The End of Duffield and the Rise of Mandatory Arbitration: How Courts Misinterpreted the Civil Rights Act's Arbitration Provision

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The End of *Duffield* and the Rise of Mandatory Arbitration: How Courts Misinterpreted the Civil Rights Act’s Arbitration Provision

Angelito Remo Sevilla†

*For the first time in our history, business has a good chance of opting out of the legal system altogether. Today’s expansive reading of the Federal Arbitration Act allows the unilateral imposition of arbitration clauses to trump all sorts of civil rights and consumer protection legislation. Coupled with today’s expansive preemption jurisprudence, business can (and does) make a rational calculus that leads it to lobby for an ever-diminishing role for the federal district courts.*

- Judge William G. Young

**INTRODUCTION**

Labor and employment suits impose significant financial, emotional, and human costs on all involved. Nevertheless, the number of employment-related lawsuits has risen dramatically in the last few decades taking
up as much as one-third of a federal judge’s civil docket.Employers are wary of being subject to prolonged and expensive litigation, as well as the imposition of compensatory and punitive damages by sympathetic juries. These concerns have prompted employers to seek faster, less expensive, more confidential, and more predictable alternative dispute settlement mechanisms. As this increasing interest in arbitration and other alternative dispute resolution (ADR) systems develops, so too does the body of scholarship and case law dealing with the ramifications of encouraging such mechanisms. Employers hail ADR as a quick, efficient, and effective mechanism to stem the tide of employment cases overwhelming the courts. Furthermore, employers favor arbitration proceedings due to their perceived greater predictability, decreased award appealability, limited discovery requirements, and increased confidentiality.

Other ADR proponents advocate arbitration measures for the benefits they confer to employee plaintiffs bringing discrimination claims. As Richard Bales argues, ADR allows employees, who cannot easily meet an overburdened court system’s plethora of requirements, to have their grievances heard in a simple, less cumbersome forum.

This Comment examines the growing popularity of ADR processes to adjudicate employment discrimination suits. Part I discusses the legal development of the Federal Arbitration Act (FAA) and highlights the most recent stage in its evolution: mandatory arbitration agreements imposed upon prospective employees as a condition of employment. This Comment proceeds from the standpoint that, while ADR processes may indeed

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4. There are different kinds of alternative dispute mechanisms: negotiation is the discussion of a complaint by the aggrieved employee and his/her employer to set terms of the resolution, fact finding is the resolution of disputes by a neutral person investigating a complaint, peer review is the resolution of disputes by a panel of employees and managers, internal mediation is the resolution of disputes by a neutral person from within the company, mediation is the negotiation of disputes by a neutral person from outside the company, and arbitration is the resolution of disputes by a neutral person from outside the company. This Comment focuses primarily on arbitration as a form of ADR.
5. See Andrew W. Volin, Recent Legal Developments in the Arbitration of Employment Claims, 52 DISP. RESOL. J. 16 (1997) (discussing the proliferation and legality of mandatory arbitration agreements).
8. Richard A. Bales, Compulsory Arbitration: The Grand Experiment in Employment 102-13 (1997) (describing the results of a mandatory arbitration measure implemented by Brown & Root, one of the first companies in the United States to adopt an in-house program for non-judicial resolution of employment disputes).
adequately and competently adjudicate disputes more efficiently than litigation in a judicial forum, fairness and policy considerations demand that these agreements should only be enforced when both parties, especially the weaker party in the bargaining process, knowingly and voluntarily consent to settle their disputes in a fair, alternative forum. Arguably, employment agreements that coerce an employee to forgo his or her right to a judicial forum subvert the essential purposes of the 1991 Civil Rights Act and are beyond the bounds of the FAA.\footnote{See Federal Arbitration Act § 1, 9 U.S.C. §§ 1-16 (1994).}

Part II explores the social, political, and legislative history of the Civil Rights Acts of 1990 and 1991, particularly section 118. Section 118 "encourages" the use of arbitration procedures to adjudicate civil rights disputes and to explain the legislative ambiguity in the statutory language relied upon by courts to enforce mandatory arbitration procedures. Courts have read section 118 as a sign of congressional acquiescence to mandatory arbitration agreements. Because Congress did not explicitly preclude or prohibit the use of arbitral forums, it must have made a conscious decision to allow the enforcement of compulsory arbitration procedures. However, this Comment argues that Congress, in passing the Civil Rights Act of 1991, did not intend section 118 to authorize mandatory arbitration agreements. Instead, it was the pressure for political compromise and the weakening of the civil rights agenda that impeded more exacting statutory language prohibiting the use of mandatory arbitration.

Part III explores where the legal battle lines are today. In doing so, Part III sets out the potential political and policy implications of mandatory arbitration’s rise, the roles that different political actors are expected to play in delineating mandatory arbitration, and the likelihood of mandatory arbitration withstanding future judicial scrutiny.

I

EMPLOYMENT ARBITRATION AND THE DEVELOPMENT OF THE FEDERAL
ARBITRATION ACT

The scope and power of the FAA has expanded significantly since 1925. This Part highlights three significant developments that played a part in the evolution of the FAA: (1) the improved perception of arbitration efficacy, (2) the development of public agencies to adjudicate disputes, and (3) the rise of arbitration terms in employment contracts. Through case law and congressional acquiescence, the FAA matured from a purely contractual endeavor to a full-fledged dispute resolution mechanism that enjoys the same degree of legitimacy as the judicial system.

A. Improved Perceptions of the Effectiveness of Arbitration

Initially, courts and the legal community perceived arbitral forums as an inferior, second-class dispute resolution system, limited to disputes arising out of contractual agreements. This lack of confidence in arbitration was most apparent in the Supreme Court’s opinion in *Alexander v. Gardner-Denver Co.* The Court expressed strong reservations about the competence and adequacy of arbitration to adjudicate discrimination cases fairly. Arbitration, the Court added, lacks the vital procedural mechanisms such as fact-finding, testimony, cross-examination, and judicial review common to civil trials.

However, fifteen years after *Gardner-Denver*, the Supreme Court displayed a newfound appreciation for arbitration, citing a “strong endorsement of federal statutes favoring [ADR for] resolving disputes.” Sixteen years after *Gardner-Denver*, the Court determined that “[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”

As courts accepted the competence and ability of arbitrators, the scope of arbitrable matters expanded to encompass public laws as well. Arbitrators are empowered to apply and interpret external law according to the private agreements reached by the parties, unless the objecting party

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14. *id.* at 56-57 (setting out that “[W]hile well suited to the resolution of contractual disputes, [arbitration is] a comparatively inappropriate forum for the final resolution of rights created by Title VII.... the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.”).
15. *id.*
16. Quijas v. Shearson/Amer. Express, 490 U.S. 477, 481 (1989) (generalizing that attacks on arbitration “rest[] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,” and as such, they are “far out of step with our current strong endorsement of federal statutes favoring this method of resolving disputes.”); see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
can prove that Congress intended to exclude certain statutory rights from arbitral forums.\cite{8}

B. The Development of Public Agencies

Litigation and judicial conflict resolution are thought of as serving the purposes of society as a whole, rather than just the involved parties, by advancing public policy aims while resolving disputes. In the late twentieth century, an intricate web of public agencies and bureaucracies arose to provide plaintiffs with new remedial forums while advancing public policy concerns through dispute resolution.\cite{19} In particular, the Civil Rights Act of 1964\cite{20} created the Equal Employment Opportunity Commission (EEOC) to enforce federal employment discrimination law. In 1972, the EEOC was granted independent prosecutorial power.\cite{21}

The Supreme Court approved the EEOC’s ability to preserve public policy advancements through dispute resolution in \textit{Gilmer v. Interstate/Johnson Lane Corp.}\cite{22} Justice White stated that though “arbitration focuses on specific disputes between the parties involved,” arbitration, like litigation, “can further broader social purposes”\cite{23} by setting up a more favorable environment for other alternative dispute resolution. White’s statement indicates a growing acceptance of arbitration and ADR as capable of fulfilling not only litigation’s equitable dispute resolution capacities, but also its broader public policy capabilities.

While the Court endorsed arbitration’s ability to serve broader social purposes,\cite{24} its decision in \textit{EEOC v. Waffle House, Inc.}\cite{25} ensured that public agencies such as the EEOC retain the independent authority to pursue judicial relief in individual cases, such as back pay, reinstatement, and damages, even when employees contract or otherwise agree to arbitrate all employment related disputes.\cite{26} Although \textit{Waffle House} seemed like a setback for the arbitration movement, the decision actually fostered greater judicial acceptance of arbitration measures. Since public enforcement

\begin{footnotesize}
\begin{enumerate}
\item \cite{19} When Title VII was enacted in 1964, it authorized private actions by individual employees and public actions by the Attorney General in cases involving a “pattern or practice” of discrimination. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a) (2000). In 1972, Congress amended Title VII to authorize the EEOC to bring its own enforcement actions. \textit{Id.}, see also \textit{EEOC v. Waffle House, Inc.}, 534 U.S. 279, 286 (2002).
\item \cite{22} 500 U.S. 20, 28 (1991).
\item \textit{Id.} at 27-28.
\item \textit{Id.} at 28.
\item \cite{25} 534 U.S. 279, 285-98 (2002).
\end{enumerate}
\end{footnotesize}
mechanisms remain available regardless of private arbitration agreements, and since Waffle House preserved the apparent robustness of such public mechanisms, room was made for arbitration to be seen as less of a threat to potential plaintiffs' days in court.

However, it seems unrealistic and disingenuous for the Court to claim that the social benefits of litigating discrimination claims are not lost in arbitration because public agencies such as the EEOC retain the ability to vindicate the public interest. In Waffle House, the Court acknowledged public agencies' limited capability to reach the merits of many cases brought to their attention, noting that the agencies actually file suit in only a marginal number of such cases. If litigation will no longer have a social impact when an employee agrees to arbitrate his or her claims, these statistics suggest that it is unlikely that public agencies will preserve the social impact of litigation.

Secondly, the Gilmer Court's contention that the societal benefits of litigation are preserved by arbitration is unrealistic because it assumes that arbitration systems are facilitated by unbiased arbitrators constrained by the same procedural safeguards afforded in litigation. As noted earlier, while arbitrators are now empowered to apply external law, arbitration agreements can govern which external laws will be applicable and to what degree. Arbitration will do nothing to vindicate public interests if arbitrators are not required to write opinions, the proceedings are private and confidential, the decision-maker's reasoning is not subject to public scrutiny, and parties are free to apply or circumvent external laws to a varying degree. The fact that neither Gilmer nor other court decisions concerning mandatory arbitration affirmatively prescribe a mechanism by which to

26. Id. at 290-92 n.7. The Court cited statistics showing: [In fiscal year 2000, the EEOC received 79,896 charges of employment discrimination. Although the EEOC found reasonable cause in 8,248 charges, it only filed 291 lawsuits. In contrast, 21,032 employment discrimination lawsuits were filed in 2000. These numbers suggest that the EEOC files fewer than two percent of all antidiscrimination claims in federal court. Indeed, even among the cases where it finds reasonable cause, the EEOC files suit in fewer than five percent of those cases.]

