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Oddball Arbitration

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ODDBALL ARBITRATION

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I. INTRODUCTION

Congress enacted the Federal Arbitration Act ("FAA") in 1925 to require courts to enforce arbitration agreements between merchants who wanted to keep their disputes out of the court system so the disputes could be resolved relatively quickly, economically, and amicably.[1] Arbitration works relatively well in this context, where both parties know what they are getting when they agree to arbitration and their roughly equal bargaining power helps ensure that arbitral procedures are fair.[2]

Over the last three decades, the United States Supreme Court has extended the scope of the FAA into employment and consumer arbitration, far beyond the commercial context for which it originally was designed.[3] Although the Court's arbitration jurisprudence treats arbitration in these three contexts identically, employment and consumer arbitration create policy concerns not extant in commercial arbitration. Most employment and consumer arbitration clauses are drafted by a company and imposed on employees or consumers on a take-it-or-leave-it basis.[4] Consumers and employees may not understand what they are agreeing to, and often agree to arbitration terms and procedures that are lopsidedly slanted to favor the company.[5]

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1. *See* Michael Z. Green, *Preempting Justice through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112, 112-113 (1993).

2. *Id.* at 119.

3. *See* Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration,* 52 U. KAN. L. REV. 583, 584 (2004).

4. *See* Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act,* 113 PENN. ST. L. REV. 1081, 1083 (2009).

5. *See* Michelle Eviston & Richard A. Bales, *Capping the Costs of Consumer and*

Recent Supreme Court cases have extended the FAA far beyond what either the text of the statute or the intent of the Congress that enacted it would permit.[6] The Court has done so using cases with fact patterns that are wildly atypical of the cases that usually arise in the lower courts.[7] The Court has used these atypical-fact cases to create pro-arbitration legal precedent that applies equally to the typical cases that much more commonly appear in the lower courts.[8] The precedent created in atypical fact cases, while perhaps creating a just outcome in those atypical cases themselves, can create unjust outcomes in the far-more-common typical fact cases. Bad facts make bad law.

Suja Thomas, writing in the contexts of employment discrimination and federal pleading standards, calls these atypical fact cases "oddball" cases, and has developed a framework for describing and analyzing them.[9] This essay extends Thomas's "oddball" framework to two cases recently decided, and one case imminently to be decided in the arbitration context.

This essay argues that the Supreme Court has chosen for its arbitration docket a set of cases with wholly atypical fact patterns in what appears to be a deliberate effort successful so far to advance its pro-arbitration policy agenda without provoking a political backlash. This article begins by discussing the early interpretations of the FAA. Part IIB discusses the expansion of the FAA including *Prima Paint* and the *Mitsubishi* trilogy. Part IIC analyzes the holding in *Gilmer* and the FAA's springboard into employment law. Part IID describes the post-*Gilmer* attempts to limit the FAA. Part III describes the Court's use of oddball cases to further expand arbitration doctrine. Part IV analyzes the Court's pro-arbitration agenda, and demonstrates how using oddball cases to create policy furthers this agenda. Part V concludes.

II. BACKGROUND AND APPLICABLE LAW

A. The Early Years of the FAA

After Congress passed the FAA in 1925, courts narrowly interpreted its scope and application.[10] Initially limited to federal courts,

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Employment Arbitration, 42 U. TOL. L. REV. 903, 904 (2011).

6. *See infra*, Part III.
7. *See infra* Part III.A.
8. *See infra* Part III.A.
9. *See infra* Part III.A.
10. *See* Joshua R. Welch, *Has the Expansion of the Federal Arbitration Act Gone too Far?:*

the FAA was restricted by the decision in *Erie R.R. Co. v. Tompkins.*[11] The *Erie* Court held that a federal court, sitting in diversity jurisdiction, must apply state substantive law and federal procedural law.[12] Because of *Erie*, a federal court sitting in diversity jurisdiction could not enforce the FAA.[13] Since early arbitration agreements were mostly commercial agreements and involved contract disputes, courts were forced to apply state contract law and state arbitration law that could be less friendly than the FAA.[14] If the FAA were merely a procedural rule to be used in federal courts, its application would be very limited because state contract law including state arbitration law would govern these disputes.[15] Arbitration advocates needed to make arbitration a federal, substantive law so its application would be more widespread.[16] This dilemma set the stage for the dramatic expansion of arbitration doctrine in the United States.

B. The Judicial Expansion of the FAA: Creating a National Law

1. The Creation of a National Substantive Law: *Prima Paint Corp.*

In 1967, the Court fixed the issues created by *Erie* in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[17] In *Prima Paint,* the Court addressed whether Congress relied on its commerce power or its Article III power to create the rules of decision in diversity jurisdiction situations.[18] If the FAA were classified as a substantive law, created under the commerce power, federal courts could apply it when sitting in diversity jurisdiction.[19] If the FAA were classified as an Article III created law, it would be purely procedural, and courts would be forced to apply state substantive law rather than the FAA when sitting in diversity jurisdiction.[20]

Enforcing Arbitration Clauses in Void Ab Initio Contracts, 86 MARQ. L. REV. 581, 588 (2002).

11. *See* Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 249 (2008) (discussing the significant impact of the *Erie* decision on the FAA).

12. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

13. *See* Carbonneau, *supra* note 11, at 249.

14. *Id.*

15. *See* Welch, *supra* note 10, at 589.

16. *Id.*

17. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

18. *See id.* at 405.

19. *See id.* at 404-05.

20. *See id.* at 422-25 (Black, J., dissenting) (arguing that FAA is purely procedural and Congress did not intend to "take away from the States their power to interpret contracts made by their own citizens in their own territory").

In circumventing the problem that *Erie* created, the Court in *Prima Paint* held that the FAA was created under the commerce power, thus making it a substantive law.[21] The Court held that "it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"[22]

2. Arbitration's Initial Roadblock in Employment Law: *Gardner-Denver*

In 1974 the Court decided in *Alexander v. Gardner-Denver Co.* that a mandatory arbitration clause in a collective bargaining agreement ("CBA") was unenforceable with respect to Title VII claims.[23] *Gardner-Denver* recognized that it was not acceptable for the FAA to foreclose an employee's rights under a federal anti-discrimination statute.[24]

Gardner-Denver involved an African American steel worker, Harrell Alexander Sr., who was terminated from his position as a drill operator in training.[25] Alexander was terminated approximately fifteen months after he began the trainee position.[26] According to the company, he was terminated because he made too many defective parts and was performing poorly.[27] Because he was a member of the United Steelworkers of America ("the union"), Alexander filed a grievance challenging his firing.[28] Alexander believed he was discharged unfairly, but did not explicitly raise any issue regarding his race until later in the proceedings.[29] The contract between the union and the company provided disputes between the company and the union were to be submitted to a grievance procedure that ended with final and binding arbitration.[30]

Just prior to arbitration, Alexander first raised the claim that his discharge "resulted from racial discrimination," and also submitted a claim to the EEOC.[31] Shortly thereafter, he lost in arbitration, and the

21. *See id.* at 405.
22. *Id.*
23. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974).
24. *Id.*
25. *Id.* at 38.
26. *Id.*
27. *Id.*
28. *Id.* at 39.
29. *Id.*
30. *Id.* at 40.
31. *Id.* at 42.

