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Courts Gone “Irrationally Biased” in Favor of the Federal Arbitration Act?—Enforcing Arbitration Provisions in Standardized Applications and Marginalizing Consumer-Protection, Antidiscrimination, and States’ Contract Laws: A 1925–2014 Legal and Empirical Analysis

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COURTS GONE “IRRATIONALLY BIASED” IN FAVOR
OF THE FEDERAL ARBITRATION ACT?—ENFORCING
ARBITRATION PROVISIONS IN STANDARDIZED
APPLICATIONS AND MARGINALIZING CONSUMER-
PROTECTION, ANTIDISCRIMINATION, AND STATES’
CONTRACT LAWS: A 1925–2014 LEGAL AND
EMPIRICAL ANALYSIS

WILLY E. RICE*

ABSTRACT

Spanning nearly forty years, the Supreme Court has issued multiple decisions and stated categorically that “judicial hostility to arbitration” was the sole impetus behind Congress’s decision to enact the Federal Arbitration Act of 1925. In fact, before the FAA, systemic trade-specific problems and practices generated heated disputes and widespread litigation among merchants and trade organizations. Thus, to arrest those constituents’ concerns, Congress enacted the FAA. Briefly, under the FAA section 2, arbitration is mandatory if a contractual arbitration provision is valid and a controversy “arises out of the contract.” However, common-law rules of contract formation are equally clear: Standing alone, standardized-preprinted application forms are not valid contracts; thus, they not enforceable. Yet, megacorporations, international holding companies, and international financial-services corporations are increasingly fashioning standardized application forms—which contain mandatory arbitration clauses. Put simply, the consequences of such practices are severe: Before contracts are formed, applicants for goods, services and employment—ordinary consumers and workers as well as small-business owners, start-up entrepreneurs and prospective franchisees—are forced to relinquish their rights to litigate common-law and statutory claims in state and federal courts. Even more unsettling, a judicial split has evolved: Most federal courts enforce arbitration clauses in

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applications and a majority of state courts do not. Based on the compelling and unexpected legal, empirical and statistical findings surrounding the dispositions of motions to compel arbitration in state and federal courts, the Article encourages Congress to address the concerns raised here and enact the recently proposed Arbitration Fairness Act of 2014.

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INTRODUCTION

By several measures, *Mitchill v. Lath*¹ and *Lucy v. Zehmer*² are “classic contract” cases.³ For nearly sixty years, they have been prominent opinions in the overwhelming majority of contract-law casebooks.⁴ Quite simply, many law professors—who teach first-year students—rely heavily on *Mitchill* and *Lucy* to help explain several foundational principles of contract law. Among other reasons, *Mitchill* and *Lucy* are celebrated because the facts in both cases are remarkably familiar and captivating. In addition, those uncomplicated facts help budding jurists to understand arguably the more complex and less exciting principles of contract of law.

First, consider the most prominent and intriguing facts in *Lucy v. Zehmer*. Welford Ordway Lucy (Lucy) and John C. Lucy were brothers, lumbermen and farmers.⁵ They resided in Dinwiddie County, Virginia.⁶ Adrian Hardy Zehmer (Zehmer) and Ida S. Zehmer—husband and wife—lived in McKenney, Virginia—where they “operated a restaurant, filling station and motor court.”⁷ Additionally, the Zehmers owned the Ferguson Farm—approximately 472 acres of land in Dinwiddie County.⁸

On a wintry evening in December 1952, Lucy and his employee visited Zehmer’s restaurant.⁹ “Lucy took a partly filled bottle of whiskey into the

¹ 160 N.E. 646 (N.Y. 1928).

² 84 S.E.2d 516 (Va. 1954).

³ See Lawrence A. Cunningham, *Toward a Prudential and Credibility-Centered Parol Evidence Rule*, 68 U. CIN. L. REV. 269, 271 (2000) (employing “the classic case of *Mitchill v. Lath* to contrast ... Willistonian[’s] ... four corners [doctrine] ... with Corbin’s [prior-agreements evidence rule to determine] whether [certain] evidence is admissible”); Jean Fleming Powers, *Promissory Estoppel and Wagging the Dog*, 59 ARK. L. REV. 841, 881 (2007) (“The parol evidence rule cases especially show how promissory estoppel can be used to undercut a longstanding rule. Consider the classic case of *Mitchill v. Lath*.”); Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 381 (2007) (explaining that *Lucy v. Zehmer* is one of the “classic cases” used to demonstrate the “objective theory of contracts”).

⁴ See Kenneth M. Alfano, *Copyright in Exile: Restoring the Original Parameters of Exclusive Reproduction*, 11 J. TECH. L. & POL’Y 215, 242 n.117 (2006) (noting that *Lucy v. Zehmer* “is a fixture of many law school Contracts casebooks”); Douglas L. Leslie, *How Not To Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the Casefile Method*, 44 ST. LOUIS U. L.J. 1289, 1300 (2000) (commenting on the “frequency with which *Lucy v. Zehmer*” appears in contracts casebooks); Barak Richman & Dennis Schmelzer, *When Money Grew On Trees: Lucy v. Zehmer and Contracting In A Boom Market*, 61 DUKE L.J. 1511, 1515 (2012) (presenting evidence to support that assertion that *Lucy v. Zehmer* is a famous contract case that appears in first-year contract casebooks); see also WILLY E. RICE, *CONTRACT LAW: PRACTICE, INTERPRETATION, AND ENFORCEMENT* 87, 469 (2014).

⁵ *Lucy*, 84 S.E.2d at 517–18.

⁶ *Id.* at 517.

⁷ *Id.* at 518.

⁸ *Id.* at 517.

⁹ *Id.* at 518.

restaurant ... for the purpose of giving Zehmer a drink.”¹⁰ After Lucy and Zehmer consumed a considerable amount of alcohol, the following exchange occurred:

Lucy: “I bet you wouldn’t take \$50,000 for [Ferguson Farm].”

Zehmer: “Yes, I would too; you wouldn’t give fifty.”

Lucy: “[Yes. I] would. ... [W]rite up an agreement to that effect.”¹¹

Zehmer secured a restaurant check and wrote the following on the back: “We ... agree to sell to W. O. Lucy the Ferguson Farm complete for \$50,000, title satisfactory to buyer.”¹² Both Zehmers signed the “memorandum” and gave it to Lucy.¹³ In response, Lucy offered \$5 for the Zehmers’ signatures.¹⁴ But Zehmer refused that offer and stated: “You don’t need to give me any money, you got the agreement there signed by both of us.”¹⁵ “Lucy left the premises insisting that he had purchased the farm.”¹⁶ The Zehmers disagreed, and Lucy sued for specific performance.¹⁷

In their answer, the Zehmers raised several defenses: (1) Lucy’s \$50,000 offer “was made in jest”;¹⁸ (2) Zehmer “did not deliver the memorandum to Lucy ... [who simply] picked it up [and] put it in his pocket”;¹⁹ (3) Zehmer refused to accept Lucy’s \$5 offer after realizing that Lucy was serious;²⁰ (4) Zehmer “had no intention of selling the farm, [because] the whole matter was a joke”;²¹ (5) Zehmer claimed that he “was high as a Georgia pine” during the transaction;²² and, (6) Lucy and Zehmer were just “two doggoned drunks bluffing to see who could talk the biggest and say the most.”²³

The Supreme Court of Virginia rejected the Zehmers’ defenses—declaring that the simple memorandum of understanding was a binding contractual agreement.²⁴ Ultimately, the supreme court ordered the Zehmers

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 517–18.

¹³ *Id.* at 518.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 517.

¹⁸ *Id.* at 517–18.

¹⁹ *Id.* at 518.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 520.

²³ *Id.*

²⁴ *Id.* at 522 (“[T]he writing signed by the defendants and ... by the complainants was the result of a serious offer by Lucy and a serious acceptance by the [Zehmers], or was a serious

to sell the farm to Lucy and his brother.²⁵ The sale was ordered, even though only a few words appeared in a short, unsophisticated memorandum of understanding. Even more importantly, the Virginia Supreme Court reaffirmed several extremely important principles of contract law: (1) “An agreement or mutual assent is ... essential to a valid contract”;²⁶ (2) “[t]he mental assent of the parties is not requisite for the formation of a contract”;²⁷ and, (3) “[an offeror may not assert] that he was merely jesting when his conduct and words would warrant a reasonable [offeree to believe that the offeror was presenting] a real agreement.”²⁸

Twenty-six years before the Virginia Supreme Court decided *Lucy*, the New York Court of Appeals decided *Mitchill v. Lath*.²⁹ The controversy in *Mitchill* also concerned whether the specific performance was warranted under an allegedly bargained-for contract.³⁰ Consider the simple facts in the case. Charles Lath and his business partner owned a farm and wanted to sell it.³¹ Lath also owned an icehouse.³² The latter sat on Lieutenant Governor Lunn’s land, which was directly across the road in front of Lath’s land.³³ Standing on Lath’s land, one could see the icehouse.³⁴

Catherine Mitchill approached Lath, looked at Lath’s farm and decided to make a purchase.³⁵ But there was a condition precedent: she wanted Lath to remove the icehouse on the Governor’s land, because “the icehouse [was] objectionable.”³⁶ Accepting the condition, Lath “orally promised” to remove the icehouse.³⁷ Lath’s *oral, stand-alone promise* was given as consideration

offer by Lucy and an acceptance in secret jest by the [Zehmers] [I]n either event, it constituted a binding contract of sale between the parties.”) The supreme court also outlined other reasons for rejecting the Zehmers’ defenses: (1) “Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed”; (2) “Zehmer was not too drunk to make a valid contract”; (3) Lucy believed that Zehmer’s offer was “a serious business transaction” rather than “a joke”; (4) “Zehmer [never] indicated to Lucy by word or act that [Zehmer] was not in earnest about selling the farm”; and (5) “[t]here was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties.” *Id.* at 520–22.

²⁵ *Id.* at 522–23.

²⁶ *Id.* at 522.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.* at 516; *Mitchill v. Lath*, 160 N.E. 646, 646 (N.Y. 1928).

³⁰ *See Mitchill*, 160 N.E. at 646.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

for Mitchill's *contractual promise* to purchase Lath's farm.³⁸ Therefore, "[relying upon Lath's oral promise, Mitchill executed] a written contract to buy the property for \$8,400."³⁹

As activities progressed, Mitchill received the deed and took possession of the farm, intending to use it as a summer residence.⁴⁰ To help achieve the latter goal, Mitchill "spent considerable sums [of money to improve] the property."⁴¹ However, one unexpected development prevented Catherine's residential plan from coming to fruition: Lath breached the oral, stand-alone promise and refused to remove the icehouse.⁴² Catherine commenced an action for specific performance in a court of equity.⁴³

Before the lower courts and the Court of Appeals, Lath advanced the parol evidence rule as an affirmative defense.⁴⁴ Simply stated, the parol evidence rule places limitations on parties' contractual obligations and/or prevents parties from tampering with totally integrated, written contracts.⁴⁵ Justice Andrews wrote the opinion in *Mitchill*, and he reaffirmed a settled principle of contract: generally, oral testimony will not alter or contradict the terms of a written contract.⁴⁶ Of course, there is an exception to the rule: if parties intentionally fashion one agreement wholly or partly as consideration for a second and simultaneous agreement, the two are "necessarily bound together."⁴⁷ Whether a bond between two agreements is sufficiently close, however, can become a major dispute—like the controversy in *Mitchill*.

In the end, Justice Andrews declared that Mitchill and Lath's written, real-estate contract was "a full and complete agreement, setting forth in detail the obligations of each party."⁴⁸ To reach that conclusion, Justice Andrews observed: if the parties had fashioned an "icehouse agreement," it would most naturally appear in the real-estate contract.⁴⁹ Yes. The oral "icehouse agreement" was "closely related to the subject ... in the written agreement."⁵⁰

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *infra* Part I.C and accompanying notes.

⁴⁶ See *Mitchill*, 160 N.E. at 646–47.

⁴⁷ See *id.* at 647 (citing SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 637 (1920)).

⁴⁸ *Id.* at 647.

⁴⁹ *Id.* ("The presence of the icehouse, even the knowledge that Mrs. Mitchill thought it [was] objectionable, would not lead [one to believe] that a separate agreement existed with regard to it.").

