ARTICLES

A Metamorphosis: How Forced Arbitration Arrived In The Workplace

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INTRODUCTION

Over the past twenty years, there has been movement away from the public enforcement of statutory workplace rights in favor of a private system of forced arbitration of employment disputes. Forced arbitration—what in legal jargon is commonly referred to as “binding pre-dispute mandatory arbitration” or “employer-promulgated arbitration”—has its roots in the Federal Arbitration Act (“FAA”), a ninety-year-old statute passed by Congress in 1925. It was not until the U.S. Supreme Court’s 1991 watershed decision in Gilmer v. Interstate Johnson/Lane Corporation that the Court allowed statutory employment claims to be submitted to arbitration under the FAA. Forced arbitration was transformed from a rarely used form of dispute resolution into a juggernaut that has changed the nature of statutory enforcement of worker protection laws in the United States.

Surveys and studies conducted over the last two decades indicate that a fast-growing number of employers have adopted the practice of forced arbitration of workplace claims. In 1995, Denise R. Chachere and Peter Feuille published a survey of alumni of human resources and industrial relations management graduate programs, which indicated that approximately two percent of employers used forced arbitration to resolve their non-union worker disputes. Ten years later, annual surveys of corporate counsel began to reveal a rapid upward trend of forced arbitration agreements:

2. 500 U.S. 20, 23, 35 (1991). The Gilmer Court held that under the FAA an arbitration provision contained in the plaintiff’s securities registration application could properly require private arbitration of a claim under the Age Discrimination in Employment Act of 1967. Id. The Court would wait another ten years before holding that the FAA meant to apply to all employment relationships save for transportation employees. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (narrowly interpreting the text of the FAA’s savings clause to exclude only seamen, railroad workers, and other similar transportation workers).
3. While the growth of forced arbitration affects many different facets of American life, including consumer contracts with cell phone providers, credit card companies, gyms, banks, rental cars, and health insurance plans, this Article focuses on forced arbitration in the employment context.
4. See infra notes 5-9. In the consumer context, preliminary results of the Consumer Financial Protection Bureau’s statutorily required study of forced consumer arbitration indicate that the frequency of forced arbitration provisions appearing in consumer contracts, particularly those waiving consumers’ right to pursue their claims in a class or collective action, is growing as well. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY, PRELIMINARY RESULTS (Dec. 11, 2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.
5. Peter Feuille & Denise R. Chachere, Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces, 21 J. OF MGMT. 27, 31-32, 36 (1995) (noting that of the 195 alumni of industrial relations and human resources masters programs surveyed only 4—or about 2.1 percent—responded that their organizations adopted arbitration for non-union employees). Feuille and Chachere’s survey, however, may have overstated the rate of forced arbitration in non-union workplaces at the time of the study because respondents disproportionately represented large employers with sophisticated human resources departments. See id.
of workplace claims in non-union settings. By 2008, a survey of senior corporate counsel commissioned by Fulbright & Jaworski LLP reported that 25 percent of U.S. employers responding to the survey required forced arbitration of employment disputes in non-union settings. In the 2010 Fulbright survey, the figure increased to 27 percent of U.S. companies. Assuming this self-reported data is accurate, at least 36 million employees nationwide are subject to forced arbitration.

This shift from public enforcement of workplace laws to private forced arbitration has been characterized by a number of trends. This Article examines some of them. Part I sets the stage by providing a brief overview of the distinctions between voluntary arbitration and forced arbitration. Part II describes the elevation of the FAA to a "super-statute" and the limited scope of judicial review of forced arbitration provisions and awards. Part III discusses how the courts have misapplied traditional labor law jurisprudence to justify the expansion of forced arbitration of employment disputes under the FAA. Finally, Part IV explores how forced arbitration has eroded the statutory purposes and protections of our nation's workplace laws, focusing on the Fair Labor Standards Act ("FLSA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). These developments have transformed the employee-employer relationship from one that is regulated by worker protection statutes enforced in our public justice system to one that operates in private tribunals where workers are forced to arbitrate their claims as a condition of employment and without due process guarantees.


7. Fulbright 2008, supra note 6, at 44.

8. Fulbright 2010, supra note 6, at 43.


10. See infra note 26.


I. VOLUNTARY VERSUS FORCED ARBITRATION IN THE WORKPLACE

The fundamental differences between voluntary and forced arbitration are knowledge, consent, and equal bargaining power between the individual employee and employer, the existence of which is embodied in the former, and the absence of which is characterized in the latter.

Voluntary arbitration in the workplace, such as labor arbitration, gains its legitimacy from the equal bargaining power between union and employer, which allows both parties to agree knowingly and voluntarily to the terms of arbitration. When arbitration is mutually agreed upon through an equal bargaining process, "there are . . . unique protections for both parties built into the arbitration process that minimize the risk of unfairness or error by the arbitrator."13 In addition, the power of collective action gives employees leverage to demand and negotiate for fair working conditions and fair arbitration rules.

Unlike voluntary arbitration, forced arbitration is one-sided, imposed as a condition of employment, and requires employees to waive their rights to vindicate statutory workplace protections in court. Forced arbitration is not consensual due to the inherent inequality in the employer-employee relationship and therefore does not result in an "agreement." Individual employees have no meaningful ability to bargain with an employer for a good contract, fair working conditions, or a just process by which workplace disputes will be resolved. Employees often have no knowledge that they are subject to forced arbitration provisions, which can be buried in boilerplate language or the fine print of job applications, employment contracts, and employment handbooks.14 Forced arbitration provisions also have been tucked into company-wide emails,15 job offers,16 and in computerized applications on websites and workplace kiosks.17

16. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (where the employee was forced to sign a securities registration application containing an arbitration provision before the employee could start his job).
Forced arbitration results in a number of injustices for employees seeking to remedy violations of their workplace rights. The U.S. Equal Employment Opportunity Commission ("EEOC"), the government agency charged with enforcing workplace anti-discrimination laws, has described forced arbitration as "structurally biased against applicants and employees."\(^{18}\) The most troubling issues that stem from the practice include the following.

1. **Forced arbitration is an inadequate substitute for the public vindication of statutory workplace rights in our civil justice system.** Arbitral procedures frequently do not conform to minimum standards of fairness as guaranteed in a court of law. In forced arbitration, discovery is nonexistent or limited, the Federal Rules of Civil Procedure and Evidence do not apply, and there is no right to appeal. There are no juries in private forced arbitrations and arbitrators do not have to be lawyers or even know the law.

2. **Forced arbitration stacks the decks in favor of employers.** Employers typically dictate all the terms and procedures in forced arbitration proceedings because employees lack the power or opportunity to bargain for better terms.\(^{19}\) Employers also often require employees to waive their rights to bring class or collective claims, allowing arbitration of individual claims only. Such provisions can have a chilling effect because individual employees may be discouraged from bringing claims,\(^{20}\) or foreclosed from obtaining legal representation due to the small amount of damages involved.

