

# THE FAIRNESS PROBLEM: MANDATORY ARBITRATION IN EMPLOYMENT CONTRACTS

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## I. INTRODUCTION

Jane was over-the-moon excited to get a phone call from the advertising firm where she had recently interviewed for a position as a graphic designer.<sup>1</sup> Since graduating from college she had sent out over two hundred applications, and finally she had a job. Jane would now have health insurance, a steady check for rent, and could stop

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1. This story is fictitious and is a compilation of the author's experience with employment and various cases.

dodging phone calls from the student loan collectors.

The first day on the job, Jane received a fat employee handbook, went through various trainings, met every co-worker in the building, and signed form after form. She barely read them. She saw an “agreement to arbitrate” in her employment contract and didn’t ask about it. Jane knew even if she understood arbitration, she had no method of removing the clause. Like her salary and benefits, Jane recognized she had no bargaining power; she was aware of her own desperation, and knew the firm also understood it. There were hundreds of other unemployed graphic designers who would gladly take her place.

Four months into the job, Jane’s boss began asking her out on dates. When she turned him down, he started sending provocative emails. She ignored the unwanted advances until he began lurking near her cubicle and car. Jane then filed a claim for sexual harassment with human resources. Two days later Jane received notice—the company had fired her without stating cause.

Jane found a lawyer and sued the company for sexual harassment and retaliatory discharge. The company moved to dismiss, citing the mandatory arbitration clause in her employment contract. When the case was removed to arbitration, Jane and her lawyer received a list of arbitrators; out of the ten, one was a woman and the rest were men over the age of sixty. In peremptory challenges, the firm struck the female arbitrator.

The process that followed shocked Jane. The arbitrator was so familiar with her former boss that he asked about her boss’ children by name. Jane’s lawyer complained about the limited discovery in proving the sexual harassment claim. After the long, painful process was over, the arbitrator ruled in favor of the employer. Jane left without a job, feeling robbed of her day in court. She couldn’t understand how her employer, the party who had always held the power, was able to force her to comply with a system that favored the company.

Mandatory arbitration clauses are everywhere. Most Americans have signed agreements to arbitrate, whether they know it or not. These agreements appear in a wide variety of contracts: in credit card and banking agreements, as part of the plethora of forms signed at a doctor’s office, and in employment contracts, to name a few. Many Americans do not understand what arbitration is, and cannot fully comprehend the rights they are relinquishing when signing these contracts.

This Paper focuses on the unfairness of mandatory arbitration clauses in employment contracts. Mandatory arbitration clauses in employment contracts are unfair for several reasons. First, there is an inherent power imbalance between employers and employees that results in unconscionable contracts and an agreement that is far from a bargained-for exchange. The current recession and many employees' desperate need to gain or retain employment make this power balance particularly acute. Second, there is a structural imbalance in arbitration because arbitrators are biased toward the repeat player, the employer. Whether this is a subconscious or overt preference, the numbers show that employers fare better in arbitration and employees receive lower judgments in arbitration. Third, mandatory arbitration agreements' inclusion of statutory rights unfairly burdens the parties Congress intended to protect in Title VII of the Civil Rights Act of 1964 and other anti-discriminatory statutes. Congress enacted this legislation to punish and deter discrimination, yet arbitration fails to adequately punish or deter discriminatory practices. In addition, the groups these mandatory arbitration clauses harm are those Congress meant to protect because of their lack of power.

I will first look at the background of employment arbitration and the U.S. Supreme Court (Court) cases that led to employment arbitration's current hallowed status. Next, I will examine the parties in this controversy—employers and employees—and discuss why employers want mandatory arbitration clauses, the ways employees benefit from arbitration, and why these agreements still are harmful to employees. I will then analyze the fairness of mandatory arbitration clauses in employment contracts. Particularly, I will focus on the power imbalance between employers and employees, arbitrators' bias towards employers as repeat players, and the egregiousness of the agreements' inclusion of statutory rights. Finally, I conclude by briefly examining measures to make arbitration fairer, particularly the Arbitration Fairness Act.