⁵⁰ *Id.*

However, the oral, stand-alone promise was a collateral agreement; therefore, Catherine could not introduce it as evidence of an enforceable contractual obligation.⁵¹

Each September, for nearly a quarter of a century, the author has witnessed a remarkable phenomenon: Interesting cases like *Lucy* and *Mitchill* encourage first-year law students to fashion exceptionally intelligent, novel, thought-provoking and commonsensical questions. To illustrate, consider an alleged incident that nearly wrecked the life of a twenty-seven-year-old law student (“Jessica”).⁵² Six years before entering law school, Jessica applied for an apartment in an “upscale-50-plus-residential community.”⁵³

The two-page, standardized application form contained six paragraphs.⁵⁴ One paragraph was a mandatory-arbitration clause.⁵⁵ The latter provision banned all trial-by-jury and trial-by-judge lawsuits—requiring tenants to arbitrate all constitutional rights, common law, and civil rights disputes before private arbitrators.⁵⁶ Jessica allegedly “*forgot to complete and sign the application.*”⁵⁷ Still, the associate-female manager told Jessica: “Don’t worry about it.”⁵⁸ Ultimately, Jessica signed a one-year lease.⁵⁹ The contract, however, *did not contain a mandatory-arbitration provision.*⁶⁰

A few months after Jessica moved into her apartment, the senior male manager allegedly wanted “to spend time” with Jessica and her new baby.⁶¹ Jessica, however, refused the manager’s “romantic and fatherly advances.”⁶² In response, the senior manager allegedly harassed Jessica—“making [her] life hell on earth.”⁶³ Later, the same manager forced Jessica to vacate the apartment, allegedly asserting: “You and your illegitimate child are trespassers. You are not 50-years-old. Leave!”⁶⁴

⁵¹ *Id.* (“The collateral agreement was made with [Mrs. Mitchill]. The contract of sale was [made] with her husband [N]o assignment of it from him appears. Yet the deed was given to her. It is evident that ... a transaction in which she was the principal from beginning to end [occurred]. We must treat the contract ... as it was in fact, made by her.”).

⁵² E-mail from Former First-year Law Student to Author (Nov. 3, 2009, 5:53 PM, CST) (on file with author). In oral conversations, the student revealed the material details—those reported in this Article—about her experiences.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

The then-twenty-one-year-old Jessica contacted an attorney, who concluded that she had viable claims under several federal statutes: The Fair Housing Act of 1968,⁶⁵ the Civil Rights Act of 1866—sections 1981⁶⁶ and 1982,⁶⁷ and the Age Discrimination Act of 1974.⁶⁸ Furthermore, the attorney reported that Jessica probably had sound common law assault and breach of contract claims.⁶⁹ On several occasions, Jessica considered filing a multi-action lawsuit against the senior-male manager and the residential community.⁷⁰ In the end, however, she vacated her apartment and decided not to sue.⁷¹

When the twenty-seven-year-old Jessica entered law school, she read *Lucy and Mitchill*. And, in the course of events, she raised three questions: (1) whether her former fifty-plus standardized apartment application was an enforceable memorandum of understanding—like the controversial memorandum in *Lucy v. Zehmer*; (2) whether her uncompleted and unsigned lease application was a binding contract, (3) whether the mandatory-arbitration clause in her defunct apartment application was enforceable, absent probative evidence of any bargained-for exchange consideration; and (4) whether—under the parol evidence rule—the provisions in her uncompleted and unsigned application could have altered or amended the terms in her signed lease agreement.⁷²

To be sure, during Jessica's tenure in law school as well as today, state and federal courts are still grappling with each question. For example, preliminary agreements appear in many forms.⁷³ Consequently, judicial

⁶⁵ 42 U.S.C. §§ 3601–3619 (2012) (outlawing housing discrimination under Title VIII of the Civil Rights Act of 1968).

⁶⁶ 42 U.S.C. § 1981(a) (2012) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”).

⁶⁷ *Id.* § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

⁶⁸ 42 U.S.C. § 6102 (2012) (“[N]o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.”).

⁶⁹ E-mail from Former First-year Law Student, *supra* note 52.

⁷⁰ *Id.*

⁷¹ *Id.* at 14.

⁷² *Id.*

⁷³ RICE, *supra* note 4, at 76–77 (outlining some familiar preliminary agreements—“memoranda of understanding,” “earnest money agreements,” “deposit receipts,” “temporary insurance binders,” “conditional binding receipts,” “letters of intent,”

splits continue to evolve over whether parties' precontractual agreements are valid and enforceable contracts.⁷⁴ Such conflicts persist even though a rich body of law has developed to answer the question: whether a memorandum of understanding is an enforceable contract.⁷⁵ Moreover, even assuming that standardized application forms are not memoranda of understanding or preliminary agreements, one is still left with a pressing question: whether a signed or an unsigned completed application is a valid and legally enforceable contract.

The latter question continues to be timely and important for two reasons. First, like preliminary agreements, standardized application forms are ubiquitous.⁷⁶ Furthermore, there are many types: applications for goods, services, employment, membership, prizes, housing as well as applications for one's gaining admission to a multitude of programs and institutions.⁷⁷ Arguably,

"commitment letters," and "agreements in principle"); *see also* *Global Seafood Inc. v. Bantry Bay Mussels Ltd.*, 659 F.3d 221, 223 (2d Cir. 2011) (discussing a less familiar preliminary agreement entitled "heads of agreement."); *Teachers Ins. & Annuity Ass'n v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987) (discussing letters of intent and commitment letters).

⁷⁴ *See, e.g.*, *Columbia Park Golf Course, Inc. v. City of Kennewick*, 248 P.3d 1067, 1080 (Wash. App. 2011) (Korsmo, J., dissenting) ("Courts across the country, and commentators as well, are split on the enforceability of agreements that contemplate future agreements."); *see also* Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 662 (2007) ("For decades, there has been substantial uncertainty regarding when the law will impose precontractual liability Courts have divided ... over the question of liability when parties make reliance investments following a 'preliminary agreement.' A number of modern courts impose a duty to bargain in good faith on the party wishing to exit such an agreement. Substantial uncertainty remains, however, regarding when this duty attaches and what the duty entails."); *cf.* *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 547 (2d Cir. 1998) ("Parties to proposed commercial transactions often enter into preliminary agreements, which may provide for the execution of more formal agreements. When they do so and the parties fail to execute a more formal agreement, the issue arises as to whether the preliminary agreement is a binding contract or an unenforceable agreement to agree.").

⁷⁵ *See infra* Part I.B and accompanying notes.

⁷⁶ *Cf.* Alison Doyle, *How Many Applicants Are There for Each Job Opening* (Aug. 18, 2013), <http://jobsearch.about.com/b/2013/08/18/the-number-of-job-applications-per-opening.htm> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/P7R5-9JPR> ("Google, the company where just about everyone would love to work, gets over a million job applications each year and reportedly only hires .4 – .5% of applicants. Last year, Walmart reportedly received 5 million applications. Depending on the time of the year, there are 15,000–50,000 job openings at Walmart.").

⁷⁷ *See, e.g.*, Cathie A. Shattuck, *The Tort of Negligent Hiring and the Use of Selection Devices: The Employee's Right Of Privacy and the Employer's Need to Know*, 11 INDUS. REL. L.J. 2, 6 (1989) (reporting that "most companies use general application forms"); J. Craig Wallace, Mary G. Tye & Stephen J. Vodanovich, *Applying for Jobs Online: Examining the Legality of Internet-Based Application Forms*, 29 PUB. PERSONNEL MGMT. 497, 500 tbl.2 (2000).

absent the widespread use of standardized applications, face-to-face transactions and interviews would increase dramatically. In turn, efficient operations of most small-to-large institutions, industries and professions would probably decrease substantially and business costs would increase.⁷⁸

Therefore, given the ubiquity and use of applications forms, disputes over whether such forms create legal rights or obligations are exceedingly common. But consider the pressing question in this Article: whether the Federal Arbitration Act of 1925 (FAA)⁷⁹ governs the enforceability of arbitration clauses in standardized application forms? Without doubt, this question has generated serious splits between and among federal and state courts.⁸⁰ Furthermore, as discussed later and more extensively in this Article, the Supreme Court has fashioned extremely liberal policies—those favoring the enforcement of mandatory-arbitration provisions in binding contracts as well as in non-binding instruments.⁸¹

Even more disquieting, all too many inferior state courts as well as federal courts have embraced and applied the Supreme Court's "liberal" arbitration policies—without seriously questioning the wisdom of such policies.⁸² And in the wake, two adverse consequences have developed: (1) federal courts routinely ignore or refuse to weigh carefully and intelligently states' settled principles of contract law when deciding whether to coerce applicants into binding arbitration; and (2) the Supreme Courts' admittedly and, arguably, excessively pro-arbitration bias has encouraged lower courts to marginalize or ignore consumer protection, antidiscrimination, and civil rights laws, when the latter tribunals are considering whether to enforce arbitration clauses in standardized application forms.⁸³

Unquestionably, a few commentators have sounded the alarm—questioning the wisdom of courts' willingness to enforce mandatory-arbitration provisions in applications.⁸⁴ Those discussions, however, have been fairly

⁷⁸ But see James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1684 (1991) ("Law schools have you fill out lengthy application forms which require you not only to provide your GPA and your LSAT score, but also to describe your unique abilities and experiences, and the ways in which you might add to the rich fabric of the law school class. It takes you about eighty hours to fill out each of these forms When the law school receives your application, it banks your check, adds up your GPA and your LSAT, and throws the rest of the application away.").

⁷⁹ 9 U.S.C. §§ 1–16 (2012).

⁸⁰ See *infra* Part IV and accompanying notes.

⁸¹ See *infra* Part III and accompanying notes.

⁸² See *infra* Part IV and accompanying notes.

⁸³ See *infra* Part IV and accompanying notes.

⁸⁴ See Richard A. Bales, *Contract Formation Issues In Employment Arbitration*, 44 BRANDEIS L.J. 415, 444–45 (2006) (discussing a single case involving the enforceability of an arbitration clause in an employment application); Richard A. Bales and Sue Irion, *How Congress Can Make A More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081,

brief—appearing essentially as statements or conclusion in the literature.⁸⁵ Certainly, the FAA covers enforceable contracts.⁸⁶ But, completed and signed application forms generally are not contracts under state laws.⁸⁷ Like many memoranda of understanding, applications are simply unenforceable written representations or preliminary agreements. Moreover, the FAA’s “savings clause” instructs courts to weigh states’ contract laws and equitable principles extremely carefully before deciding to enforce arbitration clauses in contracts.⁸⁸

Without a doubt, the question—whether courts should enforce arbitration provisions in standardized applications—is timely and important. Yet, this question has received surprisingly little serious research and legal analysis. Therefore, the purpose of this Article is to present a comprehensive and an interdisciplinary—historical, legal, empirical and statistical—explanation of the pressing and general question: whether federal and state courts are equally more or less likely to apply section 2 of the FAA and enforce mandatory-arbitration clauses in standardized application forms? There is, of course, an equally important auxiliary question: whether state and federal courts allow legal as well as extralegal factors to influence decisions to enforce or not enforce arbitration clauses in standardized applications?

Part I begins the discussion by presenting an extremely brief review of several common law rules regarding the following: (1) the formation of a valid contract, (2) bargained-for consideration and the enforcement of a valid contract, (3) the enforceability of memoranda of understanding and other preliminary agreements, (4) the applicability of the parol evidence rule, and (5) the enforceability of applications for products, services, employment, residential and commercial tenancy, admissions, and membership in various associations, organizations and institutions.

Part II presents an even shorter review of disgruntled applicants’ federal and state statutory theories of recovery. Fairly often, in their underlying lawsuits, applicants allege that defendants violated one or a combination

1088–90 (2009) (citing three employee application forms cases and briefly proposing ways to make the FAA more equitable); Stacy A. Hickox, *Ensuring Enforceability and Fairness In The Arbitration of Employment Disputes*, 16 WIDENER L. REV. 101, 114–15 (2010) (briefly reporting four courts’ decisions in cases involving the enforcement of arbitration clauses in employee’s application forms); Linda M. Lasley, Keith Maurer & H. Wesley Sunu, *Recent Developments In Alternative Dispute Resolution*, 41 TORT TRIAL & INS. PRAC. L.J. 123, 133 (2006) (reporting—without providing an analysis—a single Sixth Circuit dispute over whether an arbitration clause in an employment application was enforceable).

⁸⁵ See articles cited *supra* note 84.

⁸⁶ See *infra* Part III and accompanying notes.

⁸⁷ See *infra* Part I and accompanying notes.

⁸⁸ See *infra* Part III and accompanying notes.

of federal and state consumer protection, civil rights and/or antidiscrimination laws.⁸⁹ In those same underlying lawsuits, defendants file motions to compel the applicants/plaintiffs to arbitrate the disputed claims before a private arbitrator.⁹⁰ On other occasions, defendants initiate declaratory judgment actions in courts of equity and file motions to compel arbitration.⁹¹ Still, in other instances, defendants file motions only after applicants have commenced underlying antidiscrimination, consumer protection or civil rights lawsuits in courts of law, and served copies of their complaints.⁹² Briefly put, the discussion in Part II is a necessary prerequisite for understanding the more troublesome and prevalent judicial conflicts, which are discussed in Part IV of this Article.