3. **Statistics show that workers lose more often, win smaller awards, and spend more money to prosecute their claims in forced arbitration than in court.**\(^{21}\) A

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\(^{19}\) See, e.g., Porreca v. Rose Group, No. 13-1674, 2013 U.S. Dist. LEXIS 173587, *2, 2013 WL 6498392, at *4-6 (E.D. Pa. Dec. 2013) (employee was presented with the terms of a forced arbitration provision in a dispute resolution program during the orientation for his job).


recent social science study found that employees are almost twice as likely to prevail in federal court than in forced arbitration. In addition, judges and juries awarded employees damages that were 150 percent greater than those received in arbitration. Employees fared even better in state courts.

4. **Forced arbitration shields employers from public accountability and judicial review when they violate the law.** The private and confidential nature of forced arbitration conflicts with the public nature of our nation’s judicial system. Forced arbitration nullifies the important deterrent effect that results from public enforcement of worker protection laws. Because forced arbitration is binding, there is no effective appeal from an arbitrator’s decision, which is final, even when it is legally wrong. Moreover, the lack of published decisions and review by an appellate tribunal stymies the development of jurisprudence.

By denying employees access to the civil justice system, forced arbitration robs them of a fair forum in which they can meaningfully remedy violations of their workplace rights and deprives the public of transparent enforcement mechanisms available under the law. Forced arbitration in the workplace has detrimentally altered the enforcement of worker protection laws.

II. **THE RISE OF THE FEDERAL ARBITRATION ACT**

The FAA has been transformed from a statute of limited scope, which originally applied only to commercial parties having equal bargaining power, into a statute with expansive authority over judicial enforcement of workplace rights. Courts have construed the FAA beyond its original statutory reach, elevating the law to the status of a “super-statute.”

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22. Colvin & Pike, *supra* note 21, at 17-18. Colvin and Pike studied employment arbitration cases conducted by the American Arbitration Association in 2008, comparing the outcomes of these cases to federal and state court employment litigation. *Id.* at 10-11. In state court, plaintiff employees won 57 percent of the time with an average award of $462,307. *Id.* at 17-18. In federal court, plaintiff employees won 36.4 percent of the time with an average award of $336,291. *Id.* In “employer-promulgated” arbitrations before the American Arbitration Association, Colvin and Pike found that employees won only 18.8 percent of the time with an average award of $21,871. *Id.*

23. *Id.* at 17-18.

24. *Id.* at 18.

25. See *infra* Part VI (discussing the role and importance of public enforcement schemes created in workplace statutes).

26. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215-16, 1260 (2001) (describing FAA as a “super-statute” because it “reverse[d] the longstanding judicial hostility to arbitration agreements” and because “the Supreme Court has construed the FAA broadly, with a breadth sweeping well beyond the statute’s plain meaning and the probable expectations of its framers in 1925” (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)). But cf.
Although the FAA lay dormant for a half-century after its 1925 passage, a series of Supreme Court cases in the 1980s opened the floodgates to forced arbitration. This Part first discusses the historic underpinnings of the FAA and how the statute’s drafters never intended it to apply to workplace disputes and indeed meant to exclude workplace disputes. Next follows an analysis of the limitations on judicial power to overturn forced arbitration provisions and a discussion of the lack of judicial authority to vacate arbitrator awards. This Part ends with a case study of Awuah v. Coverall, which demonstrates the impact that limited judicial review has on employees’ ability to enforce their workplace rights.

A. The History Of The Federal Arbitration Act

The FAA emerged from the Progressive Era philosophy of self-regulation, corresponding with the growth of trade associations in the 1920s. This concept was idealized in President Herbert Hoover’s vision of public-private cooperation, in which commercial practices were created through strong, shared norms and standards among the business community and reinforced by robust trade associations. Voluntary arbitration between like-minded merchants was part of this self-regulatory commercial scheme.

Consistent with this history, the intent of the drafters of the FAA was to create federal statutory support for voluntary arbitration between commercial businesses of equal bargaining power, not forced arbitration of employment disputes. Section 1 of the FAA includes an exclusionary clause stating that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” As described in a newly

Charles A. Sullivan & Timothy P. Glynn, Horton Hatches The Egg: Concerted Action Includes Concerted Dispute Resolution, 64 ALA. L. REV. 1013, 1043 n.172 (2013) (“While it would be hard to disagree with [Eskridge and Ferejohn’s] thesis that, as a matter of descriptive reality, some statutes seem to be more important than others, that view is inconsistent with the Court’s official ideology.”).

27. One important case from this period is Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc. where the U.S. Supreme Court first held that arbitration was an appropriate forum to hear statutory claims. 473 U.S. 614, 625-27 (1985).

28. See infra Part II.D.


30. See id.; IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 108-09, 144-45 (2013) (discussing President Hoover’s early support of commercial arbitration when he was Secretary of Commerce and reprinting letters Hoover wrote in support of early iterations of the FAA).


published book by Professor Imre Szalai, the FAA's drafters inserted the language in section 1 to exclude all workplace disputes from the statute's coverage. The addition of this exclusionary clause was in response to criticism from the International Seamen's Union, who feared that the Act would force workers into signing employment contracts and that "rules of procedure or constitutional guarantees [would] cease to operate." Congressional testimony by William H. H. Piatt, a drafter of the bill and then chairperson of the American Bar Association's Committee on Commerce, Trade, and Commercial Law, confirmed the purpose of the worker exclusionary clause. Piatt testified that the FAA was not intended to apply to labor disputes and stated that it "is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." This legislative history makes clear that the drafters intended the FAA to govern voluntary arbitration agreements among merchants of equal bargaining power and to exclude all workplace disputes.

