Arbitration of Employment Discrimination Claims and the Challenge of Contemporary Federalism

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ARBITRATION OF EMPLOYMENT
DISCRIMINATION CLAIMS AND THE
CHALLENGE OF CONTEMPORARY FEDERALISM

Ellwood F. Oakley, III
Donald O. Mayer*

I. INTRODUCTION ........................................ 476
II. ARBITRATION CLAUSES IN “CONTRACTS OF EMPLOYMENT” . 480
   A. A Brief History of the Federal Arbitration Act ........... 480
   B. Gilmer v. Interstate/Johnson Lane: Opening Arbitration to Employment Discrimination Claims .......... 483
   C. Arbitration of Employment Discrimination Cases
      After Gilmer ........................................ 486
III. SECTION 118 OF THE CIVIL RIGHTS ACT OF 1991 ......... 489
    A. An Inconclusive Legislative History ..................... 489
    B. A Political Compromise with Little Guidance ........... 490
IV. THE FAA AND THE CONSTITUTION ......................... 492
    A. The Supremacy Clause and Traditional Preemption Doctrines ........................................ 493
    B. The Volt Paradox in FAA Preemption Doctrine:
       State Laws as Private Rules of Reference .......... 496
       1. Volt Information Sciences, Inc. v. Board of Trustees:
          A New FAA Preemption Doctrine ..................... 498
       2. The Circuit Courts: Following a Confusing Lead .... 500
    C. Relevant Trends in the Supreme Court’s Constitutional Jurisprudence Affecting the FAA ............... 503
       1. Recent Preemption Cases ............................ 503
       2. Choice of State Laws in Arbitration:
          The Constraints of Mastrobuono ...................... 507
       3. From Bernhardt to Dobson: Rethinking the
          Judicial Creation of Preemptive Substantive Law ... 509

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475
D. The Likelihood of Southland Being Overruled by the Supreme Court .................. 514
E. Section 118 and the Prospects for FAA Preemption of State Law ..................... 517

V. PREDISPUTE ARBITRATION CLAUSES IN THE EMPLOYMENT CONTEXT: UNCONSCIONABLE CONTRACTS OF ADHESION? ........ 519
A. Development of the Common Law of Adhesion and Unconscionability .................. 519
B. Carnival Cruise Lines, Inc. v. Shute: The Supreme Court Adopts Chicago School Adhesion Analysis .................. 521
C. Mandatory Arbitration Clauses and Claims of Adhesion .......................... 523
D. A Title VII-Based "Knowing and Voluntary" Requirement? .......................... 526
E. Application of "Knowing and Voluntary": A Harassment Hypothetical .................. 528

VI. A CALL FOR CONGRESSIONAL ACTION .................................. 529
A. Proposals for Amending the FAA .................................. 529
B. Proposals for Amending Federal Employment Discrimination Laws .................. 530

VII. CONCLUSION .......................................................... 534

"Verdicts in employment litigation regularly reach six and even seven figures. The prospect of such awards does serve as a deterrent to improper management decisions (though sometimes a source of unduly defensive personnel practices). The overall pattern of jury awards does, however, display a rather lottery-like response to the harm inflicted on individual employees."

I. INTRODUCTION

Last year, a nonpartisan federal commission headed by former Secretary of Labor John T. Dunlop highlighted a matter of national concern when it characterized jury responses to employees' claims of discrimination as "lottery like." The commission's finding at least partly explains the increased call for the use of private alternative dispute resolution (ADR) in employer-employee disputes.

2. Id. In the commission's exploration of workplace productivity and conflict reduction, there were often little or no consensus, but the Commission's views on employment-related jury verdicts were not the subject of controversy.
This call is often couched as a rational response to the costs, delays, and uncertainties inherent in civil litigation, but the dominant motive seems to be the search for a safe haven from runaway juries. Recent verdicts gaining national publicity include an award of $7 million for sexual harassment by a law firm partner and $15 million for the improper sale of a $300 medicare supplement insurance policy. Publicity arising from these and other large dollar jury awards have stimulated greater interest in ADR generally, with particular interest in binding arbitration. As one advocate of arbitration for employment discrimination disputes noted, "It's the existence of jury trials which is the major impetus toward arbitration agreements."

ADR includes mediation, conciliation, mini-trials, non-binding arbitration, and binding arbitration. Of these, only binding arbitration has the same impact as a judicial determination: a determination of liability that is enforceable through courts of competent jurisdiction. In recent years, employers have included predispute arbitration clauses in employment contracts. This trend is the result of such clauses in contracts "involving commerce" being deemed "valid, irrevocable and enforceable" under the Federal Arbitration Act (FAA) and judicial affirmance of arbitral awards.

Moreover, the Supreme Court has opened the door to arbitration of federal employment discrimination claims. In the 1991 case of Gilmer v. Interstate/Johnson Lane Corp., the Supreme Court held that plaintiff employees asserting claims under the Age Discrimination in Employment Act (ADEA) could be compelled to arbitrate even though the employees could not have avoided or modified the predispute arbitration clauses as a condition of

4. See generally Todd B. Carver & Albert A. Vondra, Alternative Dispute Resolution: Why It Doesn't Work and Why It Does, HARVARD BUS. REV. 120 (May-June 1994) (highlighting the role played by the Center for Public Resources, Inc., a nonprofit group funded by Fortune 500 corporations, in encouraging increased usage of ADR by businesses in all aspects of contractual relationships); Theodore B. Olson, The Dangerous National Sport of Punitive Damages, WALL ST. J., Oct. 5, 1994, at A17 (reflecting the concerns of business interests that excessive jury verdicts are crippling entrepreneurial activities).
9. See 9 U.S.C. §§ 1-9 (1988); see also infra notes 29-44 and accompanying text.
11. 500 U.S. 20 (1991); see also infra notes 45-65 and accompanying text.
employment. In turn, several circuit courts of appeals soon applied *Gilmer* in granting motions to compel arbitration of Title VII discrimination claims in cases where the plaintiffs claimed they did not understand that they had waived their right to a jury determination of their claims in advance.\(^{13}\)

As the demand for predispute arbitration agreements has increased among employers,\(^{14}\) some commentators have questioned arbitration's fairness to complaining employees,\(^{15}\) particularly in the securities industry.\(^{16}\) Yet, employers are increasingly responding to *Gilmer* by requiring job applicants to forfeit their statutory right to a jury trial as a condition of employment.\(^{17}\) Other companies make such agreements a condition for promotion or other benefits.\(^{18}\) To limit the possibility of adverse arbitral rulings, some companies have set up rules of arbitration that call for company-dominated arbitral panels. Interestingly, the courts have used the FAA to enforce awards made by these panels.\(^{19}\)

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14. Wade Lambert, *Employee Pacts to Arbitrate Sought by Firms*, WALL ST. J., Oct. 22, 1992, at B1. Lambert quotes several firm leaders as saying the following: "There's been a groundswell of interest"; that small firms cannot "run the risk of taking a big hit in the court system"; and that arbitration is "the new way of dealing with employment problems." *Id.*

15. See, e.g., Margaret A. Jacobs, *Men's Club—Riding Crop and Slurs: How Wall Street Dealt with a Sex-Bias Case*, WALL ST. J., June 9, 1994, at A1 (containing an in-depth portrait of Helen Walters, who lost a "textbook" case of sexual harassment in which her boss repeatedly referred to her as, inter alia, a "hooker" and a "bitch"). Complaints of sex discrimination in the securities industry are dealt with by three-person arbitral panels appointed and paid by an industry organization such as the New York Stock Exchange or the National Association of Securities Dealers. But 89% of the more than 3,000 arbitrators used by those two big groups are men. Nearly half are retired, and the average age of the men is 60.

*Id.* Between May of 1991 and June of 1994 at least 48 cases of sex, race, or age discrimination were arbitrated by securities industry panels. Jacobs writes that "women are known to have prevailed in only 2 of 16 cases in which the results could be verified . . . [and] received barebones awards." *Id.* Of the more than a dozen women interviewed who had been through securities industry arbitration, "[n]one thought the process, or the result, was fair." *Id.*

16. Diana B. Henriques, *Wall St. Arbitration Programs Criticized*, N.Y. TIMES, May 12, 1992, at D3. Henriques writes that the General Accounting Office's study of the securities industry found that arbitration claims by customers against brokerage firms "do not provide a reasonable level of assurance regarding either the independence of the arbitrators or their competence in arbitrating disputes." *Id.* Employment discrimination claims by securities firms are handled by the same kinds of arbitral panels that handle investor/broker disputes.


18. *Id.* (noting that "[c]orporations like ITT, Hughes, Rockwell International, NCR, Brown and Root[,] and Travellers have adopted policies that require arbitration for discrimination claims . . . [while others] like TRW, General Mills, MCI, and Conoco, are considering putting similar policies into effect").


Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes under the Acts or provisions of Federal law amended by this title.

Notwithstanding *Gilmer* and its subsequent application to Title VII cases, as well as the ADR-supportive language of section 118, it is not clear whether arbitration clauses in employer-employee agreements will invariably be enforceable through the FAA. This uncertainty is the result of several factors. There is still some question whether section 1 of the FAA exempts “contracts of employment” in interstate commerce from the scope of the FAA’s enforcement provisions. Additionally, state laws limiting arbitration or limiting arbitral remedies may not be entirely preempted by the FAA, especially where the parties designate state law as controlling. Moreover, in legislating section 118 of CRA-1991, Congress neither addressed whether “contracts of employment” are excluded from the FAA’s enforcement provisions nor clarified the FAA’s preemptive effect on state laws. Finally, some Supreme Court Justices express doubt that Congress intended to enact substantive law binding in state courts when it passed the FAA. Although these doubts have

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23. 42 U.S.C. § 2000e-2(a)(1) (1988) (making it unlawful for employer “to fail to refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin”).


recently been resolved in favor of stare decisis, several Justices suggest that Congress should amend the FAA to allow more room for state action.\textsuperscript{27}

This article reviews the FAA, the \textit{Gilmer} decision, and subsequent applications of \textit{Gilmer} in light of continuing uncertainties over the FAA’s preemptive effect on state law restraints on arbitration. The Supreme Court’s present approaches to federalism and preemption may allow states to impose limits on arbitration agreements and arbitral remedies, provided such limits are consistent with the general purpose of the FAA: to ensure that “private agreements to arbitrate are enforced according to their terms.”\textsuperscript{28}

In light of the aforementioned uncertainties, this article concludes that further federal legislation is warranted and proposes specific changes to existing federal law. In conjunction with expressly extending the FAA’s scope to include disputes arising out of agreements and contracts affecting interstate commerce, Congress should require a “knowing and voluntary” waiver of jury trials and specify minimum procedural safeguards to insure that employees’ claims are resolved in neutral forums. Until Congress takes affirmative steps to clarify the permissible scope of the FAA, the judiciary will be required to sort through the bramble bush of federalism, preemption, freedom of contract, state laws, and private parties’ choice of law. Clear guidance to both employers and employees on a variety of issues affecting arbitration of employment discrimination claims is still lacking, and that clear guidance must come from Congress.

II. ARBITRATION CLAUSES IN “CONTRACTS OF EMPLOYMENT”

\textit{A. A Brief History of the Federal Arbitration Act}

Congress passed the FAA in 1925 to encourage the use of commercial arbitration as an alternative to litigating commercial disputes. A reading of the legislative hearings indicates that the primary purpose of the legislation was to enable merchants to rely on arbitration agreements to settle disputes amongst themselves.\textsuperscript{29}

\textsuperscript{27} Id. at 843-44 (O’Connor, J., concurring). See also infra Part IV, notes 217-34 and accompanying text.

\textsuperscript{28} Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989); see also infra notes 138-45 and accompanying text.

\textsuperscript{29} See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 & S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 14 (1923) (letter from Herbert Hoover, Secretary of Commerce; Report of the Committee on Commerce, Trade, and Commercial Law of the American Bar Association Re Federal Commercial Arbitration Act). Prior to 1925, the common law of most states was hostile to predispute arbitration agreements. Judges often determined that such agreements could not "oust the jurisdiction" of the courts. See, e.g., Cocalis v. Nazlides,
Prior to passing the FAA, Congress became convinced that arbitration was a useful alternative to litigation and decided that agreements to arbitrate contained in contracts “evidencing a transaction involving commerce” would be enforceable where an independent basis for federal jurisdiction existed. As a result, the FAA provided that a reluctant party to an agreement to arbitrate could be compelled to arbitrate by a federal court, and that if a party reluctant to arbitrate instituted litigation, a court could issue a stay order and hold judicial proceedings in abeyance.

Not all affected parties were happy with the FAA. At the time of the FAA’s passage, organized labor was wary of the federal judiciary and did not want federal courts to have the power to order it to arbitrate disputes with management. As a result and “at the behest of the Seamen’s Union,” Congress added section 1: “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.”

The 1947 Taft-Hartley Act did not immediately clarify employment arbitration issues. Section 301 of Taft-Hartley arguably made the failure to abide by an agreement to arbitrate an unfair labor practice. Therefore, the courts soon had to address whether arbitration agreements in collective bargaining contracts were excluded from FAA coverage pursuant to section 1. Among federal courts, considerable disagreement existed over whether parties to a collective bargaining agreement could be ordered to arbitrate at all.

139 N.E. 95, 98-99 (Ill. 1923) (holding that a predispute arbitration agreement could not be enforced because a state arbitration statute required submission of an existing controversy); Hurst v. Litchfield, 39 N.Y. 377, 379 (1868) (holding that a postdispute arbitration agreement is not binding because it ousts courts of their jurisdiction and is therefore against public policy).

33. American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 470 (11th Cir. 1987).
34. Id. at 470-71 (quoting 9 U.S.C. § 1 (1982)).
37. Many courts held that the exclusionary language of § 1 barred the use of the FAA to order arbitration under a collective bargaining agreement. See, e.g., Lincoln Mills v. Textile Workers Union, 230 F.2d 81, 88-89 (5th Cir. 1956), rev’d on other grounds, 353 U.S. 448 (1957); United Elec. Workers v. Miller Metal Prods., Inc., 215 F.2d 221 (4th Cir. 1954); Pennsylvania Greyhound Lines v. Amalgamated Ass’n of Street Employees, 193 F.2d 327 (3d Cir. 1952). But see Local 205, United Elec. Workers v. General Elec. Co., 233 F.2d 85, 91-93 (1st Cir. 1956), aff’d on other grounds, 353 U.S. 547 (1957); Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298 (2d Cir. 1956), cert. denied, 354 U.S. 911 (1957); Tenney Eng’g, Inc. v. United

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The issue was resolved in *Textile Workers Union v. Lincoln Mills*, which held that section 301 of the Taft-Hartley Act was a source of substantive federal law, and thus, the FAA was not applicable.

Since *Lincoln Mills*, arbitration clauses contained in collective bargaining agreements have been governed by section 301 of the Taft-Hartley Act and not the FAA. As the Court's opinions in *Alexander v. Gardner-Denver Co.* and *Gilmer* make clear, the Supreme Court treats arbitration clauses in collective bargaining agreements differently than like clauses in non-collective bargaining agreements. In instances of collective bargaining, a distinct line of cases would also limit the application of the section 1 FAA exclusion to workers directly engaged in interstate commerce, such as bus drivers and truck drivers. These cases place considerable emphasis on the textual arrangement in section 1 that excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the application of the FAA.