Part III discusses the debate surrounding the actual and purported purposes of FAA section 2—the primary focus of this Article. That section has repeatedly fostered numerous motion to compel arbitration disputes involving the following questions: (1) whether an arbitration clause in a standardized application form qualifies as a “written provision in a contract” under

⁸⁹ See *infra* Part II and accompanying notes.

⁹⁰ See, e.g., *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003) (rejecting district court’s ruling that denied defendant’s motion to compel arbitration and stay judicial proceedings in an employment religious discrimination action); *Maddox v. USA Healthcare-Adams, L.L.C.*, 350 F. Supp. 2d 968, 975 (M.D. Ala. 2004) (granting, without ruling on the merits of plaintiff’s claims, defendant’s motion to compel arbitration and stay the proceedings in an employment age discrimination action).

⁹¹ See, e.g., *Wyatt v. Virgin Islands*, 385 F.3d 801, 803–04 (3d Cir. 2004) (rejecting defendant’s petition for declaratory relief by declaring that the applicant for employment did not agree to resolve all disputes in an arbitral forum or forego substantive rights); *Whittington v. Taco Bell of Am., Inc.*, No. 10-cv-01884-KMT-MEH, 2011 WL 1772401, at *6 (D. Colo. May 10, 2011) (“Although Defendants’ motion is styled as a motion to compel arbitration, Defendants’ reply suggests that what Defendants seek is in fact a declaratory judgment regarding the enforceability of the arbitration agreement as it exists in Taco Bell job applications The Declaratory Judgment Act provides that, ‘[in] a case of actual controversy within its jurisdiction, ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.’ 28 U.S.C. § 2201(a) (2012).”); see also *Gardner v. Ryan’s*, No. 1:01CV00030, 2001 WL 1352113, at *1 (W.D. Va. Oct. 31, 2001) (“The plaintiff, Charissa Gardner, brought this action alleging racial discrimination by her employer in violation of her rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e–2000e-17 (West 1994 & Supp. 2001). Gardner also sought a declaratory judgment as to the enforceability of an arbitration agreement ... signed by the plaintiff as part of her employment application. The defendant, Ryan’s Family Steak Houses, Inc. ... has moved to dismiss the action, or in the alternative, to stay proceedings and compel arbitration in accord with the [a]greement.”).

⁹² See, e.g., *Ives v. Ramsden*, 174 P.3d 1231, 1238–39 (Wash. Ct. App. 2008) (holding that a defendant waived his right to arbitration when he moved to stay the action to allow the parties to arbitrate only after three years and four months elapsed since filing of the complaint).

section 2 of the FAA; (2) whether applicants' antidiscrimination, civil rights and harassment claims "arose out of" an enforceable arbitration clause in an employment contract, or "arose out of" an unenforceable employment-application form; (3) whether an applicant's consumer-protection claims "arose out of" an arbitration clause in a financial services contract or "arose out of" an unenforceable application for services; and (4) whether a party's failure to prove sufficient and bargained-for exchange consideration precludes the enforcement of an arbitration clause in preprinted application form. These specific questions have generated judicial splits, which are discussed in Part IV.

Once more, it is important to stress: many federal and some state courts routinely cite and apply FAA section 2 and enforce arbitration clauses in all sorts of applications for employment, services, goods, benefits and memberships.⁹³ Under the common law, however, standardized and stand-alone applications are not valid and enforceable contracts.⁹⁴ Even more importantly, a large body of congressional and historical evidence exists to support two assertions: (1) Congress never intended for the FAA section 2 to marginalize or preempt state principles of contract law; and (2) Congress never envisioned for the FAA section 2 to govern the enforceability of arbitration clauses in standardized application forms.⁹⁵ Part III presents the historical and congressional evidence.

Finally, Part V presents a case study. The reported findings are based on an analysis of approximately one thousand federal and state court cases. More specifically, Part V outlines and discusses the substantive and procedural dispositions of motion to compel arbitration disputes—those involving the enforceability of arbitration clauses in standardized application forms as well as in standardized and negotiated contracts. Quite simply, the statistically significant findings reported in Part V reveal several unintended and troublesome consequences: (1) federal courts' motion to compel arbitration rulings muddle markedly settled, common law principles of contract; (2) state and federal courts' decisions undermine or marginalize consumer protection laws; and (3) federal courts' section 2 rulings effectively preempt the application of antidiscrimination statutes, thereby precluding applicants-litigants from securing remedies under those statutes.

Certainly, Congress did not enact the FAA to undermine federal and state civil rights, antidiscrimination, and consumer protection statutes. Therefore, the Article concludes by encouraging Congress to enact a previously proposed statute entitled, "The Arbitration Fairness Act." The evidence in the study strongly suggests that some state courts and most federal courts

⁹³ See *infra* Part IV and accompanying notes.

⁹⁴ See *infra* Part I and accompanying notes.

⁹⁵ See *infra* Part III and accompanying notes.

will continue to enforce arbitration provisions in all sorts of standardized applications and bar disgruntled applicants' access to courts of law—unless Congress acts.

I. BRIEF OVERVIEW OF PERTINENT, COMMON LAW PRINCIPLES OF CONTRACT

A. The Formation and Enforcement of Valid Contracts

Put simply, “[a] contract is an agreement between two or more parties.”⁹⁶ Under the terms of an agreement, parties promise to do something for each other’s benefit.⁹⁷ Or, one party promises to abstain from engaging in a certain activity for the benefit of the other party.⁹⁸ In addition, contractual agreements appear in many flavors: (1) express—oral and written, (2) implied-in-fact, and (3) implied-in-law.⁹⁹

Settled law is clear: only “valid” contracts are enforceable in courts of law and equity. Therefore, to enforce an agreement, a party must establish a “valid” contract by presenting prima facie or probative evidence of the following: (1) each party’s intent to be mutually bound under the terms of the contract; (2) one party’s offer; (3) the other party’s acceptance of the offer; (4) the parties’ meeting of the minds regarding the “undertaking”; (5) each party’s consent to the terms of the contract; (6) the execution of the contract; and (7) the “delivery” of the contract.¹⁰⁰

⁹⁶ See, e.g., *Boland v. Catalano*, 202 Conn. 333, 336 (1978) (“A contract is an agreement between parties whereby one of them acquires a right to an act by the other; and the other assumes an obligation to perform that act.”); *State v. Atwood*, 301 P.3d 1255, 1258 (Haw. 2013) (“A contract is an agreement between two or more persons which creates an obligation to do or not do something.”); *McCraw v. Llewellyn*, 123 S.E.2d 575, 578 (N.C. 1962) (“A contract is an agreement between two or more persons upon sufficient consideration to do or to refrain from doing a particular act.”).

⁹⁷ See cases cited *supra* note 96.

⁹⁸ *La Salle Nat’l Bank v. Vega*, 520 N.E.2d 1129, 1131 (Ill. App. 1988) (“[A] contract is an agreement between competent parties, upon consideration sufficient in law, to do or not to do a particular thing.”) (internal quotation marks omitted).

⁹⁹ *Legros v. Tarr*, 540 N.E.2d 257, 263 (Ohio 1989) (“[I]t is well-established that there are three classes of simple contracts: express, implied in fact, and implied in law. ‘In express contracts the assent to its terms is actually expressed in offer and acceptance. In contract implied in fact the meeting of the minds, manifested in express contracts by offer and acceptance, is shown by the surrounding circumstances, which made it inferable that the contract exists as a matter of tacit understanding Contracts implied in law are not true contracts; the relationship springing therefrom is not in a strict sense contractual In truth contracts implied in law are often called quasi contracts or constructive contracts.’”) (citations omitted); see also *Hummel v. Hummel*, 14 N.E.2d 923, 925–26 (Ohio 1938); *Columbus, Hocking Valley & Toledo Ry. Co. v. Gaffney*, 61 N.E. 152, 153–54 (Ohio 1901).

¹⁰⁰ See *Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex. App. 1999).

Furthermore, even if a contract is “valid, courts will not enforce it unless sufficient consideration supports the agreement.”¹⁰¹ Quite simply, a contract is “a promise enforceable against the promisor if the promisee gave some consideration for the promise.”¹⁰² The consideration doctrine requires some evidence of bargained-for exchange promises, which may be exchanged acts, forbearance, or “the creation, modification, or destruction of a legal relation” for another’s benefit.¹⁰³ Moreover, bargained-for exchange consideration does not have to be extremely valuable.¹⁰⁴ In fact, the proverbial peppercorn may serve as sufficient consideration.¹⁰⁵

Of course, even if a promisee cannot establish bargained-for exchange consideration, it may be possible for a promisee to secure breach of contract damages under the theory of promissory estoppel.¹⁰⁶ Under the doctrine of promissory estoppel, a promise is binding (1) if it is offered to induce a promisee’s performance, (2) if it actually induces the promisee’s performance, and (3) if enforcing the promise prevents injustice.¹⁰⁷ To establish promissory estoppel consideration, a party must prove: (1) a promisor made a clear and definite promise, (2) the promisor’s intention was to induce the promisee’s reliance on the promise, (3) the promisee relied on the promise to his detriment or changed his position, and (4) an injustice would be avoided by enforcing the promisor’s promise.¹⁰⁸

¹⁰¹ *United States v. Prokos*, 441 F. Supp. 2d 887, 893 (N.D. Ill. 2006) (“In evaluating the consideration supporting any agreement, [a] court is only permitted to determine whether sufficient consideration supports the contract, a court is not permitted to examine the adequacy or equities of the exchange between the parties unless there is mutual mistake or the deal is so unfair that justice prevents its enforcement.”).

¹⁰² *Martindale v. Sandvik, Inc.*, 800 A.2d 872, 878 (N.J. 2002).

¹⁰³ *Shebar v. Sanyo Bus. Sys. Corp.*, 544 A.2d 377, 383 (N.J. 1988).

¹⁰⁴ *See, e.g., Traphagen’s Ex’r v. Vorhees*, 12 A. 895, 901 (N.J. Eq. 1888) (“A very slight advantage to one party, or a trifling inconvenience to the other, is a sufficient consideration to support a contract, [absent mental incapacity] ... fraud, imposition, or mistake.”).

¹⁰⁵ *See, e.g., Sfreddo v. Sfreddo*, 720 S.E.2d 145, 152–53 (Va. Ct. App. 2012) (“[A] gift has been defined as a contract *without* a consideration. Indeed, ‘by definition, a deed of gift requires no consideration.’ Consideration represents ‘the price bargained for and paid for a promise.’ It may come in ‘a benefit to the party promising or a detriment to the party to whom the promise is made’ Virginia has long followed the ‘peppercorn’ theory of consideration, under which even a peppercorn suffices as consideration. A peppercorn has been equated with a cent.”) (citations omitted).

¹⁰⁶ *In re Estate of Ross*, No. A07-1249, 2008 WL 2168640, at *5 (Minn. Ct. App. May 27, 2008).

¹⁰⁷ *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992).

¹⁰⁸ *Id.*

B. The Enforceability of Purportedly Legal Rights in Written Preliminary Agreements

Again, the definition is clear: “A contract is an agreement between two or more persons consisting of a set of promises that are legally enforceable.”¹⁰⁹ But consider these facts: “Memoranda of understanding (MOU),” “earnest money agreements,” “real estate binders,” “deposit receipts,” “temporary insurance binders,” “conditional binding receipts,” “letters of intent,” “commitment letters,” and “agreements in principle” are familiar examples of preliminary agreements.¹¹⁰ Parties fashion such temporary agreements in order to outline their intentions, weigh their options, circumvent ambiguities, escape liabilities, and consider the consequences of an undertaking before binding themselves to a permanent enforceable contract.¹¹¹ In fact, letters of intent, insurance binders, and similar temporary instruments are often called “agreements with open terms” or “agreements to negotiate.”¹¹² On the other hand, some preliminary agreements simply

¹⁰⁹ Behrens v. Wedmore, 698 N.W.2d 555, 565 (S.D. 2005).