Recognizing this history, the Supreme Court initially resisted attempts to permit forced arbitration of statutory workplace rights. In 1981, for example, the Court considered the question of whether a collective bargaining agreement between a union and an employer could waive an individual employee's rights to pursue FLSA claims in court in Barrentine v. Arkansas-Best Freight System, Inc. The majority opinion, written by Justice William J. Brennan, held that these statutory workplace rights were independent of the collective bargaining process and, therefore, could not be waived by a union or an employer. Justice Brennan reasoned that "[b]ecause Congress intended to give individual employees the right to

33. See Szalai, supra note 30, at 131-33 (discussing why the FAA's exclusionary clause in section 1 was drafted and included in the statute).
34. See id. (quoting Seamen Condemn Arbitration Bill, N.Y. TIMES, Jan. 14, 1923, at 21) (discussing the International Seamen's Union 1923 annual conference and the organization's adoption of a resolution against the proposed bills).
36. But see Circuit City, 532 U.S. at 119-21 (2001) (concluding that the Court need not assess the legislative history of the FAA because the text of FAA "forecloses . . . a construction which would exclude all employment contracts from the FAA"). Discussing the International Seaman's Union objections to the FAA, the Circuit City Court questioned whether courts should consult with legislative history that is "steps removed from the full Congress" or "speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation." Id. at 121.
38. Id. at 745.
bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum” they could not be submitted to arbitration. 39

Chief Justice Warren E. Burger, albeit writing the dissent in Barrentine, championed public enforcement of anti-discrimination employment laws. He warned about the ability of powerful parties to waive the rights of individual employees to take their Title VII discrimination claims to court. 40 Justice Burger cautioned that permitting private arbitration of Title VII discrimination claims would perpetuate discrimination in the workplace, writing that “it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts.” 41 He cautioned that judicial deference to arbitral decisions concerning workplace discrimination would make “the foxes guardians of the chickens.” 42 Although Justice Burger ultimately came to an inconsistent conclusion about the FLSA, his warning underscored the potential for the party with superior power to manipulate the arbitral system so that employees are functionally prevented from a fair adjudication of their statutory workplace rights. Unfortunately, starting with the 1991 Gilmer decision, 43 the Court ignored its own earlier doubts about the efficacy of forced arbitration in the workplace. Since then, the Supreme Court has eagerly and aggressively expanded the FAA to favor forced arbitration of workplace disputes.


The Supreme Court has broadly interpreted the FAA to apply to contracts beyond the business-to-business context and even to permit companies to ban people from bringing class action arbitrations and lawsuits. By doing so, the Court has elevated corporate interests above the rights of individuals to have their day in court and is making it extremely difficult for plaintiffs to invalidate forced arbitration provisions as illustrated by the Court’s recent decisions in AT&T Mobility LLC v. Concepcion 44 and American Express Co. v. Italian Colors Restaurant. 45

39. Id.
40. Id. at 750 (Burger, C.J., dissenting).
41. Id.
42. Id.
43. See supra note 2 and accompanying text.
45. 133 S. Ct. 2304 (2013).
Lower courts have read *Concepcion* as an expansive command by the Supreme Court to use the FAA to invalidate any state law that undermines forced arbitration.\(^4\) In 2011, the *Concepcion* Court held that the FAA preempted a California law that conditioned the enforcement of forced arbitration provisions on the availability of class arbitration.\(^4\) In *Concepcion*, plaintiffs filed a consumer class action against AT&T over their mobile phone contract alleging that the telecommunications corporation engaged in deceptive advertising by charging sales tax on “free” phones.\(^4\) The Court held that the FAA preempts state laws that “prohibit[] outright the arbitration of a particular type of claim.”\(^4\) Some commentators have argued that *Concepcion*’s reach is limited because it was a simple refocusing of unconscionability analysis to its traditional fact-intensive inquiry rather than the aggressive judicial review permitted under the California law in question.\(^5\) The Ninth Circuit, however, has read *Concepcion* more broadly, explaining that the decision “crystalized the directive . . . that the FAA’s purpose is to give preference (instead of mere equality) to arbitration provisions.”\(^5\) The California Supreme Court similarly held in *Sonic-Calabasas v. Moreno* that under *Concepcion* the FAA preempted a state law that prohibited waiver of state administrative hearings on employees’ claims of state law wage and hour violations.\(^5\)

In *American Express*,\(^5\) the U.S. Supreme Court further strengthened the FAA’s preemption of state laws, weakening lower courts’ authority to invalidate unfair arbitration provisions, and reaffirmed its sweeping embrace of forced arbitration. In this anti-trust case, a small business sued American Express, a financial services corporation, alleging that the company used its power as a monopoly to force small businesses to pay

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46. See, e.g., Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 487-88 (2d Cir. 2013) (holding that plaintiffs’ Title VII “pattern or practice” gender discrimination claim was subject to a forced arbitration provision prohibiting class arbitration and rejecting plaintiffs’ argument that the application of the class waiver would prevent plaintiffs from effectively vindicating their statutory rights under Title VII); Ferguson v. Corinthian Colls., Inc., 733 F.3d 928, 930 (9th Cir. 2013) (holding that the FAA preempted a California law that exempted consumer claims for "public injunctive relief" from arbitration).
47. 131 S. Ct. at 1753.
48. Id.
49. Id. at 1747.
50. See id. at 1746 (holding that parties can still challenge the enforceability of arbitration provisions through “generally applicable contract defenses, such as fraud, duress, or unconscionability”) (quoting Doctor’s Assocs., Inc. v. Casaro, 517 U.S. 681, 682 (1996)); see, e.g., Jerett Yan, *A Lunatic’s Guide to Suing for $30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion,* 32 BERKELEY J. EMP. & LAB. L. 551, 561-65 (2011).
51. Mortensen v. Bresnan Commc’ns, 722 F.3d 1151, 1160 (9th Cir. 2013).
52. Sonic-Calabasas v. Moreno (Sonic II), 57 Cal. 4th 1109, 1124 (Cal. 2013), rev’g Sonic-Calabasas v. Moreno (Sonic I), 51 Cal. 4th 659 (Cal. 2011) (applying *Concepcion*, the California Supreme Court held that the FAA preempted a state law that prohibited waiver of state administrative hearings before the labor commissioner).
exorbitantly high credit card fees.\textsuperscript{54} The Court reversed the Second Circuit’s invalidation of a class arbitration waiver, holding that the FAA did not allow courts to invalidate an arbitration provision on the grounds that plaintiffs could not effectively vindicate their rights in arbitration because the costs of arbitrating on an individual basis would exceed the potential recovery.\textsuperscript{55} The Court stated that “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”\textsuperscript{56} Lower courts have been quick to apply American Express widely to the non-union employment context. For example in Sutherland v. Ernst & Young, a case concerning unpaid overtime claims under the FLSA, the Second Circuit rejected clerical workers’ reliance on the vindication of statutory rights theory to challenge a class action waiver because the statute did not expressly prohibit waiver of rights to proceed collectively.\textsuperscript{57}

\textbf{C. Enforceability Of Arbitration Awards}

In addition to the constriction of judicial power to declare forced arbitration provisions unenforceable in employment disputes, an arbitrator’s award can almost never be reviewed under the FAA even when the arbitrator gets the law or the facts wrong. By contrast, parties in court have the right to appeal a trial court’s decision. The FAA provides for narrow statutory grounds for a court to vacate an arbitrator’s award such that vacatur or modification of an arbitral award under sections 10 and 11 must involve “corruption,” “fraud,” and “undue means” by the arbitrator.\textsuperscript{58}