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39. The court of appeals had concluded that the FAA "does not authorize the judicial enforcement of a contractual undertaking to submit to arbitration grievances arising under a collective bargaining agreement." *Lincoln Mills*, 230 F.2d at 86. Justice Douglas, writing for the majority in *Lincoln Mills*, affirmed the district court's decree for specific performance of the arbitration agreement based on § 301, but did not address the § 1 issue at all. *Textile Workers Union*, 353 U.S. at 459. Justice Frankfurter urged in dissent that the Court explicitly recognize "that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." Id. at 466. Justice Frankfurter would have preferred that the Court, in finding authority under § 301 of Taft-Hartley to compel arbitration, also find that "Congress 'by implication' repealed its own statutory exemption of collective bargaining agreements in the Arbitration Act." Id. at 467.
40. See, e.g., *American Postal Workers Union*, 823 F.2d at 473 (holding "that collective bargaining agreements are 'contracts of employment' within the meaning of the [FAA § 1] exclusion"). But cf. *Miller Brewing Co. v. Brewery Workers Local Union Number 9, 739 F.2d 1159, 1162 (7th Cir. 1984)* (finding the FAA applicable to a collective bargaining agreement and stating that the § 1 exclusion is "limited to workers employed in the transportation industries").
43. See, e.g., *American Postal Workers Union*, 823 F.2d at 473 (refusing to choose a side in the debate, but listing cases that have limited the section 1 exclusion to "'workers actually engaged in interstate commerce'") (citations omitted).
44. 9 U.S.C. § 1 (Supp. 1994). This line of interpretation stresses *ejusdem generis*, pointing to the specific categories of transportation workers that precede (and arguably limit or qualify) the more generic category of workers engaged in interstate or foreign commerce. Thus, in *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972), the court found that
B. Gilmer v. Interstate/Johnson Lane: Opening Arbitration to Employment Discrimination Claims

In 1981 the Charlotte, North Carolina, securities brokerage firm of Interstate/Johnson Lane Corporation (Interstate) hired Robert Gilmer as Manager of Financial Services for its main office. Prior to actual employment, Gilmer had to register as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). His registration application to the NYSE was titled “Uniform Application for Securities Industry Registration or Transfer,” and provided for arbitration of any “dispute, claim, or controversy” arising between him and Interstate “that [was] required to be arbitrated under the rules, constitutions or by-laws of the organizations with which [Gilmer] register[ed].”45 The NYSE’s Rule 347 provided for arbitration of “[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.”46

When Gilmer was 62 years of age, Interstate ended his employment only six years after hiring him. Gilmer suspected age discrimination and took his claim to the Equal Employment Opportunity Commission (EEOC). The claim was not conciliated through the EEOC so Gilmer brought suit in federal district court, alleging that Interstate had discharged him because of his age. In response, Interstate filed a motion to compel arbitration under section 4 of the FAA. The district court denied the motion, but the Fourth Circuit Court of Appeals reversed, finding “nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements.”47

Before the Supreme Court, Gilmer made the following arguments: (1) noting the general insufficiency of arbitral procedures, Congress intended ADEA claims to be litigated rather than arbitrated; (2) the agreement to arbitrate was not freely negotiated; and (3) the Supreme Court’s prior opinion in Alexander v. Gardner-Denver Co.48 required reversal. The Court dis-

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46. Id.
48. 415 U.S. 36 (1974) (holding that a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective bargaining agreement was not precluded from subsequently bringing a Title VII action based upon conduct that was the subject of the
agreed, finding that Alexander was inapposite,\(^49\) that Congress had not expressly precluded arbitration in creating causes of action under the ADEA,\(^50\) and that Gilmer effectively made his choice to arbitrate.\(^51\)

Gilmer also contended that arbitration agreements should not be enforced in ADEA claims because employers and employees have different bargaining power. The Court countered that section 2 of the FAA provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract,"\(^52\) and that there was no indication "that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application."\(^53\)

As will be made more evident below, the argument over choice will prove instructive in considering the pre-emptive effect of the FAA, particularly because state laws seeking to maximize freedom of choice for franchisees\(^54\) and auto dealers\(^55\) have been held to be preempted by the FAA. Yet some courts have upheld state legislation or common law rulings limiting the power of arbitrators to award punitive damages.\(^56\) Additionally, a contractual agreement to abide by state rules of arbitration presumptively weakens the FAA's preemptive powers.\(^57\)

Plaintiff Gilmer had not raised the issue of section 1's scope in his petition for certiorari, and the majority dealt with the issue of section 1's application to employment contracts in a footnote, "appropriately" not addressing the section 1 issue as follows:

\[\text{grievance).}\]

\(^49\) Gilmer, 500 U.S. at 33-35.
\(^50\) Id. at 26-29.
\(^51\) Id. at 33-34. The Court stated:

"Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. . . . "Of course, courts 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.'"

\(^52\) Id. at 33 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).
\(^53\) Id. at 33 (quoting 9 U.S.C. § 2 (1982)).
\(^55\) See Saturn Distrib. Corp. v. Williams, 905 F.2d 719 (4th Cir. 1990); see also infra notes 146-52 and accompanying text (discussing Saturn in detail).
\(^57\) See Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989); see also infra notes 138-45 and accompanying text (discussing Volt in detail).
In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. . . . The record before us does not show, and the parties do not contend, that Gilmer’s employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer’s securities registration application, which is a contract with the securities exchanges, not with Interstate.58

Thus, although the majority was willing to make Gilmer’s agreement with the NYSE contractually binding on Gilmer, it was unwilling to find that the required registration application was part of Gilmer’s overall employment contract with Interstate. In dissent, Justices Stevens and Marshall argued that the section 1 issue was logically antecedent to the resolution of other issues and should be addressed.59

The Court rejected Gilmer’s argument that the arbitration procedures in the NYSE’s registration application were inadequate because of the limited discovery allowed in arbitration.60 Gilmer argued that because discovery in arbitration was more limited than in federal courts, he would have a more difficult time proving discrimination.61 The Court disagreed, reasoning that age discrimination claims did not require more extensive discovery than other arbitrable claims and that the discovery provisions under the NYSE’s arbitration guidelines were adequate.62

The Court’s conclusion ignores the fact that more detailed discovery may often be required to prove a claim of employment discrimination.63 For example, an employer’s statistical hiring data may be essential to prove a pattern of discrimination.64 Under the limited discovery allowed in commer-

59. Id. at 36-37.
60. Id.
61. Id.
62. Id.
64. See Heidi M. Hellekson, Taking the “Alternative” out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising out of Employment Contracts, 70 N.D. L. REV. 435, 449 (1994) (noting that “discovery in employment discrimination claims often involves extensive inquiries into the work environment of the employer”); Susan E. Powley, Exploring a Second Level of Parity: Suggestions for Developing an Analytical Framework for Forum Selection in Employment Discrimination Litigation, 44 VAND. L. REV. 641, 683 (1991) (noting that discovery is important in employment discrimination cases because the statistical data needed to prove discrimination can be found only in the employer’s records); see also Kieve, supra note 63, at 81 (noting that in employment
cial arbitration, this information might not be readily available, and the plaintiff would be denied access to the documents needed to prove his or her case.  

C. Arbitration of Employment Discrimination Cases After Gilmer

Any doubt whether the direct raising of a section 1 issue by a petitioner would make a difference was soon put to rest. In Willis v. Dean Witter Reynolds, Inc. the Sixth Circuit Court of Appeals held that a securities broker must arbitrate her Title VII claims where the agreement to arbitrate was contained in a securities registration form required by her employer. The form was identical to the one in Gilmer, but unlike Gilmer, Willis raised the section 1 issue directly. The Sixth Circuit Court agreed with Plaintiff Willis and Justice Stevens that Congress did not intend the FAA "[to] be an act referring labor disputes, at all. It is purely an act to give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, . . ." Nevertheless, the Willis court felt bound by the Gilmer decision and held the arbitration agreement to be enforceable.

In another discrimination case, the Fifth Circuit, following Gilmer, held that a former employee’s sexual harassment claim could be subjected to compulsory arbitration. In Alford v. Dean Witter Reynolds, Inc. the court reconsidered its prior decision denying compulsory arbitration in light of a specific remand from the Supreme Court. Alford, like Willis and Gilmer, had been required to register with the NYSE as a condition of employment. The Fifth Circuit, in remanding to the district court for reconsideration, noted discrimination cases “the plaintiff needs to have access to the employer’s statistical employment information”).

65. Currently, the American Arbitration Association’s Employment Dispute Resolution Rules, as amended and effective on November 1, 1993, permit discovery in large or complex employment cases, but only with the arbitrator's discretionary approval. For example, the Association's Rule 6 states:

In large or complex cases, at the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing with the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator to specify the issues to be resolved. . . . Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) the extent of and schedule for the production of relevant documents and other information . . . .


66. 948 F.2d 305 (6th Cir. 1991).

67. Id. at 311 (quoting Hearings on S. 4213 & S. 4214 Before the Subcomm. to the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923)).

68. 939 F.2d 229 (5th Cir. 1991).


that "[i]n both this case and Gilmer, the arbitration clause was contained in the employee's contract with a securities exchange, not with the employer." 71

In Mago v. Shearson Lehman Hutton Inc. 72 the Ninth Circuit Court of Appeals considered an arbitration clause in an agreement between the employer and employee. Dana Mago, an employee with E.F. Hutton, completed and signed an employment application with Shearson after it acquired E.F. Hutton. The application contained a broad arbitration clause. Mago later brought a Title VII action against Shearson alleging gender discrimination and sexual harassment. 73 There is no indication that the section 1 issue was raised at the trial court level.

Mago argued that Congress did not intend Title VII disputes to be subject to arbitration pursuant to the FAA, but the court, relying on Gilmer, concluded that she did not meet her "burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act." 74 Mago also raised the issue of adhesion in the district court. Following the lead of Gilmer in holding that "[a] claim of 'unequal bargaining power is best left for resolution in specific cases,'" 75 the Ninth Circuit remanded the case to the district court for a determination of whether the agreement was one of adhesion "under principles of federal law." 76

In Delaney v. Continental Airlines 77 a federal district court in California held that the arbitration provisions contained in a Continental Airlines "Corporate Policy and Procedures Manual" were enforceable. Continental Airlines discharged employee Thomas Delaney based on his unsatisfactory work performance. 78 Delaney appealed his termination under the process provided for in his employee manual. A three member board, consisting of three officers of Continental, upheld his termination. 79 Delaney appealed the arbitration award and argued that "the arbitration agreement was a contract of adhesion." 80 He relied on Graham v. Scissor-Tail, Inc., 81 where the court ruled that an arbitration clause found in a contract of adhesion is enforceable unless it is contrary to "the reasonable expectations of the weaker or 'adhering' party" or is "unduly oppressive or 'unconscionable.'" 82

71. Alford, 939 F.2d at 230 n.1.
72. 956 F.2d 932 (9th Cir. 1992).
73. Id. at 934-35.
74. Id. at 935. The court did not refer to § 118 of the Civil Rights Act of 1991.
75. Id. at 934 (quoting Gilmer, 500 U.S. 20).
76. Id.
78. Id. at 1171.
79. Id. at 1172.
80. Id.
82. Id. at 172-73.
Delaney argued that the arbitration process was "inherently biased" in favor of the employer because the panel consisted only of company officers. Thus, the agreement was beyond the "reasonable expectation of fairness" and "unduly oppressive and unconscionable." The district court rejected this argument and stated that "arbitrators need not be only independent, professional arbitrators or be selected from 'outside' the company." The court further stated that panels comprised of employees and supervisors are not inherently biased in favor of the company.

Finally, the District of Columbia Court of Appeals held that an arbitration agreement in a securities application was enforceable in Benefits Communication Corp. v. Klieforth. There, an employee sued Benefits for denial of a promotion based on a violation of the District of Columbia Human Rights Act. Once again, the arbitration clause at issue was a compulsory one in a securities application. The employee argued, on the basis of an isolated remark in the legislative history of the CRA-1991, that the Gilmer decision did not apply to employment discrimination claims. The court held that Gilmer applied to employment disputes and that the CRA-1991 did not modify or undermine the Gilmer holding. The court found that the statute did not suggest that Gilmer no longer applied, and thus the court did not need to look to the legislative history.

83. Delaney, 8 Individual Empl. Rights Cas. at 1173.
84. Id.
85. Id. (relying on Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 952 (D.N.J. 1991), where the court noted that a Board of Adjustment consisting of equal numbers of employees and employers was "extremely fair"). Lang v. Burlington N. R.R., 835 F. Supp. 1104 (D. Minn. 1993), reached a similar conclusion. In Lang, the district court held that an arbitration policy added to an employee manual during an employee's employment was enforceable. The employee argued that the agreement was a contract of adhesion because he had only two choices: (1) he could resign his position; or (2) he could continue working with the arbitration policy in the manual. Id. at 1105. The court held that Lang "failed to show that Burlington Northern's arbitration clause is inherently unfair," and that his continued employment constituted the acceptance and consideration necessary to make the agreement an enforceable contract. Id. at 1106.
86. 642 A.2d 1299 (D.C. 1994).
87. Id. at 1300; see D.C. CODE ANN. §§ 1-2501 to -2557 (1992 & Supp. 1995).
88. Klieforth, 642 A.2d at 1300.
90. Klieforth, 642 A.2d at 1305.
91. Id. at 1304.
92. Id. at 1305. In a concurring opinion, Acting Chief Judge Ferren noted his concern that in some circumstances these types of agreements could constitute unconscionable contracts of
III. SECTION 118 OF THE CIVIL RIGHTS ACT OF 1991

Although it is tempting to interpret section 118 of the CRA-1991 as clearly affirming Congress' desire to make employment discrimination claims arbitrable, a closer examination reveals that nothing in either the text or legislative history explicitly indicates that Congress carefully considered the section 1 issue, the Gilmer case, the troubling issue of the FAA's preemptive scope, or the extent of its own powers under the Commerce Clause. 93

In November of 1991, President Bush signed the CRA-1991 into law after considerable debate in Congress and the country at large. Section 118 of the CRA-1991 encourages ADR to resolve employment disputes "[w]here appropriate and to the extent authorized by law." 94 Ironically, the CRA-1991 also expressly establishes jury trial rights. For Congress to establish jury trial rights and expressly encourage arbitration in the same piece of legislation is a bit of a policy puzzle. What were the underlying policy objectives of Congress?

A. An Inconclusive Legislative History

The legislative history is not particularly revealing. The Senate did not produce a Committee Report to support S. 1745, but two House committees produced a joint report for two companion bills. Much of the content of CRA-1991 was contained in House sponsored legislation, H.R. 1 (Democratic leadership bill) and H.R. 1375 (Bush Administration bill). The House Committee on Education and Labor and the House Committee on the Judiciary both addressed ADR in committee reports. The Education and Labor Report (H.R. 102-40, part 1) was dated April 24, 1991, and the Judiciary Report (H.R. 102-40, Part 2) was dated May 17, 1991. Although the Judiciary Report was dated a few days after the release of the Gilmer decision, it contained no mention of Gilmer, and it appears that the Gilmer decision played no part in the analysis of the committees.

The majority report of Education and Labor made clear that the use of ADR "is intended to supplement, not supplant, the remedies provided by Title VII." 95 The report concluded that an agreement to submit disputed issues to arbitration adhesion. Id. However, Judge Ferren did not give any guidelines as to what circumstances would be required to make mandatory arbitration clauses unenforceable as contracts of adhesion.

93. As to preemption and the FAA, see infra Part IV.
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.* . . . The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.96

If “rights and remedies” are intended to refer to the substantive provisions of Title VII, then arbitration would not be precluded. However, if “rights and remedies” extend to the procedural right of jury trial provided under CRA-1991, then it would seem to render meaningless the ADR provisions of section 118.

The minority report of Education and Labor noted that H.R. 1375 specifically provided that any agreement to arbitrate must be “knowing and voluntary.”97 The parallel provisions of H.R. 1 did not contain that stipulation, nor did the final version of CRA-1991. Congress considered, but rejected, the express requirement that ADR be voluntary. Thus, an implication can be drawn that Congress approved of binding predispute arbitration agreements.

The House Judiciary Committee Report contained an analysis of ADR virtually identical to the report produced by the House Education and Labor Committee and concluded that “[t]he Committee does not intend for the inclusion of this section to be used to preclude rights and remedies that would otherwise be available.”98 The minority report of the House Judiciary reached the conclusion that the ADR section had no teeth, providing that “this section is nothing but an empty promise to those claimants (and employers) who wish to resolve their disputes without expensive litigation.”99 The report does not make clear the reason the minority considered section 118 an “empty promise,” but an explanation might lie in the expectation that the holding of *Alexander v. Gardner-Denver Co.*100 would extend to all employment contracts. Neither side apparently anticipated the holding or impact of *Gilmer* on the developing case law.