EEOC informed him that his complaint lacked probable cause.[32] He took his case to federal district court and the case was dismissed because he had voluntarily submitted his case to arbitration, was bound by the arbitral decision, and thus his rights to court under Title VII had been precluded.[33] The Tenth Circuit affirmed the district court's decision.[34] The court's decision restricted Alexander from filing a lawsuit under Title VII and made the arbitrator's decision his sole remedy.[35]

The Supreme Court was faced with the decision of whether Alexander's Title VII claims were foreclosed by his decision to pursue his claims in arbitration.[36] The Court discussed the legislative intent of Title VII, specifically that "Title VII was designed to supplement, rather than supplant, existing laws and institutions related to employment discrimination."[37] "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration . . . ."[38] The Court also distinguished an employee's "contract" rights under a collective bargaining agreement, and his "independent statutory rights accorded by Congress."[39] "The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence."[40]

Gardner-Denver was important because the Court dismissed the idea that an employee waived its rights by submitting a claim to arbitration.[41] The Court's critical holding was that if an employee could waive its rights in a collective-bargaining agreement, then Title VII's paramount purpose of freeing individuals from discrimination would be undermined.[42] *Gardner-Denver* represents that allowing such rights to be waived is a violation of clear public policy.[43] It would seem apparent that similar precedent would follow for other types of employment claims under statutes like the ADA and the ADEA since the legislative purposes are similar.[44] Although *Gardner-Denver* protected employee

32. Alexander v. Gardner-Denver Co., 346 F.Supp 1012, 1013 (D. Colo. 1971).
33. 415 U.S. at 43.
34. Alexander v. Gardner-Denver Co., 466 F.2d 1209, 1210 (10th Cir. 1972).
35. *Id.*
36. 415 U.S. at 48-49.
37. *Id.*
38. *Id.* at 49.
39. *Id.* at 49-50.
40. *Id.* at 50.
41. *Id.* at 51-53.
42. *See id.* at 51.
43. *See id.*
44. *See* M. Lane Lowrey, *Arbitration or Adjudication?: The Trials and Tribulations of the*

rights from being foreclosed on by arbitration agreements, it did not address or base its decision on the FAA and its liberal policy favoring arbitration. Following the decision in *Gardner-Denver,* the Supreme Court decided a number of cases that dramatically expanded the FAA's application. The next section discusses a number of these cases.

3. Expansion of Arbitration Doctrine into Substantive Law in the Early 1980s

The first case that expanded the FAA's scope was *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[45] *Moses H. Cone* involved two businesses under contract to arbitrate all disputes.[46] The parties got into a dispute and the hospital attempted to get a declaratory judgment in state court to avoid being forced to arbitrate and to preclude any liability to the construction company.[47] In an effort to resolve the dispute and force arbitration, Mercury Construction Company filed a parallel suit in federal court.[48] The district court issued a stay pending the outcome of the state litigation.[49] The Fourth Circuit reversed and ordered the district court to compel arbitration.[50] The Supreme Court affirmed and compelled arbitration, applying federal law.[51] The important aspect of *Moses H. Cone* was the Court's declaration that the FAA applied in both federal and state courts.[52] Equally important in *Moses H. Cone* was the Court's recognition of the strong policy favoring arbitration, and that when in doubt regarding arbitrability, the preference should be to arbitrate.[53]

In 1984, the Court further expanded the scope of arbitration and held that the FAA applies even in situations involving a comprehensive state regulatory scheme.[54] *Southland Corp. v. Keating* involved a dispute between a franchisor and several franchisees.[55] The parties had a franchise agreement that contained an arbitration clause that stated,

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Federal Circuit Split Over Mandatory Arbitration of Employment Discrimination Claims, 40 S. TEX. L. REV. 993, 1012-1016 (1999).

45. 460 U.S. 1 (1983).
46. *Id.* at 4-5.
47. *Id.* at 7.
48. *Id.*
49. *Id.*
50. *Id.* at 8.
51. *Id.* at 4.
52. *Id.* at 24.
53. *Id.*
54. *See* Southland Corp. v. Keating, 465 U.S. 1, 2 (1984).
55. *Id.* at 3-4.

"[a]ny controversy or 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 thereof."[56] Several of the franchise owners sued under state franchise law, and the franchisor responded by attempting to compel arbitration.[57] The trial court held the FAA did not apply to the actions filed under the franchise law.[58] The state court of appeals reversed and decided that if the franchising law made arbitration agreements involving commerce invalid, then it would conflict with the FAA and, thus, be unenforceable under the Supremacy Clause.[59] The California Supreme Court reversed the appeals court and held the franchise law did not conflict with the FAA.[60] The United States Supreme Court then granted certiorai and discussed the congressional intent in enacting the FAA and recognized that when enacting the FAA, one of the purposes was "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[61] Because the franchising law was contradictory to congressional intent, the Court applied the Supremacy Clause and held that the FAA applied.[62] *Southland* marked another expansion of the FAA, and reaffirmed the holdings in *Prima Paint* and *Moses H. Cone* that the FAA was a substantive federal law that applied in state courts.

The next case that expanded arbitration doctrine in the early 1980s was *Dean Witter Reynolds, Inc. v. Byrd*.[63] *Dean Witter Reynolds* involved a dispute between a broker and a client where the client alleged the broker violated several laws by causing the client to lose significant money out of an investment account.[64] The client sued the broker in federal court for violations of the Securities Exchange Act of 1934 and for several state claims.[65] The federal court had diversity jurisdiction over the state claims.[66] When the client invested money with the broker, the parties signed an arbitration agreement that stated, "[a]ny

56. *Id.* at 4.
57. *Id.*
58. *Id.*
59. *Id.* at 5.
60. *Id.*
61. *Id.* at 16.
62. *Id.*
63. 470 U.S. 213 (1985).
64. *Id.* at 214.
65. *Id.*
66. *Id.*

controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration."[67] Once a dispute between the parties arose, the broker sought to compel arbitration over the state claims.[68] The issue for the Court was whether in the situation involving both arbitrable and non-arbitrable claims, should the Court compel arbitration on all the claims or should the Court deny arbitration on all the claims and try them together in federal court.[69] The circuits are divided on this question.[70] In deciding the case, the Court again displayed its preference toward the expansion of arbitration and overruled this "intertwining doctrine," further closing any potential loopholes for parties to avoid arbitration in state actions.[71]

In 1985 the Court cast its liberal policy favoring arbitration in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[72] *Mitsubishi Motors* involved a dispute between an auto manufacturer and an auto distributor.[73] Both parties agreed to a sales agreement containing an arbitration clause.[74] The parties got into a dispute on multiple grounds, including claims that Soler had violated the Sherman Act.[75] The district court referred all of the issues except the issue involving the Sherman Act to arbitration.[76] In keeping the Sherman Act issues out of arbitration, the district court recognized that federal antitrust issues were

67. *Id.* at 215.