In 2008, the Supreme Court held in \textit{Hall Street Associates, LLC v. Mattel, Inc.} that sections 10 and 11 of the FAA provide the only statutory grounds on which a court can vacate, modify, or correct an arbitral award.\textsuperscript{59} Otherwise, a court “must” confirm the arbitrator’s decision because there is “no hint of flexibility” in the statute for a court to go beyond the statutory grounds for vacatur or modification of an arbitrator’s award.\textsuperscript{60} The \textit{Hall Street} Court explained that even if an arbitration provision expanded or supplemented the statutory scope of judicial review as provided in sections 10 and 11 through the agreement of both parties, the arbitration provision

\begin{itemize}
  \item \textsuperscript{54} Id. at 2308.
  \item \textsuperscript{55} Id. at 2310-11.
  \item \textsuperscript{56} Id. at 2311 (emphasis original).
  \item \textsuperscript{57} 726 F.3d 290 (2d Cir. 2013).
  \item \textsuperscript{58} See \textit{Hall Street Assoc., LLC v. Mattel, Inc.}, 552 U.S. 576, 583 n.4, 586-87 (2008) (interpreting the limits of sections 10 and 11 of the FAA). Section 10 of the FAA defines when a court can vacate an arbitrator’s award. 9 U.S.C. \textsection{} 10 (2012). Section 11 of the FAA defines when a court can modify an arbitrator’s award. 9 U.S.C. \textsection{} 11 (2012).
  \item \textsuperscript{59} 552 U.S. at 582, 584.
  \item \textsuperscript{60} Id. at 582, 587.
\end{itemize}
would be unenforceable. Review of an arbitration award on matters “affecting the merits” is simply not permitted. Consequently, mistakes of law or fact cannot be challenged. The Court’s 2013 decision in *Oxford Health Plans v. Sutter* reaffirmed that courts should interpret statutory grounds for vacatur of forced arbitration awards under the FAA narrowly. The Court reasoned that, “convincing a court of an arbitrator’s error—even his grave error—is not enough. So long as the arbitrator was ‘arguably construing’ the contract . . . a court may not correct his mistakes under § 10(a)(4) [of the FAA].”

Though not specifically found in the FAA, the long-standing theory of “manifest disregard” also has been used to vacate arbitration awards. Under this standard, which the Supreme Court first articulated in *Wilko v. Swan*, a court may vacate an arbitral award upon a showing that the arbitrator exhibited “manifest disregard” of the law. The standard has been described, however, by one commentator as a “virtually insurmountable” hurdle, and even courts recognize the limited utility of the doctrine.

Since the *Wilko* decision, courts have consistently limited the scope of judicial review of arbitration awards such that an arbitral award cannot be vacated because of the arbitrator’s misunderstanding or misinterpretation of

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61. *Id.* at 586-87.

62. *See id.* The Ninth Circuit also interpreted *Hall Street* to mean that statutory grounds to vacate an arbitral award under Sections 10 and 11 of the FAA cannot be “waived or eliminated” by contract among the parties. In re Wal-Mart Wage & Hour Empl. Practices Litig. v. Class Counsel & Party to Arbitration, 737 F.3d 1262, 1267-68 (9th Cir. 2013).


64. *Id.* at 2070. Part III discusses how the holding in *Oxford Health* inappropriately relied on labor arbitration jurisprudence to come to this conclusion.

65. *See Wilko v. Swan, 346 U.S. 427, 436-37 (1953).* A circuit split is developing on whether the Supreme Court’s decision in *Hall Street* overrules the “manifest disregard” standard. *See, e.g.*, Med. Shoppe Int'l, Inc. v. Turner Invs., Inc., 614 F.3d 485, 489 (8th Cir. 2010) (finding that *Hall Street* overruled *Wilko*’s “manifest disregard” standard in that it is not among the specifically enumerated grounds for vacatur or modification of an arbitral award under sections 10 and 11 of the FAA). *But see, e.g.*, Wachovia Secs., LLC v. Brand, 671 F.3d 472, 483 (4th Cir. 2012) (“[M]anifest disregard continues to exist either ‘as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.’”). The *Hall Street* Court suggested that “manifest disregard” may “merely refer[e] to the § 10 grounds collectively, rather than adding to them.” 552 U.S. at 585; cf. Stolt-Nielsen SA v. AnimalFeeds Int'l, 559 U.S. 662, 672 n.3 (2010) (declining to decide whether the “manifest disregard” standard survives after *Hall Street*).


69. *See, e.g.*, Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004) (noting that the “manifest disregard” standard is a “severely limited” doctrine).
the law or fact.\textsuperscript{70} This can lead to absurd results that undermine the purposes of our nation's employment and civil rights laws. For example, one judge upheld an arbitration award even though the arbitrator habitually fell asleep during the arbitration.\textsuperscript{71} In another instance, a judge refused to vacate an arbitrator's denial of an employee's discrimination claim despite agreeing with the employee that the arbitrator ignored evidence and misapplied the law.\textsuperscript{72} The judge complained that the FAA limited his judicial power to review the arbitrator's award and wrote that "incorrect, even wacky, legal interpretations by arbitrators usually survive judicial challenges."\textsuperscript{73} Consequently, it is exceedingly rare for a court to overturn incorrect decisions by arbitrators under the FAA.

\textbf{D. A Case Study: Judicial Review Versus Forced Arbitration}

\textit{Awuah v. Coverall North America}\textsuperscript{74} underscores how limited judicial review of forced arbitration provisions can result in fundamentally different outcomes between employees that are subject to forced arbitration and those that are not. In \textit{Coverall}, janitors sued a janitorial company in a class action lawsuit for misclassifying them as "franchisees" rather than employees, among other claims.\textsuperscript{75} The janitors sought to recover upfront "franchise fees" they paid, which ranged from $12,000 to $21,500, as well as deductions the company made from their pay for equipment, insurance, and


\textsuperscript{73} \textit{Id. at *18.}

\textsuperscript{74} The case has an extensive history. \textit{See Awuah v. Coverall N. Am., Inc.}, 563 F. Supp. 2d 312 (D. Mass. 2008); \textit{Awuah v. Coverall N. Am., Inc.}, 554 F. 3d 7 (1st Cir. 2009) (holding that the district court had the authority to determine the validity of the arbitration provision within the franchisee contracts); \textit{Awuah v. Coverall N. Am., Inc.}, 585 F.3d 479 (1st Cir. 2009); \textit{Awuah v. Coverall N. Am., Inc.}, 707 F. Supp. 2d 80 (D. Mass. 2010) (finding that the company misclassified plaintiff janitors); \textit{Awuah v. Coverall N. Am., Inc.}, 740 F. Supp. 2d 240 (D. Mass. 2010) (considering cross motions for summary judgment on the issue of damages, certifying questions on the calculation of damages to the Supreme Judicial Court of Massachusetts, and referring claims of plaintiffs that signed arbitration provisions to arbitration); \textit{Awuah v. Coverall N. Am., Inc.}, 791 F. Supp. 2d 284 (D. Mass. 2011); \textit{Awuah v. Coverall N. Am., Inc.}, 460 Mass. 484 (Mass. 2011) (answering questions certified by the District Court of Massachusetts as to the calculation of damages under state law); \textit{Awuah v. Coverall N. Am., Inc.}, 703 F.3d 36 (1st Cir. 2012); \textit{Awuah v. Coverall N. Am., Inc.}, 729 F.3d 22 (1st Cir. 2013).