27. In Gilmer, the Court was faced with a set of facts uncharacteristic of arbitration agreements that employees are likely to face. The New York Stock Exchange (NYSE) arbitration agreement signed by the plaintiff had measures that promoted procedural fairness: the rules provided for pre-hearing discovery, and the contract at issue was not an ordinary employment contract between employer and employee. Gilmer, 500 U.S. at 20; see also Christine Godsil Cooper, Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims, 11 ST. LOUIS U. PUB. L. REV. 203, 220-21 (1992).

28. See Stuart H. Bompey et al., The Attack on Arbitration and Mediation of Employment Disputes, 13 LAB. LAW 21, 28 (1997) (noting that "the most important difference is that arbitrators have broad discretion to decide cases without strict application of legal principles and to fashion remedies that are broader or more flexible than those available in a court of law.").

29. Hence, compulsory arbitration agreements have the capacity to constitute a complete rejection of Title VII protections if the employer has a compulsory arbitration agreement that denies the use of Title VII, and the employee is left in the take-it-or-leave-it position. Cole, supra note 18, at 612.
adjudicate disputes troubles employee activists because the decisions do not articulate a standard for a fair arbitration program, and they do not provide contract drafters with guidelines to preserve public policy or statutory construction in the courts.30

C. The Expansion of Arbitration to All Employment Contracts

Section one of the FAA states: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."31 Hence, the statute's terms leave unclear whether it excludes all employment contracts or only certain categories. For courts to construe the FAA as a broad statement of congressional policy in favor of arbitration agreements would allow the FAA to encompass matters for which the Congress of 1925 did not intend the FAA to apply. Critics of mandatory arbitration measures point out that state employment contracts are beyond the scope of the FAA, arguing that when the FAA was passed, it was not intended to cover statutory disputes, only labor contract terms.32 Congress passed the FAA knowing that only interstate employees were within the scope of their power to control commerce.33 Furthermore, at the time of the FAA's passage, important statutory civil rights protections did not exist, and the legal construction of "commerce" was much narrower than it is today.34

Prior to 1950, a number of courts had held that the FAA excluded all contracts of employment.35 After 1950, the trend shifted to encourage an expansion of matters subject to arbitration.36 By 1953, a vast majority of

30. Id.
32. See Clyde W. Summers, Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate, 6 U. PA. J. LAB. & EMP. L. 685, 732 (2004) (arguing that the legislature should amend the FAA in accordance with the intent of the framers of the FAA to exclude all employment contracts). See also section 1 of the FAA defining "commerce" and excluding certain employment related contracts from coverage, providing in pertinent part:

"[C]ommerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Federal Arbitration Act § 1.
34. Id.
35. See, e.g., Gatliff Coal Co. v. Cox, 142 F.2d 876, 882 (6th Cir. 1944) (finding that the FAA did not apply to employment contracts).
36. United Elec., Radio & Mach. Workers v. Miller Metal Prods., 215 F.2d 221 (4th Cir. 1954) (expanding FAA provisions not only to employment contracts, but also to collective bargaining contracts as well); Tenney Eng'g, Inc. v. United Elec., Radio & Mach. Workers, Local 437, 207 F.2d 450 (3d Cir. 1953) (adopting a narrow construction of the section 1 exception language).
circuits construed the exclusionary clause narrowly and held that most employment contracts were covered under the FAA. By 2001, only the Ninth Circuit adhered to the view that the FAA excluded all contracts of employment. The Gilmer court had the opportunity to resolve this issue, but left it undecided, creating a momentary split in the circuits.

In the matter of the FAA’s applicability to employment contracts, the EEOC has opined that section 1 restrictions of the FAA apply to all contracts of employment, not just contracts of those employed in the transportation industry. On June 30, 1995, the EEOC filed an amicus curiae brief in Cosgrove v. Shearson Lehman Bros., urging the Sixth Circuit to remand the plaintiff’s claims of unlawful retaliation under Title VII to the district court for trial.

The Supreme Court, by a 5-4 vote, resolved this issue in 2001. In Circuit City Stores, Inc. v. Adams, the majority held that the FAA covers most employment contracts, exempting only those of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce. The Court reasoned, “If all contracts of employment were beyond the scope of the [Federal Arbitration] Act under the same provision, the separate exemption for ‘contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce’ would be pointless.”

The majority also considered the FAA’s broad pro-arbitration stance, concluding that there are real benefits in enforcing arbitration provisions in the employment context. Once again, the Court endorsed the increased legitimacy of arbitration agreements. At this point, it was apparent that the Court would no longer question the efficacy of ADR procedures as adopted by many employers.

II
THE RISE OF MANDATORY ARBITRATION AGREEMENTS

A. The Impact of Gilmer

In May 1991, arbitration continued its rampant momentum in the Supreme Court’s widely-watched case, Gilmer v. Interstate/Johnson Lane Corp.
The Court compelled arbitration of a claim under the Age Discrimination in Employment Act (ADEA) where the plaintiff signed an agreement in a securities registration application that contained a provision requiring arbitration of all future employment related claims. The 7-2 majority opinion, authored by Justice White, held that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." The Court ruled that the FAA applies to statutory disputes, limiting Gardner-Denver and its progeny to the collective bargaining realm. In reaching its decision, the Court explained that arbitration adequately protects statutory rights under the ADEA. Gilmer also followed the Court's earlier cases, which place the burden on the party resisting arbitration to show through textual analysis or legislative history that Congress intended to shunt certain statutory rights from the arbitral forum.

Gilmer spawned fiery criticisms from various commentators who have proved virtually unanimous in their opposition to what they regarded as an infringement of employees' right to a judicial forum. As Professor Covington explained, "the opinion has been the subject of commentary in well over a hundred law review articles, and has been chewed over in countless academic conferences, after-dinner speeches, and briefings for managers." Employee activists also heavily criticized the Court's acceptance of mandatory arbitration out of concern for the preservation of employees' right to a judicial forum for their grievances. As recently as 1974, the Court had been especially protective of a discrimination victim's ability to advance his claim in a judicial forum. In fact, the Court then seemed opposed to allowing waiver of statutory rights, even when knowingly and

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47. Gilmer, 500 U.S. at 20 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).
48. Id. at 28. See also Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 78 (1998) (affirming Gilmer in holding that an employee's statutory right to a judicial forum for claims of employment discrimination "is not a substantive right.").
49. Gilmer, 500 U.S. at 33.
51. Id. at 351-52.
voluntarily waived.\textsuperscript{53} At the time, the concept of forcing employees to choose between their employment and arbitration was unthinkable.\textsuperscript{54}

In contrast, employers and employer advocates welcomed the decision with open arms. \textit{Gilmer} triggered an exponential increase in the use of arbitration agreements.\textsuperscript{55} Some advisors even suggested that mandatory arbitration agreements should be placed on job application forms.\textsuperscript{56} In 1995, the General Accounting Office (GAO) published an in-depth analysis of the prevalence of arbitration agreements used by private firms as well as the characteristics of the various arbitration plans being implemented.\textsuperscript{57} Almost all employers studied with 100 or more employees used one or more ADR approaches.\textsuperscript{58} Arbitration was one of the least common approaches reported.\textsuperscript{59} Almost 90\% of employers that had more than 100 employees and filed Equal Employment Opportunity (EEO) reports with the EEOC in 1992 used at least one ADR approach to resolve discrimination complaints.\textsuperscript{60} Smaller businesses were just as likely to use arbitration as larger ones.\textsuperscript{61}

The growing acceptance of alternative dispute resolution is by no means limited to the private realm. Government agencies are also exploring these processes to ease the judicial case load. Thirty-five states have adopted ADR measures.\textsuperscript{62} In California, for example, judges may refer disputes of $50,000 or less to nonbinding arbitration before proceeding in court.\textsuperscript{63}

At the federal level, Congress passed the Administrative Dispute Resolution Act (ADRA), authorizing and encouraging federal agencies to

\textsuperscript{53} See id. at 56 (holding that "[t]he purposes and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal.").

\textsuperscript{54} McDonald v. City of West Branch, 466 U.S. 284 (1984) (holding that res judicata and collateral estoppel principles from an award in arbitration does not apply to a subsequent employee's § 1983 claim); see Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981) (holding that employees' wage claims under Fair Labor Standards Act are not barred by the prior submission of their contractual dispute to arbitration).


\textsuperscript{56} See, e.g., Volin, \textit{supra} note 5, at 18.

\textsuperscript{57} U.S. \textit{GAO REPORT}, \textit{EMPLOYMENT DISCRIMINATION: MOST PRIVATE EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION}, 95-150 (July 1995) [hereinafter \textit{GAO REPORT}].

\textsuperscript{58} Id. at 7.

\textsuperscript{59} The General Accounting Office sent a questionnaire to a random sample of 2,000 businesses that filed an equal employment opportunity (EEO) report with the EEOC in 1992 and have over 100 employees. Employers who reported using arbitration procedures were asked to describe the process. To evaluate the fairness of these procedures, the employer reports were compared with the policy provisions proposed by the Commission on the Future of Worker-Management Relations. \textit{id.} at 1.

\textsuperscript{60} Id. at 7.

\textsuperscript{61} Id. at 11.

\textsuperscript{62} See Bompey et al., \textit{supra} note 28, at 23.

\textsuperscript{63} Id.
use alternative means of resolving disputes.\textsuperscript{64} Even the EEOC initiated an ADR program based on voluntary participation by the disputing parties,\textsuperscript{65} confidential proceedings, a neutral facilitator, and settlement agreements enforceable by the EEOC.\textsuperscript{66}

\section*{B. The Controversy Behind Mandatory Arbitration Agreements}

As Judge Young's admonition suggests, ADR's prominence grew under the suspicious and wary eye of employee advocacy groups cognizant of disparate bargaining power between employers and employees. Some of these critics contend that forcing employees to waive legal rights is reminiscent of "Yellow Dog Contracts," where employers conditioned employment upon employees' agreements to waive their rights to unionize.\textsuperscript{67} Other critics are concerned about the adequacy of arbitration measures to decide these employment discrimination matters, systemic bias on the part of arbitrators, the limited availability of remedies, and the reduced likelihood of meaningful appellate review. The most prominent objections to mandatory arbitration are the erosion of the weaker bargaining parties' rights, the inability of arbitration to fairly adjudicate employment discrimination disputes, the inherent unfairness in allowing employers to choose the arbitration forum, and the frustration of the employee's or potential employee's Seventh Amendment right to a jury trial.

