

The Privatization of the Justice System: How Enforcement of Compulsory, Pre-Dispute Arbitration Agreements Undermines Civil Rights and Judicial Power<sup>1</sup>

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There has been an explosion of mandatory, pre-dispute arbitration agreements in employment contracts over the last fifteen years. At least one fifth of all employees are subject to mandatory arbitration.<sup>3</sup> The proliferation of such agreements has led to an unparalleled privatization of the justice system, which has serious implications for civil rights enforcement. Because of the judiciary's propensity to enforce pre-dispute, compulsory arbitration agreements, employees are increasingly precluded from having their claims heard in a court, relegated instead to arbitration – a forum not necessarily conducive to the rigorous enforcement of employment discrimination statutes.

Initially, arbitration agreements under the Federal Arbitration Act (FAA) – enacted in 1925 – were a method of alternative dispute resolution (ADR) between commercial entities of equal bargaining power, matched in business experience and sophistication. Within this context, the parties would agree to resolve future disputes in arbitration – an ADR method perceived as faster and less expensive than litigation.

The FAA's reach was initially limited. At first, the Supreme Court and lower courts resisted arbitration, suspecting the arbitrator's capacity to adequately protect statutory rights and perceiving the forum as inferior to the judiciary. Prior to the 1980s, court would ignore the FAA or openly resist forcing parties to go to arbitration. The Supreme Court itself set a tone of

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<sup>3</sup> *NELA Applauds Bill Banning Mandatory Arbitration*, July 12, 2007 Press Release from Donna R. Lenhoff, National Employment Lawyers Association, Legislative & Public Policy Director (quoting NELA President, Kathleen L. Bogas).

distrust and disdain for the alternative forum. For example, in *Wilko v. Swan*,<sup>4</sup> the Court held that the right to select a judicial forum is non-waivable, thereby making a pre-dispute arbitration agreement between securities brokers and buyers an impermissible “stipulation” binding buyers to waive compliance with the Securities Act of 1933. The Court was concerned that arbitrators – not instructed in the applicable law – would be relied upon to make subjective findings and interpretations of the law – an unacceptable risk in the absence of meaningful judicial review.<sup>5</sup> The Court expressed similar reservations about arbitration in the collective bargaining context.<sup>6</sup>

However, the Supreme Court’s hesitancy to enforce pre-dispute arbitration agreements has drastically waned over the last forty years. This change was initiated by *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), a case in which the Court held that claims brought under the Sherman Act for anti-trust violations were subject to arbitration, pursuant to an arbitration agreement in an international commercial agreement and governed by the FAA. The Court radically departed from its initial reluctance, and instead embraced the “liberal federal policy favoring arbitration agreements.”<sup>7</sup> So long as the arbitral forum enabled a party to vindicate its statutory rights, the statute would serve its remedial and deterrent functions and the arbitration agreement was enforceable.<sup>8</sup>

Growing acceptance of arbitration became the norm. By 1989, the Court overturned *Wilko*, in *Rodriguez De Quijas*, putting an end to “the old judicial hostility to arbitration.”<sup>9</sup> The Court recognized that such long-held skepticism “has been steadily eroded over the years . . . [and] intensified in [its] most recent decisions upholding agreements to arbitrate federal claims

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<sup>4</sup> 346 U.S. 427 (1953), overruled, *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 1490 U.S. 477 (1989).

<sup>5</sup> *Wilko*, 346 U.S. at 435-37.

<sup>6</sup> See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

<sup>7</sup> *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

<sup>8</sup> *Mitsubishi Motors Corp.*, 473 U.S. 614, 625, 628, 637 (1985).

<sup>9</sup> 490 U.S. at 480-81.

raised” under a variety of federal statutes.<sup>10</sup> In *Rodriguez De Quijas*, the Court concluded that once “the outmoded presumption of disfavoring arbitration” was cast aside, it became clear that the right to select the judicial forum was not paramount to Securities Act enforcement. So long as there was no inherent conflict between the federal statute and the arbitral forum, the arbitration clause was enforceable.<sup>11</sup>

The Court’s fondness for arbitration has become a common mantra over the last quarter century.<sup>12</sup> This shift in attitude has taken place in the employment context. Almost two decades following *Alexander*, the Court, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held that statutory employment discrimination claims could be resolved in the arbitral rather than judicial forum. In *Gilmer*, as a condition of his employment, a securities broker was required to sign a contract with the New York Stock Exchange, obligating him to arbitrate all employment related disputes, including statutory discrimination claims. In striking contrast to *Alexander*, the Court embraced the “liberal federal policy favoring arbitration agreements” and required the broker to arbitrate the claims he brought under the Age Discrimination in Employment Act of 1967 (ADEA).<sup>13</sup> The Court has subsequently endorsed the availability of arbitration over just about any kind of civil dispute over which a court could have jurisdiction.<sup>14</sup> The Court has read into the FAA a strong preference for the private resolution of claims brought to enforce rights in areas as varied as antitrust, consumer protection and civil rights.