68. *Id.* He did not seek to compel arbitration of the federal security claim because he assumed that Security Exchange Act claim was not arbitrable. *Id.*

69. *See id.* at 216.

70. *Id.* The Ninth, Fifth, and Eleventh Circuits have relied on the "doctrine of intertwining." "When arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court, under this view, may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal court." *Id.* "In contrast, the Sixth, Seventh, and Eighth Circuits have held that the Arbitration Act divests the district courts of any discretion regarding arbitration in cases containing both arbitrable and nonarbitrable claims, and instead requires that the courts compel arbitration of arbitrable claims, when asked to do so." *Id.* at 217.

71. *See id.* at 217.

72. 473 U.S. 614, 626-27 (1985) ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. Just last Term in Southland Corp. . . . where we held that § 2 of the Act declared a national policy applicable equally in state as well as federal courts, we construed an arbitration clause to encompass the disputes at issue without pausing at the source in a state statute of the rights asserted by the parties resisting arbitration.").

73. *Id.* at 617.

74. *Id.*

75. *Id.* at 619-20. Specifically, "Soler alleged that Mitsubishi and CISA had conspired to divide markets in restraint of trade", in violation of the §1 of the Sherman Act, which prohibits conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." *Id.* at 620; *see also* 15 U.S.C. §1 (2006).

76. *Id.* at 620-21.

"of a character inappropriate for enforcement by arbitration,"[77] but because the claims were of an international character, all the claims must move forward to arbitration.[78] The First Circuit reversed in part with respect to the arbitration of the antitrust claims.[79] The Supreme Court granted certiorari to determine whether an antitrust claim with international character should be resolved in arbitration.[80]

The Court held that the international arbitration agreement on the antitrust claims was enforceable.[81] The Court again affirmed its liberal policy favoring arbitration and noted that agreeing to arbitrate a statutory claim does not foreclose the rights of the party, but rather simply commits their resolution to the arbitral forum as opposed to a judicial forum.[82] After *Mitsubishi Motors Corp.*, the Court applied similar reasoning to cases in the employment context. The next section of this article discusses the expansion of arbitration into cases involving statutory employment rights.

C. Gilmer: Arbitration's Springboard into Employment Disputes

In *Gardner-Denver,* the Court held collective-bargaining agreements that confine resolution of statutory anti-discrimination rights to arbitration were unenforceable.[83] The case limited the enforcement of compulsory arbitration of statutory employment discrimination claims; however the Court would dramatically change this posture in 1991 by deciding the case *Gilmer v. Interstate/Johnson Lane Corp.*[84]

Plaintiff Robert Gilmer was an employee of Interstate/Johnson Lane Corporation ("Interstate").[85] In the course of his employment, Gilmer was required to register as a securities representative with the New York Stock Exchange (NYSE).[86] His registration application included an agreement to arbitrate "when required to by NYSE rules."[87] NYSE Rule 347 requires arbitration for "any controversy arising out of a

77. *Id.* at 621 (citing Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 825 (2d Cir. 1968)).
78. *Id.* at 621.
79. *Id.* at 621-23.
80. *Id.* at 624.
81. *Id.* at 640.
82. *Id.* at 628.
83. Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974).
84. Lowrey, *supra* note 44, at 998.
85. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20 (1991).
86. *Id.*
87. *Id.*

registered representative's employment or termination of employment."[88] Gilmer was subsequently terminated by Interstate at age sixty-two and filed a charge and then brought suit in district court claiming Interstate violated the Age Discrimination in Employment Act of 1967 (ADEA).[89] Interstate moved to compel arbitration of the claims.[90] The district court denied the motion, and relied on the previous precedent in *Gardner-Denver*.[91] The district court concluded that like Title VII, the ADEA contained congressional intent "to protect ADEA claimants from a waiver of judicial forum."[92] The Fourth Circuit reversed the district court finding that "nothing in the text, legislative history, or underlying purposes of the ADEA" indicated a congressional intent to preclude enforcing this type of arbitration agreement.[93] The Supreme Court granted certiorari to decide whether an ADEA claimant can be subjected to compulsory arbitration and answered the question in the affirmative.[94]

In making its determination, the Court started by analyzing the purpose of the FAA, and its application in previous cases to non-employment statutory rights.[95] The Court noted the FAA's requirement that arbitration clauses be enforced unless some type of normal contract defense is present, and again recognized the perceived liberal policy favoring the enforcement of arbitration agreements that was established in *Moses H. Cone*.[96] Then the Court applied its previous doctrine from *Mitsubishi Motors Corp.* which states that claims arising under various statutory schemes were arbitrable.[97] The Court reasoned that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum."[98]

The second issue the Court addressed was whether Congress intended claims under the ADEA to be inappropriate for arbitration.[99]

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 24.
92. *Id.* at 20.
93. *Id.* at 24 (quoting Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990)).
94. *Id.* at 23.
95. *See id.* at 24, 26.
96. *See id.* at 25.
97. *Id.* at 26
98. *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
99. *See id.* at 26-27.

The ADEA was passed to promote the broad social purpose of prohibiting arbitrary age discrimination of older persons in employment settings.[100] The Court compared the ADEA's broad social purpose to that of the Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933, all of which may have claims referred to arbitration.[101] "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" the issue is appropriate for arbitration.[102] The *Gilmer* opinion suggested that arbitration is a one-size-fits-all shirt to the variable shaped body of employment law.

With *Gilmer's* holding still in place, today's employees with a statutory cause of action that wish to pursue their claims in court are fighting an uphill battle if they are under a contract containing an arbitration clause. *Gilmer* stands for the fact that employment disputes do not have unique characteristics that make them different from disputes under antitrust or securities statutes, and suggests that anything is arbitrable unless the text or legislative history "explicitly preclude[s] arbitration or other nonjudicial resolution."[103] Since the current anti-discrimination statutes do not "explicitly" preclude arbitral resolution, this seems to be an impossible standard to meet. The next section of this article argues that claims under employment statutes are different from others, and discusses the small window that the Court has opened in *Gilmer* to allow certain types of disputes to proceed in court despite the presence of an arbitration provision. Following *Gilmer*, there have been a number of failed attempts to limit the FAA. The next section briefly discusses some of these legislative attempts.

D. Post-Gilmer Failed Attempts to Limit the FAA

Since *Gilmer,* there have been a number of attempts by Congress to step in and restore the FAA to its original purpose.[104] Beginning in 1994, Congress attempted to amend the anti-discrimination statutes themselves.[105] The Protection From Coercive Employment Agreements

100. *Id.* at 27.