\footnotesize
\begin{itemize}
    \item \textsuperscript{65} With voluntary participation, it is empirically unclear who would benefit; studies assessing relative success levels of employees versus employers offered mixed results. Compare Bompey et al., supra note 28, at 65, with Lisa Bingham, Employment Arbitration: The Repeat Player Effect, 1 EMPLOYEE RTS. & EMP. POL. J. 189, 210-13 (1997); see also Paul L. Edenfield, Note, No More The Independent and Virtuous Judiciary?: Triaging Antidiscrimination Policy in a Post-Gilmer World, 54 STAN. L. REV. 1321, 1330 (2002).
    \item \textsuperscript{66} The EEOC, with the consent of the employee, would suspend the process of a discrimination charge for a maximum of sixty days to give the parties an opportunity to resolve the dispute using the employer's dispute resolution program. Jay W. Waks & Sarajane Steinberg, EEOC's Pilot Program, 25 NAT'L L.J., June 2, 2003, at 31. Perhaps the adoption of ADR procedures was motivated in part by the increasing number of cases filed with the EEOC. In 1997, the EEOC received over 80,000 discrimination complaints from employees, increasing the number of employment-related suits 128% since 1995. See Bompey et al., supra note 28, at 22.
    \item \textsuperscript{67} Congress invalidated "Yellow Dog Contracts" in the Norris-LaGuardia Act of 1932 § 3, 29 U.S.C. § 103 (1932). Courts no longer subscribe to the analogy, holding that the right to litigate in a judicial forum is merely a procedural right while the right to join a union is a substantive right that cannot be waived involuntarily. For more discussion on the argument that mandatory arbitration is similar to Yellow Dog Contracts, see Katherine Van Wezel Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 DENVER U. L. REV. 1017 (1996); Judith P. Vladeck, Yellow Dog Contracts Revisited, N.Y. L.J., July 24, 1995, at 7. But see Samuel Estreicher, Predispute Agreements to Arbitrate Statutory Employment Claims, N.Y.U. L. REV. 1344, 1352 (1997) (arguing that unlike Yellow Dog Contracts, which serve only to thwart the associational freedom of employees, predispute arbitration offers advantages for both parties to the contract).
\end{itemize}
I. The Erosion of Weaker Bargaining Parties' Rights

Using freedom of contract principles to justify mandatory arbitration envisions an ideal, balanced bargaining scenario where both parties can knowingly and willingly compromise. In this idealized process, both parties are free to negotiate the terms of their agreement. This is arguably the world conceived of by mandatory arbitration proponents; that is, the world in which Robert Gilmer, an experienced businessman entering a sophisticated business, lived when he signed his arbitration agreement with the NYSE. As Justice White's opinion in *Gilmer* emphasized: "[H]aving made a bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."\(^6\)

As such, enforcement of arbitration agreements is conceived as a matter of honoring agreements already made, a sort of freedom of contract preservation. The Court emphasized that there was no evidence of coercion or fraud, suggesting that Gilmer entered into the contract willingly.\(^6\)

However, in the years following *Gilmer*, pre-dispute arbitration agreements have taken on a more coercive, non-negotiable, and less voluntary form. These agreements are signed in situations where employees can either agree to provisions set forth by the employment contract or forgo employment.\(^7\) Employers have the unilateral option of fashioning the terms and conditions of the agreement, and can require potential employees to choose between agreeing to the provisions of the employment contract or unemployment. Moreover, prospective employees are very likely to be optimistic about the job prospect and perhaps eager to please their superiors; thus, they may not anticipate any potentially negative repercussions of an arbitration agreement.\(^7\)

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69. *Id.* at 33.
70. *See id.* at 39 (Stevens, J., dissenting) (arguing that section 1 of the FAA was intended to enforce "commercial" contracts among merchants, not agreements between employers and employees); Justice Stevens referenced Senator Walsh's testimony during consideration of a bill similar to the FAA:

The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you cannot make any contract. It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

*Id.* (quoting hearings on S. 4213 and S. 4214, before a subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923) (Senator Walsh)).
71. Studies indicate that people have a psychological tendency to undervalue the present risk of events of low incidence but high severity, making them more likely "to trade these off for immediate tangible benefit or loss." PAUL C. WEILER, GOVERNING THE WORKPLACE, THE FUTURE OF LABOR AND EMPLOYMENT LAW 74 (1990).
This inherent inequality in bargaining power in the employer-employee relationship, a significant concern for the Court in *Gardner-Denver*, was no longer sufficient to challenge mandatory arbitration. In *Gilmer*, the Court held that “mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” After *Gilmer*, the only imbalances that may support a challenge to arbitration agreements are those arising from “overwhelming” inequality of bargaining power. What actually constitutes “overwhelming” imbalance, however, remained unresolved, especially because *Gilmer* involved an experienced businessman signing a contract in a sophisticated industry, apparently without being tricked or defrauded into waiving his rights.

Some commentators, like Professors Ware and Estreicher, reject the theory that pre-dispute arbitration agreements imposed as a condition of employment are involuntary. These commentators argue that an employee can choose not to accept the position and opt for employment that does not require mandatory arbitration. However, this argument is unconvincing considering that mandatory arbitration has become the norm for entire industries. Thus, a job seeker like Robert Gilmer may not be able to avoid such agreements by seeking work with a different employer, but rather would have to abandon the profession or industry altogether.

If more and more employers continue to adopt mandatory arbitration procedures as a condition of employment without adequate guidance from the courts as to the procedures that must be in place to fairly adjudicate these claims, employee advocates fear that this development will essentially sound the death knell for adjudicating Title VII and other civil rights protections. As Paul Edenfield notes, “The foisting of arbitration on powerless or unwitting employees may comport with traditional market principles of contractualism, but bears little regard for informed employee choice or the public good. . . . Information asymmetries may cause employees to agree unwittingly to undesirable forums in a great number of instances.”

2. The Inability of Arbitration to Fairly Adjudicate Discrimination Matters

Some commentators question whether the arbitration process possesses the institutional safeguards necessary to adjudicate employment

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73. *Id.*
75. *Id.*
76. Edenfield, *supra* note 65, at 1325.
discrimination cases fairly. In this sense, expanding Gilmer's holding is troublesome because the Gilmer court did not comment on the level of procedural protection necessary to ensure fairness. Yet, many courts apply Gilmer as a means of relief from the surge of employment discrimination cases clogging their dockets. This acceptance paves the way for the enforcement of various arbitration procedures, even if they detract from the effectiveness of antidiscrimination measures.

By and large, labor arbitration proceedings are informal; they provide limited discovery, varying degrees of conformity to rules of evidence, and decision makers are not constrained by requirements to write formal opinions or the possibility of reversal on appeal. Furthermore, to the extent that these proceedings provide limited means for public scrutiny and do not set precedent for other cases, the rise of arbitration agreements stunts judicial development of antidiscrimination laws.

Even in a system with adequate procedural safeguards, critics are concerned that the system is unfair to employees because arbitrators cannot empathize with the victims of discrimination or are unfamiliar with the legal concepts governing employment law. As Professor Cooper argues,

An arbitrator who knows how limited his or her role is, who is paid a modest sum, who is not a professional arbitrator, and who knows the scope of judicial review cannot be expected to view the case as seriously as a federal judge who is developing public law. And an

78. Mandatory Arbitration, supra note 7, at 1672.
79. See Blumrosen, supra note 77, at 254-59.
80. Cooper, supra note 27, at 220-21. While the FAA does provide for judicial review, 9 U.S.C. § 10(a) (2000), courts will reconsider arbitration decisions only in limited circumstances. Siegel v. Titan Indus. Corp., 779 F.2d 891, 893 (2d Cir. 1985); Falmestock & Co. v. Waltman, 935 F.2d 512, 516 (2d Cir. 1991). The FAA allows for the vacation of an arbitration award in the following circumstances:
1. Where the award was procured by corruption, fraud, or undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
9 U.S.C. § 10(a). The FAA, moreover, does not empower a court to issue its own decision in the underlying case. The court may only vacate the arbitration award, and “in its discretion, direct a rehearing by the arbitrators.” 9 U.S.C. § 10(b). Awards can be vacated only if the arbitrator exhibits “manifest disregard” for the law, interpreted to impose a very stringent standard. Seigel, 779 F.2d at 892 (citing Wilks v. Swan, 346 U.S. 427, 436-37 (1953)). This means that the “arbitrator understood
arbitrator who is limited in knowledge of or respect for the law cannot do justice.\textsuperscript{81}

A report issued by the GAO in March 1994 revealed that, in 1992, 89\% of NYSE arbitrators were white men with an average age of sixty.\textsuperscript{82} Hence, employee advocates are concerned about whether the arbitrators are equipped to appreciate the gravity of discrimination charges and the sensitive nature of employment disputes and whether conscious or unconscious bias pervades the arbitrators’ decisions.

3. \textit{The Repeat User Bias}

Since private parties typically manage arbitration proceedings, employee advocates are concerned that decisions will be skewed against employee grievances, or that arbitrators will be unwilling to provide large compensations to victorious plaintiffs in an effort to maintain positive relations with the employer.\textsuperscript{83} When employers choose which arbitrator will adjudicate their cases, they are armed with resources that allow them to check the backgrounds and track records of arbitrators and screen out ones they perceive to be more sympathetic to employees.\textsuperscript{84} Consequently, private arbitrators may surmise that their prospects of finding future business is influenced by their ability to maintain an employer-friendly track record. Employers are, as academics put it, repeat players in the process.\textsuperscript{85} Employees, on the other hand, are theoretically disadvantaged because they will most likely utilize the process only once.\textsuperscript{86} Hence, the selection process favors employers since arbitrators want to ensure that they get hired and also stay employed.\textsuperscript{87}

These concerns led federal employment agencies to speak out against mandatory arbitration. A policy statement issued by the EEOC condemned involuntary and compulsory arbitration agreements as “contrary to the fundamental principles evinced in [antidiscrimination] laws.”\textsuperscript{88} The general

\begin{itemize}
  \item Cooper, \textit{supra} note 27, at 219.
  \item Id.
  \item Hoffman, \textit{supra} note 82, at 134.
  \item Id.
  \item Equal Employment Opportunity Commission, Legal Services, Office of Legal Counsel, Notice No. 915.002 (July 17, 1995). The EEOC explained that “parties must knowingly, willingly and voluntarily enter into an ADR proceeding.” Id. at 23.
\end{itemize}
counsel for the National Labor Relations Board (NLRB) has similarly condemned mandatory arbitration agreements, contending that requiring employees to agree to arbitrate statutory claims as a condition of employment constitutes an unfair labor practice. Both the EEOC and the NLRB filed briefs opposing mandatory arbitration in a number of pending court cases. The National Academy of Arbitrators (NAA) also expressed their disagreement with mandatory arbitration. They filed an amicus brief in a Ninth Circuit case arguing against the enforcement of statutory claims through arbitral forums lacking in procedural fairness and that all arbitration agreements of statutory rights must be voluntary.

4. The Frustration of the Seventh Amendment Right to Jury Trial

Critics of mandatory arbitration also claim that the practice frustrates plaintiffs’ rights to have their grievances heard by a jury of their peers in accordance with the Seventh Amendment. The right to a jury trial has always been regarded as an important right in the American civil justice system. This system, according to the Court, is “justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.” In 1956, the Court stated:

The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and [the state constitution]. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial. .

89. See Covington, supra note 50, at 358 (commenting that both agencies responded negatively to Justice White’s allowance of a pre-dispute arbitration agreement executed as a condition of employment).
91. The Seventh Amendment provides that “in Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved.” U.S. Const. amend. VII. Not all common law claims implicate the Seventh Amendment right. The Seventh Amendment only applies in cases brought in federal court and only in cases over twenty dollars brought “at common law.” Common law claims are claims that would have allowed the parties to have a jury trial in eighteenth-century England or claims that have legal as opposed to equitable remedies. Tull v. United States, 481 U.S. 412, 417-21 (1987).
Before the rise of arbitration, it was inconceivable for the Supreme Court to construe arbitration as equivalent to the right to jury trial. Hence, state and federal courts have held that the right to a jury in adjudicating civil matters can be waived only when a party intelligently and knowingly chooses to do so, and, theoretically, waivers should be invalid if imposed by a party with a stronger bargaining position. Commentators like Professor Jean Sternlight construe the right to a jury trial as one of such monumental importance that it requires courts to hold arbitration agreements to a higher "knowing-consent" standard, rather than to traditional contract law principles.