\textsuperscript{75} \textit{Coverall}, 554 F.3d at 8-9.
unpaid customer bills. The company insisted that the janitors who signed franchisee agreements with forced arbitration provisions were subject to mandatory individual arbitration.

In an unusual turn of events, the federal judge assigned to Coverall served, with the agreement of the parties, both as the judge for the class action lawsuit as well as the arbitrator for two janitors who were compelled to arbitrate. In both capacities, the judge held that the company misclassified the janitors as franchisees rather than employees and awarded the janitors deductions in pay for equipment, insurance, and unpaid customer bills. The judge did not award the janitors the upfront "franchise fees" in either action, which reduced the potential award for each janitor by tens of thousands of dollars. The janitors who were not forced to arbitrate and proceeded in court were able to seek judicial review by the Massachusetts Supreme Judicial Court of the judge's state law finding that the plaintiffs where not entitled to recover their "franchise fees." The state court, after affirming that the company misclassified the janitors, found that the judge had misinterpreted state law regarding damages and ordered the company to pay the janitors who were members of the class in the court action both the "franchise fees" and other paycheck deductions. The janitors who were forced to arbitrate could not seek review of the arbitrator's decision and were bound by the original decision denying repayment of the franchise fees. As a result, the awards for the janitors who were forced to arbitrate, which were only a few thousand dollars, paled in comparison to the awards for the janitors who were able to proceed in court, which were upwards of $20,000.

Coverall highlights the dramatically different outcomes and patent unfairness that can result from forced arbitration due to the lack of judicial review under the FAA. Since arbitration awards are final, any errors go uncorrected because courts do not have the ability to vacate decisions. As a

76. Id. at 8 (specifying franchise fees); Coverall, 740 F. Supp. 2d at 242-43 (describing damages sought by one plaintiff).
77. Coverall, 563 F. Supp. 2d at 313.
78. See Coverall, 791 F. Supp. 2d at 286-87.
79. See id.; Coverall, 740 F. Supp. 2d at 243 n.2 (defining "chargebacks" as "fee[s] charged by Coverall to its cleaning workers when a customer does not pay its bill").
80. See Coverall, 791 F. Supp. 2d at 286-87 (awarding one janitor $1,586.55 and another janitor $5,750.94); Coverall, 740 F. Supp. 2d at 242-43 (finding that plaintiffs were only entitled to interest on "chargebacks" and not franchise fees); Coverall, 460 Mass. at 486 (describing and subsequently reversing the federal district court judge's finding that the employer properly deducted payments related to "franchise fees"). At minimum, the company charged each janitor a $12,000 franchise fee. Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 8 (1st Cir. 2009).
81. Coverall, 460 Mass. at 484.
82. Id.
83. See id.
III. JUDICIAL MISAPPROPRIATION OF LABOR ARBITRATION JURISPRUDENCE

Another factor contributing to forced arbitration's ascendency as a mechanism to resolve workplace disputes has been the Supreme Court's misplaced reliance on traditional labor law jurisprudence. Labor arbitration, or arbitration of workplace disputes through the representation of a union, is the touchstone of the labor-management relationship as developed under federal labor law. Forced arbitration of workplace disputes, however, stands in stark contrast to traditional labor arbitration.

Labor arbitration is premised on an equal bargaining relationship between a union and an employer. Forced arbitration is not, and some federal courts have ignored the differences and conflated the two. Scholars urging arbitration providers to create procedural protections for non-union arbitration have discussed how employers have been able to "cash in on" labor-management arbitration's reputation of fairness and voluntariness. Courts considering the application of the FAA to non-union employment settings continue to misappropriate labor-management case law and principles. This Part describes the importance of voluntariness and collective bargaining in the structure of labor arbitration as it has developed under federal labor statutes, and discusses the Supreme Court's decision in Oxford Health Plans LLC v. Sutter as an example of the judicial misappropriation of labor law to justify the validity of forced arbitration in the workplace.

A. History Of Labor Arbitration

Labor arbitration, which occurs between a union and an employer, is voluntary. It is negotiated and agreed upon through the collective bargaining process and is regulated and enforced under the National Labor Relations Act ("NLRA") and the Labor Management Relations Act

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85. See infra notes 98-108 and accompanying text.

86. Arnold M. Zack, Agreements to Arbitrate and the Waiver of Rights under Employment Law, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE, supra note 29, at 67, 82.


To create an equal bargaining relationship between union and employer, the NLRA established a national policy to address "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association, which substantially burdens and affects the flow of commerce."  

Importantly, the NLRA and LMRA created and established the authority of the National Labor Relations Board ("the Board") as an independent government agency charged with maintaining the delicate balance of power between employer and employees under the nation's labor laws.  Congress authorized the Board to enforce the duties of employers and unions to engage in fair and equal bargaining, including the power to issue orders to redress unfair labor practices.  The Board serves as the referee in labor-management relations, investigating charges of unfair labor practices, and enforcing rights under the NLRA and LMRA.  In essence, Congress structured our country's labor laws to promote and safeguard equal collective bargaining in an inherently unequal relationship between employee and employer.

Labor arbitration plays an important role in the statutory scheme of the NLRA and the LMRA. In an effort that began in the 1950s, legal counsel for the Congress of Industrial Organizations and the United Steelworkers of America brought a series of cases before the Supreme Court to advance a comprehensive theory of labor arbitration as the primary mechanism to enforce collective bargaining agreements between a union and an employer.  In *Textile Workers Union of America v. Lincoln Mills of Alabama*, the Court established that a union's agreement to arbitrate labor grievances was a *quid pro quo* for an agreement not to strike and that Congress envisioned that a union's agreement to arbitrate instead of strike would promote industrial peace.  Key to this trade-off is that if an

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93. Under the NLRA, it is the duty of both unions and employers to bargain collectively and in good faith. See 29 U.S.C. §§ 158(b)-(d).


employer bargains unfairly a union retains its power to strike, which ultimately serves as leverage for workers to demand better terms and conditions of employment in negotiations.96

This system of equal bargaining and self-governance does not exist in the non-union context.97 Without the threat of striking or leverage to make demands of an employer, non-union employees are unable to negotiate the terms and conditions of employment. As a result, employees must capitulate to employer-imposed forced arbitration of their workplace disputes. To use labor arbitration to justify forced arbitration dresses a wolf in sheep's clothing, robbing labor arbitration of its repute.