101. *Id.* at 28.

102. *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 637).

103. *See id.* at 29.

104. *See* Brian K. Van Engen, *Post-Gilmer Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend,* 21 J. CORP. L. 391, 410 & n. 209 (1996).

105. *Id.* at 410-11.

Act, which was introduced but never enacted, sought to amend a number of anti-discrimination statutes by making it "illegal to condition employment on submission to mandatory arbitration."[106] The bill contained a number of specific provisions that made it unlawful for employers to conduct any adverse employment action or fail to hire an employee based on the employee's refusal to agree to an arbitration provision.[107] A second attempt to limit the power of the FAA occurred in August of 1994 when the Civil Rights Procedure Protection Act of 1994 was introduced in both the House and Senate.[108] The bill would have amended the FAA by adding the language "[t]his chapter shall not apply with respect to a claim of unlawful discrimination if such claim arises from discrimination based on race, color, religion, sex, national origin, age, or disability."[109]

Most recently, some members of Congress have demonstrated they will not give up on attempting to amend and limit the FAA. On March 8, 2012, House Resolution 4181 was introduced.[110] H.R. 4181 seeks to amend the FAA by adding in the language, "[n]otwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute.[111] The term 'employment dispute' means a dispute between an employer and employee arising out of the relationship of employer and employee."[112] The bill has been referred to committee, but no further action has taken place.[113] Each of these bills recognizes congressional attempts to limit the Court's interpretation of the FAA through statutory amendment, but none have been successful.[114] Notwithstanding the lack of success of Congress to amend the FAA, the Court has continued on its path of expansion of the FAA in a number of recent decisions. The next section of this article discusses some of these recent decisions, and highlights some of the flawed reasoning behind them.

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106. *Id.* at 411.

107. *Id.*

108. *Id.* at 411 & n.218.

109. *Id.* at 412 & n.223.

110. H.R. 4181, 112th Cong. (2012).

111. *Id.* § 2(b).

112. *Id.*

113. *H.R. 4181 (112th): To amend title 9, United States Code, to exclude employment contracts and employment disputes from such title,* GOV TRACK, http://www.govtrack.us/congress/bills/112/hr4181 (last visited Apr. 16, 2013).

114. *Id.; S. 2012 (103rd): Protection From Coercive Employment Agreements Act,* GOV TRACK, http://www.govtrack.us/congress/bills/103/s2012 (last visited Apr. 16, 2013); *H.R. 4981 (103rd): Civil Rights Procedures Protection Act of 1994,* GOV TRACK, http://www.govtrack.us/congress/bills/103/hr4981 (last visited Apr. 16, 2013).

III. THE ODDBALL TRILOGY

A number of decisions have affirmed the holdings in *Gilmer* and *Mitsubishi* over the past several years, and the Court has consistently upheld its liberal policy favoring arbitration. In continuing to uphold its policy and expand arbitration doctrine, the Court has used several "oddball" cases to develop its doctrine. The problem with using oddball cases to create precedent is that their atypical facts permit the Court to create legal rules that, while perhaps creating a just outcome in the oddball case itself, create unjust outcomes in the typical cases that much more commonly appear in the lower courts. For example, the Court's use of oddball arbitration cases has allowed the Court to extend the FAA far beyond what would otherwise be justified by the text of the statute, public opinion, or effective employee and consumer protection laws.[115] This section of the article explains the "oddball-case" principle, and discusses three cases with atypical facts in which the Court has significantly expanded (or in one case is expected to significantly expand) the scope of the FAA.

A. What is an Oddball Case?

Professor Suja Thomas presented and analyzed the concept of an oddball case in her 2011 article *Oddball Iqbal and Twombly and Employment Discrimination.*[116] Professor Thomas argued that the Court has applied "oddball reasoning" in the employment discrimination context by creating precedent using cases with atypical fact patterns that do not represent normal employment discrimination cases.[117] Professor Thomas illustrated how the Court used oddball facts in two cases to create a standard in employment discrimination that does not work for the vast majority of other cases.[118]

Professor Thomas has created a four-part test for determining whether a case is an "oddball case."[119] The four parts of the test are:

115. *See* Andrew Trask, *Rhetoric – Oddball Cases and Slaughtered Hogs,* CLASS ACTION COUNTERMEASURES, (Mar. 22, 2012), http://www.classactioncountermeasures.com/2012/03/articles/strategy-1/rhetoric-oddball-cases-and-slaughtered-hogs/.

116. See Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination,* 2011 U. ILL. L. REV. 215 (2010).

117. *See id.* at 216, 224.

118. *See id.* at 224.

119. Andrew Trask, *Notes from Depaul Class-Action Symposium,* CLASS ACTION COUNTERMEASURES, (Mar. 8, 2012), http://www.classactioncountermeasures.com/2012/03/

"(1) odd facts that create[] (2) a significant change in the law, where the change is (3) motivated by the odd facts rather than the legal principles, and has (4) a significant effect on less-oddball cases in the same area of law."[120] This essay extends Professor Thomas' theory of oddball cases to a new context: arbitration cases.

B. 14 Penn Plaza LLC v. Pyett - An Oddball Attempt to Limit Gardner-Denver

In *14 Penn Plaza LLC v. Pyett*, the Court decided whether a provision in a collective-bargaining agreement that "clearly and unmistakably" required a bargaining unit member to arbitrate discrimination claims was enforceable.[121] In *14 Penn Plaza LLC*, the Court evaluated a very specific arbitration waiver of statutory rights and decided that such a waiver resulted in the bargaining-unit member's claims limited to resolution in the arbitral forum.[122] This section of the article reviews the atypical facts of *14 Penn Plaza LLC,* and analyzes why it is an oddball case with reasoning that is not applicable to the majority of decisions.

1. Case Description

Respondent Pyett and other respondents were members of the Service Employees International Union, Local 32BJ ("Union"), who worked as night watchmen in a New York office building.[123] The building operators contracted with an outside company to provide licensed security guards in the lobby and entrances of its building thus forcing the watchmen into other jobs like light duty cleaning.[124] The respondents alleged that the job reassignment led to a loss of income, emotional distress, and that the new positions were much less desirable.[125]

After their reassignment, the union members filed a grievance based on a number of issues including that 14 Penn Plaza had violated the collective-bargaining agreement's ban on workplace discrimination

articles/certification-1/notes-from-depaul-class-action-symposium/.

120. *Id.*

121. 14 Penn Plaza LLC v. Pyett 556 U.S. 247, 251 (2009).

122. *Id.* at 273-74.

123. *Id.* at 251-52.

124. *Id.* at 252-53.