C. The Fall of the Last Fort

Even after every other circuit ruled in favor of mandatory arbitration in the wake of Gilmer, the Ninth Circuit steadfastly adhered to its ruling in Duffield v. Robertson Stephens & Co., where it held that the Civil Rights Act of 1991 precluded compulsory arbitration of civil rights claims, and that employers cannot force employees to sign arbitration agreements as a condition of employment.

For employee advocates, Duffield represented a stronghold for the protection of employees' civil rights, preserving their right to have grievances adjudicated in court. The Ninth Circuit provided a sympathetic forum for plaintiffs like Donald Lagatree who suffered employment detriment due to his refusal to submit his future claims to arbitration. Lagatree was gainfully employed as a legal secretary for Keesal, Young & Logan (KY & L). After three years of employment, Lagatree was presented with an arbitration agreement stating, "I agree that any claims arising out of or relating to my employment or the termination of my employment with Keesal, Young & Logan... that KY & L may have against me or that I may have against KY & L or its present or former

96. See Rosenberg v. Merrill Lynch, 170 F.3d 1, 21 (1st Cir. 1999); Desiderio v. Nat'l Ass'n of Sec. Dealers, 191 F.3d 198, 206 (2d Cir. 1999); Koveskie v. SBS Capital Mkts., 167 F.3d 361, 365 (7th Cir. 1999); Seus v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881-82 (4th Cir. 1996); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, 971 F.2d 698, 699 (11th Cir. 1992); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) [hereinafter Rulings in Favor of Mandatory Arbitration].
97. 144 F.3d 1182 (9th Cir. 1998).
98. See also Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1303 (9th Cir. 1994) (finding that a Title VII plaintiff may be forced to forego her statutory remedies and arbitrate her claims only if she has knowingly agreed to submit such disputes to arbitration).
employees or agents shall be resolved by final and binding arbitration . . . .”\textsuperscript{100} When Lagatree refused to sign the agreement, he was discharged.\textsuperscript{101}

By the time Donald Lagatree accepted another position as a legal secretary at the law firm Luce, Forward, Hamilton, & Scripps, mandatory arbitration had enough momentum to reverse one of the most liberal, employee-friendly circuits in the country.\textsuperscript{102} On his first day of work, Lagatree was presented with a standard offer letter containing an arbitration provision that required him to submit all future employment related disputes to binding arbitration.\textsuperscript{103} Lagatree refused to sign the agreement because of the arbitration clause, testifying that he wished to retain his “civil liberties, including the right to a jury trial and redress the grievances through the government process.”\textsuperscript{104} Luce Forward withdrew its offer of employment.\textsuperscript{105}

Lagatree filed suit against Luce Forward in state court and filed a discrimination charge with the EEOC.\textsuperscript{106} The EEOC sued Luce Forward, arguing that the compulsory arbitration clause was illegal under \textit{Duffield} and that not hiring Lagatree for his refusal to sign the agreement constituted unlawful retaliation.\textsuperscript{107} Lagatree’s state law claim was sustained on demur, which was affirmed by the California Court of Appeals, and denied review by the California Supreme Court.\textsuperscript{108}

On September 30, 2003, the Ninth Circuit unleashed a startling development in employment law: \textit{Duffield} was overruled.\textsuperscript{109} First, the Ninth Circuit argued that \textit{Duffield} was inconsistent with \textit{Gilmer}, and that the Court’s holding in \textit{Gardner-Denver} was limited to the collective bargaining context.\textsuperscript{110} \textit{Gilmer} emphasized that statutory claims can be made subject to arbitration, unless Congress itself has evinced an intention to preclude a waiver of judicial remedies.\textsuperscript{111} The Ninth Circuit held that the presumption in \textit{Duffield} that the 1991 Civil Rights Act’s purpose was to expand the possible remedies available to plaintiffs in civil rights actions was inconsistent with the Supreme Court’s endorsement of federal statutes favoring arbitration as a way of resolving disputes.\textsuperscript{112}

\textsuperscript{100} \textit{Id.} at 667.
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{EEOC v. Luce, Forward, Hamilton & Scripps}, 345 F.3d 742 (9th Cir. 2003).
\textsuperscript{103} \textit{Id.} at 745.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} Lagatree v. Luce, Forward, Hamilton & Scripps, 88 Cal. Rptr. 2d 664, 667 (Ct. App. 1999).
\textsuperscript{108} \textit{Lagatree}, 88 Cal. Rptr. 2d at 664.
\textsuperscript{109} \textit{Luce, Forward, Hamilton & Scripps}, 345 F.3d at 742.
\textsuperscript{110} \textit{Id.} at 749.
\textsuperscript{111} \textit{Gilmer v. Interstate/Johnson Lane Corp.}, 500 U.S. 20, 26 (1991).
\textsuperscript{112} \textit{Luce, Forward, Hamilton & Scripps}, 345 F.3d at 752.
THE RISE OF MANDATORY ARBITRATION

The majority selectively cited to expressions of legislative intent and purpose contained in the 1991 Civil Rights Act. At issue was section 118 of the Act, where Congress recognized the popularity of arbitration agreements as a means of resolving disputes, providing that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the [1991] Acts or provisions of Federal law amended by this title."113

Comporting with most circuits, the Ninth Circuit pointed to a number of aspects of the statutory language in construing it as "clear and unambiguous."114 First, the statute does not explicitly prohibit mandatory arbitration agreements.115 Second, section 118 does not articulate any voluntariness requirement.116 Third, the existence of section 118 itself signals that Congress approved of arbitration in general.117 The justification is that conditioning employment upon mandatory arbitration qualifies as an acceptable means to "encourage" arbitration. Thus, the court held that section 118’s text indicates that the legislators believed that conditioning employment upon mandatory arbitration is an acceptable way to encourage arbitration. Finally, since the section’s text is unambiguous, the court held that considering legislative history is unnecessary and irrelevant to the statutory interpretation.118

However, as argued in the next Part of this Comment, the actual legislative intent is betrayed by this seemingly straightforward textual construction. The next Part will analyze the political and social landscape that led to the development and enactment of the Civil Rights Act of 1991, taking into account the pressure for renewed legislation and the weakening of the civil rights movement.

III
THE ROLE OF LEGISLATIVE AMBIGUITY IN THE RISE OF MANDATORY ARBITRATION

As a member of the First Circuit Court of Appeals, Stephen Breyer commented that "referring to legislative history to resolve even difficult cases may soon be the exception rather than the rule."119 By 1990, courts

114. Luce, Forward, Hamilton & Scripps, 345 F.3d at 752.
115. Id.
116. Id.
117. Id.
118. Id. at 753.
Judge Wald has pointed out that the Supreme Court relied on legislative history in almost every statutory case it decided in 1981. And although Justice White has recently commented
were routinely ruling on the meaning and applicability of statutory language without inquiry or reference to the legislative history of the statute.\textsuperscript{120}

In analyzing section 118, most courts did not resort to legislative history, invoking instead the principle of \textit{ejusdem generis}, which directs an interpreter to disregard legislative history when the statutory language is expansive, certain, and “unambiguous on its face.”\textsuperscript{121} Thus, most circuits agreed that section 118 allows mandatory arbitration procedures by relying on statutory language alone.\textsuperscript{122} In this respect, courts discounted or disregarded the development, debate, and negotiations that led to the adoption of section 118 and the Civil Rights Act of 1991. The Second Circuit acknowledged that the legislative history of the Act suggests that Congress intended to preclude mandatory arbitration of Title VII claims\textsuperscript{123}; however, the court refused to consider the evidence because it was not part of the statutory text.\textsuperscript{124} Similarly, the Third Circuit was completely unwilling to discuss legislative intent, stating that “no amount of commentary from individual legislators or committees would justify a court in reaching the result EEOC would have us reach.”\textsuperscript{125} These cases underscore the prevailing sentiment among the courts that Congress could have drafted section 118 more explicitly to preclude mandatory arbitration, but its failure to do so belied any such intent.\textsuperscript{126}

Both the Supreme Court in \textit{Gilmer} and the Ninth Circuit in \textit{Luce Forward} also considered statutory language to be significantly more persuasive than legislative intent. Despite legislative history to the contrary, the Supreme Court and the Ninth Circuit placed the burden on the party resisting arbitration—the employee—to show that Congress did not favor mandatory arbitration. However, courts have erred seriously by adopting this analytic structure, and it undermines the statutory rights of Title VII plaintiffs in employment discrimination cases. Courts should not assume that Congress intended to allow mandatory arbitration merely because it did not expressly prohibit it. The courts have now foregone the prospect that Congress adopted language encouraging ADR intending to address

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\textsuperscript{120} See generally Rulings in Favor of Mandatory Arbitration, supra note 96.
\textsuperscript{121} Cooper, supra note 27, at 220-21.
\textsuperscript{122} Id.
\textsuperscript{123} Desiderio v. Nat’l Ass’n of Sec. Dealers, 191 F.3d 198, 206 (2d Cir. 1999).
\textsuperscript{124} Id.
\textsuperscript{125} Seus v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998).
\textsuperscript{126} See generally Rulings in Favor of Mandatory Arbitration, supra note 96.
only situations in which employees enter agreements voluntarily and uncoerced.

In neglecting the legislative history of section 118, the courts have reached an outcome that confounds Congress’s intent. First, the congressional record is replete with clear evidence that both majority and minority legislators in Congress were opposed or indifferent to mandatory arbitration agreements. Second, Gilmer itself emphasized that proper statutory construction of the FAA and the Civil Rights Act considers the language, history and purpose of the statute in assessing arbitral propriety. “If Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.” 127 Thirdly, as Judge Reinhardt’s dissent in Luce Forward points out, it is inherently inconsistent to read section 118 as a provision that allows involuntary waivers of jury trials, when it is part of a statute intended to provide discrimination plaintiffs with greater choices of forums and remedies.128

Careful analysis of the Civil Rights Act’s legislative history confirms that the language of section 118 is ambiguous and unclear. Analyzing the Civil Rights Act through the lenses of the political and social climate at the time of its passage reveals that the ambiguity does not result from any unconscious neglect on the part of legislators. Rather, the statutory language was a product of negotiation, compromise, and the pressure to pass a civil rights bill.

The legislative histories associated with the Civil Rights Acts of 1990 and 1991 suggest that Section 118 was included in the final bill as a “polite nod” to the popularity of ADR, a section instituted to address Republican concerns regarding a runaway litigation system and what they coined a “lawyers bonanza.”129 Its ambiguity regarding mandatory arbitration, however, was a by-product of negotiation and compromise. The language was left ambiguous because any further clarification to spell out congressional intent explicitly would have stifled the Act’s progress and jeopardized its chances of timely enactment. Rather than prolong what had been a divisive political process, Congress left the language ambiguous, opting to roll the dice that courts would interpret the statute in reference to congressional record and the purpose of the law.130

128. EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 762 (9th Cir. 2003) (Reinhardt, J., dissenting) (“It makes no sense that Congress would have given civil rights victims their much desired victory only to have taken it away from them in the very same bill.”); see also Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(c), 105 Stat. 1071, 1075 (1991) (providing in part: “If a complaining party seeks compensatory or punitive damages under this section... any party may demand a trial by jury...”).
130. Articulating a concise and comprehensive legislative history of the final version of the Civil Rights Act of 1991 is very difficult because there is little traditional legislative history. The Act was a
A. New Challenges of the Civil Rights Movement

The road from introduction to passage of the 1991 Civil Rights legislation was long, contentious, divisive, and controversial. At the time of its passage, a national economic recession magnified racial tension and brought issues of race relations, police abuse, and wealth disparity to the forefront of national discussion. The country continued to confront overt racism, which fueled anger among civil rights groups. Civil rights advocates also criticized a Supreme Court whose decisions they deemed hostile to civil rights plaintiffs.