B. Oxford Health Plans LLC v. Sutter

Ignoring the fundamental requirements and protections of equal bargaining embodied in the structure and purpose of the country’s labor laws, the Supreme Court and lower courts inappropriately have cited labor arbitration jurisprudence arising under the NLRA and LMRA to support the application of the FAA to forced arbitration provisions in the individual employment context.

The Supreme Court’s 2013 decision in Oxford Health Plans LLC v. Sutter98 is an example of judicial misappropriation of labor arbitration principles in the forced arbitration context. The question before the Oxford Health Court was whether an arbitrator acts within his authority under section 10(a)(4) of the FAA or exceeds it when he bases a determination regarding class arbitration solely on the broad contractual language of an arbitration provision.99 Lifting language straight from labor arbitration case law, the Court held that an arbitrator’s determination in a dispute regarding contractual construction of an arbitration provision survives judicial review under the FAA “[s]o long as the arbitrator was ‘arguably construing’ the contract.”100 In so doing, the Court ignored the realities that give rise to forced arbitration as opposed to voluntary arbitration.

The Oxford Health Court improperly relied on reasoning that originated in the trio of seminal labor arbitration cases known collectively as the Steelworkers Trilogy.101 The Court prominently cited to a labor law principle, first developed in United Steelworkers of America v. Enterprise

96. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278-79 (1956) (discussing the importance of unfair labor practice strikes in the enforcement of Congress’ statutory vision under the NLRA).
97. See Zack, supra note 86, at 72-75, 82-84 (discussing the lack of procedural and substantive protections of forced arbitration in the non-union context when compared to labor arbitration in the union context).
99. See id. at 2066-68.
100. Id. at 2070 (quoting E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)).
101. See 133 S. Ct. at 2068-71; supra note 94.
Wheel & Car Corp.,\textsuperscript{102} which severely limited judicial review of a labor arbitrator’s construction of a collective bargaining agreement.\textsuperscript{103} The Oxford Health Court quoted language from Enterprise Wheel to apply this principle in the non-union context under the FAA, holding that, “[b]ecause the parties ‘bargained for the arbitrator’s construction of their agreement,’ an arbitral decision ‘even arguably construing or applying the contract’ must stand, regardless of a court’s view of its (de)merits.”\textsuperscript{104}

The Oxford Health Court’s broad pronouncement about arbitration under the FAA, however, ignored the reality that many non-union arbitration provisions are forced arbitration provisions unilaterally imposed by employers on employees as a condition of employment and are not bargained for between the employer and employee. The Court could have issued a narrower ruling to apply solely to cases where the parties come to a post-dispute agreement about the arbitrator’s interpretive authority.\textsuperscript{105} Instead, it inaccurately presupposed that bargaining actually occurs in the non-union workplace and misapplied Enterprise Wheel’s labor arbitration principle to the forced arbitration context.

At least one court, however, has gone out of its way to explain the difference between labor arbitration and forced arbitration.\textsuperscript{106} In Cole v. Burns International Security Services, the D.C. Circuit wrote at length in dicta about the need for the courts to be “mindful of the clear distinctions between arbitration of labor disputes under a collective bargaining agreement and mandatory arbitration of individual statutory claims outside of the context of collective bargaining.”\textsuperscript{107} Despite the Cole court’s recognition of the difference between labor arbitration and forced arbitration, it ultimately was bound by precedent and was compelled to uphold the forced arbitration provision in question.\textsuperscript{108} Courts continue to cherry pick from labor arbitration jurisprudence, proliferating the incorrect

\textsuperscript{102} United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).
\textsuperscript{103} See Oxford Health, 133 S. Ct. at 2068, 2070-71. Enterprise Wheel held that “[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.” 363 U.S. at 596; see supra Part III.A. (discussing the establishment of the labor law jurisprudence on labor arbitration under the Steelworkers’ Trilogy).
\textsuperscript{104} Oxford Health, 133 S. Ct. at 2068 (quoting Enterprise Wheel, 363 U.S. at 599).
\textsuperscript{105} The parties in Oxford Health reached an agreement through the course of litigation that the arbitrator would make the determination about whether class arbitration was permissible under the contract. See 133 S. Ct. at 2067, 2068 n.2.
\textsuperscript{107} 105 F.3d 1467 (D.C. Cir. 1997).
\textsuperscript{108} Id.
assumption that bargaining has actually occurred in the forced arbitration context as it does in the labor-management relationship.

IV.
FORCED ARBITRATION ARRIVES IN THE WORKPLACE:
ERODING WORKER PROTECTION STATUTES

The FAA has been turned on its head in the individual employee-employer relationship. As described in Part II above, the statute was intended to enforce voluntary agreements to arbitrate disputes between commercial entities possessing equal bargaining power. Courts and employers have distorted the FAA's intent and labor law jurisprudence to justify the imposition of pre-dispute forced arbitration on employees as a condition of employment. This metamorphosis of voluntary arbitration into forced arbitration has culminated in the erosion of statutory workplace rights. This Part first discusses how forced arbitration averts the public remedial purposes of workplace laws, and then describes the growing discontent with the new regime of forced arbitration in the workplace.

A. Forced Arbitration Interferes With The Statutory Purposes Of Workplace Laws

Federal workplace laws have created a comprehensive statutory enforcement scheme "designed primarily to protect and provide more effective means to enforce . . . civil rights." But the proliferation of forced arbitration of employment disputes thwarts the effective vindication of the rights created under these statutes. Specifically focusing on workers' rights under Title VII and the FLSA, this section describes how forced arbitration undermines the public enforcement of these statutes.