**B. A Political Compromise with Little Guidance**

While the Senate produced no Committee Report of S. 1745, the extensive floor debate in late October, 1991 produced substantive comment along with political posturing by both the Democratic Party leadership and the Bush Administration loyalists. Upon announcing the “compromise” on October 30, 1991, Senate Minority Leader (now Majority Leader) Bob Dole presented a

96. *Id.* (emphasis added) (citation omitted).
97. *Id.* at 156.
98. *Id.* at 97.
99. *Id.* at 78.
section-by-section analysis of the Act representing the views of the Bush Administration and the Republicans in the Senate. The coverage of section 118 is notably brief:

This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties ***knowingly and voluntarily*** elect to use these methods.

In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991). 101

While Senator Dole’s statement is the first legislative recognition of the effect of the *Gilmer* decision on the debate, it does not appear to grasp the import of the *Gilmer* holding. The Bush Administration clearly favored the use of ADR over jury trials in the employment contract setting, but took no action to amend the implied limitations on employment arbitration contained in section 1 of the FAA.

Not to be outdone, Democratic Representative Don Edwards, subcommittee chair of the House Judiciary Committee and principal author of H.R.1, offered his “interpretive memorandum” during the House debate the following week. 102 While acknowledging numerous language differences, he noted that the Senate version of the CRA-1991 “achieved the same fundamental purposes of H.R.1.” 103 Like Senator Dole’s statement of analysis, Representative Edwards’ “interpretive memorandum” could be viewed by the Supreme Court as self-serving rather than as a legitimate legislative history. It does, however, provide a stark contrast with the views of Senator Dole: “[t]his section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen . . . . No approval whatsoever is intended of the Supreme Court’s recent decision in *Gilmer v. Interstate/Johnson Lane Corp.*” 104

We conclude that neither Senator Dole nor Representative Edwards represents the composite “intent” of Congress regarding arbitration because Congress did not analyze or openly debate the policy implications of its actions. Congress and the President, both under considerable pressure to produce civil rights legislation, carefully considered a number of issues in CRA-1991, but ADR was not one of them. Thus, arguments over legislative intent are suspect. In terms of clear, unequivocal statutory language, the words of section 118 do not at all address the scope of section 1 of the FAA. Furth-

103. Id.
104. Id. at H9530 (emphasis added).
er, section 118, in not addressing the Supremacy Clause issue, fails to clarify congressional intent about the FAA’s preemptive effect on state laws that might limit the enforceability of arbitration clauses in contracts.

IV. THE FAA AND THE CONSTITUTION

Prior to 1925, many state laws actively discouraged arbitration.\(^{105}\) Even now, a host of state laws would limit the enforceability of predispute arbitration agreements in certain cases.\(^{105}\) In general, these laws attempt to ensure that superior bargaining power does not force the less empowered into arbitration either when they do not know the meaning or implications of the predispute arbitration or when they have no real choice. State laws often single out predispute arbitration clauses in certain contexts\(^{107}\) for non-enforcement by state courts. Such laws appear to conflict with section 2 of the FAA, which seeks to put contracts of arbitration on the same level as other contracts, and to enforce them “save upon such grounds as exist at law or in equity for the revocation of any contract.”\(^{108}\)

However, the command of section 2 does not, as of yet, amount to a sweeping pronouncement that all predispute arbitration agreements will be enforced by all state and federal courts, despite the frequent invocation of “the liberal federal policy favoring arbitration.”\(^{109}\) A threshold question never fully resolved is whether Congress intended the FAA to apply in federal courts as a procedural mandate, or whether Congress intended section 2 of the FAA

\(^{105}\) See supra note 29.


\(^{107}\) In Southland Corp. v. Keating, 465 U.S. 1 (1984), for example, California statutes purported to protect franchisees from waiving their rights to judicial determination of their rights. See infra notes 125-36 and accompanying text. In Saturn Distrib. Corp. v. Williams, 905 F.2d 719 (4th Cir. 1990), the Virginia Motor Vehicle Dealer Licensing Act forbade nonnegotiable arbitration provisions in automobile franchise agreements. See infra notes 146-52 and accompanying text.

\(^{108}\) 9 U.S.C. § 2 (1988). This section of the FAA provides:

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

Id.

\(^{109}\) In Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983), the majority declared § 2 of the FAA to be “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.” Id. at 24.
to be substantive law binding in federal courts and having preemptive force over inconsistent state laws.

If the FAA is procedural only, many complexities and incongruities surface. In a case where the plaintiff seeks relief in state court based on a state cause of action, state laws would often dictate nonenforcement of the predispute arbitration agreement. In a case removable to federal court (either because of diversity or because the state cause of action is joined with a Title VII cause of action), though, federal procedural law will dictate enforcement of the predispute arbitration agreement.

Assuming that the FAA creates substantive federal law binding on state courts, two large questions of federalism and preemption remain unresolved. The first is whether the parties can choose a particular state law to govern their agreement and limit the application of federal law. For example, where state law would refuse to enforce a predispute arbitration agreement in certain kinds of transactions or would limit the remedies that an arbitrator could award, will the parties’ apparent preference for that state law be upheld by the courts? Based on the Supreme Court’s decision in Volt Information Sciences, Inc. v. Board of Trustees,100 the answer appears to be yes. The FAA would not have preemptive force even where the “choice” of state law is more or less inadvertent for both parties.111

The second large unresolved question is the scope of the FAA’s preemptive powers. Given the lack of an express preemption clause in the FAA, to what extent can states, consistent with the FAA, promote general laws of contracts that limit enforcement of provisions which are unconscionable, adhesive, or otherwise unenforceable because of public policy considerations? This section explores the following issues in detail: basic preemption doctrine, the Supreme Court’s three leading decisions on the FAA and preemption, recent circuit court of appeals decisions on the same subject, recent trends in Supreme Court analysis of the FAA and Constitutional questions, and analysis of these trends and opinions with respect to section 118 of the CRA-1991.

A. The Supremacy Clause and Traditional Preemption Doctrines

Dating from the adoption of the Constitution, debate has continued over the respective ranges of authority for the states vis a vis the federal government. The Constitution represents a great compromise between centralized and decentralized authority, and the concept of shared sovereignty or federalism has forever been a vexing one.112 As Justice Scalia wrote:

100. 489 U.S. 468 (1989); see also infra notes 138-45 and accompanying text.
111. Id.
112. See, e.g., THE FEDERALIST No. 15 (discussing defects of the Articles of Confederation), No. 28 (discussing the need for a national army), No. 59 (discussing the proposal of Congressio-
[W]e have to bear in mind that [federalism] is a form of government midway between two extremes. At one extreme, the autonomy, the disunity, the conflict of independent states; at the other, the uniformity, the inflexibility, the monotony of one centralized government. Federalism is meant to be a compromise between the two.\(^{113}\)

The Constitution’s Supremacy Clause\(^{114}\) would seem to give automatic priority to federal law over state law when Congress constitutionally regulates a given area. However, Congress often sets minimal standards and invites the states to exceed them or it regulates without doing so comprehensively. Judicial doctrines of preemption have thus evolved to supply a series of guidelines to discern when federal law forecloses state law on a similar subject.

Before setting out these guidelines, the historical shifts between greater and lesser centralized authority merit some mention. During the New Deal, and at least through the 1960s, liberal Democrats favored national standards while conservative Republicans often lamented the lack of local authority and control. In general, preemption served to further the interests of those favoring centralized authority. In the 1960s, federal laws favoring employees, consumers, and the environment empowered individuals and held corporate interests accountable. Yet, by the 1980s, lobbyists for corporate interests had discovered that it was easier to focus on the levers of power in Washington than to work with fifty state legislatures and bureaucracies. Business began to lobby for uniform federal regulations that would preempt potentially more protective state laws.\(^{115}\)

By the 1990s, “the sword of federal regulation evolved into the shield of federal preemption.”\(^{116}\) State laws were held preempted in areas ranging


\(^{114}\) “This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.


from negligent failure to warn on cigarettes, to tort actions on pesticides, seat belts, nuclear safety, and state consumer protection against fraudulent airline advertising. Liberal Democrats began to see state and local governments as living laboratories of democracy\textsuperscript{117} that were seedbeds for social and political innovation. Federalism, as then-Professor Antonin Scalia noted, is a "stick that can be used to beat either dog."\textsuperscript{118} Partly because federalism—and attendant preemption doctrines—is ideologically neutral, the current Court's preemption decisions seem to cut across perceived lines of liberalism or conservatism. While most of the familiar preemption tests or guidelines have been repeated in recent decisions, the current Court is developing a preference for Congressional clarity and decisiveness in marking out areas for preemption. This preference may weaken the value of long-established judicial language on preemption.

Traditionally, the Court has used a three-part analysis to determine whether a given federal law preempts particular state action. First, the Court will ask whether Congress expressed an intent to preempt. Second, if there is no express intent, the court then asks whether such an intent could be implied. In other words, does the language or structure of the federal statute evince a Congressional intent to "occupy an entire field of regulation?"\textsuperscript{119} Third, even where Congressional intent to preempt is not found, the Court has deemed state law preempted where it either conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"\textsuperscript{120}

Preemption on this third basis seems clear enough where an actual conflict makes it impossible to comply with both the state and the federal law. Where state law predates the federal law, Congress is presumably aware of the Supremacy Clause, and the intent to prevail over the inconsistent state law can safely be presumed. Where state laws originate after the federal law, the Supremacy Clause operates, without any Congressional intent, to give priority to federal law; a state law that cannot be complied with in a manner that is also consistent with federal law becomes preempted.

However, absent actual conflict, this third guideline leaves considerable room for speculation about "full purposes" and in some cases justifies judicial

\begin{itemize}
\item \textsuperscript{117} Justice Brandeis, in his famous dissent in New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting), said that one of the "happy incidents" of the federal system was "that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." \textit{Id.}
\item \textsuperscript{118} Scalia, \textit{supra} note 113, at 19.
\item \textsuperscript{119} Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984).
\item \textsuperscript{120} Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
\end{itemize}
activism in the preemption field. If the presumption of dual sovereignty and concurrent jurisdiction that lies at the core of our federal system is taken seriously, the "obstacle to accomplishing Congress' full purposes" test must be used with caution, lest judges find a message that suits their purposes in the legislative text, structure, and history.

When confronted with the FAA, the federal courts initially did not see a sweeping mandate for a uniform, federal substantive law of arbitration. Not until the 1983 case of Moses H. Cone Memorial Hospital v. Mercury Construction Corp. did the Court conclude that the FAA contained a "liberal federal policy favoring arbitration agreements." Perhaps coincidentally, during this time period, the federal courts and the Chief Justice frequently lamented the workload of federal appellate courts. Enforcing predispute arbitration agreements that lead to final, binding arbitration is certainly one way of reducing the caseload of federal courts. However, this apparent judicial desire to increase the efficiency of case disposition in federal courts seems counterbalanced by a renewed respect for federalism, which tends to find less than sweeping preemptive force in federal laws unless Congress expresses such a sweeping intent.

B. The Volt Paradox in FAA Preemption Doctrine:
State Laws as Private Rules of Reference

The Court's philosophical shifts in thinking about federalism and preemption are reflected in the Court's currently conflicted position on the FAA's preemption of state laws affecting arbitration. In general, it appears that the Court has adopted a strong federal policy favoring arbitration as substantive law binding on the states. Yet, most recently, the Court seems inclined to read the basic purpose of the FAA as encouraging disputants simply to live up to their agreements. In cases where the parties "choose" that the law of a particular state should govern their agreement, the laws of that state that would limit arbitration in some way may be given effect. Under this line of thought, the state law's inconsistency with immediate enforcement of the agreement to arbitrate does not "frustrate the purposes and objectives" of the FAA because the FAA's objective allows the parties to choose the law that will govern their disputes.

121. See Drummonds, supra note 116, at 533.
122. See Jones, 430 U.S. at 525 (stating that the assumption that state law is not preempted in the absence of a clear congressional mandate ensures that federal-state power sharing "will not be disturbed unintentionally by Congress or unnecessarily by the courts").
124. Although § 10 of the FAA provides some right of appeal from arbitral awards, the grounds are limited, and effective appeals are infrequent.
In Southland Corp. v. Keating\textsuperscript{125} the Court indicated that any state law limiting the scope or the remedies of the FAA’s enforcement provisions would be preempted. In Southland, the Court considered the California Franchise Investment Law,\textsuperscript{126} which invalidated certain agreements otherwise covered by the FAA. Franchisees of 7-Eleven convenience stores had numerous claims against the franchisor, Southland Corporation, including claims alleging fraud, oral misrepresentation, breach of fiduciary duty, and violation of the disclosure requirements of California’s Franchise Investment Law. From 1975 to 1977, franchisees brought several individual actions in California state courts. In 1977, Keating brought a class action on behalf of these and nearly 800 other franchisees against Southland. When all actions were consolidated, Southland moved for arbitration of all claims by relying on the arbitration agreement contained in all the franchise agreements.\textsuperscript{127}

The California Supreme Court ruled that claims under the Franchise Investment Law were not arbitrable because the state law provided that “[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.”\textsuperscript{128} The California Supreme Court interpreted this portion of the law to require judicial consideration of claims brought under the state statute.\textsuperscript{129}

In a 7-2 decision\textsuperscript{130} the Supreme Court held that the FAA preempted the California statute under the Supremacy Clause. Relying on Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,\textsuperscript{131} the majority reiterated that the FAA “creates a body of federal substantive law” that is applicable in both state and federal court.\textsuperscript{132} To the Southland majority “the underlying issue of arbitrability [was] a question of substantive federal law.”\textsuperscript{133} The Court concluded that in creating the FAA, Congress “contemplated a broad reach of the Act, unencumbered by state-law constraints.”\textsuperscript{134} Justice O’Connn-

\textsuperscript{125} 465 U.S. 1 (1984).

\textsuperscript{126} CAL. CORP. CODE ANN. § 31000-31516 (West 1977).

\textsuperscript{127} Southland Corp., 465 U.S. at 4. The agreement provided in part that any “claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction hereof.” Id.

\textsuperscript{128} Id. at 5. See CAL. CORP. CODE ANN. § 31512 (West 1977).

\textsuperscript{129} Southland Corp., 465 U.S. at 5.

\textsuperscript{130} Justices O’Connor and Rehnquist dissented.

\textsuperscript{131} 460 U.S. at 5 (1983).

\textsuperscript{132} Southland Corp., 465 U.S. at 12 (quoting Moses H. Cone Memorial Hosp., 460 U.S. at 25 & n.32); see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (stating that “Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate”).

\textsuperscript{133} Southland Corp., 465 U.S. at 12.

\textsuperscript{134} Id. at 13.
or offered a different analysis in dissent, asserting that Congress viewed the FAA as essentially procedural and applicable only in federal courts.135

Whether the FAA creates federal substantive law or is essentially procedural does make a difference; if procedural, the FAA applies only in federal court. In the O'Connor view, cases like Southland, which are begun in state court and based on state law, would be decided in accordance with state substantive and procedural law, with the FAA having no preemptive effect. The impact of the substantive-procedural debate has significant implications for federalism. Without diversity cases the O'Connor/Rehnquist view would result in FAA enforcement of arbitration clauses being limited to cases "arising under" federal laws (other than the FAA) or the United States Constitution. Thus, unless the FAA is substantive and clearly preemptive, some state courts would enforce arbitration clauses and arbitral awards while others might not.