125. *Id.* at 253.

by reassigning them based upon their age.[126] The agreement contained the following explicit provision ("Section 30"):

> § 30 NO DISCRIMINATION: There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.[127]

During the grievance process the union removed the age discrimination claims from arbitration because it believed it could not legitimately object to the reassignments as discriminatory.[128] The union members then sued in federal court.[129] The district court denied 14 Penn Plaza's motion to compel arbitration, and the court of appeals affirmed relying on *Gardner-Denver's* holding that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress.[130] The Supreme Court reversed the Second Circuit, holding a provision in a collective-bargaining agreement that clearly and unmistakably requires members to arbitrate ADEA claims is fully enforceable.[131]

In its analysis, the Supreme Court first dismissed the argument that the arbitration clause was outside the scope of the collective bargaining process because it affected the employees' individual rights as opposed to only their economic rights.[132] Applying the *Gilmer* holding stating that parties were bound to arbitrate unless Congress manifested a contrary intent, the Court found that no such intent was manifested in the ADEA, the parties freely negotiated the agreement to arbitrate, and the judiciary should honor the agreement.[133] Second, the Court dismissed

126. *Id.* at 253.
127. *Id.* at 252.
128. *Id.* at 253.
129. *Id.*
130. Pyett v. Pennsylvania Bldg. Co., 498 F.3d 88, 91 & n.3, 93-94 (2d Cir. 2007) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974)).
131. 14 Penn Plaza LLC, 556 U.S. at 274.
132. *Id.* at 257.
133. *Id.* at 258-60.

the Respondents' argument that *Gardner-Denver* meant that a union could not waive an employee's rights under federal anti-discrimination statutes.[134] The Court limited and distinguished *Gardner-Denver* by discussing the holding from *Gilmer* which stated that *Gardner-Denver* did not involve the enforceability of an agreement to arbitrate claims, but rather was only about whether arbitration of contract-based claims precluded a claimant from then pursuing judicial resolution.[135] Third, the Court dismissed the arguments that the clauses did not clearly and unmistakably require arbitration, and that the agreement operated as a substantive waiver of ADEA rights by allowing the union to block grievances and thus preclude union members from suing.[136] The Court did not answer the question of whether an agreement that allows a union to "block" claimants from vindicating their rights in the arbitral forum is enforceable because there was only speculation that this had occurred.[137]

14 Penn Plaza LLC stands for the proposition that a statutory waiver of the judicial forum that was freely negotiated and agreed upon by a union is fully enforceable as a matter of law. The holding makes sense with respect to the very explicit agreement in *14 Penn Plaza LLC,* but the situation in the case may not be representative of everyday disputes. The next section of this article discusses why *14 Penn Plaza LLC* is an oddball case, and why its reasoning should not be extended beyond its specific facts.

2. *14 Penn Plaza LLC* as an Oddball Case

The holding in *14 Penn Plaza LLC* stands for the proposition that a union can bargain away its members' rights to a judicial forum and restrict the members to arbitration for statutory claims. The problem with *14 Penn Plaza LLC* is that the facts involved are very atypical, and therefore its holding should not be extended beyond its specific fact situation. This section analyzes why *14 Penn Plaza LLC* meets the elements of the oddball case and discusses how its holding should be construed by other courts.

14 Penn Plaza LLC meets the first element of the test because it contains atypical facts. The clause explicitly requiring arbitration of all statutory claims is atypical of clauses found in these types of agreements

134. *Id.* at 260.
135. *Id.* at 263-64.
136. *Id.* at 272-273.
137. *Id.* at 273-74.

because unions oppose such clauses and rarely agree to them.[138] Instead, typical collective bargaining agreements contain a clause more like the one in the case *Ibarra v. United Parcel Service.*[139] *Ibarra* involved a clause that stated the following:

> Article 36 is a nondiscrimination provision. It states:
>
> The Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, sexual orientation, national origin, physical disability[,] veteran status or age in violation of any federal or state law, or engage in any other discriminatory acts prohibited by law, nor will they limit, segregate or classify employees in any way to deprive any individual employees of employment opportunities because of race, color, religion, sex, national origin, physical disability, veteran status or age in violation of any federal or state law, or engage in any other discriminatory acts prohibited by law.[140]

Unlike the clause found in *Ibarra,* the clause in *14 Penn Plaza LLC* specifically mentioned state and federal statutes, referenced the grievance procedure in the agreement, and contained an express waiver of the statutory rights.[141]

The second part of the oddball test is met because *14 Penn Plaza LLC* creates a significant change in the law. Prior to *14 Penn Plaza LLC*, the case *Alexander v. Gardner- Denver Co.* held that although a union was able to waive certain "collective" rights, that an individual's right to equal employment opportunities stands on different ground, and could not be waived.[142] Although the *Gilmer* Court stated that statutory claims were enforceable in arbitration, the situation in *Gilmer* involved an agreement that an individual had made and signed as opposed to the situations in *14 Penn Plaza LLC* and *Gardner-Denver* which involved the contents of collective bargaining agreements made by a union.[143] Because *14 Penn Plaza LLC* changes the law significantly in this area by applying *Gilmer* to agreements covered by collective-bargaining

138. LAURA J. COOPER ET AL., ADR IN THE WORKPLACE, (3d ed. Forthcoming 2013) (manuscript Ch. 9 at 32 n.1) (on file with authors).

139. *See* Ibarra v. United Parcel Serv., 695 F.3d 354 (5th Cir. 2012).

140. *Id.* at 357 (alteration in original).

141. 14 Penn Plaza LLC, 556 U.S. at 252, 254.

142. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

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

agreements, it meets part two of the test.

The third element is met because the change in law in *14 Penn Plaza LLC* was motivated by the odd facts and not the legal principles. The case involved a very explicit arbitration agreement that specifically listed the state and federal statutes it covered.[144] As discussed previously, the agreement was atypical because most parties would not be as explicit in their agreements.[145] The principle, however, that such statutory causes of action can be prospectively waived by a union in a collective bargaining agreement, could also be applied when the facts are more typical and the agreement is far less explicit on the waiver of rights. These situations give rise to the major concern behind oddball cases: a holding that is predicated on a set of oddball facts does not "work" for the more normal situations.

14 Penn Plaza LLC will meet the fourth element of the test if its holding is generally applied to other cases. The question that remains is whether courts will limit its holding to agreements containing broad and explicit waivers, or if its holding will be construed generally and the specificity requirement will be vacated.[146] If *14 Penn Plaza LLC* is kept within the confines of its specific facts, perhaps it is not an oddball case at all, but instead just a narrow holding to a specific fact issue. But, if its holding is expanded to situations with general agreements, it fits squarely into the oddball reasoning because the Court will have used an atypical fact situation to decide a much larger issue, and will have then applied the holding to fact situations that are very different from those on which the holding was predicated.

C. AT&T Mobility LLC v. Concepcion

1. Case Description

The second case of the oddball trilogy is the 2011 case *AT&T Mobility LLC v. Concepcion*.[147] *Concepcion* involved a dispute over whether an arbitration clause in a cell-phone contract precluded class-

144. 14 Penn Plaza LLC, 556 U.S. at 252.