¹¹⁰ See Global Seafood Inc. v. Bantry Bay Mussels Ltd., 659 F.3d 221, 223 (2d Cir. 2011) (discussing “heads of agreement”—a less familiar preliminary agreement); Brown v. Cara, 420 F.3d 148, 156 (2d Cir. 2005) (embracing the view that memoranda of understanding are preliminary agreements); Teachers Ins. & Annuity Ass’n v. Tribune Co., 670 F. Supp. 491, 497 (S.D.N.Y. 1987) (discussing letters of intent and commitment letters); Holman v. Musser, 212 P. 33, 35 (Cal. App. 1922) (finding that the deposit receipt was a preliminary agreement); Robinson v. Hein, No. CV92299893S, 2002 WL 450719, at *5 (Conn. Super. Ct. Mar. 4, 2002) (accepting that the real estate binder was a preliminary agreement and leaving the issue of its enforceability to a trier of fact); Kan. Pub. Emps. Ret. Sys. v. Kutak, 44 P.3d 407, 410 (Kan. 2002) (accepting without deciding that the commitment letter was a preliminary agreement); Sony Ericsson Mobile Commc’ns USA, Inc. v. Agere Sys., Inc., No. 06 CVS 17673, 2007 WL 2570180, at *3 n.4 (N.C. Super. Ct. Aug. 27, 2007) (reaffirming an “earnest money agreement” is a preliminary agreement); Sabetfard v. Smith, 760 N.Y.S.2d 525, 526 (App. Div. 2003) (finding that the real estate binder was an unenforceable preliminary agreement); Dixon v. Pickle, 327 S.W.2d 50, 53 (Tenn. App. 1959) (reaffirming the proposition that a temporary insurance binder is a preliminary agreement); Vacek Grp., Inc. v. Clark, 95 S.W.3d 439, 441 (Tex. App. 2002) (“Clark drafted an ... agreement in principle, which was described in the document as a ‘preliminary agreement.’”); see also E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 250–51 (1987) (discussing various preliminary agreements).

¹¹¹ See Cochran v. Norkunas, 919 A.2d 700, 707–08 (Md. 2007) (“[In some preliminary agreements the parties state emphatically] that they intend not to be bound until [a] formal writing is executed or [until] one of the parties has announced to the other such an intention [Other temporary agreements clearly state that the parties must embrace] one or more specific matters ... before [the] negotiations are concluded.”).

¹¹² See, e.g., Globalmart, Inc. v. Posec Hawaii, Inc., No. 28249, 2012 WL 1650697, at *7 (Haw. Ct. App. May 10, 2012) (“The ‘binding’ paragraphs of the MOU ... give Land Mark the ‘exclusive right to negotiate and enter into the Purchase Agreement’ [T]he

state that each party accepts all essential terms which appear in the written document.¹¹³ Still, other preliminary agreements are express contracts—outlining the parties’ intentions, forming a contractual relationship, and legally binding the parties to their ultimate goal or transaction.¹¹⁴

Generally, state and federal courts recognize two types of preliminary agreements—“Type I” and “Type II.”¹¹⁵ The former is an enforceable binding contract. The latter is not. A written Type I preliminary agreement is a “complete” agreement—reflecting the parties’ meeting of minds on all important negotiated issues.¹¹⁶ Since a Type I preliminary agreement is a totally integrated agreement, it legally binds both parties to their ultimate contractual objective.¹¹⁷ Conversely, a written Type II preliminary agreement is generally not legally enforceable for several reasons: (1) it binds the parties only “to a certain degree,” or to “certain major terms”; (2) it leaves “other terms open for further negotiation”; (3) it “does not commit the parties to their ultimate contractual objective”; and (4) the parties are only obligated to negotiate open issues in good faith in order to achieve the stated “objective within the agreed framework.”¹¹⁸

Once more, memoranda of understanding are preliminary agreements. Therefore, applying the Type I test,¹¹⁹ some state and federal courts have

‘binding’ terms of the MOU constitute nothing more than an agreement to negotiate and enter into a contract in the future. Therefore, the MOU is unenforceable.”); *Keystone Land & Dev. Co. v. Xerox Corp.*, 994 P.3d 945, 948 (Wash. 2004) (“The second type of agreement is an agreement with open terms. Under an agreement with open terms, the parties intend to be bound by the key points agreed upon with the remaining terms supplied by a court or another authoritative source.”).

¹¹³ *Cochran*, 919 A.2d at 708.

¹¹⁴ *Id.*

¹¹⁵ See *Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 426–27 (8th Cir. 2008); *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 548 (2d Cir. 1998) (“In some circumstances, however, preliminary agreements can create binding obligations. [In general], binding preliminary agreements fall into one of two categories.”); *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 349 (Del. 2013) (“Federal courts interpreting New York law recognize two types of binding preliminary agreements, ‘Type I’ and ‘Type II.’”).

¹¹⁶ *Teachers Ins. & Annuity Ass’n v. Tribune Co.*, 670 F. Supp. 491, 498 (S.D.N.Y. 1987).

¹¹⁷ *Adjustrite*, 145 F.3d at 548.

¹¹⁸ *Id.*

¹¹⁹ See *Brown v. Cara*, 420 F.3d 148, 154 (2d Cir. 2005) (citing *Adjustrite*, 145 F.3d at 549) (“There are four [elements which courts used to] determin[e] whether a preliminary agreement is an enforceable [Type I agreement or binding contract. They are] (1) whether there is an expressed reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.”).

declared that certain MOUs were valid, legally binding and enforceable contractual agreements.¹²⁰ In contrast, other courts have examined otherwise “valid” MOUs, applied the Type II standard,¹²¹ and concluded that the written instruments were not enforceable contracts.¹²² But consider this fact: standardized, preprinted application forms are not MOUs, conditional binders, binding receipts, agreements in principle, or temporary binders.¹²³

¹²⁰ See, e.g., *White v. AutoZone, Inc.*, 213 F. App’x 628, 629–30 (9th Cir. 2006) (“AutoZone argues that it could not have breached a contract ... because the [MOU] ... was merely a letter confirming a verbal offer and not a contract White received the [MOU] prepared and signed by Holland, an AutoZone manager, and began work ... under its terms. Therefore, both parties were contractually bound by the terms set forth in the Holland [MOU].”); *Findling v. Lossing*, No. 296841, 2011 WL 1565489, at *3 (Mich. Ct. App. Apr. 26, 2011) (“Lossing argues that, because the [MOU] was not a contract, she is not liable for any breach. She contends that the [MOU] was essentially a ‘contract to contract’ [and] that the [MOU] did not indicate what the parties intended their obligations to be, it contained no definitions, and nothing established what type of guaranty that she was to issue In this case, both parties were competent to contract with one another Further, they contracted to relinquish and redeem shares of that company respectively, as a result of the parties divorcing one another The [MOU] appears to meet all of the requirements to be deemed a valid contract.”); *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 721 S.E.2d 455, 456, 459 (S.C. App. 2011) (“The City of Columbia entered into a [MOU] with members of a development team When the City gave the project to another team ... some members of the original development team [sued] the City for breach of the MOU The City [filed] a motion for summary judgment contending [that] the MOU [was] not a contract, and the circuit court granted the motion [T]he circuit court erred [by] ruling as a matter of law that the MOU [was] not a contract [E]vidence in the facts and circumstances surrounding the MOU ... supports a reasonable inference that the MOU was a contract.”); see also *The King v. Shinfield*, [1811] 104 Eng. Rep. 709 (K.B.). In *Shinfield*, the parties signed a memorandum of understanding. *Id.* Lanesbury asserted that the memorandum stated the parties’ respective intent and was a binding apprenticeship contract. *Id.* Defendant Palmer and the King’s Bench disagreed. *Id.*

¹²¹ See *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989) (Lower courts must consider several factors to decide whether a preliminary agreement is a binding Type II agreement: “whether the intent to be bound was revealed by (1) the language of the agreement; (2) the context of the negotiations; (3) the existence of open terms; (4) partial performance; and (5) the necessity of putting the agreement in final form, as indicated by the customary form of such transactions.”).

¹²² See, e.g., *id.* at 72–73 (“The language of the [MOU]—two references to the possibility that negotiations might fail and the reference to a binding sales agreement to be completed at some future date—shows that Arcadian did not intend to be bound The language of the [MOU] reveals ... that ... API should not have believed that Arcadian intended to be bound.”); *Olszowy v. Norton Co.*, 553 N.Y.S.2d 224, 226 (App. Div. 1990) (“The function of the memorandum and related negotiating notes is merely to remind the negotiators of what was orally agreed upon during the interim period prior to the preparation and execution of the formal contract document. The memorandum is not a contract in and of itself Accordingly, only plaintiff’s conjecture, speculation, and lack of memory support his erroneous interpretation of the memorandum of agreement.”).

¹²³ See, e.g., *Hodgson v. Banner Life Ins. Co.*, 21 Cal. Rptr. 3d 907, 909 (Ct. App. 2004) (“The Banner *application form* [stated that e]xcept as provided in the *conditional receipt*

Therefore, since some MOUs, and other preliminary agreements may qualify as binding and enforceable contracts, an important question begs for an answer: whether standardized application forms are enforceable Type I preliminary agreements. Based on a conservative reading of state and federal courts' analyses and decisions, the answer is no. There is a rich, common law distinction between standardized application forms and, Type I preliminary agreements—which are often totally integrated and binding contracts.¹²⁴ The relevance of this important proposition will be discussed in Part V.

C. The Parol Evidence Rule and the Admissibility of Standardized Application Forms to Contradict or Vary Terms in Totally Integrated Written Contracts

Again, preprinted application forms appear in many varieties—benefits, employment, grant, housing, goods, insurance, loan, membership, publishing,

bearing the same number as this application, no insurance applied for will take effect until the full first premium is paid and such policy is delivered to the owner.”) (emphasis added); *Ventolas v. Berkshire Life Ins. Co.*, No. 93-3429, 1995 WL 808892, at *1 (Mass. Super. Ct. Feb. 24, 1995) (“[The corporate applicant] met with [the insurance agent] ... and applied for a disability insurance policy. The *application form* reference[d] a *conditional receipt* and [did] not by its terms make any promise of coverage.”) (emphasis added); *Wallace v. Time Ins. Co.*, 387 N.W.2d 468, 469 (Minn. Ct. App. 1986) (“Wallace contacted ... an insurance broker ... [and] completed an application for a combined policy of life and disability insurance The *application form* provided that coverage would be effective as of the date the policy was issued by the company and received by the insured unless provided otherwise in a *conditional receipt*.”).

¹²⁴ See *Optiwind v. Planning & Zoning Comm’n of Goshen*, No. LLICV084007819S, 2010 WL 4070580, at *5 (Conn. Super. Ct. Sept. 15, 2010) (“Since the *preliminary agreement* extended to the plaintiff the legal interest to build such a wind turbine, and the subject matter of the commission’s decision centered on *an application for a special permit* to construct a wind turbine, the plaintiff can demonstrate a specific, legal interest in the subject matter of the commission’s decision, and can show that the commission’s decision has specially and injuriously affected that specific personal or legal interest.”) (emphasis added); *River Glen Assocs., Ltd. v. Merrill Lynch Credit Corp.*, 743 N.Y.S.2d 870, 870 (App. Div. 2002) (citing *Adjustrite Sys., Inc. v. Gab Bus. Svcs.*, 145 F.3d 543, 549 (2d Cir. 1998)) (“We agree with the motion court that there was no binding *preliminary agreement* to negotiate in good faith plaintiff’s application for a commercial mortgage in view of the *disclaimers in the application* and the sophistication and experience of plaintiff’s principals.”) (emphasis added); see also *Brookwood Presbyterian Church v. Dep’t. of Educ.*, 940 N.E.2d 1256, 1262–63 (Ohio 2010) (“Viewing the ODE’s review of a *community-school sponsorship application* under R.C. 3314.015 as a two-stage process is further supported by the last sentence of R.C. 3314.02(C)(1), which permits any entity that falls within one of the six enumerated categories *to enter into preliminary agreements* with any person or group of individuals The ability of an eligible entity to enter into *preliminary agreements* prior to a final decision on the merits of its *application to sponsor a community school* presumes that there has been a threshold determination by ODE that an entity falls within one of the R.C. 3314.02(C)(1) categories.”) (emphasis added).

and securities registration applications.¹²⁵ And among courts' considering the issue, a majority view has emerged: standing alone, standardized application forms are not contracts.¹²⁶ On the other hand, a definitive answer to a related question remains exceptionally elusive: whether words and phrases in standardized applications may alter or contradict words and phrases in totally integrated contracts—those evolving from completed, signed and approved applications?

Briefly, the parol evidence rule is a commonsensical doctrine that memorializes and protects parties' contractual intentions, rights, obligations and reasonable expectations.¹²⁷ More specifically, the parol evidence rule prevents a party from introducing extrinsic evidence—prior or contemporaneous, written or oral agreements—to contradict or vary terms in an unambiguous written contract.¹²⁸ Or, when a written instrument facially expresses parties' final contractual agreement, the parol evidence rule prevents a party from adding more contractual undertakings, terms, conditions, exclusions and/or limitations.¹²⁹ Moreover, attempting to introduce oral or extrinsic evidence becomes even more difficult, if a written contract contains a merger clause. Quite often, merger clauses will state that the writing is the complete integration of the parties' intentions.¹³⁰

¹²⁵ See, e.g., *Cent. Ohio Alt. Program v. Ballinger*, No. 3:06CV01083, 2007 WL 846506, at *8 (N.D. Ohio Mar. 20, 2007) ("The defendant reasonably argues that the grant application on which COAP relies was not a contract By presenting and relying on only the grant application, COAP has not shown that the parties entered into a contract."); *Vakas v. Transamerica Occidental Life Ins. Co.*, 242 F.R.D. 589, 599 (D. Kan. 2006) ("[A]n application ... for life insurance is not a contract [T]he contract is the clearest intention of the parties, not the application."); *Nat'l Law Ctr. on Homelessness and Poverty v. U.S. Dept. of Veterans Affairs*, 799 F. Supp. 148, 155 (D.D.C. 1992) ("The government was mistaken when it translated an *application* for housing into a full-blown lease or a deed."); *Harden v. Maybelline Sales Corp.*, 282 Cal. Rptr. 96, 99 (Ct. App. 1991) ("[A]n application for employment is not a contract.").

