relationships in the United States are regarded as essentially involving a form of contract between employer and employee, even when people are considered "at-will" employees. The "contract" analogy frequently breaks down, however, especially when countervailing public policies come into play. Indeed, bargaining "equality" is irrelevant when one talks about conventional court enforcement of employment claims, because employee-claimants play virtually no role in the development of relevant rules and procedures. Thus, from the perspective of public policy, concerns about "equality" beg the question as to what dispute resolution procedures represent good public policy choices. Any process for adjudicating employment disputes—whether it involves a pre-dispute arbitration procedure or conventional litigation—should involve scrutiny into: (1) whether the process is fundamentally fair; (2) whether the process encourages access; and (3) whether the process can be depended on by the employer and employees alike. If a pre-dispute arbitration procedure passes muster under these standards, then relative "equality" in bargaining is immaterial. Again, if a pre-dispute arbitration procedure satisfies these or other relevant standards, then the pre-dispute arbitration procedure in many ways can be regarded as more advantageous to all parties, in comparison with conventional court litigation, regardless of any party's bargaining "leverage."

Third, experience teaches that it is extremely difficult to legislate standards concerning bargaining "equality" between contracting parties in employment. For example, although the NLRA is designed to reflect a careful balancing of competing interests between employers and labor organizations, the reality has been that bargaining "equality" and "inequality" invariably ebb and flow from time to time, and sometimes from issue to issue. Relative leverage has always been something that can rapidly change, for better and worse. Moreover, if one considers leverage between an employer and individual employees, the "equality" equation becomes even more complex. For instance, different employees invariably occupy divergent positions on the leverage

scale, depending on their particular skills, performance, unique knowledge, particular business opportunities that may favor some employees over others, and other variables.

Fourth, even in conventional employer-union relationships, there have always been enormous fluctuations in each side's relative "equality" in bargaining. Nonetheless, our federal labor policies have still consistently favored arbitration as "the desirable method" for dispute resolution.[119] So one need look no further than our existing policies concerning conventional labor arbitration to see that relative "equality" need not dictate what constitutes an appropriate method to resolve employment disputes.

As noted above, plaintiffs' advocates in the 1980s were unsuccessful in their efforts to enact the Age Discrimination in Employment Waiver Protection Act, which would have banned all prospective unsupervised age discrimination waivers, and/or required active court or EEOC involvement when any forward-looking waiver was entered into. Instead, many of the same objectives were accomplished by continuing to permit employers and employees to enter into private waiver and release agreements, subject to basic standards of fairness (including certain types of required disclosures) that were adopted as part of the Older Workers Benefit Protection Act (OWBPA).[120]

Especially considering the current troubled economy (causing more than 2 million employees to be laid off in calendar year 2008, including many recipients of severance pay conditioned on unsupervised waiver agreements), it is difficult to contemplate what further hardship would have resulted had Congress, back in the 1980s, enacted a prohibition against all unsupervised waivers.[121] Predictably, far fewer employers would have been willing to provide severance pay, based on their inability to get an enforceable release, and/or the courts and the EEOC would be besieged by employers attempting to obtain the "required" waiver agreement approvals.

Although OWBPA waiver/release compliance has itself been challenging for most employers, there appears to be little question that the enactment of more uniform waiver agreement standards has been far better than the option of invalidating all pre-dispute

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[119]LMRA §203(d), 29 U.S.C. §173(d).

[120]Pub. L. No. 101-433, 104 Stat. 978 (1990).

[121]The U.S. Department of Labor's Bureau of Labor Statistics reported that there were 2,130,220 initial claimants for unemployment insurance during 2008. *See* http://www.bls. gov/news.release/mmls.htm (mass layoffs monthly news release dated Jan. 28, 2009).

age discrimination waivers and/or relegating them to the courts and EEOC.