The statutory framework of workplace anti-discrimination rights is comprised of several laws, which "flow directly from core Constitutional principles." In creating these workplace rights, Congress considered civil rights legislation promoting and protecting equal opportunity in employment to be of the "highest priority." The enforcement of workplace civil rights laws promotes "the overriding public interest in equal employment opportunity" and "vindicat[e] the public interest in preventing employment discrimination." Title VII, one of most important
of these laws, prohibits workplace discrimination on the basis of race, color, religion, sex, or national origin.\textsuperscript{115} Congress supplemented antidiscrimination laws like Title VII with the Civil Rights Act of 1991, which enhanced the scope and remedies available under workplace antidiscrimination statutes and addressed Supreme Court decisions that "weakened the scope and effectiveness of Federal civil rights protections[].\textsuperscript{116} Both the Civil Rights Act of 1991 and Title VII are "part of a wider statutory scheme to protect employees in the workplace nationwide,"\textsuperscript{117} which includes other employment rights statutes such as the Americans with Disabilities Act,\textsuperscript{118} the Equal Pay Act,\textsuperscript{119} the Age Discrimination in Employment Act,\textsuperscript{120} the Family and Medical Leave Act,\textsuperscript{121} the Lilly Ledbetter Fair Pay Act,\textsuperscript{122} and the Uniformed Services Employment and Reemployment Rights Act.\textsuperscript{123}

Congress likewise established a broad national policy in passing the country's wage and hour laws, particularly the FLSA, creating a "comprehensive remedial scheme"\textsuperscript{124} to end "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."\textsuperscript{125} The Supreme Court has described the FLSA as "a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and

\begin{footnotes}
\item Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 144 (2d. Cir. 1999).
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as a result the free movement of goods in interstate commerce."\textsuperscript{126} In enacting the country's workplace anti-discrimination statutes and wage and hour laws, Congress sought not only to remedy individual wrongs of discrimination or wage theft but, perhaps more importantly, to promote and protect the national public interest in fair and equal working conditions. Forced arbitration has no place in this legislative scheme.

Critical to congressionally mandated worker protection laws is the dual statutory enforcement framework of private litigation and public injunctive relief available through the courts.\textsuperscript{127} For example, Title VII provides both a private right of action to enforce the statute\textsuperscript{128} and gives courts the authority to order injunctive relief to remedy ongoing violations of the law.\textsuperscript{129} Congress decreed that the courts, not administrative agencies or private arbitration, are the "preferred" forum to enforce these workplace statutes and that "the ultimate determination of discrimination rests with the Federal judiciary."\textsuperscript{130} The use of private litigation and public injunction through the courts as twin statutory enforcement mechanisms is found in other workplace laws, including the Age Discrimination in Employment Act.\textsuperscript{131} Importantly, in obtaining injunctive relief through the courts, an individual employee can act as a "private attorney general" to vindicate the public purposes of these workplace statutes.\textsuperscript{132} The ability of private litigants to obtain injunctions through the judicial forum is a "vital element" in the deterrence of future violations of workplace laws, which serves the public interest in promoting workplace equality and justice under the law.\textsuperscript{133} The FLSA specifically codified the public policy of using private litigation to end pervasive violations in the law, providing that a private action "may be

\textsuperscript{126}. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706-07, 707 n.18 (1945) ("[T]he prime purpose of the [FLSA] was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.").

\textsuperscript{127}. See Geraldine Szott Moohr, \textit{Arbitration and the Goals of Employment Discrimination Law}, 56 WASH. & LEE L. REV. 395, 421-22, 440-41 (1999) (discussing the dual purpose of federal employment discrimination law, Title VII of the Civil Rights Act, where "the statute seeks to achieve a public purpose, ending workplace discrimination, and to remedy individual injuries of discrimination.").


\textsuperscript{131}. The FLSA also created a private right of action to enforce wage and hour laws, including a mechanism to litigate violations in the courts through collective actions. See 29 U.S.C. § 216(b). The ADEA creates a private right of action to seek compensatory relief and injunctive relief through the courts. See 29 U.S.C. § 626(c) (2012).


maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," although injunctive relief must be obtained by the Secretary of Labor.  

Forced arbitration hinders courts from enforcing federal workplace laws and from deterring entrenched patterns of workplace discrimination or other violations of employment laws. Through public enforcement of workplace laws, "the courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws . . . [and] provid[ing] notice to the community, in a very tangible way, of the costs of discrimination." In explaining its policy opposing forced arbitration of employment disputes, the EEOC emphasized that "[t]he courts cannot fulfill their enforcement role if individuals do not have access to the judicial forum." In 2004, the late Clyde W. Summers, a prominent labor law scholar and practitioner, wrote specifically to describe the deleterious consequences that forced arbitration can have on the public purposes of workplace laws. He stated:

The practical effectiveness of [workplace law] is hidden in unpublished and opinionless awards. The public may thus be kept ignorant of what arbitrators are doing in the name of the statute. Whether justice is being done is kept secret. This may be tolerable when only the parties' contractual issues are implicated, but it is intolerable when the stakes involve both an individual's civil and statutory rights as well as the public interest.

Forced arbitration can never fulfill the essential deterrent role as envisioned in the country's workplace statutes because arbitration proceedings and decisions are private and arbitrators lack the power to order injunctive relief. Forced arbitration impedes the public enforcement of workplace rights as Congress mandated in the statutory purposes of our employment laws.

B. Growing Disillusionment With Forced Arbitration

Despite the ubiquity of forced arbitration of employment disputes, there is growing disillusionment with the practice. Criticism about forced

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135. See McKennon, 513 U.S. at 358-59 ("[T]he occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of [Title VII's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance.").
136. EEOC Policy On Mandatory Arbitration, supra note 18, at 283.
137. Id. at 283-84; see, e.g., McKennon, 513 U.S. at 358 ("The private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the ADEA.") (citations omitted).
arbitration is mounting from judges, federal agencies, Congress, arbitrators, and the public.

Some judges have expressed concern about the application of the Supreme Court’s Conception and American Express decisions to the employment context. Responding to Conception, the Honorable Judge Craig Smith and the Honorable Judge Eric V. Moye urged the Supreme Court to reconsider the “national policy favoring arbitration” when “applied to relationships of grossly disparate bargaining power.” Emphasizing the involuntariness of forced arbitration and the lack of collective bargaining, Judges Smith and Moye lamented that “[w]e are challenged to understand why a system that presents itself as one of equal access and power would apply such an unfair doctrine.” They counseled that “[t]he law, including the FAA, should be a shield for the weak and powerless and not a hammer for the strong and powerful.”

Similarly, the Honorable Berle M. Schiller of the Eastern District of Pennsylvania, in an order finding that the forced arbitration provision of a national restaurant chain was enforceable, decried the “lamentable” state of the law under the FAA, which bound the court to come to an “unappetizing” result. He wrote that “[t]he increasing frequency with which these arbitration clauses and class action waivers are employed is unfortunate, and in many situations, unjust.” Emphasizing the unequal bargaining power between employer and employee, he noted that the employer “hold[s] all of the cards here” where “its workers must therefore chew on a distasteful dilemma—give up certain rights or give up the job.”