¹²⁶ See cases cited *supra* note 125.

¹²⁷ See, e.g., *Garret v. Ellison*, 72 P.2d 449, 451–52 (Utah 1937) (discussing the general principle underlying the rule).

¹²⁸ See, e.g., *Gilliland v. Elmwood Props.*, 391 S.E.2d 577, 581 (S.C. 1990); see also *EPA Real Estate P'ship v. Kang*, 15 Cal. Rptr. 2d 209, 211 (Ct. App. 1992) ("The parol evidence rule ... prohibits the introduction of extrinsic evidence—oral or written—to vary or contradict the terms of an integrated written instrument."); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:1, at 862 (4th ed. 2012) (explaining that the parol evidence rule "prohibits the admission of [extrinsic] evidence of prior or contemporaneous oral ..., or prior written agreements, [to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing]").

¹²⁹ See *U.S. Leasing Corp. v. Janicare, Inc.*, 364 S.E.2d 202, 205 (S.C. Ct. App. 1988).

¹³⁰ See *Blackwell v. Faucett*, 108 S.E. 295, 296 (S.C. 1921) (reiterating that parol evidence may not be admitted to add or modify terms if a writing appears to express the parties' whole agreement); *Wilson v. Landstrom*, 315 S.E.2d 130, 134 (S.C. Ct. App. 1984).

Certainly, exceptions to the parol evidence rule exist. Consider Justice Andrews's analysis in *Mitchill*. He wrote:

[Before an oral agreement may vary a] written contract, at least three conditions must exist: (1) The [oral] agreement must ... be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing, or, put in another way, an inspection of the written contract, read in the light of surrounding circumstances, must not indicate that the writing appears "to contain the engagements of the parties, and to define the object and measure the extent of such engagement." Or, again, it must not be so clearly connected with the principal transaction as to be part and parcel of it.¹³¹

Furthermore, a party may introduce extrinsic evidence to interpret an ambiguous term in a contract, even if a merger or an integration clause appears in the contract.¹³² Also, evidence of prior or contemporaneous agreements—those fashioned before a final, totally integrated contract—are admissible to establish "illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause."¹³³

But reconsider the question: whether the language in an approved and preprinted application form may alter, contradict or modify language in an applicant and offeror's subsequent and wholly integrated contract? A canvas of common law rulings and state statutes reveals that the answer depends on whether a consumer applied for, say, insurance, or whether the individual applied for employment or housing. To help illustrate the point, consider Texas Insurance Code section 1151.052. It reads:

Entire Contract

(a) An industrial life insurance policy must provide that the policy is the entire contract between the parties, *except that at the option of the insurer*, the insurer may *make the policy and the policy application the entire contract* between the parties.

¹³¹ *Mitchill v. Lath*, 160 N.E. 646, 647 (N.Y. 1928).

¹³² See *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 233 (3d Cir. 2001) ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible ... to establish the meaning of ambiguous terms in the writing, whether or not the writing is integrated."); *Duncan v. McCaffrey Grp., Inc.*, 133 Cal. Rptr. 3d 280, 306 (Ct. App. 2011) (stressing that extrinsic evidence may be admitted to explain ambiguous language in a contract).

¹³³ See *Ingraham v. Geico Ins. Co.*, No. 06-111, 2009 WL 793046, at *15 (W.D. Pa. Mar. 24, 2009) (finding that parol evidence may be introduced to vary a writing if a contractual term evolved from fraudulent conduct, a mistake or an accident); RESTATEMENT (SECOND) OF CONTRACTS § 214 (1981).

(b) To make the policy application a part of the contract, a copy of the application must be endorsed on or attached to the policy *at the time the policy is issued*.¹³⁴

Unmistakably, under section 1151.052, the parol evidence rule would not preclude an individual from citing words and phrases in the insurance application to contradict or alter terms in the insurance policy. Section 1151.052(b) is clear: if an application is “attached to the policy” when the policy is issued, the two written instruments form a totally integrated contract.¹³⁵ Also, a careful review of other states’ insurance statutes reveals that some completed and approved applications for insurance and the insurance policies comprise the “entire insurance contract.”¹³⁶ Consequently, in those jurisdictions, the parol evidence rule does apply—if the standardized applications are endorsements to binding and enforceable insurance instruments.¹³⁷

Now, assume that an individual completes and signs a preprinted employment application. Also assume that the employer and applicant ultimately form a contractual relationship under a preprinted, standardized employment contract. May the terms in the *approved and standardized employment application* alter, contradict or modify language in the *subsequent and wholly integrated employment contract*? The analyses and rulings in *McLain v. Great American Ins. Companies*¹³⁸ and *Slivinsky v. Watkins-Johnson Company*¹³⁹ provide some limited insight.

¹³⁴ TEX. INS. CODE ANN. § 1151.052 (West 2003) (emphasis added).

¹³⁵ *Id.*; *see also id.* § 1101.003 (“[The life insurance] policy and the application for the policy constitute the entire contract between the parties.”).

¹³⁶ *See, e.g.,* ARIZ. REV. STAT. ANN. § 20-1205A (1993) (“[T]he policy and the application ... if a copy of the application is ... *attached to the policy* when issued, shall constitute the *entire contract* between the parties.”) (emphasis added); CAL. INS. CODE § 10113 (West 2014) (“Every policy of life, disability, or life and disability insurance issued ... by any insurer ... shall contain and be deemed to constitute the *entire contract* between the parties and nothing shall be incorporated therein by reference to any ... application or other writings [or] either of the parties ... unless the same are indorsed ... or *attached to the policy*.”) (emphasis added); 215 ILL. COMP. STAT. 5 / 224(1)(c) (2011) (“[T]he policy, together with the application ... a copy of which shall be endorsed upon or *attached to the policy* ... shall constitute the *entire contract* between the parties.”) (emphasis added); KAN. STAT. ANN. § 40-420(2) (2013) (“[T]he policy together with the application, if a copy [is] endorsed ... or *attached to the policy* shall constitute the *entire contract* between the parties.”) (emphasis added); MINN. STAT. § 61A.05 (2014) (“Every policy of insurance issued or delivered ... by any life insurance corporation ... shall contain the *entire contract* between the parties. Every policy which contains a *reference to the application*, shall have a copy of such *application attached thereto or set out therein*.”) (emphasis added); VA. CODE ANN. § 38.2-3344(A) (West 2014) (“[T]he policy, or the policy and the application for the policy, if a copy of the application is endorsed ... or *attached to the policy* when issued, shall constitute the *entire contract* between the parties.”) (emphasis added).

¹³⁷ *See* statutes cited in *supra* note 136.

¹³⁸ 256 Cal. Rptr. 863 (Ct. App. 1989).

¹³⁹ 270 Cal. Rptr. 585 (Ct. App. 1990).

In *McLain*, Robert McLain secured one of Great American's standardized employment application forms and applied for work.¹⁴⁰ At the bottom of the form, the phrase "For Company Use Only" appeared.¹⁴¹ Great American never signed or completed the bottom portion of the application.¹⁴² On the back page of the application form, the following provision appeared:

In consideration of my employment, I agree to conform to the rules and regulations of the Great American Insurance Company, and I agree that my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the Great American Insurance Company or myself. I also understand and agree that the terms and conditions of my employment may be changed, with or without cause, and with or without notice, at any time by the Great American Insurance Company. I understand that no representative of the Great American Insurance Company, has any authority to enter into an agreement for any specified period of time, or to make any agreement contrary to the foregoing.¹⁴³

After completing and signing the application, McLain returned the form to Great American.¹⁴⁴ In the course of events, Great American hired McLain.¹⁴⁵ And even though McLain's probationary review was favorable, Great American fired McLain after eight months of employment.¹⁴⁶ McLain filed a lawsuit.¹⁴⁷ Among other claims, McLain alleged that Great American breached an implied-in-fact contract¹⁴⁸ that permitted the employer to terminate McLain only for cause.¹⁴⁹ In its answer, Great American asserted that it terminated McLain for "insubordination."¹⁵⁰ But, McLain insisted he never read an insubordination clause and no one from Great American discussed

¹⁴⁰ *McLain*, 256 Cal. Rptr. at 865.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (emphasis added).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 867; *see also* *Foley v. Interactive Data Corp.*, 765 P.2d 373, 387 (Cal. 1988) ("[F]actors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.'... [T]he totality of the circumstances determines the nature of the contract. Agreement may be shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances.").

¹⁴⁹ *McLain*, 256 Cal. Rptr. at 867.

¹⁵⁰ *Id.* at 865.

it with him.¹⁵¹ “The jury found in favor of McLain and awarded \$62,000 in compensatory damages.”¹⁵² Great American appealed.¹⁵³

On appeal and citing the language in the application, Great American argued that McLain could be terminated with or without cause.¹⁵⁴ In addition, Great American asserted that the preprinted employment application form was a totally integrated contract.¹⁵⁵ Therefore, according to Great American, the lower court violated the parol evidence rule when that tribunal allowed McLain to introduce evidence about termination procedures in an allegedly implied-in-fact contract.¹⁵⁶ To reach its decision, the California Court of Appeals performed a two-part analysis.¹⁵⁷ First, the court asked whether the parties intended for the terms in the application form to be the complete and final agreement.¹⁵⁸ If so, the parol evidence rule evidence would preclude the introduction of additional terms or conditions in a collateral, independent agreement.¹⁵⁹ Second, the court asked whether the terms in the employment application were susceptible to the interpretation and meaning that McLain proffered.¹⁶⁰

To determine whether the application form was a totally integrated and independent contract, the court of appeals weighed the following factors: (1) whether the writing in the application was “complete,” (2) whether the application form contained an integration clause, (3) whether the terms in the alleged implied-in-fact agreement were material, (4) whether the latter terms contradicted the terms in the preprinted application form, (5) whether the parties would “naturally” form the allegedly implied-in-fact agreement as a separate, independent agreement, (6) whether the circumstances surrounding the employment were probative, (7) whether the nature and objective of the employment were material, and (8) whether the introduction of the extrinsic evidence mislead the jury.¹⁶¹ In the end, the *McLain* court concluded that the standardized, preprinted application form was not a totally integrated contract.¹⁶² In addition, the application did not contain an

¹⁵¹ *Id.*

¹⁵² *Id.* at 867.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 868 (“Because the application was a standardized form, did not cover several key aspects of the employment relationship and ... expressly stated that the terms and conditions of employment could be changed, we conclude that it was not an integrated document.”).

integration clause. On the other hand, the implied-in-fact employment agreement was an independent contract; therefore, Great American was liable for breaching it.¹⁶³

Now, consider the facts and the dispute in *Slivinsky v. Watkins*. Sandra Slivinsky applied for a job with Watkins-Johnson Company (Watkins), a large aerospace manufacturer.¹⁶⁴ Directly above the signature line on the preprinted-standardized application form, the following language appeared: “I understand that employment ... is conditional upon ... execution of an Employee Agreement I further understand that if I become employed by Watkins-Johnson Company, there will be *no agreement expressed or implied*, between the company and me *for any specific period of employment*, nor for continuing or long term employment.”¹⁶⁵ Watkins evaluated Slivinsky’s credentials and work history.¹⁶⁶ After Watkins’ agents interviewed Slivinsky several times, they employed Slivinsky.¹⁶⁷

On the first day of her employment, Slivinsky signed the Employee Agreement, which was described in Slivinsky’s completed and signed pre-printed application form.¹⁶⁸ The last paragraph in the Employee Agreement read: “Employee acknowledges that there is no agreement, express or implied, between [the] employee and the Company for any specific period of employment, nor for continuing or long-term employment. Employee and the Company each have a right to terminate employment, with or without cause.”¹⁶⁹

In January 1986, the Challenger Space Shuttle disaster occurred.¹⁷⁰ In the wake, many governmental contracts were cancelled—including the contracts that Watkins had formed with the federal government.¹⁷¹ Consequently, six months later, Watkins fired Slivinsky and many more employees.¹⁷² Slivinsky sued Watkins under several theories of recovery—including an

¹⁶³ *Id.* at 869 (“McLain introduced ... evidence to establish that there was an implied contract that he could only be terminated for cause The testimony of two Great American employees also suggests that McLain could not be terminated without cause Finally, McLain testified that he left the independent adjusting firm based upon ... promises of long-term advancement possibilities coupled with the assurance that McLain would be a permanent employee once the 90-day probationary period ended. Based upon the foregoing, we conclude that there was substantial evidence to establish an implied contract that McLain could only be terminated for cause.”).