## II. THE GROWTH OF MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT AGREEMENTS

In 1925, Congress enacted the Federal Arbitration Act (FAA)<sup>2</sup> in an effort to place arbitration agreements “upon the same footing as

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2. Pub. L. No. 68-401, § 213, 43 Stat. 883 (reenacted July 30, 1947, § 392, 61 Stat. 670, codified as amended at 9 U.S.C. §§ 1–16 (2000)).

other contracts”<sup>3</sup> and to undo judicial antagonism towards arbitration.<sup>4</sup> Congress’ primary motivation behind enacting the FAA was to “enforce agreements into which parties had entered.”<sup>5</sup> Section 2 of the FAA provides the primary authorization for the enforcement of arbitration clauses, stating that arbitration agreements are enforceable, “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>6</sup>

The Court has expressly found that under the FAA, Congress “declared a national policy favoring arbitration.”<sup>7</sup> The Court has “rigorously upheld” arbitration clauses’ enforceability and has unwaveringly preferred “resolving difficult questions in favor of arbitration.”<sup>8</sup> The Court’s endorsement of arbitration has been so powerful that some have criticized it for being “too extreme in its enthusiasm for arbitration.”<sup>9</sup>

Employment arbitration arises from a contract between an employer and an employee.<sup>10</sup> The Court’s support of mandatory arbitration clauses in employment agreements in the past two decades has bolstered employers’ use of them.<sup>11</sup> In 1991, the Court ruled on

3. H.R. REP. NO. 68-96, at 2 (1924).

4. Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 737 (2001).

5. Volt Info. Scis., Inc. v. Bd. Of Trs., 489 U.S. 468, 478 (1989) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985)).

6. 9 U.S.C. § 2 (2000). Section 2 states in full:

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

*Id.*

7. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

8. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in the Ages of Compelled Arbitration*, 1997 WIS. L. REV. 33, 54, 82 (1997).

9. Kristin McCandless, Note, *Circuit City Stores, Inc. v. Adams: The Debate over Arbitration Agreements in the Employment Context Rages On*, 80 DENV. U. L. REV. 225, 228 (2002). David Schwartz argued that the Court’s “enthusiastic approval” of pre-dispute arbitration clauses created a “monster.” Schwartz, *supra* note 8, at 82.

10. Ware, *supra* note 4, at 737. Employment arbitration is often confused with labor arbitration. Labor arbitration arises out of a collective bargaining agreement between a union and an employer. *Id.*

11. Ashley M. Sergeant, *The Corporation’s New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 149 (2012) (“Since 1998, the Supreme Court has

*Gilmer v. Interstate/Johnson Lane Corp.*<sup>12</sup> and “reversed a longstanding presumption that employment claims were exempt from the FAA.”<sup>13</sup>

*Gilmer* involved an employer (Interstate), who required its employee (Gilmer) to register as a securities representative with the New York Stock Exchange.<sup>14</sup> Part of the registration form contained an agreement to arbitrate “[a]ny controversy between a registered representative and any . . . member organization arising out of the employment or termination of employment of such registered representative.”<sup>15</sup> When Interstate fired Gilmer at age 62, Gilmer filed suit, alleging his discharge violated the Age Discrimination in Employment Act of 1967 (ADEA).<sup>16</sup> Interstate moved to compel arbitration of the ADEA claim, relying on the arbitration agreement in Gilmer’s registration application.

The Court found for the employer and in the process established important rules for employment arbitration.<sup>17</sup> The first was a clear-cut endorsement of the arbitrability of statutory claims in employment agreements.<sup>18</sup> The Court rejected the argument that arbitration was inferior to a judicial remedy and stated, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”<sup>19</sup> In addition, the Court found no inconsistency between the “important social policies” of the ADEA and the enforcement of arbitration agreements.<sup>20</sup>

The Court also “rejected a number of arguments about arbitration’s intrinsic unfairness”<sup>21</sup> and called these complaints “far out of step with [the Court’s] current strong endorsement of the

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issued opinions that have greatly expanded corporations’ use of mandatory binding arbitration clauses.”).

12. 500 U.S. 20 (1991).

13. *Id.* at 35; Kenneth F. Dunham, *Great Gilmer’s Ghost: The Haunting Tale of the Role of Employment Arbitration in the Disappearance of Statutory Rights in Discrimination Cases*, 29 AM. J. TRIAL ADVOC. 303 (2006).

14. *Gilmer*, 500 U.S. at 23.

15. *Id.*

16. *Id.* at 23–24.

17. *Id.* at 35.

18. *Id.* at 26.

19. *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 631 (1985)).

20. *Id.* at 27–28.

21. McCandless, *supra* note 9, at 229.

federal statutes favoring this method of resolving disputes.”<sup>22</sup> The Court brushed off Gilmer’s arguments about the arbitration panel’s bias towards employers, the difficulty of proving discrimination with arbitration’s limited discovery, and the unequal bargaining power between employers and employees.<sup>23</sup>

*Gilmer* laid a solid foundation for the growth of mandatory arbitration agreements in employment contracts, and the following two decades of U.S. Supreme Court jurisprudence built upon *Gilmer*’s foundation. In *Circuit City v. Adams*,<sup>24</sup> the Court held that all employment contracts containing agreements to arbitrate are enforceable and fall within the scope of the FAA, with a narrow exception.<sup>25</sup> The Court afforded employees some protection in *EEOC v. Waffle House*<sup>26</sup> and found that mandatory arbitration provisions in employment contracts cannot preclude the EEOC from filing an enforcement action in a particular case. However, *Rent-a-Center v. Jackson*<sup>27</sup> further strengthened employment arbitration when the Court held it lacked the authority to hear the employee’s unconscionability claim where the agreement stipulated the arbitrator would “resolve any dispute relating to . . . the enforceability . . . of this Agreement.”<sup>28</sup>

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22. *Gilmer*, 500 U.S. at 30.