Faced with an unsympathetic Court and a critical public, civil rights advocates found an ally in the Democratic legislature. Congress responded to nearly every unfriendly Supreme Court decision with actions supporting civil rights. This tension between the Court, the public, and Congress on the issue of civil rights continued throughout the 1980s and early 1990s.

The progress and setbacks of the civil rights movement took place as the legitimacy of arbitration measures was increasing and as the litigation system was being intensely scrutinized as a haven for frivolous lawsuits. During the early 1980s, plaintiffs won a significant number of wrongful termination claims filed in court. Most of these victories involved large amounts of compensatory and punitive damages. However, as stories about runaway juries, egregious awards, and frivolous lawsuits encouraged compromise reached late in the 1991 legislative session. Senator Danforth eventually introduced the bill that was to become the Civil Rights Act of 1991. For the purposes of this analysis, I will use the failed Civil Rights Act of 1990 and interpretative memoranda from both majority and minority congressional members from the 1990 and 1991 versions of the bill to underscore the controversy surrounding many of the Act’s provisions. See David Cathcart et al., The Civil Rights Act of 1991, 7 (1993).

131. The Washington think tank, The Urban Institute, for example, released a study that concluded that blacks were three times more likely than whites to face discrimination. After sending carefully selected pairs of young black and white men to apply for 476 entry level jobs, researchers found that the black man did not get as far in the process as his white counterpart in one out of every five cases. David Wessel, Racial Bias Against Black Job Seekers Remains Pervasive, Broad Study Finds, WALL St. J., May 15, 1991, at A8.


134. See id. For instance, the Americans with Disabilities Act (ADA) was passed in 1990, prohibiting private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12,101-12,213 (2000).


136. Id.
by unscrupulous plaintiffs' lawyers permeated the social and legal landscape, so too did calls to institute changes in the nation's tort system.\textsuperscript{137} As one article from the \textit{Economist} states, "Americans are famous for suing at the drop of a hat. Their courts are equally famous for determining awards through their damp handkerchiefs."\textsuperscript{138} Responding to these concerns in a series of decisions issued in the 1980s, the Supreme Court authorized lower courts to act as gatekeepers by making it easier for defendants to succeed on summary judgment motions.\textsuperscript{139} Hence, litigation as a remedy for grievances had cracks in its armor.

\section*{B. The 1990 Civil Rights Act and the Birth of Section 118.}

The language encouraging alternative dispute resolution was not part of the statutory language at the time the 1990 version of the Civil Rights Bill was introduced in both chambers of Congress.\textsuperscript{140} The provision spawned from deliberations of the Labor and Education and the Judiciary Committees of the House of Representatives over five months after the bill was first introduced.\textsuperscript{141}

One of the ways the committees tried to alleviate Republican concerns about increased litigation was by acknowledging the growing popularity of ADR. The language in section 118 drafted by the committees was the same version that is currently enforced, with limiting language such as "encourage," or "to the extent authorized by law."\textsuperscript{142} However, the record is clear that the committees' addition of section 118 was a polite nod to the growing popularity of arbitration, not an endorsement of the use of mandatory arbitration agreements. Congress certainly did not contemplate the kind of pre-dispute, mandatory arbitration agreements employees are facing today.\textsuperscript{143} According to the House Committee Report, ADR was intended to supplement, not supplant, Title VII remedies:

\begin{itemize}
  \item \textsuperscript{137} See, e.g., David P. Henrie, M.D., \textit{Editorial, Tort Reform}, \textit{SALT LAKE TRIB.}, Apr. 30, 1992, at A13; Philip D. Diggon, M.D., \textit{Editorial, People's Forum for Tort Reform}, \textit{TULSA TRIB.}, July 31, 1992, at 13A (writing that "an attorney who files a potential lawsuit against volunteer rescue workers, who have risked their lives for free, does society a great favor. Such an attorney brings to the public attention the need for tort reform.").
  \item \textsuperscript{138} \textit{Tortious is as Tortuous Does}, \textit{THE ECONOMIST}, Oct. 27, 1990, at 10.
  \item \textsuperscript{139} See \textit{Celotex Corp. v. Catrett}, 477 U.S. 317 (1986) (holding that to withstand summary judgment plaintiffs must show the presence of every element in their claim); \textit{Matsushita Elec. Indus. Co. v. Zenith Radio Corp.}, 475 U.S. 574 (1986) (holding that no rational jury could find for the non-moving party on the basis of the record as a whole and that the moving party is entitled to judgment as a matter of law); \textit{Anderson v. Liberty Lobby, Inc.}, 477 U.S. 242 (1986) (allowing district court judges to weigh evidence and credibility issues in deciding summary judgment cases).
  \item \textsuperscript{140} See S. 2104, 101st Cong. (1990); H.R. 4000, 101st Cong. (1990).
  \item \textsuperscript{141} H.R. REP. No. 101-856, at 47 (1990).
  \item \textsuperscript{143} The ADA includes the same amendment. 42 U.S.C. §§ 12,101-12,213 (2000). The drafters of section 513 of the ADA did not intend to allow enforceable mandatory arbitration agreements. According to the House Conference Committee Report, "[T]he intent of the conferees that the use
[A]ny agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court’s interpretation of Title VII in *Alexander v. Gardner-Denver Co.* 415 U.S. 36 (1974). The Committee does not intend for the inclusion of this section be used to preclude rights and remedies that would otherwise be available.144

Thus, any arbitration was unequivocally intended only as a voluntary measure.

Indeed, it was obvious to the Republican committee members that the language encouraging ADR was to be voluntary in nature, and they were upset that the proposed section lacked any teeth. In response to the committees’ approval of section 118 as proposed, the frustrated minority committee members remarked,

Unfortunately, this section is nothing but an empty promise to those claimants (and employers) who wish to resolve their disputes without expensive litigation. We recognize that mediation and arbitration, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes. This provision, however, is an empty promise which in no way will assist claimants or employers in the resolution of such claims.145

In June 1990, Bush administration officials met with civil rights groups, led by Senator Kennedy’s staff member Jeffrey Blattner, to negotiate the terms of a civil rights legislation.146 The negotiations proved to be especially divisive, and both parties left frustrated and unable to come to any consensus.147 Despite the impending veto risk, both chambers of Congress forged on with the legislation.148

The following October, the Senate got its first glimpse of the arbitration clause in a conference committee. During the conference, the Senate agreed to withdraw its disagreement on various terms of the Act in lieu of provisions that would adopt the ADR language contained in the House version, along with other provisions such as a limit on the amount of punitive

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147. Id.
148. Id.
damages that could be awarded.149 Once again, the conferees adopted the current language, but expressed the similar intent for arbitration to act only as a supplementary mechanism to the remedies provided by the Act.150

With this, Congress passed the Civil Rights Bill, and, as expected, the president promptly vetoed it.151 The Senate failed to override the veto, with sixty-six affirmative votes, only one vote short of the two-thirds necessary.152

President Bush’s veto intensified an already bitter public relations battle. Senator Kennedy blamed the failure to reach a compromise after the long negotiations on “patently unreasonable” demands by the White House.153 Kennedy further commented, “To some extent, President Bush is at the mercy of his lawyers.” Bush responded by pandering to conservatives and businesses on the one hand, while maintaining a firm commitment to minorities on the other, by painting the bill as a “quota bill” that does not actually serve minorities.154

With the 1992 elections looming, President Bush must have been cognizant of the political ramifications of his veto. The last thing his administration needed was to be labeled as unfriendly to civil rights. As such, the Bush administration wanted to portray the president as pro-civil rights, and it tried earnestly to discredit the legislation as a civil rights bill.155

C. The 102nd Congress and Section 118 of the 1991 Civil Rights Act

The 102nd Congress returned with renewed optimism for a civil rights bill. The first legislative item in 1991 was H.R. 1, the 1991 Civil Rights Act introduced on January 3.156 The Bush administration still opposed the bill and continued to characterize it as a “quota bill.”157 At the same time, however, the administration recognized that civil rights organizations remained committed to passing the bill and that it would not be strategically sound to continue to oppose the legislation without offering any alternative proposals.158 Hence, the president emphasized his support for civil rights

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150. Id.
151. President’s Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990) [hereinafter President’s Message].
152. Paul Barrett, Bush Veto of Job-Bias Bill is Sustained; Action is Called a ‘Temporary Setback,’ WALL ST. J., Oct. 25, 1990, at A22. All fifty-five Democrats voted to override the veto, along with eleven Republicans. Id.
153. Id.
154. See President’s Message, supra note 151 (vetoing S. 2104, in part due to quota provisions in bill).
155. Early in 1991, the administration released a detailed study arguing that lower court decisions following Wards Cove did not lead to unfair results. The study attracted little attention. Clegg, supra note 146, at 1466.
157. Clegg, supra note 146, at 1466.
158. Id.
legislation, but not the Civil Rights Act as proffered by Congress. Two months after H.R. 1 was introduced, the administration presented its own civil rights bill.

Ironically, it was the president's bill, not the bill introduced by Democrats in January, that contained clear language stipulating that arbitration agreements must be voluntary in nature. Representative Michels and Senator Dole introduced a Republican version of the bill on March 12, 1991, which contained section 12, "Alternative Means of Dispute Resolution." The section provided that "[w]here knowingly and voluntarily agreed to by the parties, reasonable alternative means of dispute resolution, including binding arbitration, shall be encouraged in place of the judicial resolution of disputes arising under this Act and the Acts amended by this Act." Thus, the proposed Republican counterpart of section 118 clearly emphasized that such agreements were to be knowing and voluntary, a requirement not preserved in the civil rights legislation eventually adopted. Even the Republicans were cautious in their endorsement of arbitration. Although the Republicans more strongly endorsed arbitration than the Democrats, they still recognized the need for employee consent.