As long as there are diversity cases, Erie R.R. v. Tompkins136 requires substantive state law to control. However, if the FAA is deemed to be federal procedural law, the party seeking arbitration could remove the case to federal court and compel arbitration under section 4 of the FAA, thus allowing a defendant to "forum shop" for enforcement of arbitration agreements and awards. This result would be ironic because one of Erie's principal concerns related to forum shopping by plaintiffs for a different substantive law outcome.137

I. Volt Information Sciences, Inc. v. Board of Trustees: A New FAA Preemption Doctrine

In the 1989 case of Volt Information Sciences, Inc. v. Board of Trustees,138 Chief Justice Rehnquist appeared to chart a new course for the FAA preemption doctrine. In Volt, Chief Justice Rehnquist assessed the effect of a California statute that allowed a court to stay arbitration pending resolution of related litigation.139 Volt had a construction contract dispute with the Stanford board of trustees (Board) and sought additional compensation for

135. Id. at 25.
136. 304 U.S. 64 (1938).
137. This same concern led Justice Douglas to caution:
    If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.

Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956); see also infra notes 215-26 and accompanying text.
139. See CAL. CIV. PROC. CODE ANN. § 1281.2(e) (West 1982).
extra work. The underlying contract contained a broad arbitration clause as well as a choice-of-law clause providing that “[t]he Contract shall be governed by the law of the place where the Project is located.” Volt formally demanded arbitration, and the Board then filed an action in California Superior Court alleging fraud and breach of contract. The Board also filed suit against two other companies involved in the construction project that were not subject to arbitration agreements.

Volt moved to stay all litigation and compel arbitration under the FAA and parallel provisions of the California Arbitration Act. Stanford argued, and the Superior Court agreed, that the pending litigation with other contractors raised the possibility of “conflicting rulings on a common issue of law or fact.” The permissive stay of arbitration provided by section 1281.2(c) of the California Arbitration Act was, therefore, given effect. The California Court of Appeals affirmed, and the California Supreme Court denied Volt’s petition for discretionary review.

In affirming, Chief Justice Rehnquist noted that the “FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.” The Chief Justice further noted that the FAA’s “primary purpose” was to ensure that “private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”

The Volt opinion clearly raises the possibility that preemption under the FAA will not automatically occur where the parties have specified, however indirectly, that state law will govern the relationship. By implication, Southland would have been decided differently if the franchise agreements had specified California state law as governing and the issue of a party’s “freedom to structure contracts” had been raised. The Volt opinion represents an important break in the trend towards sweeping application of the FAA in virtually all contract-based claims. As a result of Volt, FAA preemption of state legislative or common law limits on arbitration procedures may or may not be avoided by the parties through an appropriate choice of state law clause.

In essence, the Court has moved from its earlier position that viewed the FAA as mandating arbitration wherever and however chosen, to a new position that interprets the FAA as favoring freedom of choice for the parties. Because some state laws are expressly aimed at making sure that a knowing

141. Id. at 471 (quoting CAL. CIV. PROC. CODE ANN. § 1281.2(c) (West 1982)).
142. Id. at 472-73.
143. Id. at 477.
144. Id. at 479.
choice of arbitration is made,\textsuperscript{145} the value of efficiency may be yielding to the value of fairness implicit in the notion of informed consent. If the \textit{Volt} rationale is given full effect, the Supreme Court would uphold the parties' "choice" of a state law, requiring parties to make knowing choices when they agree to arbitration.

What is peculiar about \textit{Volt} is that its logic holds that the FAA does not preempt such laws where the parties have chosen them. Thus, \textit{Volt} puts private parties in a position to incorporate state law provisions that would ordinarily be preempted by the FAA. In short, state laws control only where the parties so choose. These laws are therefore not public laws of general applicability but, rather, a set of laws that apply only if private parties choose them. It seems doubtful that state legislatures, in passing laws designed to make sure that parties knowingly and voluntarily waive their right to litigate, intended merely to publish a set of additional rules of arbitration that parties may or may not adopt.

2. The Circuit Courts: Following a Confusing Lead

Circuit Courts of Appeals' cases decided after \textit{Volt} can be classified into two categories: cases where the arbitration agreement also has a state choice of law clause and cases where the agreement does not have such a clause. In the latter category, some disagreement over the preemptive scope of the FAA is evident.

In \textit{Saturn Distribution Corp. v. Williams}\textsuperscript{146} the Fourth Circuit Court of Appeals considered a case in which Virginia sought to protect retail automobile dealers by forbidding non-negotiable arbitration clauses in automobile franchise agreements.\textsuperscript{147} The arbitration agreement did not contain a choice-of-law clause. Saturn tried to have its franchise agreements approved by the Virginia commissioner, who rejected the mandatory, predispute arbitration clause in the agreement. Consequently, Saturn sought declaratory relief in federal district court. The district court denied such relief, holding that Virginia could enforce its statutory provisions to prevent the formation of mandatory arbitration agreements between automobile manufacturers and dealers.

The circuit court reversed the district court and held that the FAA preempted the Virginia statute. Writing for the majority, Circuit Judge


\textsuperscript{147} Id.
Chapman rested his analysis on the *Southland* case, which he cited to show that "Congress intended to *foreclose* state legislative attempts to undercut the enforceability of arbitration agreements." Judge Chapman utilized the basic test that states must "place no greater restrictions upon arbitration provisions than they place upon other contractual terms." It is not clear that a majority of the Supreme Court agrees with this formulation. While the *Saturn* majority adopted language that bears a distinctively *Southland* tone, key portions of the opinion seem at odds with Chief Justice Rehnquist’s view of the FAA as articulated in *Volt*.

Judge Widener filed a resounding dissent in *Saturn*, one which is arguably more in tune with *Volt* and other recent preemption cases. Judge Widener suggested that there is a "sliding scale in which a finding of pre-emption becomes more difficult as the tension between state and federal enactments becomes more obscure." The FAA, he pointed out, "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." According to Judge Widener, a finding of preemption must be supported by some direct conflict with the FAA. Furthermore, Judge Widener questioned whether the FAA was ever intended to preempt all state laws that would render contracts void. In reaching this conclusion, Judge Widener relied on the familiar maxim that "[i]n the face of Congressional silence, 'there is a presumption against preemption.'"

Where *Saturn* is followed, its logic would dictate that the following kinds of state laws would be preempted by the FAA because they “single out” arbitration contracts:

1. Statutes requiring that arbitration clauses be introduced in 10 point type or larger.
2. Statutes which require that arbitration clauses cannot be incorporated by reference.
3. Cases that refuse on public policy grounds to enforce arbitration clauses that put “all issues” before an arbitrator.

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148. *Id.* at 723 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)) (emphasis added).
149. *Id.* at 722.
150. *Id.* at 728.
152. *Id.* at 728 (quoting *Abbot v. American Cyanamid Co.*., 849 F.2d 1108, 1113 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988)).
(4) Common law prohibitions on arbitrators awarding attorney’s fees or punitive damages.\textsuperscript{156}

Where a choice-of-law clause is found, the circuit courts take a more Volt-like view of the FAA’s preemptive scope. In \textit{Fahnestock & Co. v. Waltman}\textsuperscript{157} the Second Circuit Court of Appeals gave the FAA fairly narrow preemptive scope when it confirmed an arbitral award of compensatory damages, but vacated the punitive damages. In that case, Fahnestock fired Waltman in a corporate consolidation and filed a Form U-5 termination notice with the National Association of Securities Dealers indicating that his “discharge was occasioned by ‘business consolidation.’”\textsuperscript{158} Subsequently, a dispute arose over files for which Waltman made both legal and possessory claims. Fahnestock made a claim for the files with the Director of Arbitration of the New York Stock Exchange and also amended the U-5 form to state that “the employee was under ‘internal review’” for wrongful conduct.”\textsuperscript{159} The arbitrators awarded Waltman $56,000 in compensatory damages for wrongful discharge, $100,000 for defamation, and $100,000 in punitive damages. Fahnestock moved in federal district court\textsuperscript{160} to vacate the arbitral award under section 10(d) of the FAA, claiming that the arbitrators had exceeded their authority.\textsuperscript{161}

The district court relied on a 1976 New York Court of Appeals decision, \textit{Garrity v. Lyle Stuart, Inc.},\textsuperscript{162} which held that an arbitrator had no power to award punitive damages because such an award violated public policy in New York state. Although the court in \textit{Garrity} did not consider the issue of preemption, the \textit{Fahnestock} court did. The \textit{Fahnestock} majority recognized the \textit{Southland} holding (“Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements”),\textsuperscript{163} but immediately cited \textit{Volt} for the proposition that the “‘FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.’”\textsuperscript{164} The majority also cited \textit{Volt} for the proposition that “state law may be applied in arbitration matters, subject to preemption only ‘to the extent that it actually conflicts with federal law.’”\textsuperscript{165} Simply put, “[w]hat the

\begin{footnotesize}
156. See Phelps, \textit{supra} note 106, at 223-25.
158. \textit{Id.} at 514.
159. \textit{Id.}
160. He based his motion on diversity of the parties.
164. \textit{Fahnestock & Co.}, 935 F.2d at 517 (citation omitted).
165. \textit{Id.} at 517 (citation omitted).
\end{footnotesize}
FAA requires is that parties comply with their agreements to arbitrate.”166 In this case, the parties failed to specify either New York law or the FAA. Nonetheless, the federal district court presiding over this diversity case had to choose whether the FAA prevented application of the substantive state law policy.

The Fahnestock majority noted that in a diversity action state law provides the basis of decision and, ordinarily, the propriety of an award of punitive damages for the conduct in question is an issue of state law.167 Thus, the Garrity rule prohibiting the arbitral award of punitive damages must be applied. But the Fahnestock court also noted, by way of dicta consistent with Volt, that if the parties had specified that the arbitrators could award punitive damages, “a different outcome” might have been dictated.168 The federal substantive law rules “sweep aside any state attempt to interfere with the agreement of the parties,”169 but do not guarantee the unfettered primacy of FAA-based arbitration when the procedure conflicts with state law and state public policy.

The dissent pointed out that “a state law which limits freedom of contract with respect to arbitration agreements covered by the FAA conflicts with the FAA and is preempted by it.”170 Although the dissent took a broad view of “actual conflict” for preemption purposes, the majority did not take such a view. Accordingly, the court did not find actual conflict because its decision did not prevent arbitration from going forward, did not prevent the parties from specifying that the arbitrator could award punitive damages, and did not prevent the arbitrator’s award from being enforced.

C. Relevant Trends in the Supreme Court’s Constitutional Jurisprudence Affecting the FAA

1. Recent Preemption Cases

The Supreme Court’s preemption ruling in Volt was followed the next term by a closely watched tobacco warning label case. In Cipollone v. Liggett Group, Inc.171 the preemption doctrine was analyzed in a context slightly different from Volt. In Cipollone, despite a finding of express preemptive intent on the part of Congress, the Supreme Court narrowly interpreted this

166. Id.
167. Id. at 518 (citing Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989)).
168. Id.
169. Fahnestock & Co., 935 F.2d at 518.
170. Id. at 520 (citing Saturn Distrib. Corp., 905 F.2d at 722).
preemption language and permitted a state law tort claim to be asserted. As Justice Scalia explained in his dissenting opinion in Cipollone, "[t]he existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute’s express language defines."172

As illustrated by Cipollone, the current Supreme Court appears determined to force Congress to either expressly articulate its intent to legislate comprehensively, and thus "occupy an entire field of regulation,"173 or co-exist with state regulation. Absent that clear expression, the Court appears to be giving state legislative and judicial bodies great latitude to join in the regulation of interstate commerce.

This view of preemption was reinforced in CSX Transportation, Inc. v. Easterwood.174 In Easterwood, the defendant's train collided with a truck at a grade crossing in Georgia, killing plaintiff’s husband. The plaintiff used diversity of citizenship to bring a wrongful death action in the federal courts against CSX Transportation (CSX). The plaintiff claimed "that CSX was negligent under Georgia law for failing to maintain adequate warning devices . . . and for operating the train at an excessive speed."175 CSX defended on the grounds of federal preemption under the Federal Railroad Safety Act of 1970 (FRSA). The District Court granted summary judgment to CSX, finding that both the warning device and excessive speed claims were preempted by the federal law.176 The Eleventh Circuit Court of Appeals affirmed in part and reversed in part, finding that the claim of negligence based on speed was preempted while the claim based on the absence of proper warning devices was not.177

The Supreme Court affirmed the Court of Appeals decision. All the Justices agreed that the claim based on Georgia negligence law was not preempted. Justice White, writing for the majority, relied on Morales v. Trans World Airlines, Inc.178 to distinguish between broad and narrow preemption language.179 Justice White reasoned that federal regulations that cover the subject matter of state law focus more narrowly and thus have less preemptive effect than more broad language that relates to the subject.180

In section 434 of FRSA, Congress provided express preemption language:

172. Id. at 547 (Scalia, J., concurring in part and dissenting in part).
175. Id. at 1736.
179. Easterwood, 113 S. Ct. at 1738.
180. Id. at 1737-38.
The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. 181

For the Court, the use of the word “covering” in section 434 had significance and indicated that the accompanying preemption language should be read narrowly. 182 The Court interpreted section 434 in its proper context: congressional recognition that states may continue to adopt or continue in force laws and standards relating to railroad safety, even exceeding federal standards if such state laws and standards are basically compatible with those federal standards and do not “unduly” burden interstate commerce.

All the Justices agreed that the applicable federal regulations did not “cover” the grade crossing where the accident took place because that crossing had not received federal funds. 183 Thus, the FRSA did not preempt Georgia laws or regulations designed to establish a level of proper warnings for the crossing. In citing Morales, the Court noted that “[t]o prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they ‘touch upon’ or ‘relate to’ that subject matter.” 184 This part of the Court’s decision re-emphasizes that the language and structure of express preemption provisions will be carefully interpreted. The Court also re-emphasized that “the presumption against pre-emption” 185 lies at the core of its beliefs regarding federal-state power sharing.

Nonetheless, the majority found that the plaintiff’s claim that the train was being operated at an excessive speed was preempted. The difference was that the Secretary of Transportation had used the authority granted by FRSA to issue numerous regulations 186 that are quite specific and that relate to “different classes of track . . . defined by, inter alia, their gage, alignment [sic], curvature, surface uniformity, and by the number of crossties per length of

182. Easterwood, 113 S. Ct. at 1738.
183. Id. at 1741-42.
184. Id. at 1738 (citations omitted).
185. Id. at 1739.
186. These regulations are codified at 49 CFR § 213.9(a) (1994).
The crossing belonged to class four, where the maximum speed for freight trains is 60 miles per hour. Mrs. Easterbrook conceded that the CSX train was being operated at less than 60 miles per hour, but alleged that CSX had breached a common-law duty to operate the train at a safe speed. The majority, however, read the regulations as comprehensively regulating maximum train speed not only to place a ceiling on permissible speeds, but also to preclude additional state regulation.

The clear messages from Cippollone and CSX are that the Court will begin with a presumption against preemption, will avoid putting any general gloss on expressly preemptive language, and will not infer preemption unless the federal law or regulation impliedly covers the same subject as the state’s laws or regulations, rather than merely relating to the same general subject.

In light of this presumption against preemption, states should be free to fashion their own policies on arbitration, subject to the oft-stated requirements that state law must not conflict with federal law or unduly frustrate the “purposes and objectives of Congress.” This is so because the FAA contains no express preemptive language and does not invite concurrent lawmaker by the states.

But when the statute involved is the FAA, the Court has been willing to ignore its own recent preemption doctrine and to re-assert a strong federal policy to preempt state laws that limit arbitration in any way, even in cases based entirely on state-based causes of action heard in state courts. In deciding Volt, the Supreme Court certainly could have invoked language to the effect that state laws must not conflict with federal law or unduly frustrate congressional purposes and objectives. In most cases, the Supreme Court sees the FAA as creating a substantive federal policy favoring immediate enforcement of predispute arbitration provisions. Yet even though the California statute at issue in Volt appeared to “stand[] as an obstacle” to enforcement of the FAA, the Court allowed the parties to choose California law, with the net effect of at least delaying the arbitration. Chief Justice Rehnquist noted that section 4 of the FAA “does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that ‘arbitration proceed in the manner provided for in [the

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187. Easterwood, 113 S. Ct. at 1742.
188. Id.
189. Id.
191. See supra notes 125-36 and accompanying text.
parties' agreement." As long as the chosen state’s law does not render arbitration agreements unenforceable, parties are “at liberty to choose the terms under which they will arbitrate.”