145. *See supra* Part III.B.2.

146. The Fifth Circuit recently applied *14 Penn Plaza LLC* narrowly in *Ibarra v. United Parcel Service* and held that the less specific agreement previously discussed in this article was not enforceable as a waiver of an employee's rights to the judicial forum. Ibarra v. United Parcel Serv., 695 F.3d 354, 359-60 (5th Cir. 2012). The Fifth Circuit's interpretation is an indication that *14 Penn Plaza LLC* will be viewed narrowly, but the Court could eventually overrule the lower courts and broaden the *14 Penn Plaza LLC* holding to other cases.

147. AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011).

wide arbitration.[148] The Concepcions entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LLC ("AT&T").[149] The agreement contained a number of consumer-friendly provisions.[150] First, AT&T agreed to bear the cost of all "non-frivolous claims."[151] Second, AT&T allowed the arbitration proceeding to take place in the county in which the customer was billed thus saving the customer on travel costs.[152] Third, the agreement guaranteed that if the claimant received an arbitration award greater than AT&T's last settlement offer, AT&T would pay a minimum of $7,500, twice the amount of the claimant's attorney's fees, and provide a guarantee that AT&T would not seek attorney's fees.[153] In addition to the lopsided cost provisions, the agreement also laid out a very simple settlement procedure, and left open the claimant's right to pursue its claim in small claims court.[154] The agreement contained a clause providing for arbitration of all disputes and required that claims be brought in the parties' "individual capacity" only.[155] The dispute regarded whether the Concepcions had to pay sales tax on a free phone they received.[156]

Because they did not want to pay the tax, the Concepcions filed a suit in the Southern District of California that was later consolidated with a putative class action alleging, "among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free."[157] Following the complaint, AT&T moved to compel arbitration under the terms of the contract, and its motion was denied when the district court found the agreement unconscionable because AT&T had not shown that bilateral arbitration adequately protected the claimants.[158] The Ninth Circuit affirmed the district court's ruling on the same grounds.[159] The Supreme Court granted certiorari and reversed, finding the agreement to arbitrate was fully enforceable.[160]

148. *Id.* at 1742.
149. *Id.* at 1744.
150. *See id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 1745.
159. *Id.*
160. *Id.* at 1740.

2. *Concepcion* as an Oddball Case

Like *14 Penn Plaza LLC, Concepcion* is an oddball case containing reasoning based on facts that do not accurately represent the majority of cases before the courts. The first element of the oddball test is met because of the presence of a very atypical cost structure. The agreement in *Concepcion* contained a number of cost provisions that are completely slanted towards the consumer.[161] Each of these items are oddball facts because they do not represent the normal agreements that are lopsided in favor of the companies.[162]

The second element of the oddball test is met because *Concepcion* created a significant change in the law. The lower court in *Concepcion* had applied a state-law unconscionability rule from the prior case of *Discover Bank v. Superior Court*,[163] which held that class-action waivers were unconscionable if, among other things, bilateral dispute resolution would not substitute for the deterrent effect of a class action.[164]

Section 2 of the Federal Arbitration Act provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[165] The Supreme Court consistently, until *Concepcion*, interpreted this to mean that arbitration agreements must be treated the same as other contracts; if state law imposes a restriction on arbitration agreements but not on other contracts, that restriction is preempted by the FAA.[166]

The *Discover Bank* rule would have been valid under that test because the rule forbade unconscionable consumer class-action waivers not only in arbitration agreements, but in any agreements, whether the agreements contained an arbitration clause or not.[167] The majority in *Concepcion*, however, found that the *Discover Bank* rule had the *effect* of discouraging arbitration by increasing the complexity of the dispute-resolution process and thereby making arbitration less attractive to the

161. *See id.* at 1744.

162. In *Concepcion*, the defendant (AT&T) had "gone way out of its way to ensure that individual rights could be pursued notwithstanding the class-action waiver." Richard Bales, *Is There Any Defense to a Lopsided Arbitration Agreement?*, WORKPLACE PROF. BLOG (Nov. 14, 2012), http://lawprofessors.typepad.com/laborprof_blog/2012/11/is-there-any-defense-to-a-lopsided-arbitration-agreement.html [hereinafter *Lopsided Arbitration Agreement*].

163. Discover Bank v. Superior Court, 113 P.3d 1100, 1112 (Cal. 2005); *see also* Discover Bank Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (2009).

164. *Concepcion*, 131 S. Ct. at 1745.

165. 9 U.S.C. § 2 (2006).

166. *See* Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 769 (2012).

167. 113 P.3d at 1112.

AT&Ts of the world.[168] This ruling – that the FAA preempts generally applicable state contract rules that have the *effect* of discouraging arbitration – represents a significant change in law and an equally significant extension of the FAA into an area previously reserved (both by precepts of federalism and seemingly by the text of the FAA section 2 itself) for state law.[169]

The third part of the test is satisfied because *Concepcion*'s atypical facts and not the legal precedent motivated the decision. The cost scheme and the lopsided dispute procedure are atypical for a consumer contract of adhesion.[170] The fact that all aspects of the agreement weighed heavily in favor of the consumer made this an easy case for the Court to make a pro-arbitration and potentially politically unpopular ruling. Despite the fact that the consumer could not proceed as a class, the consumer still could be made whole under a very favorable agreement.

The fourth part of the oddball test illustrates the problem in *Concepcion.* It is true that the consumer could easily have been made whole through the dispute policy, and in this case the only thing the consumer lost was the right to proceed as a class. The problem is that most agreements do not provide such easy resolution for the consumer. If the holding of *Concepcion* is applied to situations in which the agreement is more typical and is not lopsided toward the consumer, the consumers will effectively be left without a remedy. For this reason, it is important that *Concepcion's* holding be limited to the specific fact situation provided in the case, if at all. *Concepcion* clearly meets the four-part oddball test and is another example of the Court using an atypical fact situation to create an unpopular, binding precedent to further its liberal policy favoring arbitration.

D. Italian Colors Restaurant v. American Express Travel Related Servs. Co.

1. Case Description

Italian Colors Restaurant v. American Express Travel Related

168. *Concepcion*, 131 S. Ct. at 1750.

169. Richard Bales, *Supremes Uphold Arbitral Class-Action Waivers,* WORKPLACE PROF. BLOG (Apr. 27, 2011), http://lawprofessors.typepad.com/laborprof_blog/2011/04/supreme-uphold-arbitral-class-action-waivers.html [hereinafter *Class-Action Waivers*].

170. *Lopsided Arbitration Agreement*, *supra* note 162.