23. *Id.* at 30–33. The *Gilmer* court found arbitration would not harm Mr. Gilmer because the parties agreed to the procedure, the procedures the employer set up were not unfair, and there was no inequality of bargaining power because Mr. Gilmer was an “experienced businessman.” Reginald Alleyne, *Arbitrators’ Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1 (2003).

24. 532 U.S. 105 (2001).

25. *Id.* at 119. The Court found that interstate transportation workers were the only category of employees who were exempt from the FAA. *Id.* at 121.

26. 534 U.S. 279, 296 (2002) (holding not to interfere with the EEOC’s statutory function, regardless of whether the EEOC was filing a claim to pursue victim-specific relief or for broader public interest). The decision was narrow. The EEOC may enforce important public rights under Title VII and other anti-discriminatory statutes, but it is unclear whether this ability extends to other agencies. Practically, the decision was unlikely to discourage mandatory arbitration in the employment context as EEOC litigates “less than one percent of enforcement suits annually.” Robert J. Landry, III & Benjamin Hardy, *Mandatory Pre-Employment Arbitration Agreements: The Scattering, Smothering and Covering of Employee Rights*, 19 U. FLA. J.L. & PUB. POL’Y 479, 491 (2008).

27. 130 S. Ct. 2772 (2010).

28. *Id.* at 2779. Critics worried about *Rent-a-Center*’s reach and argued about the circularity of arbitrators deciding themselves whether the arbitration process is flawed: “After *Rent-a-Center*, employers may design their own arbitration scheme, confident that questions regarding the fairness of the scheme will not be heard by the courts but by arbitrators. The law will now provide little oversight on employers in their use of mandatory arbitration clauses in

Since *Gilmer*, the Court has firmly established its support for mandatory arbitration clauses in employment agreements. The Court is “enamored” with arbitration<sup>29</sup> and has repeatedly reaffirmed an “emphatic federal policy in favor of arbitral dispute resolution.”<sup>30</sup> The Court has interpreted the FAA as evidence of Congress’ sweeping support for arbitration.<sup>31</sup> The Court’s support for arbitration is unlikely to change without a strong message from Congress to the contrary. Therefore, congressional action is imperative to change the law of arbitration.

### III. EMPLOYERS AND EMPLOYEES: PLAYERS IN THE MANDATORY ARBITRATION CONTROVERSY

The rise of employment arbitration agreements traces back to Congress’ enactment of Title VII and other anti-discriminatory statutes.<sup>32</sup> As a result, there was a subsequent rise in employment litigation.<sup>33</sup> Employers began to include mandatory arbitration clauses in their employment agreements to minimize contact with the judicial system and the risk of unfavorable verdicts.<sup>34</sup>

Employers find arbitration appealing for several reasons. Corporations are easily undone by bad publicity, and they highly value the private nature of arbitration.<sup>35</sup> Arbitration saves time and money.<sup>36</sup> Employment disputes are well suited to the informality and limited discovery of arbitration because the disputes tend to involve

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employment agreements.” Griffin Toronjo Pivateau, *Private Resolution of Public Disputes: Employment, Arbitration, and the Statutory Cause of Action*, 32 PACE L. REV. 114 (2012).

29. Pivateau, *supra* note 28, at 135 (quoting Richard A. Bales, *How Can Congress Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1085 (2009)).

30. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

31. Pivateau, *supra* note 28, at 136.

32. *Id.* at 120 (Title VII and the subsequent amendments prohibited employment discrimination on the basis of race, color, religion, sex, national origin, age, pregnancy, and disability).

33. *Id.*

34. *Id.* at 121.

35. Jeremiah A. Byrne, Note, “*Another Day*” Has Come and Gone: Circuit City Stores, Inc. v. Adams, *Application of the Federal Arbitration Act to Employment Disputes*, 40 BRANDEIS L.J. 163, 183 (2001).

36. Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL’Y & L. 519, 540 (2004). *But see* Alleyne, *supra* note 23, at 5 (“[F]resh empirical data indicates that arbitration is not, as is conventionally thought to be, an inexpensive means of resolving statutory disputes.”).

small amounts of money and are typically patterned and repetitive.<sup>37</sup>

Employers also benefit because comparable cases in arbitration tend to produce lower awards than litigation.<sup>38</sup> This results in lower employee expectations, which reflect in lower settlements and fewer cases filed.<sup>39</sup> Even if the award in arbitration is identical to litigation, employers still pay less because the process costs (time and legal fees spent on pleadings, discovery, motions, trial, hearings or appeals) are lower in arbitration.<sup>40</sup> Arbitration helps avoid frivolous suits intended to extort settlements from employers who would rather settle than pay litigation costs.<sup>41</sup> The threat of punitive damages is also less in an arbitral forum.<sup>42</sup>

Employers also recognize their advantage in arbitration as the repeat player.<sup>43</sup> Since arbitrators typically are from the business world, corporate defendants may sense “a better chance of gaining sympathy, if not straight bias” from arbitrators.<sup>44</sup> When an employer unilaterally selects and pays the arbitrator, it is difficult to escape the notion of partiality—the arbitrator becomes “a paid piper who plays the tune” the employer calls.<sup>45</sup>

Employees can also benefit from some of arbitration’s advantages. Arbitration results in cheaper attorney’s fees, resolves cases faster, and is more likely to preserve a good relationship with an employer.<sup>46</sup> Arbitration proponents argue that the lower cost of arbitration allows employer savings to funnel into more generous employee compensation and benefits.<sup>47</sup> Arbitration also provides a more accessible forum to employees who cannot afford to litigate.<sup>48</sup>

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37. Schwartz, *supra* note 8, at 60.

38. Ware, *supra* note 4, at 747 (noting there are fewer cases in which employers pay at all, and in those limited cases, employers pay less on average).

39. *Id.*

40. *Id.* at 747–48.

41. Yongdan Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers*, 31 WHITTIER L. REV. 665, 696 (2010).

42. Erin O’Hara O’Connor, Kenneth J. Martin, & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 142 (2012).

43. Li, *supra* note 41, 698–99.

44. McCandless, *supra* note 9, at 231.

45. Alleyne, *supra* note 23, at 5.

46. O’Connor et al., *supra* note 42, at 150–51; Schwartz, *supra* note 8, at 60.

47. O’Connor et al., *supra* note 42, at 151. This does not mean money saved in arbitration actually goes to employee compensation and benefits; rather, it is one economic justification that may have little basis in reality.

48. Li, *supra* note 41, at 697.



Both parties benefit from arbitrators having industry experience and familiarity with relevant customs and trade usage.<sup>49</sup> Statistics indicate employees are more likely to recover damages in arbitration.<sup>50</sup> On the other hand, arbitrators tend to give smaller awards than juries.<sup>51</sup>

While there are advantages to employment arbitration, the mandatory element of arbitration agreements in employment contracts introduces fairness problems. In this arena, employees are at a severe disadvantage because of the power imbalance, the repeat player problem, and the agreements' inclusion of statutory rights.

#### IV. ANALYSIS: THE FAIRNESS PROBLEM IN MANDATORY EMPLOYMENT ARBITRATION

##### *A. The Employer/Employee Power Imbalance*

Under the FAA, parties may challenge arbitration agreements on the same grounds as any other contract.<sup>52</sup> To litigate rather than arbitrate, a party must prove contract defenses such as misrepresentation, duress, or unconscionability.<sup>53</sup> The justification for the "strict judicial respect" for arbitration agreements is based on a belief that if parties agree to resolve their dispute through arbitration, a court should not interfere with the parties' original intent.<sup>54</sup> The best challenge to these clauses on contract grounds lies in the lack of choice and resulting unconscionability of the agreements.

A court will strike down contract provisions in whole or in part if the agreement is both procedurally and substantively unconscionable and enforcing the contract as written "would be fundamentally

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49. O'Connor et al., *supra* note 42, at 142. However, some arbitrators have no experience with a particular area of law; some arbitrators are not even trained lawyers. Roma, *supra* note 36, at 538.

50. Byrne, *supra* note 35, at 182 (citing *Rosenberg v. Merrill Lynch*, 170 F.3d 1, 7 n.4 (1st Cir. 1999)).

51. Schwartz, *supra* note 8, at 60.

52. 9 U.S.C. § 2 (2012) ("[An arbitration agreement shall be] valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

53. Ware, *supra* note 4, at 738. At this point, courts have not found lack of consideration to be a defense; instead, courts find continued employment to be adequate consideration for the contract. Pivateau, *supra* note 28, at 128.