¹⁶⁴ *Slivinsky v. Watkins-Johnson Co.*, 270 Cal. Rptr. 585, 586 (Ct. App. 1990).

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 587.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

action for breach of contract.¹⁷³ In her complaint, Slivinsky insisted that the reasons for her termination were pretextual: (1) she was fired to reduce her superior's cost overruns; (2) her superior did not like her; and (3) her superior had difficulty communicating with her.¹⁷⁴ Slivinsky also asserted that Watkins made several oral promises during the pre-hire interviews—promising to employ her long term, indefinitely or permanently, and promising that ordinary business cycles would not affect her employment.¹⁷⁵

Responding to the lawsuit, Watkins filed a motion for summary judgment—stressing that Slivinsky failed to state any viable cause of action.¹⁷⁶ Additionally, the employer asserted that under the written employment agreement, Slivinsky was an employment-at-will employee.¹⁷⁷ The trial court granted Watkins' motion for summary judgment.¹⁷⁸ On appeal, Slivinsky argued that the trial court's adverse summary judgment was erroneous.¹⁷⁹ But, to resolve the controversy, the California Court of Appeals fashioned the appellate question in a somewhat novel way: whether Slivinsky could introduce parol and/or extrinsic evidence—beyond Watkins's written employment agreement—to determine the parties' "complete" agreement.¹⁸⁰

Citing the parol evidence rule, the court of appeals stressed that the employment-termination procedures were enforceable only if the parties intended for Slivinsky's completed and signed application and Watkins' Employment Agreement to comprise the final and totally integrated contract.¹⁸¹ If so, any evidence of a prior agreement or a contemporaneous oral agreement could not be introduced to contradict Slivinsky and Watkins's completely integrated, written employment contract.¹⁸² Applying that standard, the appeals court concluded that the preprinted application form and the subsequent employment agreement constituted the entire contract.¹⁸³

To reach that conclusion, the appellate court found that Slivinsky's standardized employment application "specifically conditioned employment upon execution of an employee agreement."¹⁸⁴ Moreover, the preprinted application stated: "[If Watkins employs Slivinsky, there will be no express or

¹⁷³ *Id.* at 586 (The mixed-claims and mixed-theories complaint included the following: breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and invasion of privacy.).

¹⁷⁴ *Id.* at 587.

¹⁷⁵ *Id.* at 586.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 587.

¹⁷⁸ *Id.* at 586.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 587.

¹⁸¹ *Id.* at 587–88.

¹⁸² *Id.*

¹⁸³ *Id.* at 588.

¹⁸⁴ *Id.*

implied agreement] for any specific period of employment, nor for continuing or long term employment.”¹⁸⁵ Also, when Slivinsky executed the Employee Agreement, she acknowledged that she and Watkins had “*a right to terminate the employment, with or without cause.*”¹⁸⁶

Clearly, the *McLain* and *Slivinsky* courts reached different conclusions after applying the parol evidence rule. Again, in *McLain*, the court declared that application form and the employment contract did not constitute the final embodiment of the parties’ intentions.¹⁸⁷ So, may language in a standardized application form vary or modify language in a subsequent employment agreement? The answer is yes, *if and only if* both parties intended for terms in both the standardized application and the employment agreement to encompass the parties’ final and entirely integrated contract. At this point, it is extremely important to reiterate a previously discussed principle of contract law: stand-alone and preprinted application forms are not valid, binding and enforceable contracts.¹⁸⁸

II. A SHORT REVIEW OF PERTINENT FEDERAL AND STATE CONSUMER PROTECTION, CIVIL RIGHTS AND ANTIDISCRIMINATION LAWS

A. Federal and State Antidiscrimination and Civil Rights Laws

During the late 1800s, the United States Congress enacted four statutes to help identify and eradicate ethnicity-based discrimination.¹⁸⁹ Nearly one hundred years later, Congress learned that persistent “irrational discrimination”¹⁹⁰ remained in occupations,¹⁹¹ in residential and public

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *McLain v. Great Am. Ins. Cos.*, 256 Cal. Rptr. 863, 868 (Ct. App. 1989).

¹⁸⁸ See *supra* Part I.A and accompanying notes; see also *Wagner v. Glendale Adventist Med. Ctr.*, 265 Cal. Rptr. 412, 417 (Ct. App. 1989) (holding an application for employment is not a contract; it is a mere solicitation of an offer of employment).

¹⁸⁹ Civil Rights Act of 1875, 18 U.S.C.A. § 243 (West 2014); Civil Rights Act of 1870, 42 U.S.C.A. § 1981 (West 2014); Civil Rights Act of 1866, 42 U.S.C.A. § 1982 (West 2014); Civil Rights Act of 1871, 42 U.S.C.A. §§ 1983, 1985 (West 2014).

¹⁹⁰ See, e.g., *Ohio, ex rel. Clarke v. Deckebach*, 274 U.S. 392, 397 (1927) (“Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification.”) (citations omitted); see also Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 705–06 (2013) (“Discrimination ... ‘is irrational and unjust because it denies the individual what is due him or her under society’s agreed upon standards of merit.’”).

¹⁹¹ See, e.g., E. Ericka Kelsaw, *Help Wanted: 23.5 Million Unemployed Americans Need Not Apply*, 34 BERKELEY J. EMP. & LAB. L. 1, 19–20 (2013) (“[A]s Title VII was

places,¹⁹² within educational and financial institutions,¹⁹³ and against disabled persons.¹⁹⁴ Consequently, the federal legislative body enacted additional antidiscrimination statutes to eliminate or minimize irrational discriminatory practices based on age, ancestry, disability, ethnicity, familial status, gender, marital status, national origin, and religion.¹⁹⁵

originally enacted, all successful plaintiffs could recover back and front pay, declaratory and injunctive relief, and attorney's fees, but not compensatory or punitive damages. In 1991, finding that 'additional remedies under Federal law are needed to deter ... intentional discrimination in the workplace,' Congress amended Title VII of the Civil Rights Act. With the passage of the Civil Rights Act of 1991, Congress made punitive and compensatory damages available to plaintiffs claiming intentional discrimination.”).

¹⁹² See, e.g., *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1035 (11th Cir. 1992) (Congress discovered that housing discrimination against families was a pervasive national problem.).

¹⁹³ See Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: A Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950–1995*, 33 SAN DIEGO L. REV. 583, 585–86 (1996); Willy E. Rice, *Judicial and Administrative Enforcement of Title VI Title IX and Section 504: A Pre- and Post-Grove City Analysis*, 5 REV. LITIG. 219, 225–45 (1986).

¹⁹⁴ E.g., Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012). Congressional findings revealed: “[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem,” that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous,” and that discrimination “costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.” *Id.* §§ 12101(a)(2)–(8). The Act’s purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” *Id.* §§ 12101(b)(1)–(2).

¹⁹⁵ See National Housing Act of 1937, (codified as amended at 12 U.S.C. § 1735f-5 (2012)); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2012); Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (2012); Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (2012); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796 (2012); Job Training Partnership Act, 29 U.S.C. § 1577 (2012); Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (2012); Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109 (2012); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611–2654 (2012); Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 476 (2012); Civil Rights Act of 1991, 42 U.S.C. § 1981a (2012); Title II of the Civil Rights Act of 1964, Equal Access to Public Accommodations, 42 U.S.C. § 2000a (2012); Title VI of the Civil Rights Act of 1964, Equal Access to Federal Funds, 42 U.S.C. § 2000d (2012); Title VII of the Civil Rights Act of 1964, Equal Access to Employment, 42 U.S.C. §§ 2000e–2000e-17 (2012); Title VIII of the Civil Rights Act of 1968, Fair Housing Act, 42 U.S.C. §§ 3601,

Also, various states and American territories amended their constitutions or enacted antidiscrimination statutes.¹⁹⁶ And, like federal statutes, state laws were designed to stop irrational discrimination based on age, ethnicity, disability and/or gender.¹⁹⁷ Unlike federal statutes, however, many state's anti-discrimination statutes allow alleged victims of irrational discrimination to receive substantially more remedies and monetary relief.¹⁹⁸ Furthermore,

3602(a), 3604, 3605, 3606 (2012); Community Development Act, 42 U.S.C. § 5309 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012); Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 554 (2012).

¹⁹⁶ See, e.g., ALA. CODE § 24-8-4 (1975); ALASKA STAT. ANN. § 18.80.210 (West 2013); ARIZ. REV. STAT. ANN. § 41-1463 (2013); ARK. CODE ANN. § 16-123-107 (West 2013); CAL. GOV'T CODE § 12955 (West 2013); COLO. REV. STAT. ANN. § 24-34-601 (West 2013); CONN. GEN. STAT. ANN. Const. Art. 1, § 20 (West 1965); DEL. CODE ANN. tit. 6, § 4501 (West 2013); D.C. CODE § 1-2515 (1981); FLA. STAT. ANN. § 760.01 (West 2013); GA. CODE ANN. § 8-3-203 (West 2013); HAW. REV. STAT. Const. Art. 1, § 5 (West 2013); IDAHO CODE ANN. § 18-7301 (West 2013); 20 ILL. COMP. STAT. ANN. 1510 / 50 (West 2013); IND. CODE ANN. § 22-9-5-19 (West 2013); IOWA CODE ANN. § 216.6 (West 2013); KAN. STAT. ANN. § 44-1001 (West 1953); KY. REV. STAT. ANN. § 207.150 (West 2013); LA. CIV. CODE ANN. Const. Art. 1, § 12 (1974); ME. REV. STAT. tit. 5, § 4552 (2013); MD. CODE ANN., COM. LAW § 12-305 (West 2013); MASS. GEN. LAWS ANN. ch. 151B, § 1 (West 2013); MICH. COMP. LAWS ANN. Const. Art. 1, § 2 (West 1963); MINN. STAT. ANN. § 181.59 (West 2013); MISS. CODE ANN. § 43-33-723 (West 1972); MO. ANN. STAT. § 213.055 (West 2013); MONT. CODE ANN. Const. Art. 2, § 4 (West 2013); NEB. REV. STAT. ANN. § 20-134 (West 1943); NEV. REV. STAT. ANN. § 613.330 (West 2013); N.H. REV. STAT. ANN. § 354-A:1 (2013); N.J. STAT. ANN. § 10:5-4 (West 2013); N.M. STAT. ANN. § 28-1-7 (West 1978); N.Y. EXEC. LAW § 296 (McKinney 2013); N.C. GEN. STAT. ANN. § 143-422.2 (West 2013); N.D. CENT. CODE ANN. § 14-02.4-16 (West 2013); OHIO REV. CODE ANN. § 4112.02 (West 2013); OKLA. STAT. ANN. tit. 25, § 1302 (West 2013); 35 PA. CONS. STAT. ANN. § 1680.402a (West 2013); P.R. LAWS ANN. tit. 29, § 146 (1995); R.I. GEN. LAWS ANN. § 34-37-5.4 (West 1956); S.C. CODE ANN. § 31-21-60 (1976); S.D. CODIFIED LAWS § 20-13-10 (1968); TENN. CODE ANN. § 4-21-606 (West 2013); TEX. LAB. CODE ANN. § 21.001 (West 2013); UTAH CODE ANN. § 34A-5-106 (West 1953); VT. STAT. ANN. tit. 8, § 1211 (West 2013); V.I. CODE ANN. tit. 10, § 3 (2013); VA. CODE ANN. § 36-96.4 (West 1950); WASH. REV. CODE ANN. § 49.60.010 (West 2013); W. VA. CODE ANN., § 5-11A-6 (West 1966); WIS. STAT. ANN. § 111.321 (West 2013); WYO. STAT. ANN. § 27-9-105 (West 1977); see also FindLaw, State Civil Rights Law, <http://statelaws.findlaw.com/civil-rights-laws/> (last visited Mar. 26, 2015), archived at <http://perma.cc/36VV-2TMN>.

¹⁹⁷ See statutes cited *supra* note 196.