The Ghost of Arbitration Present

Strict Standards and Rigorous Court Enforcement. As described at considerable length above,[122] present-day litigation reveals that the courts now require adherence to fairly strict standards under the FAA, which includes the application of state law contract principles, before employer arbitration agreements will be enforced. The existing standards involve all of the following areas, among others, which have received meaningful scrutiny, albeit with a variety of results in particular cases:

- **Basic Fairness:** whether the circumstances surrounding adoption of the arbitration arrangement satisfy fundamental standards of fairness or can be considered procedurally and substantively unconscionable;
- **Mutuality:** whether the arbitration agreement requires arbitration of employer claims as well as employee claims and/or otherwise exhibits mutuality;
- **Claim-Filing Periods:** whether any claim-filing periods under the arbitration agreement are unduly short or operate to extinguish claims otherwise permitted by conventional court litigation;
- **Notice and Acceptance:** whether employees have been afforded adequate notice of mandatory employment arbitration, and whether the circumstances otherwise support the existence of a binding obligation for employees to arbitrate their legal claims against the employer;
- **Costs:** whether the arbitration agreement involves the imposition of prohibitive costs on individual claimants that would not otherwise be required in litigation, and/or that would be recoverable in court litigation but not in arbitration;
- **Damages:** whether the arbitration program imposes restrictions on damages that would be recoverable in conventional litigation;
- **Potential "Class" Claims:** whether the arbitration arrangement limits "class" claims or "class" proceedings that could otherwise be asserted or pursued in the courts;

[122] *See* the text accompanying notes 79–95, *supra*.

- **Agency Charges and Proceedings:** whether the arbitration procedure prevents employees from filing EEOC or other agency charges or purports to prevent EEOC or agency relief on behalf of covered employees;
- **Confidentiality:** whether the arbitration agreement imposes confidentiality restrictions that unduly limit claimant contact with potential witnesses and/or prevent access to other relevant information;
- **Arbitrator Selection:** whether the arbitration program is fair and reasonable as to the selection of the arbitrator; and
- **Appeals:** what standards are applicable to any appeal from an adverse arbitration ruling.

The Due Process Protocol. An equally important present-day feature of non-labor employment arbitration is the existence of the Due Process Protocol, dated May 9, 1995, and adopted by a Task Force on Alternative Dispute Resolution in Employment, involving union and management representatives of the American Bar Association (ABA) Labor and Employment Section, the Arbitration Committee of the ABA Labor and Employment Section, the NAA, the AAA, the Society of Professionals in Dispute Resolution, the Federal Mediation and Conciliation Service, the National Employment Lawyers Association, and the American Civil Liberties Union.[123]

Significantly, the Due Process Protocol indicated there was a lack of "consensus" as to whether pre-dispute arbitration agreements should be permitted. Consequently, although the Task Force took "on the timing of agreements to mediate and/or arbitrate statutory employment disputes," it agreed that "such agreements [should] be knowingly made."

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[123]The Due Process Protocol is available on the NAA Web site. *See* http://www.naarb.org/due_process/due_process.html. The Due Process Protocol and its development have received extensive attention in meetings of the NAA and other groups over the years. *See, e.g.*, Zack, *Due Process in Employment Arbitration: Part I, On the Evolution of the Due Process Protocol*, in Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution, Proceedings of the 57th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA Books 2005), at 243; Sternlight, *The Due Process Protocol: Good as Far as It Goes or a Shield for Evil*, in Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution, Proceedings of the 57th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA Books 2005), at 246; Mackenzie, *Is the Protocol a Shield for Evil or a Sword for Fundamental Fairness?*, in Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution, Proceedings of the 57th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA Books 2005), at 250; Zack, *The Due Process Protocol: Getting There and Getting Over It*, 11 Empl. Rts. & Empl. Pol'y J. 101 (2007).

The other components of the Due Process Protocol include standards that have been mentioned in various court decisions.[124] Unsurprisingly, many Due Process Protocol standards also are now reflected in substance in an even larger number of employment arbitration cases litigated under the FAA.[125] Some of the most important standards incorporated into the Due Process Protocol include the following:

- **Choice of Representative.** Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing. The mediation and arbitration procedure should so specify and should include reference to institutions that might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc.
- **Fees for Representation.** The amount and method of payment for representation should be determined between the claimant and the representative. We recommend, however, a number of existing systems that provide employer reimbursement of at least a portion of the employee's attorneys' fees, especially for lower-paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.
- **Access to Information.** One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation.

  Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available. We also recommend that prior to selection of an arbitrator, each side should be provided with the names, addresses, and phone numbers of the representatives of the parties in that arbitrator's six most recent cases to aid them in selection.

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[124] *See, e.g.*, Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998); Moorning-Brown v. Bear, Stearns & Co., 81 Fair Empl. Prac. Cases (BNA) 1488, 2000 U.S. Dist. LEXIS 127 (S.D.N.Y. 2000); Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998).

[125] *See* the text accompanying notes 79–95, *supra*.

- **Authority of the Arbitrator.** The arbitrator should be bound by applicable agreements, statutes, regulations, and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.

  The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).
- **Compensation of the Mediator and Arbitrator.** Impartiality is best ensured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the arbitrator should determine allocation of fees. The designating agency, by negotiating the parties' share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties share therein.
- **Scope of Review.** The arbitrator's award should be final and binding and the scope of review should be limited.

Benefits for Employees, and Disadvantages for Employers. Particularly when a pre-dispute arbitration program has been developed by the employer, some observers may be tempted to regard many aspects—or every aspect—of the program as reflecting a nefarious effort to create structural advantages for the employer. Existing case law, however, makes clear that employers can no longer start with a "clean slate" when commencing the development of pre-dispute arbitration arrangements, nor can they build into the process a dizzying array of top-heavy, lopsided provisions favoring management.

Moreover, pre-dispute arbitration agreements can provide important benefits to employees, assuming that the procedure meets fundamental standards of fairness (which have been required in the majority of court decisions involving FAA enforcement of arbitration agreements):

- **Notice:** The adoption of arbitration agreements requires notice to employees and applicants, which tends to be more prominent than the normal break room posting of required federal, state, and local employment-related notices.
- **Access:** Employment arbitration agreements can afford universal or near-universal employee access to an effective means for resolving legal claims, in comparison with the substantial number of employees who—for a variety of reasons—have difficulty gaining access to the courts.
- **Representation:** Most arbitration procedures provide for representation by an employee spokesperson of the employee's own choosing, and in many cases this need not be an attorney; also, experienced arbitrators—much more so than the courts—have proven themselves effective at conducting fair, even-handed proceedings when one or more parties are *not* represented by counsel.
- **Efficiency and Cost-Effectiveness:** In comparison to the delays, burdens, and expenses associated with conventional court litigation, an effective arbitration process adopted prior to a dispute's existence can afford meritorious claimants the same relief sooner, less expensively, and, as noted above, with a greater likelihood of employee access to the process than is typically available in conventional litigation.
- **Speed:** Pre-dispute arbitration can provide relief more quickly to prevailing claimants and, for those claimants whose claims are not meritorious, the speed and informality associated with arbitration permits the individual to more quickly adjust to an unfavorable outcome, shortening the time devoted by the employee to backward-looking adjudication, which frequently places heavy burdens on the employee and family members, while delaying and possibly jeopardizing whatever forward-looking objectives and aspirations the employee may have.

Conversely, employment arbitration programs almost invariably involve important negative tradeoffs for the employer. These tradeoffs make it inappropriate to regard pre-dispute arbitration as an employer-driven "heads-I-win, tails-you-lose" proposition. Thus,

employment arbitration programs generally must now reflect a balancing of employer-employee interests, and often this balancing disfavors the employer:

- **Increased Access and Claim Generation:** By making the assertion of legal claims easier, faster, and less formal—and by affording notice and access to all employees—employment arbitration procedures can easily encourage the initiation of many more legal claims than would otherwise be asserted against the employer.
- **New Substantive Rights:** Some employers have combined the implementation of mandatory arbitration programs with giving employees other important protections (e.g., a commitment that employment terminations or time-off-from-work discipline will be based on only "cause") that otherwise would not exist under federal or state law.
- **Easier for Some Employees to Prevail:** In some ways, a claimant may have a better chance at prevailing in arbitration—given its informality, the singular nature of who the employee must convince, and the arbitrator's experience with workplace issues—than would be possible if the claimant had to survive summary judgment briefing in court, and convince 6, 8, or 12 jurors that the employee's claim had merit.
- **Continued Discovery Procedures:** Arbitration does not completely dispense with the need for some pre-hearing procedures, which can include depositions and discovery.
- **Potential Agency Proceedings:** Nor does arbitration dispense with the possibility of ongoing or subsequent federal or state agency charges, investigations, or agency-initiated lawsuits filed on behalf of the employee. Likewise, a variety of important programs administered by state agencies—like the state administrative procedures for enforcing workers' compensation, unemployment compensation, and similar programs—are likely to remain outside the scope of any mandatory arbitration procedure.
- **Adverse Impact on Potential *Employer* Rights:** The issue of mutuality, in many cases, requires that employers also commit to arbitrate claims they may have against employees. In turn, this can give rise to complex issues where, for example, other indispensable parties are not available because they have not adopted the arbitration agreement (e.g., this may occur, for example, if an employee accepts employment from a competi-

tor in violation of a non-competition or trade secret agreement).

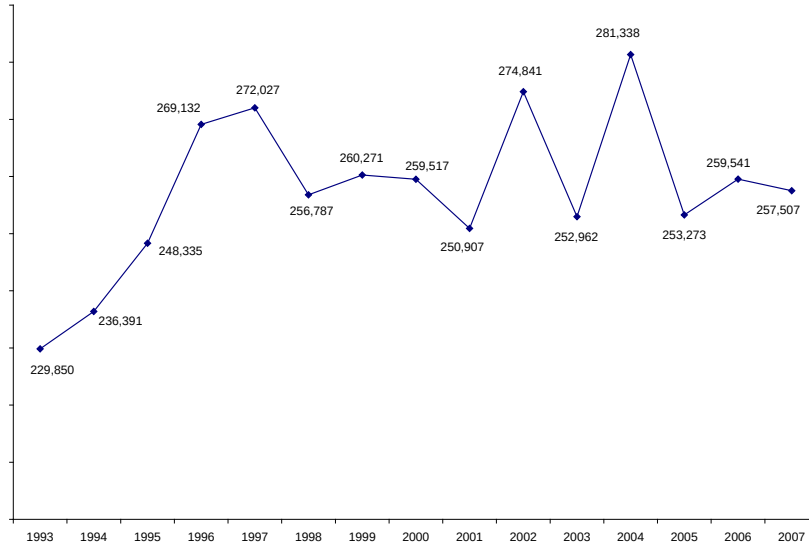
- **Dispositive Motions:** Although the arbitration of employment law claims can and should involve the consideration of pre-hearing dispositive motions (e.g., post-discovery summary judgment motions), such motion practice tends to be much more limited than is common in court litigation, and the informality and speed associated with arbitration hearings may prompt arbitrators to deny some dispositive motions that would have been granted by a court.
- **State-by-State Standards (and Litigation):** As described above, an employer adopting pre-dispute arbitration, under existing FAA law, must still bear the potential burden of state-by-state litigation over the program's enforceability based on different state contract law principles that the FAA makes applicable to enforcement issues. If anything, contrary to what would be accomplished by the AFA, employers and employees would benefit from different legislation that would establish reasonable, uniform standards; such standards would lend greater predictability and uniformity to pre-dispute arbitration without the need for sometimes disparate state-by-state court decisions.

No Room at the Inn—Case Loads and Court Litigation. Some proponents of the AFA may too readily fail to attach any weight to the proposition that "justice delayed is justice denied."[126] Or conversely, they may regard litigation-related burdens, costs, and restrictive access—all tied to the case loads in federal and state courts and the willingness of plaintiffs' attorneys to regard claims as litigable—as slight market imperfections that have no impact on substantive rights and claims. Such views are contradicted by more than 80 years of history that have prompted the courts, employers, and unions alike to regard arbitration as the preferred vehicle for dispute resolution, based on tangible benefits for all affected parties.