Servs. Co., is another case involving a class-action waiver.[171] In *Italian Colors*, the plaintiffs represented "all merchants that have accepted American Express charge cards . . . and have thus been forced to agree to accept American Express credit and debit cards."[172] The dispute centered on a portion of the card agreement called the "Honor All Cards" provision.[173] The provision required merchants that only accepted certain American Express cards as payment to accept all American Express cards as payment.[174] American Express previously centered its business on wealthy customers and corporations.[175] Thus the typical American Express customer was particularly attractive to merchants.[176] Because American Express customers were attractive to merchants, American Express was able to withhold larger fees than normal mass-market credit cards when its cards were used.[177] The merchants' acceptance of higher fees was conditioned on the fact that the cards were held only by attractive customers.[178] The merchants alleged that American Express violated the Sherman Act because it expanded its business into a "mass-market" business and forced them through its "Honor All Cards" provision to accept higher fees (originally designed only for the affluent customers and corporations) even when the customers were much less attractive.[179]

The merchants and American Express were parties to a standard "Card Acceptance Agreement" that contained a mandatory arbitration clause for all disputes unless the merchant filed its claim in small claims court.[180] The arbitration clause also contained a class-action waiver for claims "subject to arbitration."[181] The merchants asserted that American Express' attempt to force them to "Honor All Cards" provided them with the unattractive options of either paying the very high fees or losing a large share of their customers, and thus claimed this is a violation of the Sherman Act.[182] The merchants then argued they were unable to vindicate the antitrust rights by pursuing this case individually because

171. Italian Colors Rest. v. Am. Express Travel Related Servs. Co., 667 F.3d 204 (2d Cir. 2012).
172. *Id.* at 207.
173. *Id.* at 208.
174. *Id.*
175. *Id.* at 207.
176. *Id.*
177. *Id.* at 208.
178. *See id.* at 207-08.
179. *Id.*at 208.
180. *Id.* at 209.
181. *Id.*
182. *Id.* at 208.

of the high prohibitive costs of doing so.[183] The question before the Second Circuit was whether the class-action arbitration waiver was enforceable when the practical effect of enforcement was that the plaintiffs would be unable to vindicate their statutory rights.[184]

The court applied the 1991 case *Green Tree Financial Corp. v. Randolph* that noted that an arbitration agreement with cost provisions such that a plaintiff could not vindicate its statutory rights may be unenforceable if the plaintiff meets their "burden of showing the likelihood of incurring such costs."[185] Here, the court found that since the merchants' only economically feasible option was through a class action, the agreement was unenforceable because forcing arbitration and declining to allow a class-action would render the merchants unable to vindicate their statutory rights.[186] The Supreme Court recently granted certiorari to review the Second Circuit's decision.[187] The next section of this article discusses why *Italian Colors* is an oddball case, and predicts that the Court will reverse the Second Circuit.

2. *Italian Colors* as an Oddball Case

Italian Colors is currently before the Court.[188] This section discusses how *Italian Colors* is an atypical fact situation, and opines that the Court will reverse the holding of the Second Circuit in yet another pro-arbitration ruling.

Italian Colors meets the first element of the oddball test because its facts are atypical.[189] The plaintiffs in *Italian Colors* are merchants who are at least to some degree sophisticated parties.[190] Merchants are positioned differently than the average consumer that is bound by credit card agreements. Merchants have more financial resources, more experience in commercial dealings, and more ability to protect their

183. *Id.* at 217. As support, the merchants offered an expert opinion that the cost would be somewhere between "$300 thousand and $2 million" to get the expert assistance they would need in such an antitrust case. *Id.*

184. *Id.* at 212.

185. 531 U.S. 79, 90-92 (2000).

186. *Italian Colors Rest.*, 667 F.3d at 219.

187. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (2012).

188. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 1236 (2013).

189. "Plaintiffs are merchants who have sued American Express over the terms AmEx imposes on merchants who accept AmEx credit cards from consumers. Thus, the Court will have the opportunity to issue yet another pro-arbitration ruling in a context that hides the anti-consumer/employee effect the ruling will have on the vast majority of cases now subject to the FAA." *Lopsided Arbitration Agreement*, *supra* note 162.

190. *See* Italian Colors Rest., 667 F.3d at 207.

interests than the everyday consumer.[191]

Italian Colors meets the second element of the test because it will likely create a significant change in the law, in two ways. First, the Court in *Green Tree Financial Corp v. Randolph* held that arbitration agreements can be invalidated because of high-prohibitive costs;[192] allowing the *Italian Colors* arbitration agreement to be enforced notwithstanding prohibitive costs will change the law. Second, the Court in *Italian Colors* seems primed to eviscerate a defense that many lower courts have used to strike down lopsided arbitration agreements: that enforcing an arbitration agreement containing lopsided terms in a case involving statutory claims (in the employment context, typically employment discrimination claims) would interfere with the vindication of federal statutory rights.[193] After *Concepcion* eviscerated the unconscionability defense to lopsided arbitration agreements, the one defense left is that they interfere with the vindication of federal statutory rights.[194] "In other words, when a lopsided arbitration agreement forces a court to choose between enforcing the FAA on the one hand and vindicating Title VII rights on the other, courts should choose the latter."[195] If the Court, as expected eliminates this defense,[196] that will represent a significant change in law and an equally significant "promotion" of the FAA into a statute with primacy over all federal substantive statutes.[197]

Third, if the Court reverses, the decision may be based upon the atypical facts as opposed to the legal principles. The principle contained in *Green Tree* is fairly straightforward. If there is a case that meets the *Green Tree* cost requirement, it is *Italian Colors*. However, the atypical fact of the parties being merchants as opposed to the *Green Tree* principle might motivate the ruling. The Court will likely rule in favor of American Express for four reasons. First, despite the fact that it would be impractical to do so, the merchants are able to advance their claims individually. Second, the Court will argue that the plain language of the FAA trumps the policies behind Title VII and other federal statutes. Third, the Court will argue that the FAA trumps later written statutes because if Congress wanted to preclude arbitration in the

191. *See id.* at 207-08.
192. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90-92 (2000).
193. *Lopsided Arbitration Agreement*, *supra* note 162.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*

statutes, it could have easily placed a waiver in them. Fourth, the Court will use the oddball fact that the parties were merchants to hold them more accountable to the agreements they sign. If the Court uses these four reasons, especially the fact that the parties are merchants in reaching its decision, it will have used a set of atypical facts to come to its holding.

The fourth element of the test is met because the Court's holding will create a serious concern for other parties in these types of disputes. The Court's destruction of the "interfered with enforcement of federal-statutory rights" defense will have an effect not only on sophisticated parties like the merchants in *Italian Colors*, but will also affect non-sophisticated consumers and employees. The ruling will come "in a context that hides the anti-consumer/employee effect the ruling will have on the vast majority of cases now subject to the FAA."[198] The Court's position seems logical in the sophisticated party context, but it really is not logical if applied outside of the sophisticated party context – precisely the oddball problem. This article stands for the proposition that the two situations are different, but argues that the Court will use this oddball situation involving sophisticated parties to create a pro-arbitration holding that will extend to non-sophisticated parties like consumers and employees. Many other cases involving consumer and business arbitration agreements such as *Green Tree* have been applied in the employment setting,[199] and this case would seem to be no different.