54. Russell Evans, Note, *Engalla v. Permanente Medical Group, Inc.: Can Arbitration Clauses in Employment Contracts Survive a "Fairness" Analysis?*, 50 HASTINGS L.J. 635, 653 (1999).

unfair.”<sup>55</sup> Procedural unconscionability is present when “a party lacks a meaningful choice” or the bargaining process makes the court question a party’s “true assent” to the contract.<sup>56</sup> Substantive unconscionability is present “when the terms of the bargain unreasonably favor one party,” or the terms are overly harsh.<sup>57</sup>

Some courts consider adhesion contracts (those offered on a take-it-or-leave-it basis) to have elements of procedural unconscionability and will invalidate them if they appear to be oppressive or unfairly one sided.<sup>58</sup> Most arbitration literature “assumes that parties face a binary choice between courts and arbitration for the resolution of all of their disputes.”<sup>59</sup> This ignores the reality that most employees lack any meaningful choice.<sup>60</sup> Employers have exclusive control over the employment agreement and all terms of the employment relationship.<sup>61</sup> Employees are in “no position to bargain or shop for a better term.”<sup>62</sup>

The power imbalance in employment relationships results in contracts that are not bargained-for exchanges.<sup>63</sup> The relationship between an employer and an employee is “inherently asymmetrical.”<sup>64</sup> Employees typically receive contracts containing mandatory arbitration clauses as a condition for new or continued employment on a take-it-or-leave-it basis.<sup>65</sup> These agreements are not the result of negotiations between parties of roughly equal bargaining power; rather, employers unilaterally decide to arbitrate disputes and plan arbitration procedures with no employee input.<sup>66</sup> Employers rarely provide information on arbitration, and many employees do not understand the rights they relinquish when they sign employment contracts.<sup>67</sup> Even if employees understand arbitration provisions, the majority still lack the bargaining power to change any terms of the

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55. O’Connor et al., *supra* note 42, at 147.

56. *Id.* at 148.

57. *Id.*

58. Li, *supra* note 41, at 671; O’Connor et al., *supra* note 42, at 148.

59. O’Connor et al., *supra* note 42, at 137.

60. *Id.*

61. Pivateau, *supra* note 28, at 128.

62. Schwartz, *supra* note 8, at 57.

63. Pivateau, *supra* note 28, at 125.

64. *Id.* at 127.

65. Li, *supra* note 41, at 698 (internal quotation marks omitted).

66. Pivateau, *supra* note 28, at 125.

67. *Id.*

employment contract, including the arbitration clause.<sup>68</sup>

In spite of the lack of a bargained-for exchange, courts continue to uphold arbitration agreements as a matter of contract.<sup>69</sup> The economic climate exacerbates the divide in bargaining power.<sup>70</sup> As the signing of a mandatory arbitration clause is often a condition of employment, “applicants who are limited in employment options are essentially required to sign such agreements.”<sup>71</sup> These employment contracts with mandatory arbitration clauses are procedurally unconscionable.

In Section A, I examined procedural unconscionability in mandatory arbitration agreements. In Part III, I looked at the benefits of arbitration for the employer and began to demonstrate that these clauses are substantively unconscionable because “the terms of the bargain unreasonably favor one party.”<sup>72</sup> In the following two sections, I will expand on this issue, and also will show how mandatory arbitration agreements result in overly harsh terms for employees.

#### *B. Whoever Pays the Piper Calls the Tune: The Repeat Player Bias*

As briefly discussed in Part III, employers benefit from being repeat players in arbitrations.<sup>73</sup> Arbitrators are biased “either subconsciously or intentionally” toward the employer.<sup>74</sup> One court took note of various studies that show arbitration is “advantageous to employers . . . because it reduces the size of the award that an employee is likely to get, particularly if the employer is a ‘repeat player’ in the arbitration system.”<sup>75</sup>

The Court has ignored this presumption of bias and believes parties are able to find “competent, conscientious and impartial arbitrators.”<sup>76</sup> This view overlooks the reality that “individual

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68. Landry, III et al., *supra* note 26, at 494; Pivateau, *supra* note 28, at 127.

69. Pivateau, *supra* note 28, at 128.

70. See Walter J. Gershenfeld, *Pre-Employment Dispute Arbitration Agreements: Yes, No and Maybe*, 14 HOFSTRA LAB. & EMP. L.J. 245 (1996). Even in 1996, many individuals who found the job market difficult signed pre-employment agreements because it allowed them to obtain work: they believed “no alternative [was] available.” *Id.*

71. Landry, III et al., *supra* note 26, at 482.

72. O’Connor et al., *supra* note 42, at 148.

73. Li, *supra* note 41, at 698–99.

74. *Id.*

75. *Armendariz v. Found. Health Psychcare*, 6 P.3d 669, 690 (Cal. 2000).

76. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634

arbitrators have an economic stake in being selected again.”<sup>77</sup> The Court also discounts that the arbitrators’ need “to build a ‘track record’ of decisions that corporate repeat-users will view approvingly” likely clouds their judgment.<sup>78</sup> In the best-known study of employment arbitration, Lisa Bingham found that employers who are repeat players fare better in arbitration than employers who only arbitrate once.<sup>79</sup> The employer’s repeated use of arbitration creates an institutional bias “whereby an arbitrator who desires future work will be hesitant to render a decision that is contrary to the employer’s expectations.”<sup>80</sup> Employers that act rationally will use this knowledge to pick an arbitrator or arbitration association who will produce “results biased in their favor.”<sup>81</sup>

Even if arbitrators are not biased, employers still have an advantage as repeat players because they have superior knowledge about arbitrating disputes.<sup>82</sup> Compared to employers, employees are at a distinct disadvantage because they lack relationships with and information about arbitrators.<sup>83</sup> Therefore, arbitration benefits employers over employees regardless of whether bias is present.

In spite of the evidence of arbitrator bias in employment arbitration, it is exceedingly hard to make an arbitrator’s partiality an issue that would justify the court overturning an arbitrator’s judgment.<sup>84</sup> However, the arbitrator’s bias toward the employer goes to show the substantive unconscionability of arbitration clauses in employment contracts. Arbitration’s institutional bias towards employers, the repeat players, demonstrates that mandatory arbitration clauses unreasonably favor one party (the employer). Under this analysis, arbitration clauses where the employer unilaterally selects the arbitrator should be automatically

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(1985).

77. Schwartz, *supra* note 8, at 57.

78. *Id.* at 60–61.

79. Ware, *supra* note 4, at 751. Other studies show that “employers with multiple cases in front of the same arbitration association fare better in arbitration than do employers that do not arbitrate multiple cases.” Employers that arbitrate multiple cases with the same arbitrator do better than employers that use different arbitrators to arbitrate multiple cases. O’Connor et al., *supra* note 42, at 150.

80. Evans, *supra* note 54, at 644.

81. O’Connor et al., *supra* note 42, at 150.

82. Li, *supra* note 41, at 698–99.

83. Evans, *supra* note 54, at 644.

84. Alleyne, *supra* note 23, at 41.

unenforceable because of the employer's clear advantage.<sup>85</sup> The repeat player bias makes mandatory arbitration clauses inherently unfair, regardless of whether the employee helps to choose the arbitrator.

*C. The Inclusion of Statutory Rights Hurts the Powerless*

In *Gilmer*, the Court upheld the arbitrability of statutory rights in employment contracts.<sup>86</sup> However, over twenty years later, scholars continue to protest the “effective privatization of civil rights and other discrimination claims in arbitration.”<sup>87</sup> Statutory rights present two problems in the arbitration fairness analysis. First, the privatization of statutory anti-discrimination claims results in an effective waiver. Second, statutory claims hurt the groups with the least power, which are the very groups Congress created the statutes to protect. As a result, statutory claims in mandatory arbitration clauses are substantively unconscionable because they result in overly harsh terms for employees.

For example, Congress enacted Title VII and other anti-discriminatory statutes to protect employees from discrimination on the basis of race, sex, age, and disability.<sup>88</sup> Employees cannot waive these statutory rights, and the law provides public enforcement mechanisms and remedies.<sup>89</sup> Compulsory arbitration clashes with the public policies at stake in anti-discriminatory legislation because it amounts to a waiver of the employee's statutory rights.<sup>90</sup> Private arbitration is not equipped to deal with statutory discrimination cases because its “non-standardized procedures, questions of fairness, questions of due process, and a lack of transparency[]” are almost certain to “perpetuate the problem of employment discrimination.”<sup>91</sup>

There are several procedural problems with arbitrators deciding statutory claims. The Federal Rules of Evidence do not apply.<sup>92</sup> Courts review arbitration awards under an “extremely deferential

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85. Evans, *supra* note 54, at 644 (explaining that in many cases, employers have sole power to choose the arbitrator).

86. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

87. O'Connor et al., *supra* note 42, at 149.

88. Landry, III et al., *supra* note 26, at 480; Pivateau, *supra* note 28, at 126.

89. Pivateau, *supra* note 28, at 126.

90. Landry, III et al., *supra* note 26, at 480; Pivateau, *supra* note 28, at 126. *But see Gilmer*, 500 U.S. at 26 (disagreeing with the assertion).