A look at the magnitude of lawsuits in the federal court system demonstrates the courts do not have limitless capacity. Figure 1 shows the total number of civil lawsuits filed in the federal district courts over a 15-year period (fiscal years 1993–1997), and reveals

[126]The maxim, "Justice delayed is justice denied," is frequently attributed to British politician William E. Gladstone (1809–1898). Laurence J. Peter, Peter's Quotations 276 (1977) (cited at http://www.bartleby.com/ 73/954.html).

FIGURE 1. Total Civil Cases Filed in U.S. Federal District Courts (Fiscal Years 1993–2007)

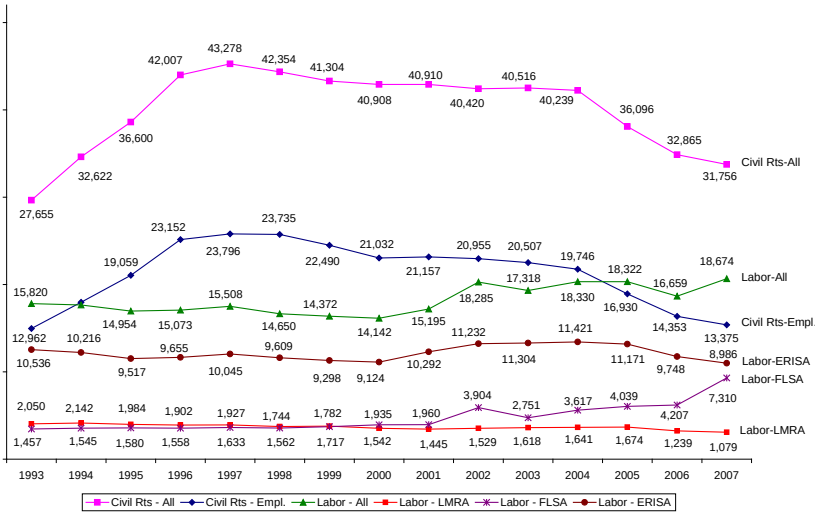


that the court's overall case load fluctuates up as well as down, but the overall number of new cases filed annually from the beginning to the end of this 15-year period has increased.[127]

Figure 2 shows selected categories of civil lawsuits filed in the federal district courts over the same 15-year period, including total civil rights cases, employment-related civil rights cases, total labor cases, and three labor subcategories (ERISA cases, LMRA cases, and Fair Labor Standards Act (FLSA) cases). This data reveal that annual civil rights lawsuits, both total and employment-related actions, ended up higher at the end of this period than at the beginning. Both types of actions in the federal courts peaked in the late 1990s, however, but remained relatively stable at high levels between 1997 and 2004. Likewise, there has been an increase in all labor cases throughout this 15-year period, albeit with some

[127]The data reflected in Figures 1 and 2 are compiled by the Administrative Office of the United States Courts, 2007 Annual Report of the Director, Table 4.4; 2003 Annual Report of the Director, Table C-2A; 1999 Annual Report of the Director, Table C-2A; 1997 Annual Report of the Director, Table C-2A (these annual reports and the relevant tables are available at http://www.uscourts.gov/library/statisticalreports.html).

FIGURE 2. Civil Cases Filed in U.S. Federal District Courts, Selected Types (Fiscal Years 1993–2007)



up-and-down fluctuations from year-to-year. ERISA litigation has remained fairly consistent, though declining slightly in the past four years. Although LMRA cases have declined, there has been a five-fold increase in FLSA litigation over the 15-year period.

In two important respects, Figures 1 and 2 significantly understate the burdens that would be placed on the federal and state court system if the AFA were enacted. Most important, except for cases involving FAA enforceability (like those discussed previously in this article), Figures 1 and 2 do not reflect *any* of the employment disputes already being adjudicated in arbitration pursuant to pre-dispute arbitration programs. Moreover, Figures 1 and 2 are limited to federal court litigation, and therefore do not reflect the large number of employment-related lawsuits that have been litigated in the various state courts.