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<sup>10</sup> See *Rodriguez De Quijas*, 490 U.S. at 480-81 (upholding agreement to arbitrate claims under the Securities Act of 1933; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (the Securities Exchange Act of 1934 and RICO); *Mitsubishi Motors Corp.*, 473 U.S. 614 (the Sherman Act).

<sup>11</sup> See *Rodriguez De Quijas*, 490 U.S. at 481, 483.

<sup>12</sup> See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (federal arbitration statute “requires that we rigorously enforce agreements to arbitrate”); *Moses H. Cone Memorial Hospital*, 460 U.S. 1 at 24 (“[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration”).

<sup>13</sup> 500 U.S. at 25.

<sup>14</sup> See, e.g., *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001) (construing exception to the FAA to ensure that persons with EEO claims in non-unionized workplaces would be covered by the Act).

Since the Supreme Court's holding in *Gilmer*, employers have been conditioning employment on an individual's willingness to waive his right to sue his employer in court. Despite Congress's admonition in enacting the Civil Rights Act of 1991 that "American workers should not be forced to choose between their jobs and their civil rights,"<sup>15</sup> many employees face just this dilemma. The Court's endorsement of arbitration has contributed to a burgeoning practice by employers to insert mandatory arbitration clauses in their standardized, non-negotiable contracts – compelling employees to forgo prospectively the option of using the courts to vindicate their rights infringed in the future.

The Supreme Court has repeatedly encouraged judicial deference to contract enforcement -- leaving only state law theories and limited review of arbitral awards -- as means for challenging such contracts of adhesion. The FAA makes clear that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>16</sup> The arbitrator's decision is generally binding and subject only to appeal on limited grounds such as fraud, duress, bias and unconscionability.<sup>17</sup> Moreover, the Supreme Court has rejected challenges to arbitration on a number of significant grounds. For example, in *Mitsubishi*, the Court approved of arbitration despite such arguments that: the arbitration agreement failed to expressly provide which statutory claims it covered;<sup>18</sup> the underlying issues were too complex for the arbitrator;<sup>19</sup> and the arbitrator might be incompetent, non-conscientious or biased.<sup>20</sup> In *Gilmer*, the Court also endorsed arbitration over arguments

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<sup>15</sup> H.R. Rep. No. 102-40(I), at 104 (1991).

<sup>16</sup> 9 U.S.C. § 2.

<sup>17</sup> See *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000) (in collective bargaining context, Court demonstrated traditional deference to arbitrator's award by holding that that it was not a violation of public policy for arbitrator to reinstate – in a safety-sensitive position – an employee who had twice tested positive for marijuana).

<sup>18</sup> 473 U.S. at 625.

<sup>19</sup> 473 U.S. at 633.

<sup>20</sup> 473 U.S. at 634; see also *Gilmer*, 500 U.S. at 30.

that: the underlying statute was designed to advance important broad public policies;<sup>21</sup> arbitration would undermine the enforcement agency's role;<sup>22</sup> arbitration only provided limited discovery, thereby compromising a party's ability to prove statutory violations;<sup>23</sup> the parties did not equal bargaining power;<sup>24</sup> the arbitrator lacked the power to provide broad equitable relief and class actions;<sup>25</sup> and the arbitrator's failure to issue written opinions would result in public ignorance about a defendant's conduct, an inability to secure adequate appellate review and a stifled development of the law.<sup>26</sup>

While supporters of arbitration – largely employers and corporations – tout its speed, cost and flexibility, they fail to mention the risks that arbitration will dispense with many rights that would ordinarily be available in the courts and are often taken for granted. More specifically, mandatory, binding arbitration can, and in some circumstances will necessarily dispense with, *inter alia*, the right to: a jury trial, a public forum, a written record, a subsidized forum, discovery, binding legal precedents, opportunity for collective actions, an adjudicator with legal expertise and meaningful appellate review. Each of these features, standard in judicial fora, can be compromised or eliminated altogether in arbitral fora.

Plaintiffs, unaware of the deleterious consequences of signing such an agreement -- or even of the agreement itself -- may be forced to accept unfavorable terms such as exorbitant costs,<sup>27</sup> class action prohibitions,<sup>28</sup> and proscribed statutory remedies.<sup>29</sup> Employees with little

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<sup>21</sup> *Gilmer*, 500 U.S. at 27.

<sup>22</sup> *Gilmer*, 500 U.S. at 28.

<sup>23</sup> *Gilmer*, 500 U.S. at 31.

<sup>24</sup> *Gilmer*, 500 U.S. at 32-33.

<sup>25</sup> *Gilmer*, 500 U.S. at 32.

<sup>26</sup> *Gilmer*, 500 U.S. at 31-32.

<sup>27</sup> *But see, Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000) (recognizing that an arbitration agreement that would impose large costs on a party opposed to arbitration may render the agreement unenforceable).

<sup>28</sup> *See Randolph v. Green Tree Financial Corp. – Alabama*, 244 F.3d 814 (3d Cir. 2001).

<sup>29</sup> *See, e.g., Graham Oil v. Arco Prods. Co.*, 43 F.3d 1244, 1247-49 (9<sup>th</sup> Cir. 1994) (arbitration clause enforceable where it shortened statute of limitations and limited punitive damages and attorney's fees).

bargaining power are compelled to forego their day in court because they signed an arbitration clause --appearing in fine print, on the back of a form or application, in incomprehensible legalese.