The House Education and Labor Committee intensely scrutinized the president's proposal, which it saw as an effort to substitute arbitration procedures for litigation of Title VII claims. Congressional Democrats construed the president's proposal as a threat to the Seventh Amendment right to a jury trial that would result in employers forcing employees to sign arbitration agreements as a condition of employment. After extolling the supplemental rather than supplanting nature of ADR in the bill introduced by the Democrats, the committee blasted the Republican version for endorsing "the use of such mechanisms 'in place of judicial resolution.'"
The committee feared that under the Republican proposal, "employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints."166 The committee went on to argue that this "would fly in the face of Supreme Court decisions" granting employees the right to litigate their Title VII claim "rather than being forced into compulsory arbitration to resolve important statutory and constitutional rights, including employment opportunity rights."167 "American workers," the committee stated, "should not be forced to choose between their jobs and their civil rights."168

Minority members of the committee did not take kindly to the committee's rejection of the administration's proposal. They argued that the Democratic version would benefit only lawyers since plaintiffs would be given incentives to pursue claims in court.169 The inclusion of punitive and compensatory damages would "transform Title VII from a statute rightfully focused on the prompt resolution of disputes through settlement and conciliation and the repair of the employment relationship with full compensatory relief for the employee to a litigation and attorney's fee generating machine."170 The minority opinion belabored this point, pointing to the testimony of employment lawyers Pamela Hemminger and Beverly Hall Burns, who opined that the Democratic bill would replicate the problems that California was experiencing with the "tortification" of employment law.171 Specifically, Republicans feared that such a system would benefit only lawyers, prolong employment litigation, diminish the number of settlements, and result in enormous delays in the judicial docket.172 What results, according to the minority members, is a "lawyer's bonanza" where "cases [would] be dragged out for years as plaintiffs hold out for the 'big win' and employers refuse to settle at levels meeting the expectations of the litigants."173 Perhaps most compelling, the minority members noted that, while both Republican and Democratic proposed civil rights bills encouraged the use of alternative dispute resolution mechanisms, only the Republican version specifically required that agreements to such mechanisms must be "knowing and voluntary."174

Hindsight, of course, is 20/20. Had the Democrats known that the courts would interpret section 118's approval of alternative dispute

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167. Id.
168. Id.
169. Id. pt. 11, at 147.
170. Id.
171. Id. pt. 11, at 150-51.
172. Id.
173. Id. at 147.
174. Id. at 156. The dissenting members added, "Given the well-known litigation crisis pervading the judicial system, which will be immeasurably worsened by H.R. 1, there is a desperate need for greater use of these sorts of informal procedures." Id.
resolution methods to permit mandatory arbitration agreements, they may have adopted the Republicans' explicit "knowing and voluntary" standard. Instead, Democrats rejected the Republican proposal because it explicitly stated that arbitration procedures would replace some court litigation. Given that mandatory arbitration agreements whereby employees relinquish judicial forums have become commonplace, Democrats raise a futile battle, raising objections to the "in place of judicial forum" language instead of recognizing the importance of its "knowing and voluntary" requirement. If employees consent to arbitration and waive their right to trial, they necessarily do so "in place of judicial forum," regardless of whether such language was included in the statute.\textsuperscript{175} After all, the term is "alternative" dispute resolution, not "supplementary," dispute resolution.

The Supreme Court handed down its decision in \textit{Gilmer} on May 13, 1991, while the Civil Rights Act was in committee. Although \textit{Gilmer} was a controversial and heavily publicized employment discrimination case, it took Congress a while to incorporate the decision into its discussion and reports. The delay was likely due to Congress' uncertainty over whether \textit{Gilmer} applied only to cases involving the ADEA and contracts between an employee and a third party. Many newspapers reported that the holding was narrow, emphasizing that the Court did not rule on the applicability of the FAA to employment contracts.\textsuperscript{176} It was therefore unclear whether the holding would have a significant impact on Title VII claims.

The House Judiciary Committee issued its report on May 17, 1991 without mentioning \textit{Gilmer}. The report indicated that the Committee intended the amendment to strengthen civil rights remedies and to provide more effective deterrence against discrimination, affirming the analysis by the House Labor and Education Committee that the 1991 amendments were an attempt to provide parity in remedies where discrimination on

\textsuperscript{175} In fact, Congress used such specific language when it drafted the Older Workers Benefit Protection Act (OWBPA). Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 626(f)(1) (2000). The OWBPA codified the knowing and voluntary requirement in the civil rights statute itself. \textit{Id.} A statutory requirement of a knowing and voluntary waiver for mandatory arbitration agreements should establish a presumption against waiver, except under specified circumstances. A mandatory arbitration agreement should not be considered to have been signed knowingly and voluntarily unless it meets certain minimum requirements: it must be written in clear language that can be understood by an average individual employee, and contain a recommendation to consult with an attorney prior to executing the agreement. \textit{Id.} at § 626(f)(1)(A); \textit{Id.} at § 626(f)(1)(E).

\textsuperscript{176} See, e.g., James H. Rubin, \textit{Court Limits Job Discrimination Suits}, AP, May 13, 1991 (suggesting that the Court limited its holding only to the securities industry); Cindy Roberts, \textit{Employers Take Note of Supreme Court Decision in Age Bias Case}, AP, Aug. 30, 1991 (suggesting that the Court limited the ruling's impact since it did not decide on the agreement's application to employment contracts); Stephen Wermiel, \textit{Securities Firms May Require Arbitration On Age-Bias Claims, High Court Rules}, \textit{WALL ST. J.}, May 14, 1991, at A4 (indicating that the court expressed no opinion on the broader issue of whether the FAA exempts from arbitration all claims arising from employment agreements).
grounds other than race exists. In fact, the explanation given by the Democratic majority of the House Judiciary Committee was in all respects similar to its explanation of the 1990 Act. No effort was made to modify the explanation in light of Gilmer.

The Republican dissent also did not alter its views in light of Gilmer. Their comments indicated that they understood arbitration agreements must be voluntary. The dissent’s report sarcastically quoted “encourage,” to point out that the supposed Democratic concession to arbitration would not actually diminish litigation and would be nothing but “an empty promise to claimants (and employers) who wish to resolve their disputes without expensive litigation.” The Republicans again invoked the image of unscrupulous lawyers abusing overburdened courts with “protracted litigation” for “unrestricted damages” and “an ‘attorney’s bonanza.”

By June 4, the legislature faced the likelihood that compromise would not be achieved between chambers, much less legislation that would withstand another Bush veto. An exhausted Senator Danforth, commenting on the multiple proposals and the lengthy legislative impasse, asked, “[H]ow can we move forward? How can we come together with a reasonable accommodation that can become law?”

Of course, the language concerning arbitration was only a minor consideration of a larger ongoing battle. Congress was also bitterly divided over the definition of the “business necessity” defense in disparate impact cases; punitive damage caps, whether to give women, disabled people,

Although I understand the problems with the jury trial system—it can be expensive and time consuming for plaintiff and defendant alike—I do not agree that some citizens should be denied a jury trial when it is available to others in employment discrimination cases, even if that is through the use of another statute. Therefore I prefer the remedy section of H.R. 1 over that of H.R. 1375. However, the damages section of H.R. 1 could still be improved by encouraging and offering a non-litigation remedy in addition to a jury trial.

Id. at 81.
179. Id.
181. Id.
I believe there is virtually no chance that the President's legislation will be enacted into law in its present form. The House of Representatives is about to pass its version of the civil rights bill. I believe that no matter how well meaning they are in the House of Representatives, there is almost no chance that that bill which passes the House will be enacted into law in its present form. So the question, remains, how can we move forward? How can we come together with a reasonable accommodation that can become law?

Id.
183. Id.
and religious minorities the same scope of remedies available for racial
discrimination; and whether Congress should be exempted from the provi-
sions of the Civil Rights Act. With Congress tackling so many contentious
issues at once, it was not surprising to see vague statutory language in
various parts of the bill, shunting final interpretation onto the courts.
Legislators preferred to pass the burden to the courts rather than prolong
the process any further. The months leading up to the compromise agree-
ment had devolved into incendiary debates about quotas, lawyer bashing,
and runaway litigation.¹⁸⁵

A bill embodying the compromise between Democrats and
Republicans was reached late in the 1991 session in a proposal set forth by
Senators Danforth and Kennedy and was construed as a product of a hard-
fought and bitter negotiations process.¹⁸⁶ The House of Representatives
considered the Senate bill under a closed rule and passed it without
amendment, leaving much of its legislative history in the Senate
debates.¹⁸⁷

Some legislators appreciated that drafting an ambiguous statute would
risk that courts would interpret it in a manner contrary to the legislators’
intended purposes. The risk was especially great with regard to legislation
such as the Civil Rights Act, which was the culmination of two years of
intense debate. Senator Danforth explained, “It is very common for
Members of the Senate to try to affect the way . . . a court will interpret a
statute by putting things into the Congressional Record.”¹⁸⁸ Therefore,
Senator Danforth knew the importance of drafting explicit statutory lan-
guage to codify legislative intent. To address this statutory interpretation
concern, section 105(b) of the Danforth compromise attempted to focus the
court’s attention on only that legislative history appearing in “the inter-
pretative memorandum appearing at Vol. 137, Congressional Record S.

No further efforts were made to codify more explicit language for sec-
tion 118 to bar mandatory arbitration agreements or provide more thorough

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¹⁸⁵ As a practical matter, additional damages and jury trials will lead to further delays for
legitimate victims of discrimination. Our Federal courts are already overburdened, and under
the Speedy Trial Act, the backlog of criminal cases, by necessity, takes precedence. Civil jury
trials, including title VII cases, are often dropped to the bottom of the docket.

¹⁸⁶ See, e.g., id. at S15,446. Senator Robb suggested that the quotas were used as a code word to
mask the real issue: authorizing punitive damages and whether punitive damages and compensatory
damages in Title VII should apply to the Senate as well as to private companies. Id.

¹⁸⁷ Nelson Lund, Congressional Self-Exemption from the Employment Discrimination Laws: A


guidance in interpreting section 118. Democrats apparently believed it would be best to leave section 118 toothless and vague. As it stood, the provision allowed them to rebut concerns of more litigation furthering any lawyers’ bonanzas.

Section 118, which started as a provision acknowledging the increasing popularity of ADR methods to dispel fears of runaway litigation, remained vague. The more explicit “knowing and voluntary” language was not adopted because it was part of the Republican proposal that separately stipulated that arbitration would resolve disputes in place of litigation. Ultimately, then, section 118 remained as an apparently impotent “encouragement” of ADR “where appropriate and to the extent authorized by law.”

Ironically, the final interpretation of section 118 was left to the same courts that provoked the need for renewed civil rights legislation in the first place.

The congressional majority, however, may have had good reason to be confident that courts would interpret section 118 in accordance with their intention. First, the spirit of the Civil Rights Act was to provide additional remedies via jury trials to civil rights plaintiffs. Allowing mandatory arbitration allows employers to circumvent this process. Secondly, section 1107(a) explicitly provides that ambiguity in the Act be construed to effectuate the Act’s remedial purposes towards discrimination victims. Third, statements made by the committee members indicate that arbitration was intended to “supplement, not supplant” the remedies provided by the Act.

Finally, congressional members from both parties as well as the president shared a common assumption that arbitration was to be “knowing and voluntary.”

Moreover, legislators attempted to provide guidance for the courts through interpretive memoranda containing references to *Gilmer*. Senator Dole proposed an interpretative memorandum on October 30, insisting that its analysis be printed immediately on the record. Representative Hyde submitted the same memo for consideration in the House one week later.

Dole’s memorandum cited to *Gilmer* suggesting that some congressional members approved of the *Gilmer* court’s decision. Senator Dole then emphasized that arbitration is appropriate only when “the parties knowingly and voluntarily elect to use these methods,” referencing the *Gilmer* court’s approval of arbitration. Representative Edwards also submitted his proposed interpretative memorandum. His version contained an explicit disapproval of *Gilmer*, stating, “No approval whatsoever is
intended of the Supreme Court's recent decision in [Gilmer] v. Interstate Johnson Lane Corp., 111 S.Ct. 1647 (1991), or any application or extension of it to Title VII.”