These statistics reflect what is already well known by the current members of our federal and state judiciary: the courts are not lacking in things to do. And the demands on our federal and state courts have only increased, with more (rather than fewer) burdens imposed by changing technology, including the plethora of electronic documents, e-mails, text messages, digital voicemails,

cell phone logs and blogs, among other things, that now become the endless subject of mind-numbing discovery disputes, complex evidentiary rulings, and appeals. The AFA would further add to the burdens on our courts and detract from the effectiveness of dispute adjudication for: (1) those employees whose claims would otherwise be resolved in arbitration, and (2) all other litigants whose court cases would be delayed by the increased case loads attributable to the absence of arbitration as an effective alternative to the courts.

The Ghost of Arbitration Yet to Come

We now come to our most troubling revelations, which relate to those future events that will result from enactment of the AFA, should Congress and President Obama disregard the lessons that appear so self-evident from arbitrations past and present. If the AFA were to become law, our future vision is limited to the faint light cast by half-hearted jubilation at the White House signing ceremony, followed by years of social and economic decline, a deterioration of values, diminished self-esteem among people employed in all sectors of our economy, and other equally disturbing developments.

For those of us who, at some point, may have fading memories of arbitration, including memories of arbitrators who commanded such well-deserved deference and respect, these future images are almost too painful to convey.

1. Two years after enactment of the AFA, we see a court system that is conspicuous by the absence of meritorious claims, because so many lawsuits are abandoned (or not initiated in the first place) when aspiring litigants learn of the obstacles standing in the way of meaningful review. Individual claims have virtually disappeared, not because of changes in the law, but because experience has shown it is only feasible for plaintiffs to litigate class action or pattern-and-practice employment claims. Judicial delays and discovery burdens prevent the courts from ever getting to the merits of single-employee disputes.
2. After four years, the Federal Rules of Civil Procedure have been amended, requiring a post-complaint three-year "court inactivity period" in all employment cases, during which the parties must attempt to negotiate a "post-dispute"

alternative claim resolution agreement which, it is hoped, will operate as a substitute for continued litigation in the courts.

Unfortunately, these "court inactivity periods" have caused even more litigation, with plaintiffs and defendants arguing that they have insufficient information—absent discovery, class certification proceedings, and so on—to determine what type of "post-dispute" claim resolution procedure would avoid unfairness to the parties. As one might expect, these "post-dispute" claim resolution negotiations have also become enormously contentious, with each side arguing for whatever arrangements would impose substantive and procedural hardships on the other.

3. Six years after the AFA's adoption, the acrimony and collateral litigation associated with "post-dispute" claim resolution negotiations have resulted in new legislation—the "Post-Dispute Claim Resolution Fairness Act"—requiring court supervision of all "post-dispute" claim resolution negotiations, based on arguments by plaintiffs and defendants alike that they have "unequal bargaining power" that, both sides urge, precludes fair negotiations absent active court involvement and supervision.
4. After eight years, trials are finally scheduled in the first six employment cases that were filed after the AFA became law. Over the same eight years: (i) the economy has changed dramatically with ever-increasing speed; (ii) all jobs have changed many times over, making it difficult to reconstruct what positions would have been held by employee-plaintiffs; (iii) the American workplace has seen massive increases in employee mobility, retraining, relocations, and job changes; and (iv) mergers, acquisitions, breakups, or bankruptcies have extinguished the corporate existence of every defendant-employer awaiting trial (except for one case involving the United States Postal Service).
5. The darkest and most upsetting revelations take place after the 10-year anniversary of the AFA. By that time, employers have adopted policies prohibiting all face-to-face meetings and oral conversations, because experience shows it is impossible—in trials conducted years later—to reconstruct

any undocumented events that take place at work. Therefore, employers require all interaction to occur by e-mail, instant messaging, text messages, or digitally recorded videoconferences. These measures, and the mayhem now rampant in employment litigation, prompt Congress to introduce two new pieces of legislation:

—The "Workplace Documentation Fairness Act" would prohibit all efforts by employers to record, reflect, or otherwise reduce to tangible form anything that takes place in the workplace. Proponents of this legislation argue it is needed to protect employees from the unfairness inherent in "pre-dispute" documentation in the workplace. According to the bill's sponsors, "pre-dispute" documentation is especially unfair because employees have not yet been subjected to unlawful conduct, which prevents them from knowing when or how the documentation might support or detract from the employee's claims after unlawful conduct has occurred. Ironically, this legislation is passed with bipartisan support, as litigants and public interest groups alike perceive it will operate to their advantage, because future trials will focus on which side can present the most plausible, undocumented account of what might have occurred, rather than focusing on what actually happened.

—The second piece of legislation is the "Private Adjudication Restoration Act." This bill results from a task force of federal and state judges who argue for some type of alternative that would resolve employment disputes more quickly than conventional litigation. However, after initial referrals to the House and Senate Judiciary Committees, this legislation is abandoned as being impractical, because congressional staff members are unable to identify anyone left with the experience and credibility needed to be impartial arbiters of employment disputes. As this revelation fades, we see a House Judiciary Committee intern performing a Google search using the phrase, "National Academy of Adjudicators," which produces a response: "No results found."

Concluding Remarks

After bearing witness to the revelations presented by the Ghosts of Arbitration Past, Present, and Yet to Come, the authors completed this essay, giving voice to the profound concerns raised above, and only then did the spirits disperse.[128] Nobody can doubt that employment is indispensable to everyone who works and to the companies where people are employed. Equally important is the complex assortment of federal, state, and local laws that govern employment. Everyone benefits from having these laws effectively enforced. If anything, Congress should develop a different "arbitration fairness act" that would promote rather than prohibit employer-employee arbitration agreements, while codifying reasonable standards of fairness in lieu of requiring the state-by-state litigation of these issues, which would provide greater certainty and stability for employers and employees alike.

Ironically, these considerations have been the subject of attention before, and in a country where litigation has been far less rampant than in the United States. Among the views espoused by Charles Dickens in 19th century England was a pronounced concern about multiple infirmities associated with the courts, includ-

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[128]Unfortunately, the authors more recently have been disturbed by a persistent tapping sound, followed by appearance of a dark winged feathered creature, and the repeated utterance, "Nevermore." Research suggests a strong resemblance between this latest event and another literary work, "The Raven," authored in 1845 by Edgar Allan Poe. Edgar Allan Poe's poem, "The Raven," first appeared in the *Evening Mirror* on January 29, 1845, followed by its publication in February 1845 in *The American Review*. *See* http://en.wikipedia.org/wiki/The_Raven.

Further investigation reveals, however, that all roads return to Charles Dickens. The Edgar Allan Poe work, "The Raven," was inspired by a talking raven appearing in the Charles Dickens novel, *Barnaby Rudge: A Tale of the Riots of 'Eighty*. Charles Dickens published *Barnaby Rudge: A Tale of the Riots of 'Eighty* in 1841, as part of the Dickens serial publication, *Master Humphrey's Clock* (1841–82). *See* http://en.wikipedia.org/wiki/Barnaby_Rudge:_A_Tale_of_the_Riots_of_%27Eighty. In Chapter 5 of Dickens' *Barnaby Rudge*, a talking raven named "Grip" makes a sound, and "someone says, 'What was that—him tapping at the door?' The response is, 'Tis someone knocking softly at the shutter.'" *Id*. Edgar Allan Poe was intrigued with the Dickens talking raven in *Barnaby Rudge*. In fact, Edgar Allan Poe in *Graham's Magazine* authored a review of *Barnaby Rudge*, and commented on the Dickens' raven, suggesting "that the raven should have served a more symbolic prophetic purpose." *Id*. Ironically, the Dickens' *Barnaby Rudge* raven was modeled after a real life raven, "Grip," owned by Charles Dickens himself. Sadly, the Dickens' real life raven died in 1841 and, curiously, was preserved, mounted, and transported to the United States, where it is now on display in the Rare Book Department of the Free Library of Philadelphia. *See* http://palimpsest.stanford. edu/byform/mailing-lists/exlibris/1999/ 07/ msg00399.html. *See also* http://libwww.library.phila.gov/ blog/ index.cfm?srch= 2&month=10&year=2006 (photograph of "The Infamous Grip"). It is notable that the 2010 Annual NAA meeting is scheduled to take place in Philadelphia (on May 26–29, 2010, at the Loews Philadelphia Hotel). *See* http://www.naarb.org/coming_meetings/index.asp. There, the authors hope to give an expanded report on the role played by arbitration in the collective writings of Charles Dickens *and* Edgar Allan Poe.