While the Supreme Court has purportedly enforced arbitration agreements to pay appropriate deference to privately negotiated contracts and prohibit parties from escaping their contractual obligations, the Court's almost unwavering endorsement of the forum suggests another agenda. Arbitration is currently being used as a means of diverting cases from an overloaded federal judiciary to private fora for the resolution of almost every type of dispute. This shift suggests that efficiency concerns have won out over the pursuit of just outcomes. The judiciary's deference to the enforceability of such contracts of adhesion forces unsuspecting civil rights claimants and consumers into an alternative forum that may compromise the substantive rights of themselves and others.

In response to a groundswell of dissatisfaction on the part of consumer and employment rights groups, Congress has sought to "fix" the problem of compulsory, pre-dispute arbitration agreements that impact the enforcement of civil rights and consumer laws. In particular, the Arbitration Fairness Act of 2007 (AFA), codified in H.R. 3010 and S. 1782, would amend the Federal Arbitration Act (FAA) to make unenforceable any pre-dispute arbitration agreement dealing with consumer, employment and franchise disputes, or disputes arising under laws that protect civil rights or regulate contracts and transactions between those of unequal bargaining power. Mandatory arbitration of employment claims outside of collective bargaining agreements would be prohibited under the AFA.

While mandatory, pre-dispute arbitration has been successfully curtailed by legislation for certain discrete groups – such as nursing homes, auto-dealers, livestock producers, and

military personnel subjected to payday loan agreements – it has not caught on in general. The AFA -- an important fix to the problem of denied judicial access and consumer rights and civil rights under-enforcement -- will likely not gain traction again, if ever, until after the election of a new administration. Despite legislative attempts to address the privatization of the justice system, judges currently guard the gates of the courthouse door.

Given the mixed success by the legislature to quell the surge of compulsory, pre-dispute arbitration agreements among those of unequal bargaining power or those pursuing certain claims, the courts will continue to play a vital role in the future of such agreements. When determining the propriety of such agreements, the courts should consider the power of the parties vis-à-vis each other and the underlying substantive rights at issue.

The role of the courts is broader than merely resolving private disputes between the parties before them.<sup>30</sup> Rather, courts – imbued with the authority of the state – are tasked with a larger role of defining and defending democracy.<sup>31</sup> This broader role was articulated over a quarter century ago by Owen Fiss, in his seminal article, *Against Settlement*, 93 Yale L.J. 1073 (1984), and later by others, who provide an alternative theoretical framework of the judiciary’s role – often referred to as the “public life conception” of adjudication.<sup>32</sup>

Court decisions provide authoritative interpretation of the law, which in turn enforces the societal values embodied and reflected in the law.<sup>33</sup> The public life conception of adjudication states that the function of the lawsuit and the court system is not merely to resolve private disputes, but to safeguard public values.<sup>34</sup> It is not the court’s job to just maximize the interests of private parties or merely bring about peace, but rather to explain and give force to the values

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<sup>30</sup> Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1083, 1085 (1984).

<sup>31</sup> *Id.* at 1085, 1089.

<sup>32</sup> David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2633-35 (1995).

<sup>33</sup> *Against Settlement*, 93 Yale L.J. at 1085.

<sup>34</sup> *Id.* at 1083, 1085-86.

embodied in authoritative texts, like the Constitution and federal statutes.<sup>35</sup> Judgment is necessary to ensure that society's most fundamental democratic ideals are made real.<sup>36</sup> For example, adjudication would lend itself to cases where there are "significant distributional inequalities" between the parties or those cases "where there is a genuine social need for an authoritative interpretation of the law", *i.e.* where "justice needs to be done."<sup>37</sup> Only purely private matters would be exempt from adjudication.

Similarly, the public life conception of adjudication offers a model for how the courts should view pre-dispute, compulsory arbitration. More specifically, the courts should apply this framework when determining whether to enforce agreements that require the use of this forum. Pre-dispute, compulsory arbitration agreements are not appropriate in all situations. One size does not fit all. Therefore, the courts should tailor their acceptance of such agreements to the substantive rights at issue and the bargaining power of the parties.

The courts must carefully consider the larger implications of permitting individuals to contract away their access to the judicial forum. The public life conception of adjudication provides a more rigorous and public oriented appropriate to determining the enforceability of compulsory, pre-dispute arbitration agreements. Judges are not only gatekeepers to the courthouse, but gatekeepers of societal values such as providing equal access and promoting justice.

In sum, given the explosion of compulsory, pre-dispute arbitration agreements in consumer and employment contracts, it is imperative to determine whether judicial deference to such arrangements is appropriate – not only for contracting individuals, but for the society as a

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<sup>35</sup> *Id.* at 1085-86.

<sup>36</sup> *Id.* at 1086-87.

<sup>37</sup> *Id.* at 1087.

whole. The judiciary plays an important role in not only resolving individual disputes, but in safeguarding democracy through process.