Furthermore, the statement also suggested that some members of Congress did not intend to enforce pre-dispute arbitration agreements as a condition of employment.196

Both Dole’s and Edwards’s statements provide an interesting glimpse into how Republican and Democratic legislators construed arbitration agreements: they are inherently voluntary. In upholding mandatory arbitration agreements, many circuits point to this contrasting treatment of Gilmer in the interpretive memoranda as evidence of the unreliability of legislative history and as further justification that their analysis should be constrained by statute’s terms themselves.197

To some extent, most legislative history will reveal confusing and contradictory language, and hence it is often assailed as an unreliable indicator of congressional intent. Indeed, section 118’s legislative history contains some contradictory treatment of Gilmer. Nevertheless, courts should not discount or ignore legislative history simply because disagreement existed. Rather, courts should use legislative history as a means through which to discover which assumptions were shared by all parties. Furthermore, emphasizing the contradiction between Edwards’s and Dole’s memoranda is inaccurate. Dole seems to use Gilmer merely to support the proposition that arbitration measures have enjoyed increased legitimacy over the years, which is an uncontroversial observation not in conflict with Edwards.

Even the executive branch shared the belief that despite the growing acceptance of mandatory arbitration, arbitration agreements were to remain voluntary. In fact, President Bush referred to the “voluntary” nature of arbitration twice in a statement touting section 118:

In addition to the protections provided by the [damage] ‘caps,’ section 118 of the Act encourages voluntary agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in the effort to conserve resources of the Federal judiciary for those matters as to which no alternative forum would be possible or appropriate.198

196. Id.
197. See, e.g., Seus v. John Nuveen & Co., 146 F.3d 175, 182 n.1 (3d Cir. 1998) (“Not surprisingly, there is ample legislative history to support a straightforward reading of the text of section 118.”).
Hence, it is clear that both chambers of Congress as well as the executive branch believed that this form of dispute resolution could only be imposed upon prospective employees who knowingly and voluntarily waived their right to have their claims heard by a jury of their peers.

D. The Underlying Concern of the 102nd Congress: Increased Litigation and the Control of "Excesses" of Civil Rights

The legislative history of the Civil Rights Acts of 1990 and 1991 provides insight into Republicans' and Democrats' difficulties in settling on concrete language. It also exposes the weakening of the civil rights movement, which had begun in the early 1980s. The deliberations and debates suggest a tension between expanding civil rights remedies and fostering needless litigation. As Senator Nickles argued representatively during the final stages of the compromise bill:

"[I]f we have jury trials and we have punitive damages we will be encouraging litigation—a lot of litigation. I do not want to encourage litigation. I also do not want any discrimination. And I want people who are guilty of discrimination to be punished. But I do not want a lot of frivolous lawsuits in the process and I do not know what the exact result will be, but my guess is it is going to be a lot of litigation, because of jury trials and because of punitive damages."

Hence, by the late 1980s, the civil rights lobby could no longer expand remedies without addressing frivolous lawsuits.

Implicit in legislators' concern about increasing the amount of litigation is the assumption that increased litigation is undesirable. Litigation is no longer celebrated as an indication that marginalized, subordinated, and downtrodden members of society are empowered to assert their civil rights, or that signs of discrimination not previously apparent are made visible. The pervading sentiment was that civil rights advocates should look outside of the courts to continue the movement's progress. While the Democrats controlled Congress and had a history of embracing civil rights, the 102nd Congress contained a resistant conservative faction and an increasingly prominent contingent of "New Democrats" who prided themselves on being centrist. At the same time, the civil rights movement lost

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199. For example, the Leadership Conference on Civil Rights surveyed Americans and found that the American public largely viewed civil rights groups as fighting for preferential treatment for minorities, rather than for racial fairness. Thomas B. Edsall, Rights Drive Said to Lose Underpinnings: Focus Groups Indicate Middle Class Sees Movement as Too Narrow, WASH. POST, March 9, 1991, at A6.


ground in the courts and in public opinion. Courts became increasingly hostile towards affirmative action, viewing it as opening doors for minorities at the expense of whites.  

The civil rights movement was also suffering from a decline in public confidence. What was once viewed as legitimate civil rights progress began to be construed as civil rights excesses. Preaching tolerance, acceptance, and the fight against discrimination were being scrutinized as racial preferences, unjustified quotas, and reverse discrimination. Affirmative action was quickly losing stride. Minority members of the House Labor and Education Committee quoted a *Washington Post* editorial that summed up the decreased legitimacy of the civil rights movement:

The American civil rights leadership reminds me of the American automobile industry: hoping for a return to the days when its products had worldwide appeal, playing to nameplates and psychological gambits, willing to [do] almost anything to restore consumer interest. Anything, that is, except the one thing that might work: a better line of products.

The movement itself had trouble maintaining cohesion and uniformity, particularly during the Clarence Thomas-Anita Hill sexual harassment hearings. As Roger Clegg explains, "Most blacks, male and female, backed the confirmation, which the civil rights lobby and especially its feminist arm had opposed."

In seeking to increase judicial remedies for civil rights plaintiffs, liberal Democrats were waging an uphill battle, with all the weight of a skeptical public, a resistant Supreme Court, a vocal Republican minority, and rising "New Democrats" offering resistance. Section 118 was implemented to address these concerns by acknowledging the increasing prominence of ADR. Although Democrats may have thought it was clear that ADR was meant to supplement, not supplant remedies afforded by the Act, the failure to provide more explicit language allowed this insubstantial section to confound the larger purposes of the bill.

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203. *See Edsall, supra note 199.*

204. *Id.*

205. *See e.g.*, City of Richmond, 488 U.S. at 469 (striking down as unconstitutional a municipal ordinance that awarded city contracts on a racially preferential basis).


207. *Epilogue, supra note 133, at 1605.*
IV

THE LIMITS OF MANDATORY ARBITRATION

Despite the expansive judicial interpretation of *Gilmer* and the Ninth Circuit's alignment with other circuits in allowing mandatory arbitration agreements as a condition of employment, many questions still remain unresolved. Employers and employees are largely unclear on the limits of arbitration agreements and how to draft arbitration agreements that will pass judicial muster.208

These unresolved questions leave lower courts, state legislatures, and arbitration providers with the task of determining when an employer's means of enforcing arbitration are acceptable. Congressional response might also delineate acceptable limits, but it is unlikely that the current Republican majority will impose any strict restrictions on arbitration.

A. The Use of Contractual Principles to Challenge Mandatory Arbitration

The *Gilmer* Court held that "arbitration agreements are enforceable save upon such grounds as exist at law or in equity for the revocation of any contract."209 The Court explained, "[C]ourts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract."210 Hence, the *Gilmer* Court left the door open to challenges to arbitration agreements based on contract law that are unilaterally imposed on employees.

However, plaintiffs contesting the enforcement of arbitration agreements by invoking contract principles, such as lack of consideration, fraud, unconscionability, adhesion, or unequal bargaining power, have been frustrated in federal court.211 Indeed, courts no longer indulge the presumption that employers have greater bargaining power when they condition employment upon the agreement to arbitrate all disputes. According to the Ninth Circuit, "mere inequality of bargaining power is not sufficient reason to hold that arbitration agreements are never enforceable in the employment context."212 Most circuit courts set a very high standard for

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208. *See Covington*, supra note 50, at 370 (noting that federal courts look to the content of arbitration clauses as well as the circumstances of its adoption in deciding whether to grant or deny requests to enforce arbitration agreements).
210. *Id.* at 33 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 627 (1985)).
212. *See PaineWebber, Inc. v. Bahr*, 1996 WL 540164 1, 5 (9th Cir. 1996) (unpublished decision) (focusing on plaintiff's sophistication as a highly successful stockbroker with a strong bargaining position, and rejecting stockbroker's argument that he was fraudulently induced to sign arbitration agreement).
invalidating arbitration agreements based on contract claims. According to the Ninth Circuit, the clause must "shock the conscience." 213

Some challenges to the enforcement of arbitration agreements in state courts have been more successful. In Graham v. Scissor Tail, the California Supreme Court cast suspicion on the enforceability of arbitration agreements that are imposed as a condition of employment. 214 The court found a form contract between a music promoter and a musical group to be adhesive, unconscionable, and unenforceable because it designated an arbitrator whose status and identity indicated that he was presumptively biased in favor of the employer. 215 The court stated that "a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party, [it] will not be enforced against him." 216 In addition, "a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'" 217 Although the holding conflicts with the federal courts, the California Supreme Court noted that it is "under no obligation to follow federal court precedents interpreting acts of Congress when those precedents are found unpersuasive." 218 Ominously, though, in Perry v. Thomas, the Supreme Court held that whether an arbitration agreement is unenforceable must be based on federal construction of contract law, not that of the state. 219 Hence, unless an arbitration agreement is egregiously unfair, the agreement will likely withstand challenges based on contract principles even in state court.

B. The Increased Role of State Courts and Federal District Courts in Defining the Proper Level of Procedural Safeguards

Although employers can condition employment on the prospective employee’s agreement to submit all future claims to arbitration, employers must be cautious in deciding how these agreements are implemented and imposed upon employees and the procedural mechanisms in their chosen forum. As mentioned, commentators and employee advocates warn that arbitration cannot fairly adjudicate employment discrimination cases because the process is skewed in favor of employers who select the arbitration procedures. To address concerns about procedural fairness the GAO proposed six procedural standards that should be followed in implementing

213. Ferguson v. Countrywide Credit Industries, 298 F.3d 778, 785 (9th Cir. 2002).
215. Id.
216. Id. at 172 (citations omitted).
217. Id. at 173.
218. Id. at 171.
219. 482 U.S. 483, 489 (1987) (declining to address the claim that the arbitration agreement in question constituted an unconscionable, unenforceable contract of adhesion).
an ADR program. The guidelines relate to: (1) selection of arbitrator, (2) procedures for selection, (3) payment of arbitrator, (4) awards and remedies, (5) final arbitrator ruling, (6) judicial review. The GAO found that some existing arbitration policies they studied would not meet their proposed standards.

The California Supreme Court also demanded procedural fairness in Amendariz v. Foundation Health Psychcare Services. The court held that Fair Employment and Housing Act (FEHA) claims are subject to arbitration if the arbitration permits an employee to vindicate his or her statutory rights. The court also held that arbitration must meet certain minimum requirements, including arbitrator neutrality, adequate discovery, judicially reviewable written decisions, unlimited statutory remedies, and limitations on the costs of arbitration. Thus, the court invalidated the arbitration agreement imposed on plaintiffs in Amendariz because it possessed a damages limitation and was unconscionably unilateral.

Similarly, around the same time the Ninth Circuit decided Luce Forward, the Third Circuit indicated that it would require employers to ensure that the arbitration forum has adequate procedural safeguards in place and that the court would scrutinize these procedures closely. The court struck down an employer’s mandatory arbitration agreement because many of its provisions were too heavily weighted in favor of the employer. The plaintiffs had to sign an employment agreement that gave them only thirty days from “the event which forms the basis of the claim” to file a complaint. If the employee prevailed in her suit, remedies would be limited to “net pecuniary damages and/or reinstatement.” The losing party would also have to bear the costs of the arbitrator’s fees and expenses, which ranged from $800 to $1,000 per day. The court of appeals reversed the trial court’s order to compel arbitration. Senior Circuit Judge Robert Cowen noted that the contract’s “draconian terms unreasonably favor [the employer] to the severe disadvantage of plaintiffs and other St. Croix employees. Because the sickness has infected the trunk, we must cut down the entire tree.”