91. Pivateau, *supra* note 28, at 127.

92. Landry, III et al., *supra* note 26, at 483.

standard,” which means the decisions are effectively unreviewable.<sup>93</sup> Without this review, “an arbitrator can foreclose any possibility of an employee vindicating his or her statutory rights.”<sup>94</sup> In addition, arbitrators are sometimes non-lawyers.<sup>95</sup> When arbitrators who have not been legally trained are responsible for enforcing statutory rights, individuals risk “forgoing substantive rights.”<sup>96</sup> The Civil Rights Act of 1991 made the right to a jury trial available in employment cases.<sup>97</sup> Mandatory arbitration clauses force employees to waive their right to a jury trial and therefore deprive employees of this right.<sup>98</sup> The limited discovery of arbitration puts employees filing statutory claims at a disadvantage as many of these claims are hard to prove without substantial discovery.<sup>99</sup> Arbitrators are not required to issue written decisions; as a result, arbitrators lack public accountability.<sup>100</sup>

Arbitration hurts the powerless. While high-wage employees fare similarly in arbitration as in courts, low-wage employees do relatively worse in arbitration.<sup>101</sup> Women and people of color who agree to arbitrate statutory claims are “barred from bringing sexual or racial harassment and discrimination claims to juries of their peers.”<sup>102</sup> Instead, these groups face “an arbitrator pool that is demographically unrepresentative in terms of gender and race.”<sup>103</sup> Women and minorities disproportionately suffer from sexual and racial harassment.<sup>104</sup> Thus, a requirement that all employees arbitrate every employment dispute unduly burdens those that anti-discrimination statutes otherwise protect.<sup>105</sup> This logic extends to age and disability discrimination. Some critics argue compulsory workplace arbitration is particularly unfair to women. In arbitration

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93. Li, *supra* note 41, at 700.

94. *Id.*

95. Roma, *supra* note 36, at 531.

96. *Id.*

97. Landry, III et al., *supra* note 26, at 484.

98. *Id.*

99. *Id.*

100. *Id.*

101. O'Connor et al., *supra* note 42, at 149. However, low-wage employees also lack meaningful access to courts since their claims often fail to attract counsel. *Id.* at 149–50.

102. Miriam A. Cherry, Note, *Not-So Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN'S L.J. 267, 269 (1998).

103. *Id.*

104. *Id.* at 300–01.

105. *Id.*

proceedings, women win a lower percentage of claims and are “less likely than men to receive attorney’s fees or punitive damage awards in arbitration.”<sup>106</sup> This figure is disheartening in light of the low number of women who are chosen as arbitrators: in 2010, women were appointed in roughly 15 percent of AAA arbitrations involving claims for money.<sup>107</sup>

Arbitration of statutory rights fails to satisfy the deterrent purpose of the federal statutes.<sup>108</sup> Arbitration is inherently private in nature, and as a result, fails to publicly expose corporate wrongdoing.<sup>109</sup> The private nature of arbitration impedes employees’ access to proof because employees cannot use past arbitral findings to prove patterns of discrimination.<sup>110</sup> Employers do not have to face the same negative publicity as they would in court.<sup>111</sup> In addition, discovery limits in arbitration similarly inhibits employees’ ability to prove complex discrimination cases.<sup>112</sup> Therefore, while litigation serves as a strong deterrent to discriminatory behaviors, arbitration does not.<sup>113</sup>

Many critics argue the Court’s reliance on traditional contract principles as support for the mandatory employment clauses is “disingenuous” because the employment relationship is subject to external law in a way private contracts are not.<sup>114</sup> The government controls the employment relationship through statutory requirements on hours and wages, health and safety in the workplace, and social security and federal income taxes.<sup>115</sup> Therefore, the Court would not be acting in a revolutionary manner if it required fairness standards for mandatory arbitration agreements.

Mandatory arbitration clauses in employment contracts are unfair because of the procedural problems with arbitrating statutory

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106. Dunham, *supra* note 13, at 319.

107. Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RESOL. MAG., Spring 2012, at 23. These statistics vary by arbitration association, but Rothman’s statistics indicate 15% may be a generous estimate. The International Institute for Conflict Prevention & Resolution (CPR Institute) reported in 2011 that women comprised 10% of their neutrals and were selected 13% of the time. *Id.* at 23–24.

108. Dunham, *supra* note 13, at 303.

109. *Id.* at 324–25.

110. Li, *supra* note 41, at 699–700.

111. *Id.*

112. Evans, *supra* note 54, at 644.

113. *Id.*

114. Pivateau, *supra* note 28, at 130.

115. *Id.* at 129.

claims, the disproportionate harm to groups Congress intended to protect in Title VII and similar statutes, and the lack of deterrence of discriminatory claims. For all these reasons, the inclusion of statutory terms in mandatory arbitration clauses constitutes overly harsh terms for employees and is substantively unconscionable.