According to this rationale, the purposes and objectives of Congress in passing section 4 of the FAA were not to command immediate arbitration, but to enforce the dispute-resolution terms agreed to by the parties:

Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAAs, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.

2. Choice of State Laws in Arbitration: 
The Constraints of Mastrobuono

A similar issue involving state-law modification of federal norms for arbitration was addressed by the Court’s 1995 decision in Mastrobuono v. Shearson Lehman Hutton, Inc. In Mastrobuono the plaintiffs, residents of Illinois, sued on a variety of state and federal claims, asserting that a Shearson Lehman employee had mishandled their investment account. Prior to encountering any difficulty with the account, the Mastrobuonos had agreed with the brokerage house to a clause that provided for arbitration of all disputes. The Mastrobuonos also agreed to a New York state choice-of-law clause. When the Mastrobuonos became convinced that Shearson Lehman was engaged in churning and unauthorized trading, the Mastrobuonos sought relief in federal district court. The district judge granted the defendant’s motion to compel arbitration under section 4 of the FAA. After the arbitral panel heard the claims, it awarded the Mastrobuonos $159,327 in compensatory damages and $400,000 in punitive damages. Shearson Lehman filed a motion in federal district court to vacate the punitive damages award on the ground that New York law precluded arbitral awards of punitive damages. The district court vacated the punitive damages award.

195. Id. at 474-75 (citing 9 U.S.C. § (1988)).
196. Id. at 472 (quoting, with approval, the unpublished California Court of Appeal’s decision).
197. Id. at 479.
199. Id. at 1214.
200. Id. at 1217.
201. Id. at 1216-17.
202. Id. at 1214-15.
203. Mastrobuono, 115 S. Ct. at 1215.
The Seventh Circuit affirmed, holding that the plaintiffs could not “avoid their own choice of governing law.”\textsuperscript{205} Citing \textit{Volt}, the Court determined that the parties’ choice of New York law required adherence to the New York Court of Appeals’ decision in \textit{Garrity v. Lyle Stuart, Inc.},\textsuperscript{206} which allows courts, but not arbitrators, to award punitive damages.\textsuperscript{207} Accordingly, the arbitrators had no power to award punitive damages under New York law.

In an 8-1 decision written by Justice Stevens, the Supreme Court reversed, noting that there was an ambiguity in the contract that should be resolved against the author of the contract language.\textsuperscript{208} First, the contract made no express reference to punitive damages. Second, although the contract called for the application of New York state law, it also provided that any controversy arising out of the parties’ transaction would be settled by arbitration in accordance with the rules of either the National Association of Securities Dealers (NASD) or the Boards of Directors of the New York Stock Exchange or the American Stock Exchange. The NASD Code of Arbitration Procedure allows arbitrators to award “damages and other relief,” which Justice Stevens declared “broad enough at least to contemplate such a remedy”\textsuperscript{209} as punitive damages. Moreover, the rules of the New York Stock Exchange and the American Stock Exchange do not limit the power of an arbitrator to award punitive damages. Taking all the contractual provisions together, the Court did not find an intent to preclude an award of punitive damages.\textsuperscript{210}

\textit{Mastrobuono} does not mean that the FAA requires parties to allow arbitrators to award punitive damages. Rather, the Court held merely that the Mastrobuonos were unlikely to have been aware of New York’s approach to punitive damages and probably had no idea that, in signing the standard contract form “they might be giving up an important substantive right.”\textsuperscript{211} \textit{Mastrobuono} leaves open the possibility, however, that parties could by contract expressly preclude the power of an arbitrator to award punitive damages. Thus, the Supreme Court’s decision in \textit{Mastrobuono} is primarily an exercise in common law contract interpretation, giving deference to the arbitrator’s presumed interpretation of the parties’ intent to include, or at least

\textsuperscript{205} Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713, 719 (7th Cir. 1994).
\textsuperscript{206} 353 N.E.2d 793 (N.Y. 1976).
\textsuperscript{207} Mastrobuono, 20 F.2d at 716-17.
\textsuperscript{208} Mastrobuono, 115 S. Ct. at 1219 (citations omitted).
\textsuperscript{209} Id. at 1218.
\textsuperscript{210} Id. at 1219 (citations omitted). The Court’s holding is also consistent with its pronouncements in \textit{Volt} that “due regard must be given to the federal policy of favoring arbitration, and ambiguities as to the scope of the arbitration clause itself [should be] resolved in favor of arbitration.” \textit{Volt Info Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 476 (1989)}.
\textsuperscript{211} Mastrobuono, 115 S. Ct. at 1219.
not to preclude, punitive damages. The decision is consistent with Volt because both cases give effect to the intent of the parties as expressed in the agreement to arbitrate.

However, there are important differences between Volt and Mastrobuono. First, in approaching the choice-of-law clause, the Court in Mastrobuono did not give effect to the full range of the law as it affected arbitration. Second, the Court in Mastrobuono gave import to the plaintiff’s lack of awareness that “they might be giving up an important substantive right.”

3. From Bernhardt to Dobson: Rethinking the Judicial Creation of Preemptive Substantive Law

Aside from any limits imposed by the section 1 exclusion of “contracts of employment” in interstate commerce on the FAA’s scope, it has often been argued that there are constitutional limits on the reach of Congressional powers under the Commerce Clause. It therefore follows that the FAA cannot preempt any state law if to do so would reach beyond Congress’s powers under the Constitution.

In Bernhardt v. Polygraphic Co. of America the Court concluded that the stays of judicial proceedings authorized by section 3 of the FAA could

212. Justice Thomas, in dissent, found no persuasive difference between the choice of law that the parties made in Volt and the choice-of-law provision in the Mastrobuonos’ contract. Id. at 1220-21 (Thomas, J., dissenting). His comments on the majority position are direct and intellectually persuasive. Justice Stevens’ comments suggest that a choice-of-law clause itself can be ambiguous, such that even if other elements of the contract did not point to the possibility of punitive damages, the choice of law “might include only New York’s substantive rights and obligations, and not the State’s allocation of power between alternative tribunals.” Id. at 1217.

Justice Stevens’ reasoning here is not supported by citation to any authority, and the distinction strikes us as a difficult one, not easily comprehended or likely to be consistently applied by courts. Not only is it novel to distinguish rights and obligations from allocations of power between alternative tribunals, but it is equally clear that an important, substantive public policy can deny arbitrators the power to award punitive damages. See Garrity, 353 N.E.2d at 793.

213. Mastrobuono, 115 S. Ct. at 1219.

214. 9 U.S.C. § 1 (1988); see supra notes 34-44 and accompanying text.


216. Section 3 reads:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

reach no further than those contracts covered by sections 1 and 2. Justice Douglas, writing for the majority, could find "no showing" that the petitioner "was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of [the Court's] decisions." 217

Bernhardt, the petitioner, was a resident of New York when he signed a contract of employment with Polygraphic, a New York corporation. 218 Bernhardt later became a resident of Vermont, where, as the contract had envisioned, he worked for Polygraphic. 219 The contract provided for "arbitration under New York law by the American Arbitration Association . . . ." 220 After a dispute with his employer, Bernhardt brought an action in Vermont state court. Polygraphic removed the case to federal district court on the grounds of diversity of citizenship. Under Vermont law at that time, agreements to arbitrate were revocable at any time prior to an award. 221

The Bernhardt Court's finding of no interstate commerce raised a problem: that a federal court in Vermont, sitting in diversity, could not simply apply the FAA as a federal procedural law. According to Justice Douglas, application of the FAA would clearly undercut the principles underlying Erie Railroad v. Tompkins 222 because the choice of arbitration would have substantive results. 223

217. Bernhardt, 350 U.S. at 200-01. Justice Douglas relied on the language of § 1 of the FAA to define the limits of "commerce," and could find no commerce "among the several States" in Bernhardt's activities as an employee of Polygraphic Co. Id. at 201 n.3.

218. Id. at 199.

219. Id.

220. Id.

221. Id. at 199-200.

222. 304 U.S. 64 (1938).

223. Justice Douglas noted that "the federal court enforcing a state-created right in a diversity case is . . . in substance 'only another court of the State.' The federal court therefore may not 'substantially affect the enforcement of the right as given by the State.'" Bernhardt, 350 U.S. at 203 (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945)). Justice Douglas continued:

If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. 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 by Ch. 1, Art. 12th, of the Vermont Constitution.

Id.

Justice Douglas' concerns were mirrored by Justice O'Connor's concurrence, Justices Scalia's dissent, and Justice Thomas's dissent in Allied-Bruce Terminix Cos. v. Dobson, 115
It should be noted that the Court decided Bernhardt prior to its pronouncement in Moses H. Cone of "a liberal federal policy favoring arbitration agreements, . . ."224 In Bernhardt, unlike in Moses H. Cone, the employee was working in a state with no particular connection to surrounding states. Thus, although Moses H. Cone seems to implicitly overrule Bernhardt, with the result that a similar case could now successfully invoke sections 3 and 4 to preempt any state law that would delay arbitration, there is reason to ask two questions. First, if Bernhardt and Polygraphic Co. really were not involved in interstate commerce, how can any part of the FAA constitutionally apply?225 Second, if the parties had chosen New York state law, but New York conflict-of-laws principles would have led to the application of Vermont law, would the Volt rationale require a court to honor the parties’ choice and refuse to stay the litigation pending compulsory arbitration?226

The Supreme Court revisited Bernhardt in granting certiorari to a case decided by the Alabama Supreme Court in 1994.227 In Dobson, the Supreme Court of Alabama held that a contract for a termite bond on a house in Fairhope, Alabama, did not involve interstate commerce. The arbitration agreement in the contract228 was therefore held not to be enforceable under

225. See Dobson, 115 S. Ct. at 840. The answer seems to be that Bernhardt and his employer were engaged in activities affecting interstate commerce, despite the fact that Bernhardt’s activities on behalf of Polygraphic were all in Vermont.
226. Following Volt, the parties’ choice, however inadvertent, would be honored. The FAA’s purpose is not to support arbitration per se; rather, the FAA’s purpose is to enforce contracts to arbitrate according to their terms on the same basis as other contracts. See supra notes 138-45 and accompanying text.
227. Allied-Bruce Terminix Cos. v. Dobson, 628 So. 2d 354 (Ala. 1993), rev’d, 115 S. Ct. 834 (1995). On appeal to the Supreme Court, the attorneys general of nineteen other states filed amicus briefs in support of the Dobsons. Dobson, 115 S. Ct. at 838-39. They argued that the text and structure of the FAA clearly indicate that the FAA does not apply to proceedings in state court and that Southland Corp. was incorrectly decided. Id.

This case is ultimately more about federalism than about arbitration. Amici submit that each State is entitled to decide for itself how to govern proceedings in its own courts. Most of the States have chosen to facilitate arbitration. But the FAA should not be read to compel them to do so. . . . We recognize that statutory interpretations should not be discarded lightly. But Southland’s extension of the FAA to state courts was rendered without briefing based on an imprudent concession by a private litigant, is demonstrably incorrect, and is in tension with important principles of judicial restraint and federalism as reflected in such recent decisions in O’Melveney & Myers v. FDIC, No. 93-489 (June 13, 1994), New York v. United States, 112 S. Ct. 2408 (1992), and Gregory v. Ashcroft, 111 S. Ct. 2395 (1991).

Brief Amici Curiae of the Attorneys General, 40.

228. The arbitration agreement contained in the Termite Protection Plan provided that “any controversy or claim . . . arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration.” Dobson, 115 S. Ct.
the FAA since the parties did not, when they entered into the contract, contemplate "substantial interstate activity."229

Allied-Bruce Terminix, the defendant, was an Arkansas corporation doing business in Arkansas, Texas, and several southern states. A termite bond was purchased by Mr. and Mrs. Gwin prior to transferring title to the Dobsons. Terminix International, a partnership with its principal place of business in Memphis, Tennessee, guaranteed the bond.230 At closing, the Gwins provided the bond, which was transferable, along with an inspection certificate stating that there was no visible evidence of infestation.231 After closing, the Dobsons discovered termite damage to the house and brought an action against the Gwins alleging fraud.232 The Dobsons also filed suit against Terminix Service and Terminix International, alleging fraud and breach of contract. Terminix Service and Terminix International moved to stay the proceedings and to compel arbitration based on an arbitration clause in the bond.233

Under Alabama law, predispute arbitration agreements are not enforceable.234 However, the Alabama Supreme Court recognized that "if an arbitration agreement is voluntarily entered into and is contained in a contract that involves interstate commerce, then the FAA preempts state law and renders the agreement enforceable."235 Terminix Service and Terminix International argued that "because some of the materials used in fulfilling their duties imposed by the termite bond were brought into Alabama from out-of-state [sic], the bond has at least a 'slight nexus' with interstate commerce."236 However, the Alabama Supreme Court held that the FAA applies only if, at the time the that parties enter into the arbitration agreement, they "contemplated" substantial interstate activity.237

Justice Breyer, writing for the Court majority, found that the FAA preempted Alabama's anti-arbitration law.238 Focusing on section 2 of the FAA, the Court parsed the word "involving," noting that Congress uses the word "affecting" to signal its intent to exercise Commerce Clause powers to the fullest.239 Appealing to the Oxford English Dictionary, legislative

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229. Id. at 355.
230. Id. at 354.
231. Id. at 354-55.
232. Id. at 355.
233. Dobson, 628 So. 2d at 355.
234. Id. (citing Ala. Code § 8-1-41(3) (1993)).
235. Id. (citation omitted).
236. Id.
237. Id. at 355-56.
239. Id. at 839 (citing Russell v. United States, 471 U.S. 858, 859 (1985)).
history, and, dispositively, *Southland Corp. v. Keating*,\(^240\) however, the Court determined that the choice of the word “involving” in the FAA indicated that Congress intended to exercise its commerce clause power to the fullest.\(^241\) Consequently, the Court found that the transaction in *Dobson* involved interstate commerce.\(^242\) The Court recognized that “[i]n the pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be so.”\(^243\) Yet, in expanding the scope of the Commerce Clause itself, the Court noted that it has often expanded the scope of statutes that rest on Congress’s power to regulate commerce.\(^244\) Under the FAA, exercise of the Commerce Clause power to the fullest includes application of the FAA in circumstances where the parties’ activities in fact touch upon or involve interstate commerce, regardless of the contemplation of the parties.\(^245\)

The majority’s discussion of *Bernhardt* is also instructive. In *Bernhardt* the Court concluded that the contract itself did not “involv[e]” interstate commerce and thus fell outside the scope of the FAA.\(^246\) Yet, the *Dobson* majority noted that “the Court’s opinion does not discuss the implications of the ‘interstate’ facts . . . .”\(^247\) The Court apparently was suggesting that a contract between a New York resident and a New York company for work in Vermont may implicate sufficient “interstate” connections to fall within the full constitutional reach of the Commerce Clause. The Court thus implied that Justice Douglas’s opinion did not in fact construe the word “involving” in section 2, but rather concluded simply that Bernhardt’s work for Polygraphic in Vermont did not involve interstate commerce.

Thus, because of section 2 and judicial reaffirmation of *Southland*, the FAA continues to apply as substantive law in state and federal courts to the full reach of the Commerce Clause power, regardless of original congressional intent. Although *Bernhardt* has not been expressly overruled, its conclusion that an employment contract might be beyond the full reach of the Commerce Clause has minimal impact. When certain employers have only a few employees whose duties are limited to a circumscribed geographic area that is insulated from interstate activity, one might argue successfully that the FAA


\(^{241}\) *Dobson*, 115 S. Ct. at 839-40.

\(^{242}\) *Id.* at 843.

\(^{243}\) *Id.* at 840.

\(^{244}\) *Id.* (citing McLain v. Real Estate Bd., 444 U.S. 232, 241 (1980); Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 n.2 (1976)).