¹⁹⁸ See Andrea Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access To Federal Courts*, 32 AM. U. L. REV. 777, 784–85 (1983) (“[S]tate statutory schemes and common law causes of action may allow for compensatory and punitive relief, whereas under Title VII, a claimant is limited to equitable relief, which usually takes the form of reinstatement or back pay or both. In addition, the statute of limitations applicable to common law contract and tort claims generally is longer than the limitations provision applicable to either Title VII or state employment discrimination statutes. Moreover, if the complainant invokes common law remedies, often

fairly recently, several states enacted antidiscrimination laws to eradicate or minimize invidious and irrational discrimination based on one's sexual orientation.¹⁹⁹

B. Most Renowned and Litigated Federal Consumer Protection Laws

Congress and states have enacted literally hundreds of consumer protection statutes, too numerous to list and discuss here.²⁰⁰ The most renowned or major statutes are designed to protect two large categories of consumers. First, Congress enacted a series of statutes to protect consumers from "predatory" lending and credit practices. For example, in 1968, Congress passed the Truth in Lending Act (TILA).²⁰¹ The purpose of the TILA is to protect consumers from unfair and inaccurate credit practices.²⁰² Under the TILA, lenders or creditors must disclose a number of items: lenders' total financial undertaking, finance charges, annual percentage rates, and the total number of payments to be made—including a payment schedule.²⁰³ And, responding to reportedly exorbitant mortgage-settlement costs and other allegedly abusive settlement practices, Congress enacted the Real Estate Settlement Procedures Act (RESPA) in 1974.²⁰⁴ Quite simply, under RESPA, lenders must

he can avoid the procedural hurdles that must be overcome when a suit is brought pursuant to either Title VII or a state statute.").

¹⁹⁹ See Arash Jahanian & Alan K. Tannenwald, *Sexuality and Transgender Issues in Employment Law*, 8 GEO. J. GENDER & L. 505, 515 n.81 (2007) (listing nearly twenty states which have extended employment discrimination laws to sexual orientation discrimination); see also *Non-Discrimination Laws: State by State Information*, <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited Mar. 26, 2015), archived at <http://perma.cc/PWK6-TVSJ> (ACLU's website presents a state-by-state summary of statutes which outlaw irrational, sexual orientation, and gender identity discrimination.).

²⁰⁰ See *Legal Resources—Statutes Relating to Consumer Protection Mission*, FED. TRADE COMM'N, <http://www.ftc.gov/ogc/stat3.shtm> (last visited Mar. 26, 2015), archived at <http://perma.cc/Y9BF-6LDP>; *Checklist of Significant California and Federal Consumer Laws: Legal Guide M-1*, CAL. DEP'T CONSUMER AFFAIRS, http://www.dca.ca.gov/publications/legal_guides/m-1.shtml (last visited Mar. 26, 2015), archived at <http://perma.cc/4HDG-796W>; *State and Federal Consumer Laws*, PEOPLES LAWYER.NET, <http://www.peopleslawyer.net/consumer-law.html> (last visited Mar. 26, 2015), archived at <http://perma.cc/PH6-VQJC>; *Consumer Protection Law*, <http://www.federalreserveconsumerhelp.gov/learnmore/consumer-protection-laws.cfm>, FED. RESERVE (last visited Mar. 26, 2015), archived at <http://perma.cc/EXW6-MMN8>.

²⁰¹ Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified at 15 U.S.C. §§ 1601–1693 (2012)).

²⁰² *Id.*

²⁰³ 15 U.S.C. § 1602(u) (2012).

²⁰⁴ Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified at 12 U.S.C. §§ 2601–2617 (2012)).

give borrowers a good faith estimate of closing costs prior to closing.²⁰⁵ In addition, lenders must provide a uniform settlement form at closing, which itemizes all of the borrowers' loan-settlement-service charges.²⁰⁶

Congress also enacted the Magnuson-Moss Warranty Act in 1974.²⁰⁷ This act was designed to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products."²⁰⁸ Magnuson-Moss was a response to merchants' widespread misuse of express warranties and disclaimers.²⁰⁹ Therefore, section 2310(d) creates a statutory right of action for consumers "who [are] damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter or under a written warranty, implied warranty, or service contract."²¹⁰ Four years after Magnuson-Moss's enactment, Congress passed the Fair Debt Collection Practices Act (FDCPA) of 1978.²¹¹ FDCPA regulates creditors, and it protects consumers against unfair debt collection practices.²¹² More specifically, the FDCPA prohibits debt collectors from using abusive, unfair, and deceptive collection practices.²¹³ The Federal Trade Commission (FTC) found that debt collectors employ deceptive practices and cause substantial adverse consequence for consumers.²¹⁴ Under the FDCPA, consumers may secure a variety of civil remedies.²¹⁵

Finally, in 1994, Congress amended the TILA by enacting the Home Ownership and Equity Protection Act (HOEPA).²¹⁶ The purpose of HOEPA is to protect consumers and to impose additional disclosure requirements for high-cost or high-rate loans.²¹⁷ The legislative history of HOEPA—in both the Senate and House Reports—is clear: HOEPA amendments are

²⁰⁵ *Id.*

²⁰⁶ 12 U.S.C. § 2603 (2012).

²⁰⁷ 15 U.S.C. § 2301 (2012).

²⁰⁸ *Id.* § 2302(a).

²⁰⁹ *Id.* § 2301.

²¹⁰ *Id.* § 2310(d).

²¹¹ *Id.* §§ 1692–1692p.

²¹² *Id.* § 1692f.

²¹³ *Id.*

²¹⁴ *See, e.g.,* FED. TRADE COMM'N, THE FTC IN 2011: FEDERAL TRADE COMMISSION ANNUAL REPORT, APRIL 2011 2, *available at* <http://perma.cc/ML42-7W42>.

²¹⁵ 15 U.S.C. § 1692k (2012).

²¹⁶ *Id.* §§ 1601–1693.

²¹⁷ *Clark v. Fairbanks Capital Corp.*, No. 00C7778, 2003 WL 21277126, at *2 (N.D. Ill. June 2, 2003) ("Generally, HOEPA lays out the guidelines, rules, and parameters governing alternative mortgages. HOEPA and its regulations establish a cost threshold, which once exceeded, triggers a set of restrictions on lending practices related to high risk loans.") (citation omitted); *see* 15 U.S.C. § 1602(aa)(1) (2012).

designed to address the problem of “reverse redlining”—“the practice of targeting residents in certain geographic areas for credit on unfair terms.”²¹⁸ Generally, TILA, RESPA, HOEPA, and FDCPA require lenders to disclose material information in order to increase consumers’ likelihood of making informed credit decisions.²¹⁹

The second large category of federal statutes protects consumers from dangerous products. For example, in 1972, Congress enacted the Consumer Product Safety Act (CPSA).²²⁰ The CPSA was passed to protect the public against unreasonable risks of injury associated with consumer products and to help consumers to evaluate the comparative safety of consumer products.²²¹ To underscore the CPSA’s importance, Congress also enacted the Consumer Product Safety Improvement Act of 2008.²²² This latter legislation amended major federal consumer product safety statutes by setting lead levels in products and paint, and by restricting the use of several chemical compounds known as phthalates.²²³

C. State Consumer Protection Laws

All fifty states have enacted consumer-protection statutes, which give state agencies or private actors the right to prosecute consumer fraud or deceptive trade practices.²²⁴ Predictably, among the state statutes, the types of protections, scope of civil liabilities, and types of remedies that consumers might receive vary considerably.²²⁵ To illustrate, a majority of states allow *all* aggrieved consumers to commence private actions.²²⁶ Iowa, Nebraska, New York, and Nevada, however, prohibit certain private right of actions.²²⁷

²¹⁸ Clark, 2003 WL 21277126, at *2; *see also* H.R. REP. NO. 103-652, at 158 (1994), reprinted in 1994 U.S.C.C.A.N. 1977, 1981.

²¹⁹ *See, e.g.*, 12 U.S.C. § 1601 (2012); 15 U.S.C. § 1601 (2012); 15 U.S.C. § 1692b (2012).

²²⁰ Pub. L. No. 92-573, 86 Stat. 1207 (1972).

²²¹ 15 U.S.C. § 2051(b)(1)–(4) (2012).

²²² Pub. L. No. 110-314, 122 Stat. 3016 (2008).

²²³ *Id.* §§ 101–108.

²²⁴ *See* Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, COLUM. BUS. L. REV. 1, 12 (2010) (“Every state in the nation has some kind of consumer protection statute.”).

²²⁵ *Id.* at 12–13.

²²⁶ *Id.* at 14.

²²⁷ *See* NEB. REV. STAT. § 59-1601(2) (West 2014) (allowing private actions only if plaintiffs prove that an offending behavior caused a public-interest impact); N.Y. GEN. BUS. LAW § 349 (McKinney 2014) (allowing private actions only if plaintiffs prove that an offending behavior caused a public-interest impact); NEV. REV. STAT. § 598.0977 (2014) (only allowing the elderly or disabled consumers to commence private actions); *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 229 (Iowa 1998) (finding no private

In addition, many state consumer protection statutes contain a “laundry list” of specific violations.²²⁸ Other statutes, however, only provide broad definitions of a violation without enumerating an array of specific acts.²²⁹ Moreover, although most states allow agitated consumers to file class actions, several southern states and one state in the northwest do not.²³⁰ Additionally, within each region of the country, one finds a number of states preventing dissatisfied consumers from certifying certain types of class actions,²³¹ limiting a prevailing class of consumers’ damages awards,²³² and limiting the types of persons who may qualify as class members.²³³

It should be stressed, however, that an even more impressive development has occurred over the past fifty years. Most states have adopted a Deceptive Trade Practices Act (DTPA).²³⁴ These statutes either mirror the exact version of the Uniform Deceptive Trade Practices Act (UDTPA),²³⁵ or the DTPA statutes are “substantially equivalent” or “fairly similar” to the

cause of action under Iowa consumer protection statute); *Patterson v. Beall*, 19 P.3d 839, 846 n.10 (Okla. 2000) (noting that Oklahoma did not allow private actions until 1988).

²²⁸ See, e.g., ALA. CODE § 8-19-5 (2014); CAL. CIV. CODE § 1770 (West 2014); MICH. COMP. LAWS ANN. § 445.903 (West 2014).

²²⁹ See, e.g., 815 ILL. COMP. STAT. ANN. 505 / 2 (West 2014); N.J. STAT. ANN. § 56:8-2 (West 2014); N.Y. GEN. BUS. LAW § 349(a) (McKinney 2014).

²³⁰ See, e.g., ALA. CODE § 8-19-10(f) (2014); GA. CODE ANN. § 10-1-399(a) (West 2014); LA. REV. STAT. ANN. § 51:1409 (West 2014); MISS. CODE ANN. § 75-24-15(4) (West 2014); MONT. CODE ANN. § 30-14-133(1) (West 2013); S.C. CODE ANN. § 39-5-140(a) (2013).

²³¹ See, e.g., KAN. STAT. ANN. § 50-634(d) (West 2014) (limiting class actions to certain consumer claims).

²³² See, e.g., IDAHO CODE ANN. § 48-608(1) (West 2014) (limiting class recovery to actual damages); KAN. STAT. ANN. § 50-634(d) (West 2014) (limiting class recovery to actual damages); MICH. COMP. LAWS ANN. § 445.911(3) (West 2014) (limiting class recovery to actual damages); N.M. STAT. ANN. § 57-12-10(E) (West 2014) (limiting class recovery to actual damages).

²³³ See, e.g., CONN. GEN. STAT. ANN. § 42-110g(b) (West 2014) (limiting class actions to residents or consumers injured within the state).

²³⁴ See Dag E. Ytreberg, *Legislation Protecting Consumers Against Unfair or Deceptive Trade Practices*, 17 AM. JUR. 2D § 280 (2003). (“Generally speaking, the states have modeled their legislation on the Federal Trade Commission Act, or have adopted the Uniform Consumer Sales Practice Act or the Uniform Deceptive Trade Practices Act or based their statutes thereon.”); Donald M. Zupanec, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R.3d 449, at *2a (1979) (updated Mar. 2004).

²³⁵ The following twelve states have adopted the 1964 or 1966 version of the Uniform Deceptive Trade Practices Act: COLO. REV. STAT. ANN. § 6-1-105 (West 2000); DEL. CODE ANN. tit. 6, §§ 2532–2536 (West 2000); GA. CODE ANN. §§ 10-1-370–375 (West 2000); HAW. REV. STAT. §§ 481a-1–5 (West 2000); 815 ILL. COMP. STAT. ANN. §§ 510 / 1–7 (West 2001); ME. REV. STAT. tit. 10, §§ 1211–1216 (2000); MINN. STAT. ANN. §§ 325d.43–48 (West 2000); NEB. REV. STAT. ANN. §§ 87-301–303.06 (West 2001); NEV. REV. STAT. ANN. §§ 598.0905–0915 (West 2001); OHIO REV. CODE ANN. §§ 4165.01–04 (West 2000); OKLA. STAT. ANN. tit. 78, §§ 51–55 (West 1999); and OR. REV. STAT. § 646.608 (West 1999).