ing restrictions on access, exorbitant expenses, and protracted delays. Dickens biographer W. Walter Crotch, writing in the early 1900s, indicated that these criticisms were well-founded, although his observations risk offending those of us who are members of the bar:

> *Dickens would have had the law prompt, effective, certain, readily accessible to the poor man, freed from the fetters of out-of-date procedure, and ready to move immediately for the instant redress of injustice.* And who in the world was there to oppose that view? I am afraid that the answer is—the lawyers themselves. They had a very lively sense, indeed, of the significance of the changes he proposed, and, on the whole, we may take it that they were not and are not, very keen on promptitude and certainty. *The law's delays, its complex, almost baffling uncertainties, its contradictions and its procrastinations*, what is the use of hiding the fact that it is upon these that the lawyers live? So far as the men of law go, these things are admirable. *So far as the nation is concerned, they are damnable.*[129]

One need not denounce the entire legal profession when debating the serious issues raised by the Arbitration Fairness Act, because all sides agree these are issues as to which reasonable minds can differ. Yet, there is merit in the fundamental point emphasized by Dickens and expressed by Dickens biographer Crotch: The most sophisticated and complete procedural guarantees embodied in conventional litigation, though devised with the best intentions, may poorly serve those who are most in need of the law's protection. This is especially possible when one considers, *first*, the universal importance of work to *all* employees, whether they are rank-and-file laborers, production employees, technicians, professionals, managers, or executives; *second*, the speed with which our global economy places ever-increasing demands on employees and employers alike; and *third*, the immense process-related costs and burdens that conventional litigation imposes not only on the litigants—win or lose—but also on everyone else employed by the companies involved in such litigation. These costs and burdens are especially oppressive for the small businesses responsible for such an overwhelming percentage of private sector employment in the United States.

We have decades of experience with arbitration as a preferred method of resolving employment disputes, not because of abstract notions about fairness but, rather, because arbitration has demonstrated its value as a real world alternative to the courts for the

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[129]Crotch, Charles Dickens Social Reformer: The Social Teachings of England's Great Novelist (Chapman & Hall 1913), at 260–61 (emphasis added).

competent resolution of employment issues. Anyone experienced with the "world of work" knows that employment disputes require scrutiny into myriad details concerning the workplace and workplace realities, all of which have long been recognized as unique. Although one cannot value highly enough the role played by our court system and the judiciary, structural limitations prevent the courts from replicating the combination of speed, expertise, credibility, and fundamental fairness that have long been hallmarks of employment *and* labor arbitration. It makes little sense to so quickly discard these benefits, as would be accomplished by the AFA, by relegating all employment disputes to the courts, and by burdening litigants with yet an additional layer of "post-dispute" negotiation and posturing over whatever dispute resolution alternatives, at that time, may be deemed to benefit one party or the other.

When it comes to the workplace, the most well-protected, substantive employee rights fade ever-so-quickly when there are delays, expenses, restricted access, and other vagaries associated with the process of enforcing those rights. Advocates on all sides understand that conventional litigation—past, present, and yet to come—can produce precisely these disadvantages for litigants *and* the many employees who, for different reasons, are prevented from gaining meaningful access to the courts.

More now than ever, employment disputes warrant speed, predictability, and specialized expertise, all of which have long been the province of arbitrators and arbitration. There is no fairness in undermining these important values, which—without the Arbitration Fairness Act—can continue to advance our national employment and labor policies.