\(^{245}\) *Id.* at 842. Justice Breyer noted that the parties “do not contest that the transaction in this case, in fact, involved interstate commerce.” *Id.* at 843.

\(^{246}\) *See Bernhardt*, 350 U.S. at 200.

\(^{247}\) *Dobson*, 115 S. Ct. at 841.
should not apply. In such cases, federal employment discrimination laws are not likely to apply in any event. 248

D. The Likelihood of Southland Being Overruled by the Supreme Court

Dobson, joined by the attorneys general of twenty states as amici curiae, mounted a strong challenge to Southland’s constitutional validity. Amplifying Justice O’Connor’s dissent in Southland, the respondents and amici urged that Southland be overruled as a flawed precedent that had needlessly preempted state freedom of action. 249 Justice Scalia, dissenting in Dobson, claimed:

Adhering to Southland entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. . . .

I shall not in the future dissent from judgments that rest on Southland. I will, however, stand ready to join four other Justices in overruling it, since Southland will not become more correct over time, the course of future lawmaking seems unlikely to be affected by its existence, and the accumulated private reliance will not likely increase beyond the level it has already achieved . . . 250

Justice Scalia also joined Justice Thomas’ dissent. Both argued that the FAA applies only in federal courts. 251 In 1925, laws governing the enforceability of arbitration agreements, directed as they were to the mechanisms of dispute resolution, were generally considered to be procedural rather than substantive and to constitute a species of forum-selection clause. 252 Justice Thomas found the legislative history of section 2 to buttress the view that the FAA is procedural, 253 and found further support for such a view in “[t]he context of section 2” within the FAA. 254 Justice Thomas cited words in sections 3 and 4 that point to “the courts of the United States” 255 and “any United States district court,” 256 and offered further references to federal

248. Title VII, for example, applies only to employers with fifteen or more employees for each working day in each of 20 or more calendar weeks in the current year. 42 U.S.C. § 701(b) (1988).

249. See Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. at 838-39 (1995); see also id. at 844-45 (Scalia, J., dissenting).

250. Id. at 845 (Scalia, J., dissenting) (citations omitted).

251. Id. (Thomas, J., dissenting).

252. Id. at 845-46 (Thomas, J., dissenting).

253. Id. at 845-47 (Thomas, J., dissenting).

254. Dobson, 115 S. Ct. at 847 (Thomas, J., dissenting).


courts in sections 7 and 9 that give the FAA an unmistakably federal focus.\textsuperscript{257} He found that the absence of a reference to federal courts in section 2 could not, despite \textit{Southland}, reasonably be read as congressional intent to create a substantive law binding on state courts as well as federal ones.\textsuperscript{258}

The heart of this argument echoes Justice O'Connor's dissent in \textit{Southland}.\textsuperscript{259} If the FAA is procedural, meant to be binding only in federal courts, preemption of state laws that limit arbitration is not possible. Only if the FAA were seen as creating substantive rules or standards could preemption occur. Section 2 is the principal candidate for creating such a substantive rule because the other key sections are primarily procedural. But, according to Justice Thomas:

\begin{quote}
[If § 2 really was understood to "create[e] federal substantive law requiring the parties to honor arbitration agreements," then the breach of an arbitration agreement covered by § 2 would give rise to a federal question within the subject-matter jurisdiction of the federal district courts. Yet the ensuing provisions of the Act, without expressly taking away this jurisdiction, clearly rest on the assumption that federal courts have jurisdiction to enforce arbitration agreements only when they would have had jurisdiction over the underlying dispute.\textsuperscript{260}]
\end{quote}

Justice Thomas appealed to "core principles of federalism" in reminding the majority not lightly to assume that Congress is legislating in areas traditionally regulated by the states.\textsuperscript{261} "Rather, we must be 'absolutely certain' that Congress intended such displacement before we give preemptive effect to a federal statute."\textsuperscript{262} This view is more consistent with recent Supreme Court preemption cases such as \textit{Cipollone}\textsuperscript{263} and \textit{CSX},\textsuperscript{264} but considerations of stare decisis hinder any overrule of \textit{Southland}. As Justice Breyer noted:

\begin{quote}
258. \textit{Id.} at 848 (Thomas, J., dissenting).
261. \textit{Dobson}, 115 S. Ct. at 848 (Thomas, J., dissenting).
263. \textit{Cipollone v. Liggett Group, Inc.}, 112 S. Ct. 2608 (1992); see \textit{supra} notes 171-73 and accompanying text.
\end{quote}
Nothing significant has changed in the 10 years subsequent to *Southland*; no later cases have eroded *Southland*’s authority; and, no unforeseen practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying upon *Southland* as authority. Further, Congress, both before and after *Southland*, has enacted legislation extending, not retracting, the scope of arbitration. For these reasons, we find it inappropriate to reconsider what is by now well-established law.265

Justice O’Connor, who concurred with some reservations,266 continued “to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass.”267 In light of federalism and recent preemption doctrine, Justice O’Connor found the broad formulation of section 2 “troublesome” and would have given greater respect to state statutes “carefully calibrated to protect consumers”268 and “procedural requirements aimed at ensuring knowing and voluntary consent.”269 Like Justice Thomas, she reminded the majority of recent preemption doctrines, yet recognized that “over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”270 It was only in deference to stare decisis that she was willing to “acquiesce” in the majority’s judgment.271 “Though wrong,” she wrote, “Southland has not proved unworkable, and, as always, ‘Congress remains free to alter what we have done.’”272

265. *Dobson*, 115 S. Ct. at 839 (citations omitted).
266. See id. at 843 (O’Connor, J., concurring).
267. Id. at 844 (O’Connor, J., concurring) (citations omitted).
268. Id. at 843 (O’Connor, J., concurring) (citing MONT. CODE ANN. § 27-5-114(2)(b) (1993), which denies enforcement to arbitration clauses in consumer contracts where the consideration given is $5,000 or less).
269. Id. (citing S.C. CODE ANN. § 15-48-10(a) (Law. Co-op. Supp. 1993), which requires that notice of an arbitration provision be placed prominently on the first page of the contract). These types of state protections would be preempted without a choice-of-law clause in the underlying agreement because both put arbitration agreements on a different scale from other kinds of contracts.
270. *Dobson*, 115 S. Ct. at 844 (O’Connor, J., concurring). Justice O’Connor wrote, “I have no doubt that Congress could enact, in the first instance, a federal arbitration statute that displaces most state arbitration laws. But I also have no doubt that, in 1925, Congress enacted no such statute.” Id.
271. Id. Justice O’Connor stated, “[A]s the Court points out, more than 10 years have passed since *Southland*, several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance on the Court’s interpretation of the Act in the interim.” Id.
272. Id. (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)).
Justice Thomas, on the other hand, saw "no reason to think that the costs of overruling Southland are unacceptably high,"273 especially when the FAA was not necessarily within the contemplation of the parties when they entered into the contract. Parties are apt to comply with the agreement and arbitrate either as a matter of keeping promises or on the theory that arbitration is a cheaper and better way of resolving the dispute. Moreover, in a large number of states, specific enforcement of the arbitration agreement would be available under state law: "Only Alabama, Mississippi, and Nebraska still hold all executory arbitration agreements to be unenforceable, though some other states refuse to enforce particular classes of such agreements."274

Because of Justice O'Connor's written acquiescence to Southland's view of section 2 and Justice Rehnquist's decision to join the majority, the Court will adopt the view that the FAA is procedural only if Congress acts. Even while concurring, Justice O'Connor called for the preservation of autonomy in state courts.275 With the new majority in the 104th Congress, devolution of power to the states is often a persuasive argument,276 and clarification of the extent of congressional intent that the FAA preempt may yet come.

E. Section 118 and the Prospects for FAA Preemption of State Law

In suggesting that ADR would be a beneficial approach to resolving employment discrimination disputes, Congress did not address the general scope of the FAA or its preemptive possibilities. Dobson277 and Mastrobuono278 leave standing the Volt-like279 view that the FAA favors enforcement of the parties' own choice, which may refer either to state laws that limit arbitration or arbitral remedies, or to laws that expressly limit the scope of arbitral remedies. After Volt, lower courts have split on whether state laws limiting punitive damage awards by arbitrators should be honored.280 Even

273. Id. at 850 (Thomas, J., dissenting).
274. Id. (citations omitted).
276. See R.W. Apple, Jr., You Say You Want a Devolution, N.Y. TIMES, Jan. 29, 1995, § 4, at 1. "For Newt Gingrich and the band around him, his words are words to live by: 'We are committed to getting power back to the states . . . and we believe you can trust the 50 states and the 50 state legislatures to work together on behalf of the citizens of their states.'" Id.
after Mastrobuono, courts are likely to differ in their interpretations of what the parties to a standard form contract intended in terms of remedies or procedural rights. Moreover, the majority’s language in Mastrobuono suggests that a choice-of-law clause may in effect be an exercise in choice-of-laws management by the parties, such that their intent is only to specify "substantive rights and obligations" rather than to make "allocation[s] of power between alternative tribunals." As noted earlier, this distinction is not easily applied and may invite further litigation.

Other cases that involve parties who choose state law to govern their dispute pose similar issues, and invite courts to read Volt’s interpretation of the FAA to ensure that they enforce the expressed (or purported) intent of the parties rather than enforce arbitration per se.

Whatever the awareness of Congress about such issues, the language of section 118 of the CRA-1991 clearly does not address the problems posed by participants who “choose” in their agreements to be governed by state law that in some way limits enforcement of arbitration. Nor does section 118 mention the FAA or state a preference for preemption of inconsistent state law. In short, section 118 supports neither the inference that Congress intends arbitration agreements, predispute or otherwise, to be governed by a single set of federal standards, nor the view that states should be free to fashion their own substantive or procedural rights or remedies to accompany arbitrations enforced under the FAA.

Given Dobson and Mastrobuono, appears that there is little room left for state law where the FAA is involved. But a minority of Justices continue to believe that the FAA’s preemptive intent is entirely a creation of the courts, not Congress. Because the Mastrobuono majority apparently felt free to invoke the common law of contracts in finding no congressional intent to preclude an arbitral award of punitive damages, it seems fitting to ask how else an agreement to arbitrate might not be “valid, irrevocable, and enforceable” under section 2 of the FAA because of “such grounds as exist at law or in equity for the revocation of any contract.” Common law, however, might qualify to provide general grounds to resist enforcement. We thus turn our attention to common-law grounds of adhesion as a potential basis for not enforcing predispute arbitration provisions that are agreed to by employees, whether involuntarily or unknowingly.

281. Mastrobuono, 115 S. Ct. at 1217.
282. See supra note 212.
V. PREDISPUTE ARBITRATION CLAUSES IN THE EMPLOYMENT CONTEXT: UNCONSCIONABLE CONTRACTS OF ADHESION?

It is beyond dispute that many employment contracts contain predispute arbitration provisions that are either not seen or not understood by the employee. Often, the predispute arbitration agreement is part of a much larger document or set of documents that the employee or applicant is asked to sign. In Gilmer the New York Stock Exchange (NYSE) registration application was not an optional document; Gilmer’s choice was to sign it or seek work elsewhere.284 If his chosen field was stock brokerage, registration with the NYSE was not optional because all brokerage firms with seats on the NYSE require the same NYSE registration application. His real choice, in effect, was to work in the securities industry or in some other line of work.

Gilmer argued that the arbitration agreement should not be enforced because there was “unequal bargaining power” between the two parties. The Court rejected his argument, stating that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”285 Although the Court reserved a possible place for the occasional and extreme case where “‘fraud’” or “‘overwhelming economic power’” could render the predispute arbitration agreement unenforceable,286 such cases have not yet come to light, and it is difficult to imagine many cases of economic power more overwhelming than that of the United States securities industry relative to one applicant for employment in a brokerage firm. In what follows, we explore the law of contracts of adhesion to see what, if any, limitations state common law might place on the enforcement of predispute arbitration agreements.

A. Development of the Common Law of Adhesion and Unconscionability

In Gilmer the plaintiff argued, in essence, that the “take it or leave it” nature of his agreement to arbitrate made it a contract of adhesion. A contract of “adhesion” is an agreement where one party has no viable alternative but to accept the terms proffered by the other.287

285. Id. at 33.
286. Id. (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).
287. See E. ALLAN FARNSWORTH, CONTRACTS § 426 (1982); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 422 n.78 (3d ed. 1987) (citing authority that a contract of adhesion “is characterized by a lack of negotiation”). Commentators and courts also use the term “take it or leave it” to connote the same type of agreement. See 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 559C (Supp. 1994); Lea Brilmayer, Consent, Contract, and
Because of public policy, courts have often been unwilling to enforce contracts of adhesion. This unwillingness is not surprising because at common law there was considerable precedent for the view that some contracts should not be enforced where a class of people obviously need protection.

This judicial unwillingness to enforce contracts of adhesion paralleled the growth of printed form contracts, which were a natural consequence of the growth of large industrial organizations. However, the law governing the enforceability of agreements made by parties with wide disparities in bargaining power has been in a state of turmoil for the past half-century. As is

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Closely related to adhesion, but distinct in meaning, is the concept of an "unconscionable" contract. See *Farnsworth, supra*, at 302. A contract is unconscionable if it is so unfair as to "shock the conscience of the court." For a more detailed discussion of unconscionability, see generally *Restatement (Second) Of Contracts* § 208 (1981). In contrast to unconscionability, a claim of adhesion is based on the lack of a meaningful opportunity to negotiate over the contract terms. See Todd D. Rakoff, *Contracts Of Adhesion: An Essay In Reconstruction*, 96 Harv. L. Rev. 1174, 1176-77 (1983). While Mr. Locke might receive great value in his purchase of a Big Mac, he would not ordinarily be able to negotiate a key term of sale: its price. His choice, in reality, is to take it at the offered price or eat elsewhere.


289. For example, the common law of contracts has long held that infants and incompetents are incapable of exercising the right to contract. Holt v. Ward Clarencieux, 93 Eng. Rep. 954 (K.B. 1732). For a more detailed analysis of infants' and incompetents' lack of capacity to enter into a valid contract, see generally *Arthur Linton Corbin, Corbin On Contracts* § 146 (One Volume Ed.) p. 213 (1932). Although the courts have utilized the contract maxim of lack of capacity to void the attempted exercise of the freedom to contract by infants and minors, the policy underlying the maxim is the states' desire to protect parties unable to protect themselves. Similarly, public policy is invoked to void contracts that promote illegal behavior, such as gambling and racial discrimination. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that the 14th Amendment forbids judicial enforcement of race-based restrictive covenants); Lokes v. Kondrotas, 134 A. 246 (Conn. 1926) (holding that a note given for liquor was unenforceable); Watts v. Malatesta, 186 N.E. 210 (N.Y. 1933) (refusing to enforce gambling contracts). It is also well established that agreements based on fraud or duress will not be enforced as a matter of public policy. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) (holding that sufficiently extreme fraud will provide grounds "‘for the revocation of any contract’)" (citations omitted).

290. Standardization of form contract terms naturally followed the growth of mass production techniques for the sale of consumer goods and services.

discussed in the next section, a recent Supreme Court decision appears to have calmed the turmoil, at least in the federal courts.