#### V. SOLUTIONS AND THE FUTURE OF THE MANDATORY EMPLOYMENT ARBITRATION PROBLEM

The most effective and straightforward solution to the problem of unfairness in mandatory employment arbitration would be for Congress to enact the Arbitration Fairness Act (AFA). The AFA states: “[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute.”<sup>116</sup> The AFA’s findings acknowledge mandatory arbitration’s core problems: for one, mandatory arbitration in employment disputes goes against the original intent of the FAA.<sup>117</sup> Congress’ original intent was for the FAA to apply to disputes between “commercial entities of generally similar sophistication and bargaining power.”<sup>118</sup> In addition, the AFA’s findings recognize concerns that employees have “little or no meaningful choice whether to submit their claims to arbitration.”<sup>119</sup> The AFA also points to problems with inadequate transparency in arbitration and the lack of judicial review of an arbitrators’ decision.<sup>120</sup> The AFA acknowledges that arbitration is an “acceptable alternative” to litigation, but only when consent to arbitration is “truly voluntary” and “occurs after the dispute arises.”<sup>121</sup>

Critics argue that the AFA is too broad, and that a “blanket prohibition on the enforcement of arbitration clauses” is unwarranted.<sup>122</sup> Others argue that arbitration associations are already solving unfairness problems with arbitration by enacting minimum standards for employment arbitration.<sup>123</sup>

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116. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. O’Connor et al., *supra* note 42, at 182.

123. *Id.* at 151–52; John-Paul Motley, Note, *Compulsory Arbitration Agreements in Employment Contracts from Gardner-Denver to Austin: The Legal Uncertainty and Why Employers Should Choose Not to Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687, 713 (1998). These critics think the market sees problems with unfairness in



As Congress has not yet enacted the AFA, some scholars propose solving problems with mandatory employment arbitration with guarantees of due process and fairness.<sup>124</sup> These safeguards include meaningful judicial review of arbitration decisions that are explained in writing. Courts could establish arbitration standards to ensure individuals do not forgo their statutory claims in arbitration.<sup>125</sup> Other due process protections involve cost sharing of arbitrator fees, expanded discovery requirements, and “arbitrators chosen from a pool of sexually and racially diverse individuals who reflect workplace demographics.”<sup>126</sup> Some critics of mandatory arbitration argue the employer must “explicitly and painstakingly disclose the rights the employee is sacrificing” so that waiver of a jury trial is “clear, knowing and voluntary.”<sup>127</sup> While these safeguards would solve some problems with mandatory arbitration, the best solution would be for Congress to enact the AFA.

## VI. CONCLUSION

Mandatory arbitration clauses in employment contracts are unfair, damaging to employees, and particularly harmful to racial minorities, women, the aged, and the disabled. These predispute clauses are unfair because of: (a) the power imbalance between employers and employees at the time of contracting that results in an unconscionable contract; (b) the arbitrator’s inherent bias toward the employer, the repeat player; and (c) the effective waiver of statutory rights and the resulting harm on the powerless in society.

Arbitration has many benefits, but cannot survive a fairness analysis unless both parties have the ability to voluntarily, knowingly, and without pressure or coercion, choose to arbitrate rather than litigate claims. While litigation is not perfect, it has the benefit of an appellate process and reviewability, judges that are well versed in the law, and the opportunity for trial by a jury of one’s peers.

Mandatory arbitration clauses should never be in employment contracts. Rather, if employers wish to arbitrate claims, employers

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mandatory arbitration and will fix unfairness problems to survive. *Id.* at 713. However, since the market usually is not a responsible or efficient method of fixing injustice in society, I argue congressional action is still preferable.

124. Pivateau, *supra* note 28, at 143.

125. Roma, *supra* note 36, at 542–44.

126. Evans, *supra* note 54, at 662–63.

127. Cherry, *supra* note 102, at 292.

should fully inform employees of the benefits and detriments of arbitration and allow employees to choose to arbitrate or litigate. There also must be procedural protections to ensure the arbitrator pool represents the diverse employment field,<sup>128</sup> and that the arbitrator is not biased toward the repeat player.

Congress should enact the AFA and ban all predispute employment arbitration agreements. This would solve the fairness problem; regardless of the procedural safeguards, if arbitration is mandatory, the majority of employees will always be in a weaker position than the employer. Efficiency and capitalism motivate much of American economics, but the judicial system exists to protect individual rights. Principals of efficiency and support for business cannot continue to trump employee's rights. Congress should enact the AFA and restore the original purpose of the FAA.<sup>129</sup>

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128. Evans, *supra* note 54, at 662–63.

129. *See also* Motley, *supra* note 123, at 709. Legislative history demonstrates that Congress did not intend for arbitration to replace the court system; the House Report for the adoption of the Americans with Disabilities Act (ADA) implies that “even voluntary agreements were not intended to interfere with an individual’s right to sue in federal court.” *Id.* The House Report stated, “[u]nder no condition would an arbitration clause in . . . an employment contract prevent an individual from pursuing their rights under the ADA.” H.R. CONF. REP. NO. 101-596, at 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 598.