Both the EEOC and the Department of Labor (“DOL”), two of the primary federal government agencies charged with enforcement of workplace rights, have issued policy statements and reports against the practice. The EEOC’s policy statement opposing forced arbitration of workplace discrimination claims as a condition of employment declared that this practice is “contrary to the fundamental principles evinced in [employment discrimination] laws” and “inconsistent with the civil rights laws.” After describing many of the problems with forced arbitration, the EEOC concluded that, “Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights by

140. Id.
141. Id.
143. Id. at *41.
144. Id. at *42.
145. Id. at *41.
146. EEOC Policy On Mandatory Arbitration, supra note 18, at 281.
laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts—an avenue of redress determined by Congress to be essential to enforcement.”147 Likewise, the DOL has issued reports opposing the use of forced arbitration to resolve employment disputes.148 In 1993, the DOL convened the Commission on the Future of Worker-Management Relations (“Dunlop Commission”) to review the state of American employment laws, including a study on the impact of forced arbitration on statutes.149 In its final report, the Dunlop Commission found that forced arbitration could include “mechanisms that appear to be of dubious merit for enforcing the public values embedded in our laws.”150

Even arbitrators have publicly criticized the imposition of forced arbitration on workers as a condition of employment. In 1997, the National Academy of Arbitrators (“NAA”) issued a statement opposing mandatory arbitration as a condition of employment “when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights.”151 In the statement, the NAA urged its members to “consider and evaluate the fairness of any employment arbitration procedures” if they are presented with a case that resulted from a forced arbitration provision.152 The NAA statement underscored the different role that arbitrators play when adjudicating a statutory claim subject to a forced arbitration provision and when serving as the final step of a grievance procedure under a collective bargaining agreement.153 Around the same time, a number of arbitration providers and interest groups developed a set of procedural guidelines to encourage fairer arbitration of employment disputes, entitled “A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship.”154

Congress also has begun to limit the reach of the FAA, passing piecemeal legislation banning forced arbitration of particular disputes. One example is the “Franken Amendment” of the Department of Defense Appropriations Act for 2010, which prohibits employers with federal

147. Id. at 286.
149. See id. at 51-60.
150. Id. at 51.
152. Id.
153. Id.
defense contracts over $1 million from forcing arbitration of employees’ sexual harassment claims. In addition, Congress has outlawed forced arbitration provisions in contracts between car dealers and their franchisees in the Motor Vehicle Franchise Contract Arbitration Fairness Act. If the parties agree to arbitrate their claims after the dispute arises, the Act requires that the arbitrator provide a “written explanation of the factual and legal basis for the award.” The Senate Committee Report noted that prohibiting forced arbitration in this context was necessary because of the unequal bargaining relationship between national car dealers and franchisees. Members of Congress have recognized the injustices of forced arbitration in the introduction of the bipartisan Fair Contracts for Growers Act, which would have amended the FAA “to provide for greater fairness in arbitration procedures relating to livestock and poultry contracts” in the farming industry. As Senator Charles Grassley (R-IA) aptly observed when introducing the Act on the Senate floor in 2007:

The Fair Contracts for Growers Act would . . . require that any contract arbitration be voluntarily agreed upon by both parties to settle disputes at the time a dispute arises, not when the contract is signed. This would allow farmers the opportunity to choose the best form of dispute resolution and not have to submit to the packers. It ensures that a farmer, most often the “little guy” in these dealings, is able to maintain his constitutional right to a jury trial. It also gives him a chance to compel disclosure of relevant information, held by the company, which is necessary for a fair decision.

Finally, and perhaps most importantly, the general public is beginning to recognize that forced arbitration inhibits their ability to enforce their statutory rights. A 2009 public opinion poll commissioned by The Employee Rights Advocacy Institute For Law & Policy and Public Citizen found that 59 percent of Americans opposed forced arbitration of

158. See MOTOR VEHICLE FRANCHISE CONTRACT ARBITRATION FAIRNESS ACT REPORT, S. REP. 107–266, at 2 n.1 (2002) (“Motor vehicle manufacturers have historically, and do currently, require dealers to execute standard contracts of adhesion defining the manufacturer-dealer contract on a ‘take it or leave it’ basis.”).
159. Fair Contracts for Growers Act of 2007, S. 221, 110th Cong. (2007) (co-sponsored by Senators Russell Feingold (D-CA) and Charles Grassley (R-IA)).
160. Id.
162. THE EMP. RIGHTS ADVOCACY INST. FOR LAW & POLICY & PUB. CITIZEN, NATIONAL STUDY OF PUBLIC ATTITUDES ON FORCED ARBITRATION (2009) [hereinafter NATIONAL STUDY OF PUBLIC ATTITUDES], available at http://www.employeerightsadvocacy.org/article.php/ForcedArbitrationStudy. The study surveyed 800 adults nationwide, 18 years or older, who are registered and were likely to vote in the 2010 elections. Id. at 2. Fifty-nine percent of all respondents opposed forced arbitration in
employment and consumer disputes and 59 percent of Americans supported the Arbitration Fairness Act. Even after hearing arguments both for and against forced arbitration, 56 percent of Americans surveyed still opposed forced arbitration provisions in employment and consumer contracts. The poll found that most respondents were unaware that their rights were being taken away from them by forced arbitration clauses. Approximately two-thirds did not remember seeing anything about forced arbitration in either their terms of employment or consumer contracts.

CONCLUSION

As the public debate about forced arbitration as a means to resolve workplace disputes continues and as courts further interpret and apply the Supreme Court’s decisions, including Concepcion and American Express, we need to be mindful of the legal developments that gave rise to the growth of the practice in the individual employee-employer relationship. Recognizing the three trends identified above—(1) the rise of the FAA as a “super-statute” and the lack of judicial review available under the FAA, (2) the selective misappropriation of labor law and collective bargaining principles to the FAA, and (3) the Court’s disregard of public policies underlying the country’s workplace statutes—can help judges, arbitrators, practitioners, and legislators alike to combat forced arbitration with the goal of prohibiting the practice and restoring public enforcement of statutory workplace rights.

See id. at 4. Opposition to forced arbitration crossed traditional gender and partisan lines. Id. at 5. In all categories, including men, women, Democrats, Republicans, and Independents, over 58 percent opposed forced arbitration and over 40 percent strongly opposed forced arbitration. See id. at 5-6.

163. Id. at 7-8. On May 7, 2013, Senator Al Franken (D-MN) and Representative Hank Johnson (D-GA) introduced the AFA, which would amend the FAA by making it unlawful for employers to impose arbitration on employees except when knowingly and voluntarily agreed to after the dispute arises or pursuant to a collective bargaining agreement. See Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013); H.R. 1844, 113th Cong. (2013)

164. NATIONAL STUDY OF PUBLIC ATTITUDES, supra note 162, at 11-13.

165. Id. at 3, 14.

166. Id. at 3, 15.