B. Carnival Cruise Lines, Inc. v. Shute:  
The Supreme Court Adopts Chicago School  
Adhesion Analysis

A 1991 Supreme Court decision\textsuperscript{292} confirmed that most of the current Justices subscribe to the “Chicago School perspective."\textsuperscript{293} The Shutes, residents of the State of Washington, purchased passage on a cruise ship owned by Carnival Cruise Lines, a Florida-based company.\textsuperscript{294} The ticket contained a choice-of-forum clause that designated the courts of Florida as the sole location for resolution of all disputes.\textsuperscript{295} Mrs. Shute boarded the ship in Los Angeles and suffered injuries from a fall while in international waters.\textsuperscript{296} Mrs. Shute and her husband filed suit in federal court, asserting admiralty jurisdiction.\textsuperscript{297} The district court granted summary judgment to Carnival Cruise Lines on the basis of lack of personal jurisdiction.\textsuperscript{298} The court of appeals reversed, holding that there were sufficient contacts to support the exercise of personal jurisdiction.\textsuperscript{299} In rejecting Carnival Cruise’s argument that the forum-selection clause should be enforced, the court of appeals observed that the clause “was not freely bargained for” and would deprive the plaintiff of her day in court.\textsuperscript{300}

The Supreme Court held that the court of appeals erred in refusing to enforce the forum-selection clause.\textsuperscript{301} The Court readily acknowledged that it would be unreasonable to assume that a cruise passenger would or could negotiate the terms of a forum-selection clause in a routine commercial cruise


\textsuperscript{293} This perspective might suggest that price is a function of composite demand, and that the open marketplace will produce a viable alternative to the Big Mac if it is perceived by enough consumers as being overpriced. See Richard A. Posner, Economic Analysis of Law § 1.1 (3d ed. 1986); Michael I. Meyerson, The Efficient Consumer Form Contract: Law and Economics Meets the Real World, 24 Ga. L. Rev. 583 (1990). From the Chicago perspective, a true contract of adhesion cannot exist, or more accurately, should not be addressed by the legal system. The marketplace and the rational consumer will jointly address the concerns of fairness raised by adhesive sales policies, and will do so beyond any judicial or governmental policy making.

\textsuperscript{294} Carnival Cruise Lines, Inc., 499 U.S. at 587.

\textsuperscript{295} Id. at 587-88.

\textsuperscript{296} Id. at 588.

\textsuperscript{297} Id.

\textsuperscript{298} See id.

\textsuperscript{299} Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377, 381-87 (9th Cir. 1990).

\textsuperscript{300} Id. at 389.

\textsuperscript{301} Carnival Cruise Lines, Inc., 499 U.S. at 595.
ticket form. Nevertheless, the Court found the clause to be a reasonable exercise of the cruise line's interest in reducing operating expenses by limiting the number of possible fora. In implicitly adopting the position of the Chicago School, the Court commented, "Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."  

Having determined that the plaintiffs were on notice of the choice-of-forum provision, the Court found that the contract survived judicial scrutiny for "fundamental fairness" in that the plaintiffs "presumably retained the option of rejecting the contract with impunity." Carried to its logical conclusion, this argument means that no consumer contract of adhesion will be found to be fundamentally unfair as long as the consumer was on actual or constructive notice of the take-it-or-leave it provisions.

In dissent, Justice Stevens recounted the historical hostility of the courts to mandatory choice-of-forum clauses and other exculpatory clauses as "undermin[ing] the strong public interest in deterring negligent conduct." While noting that some commentators have questioned whether contracts of adhesion can be enforced at all under traditional contract theory (for lack of voluntary assent to the terms of the contract), Justice Stevens acknowledged the reality that "standardized form contracts account for a significant portion of all commercial agreements," and that a complete ban would be an extreme position. He concluded that the common-law approach to adhesion contracts, which asks "whether the terms of the contract are so unfair that enforcement should be withheld," was a valid middle ground. The dissent thus indirectly accused the majority of abandoning the "fairness" test in its entirety.

The broad holding in Carnival Cruise Lines, coupled with the Court's failure to limit expressly this holding to the rather narrow facts of the case (a tort arising in international waters under the law of admiralty), has powerful implications. The case might be read to defeat all adhesion contract claims so

302. Id. at 593.
303. Id.
304. Id. at 594 (citations omitted).
305. It is unclear whether the notice requirement had been satisfied by actual notice or by mere constructive notice from accepting the tickets without complaint.
307. Id. at 598 (Stevens, J., dissenting).
308. Id. at 600 (Stevens, J., dissenting).
309. Id. at 601 (Stevens, J., dissenting) (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965)).
310. Id. at 604-05 (Stevens, J., dissenting).
long as the restrictions are conspicuously displayed. In fact, one commentator stated:

By refusing to treat consumer contracts differently from commercial agreements and by narrowly defining the level of unfairness and inconvenience necessary to justify the nonenforcement of forum selection clauses, the Court implicitly endorsed the economic model in which parties to a contract are deemed to have knowingly and voluntarily allocated risk.311

It is too early to determine whether the impact of Carnival Cruise Lines will be that widespread. Nevertheless, it is safe to say that corporate defendants in many diverse settings will cite Carnival Cruise Lines in support of printed-form clauses offered on a take-it-or-leave-it basis.

C. Mandatory Arbitration Clauses and Claims of Adhesion

Most employers asking employees and applicants to sign a predispute arbitration agreement will do so on a take-it-or-leave-it basis.312 Yet the Gilmer Court, when asked to address the concerns of fairness arising from the unequal bargaining power inherent in most employment relationships, concluded that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”313 In support of its reasoning, the Gilmer Court cited Rodriguez de Quijas v. Shearson/American Express, Inc.314 and Shearson/American Express, Inc. v. McMahon.315 In those cases, standard customer agreements requiring arbitration of all disputes were found to be acceptable despite the fact that these forms were used almost universally in the securities industry.316 If such a claim of unequal bargaining power carries little weight for securities customers, it is reasonable to expect the same result in the context of employment.

The holding in Carnival Cruise Lines317 is consistent with Rodriguez, McMahon, and Gilmer. Although the current Supreme Court might be hesitant

311. Goldman, supra note 287, at 713.
312. See Ralph H. Baxter, Jr. & Evelyn M. Hunt, Alternative Dispute Resolution: Arbitration of Employment Claims, 15 Employee Rel. L.J. 187, 191 (1989) (“Most employers that seek to establish a mandatory arbitration procedure for their employees will offer the arbitration agreement to the employees on a take-it-or-leave-it basis . . . . Rarely, if ever, will individual employees be permitted to negotiate a change in the arbitration provisions that are offered.”).
316. See Rodriguez de Quijas, 490 U.S. at 483-84; McMahon, 482 U.S. at 229-30.
to proclaim its views of inequality in bargaining power so bluntly, it would seem that mere inequality of bargaining power by itself would never be sufficient to hold arbitration agreements unenforceable. Because unequal bargaining power lies at the core of adhesion claims, it is tempting to conclude that claims of adhesion are an endangered species, if not extinct.

*Mitsubishi*, however, left the door for adhesion claims slightly ajar by briefly noting, “Of course, courts 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.’” Thus, the Court mixed claims of adhesion with claims of coercion and fraud. Although coercion and fraud claims require active malfeasance on the part of the employer, adhesion claims arise from the economic inequality of the parties. But the *Gilmer* case gives the impression that Gilmer’s claim of inequality of bargaining power would be taken seriously only if fraud or coercion, in the nature of overwhelming economic power, could be proven.

Federal courts of appeals have had some occasion to consider claims of adhesion, fraud, and coercion in connection with predispute arbitration agreements. Recently, the First, Second, Seventh, Eighth, and Ninth Circuits have denied claims of adhesion. *Bayma*, which arose in California, is of

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318. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) (citations omitted). The Court’s dicta—that courts remain free to consider well-grounded claims of coercion or overwhelming economic power—bears a striking resemblance to other empty categories established in earlier dicta. For example, in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the Court opined that an arbitrator’s award might be overturned through judicial appeal if enforcing the award would contravene public policy. *Id.* at 519 n.14. But “[a]lthough the ‘manifest disregard’ of the law standard has been discussed in dozens of cases involving judicial review of arbitration awards resulting from securities disputes, no cases have been identified wherein vacation of a securities arbitration award has been clearly upheld on appeal.” Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the “Manifest Disregard” of the Law Standard*, 27 INDIAN L. REV. 241, 252 (1993). Thus, variations of the dicta in *Mitsubishi* have yielded much discussion, but seem to create an empty category—judges know what manifest disregard is not, but not what it is.

Similarly, in Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Court enforced a forum-selection clause specifying the London Court of Justice for disputes between a United States company and a German company. The clause had been part of a freely negotiated contract between two sophisticated businesses and was enforced despite the apparent disadvantages this would bring to the United States company. In leaving the door open for nonenforcement of such agreements, the Court stated that such clauses should be enforced unless there is evidence of “fraud, undue influence, or overweening bargaining power.” *Id.* at 12. The number of cases in which “overweening bargaining power” has resulted in nonenforcement of a forum selection clause apparently still stands at zero.

particular interest. In Bayma the court acknowledged that, under California law, standard arbitration clauses in employment contracts are contracts of adhesion and therefore are revocable at the pleasure of the employee. Nevertheless, the court found that the FAA preempted this state law and refused to stay the arbitration.

A similar federal-state conflict arose in Securities Industry Ass'n v. Connolly, which was decided after Volt. The Massachusetts legislature had singled out mandatory arbitration clauses in customer contracts in the brokerage industry as impermissible contracts of adhesion. The First Circuit Court of Appeals found that the state regulation was preempted because "the state law disturbs too much the congressionally declared scheme." The court noted that the FAA did not render the state powerless and speculated that Massachusetts could have passed legislation declaring all contracts of adhesion to be presumptively unenforceable. Massachusetts could not, however, single out contracts of arbitration for treatment different from that given to other contracts.

In Delaney v. Continental Airlines a California federal district court rejected the plaintiff's argument that the arbitration agreement in his employee manual was unduly oppressive and contrary to his reasonable expectations. In that case the internal appeals board consisted of three company officials. Arguably, a mandatory arbitration agreement that provides for appeals before a board consisting of company officials is unduly oppressive, or at the very least heavily biased in favor of the company. Nevertheless, the federal district judge found "no showing" that the agreement was unduly oppressive and thus upheld the arbitration agreement.

Similarly, in Lang v. Burlington Northern Railroad, a federal district court in Minnesota held that a mandatory arbitration agreement that was added to the employees' handbook during the plaintiff's employment was not an unconscionable contract of adhesion. Although the employee's only choices

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v. Dean, Witter Reynolds, Inc., 742 F.2d 334 (7th Cir. 1984).
320. Bayma, 784 F.2d at 1023 (citations omitted).
321. Id. at 1025. Chronologically, Bayma follows Southland and precedes Volt (also California cases). Its precedential value is therefore admittedly marginal.
323. Id. at 1116-17.
324. Id. at 1118 (quoting Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987)).
325. Id. at 1120-21.
326. Id. at 1121.
328. Id. at 1172.
329. Id. at 1173.
were to accept the agreement or quit his job, the court rejected the adhesion argument because the agreement was found not to be “inherently unfair.”

Thus, from California to Massachusetts, federal courts in recent years have turned a deaf ear to arguments based on adhesion. Additionally, adhesion as a specific common-law ground for the revocation of a contract has been conmimgled with the different concept of unconscionability. The logic seems to be that (1) predispute arbitration agreements are not per se unconscionable (because, among other things, the Supreme Court intimated as much in \textit{Gilmer}); (2) a claim of adhesion, by itself, is insufficient to avoid a contract provision unless the provision is itself in some way unconscionable; therefore, (3) no successful claims of adhesion can be made to arbitration, which in itself is not unconscionable. This line of reasoning arises in numerous federal cases.

\textbf{D. A Title VII-Based “Knowing and Voluntary” Requirement?}

Although one case does not signal a trend, at least one federal circuit court of appeals has refused to uphold an arbitration agreement when the employee had no opportunity to negotiate or even to read the forms before signing and when arbitration was never mentioned. In \textit{Prudential Insurance Co. of America v. Lat}, the plaintiffs worked as sales representatives in the securities industry. Before signing standard U-4 registration forms, the plaintiffs were told only that they were applying to take a test required by their employer; they had no opportunity to read the forms and they were not given

\begin{itemize}
  \item 331. \textit{Id.} at 1106.
  \item 332. \textit{See supra} note 287 and accompanying text.
  \item 333. \textit{See, e.g.,} Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992) (“Adhesion contracts are not automatically void. Instead, the party seeking to avoid the contract generally must show that it is unconscionable.”) (citing \textit{6A ARTHUR LINTON CORBIN, CONTRACTS \S 1376, at 20-21 (1962) and 7-9 (Supp. 1991)}, \textit{cert. denied}, 113 S. Ct. 1046 (1993); \textit{see also} Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 700 (10th Cir. 1989) (noting that “even if [the contracts here] were contracts of adhesion, we find no authority that arbitration clauses are unconscionable”); Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988) (holding that “state law adhesion contract principles may not be invoked to bear arbitrability of disputes under the Arbitration Act”); Surman v. Merrill Lynch, Pierce, Fenner & Smith, 733 F.2d 59, 61 n.2 (8th Cir. 1984) (stating that “[t]here is certainly nothing inherently unfair about the arbitration clauses, and they are therefore valid and enforceable”).
  \item 334. 42 F.3d 1299 (9th Cir. 1994), \textit{cert. denied}, 116 S. Ct. 61 (1995).
  \item 335. The forms, standard in the securities industry, required the employee “to arbitrate any dispute, claim or controversy that . . . is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register.” \textit{Id.} at 1301. The employees were required to register with the NASD, whose manual required arbitration of all disputes “arising in connection with the business of its members.” \textit{Id.}
\end{itemize}
the NASD manual that mentioned arbitration of claims arising out of the employment relationship.336

The plaintiffs filed a lawsuit that included Title VII claims and allegations of rape, sexual abuse, and sexual harassment by the employer. The defendant filed a separate action in federal district court asking that the plaintiffs be compelled to arbitrate under section 4 of the FAA.337 This request was denied, and the denial was upheld by the Ninth Circuit Court of Appeals.338 The court’s refusal to compel arbitration was based on the absence of a knowing and voluntary agreement to arbitrate employment disputes: “We agree with appellants that Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes.”339

Because of the nature of the Court’s discussion of overwhelming bargaining power in Gilmer, it seems doubtful that other federal courts will follow the Ninth Circuit Court of Appeals and require knowing and voluntary consent to predispute arbitration agreements invoked in Title VII or other employment discrimination disputes. Yet there is a hint in Mastrobuono that when the party asked to sign a standard form contract does not clearly understand that important remedies are being waived, courts should favor the interpretation offered by the party who had no real voice in creating the contract language.340 Unlike Carnival Cruise Lines, in which efficiency was favored over fairness, Mastrobuono resurrects values of fairness by resorting to common-law contract doctrines, even of it does not follow an adhesion or unconscionability analysis. Furthermore, unlike Prudential, Mastrobuono does not directly address the significance of the amended Title VII right to a jury trial and punitive damages.

336. Id.
337. Id.
338. Id. at 1305.
339. Lai, 42 F.3d at 1304.
340. In Mastrobuono, Justice Stevens noted:

As a practical matter, it seems unlikely that petitioners were actually aware of New York’s bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners.

E. Application of “Knowing and Voluntary”: A Harassment Hypothetical

A short hypothetical should suffice to pose the dilemma presented by these cases and current judicial preemption doctrine to arbitration of employment discrimination claims. Suppose Sebastian Industries employs Johanna Bache, and that one of Sebastian’s employee-supervisors, Carl Phillips, engages in egregious sexual harassment. Additionally, suppose that Sebastian’s in-house counsel has read Mastrobuono and has inserted a new provision in the company’s standard form contract, which already contains an arbitration clause that requires arbitration of any dispute arising out of the employment relationship. The new provision states that New York law shall govern the rights and remedies available to the parties unless preempted by federal law. This provision forthrightly reads:

The undersigned employee understands that in agreeing to arbitrate, the employee forgoes the right to bring a lawsuit in state or federal court to hear the merits of any claim s/he may have against the company, and that in arbitration, the arbitral panel may hear any and all claims that s/he may have against the company, but in no case may the arbitrators award punitive damages against the employee or the company.

Further suppose that when she is hired, Johanna tries to delete the arbitration provisions. She is told, however, that the company finds arbitration to be in the best interest of both employees and the company and that the standard terms and provisions “apply to everybody in the company.” She must either sign or seek work elsewhere.