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220. See GAO REPORT, supra note 57, at n.3.
221. Id.
222. Id. at n.7.
223. 6 P.3d 669 (Cal. 2000).
224. Id. at 682.
225. Id. at 682-89.
226. Id. at 698.
228. Id. at 259.
229. Id. at 260.
230. Id. at 261.
231. Id. at 272.
232. Id.
The current trend seems to be to enforce mandatory arbitration agreements if the arbitration system has procedural safeguards in place to protect the employee. In *Cole v. Burns International Security Services*, the District of Columbia enforced the disputed mandatory agreement to arbitrate because it (1) required neutral arbitrators, (2) allowed “more than minimal discovery” for both sides, (3) required a written explanation of the award, (4) gave the arbitrator authority to award the same types of relief available in court, and (5) did not require the employee to bear any costs of arbitration.

C. The Role of Arbitration Associations, Securities Dealers, and Bar Associations in Defining Standards for Fair Arbitration and Necessary Procedural Safeguards

Organizations that administer arbitration, such as the American Arbitration Association (AAA), and Judicial Arbitration & Mediation Services (JAMS/Endispute), are also active in defining the standards for procedural fairness. The AAA adopted modified rules for the arbitration of employment disputes in California, intending to provide greater protection to employees subject to mandatory arbitration. The modified rules provide a more extensive discovery process, burdens of proof and production similar to court litigation, the appointment of arbitrators who have experience in employment law, and written arbitrator decisions. Similarly JAMS/Endispute also set minimum standards of procedural fairness to determine whether it can accept an arbitration assignment. Employers should draft arbitration agreements that do not limit the rights and remedies available to employees through statutory law. The arbitration system must be facilitated by neutral adjudicators selected by both the employer and the employee. Agreements must preserve employees’ right to be represented by counsel, maintain a minimum level of discovery, and preserve the employees’ right to submit testimony and cross-examination.

To address Congress’ concerns about procedural fairness in arbitration, the National Association of Securities Dealers (NASD) voluntarily

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234. *Cole*, 105 F.3d at 1482.
235. *See Bompey et al., supra* note 28, at 33-34.
236. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
amended its rules to adopt procedural fairness in the mediation process.\textsuperscript{242} The amended rules ensure the competence and impartiality of arbitrators, the availability of pre-hearing discovery, and increased flexibility of awards.\textsuperscript{243} Many arbitration providers believe that improving arbitration procedures and putting procedural safeguards in place not only ensures fairer results, but also enhances the effectiveness of arbitration.

The New Jersey Bar Association is taking more drastic measures, calling for the repeal of the “bureaucratic waste” of mandatory arbitration.\textsuperscript{244} The Bar Association’s Ad Hoc Committee on Arbitration opined that the system is largely ineffective since only one-third of the cases sent to arbitration are arbitrated.\textsuperscript{245}

\section*{D. The Limits of Pre-Dispute Mandatory Arbitration as a Condition of Employment}

Even with seemingly fair and efficient arbitration procedures, mandatory arbitration agreements might not be enforced if they were implemented in a manner that may be perceived as retaliation for the exercise of statutory rights.\textsuperscript{246} Although mandatory arbitration as an employment condition is allowed by the courts, it does not necessarily follow that employers can discharge current employees who refuse to sign such agreements. In \textit{EEOC v. River Oaks Imaging and Diagnostic}, for instance, a federal district court in Texas refused to enforce an employer’s ADR policy since it was imposed on employees after twenty-one current and former employees filed Title VII charges with the EEOC against the company.\textsuperscript{247} The employer required all of its employees to sign a mandatory arbitration policy.\textsuperscript{248} Those who refused to sign were discharged immediately.\textsuperscript{249}

Retaliation is a difficult issue that courts will have to confront. It is one thing to refuse to hire incoming employees who refuse to sign arbitration agreements, but it might be a clearer case for retaliation to require current employees sign such agreements and fire them if they refuse. In \textit{Luce Forward}, the Ninth Circuit upheld mandatory arbitration without reaching this question; it remanded the retaliation case back to the lower court.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{244} Charles Delafuente, \textit{New Jersey Wants to Revamp System it Calls a ‘Bureaucratic Waste,’} 2 No. 49 A.B.A. J. E-REPORT 3 (Dec. 19, 2003).
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id.
\item \textsuperscript{247} See Bompey et al., \textit{supra} note 28, at 67-69.
\item \textsuperscript{248} Bompey et al., \textit{supra} note 28, at 67-69.
\item \textsuperscript{249} Id.
\end{itemize}
\end{footnotesize}
E. The Continuing Congressional Response in Favor of Arbitration

As circuit courts around the country expand the scope of Gilmer, condoning the widespread acceptance of pre-dispute mandatory arbitration agreements, congressional response has been very limited. To the extent that support for the right to jury trial in such circumstances correlates with party lines—with Democrats in favor of the right to jury trial and Republicans concerned about frivolous lawsuits—the 1994 mid-term elections, coined the “Republican Revolution,” contributed to the continuing legislative silence on the issue. In 1994, Republicans captured the House of Representatives after a forty-two-year hiatus; a gain of fifty-two seats that gave them a 230-204 majority. The Senate also fell into the hands of the Republicans, taking eight seats from the Democrats to capture a fifty-three to forty-seven majority.

The change in power was significant not only because it brought legislators less sympathetic to plaintiffs’ rights to court but because it also suggested the change in the national mood to one less sympathetic to civil rights litigation. Media analysts coined the phenomenon as the “revenge of the angry white males.” Republicans viewed the power shift as a mandate to adopt their agenda, which they dubbed the “Contract with America.” Among the major reforms touted by the new majority was the “Common Sense Legal Reforms Act,” which addressed the perceived problem with America’s litigation system and the incessant rise of lawsuits. Among other things, the Act limited securities lawsuits and expanded opportunities for alternative dispute resolution.

This seemingly inhospitable political and national climate did not deter many congressional members from introducing legislation aimed at reversing the trend of mandatory arbitration agreements. Senator Russell Feingold introduced the Protection from Coercive Employment Agreements Act, which explicitly prohibited employers from requiring employees to arbitrate employment discrimination claims.

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251. Id.
252. Id.
255. Id.
256. Id.
THE RISE OF MANDATORY ARBITRATION

however, died in the Committee on Labor and Human Resources.\textsuperscript{258} Feingold tried to pass a similar bill in 1997 called the Civil Rights Procedures Protection Act,\textsuperscript{259} but his efforts failed again. A House of Representatives counterpart, introduced by Representative Edward Markey of Massachusetts, garnered a great deal of support from the Democrats, but this bill also died in committee.\textsuperscript{260}

The current Republican congressional majority no longer seems to consider knowing and voluntary consent to be a requirement for ADR. Rather, the current Congress has embraced mandatory ADR as an effective vehicle for tort reform.

Arbitration is no longer assumed to be an implicitly voluntary process, and ADR has since taken on a more aggressive tone of enforcement. In 1998, Congress passed the Alternative Dispute Resolution Act, which replaces the Federal Judicial Code Arbitration Provisions.\textsuperscript{261} The Act directs each U.S. district court to authorize the use of ADR processes in all civil actions; devise and implement its own ADR program to encourage and promote the use of ADR in its district; examine the effectiveness of existing ADR programs and adopt appropriate improvements; and retain or designate an employee or judicial officer who is knowledgeable in ADR practices and processes to implement, administer, oversee, and evaluate the court’s ADR program.\textsuperscript{262} There were also efforts, led largely by Iowa Senator Charles Grassley, to require all U.S. district courts to authorize the use of arbitration in civil actions and permit district courts to require arbitration when the amount of money damages sought is under $150,000.\textsuperscript{263}

The continued expansion of the FAA leaves opponents of mandatory arbitration with little recourse. Congress had a chance to fight mandatory arbitration agreements by incorporating this knowing and voluntary requirement directly into the statute. Since it now seems too late to reject mandatory arbitration, many legislators attempt action through the courts and pending statutes in the state legislature. Fourteen legislators filed an amicus brief urging the Ninth Circuit to rehear Donald Lagatree’s case in \textit{Luce Forward en banc}.\textsuperscript{264} These legislators contended that the 1991 Civil

\textsuperscript{258} See Bill Summary & Status for the 103rd Congress, at http://thomas.loc.gov/cgi-bin/bdquery/z?d103:SN02012:@@c (last visited Nov. 7, 2004).


\textsuperscript{262} Id.

\textsuperscript{263} S. 997, 105th Cong. (1997).

\textsuperscript{264} Brief of Amici Curiae Representatives George Miller, Barney Frank, Dennis J. Kucinich, John Conyers, Jr., Robert E. Andrews and Other Members of The United States House of Representatives, EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (Nos. 00-57222, 01-57221).
Rights Act was intended to preserve the plaintiff's judicial forum.\textsuperscript{265} These legislators also sided with California Assembly Democrats in a bill introduced by John Burton that would ban pre-dispute agreements to arbitrate discrimination claims under California's Fair Employment and Housing Act. The bill garnered tremendous support from the Democratic-controlled legislature, but it fell under Governor Davis's veto. Governor Davis explained that he was "concerned about adversely affecting the ability of California business to cost efficiently resolve disputes."\textsuperscript{266}

CONCLUSION

Courts and employers have argued that the inclusion of section 118 in the Civil Rights Act, which explicitly encourages alternative dispute resolution, shows a strong federal policy favoring mandatory arbitration agreements. However, legislators did not intend section 118 to support mandatory arbitration agreements or to supplant litigation. Rather, it was an initiative strategically adopted by congressional Democrats to acknowledge the rising popularity of ADR and Republican concerns about runaway litigation and punitive damage awards. However, both Democrats and Republicans understood arbitration agreements as necessarily voluntary. Hence, the use of mandatory arbitration as a condition of employment is beyond the intent of the drafters of the Civil Rights Act of 1991, as deducible from legislative history of the Civil Rights Act, Committee reports, and debates that shows shared assumptions among different political actors involved in its passage.

The language of section 118 was not considered more closely in part because of a political climate that was becoming suspicious of civil rights, an unfriendly Supreme Court, and the need to compromise with Republican legislators who were concerned about furthering needless litigation. Also involved was that section 118 was not an affirmative provision of any substance; it merely provided encouragement of arbitration in appropriate circumstances. It confounds reason to think that, in enacting a statute designed to expand remedies and forums for civil rights plaintiffs, Congress would contemplate a provision that serves to undermine the purpose of the law itself. It is perhaps most bitter for Democrats and civil rights advocates, then, that an insubstantial provision left intentionally vague was construed as "clear and unambiguous" by the courts and allowed to circumvent the judicial remedies provided in the same Civil Rights Act.

\textsuperscript{265} Id.

Mandatory arbitration as a condition of employment has contributed to the growing legitimacy of the FAA in the eyes of the legal system. In light of the current political climate, mandatory arbitration will continue to grow. The question becomes: What procedural mechanisms should be in place to ensure fairness, and under what circumstances should employers avoid imposing these agreements? Legislators who wished that a more explicit version of section 118 had been adopted must rely on state legislatures and district courts to limit these agreements by precluding retaliatory enforcement and adopting procedural mechanisms to protect employees.