IV. ANALYSIS

The Supreme Court has chosen for its arbitration docket a set of cases with wholly atypical fact patterns in what appears to be a deliberate effort – successful so far – to advance its pro-arbitration policy agenda without provoking a political backlash. This section first identifies the Court's pro-arbitration agenda. It then discusses how the Court has used a series of oddball cases to further that agenda. This section then concludes by discussing why the Court's use of oddball arbitration cases creates bad arbitration law.

A. The Court's Pro-Arbitration Agenda

The Court's pro-arbitration bias can be demonstrated in two ways.

198. *Id.*

199. *See, e.g.*, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000).

The first is its outcome-oriented jurisprudence. Over the last several decades, the Court has never seen an arbitration clause that it did not like, except in the rare case in which the arbitration clause disfavors a politically or economically powerful party.[200] One prominent scholar has characterized the Court's results-oriented arbitration jurisprudence as "among the worst examples in the Court's history."[201]

The second piece of evidence of the Court's pro-arbitration agenda is its willingness to abandon its textual approach in reviewing agreements under the FAA. Justice Scalia is arguably the strongest textualist on the Court. Ironically, he is also the drafter of the majority opinion in *Concepcion*.[202] In his opinions, Justice Scalia often demonstrates his textual principles. In *Oncale v. Sundowner Offshore Services Inc.*, Justice Scalia wrote "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[203] Despite Justice Scalia's strong preference toward textualism demonstrated in *Oracle*, in *Concepcion*, he was willing to completely ignore the text of the FAA in enforcing an agreement to arbitrate despite the presence of a legitimate contract defense under well-established California law.[204] The only plausible conclusion for this abandonment of textualism is the Court's pro-arbitration agenda.

B. The Court has Recently Used Oddball Cases to Advance its Agenda

The Court has recently used three oddball cases to advance its pro-arbitration agenda. This section reviews how each of these oddball cases is being used to further the Court's agenda.

First, in *14 Penn Plaza LLC*, the Court held a clause requiring the submission of claims to arbitration was binding on an individual despite the fact that the clause was negotiated by a union on behalf of that individual.[205] *14 Penn Plaza LLC* involved a very specific arbitration clause that was abnormal in the sense that most unions and employers

200. Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 798 (2012).

201. *Id.* at 800-801.

202. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

203. Oncale v. Sundowner Offshore Svcs., Inc., 523 U.S. 75, 79 (1998).

204. Conception, 131 S. Ct. at 1748, 1753.

205. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273-74 (2009).

would not have agreed to it because it was so specific.[206] *14 Penn Plaza LLC* was an attempt by the Court to take an arbitration clause that was extremely atypical, and to create a holding that could be applied anytime a union negotiated a waiver, not just when the waiver was so specific like in the case.

Second, in *Concepcion*, the Court used an abnormal situation involving an arbitration agreement to advance its agenda. The arbitration clause in question was very lopsided toward the consumer, and allowed the consumer to easily be made whole. The problem is, not all arbitration agreements are so friendly. By using a very pro-consumer arbitration agreement to destroy the unconscionability defense, the Court was able to provide a smokescreen to its anti-consumer ruling. If the Court would have destroyed the unconscionability defense in an agreement that provided a consumer no other means of relief, its holding would have been far more politically unpopular. In this case, the consumer had other means of relief, but the Court's rule, if applied to agreements that favor the business, would have resulted in the opposite.

Third, in *Italian Colors*, the Court has again taken a case with extremely atypical facts and is likely in the process of creating yet another pro-arbitration ruling predicated upon an oddball situation. In *Italian Colors*, the parties to a credit card agreement are merchants.[207] In order to litigate their dispute individually, the merchants will have to incur significant costs. The Court will likely in this case bind the merchants to their agreement to arbitrate individually despite the presence of the high costs because of "their sophistication." The holding may seem reasonable in this case with a sophisticated party, but might be very disadvantageous if it is applied to non-sophisticated parties like the everyday consumer. The Court is currently reviewing the case and, thus, it is unknown what the outcome will be.

Each of these cases demonstrates how the Court has chosen cases with strange fact patterns to create broad holdings applicable to other cases, many with far different facts. The next section discusses why this is problematic for society as a matter of public policy.

C. Why Creating Policy with Oddball Cases is Bad

Creating public policy using oddball cases to create precedent is a

206. *See supra* Part III.B.2.

207. Italian Colors Rest. v. Am. Express Travel Related Servs. Co., 667 F.3d 204, 207 (2d Cir. 2012).

bad idea because it permits the Court to create legal rules that, while perhaps creating a just outcome in the oddball cases themselves, create unjust outcomes in the typical cases that much more commonly appear in the lower courts. Before *14 Penn Plaza LLC, Concepcion,* and *Italian Colors*, employees and consumers had two strong defenses. Employees and consumers could assert the unconscionability defense or the "interferes-with-vindication-of-statutory-rights" defense in order to escape the arbitration agreement.[208] In the three oddball cases, the Court used atypical cases (in *14 Penn Plaza LLC* a case involving an abnormally specific waiver of rights;[209] in *Concepcion* a case involving arbitral provisions abnormally skewed to favor the consumer;[210] in *Italian Colors* involving an atypical party, the sophisticated merchant[211]) to eviscerate these two important defenses. The problem is the new rule gutting these defenses will apply not only to arbitration agreements with procedures that favor the weaker party, but also to the far more typical agreements where arbitral procedures are stacked *against* the weaker consumer or employee. Because of these new rules, the weaker party will be forced to arbitrate, but will be left without the two previous defenses. This illustrates the general principle that using oddball cases to create precedent is a bad idea because it allows the Court to create legal rules based on abnormal factual situations that will later adversely affect a disadvantaged party.

V. CONCLUSION

Over the past thirty years, the Supreme Court has dramatically expanded arbitration doctrine. Beginning in the 1980's, the Court has expanded arbitration doctrine to include arbitrability of almost any dispute.[212] More recently, the Supreme Court has chosen for its arbitration docket a set of cases with wholly atypical fact patterns in a deliberate effort – successful so far – to advance its pro-arbitration policy agenda without provoking a political backlash.[213] These cases and the expansion of arbitration doctrine should be limited to ensure that

208. *See, e.g.*, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90-92 (2000).

209. 14 Penn Plaza, 556 U.S. at 251.

210. Concepcion, 131 S. Ct. at 1744.

211. *See* Italian Colors Rest., 667 F.3d at 207.

212. *See supra* Part II.B.3.

213. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Italian Colors Rest. v. Am. Express Travel Related Serv. Co., 667 F.3d 204 (2012).

parties are afforded a fair opportunity to resolve their disputes.