If Johanna raises section 1 to claim that employment contracts are outside the scope of the FAA, she will most likely lose, although not because Congress has clearly expressed its desire that employees arbitrate with employers whether they want to or not. Nor can she rely on Prudential, because the contract terms make it very clear that she has waived her right to litigate before a jury. Moreover, if she does arbitrate, the arbitrators probably cannot award punitive damages because the Court in Mastrobuono and Volt viewed the essential purpose of the FAA as enforcing the parties’ contractual intent rather than imposing a national standard of arbitration rights and remedies.

This hypothetical illustrates that the Supreme Court has created a body of arbitration law that makes no meaningful distinctions between voluntary and involuntary waivers of punitive damages and the right to a trial by jury, both substantial rights granted by Title VII as amended in 1991. If fairness is

341. See supra notes 66-74 and accompanying text.
valued as highly as efficiency, Congress should consider adding a requirement that these agreements be "voluntary." As mentioned earlier, in commenting on section 118 of the CRA-1991 both Senator Dole and Representative Edwards stressed the voluntary nature of arbitration agreements in the context of employment discrimination law.\textsuperscript{342}

VI. A CALL FOR CONGRESSIONAL ACTION

Even after \textit{Gilmer} and passage of section 118 of the CRA-1991, there is considerable confusion about the FAA, its application to employment discrimination claims, and underlying issues of federalism. Recognizing that the scope of section 1 has not been addressed directly by either Congress or the Supreme Court, and that difficult interpretations of the preemptive effect of the FAA are engendering differences in the circuit courts, we believe that Congress must act to clarify these issues. Our proposals place a primary value on freedom of contract for employers and employees considering arbitration of employment disputes, while recognizing that employees should be guaranteed certain procedural safeguards to ensure fundamental fairness.

\textit{A. Proposals for Amending the FAA}

\textit{(1) Section 1 Amendment}

Section 1 of the FAA should be amended to make clear that all "contracts or other agreements relating to employment" are included under the federal umbrella of enforceable arbitration agreements.

\textit{(2) Section 2 Amendment}

Section 2 of the FAA should explicitly state that the common-law presumption against arbitration is reversed and address whether the provisions of the FAA are intended to be procedural or substantive. While Justice Thomas's interpretation of the original intent of the FAA is entitled to respect, there are some perplexing problems in meshing diversity jurisdiction with the view that the FAA is primarily procedural.\textsuperscript{343} Such problems would not be solved by

\textsuperscript{342} See \textit{supra} notes 101-04 and accompanying text.

\textsuperscript{343} For example, in a diversity case, the appropriate state law governs, but federal procedural law applies. The FAA, if seen as procedural, would compel arbitration in federal court but not in state court. Yet if a case is originally filed in state court by a plaintiff alleging employment discrimination, a defendant seeking enforcement of an arbitration agreement could simply remove the case to federal court and invoke the FAA. If there were no diversity, defendants could compel arbitration only if state arbitration laws so provided. In short, enforcement of arbitration agreements would be uneven.
a congressional directive to do away with diversity jurisdiction of federal courts.\textsuperscript{344}

Congress should declare in section 2 that the FAA is substantive law, binding on state and federal courts. Furthermore, Congress should expressly declare that any state law that limits the recognition or enforcement of arbitral awards is preempted. Additionally, Congress should preempt state laws that limit arbitral remedies or interfere with parties’ freedom to choose particular arbitral procedures and consider including a provision to ensure that predispute agreements to arbitrate are voluntary and informed.

\textbf{B. Proposals for Amending Federal Employment Discrimination Laws}

As Congress clarifies its preemptive intent for the FAA generally, it could also unify the piecemeal efforts by states to ensure that arbitration agreements are entered into knowingly and voluntarily. The strong public policy interests that motivate employment discrimination laws in the first place collide directly with the public policy interests that favor increased use of arbitration. Section 118 of the CRA-1991 suggests, but does not expressly state, a resolution to this collision: predispute agreements to arbitrate employment discrimination disputes should be entered into only if the employee knowingly and voluntarily waives the federal statutory rights, remedies, and procedures that would otherwise be available. Senator Dole’s comments support this resolution, but the text and legislative history of the CRA-1991 does not support the inference that the rest of Congress had the same intent.

Public policy interests strongly suggest the need to preserve freedom of choice for individuals pursuing statutory causes of action in disparate dispute resolution fora. Accordingly, in the context of employment discrimination laws, Congress should expand the language of section 118 expressly to approve predispute agreements to arbitrate workplace discrimination claims, as long as (1) the waiver of statutory rights, remedies, and procedures is knowing and voluntary; and (2) certain minimal standards are met to ensure fair and impartial arbitral procedures. The following procedural protections should be mandated when binding predispute arbitration agreements are invoked in federal statutory employment discrimination cases.

\textsuperscript{344} For example, a plaintiff with a sex discrimination complaint could have both a state and federal cause of action, file in state court, and have the case removed by the defendant to federal court. Once in federal court, the FAA as procedural law would usually entitle the defendant to a stay and to compel the plaintiff to arbitrate.
(1) Predispute Agreements to Arbitrate
Should Be Informed and Voluntary

The law not only should be "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,"" but also should be attuned to well-supported claims that the choice to arbitrate was neither informed nor voluntary.

Taking a cue from Lai, Congress should amend section 118 of the CRA-1991 to require expressly that predispute arbitration agreements contain a "knowing and voluntary" waiver of Title VII jury trial rights to be effective. As Senator Dole declared in his support for section 118 of the CRA-1991, Congress intended arbitration of employment disputes only "where the parties knowingly and voluntarily elect to use these methods."347

The courts should have little difficulty determining whether the jury trial waiver was "knowingly" entered into by the employee. Although compliance with the voluntariness requirement is subject to debate, given the current standard of voluntariness expressed in Carnival Cruise Lines, federal courts are likely to view most employment agreements as voluntary. But with specific language on voluntariness in Title VII or the other employment discrimination statutes, litigants would be more likely to take exception when gross disparities in bargaining power lead to an agreement to settle disputes by arbitration. Although such a change would likely increase litigation over such issues in the short term, such an increase might be a reasonable price to pay to place values of fairness alongside that of "efficiency." Moreover, a tilt towards voluntariness may bode well in the long term for arbitration of employment discrimination claims, with more satisfied participants and better publicity for the arbitral process in settling such claims.

(2) Employees Should Have Equal Input
with Employers Regarding the
Selection of Arbitrators

It is unconscionable for the employer to have sole power to choose the fact finders. Likewise, it is unconscionable for the employer to mandate that the arbitrators be chosen from the management team of the employer. An existing model for fairly selecting the fact finder is found in the 1993 revisions

346. Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994).
347. See supra note 101 and accompanying text.
to the Employment Dispute Resolution Rules of the AAA. The AAA Rules provide that all arbitrators on the panel “shall have familiarity with the employment field.” From this panel of experts, AAA submits to the parties a list of prospective arbitrators. Each party has the same number of peremptory strikes as well as the ability to designate arbitration preferences in order. This input provides the basis for AAA’s selection of impartial, expert arbitrators. The AAA process is designed to produce a neutral arbitrator that inspires confidence in both sides. Congress should require neutrality and competence from the chosen arbitrator in a manner similar to that utilized by AAA.

(3) Limited Discovery Rights Should Be Guaranteed

Despite the cursory attention given to the question of discovery rights in Gilmer, most employment lawyers would agree that claimants need access to basic personnel records in the exclusive custody of the employer in order to establish a prima facia claim. These records would include the claimant’s own personnel file, documents related to the position in issue, and personnel files of persons who currently occupy the contested position. A list of routine documents that are ordinarily discoverable should be set out with specificity in the forum’s operating rules. The Securities Industry Conference on Arbitration has specified such a listing in its operating rules for securities customers’ disputes. Depending on the type of claim, other documents would become relevant and subject to discovery after review by the arbitrator. Witness lists should be exchanged prior to the hearing, and a limited number of depositions permitted. One deposition per party should be available as a matter of course, with other depositions permitted upon a showing of good cause. Even this minimum discovery would probably require the availability of a prehearing conference at the request of either party to resolve open discovery issues, narrow the scope of the hearing, and sanction discovery abuses.

(4) Attorneys Fees Should Be Available to Claimants Who Prevail

Currently, employment discrimination claimants who substantially prevail in litigation are entitled to statutory attorneys fees. This provision should remain inviolate in the arbitration forum in order to provide access to counsel for low and mid-level employees. Otherwise, only highly paid management employees would have the resources to pursue claims of discrimination.

(5) All Substantive Remedies Now Available to Claimants Should Be Continued in the Arbitral Forum

The availability of back pay, compensatory and punitive damages, injunction, reinstatement, and other statutory remedies should not be restricted in arbitration. The purpose of binding arbitration is to provide a more rational forum, not to reduce the statutory rights or remedies available to employees. To permit otherwise would be unjust.

(6) The Arbitrators Should Be Required to Publish Findings of Fact and Conclusions of Law

Findings of facts and conclusions of law have the salutary effects of (1) forcing a disciplined, reasoned decision from the arbitrator; (2) explaining the reasoning and results to the participants (the least they deserve); and (3) providing a basis for limited judicial review. If the arbitral forum is to dispense workplace justice, the process should be able to withstand the light of reasoned analysis. In deciding grievances, labor arbitrators currently provide a form of findings and conclusions that should serve as a viable model for this congressional mandate. There are pros and cons of making the arbitrators' decisions public, but the benefits of public disclosure outweigh the loss of confidentiality. Disputes that are subject to arbitration frequently involve important matters of civil rights that have been created by congressional action. It follows that public disclosure of arbitration awards would deter violations by employers and promote the goals of workplace equality.

(7) Limited Judicial Review Should Be Available

Employment laws are based on the principles of civil rights and fundamental fairness in the workplace. For participants to have confidence in the process of binding arbitration, limited judicial review should be made available. In addition to the narrow grounds for review currently contained in section 10 of the FAA, employment arbitration awards should be reviewable by the federal judiciary, via magistrates, under the standard of "manifest disregard of the law." Such a standard would require arbitrators to make decisions on more than general principles of equity. Application of this standard assumes that the arbitrator, or at least one member of the panel, is familiar with the relevant statutory and case law. Federal magistrates are generally familiar with employment law and would have the skills to render efficient and reasoned review of the award based primarily upon the arbitrators published findings and conclusions.

Admittedly, mandating limited judicial review would entail some additional delay before the decision becomes final. Although less efficient than current arbitration practice, the requirement would provide judicial quality control over the process.

VII. CONCLUSION

The adoption of the recommendations in Part VI would lead to a number of positive outcomes. First, in both federal and state courts, where Title VII, ADEA, or ADA claims may be invoked, the FAA would apply as both substantive and procedural law. Any reluctance to continue Southland's\textsuperscript{352} finding of preemptive, substantive law in the FAA would finally be put to rest. Second, any remaining doubts that the FAA applies to employment agreements or contracts affecting interstate commerce would be erased. Third, in either state or federal courts, and whether the cause of action is based on state or federal employment discrimination law, the FAA would enforce only "knowing and voluntary" arbitration agreements. The various state common law doctrines of adhesion, unconscionability, fraud, coercion, and the like could be unified in a single inquiry as to whether the waiver of statutory rights and remedies was knowing and voluntary. The various state statutes designed to bring arbitration provisions to the attention of those signing such provisions would not be expressly preempted when applied to employment discrimination claims; such statutes would not frustrate the purposes and objectives of Congress because Congress's purpose was to ensure a variety of freely chosen dispute-resolution fora.

A fourth positive outcome potentially exists as well. When the parties' agreement contains a choice of law clause, the "chosen" state laws would not, in some Volt-like\textsuperscript{353} blind deference to federalism, be honored if it would otherwise be preempted. This follows from the third benefit described above, where applicants and employees may not be required to waive specific remedies for proven instances of employment discrimination. Changing from one forum (federal or state court) to an alternative dispute-resolution forum (arbitration) should not lead to an unwitting loss of statutorily prescribed remedies, such as punitive damages.

Mastrobuono\textsuperscript{354} and its application to the issue of punitive damages are instructive: if Volt had been followed to give primary effect to the New York choice-of-law provision, no punitive damages could be awarded by the arbitrators because New York case law describes this limitation as an important point of its public policy. But the majority in Mastrobuono avoided this result

\textsuperscript{353} Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989).
through a de novo contract interpretation, which is unlikely to yield consistent results in future cases. The proposed amendments to the FAA and Title VII would result in arbitrations that invariably allow arbitrators to award punitive damages if appropriate. *Mastrobuono* arrives at the same result, but not consistently; the anomalous reference to NASD or other procedures was seized upon as an ambiguity to be resolved against the contract’s authors. We would argue that the reasoning process needs considerable simplification. Where Congress declares that punitive damages may be awarded in a Title VII case, congressional intent as expressed in the FAA and Title VII, considered together, permits arbitral awards of punitive damages. In view of the remedial character of Title VII, Congress should expressly make punitive damages a nonwaivable element of the claim.

Given these proposed statutory changes, whether a claimant uses Title VII as a cause of action or instead relies solely on state-law employment discrimination protections, courts should recognize that Congress does not intend the FAA to operate as substantive law preempting state common law on adhesion or unconscionability. Courts should also recognize that states are free under the FAA to suggest reasonable statutory requirements for the formation of arbitration agreements, provided that those requirements are not hostile to arbitration as such, do not purport to limit arbitration or arbitral remedies, and address only the process of agreement formation with the aim of ensuring that predispute arbitration agreements are knowing and voluntary. States cannot, by statute or by case decision, limit arbitral remedies as a matter of public policy; only the parties themselves may do so through reference to state law that limits arbitral remedies.

In essence, the proposals offered here give overt recognition to the preemptive power of the FAA as substantive law while preserving a more meaningful role for the states. Under the status quo, the FAA preempts state statutes designed to increase the likelihood that someone actually understands that, by signing a standard form contract, they may be waiving the right to a judicial hearing and, possibly, a jury. Moreover, under the status quo, choice of law provisions referring to, for example, New York or California law may limit arbitral remedies355 or stay arbitration pending resolution of judicial actions,356 and do so primarily as rules of reference in agreements by private parties rather than as binding public policies. Under the proposals offered here, states could pass legislation creating specific requirements for the formation of predispute agreements to arbitrate, provided that those require-

355. This remains so even after *Mastrobuono*, because the perceived contractual intent of the parties not to preclude punitive damages depends on the presence of references to NASD rules or other rules that may or may not be read to allow arbitrators the right to award punitive damages.

ments are not hostile to arbitration and are aimed at making such agreements both informed and voluntary. State courts could interpret a revised section 2 of the FAA with similar aims, developing, along with the federal courts, a body of case law focused on the formation process. State courts could also adopt more nuanced adhesion decisions without the assumptions about preemption that have characterized many decisions where predispute arbitration agreements are challenged.  

A somewhat more cautious proposal would avoid any mention of “voluntary” or “knowing” in section 2, but would add such requirements to predispute agreements to resolve Title VII or other federal employment discrimination act claims. There is reason to believe that Congress, in mentioning ADR in section 118 of the CRA-1991, believed that it was endorsing the voluntary and knowing submission of federally based claims to nonjudicial fora. If Congress is content to allow unknowing or involuntary waiver of the newly created rights to a jury trial and punitive damages in Title VII cases, it may do nothing and endorse the status quo. But change is required if the newly created rights are worthy of protection and if states are to have a more meaningful role in the process of governing agreements to arbitrate. We believe that the proposals offered here represent a reasonable balance between the original aims of the FAA, the federal policy encouraging ADR as expressed in section 118 of the CRA-1991, and the need to clarify and strengthen the role of the states in supporting a better informed and more voluntary process of arbitrating employment discrimination claims.

357. In essence, the assumption widely made by courts is that adhesive agreements are not necessarily unconscionable, that arbitration is not unconscionable, and that therefore, no arbitration agreement could be unenforceable because of state law decisions on adhesion contracts. See supra notes 312-33 and accompanying text.

358. In doing so, Congress could also make clear that states are permitted to impose similar requirements for predispute agreements to arbitrate state-based employment discrimination claims.