UDTPA.²³⁶ In a nutshell, DTPA statutes “make it unlawful [for any person] to use or otherwise engage in unfair or deceptive acts or practices in the conduct of trade or commerce.”²³⁷

D. The Prevalence of Consumer Protection and Irrational Discrimination Complaints—Statistical Evidence from Federal and State Agencies, Courts and Private Research Organizations

Since the enactment of state and federal antidiscrimination statutes, alleged victims of irrational discrimination have filed thousands of administrative complaints and lawsuits.²³⁸ For example, employment-discrimination suits have increased substantially each year since Congress enacted Title VII of the Civil Rights Act of 1967.²³⁹ In fiscal year 1997, the Equal Employment

²³⁶ The “substantially equivalent” or “fairly similar” DTPA-related statutes are: ALA. CODE § 8-19-5 (2014); ALASKA STAT. ANN. § 45.50.471 (West 2014); ARIZ. REV. STAT. ANN. § 44-1211 (2014); ARK. CODE ANN. § 4-88-107 (West 2014); *Id.* § 4-101-201 (governing the sale of fracture-filled and clarity-enhanced diamonds); CAL. BUS. & PROF. CODE § 17200 (West 2014); CONN. GEN. STAT. ANN. § 42-110b (West 2014); D.C. CODE § 28-3904 (2014); FLA. STAT. ANN. § 501.204 (West 2014); IDAHO CODE ANN. § 48-603 (West 2014); IND. CODE ANN. § 24-5-0.5 (West 2014); IOWA CODE ANN. § 714.16 (West 2014); KAN. STAT. ANN. § 21-4403 (West) (repealed 2010); KY. REV. STAT. ANN. § 367.170 (West 2014); LA. REV. STAT. ANN. § 51:1405 (2014); MD. CODE ANN., COM. LAW § 13-301 (2014); MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 2014); MICH. COMP. LAWS ANN. § 445.903 (West 2014); MISS. CODE ANN. § 75-24-5 (West 2014); MO. ANN. STAT. § 407.020 (West 2012); MONT. CODE ANN. § 30-14-103 (West 2013); NEV. REV. STAT. ANN. § 598.0915 (West 2014); N.H. REV. STAT. ANN. § 358-A:2 (2014); N.J. STAT. ANN. § 56:8-2 (West 2014); N.Y. GEN. BUS. LAW §§ 349, 350 (McKinney 2014); N.C. GEN. STAT. ANN. § 66-74 (West 2014); N.D. CENT. CODE ANN. § 51-15-02 (West 2013); 73 PA. CONS. STAT. ANN. § 201-3 (West 2014); R.I. GEN. LAWS ANN. § 6-13.1-2 (West 2014); S.C. CODE ANN. § 39-5-20 (2013); S.D. CODIFIED LAWS § 37-24-6 (2014); TENN. CODE ANN. § 47-18-104 (West 2014); TEX. BUS. & COM. CODE ANN. § 17.46 (West 2013); UTAH CODE ANN. § 13-11-4 (West 2014); VT. STAT. ANN. tit. 9, § 2453 (West 2014); VA. CODE ANN. § 59.1-200 (West 2014); WASH. REV. CODE ANN. § 19.86.020 (West 2014); W. VA. CODE ANN. § 46A-6-104 (West 2014); WIS. STAT. ANN. § 100.20 (West 2013); WYO. STAT. ANN. § 40-12-105 (West 2014).

²³⁷ Cf. Carolyn L. Carter, *Consumer Protection In The States—A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT’L CONSUMER LAW CTR. INC., archived at <http://perma.cc/3EZP-BWEU>.

²³⁸ See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, CHARGE STATISTICS FY 1997 THROUGH FY 2012, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Mar. 26, 2015) [hereinafter EEOC Charge Stats], archived at <http://perma.cc/P888-JWLR> (The report discloses that 80,680 “charges were filed in fiscal year 1997. In fiscal year 2012, the number of charges had increased to 99,412. The charges were racial/color, gender, disability and religion discrimination, retaliation, and violations of the equal pay act.).

²³⁹ See Michael J. Sniffen, *Job Bias Suits Rise—Justice: Private Sector Litigation for Discrimination More than Triples in Decade*, LONG BEACH PRESS-TELEGRAM, 1/17/2000 LBPRESS at A16, 2000 WLNR 1358301 (“Aided by new federal laws, private lawsuits

Opportunity Commission (EEOC) reported that 80,680 persons filed anti-discrimination complaints.²⁴⁰ In fiscal year 2012, the number of filings increased appreciably—nearly one hundred thousand (99,412) persons filed EEOC-related charges.²⁴¹

More specifically, after reviewing fiscal year 2012 statistics more thoroughly, the EEOC found the following: (1) a large group of disgruntled persons (38.1%) filed 37,836 complaints, accusing defendants of practicing “work-place retaliation”; (2) more than a third of the complainants (33.7%) filed 33,512 “racial-discrimination charges”; (3) among all “retaliation charges,” 31 percent (31.4%) or 31,208 were allegedly Title VII violations; (4) about a third of the complainants (30.5%) filed 30,356 “gender-based discrimination charges”; (5) a relatively smaller group of complainants (26.5%) filed 26,379 “disability-discrimination charges”; and (6) 23 percent (23.0%) of the aggrieved filed 22,857 “age discrimination charges.”²⁴²

Also, after the debt collection industry increased its compliance efforts, the number of debt collection *administrative complaints* rose dramatically. To illustrate, the FTC reported that dissatisfied consumers filed 119,609 complaints in 2009.²⁴³ One year later, the number of FDCPA complaints increased to 140,036, and the annual number of lawsuits continued to climb.²⁴⁴ Additionally, in very recent years, consumers of financial services filed a record number of FCRA, TCPA, and truth in lending *lawsuits*. TCPA litigation more than doubled, and FDCPA litigation set a record 11,811 filings in 2011.²⁴⁵ What is more, the number of FDCPA lawsuits continues

alleging discrimination in the work place more than tripled during in the 1990s, the Justice Department said [J]ob bias lawsuits filed in U.S. District Courts soared from 6,936 in 1990 to 21,540 in 1998 Civil rights complaints of all varieties more than doubled from 1990 to 1998, from 18,793 to 42,354 New civil rights laws paved the way for the explosion in job bias cases, including the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991 The 1991 law amended five older federal employment discrimination laws. It also allowed plaintiffs to win compensatory and punitive damages in certain cases, permitted jury trials when plaintiffs sought monetary damages, and overturned seven Supreme Court rulings.”).

²⁴⁰ EEOC Charge Stats, *supra* note 238.

²⁴¹ *Id.*; see also Paul Feely, *Lawyer: Ruling Opens Door to More Anti-Bias Suits*, N.H. UNION LEADER (Manchester, N.H.), Feb. 13, 2011, available at 2011 WLNR 2918838.

²⁴² EEOC Charge Stats, *supra* note 238; see also Feely, *supra* note 241.

²⁴³ EEOC Charge Stats, *supra* note 238.

²⁴⁴ See FED. TRADE COMM’N, *supra* note 214, at 5–6.

²⁴⁵ See WEBRECON L.L.C., *FDCPA and Other Consumer Lawsuit Statistics—Full Year 2011 Recap*, WEBRECON.COM, <https://dev.webrecon.com/fdcpa-and-other-consumer-lawsuit-statistics-full-year-2011-recap/> (last visited Mar. 26, 2015), archived at <http://perma.cc/PE65-25SJ> (“[T]he Denver Colorado district court saw the most suits filed—totaling 658. Philadelphia was 2nd with 634 suits. Los Angeles was 3rd with 623, followed by Chicago with 592 and Newark with 486. Statewide, California led with 1654 lawsuits in 2011.

to grow each year.²⁴⁶ In 2009, FDCPA litigation reached a new peak; the new percentage was a 52 percent increase above the aggregate percentage for prior years.²⁴⁷ On the other hand, consumers still file truth in lending lawsuits. In recent years, however, the rates have fallen.²⁴⁸ Arguably, the unforeseeable financial calamity in 2008 caused the higher-than-usual spike: consumers filed the greatest number of truth-in-lending lawsuits—against banks and mortgage companies—after the collapse of the mortgage-housing market.²⁴⁹ Those numerous lawsuits originated under Title 15, section 1601 of the TILA.²⁵⁰

There is more. Without question, the National Fair Housing Alliance (NFHA) is a politically “partisan” for-profit and non-profit organization.²⁵¹ Yet, by most objective measures, the NFHA is a thoroughly competent, resourceful and transparent organization.²⁵² Each year, NFHA collects data

Florida was next with 1146 lawsuits, followed by New York with 1128, Pennsylvania with 940 and New Jersey with 711.”).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ See TRAC REPORTS, INC., *Truth in Lending Federal Lawsuits Continue to Decline*, TRAC.SYR.EDU, <http://trac.syr.edu/tracreports/civil/323/> (last visited Mar. 26, 2015), archived at <http://perma.cc/7SDR-QVMF> (“During May 2013 the government reported only 16 new truth-in-lending civil filings. This followed only 26 such suits filed in April and 14 suits begun during March, according to the case-by-case information analyzed by the Transactional Records Access Clearinghouse (TRAC). Truth in lending lawsuits have fallen 89 percent, down from the peak of 152 reached four years ago in May 2009.”).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See *Mission Statement*, NAT’L FAIR HOUS. ALLIANCE, <http://www.nationalfairhousing.org/AboutNFHA/MissionandVision/tabid/2606/Default.aspx> (last visited Mar. 26, 2015), archived at <http://perma.cc/XC89-WKGK> (“NFHA works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education, outreach, membership services, public policy initiatives, advocacy and enforcement.”); see also *Rigging Antidiscrimination Law*, WALL ST. J., Nov. 19, 2013, at A16 (“It’s rare for a case that reaches the Supreme Court to be pulled from the docket ... twice in two years on the same legal issue. Yet [this] happened *Township of Mount Holly v. Mount Holly Gardens Citizens* asked whether the 1968 Fair Housing Act allows the government to charge discrimination by using statistics rather than specific intent. The feds had never employed this theory in housing until the Obama Administration began to use it against lenders *There’s no evidence that the Obama Administration played a direct role in scuttling the case this time, but its housing allies did.* Mount Holly, the Ford Foundation, George Soros’s Open Society Foundations, the National Fair Housing Alliance and Self Help Community Development contributed money to a developer who will build new homes for the plaintiffs and other private buyers. That deal led to the settlement.”) (emphasis added).

²⁵² Cf. Federal Reserve Board of Governors Holds a Public Hearing on Potential Revisions to the Board’s Regulation C—Final, *in* FD (FAIR DISCLOSURE) WIRE, Sept. 24, 2010 (“[O]n behalf of the Board of Governors of the Federal Reserve System, I’d like to

from private and non-profit fair-housing organizations as well as from government entities.²⁵³ In particular, NFHA collects large volumes of data involving various types of housing-related transactions: rentals, sales, mortgage lending, homeowners' insurance, advertising, harassment, homeowners and rental associations' practices, zoning procedures, and persons' gaining access to shelters.²⁵⁴ The annual research is designed to measure the numbers of fair-housing complaints and the types of remedies that private and state actors employ to arrest consumers concerns.²⁵⁵

In 2013, NFHA's statistical report disclosed several pertinent findings. First, during calendar year 2012, displeased consumers filed 28,519 administrative and judicial housing-discrimination complaints.²⁵⁶ In 2011, there were 27,092 complaints.²⁵⁷ Private fair housing groups—rather than governmental agencies—investigated and reported the highest number of complaints. “In 2012, private fair housing organizations investigated 69.0% of all housing-discrimination complaints in the United States.”²⁵⁸ In 2011, the percentage was 67.6 percent.²⁵⁹ The report also stated:

A conservative estimate puts the number of violations of fair housing laws at four million every year. Many people do not report housing discrimination because they don't know where to go Also, landlords, managers, real-estate agents, loan officers, and insurance agents who choose to discriminate have become quite sophisticated in their practices. It is rare for someone in the industry to engage in blatant discrimination; instead,

welcome everyone ... to discuss changes to the Home Mortgage Disclosure Act [W]e have heard from key players ... academics and *researchers*, consumer advocacy and community development organizations, *data experts* Although they play different roles, we believe that all share a common goal—to ensure that the mortgage market is responsible, transparent, efficient, and serves the needs of consumers and market participants alike [We thank all of you] for being here on this panel [W]e have Jay Brinkmann, chief economist and senior vice president of Research and Economics for the Mortgage Bankers Association; Thomas Noto, associate general counsel at Bank of America; [and] *Lisa Rice, vice president, National Fair Housing Alliance.*”) (comment of Elizabeth A. Duke, former member of the Federal Reserve System Board of Governors) (emphasis added).

²⁵³ NAT'L FAIR HOUS. ALLIANCE, MODERNIZING THE FAIR HOUSING ACT FOR THE 21ST CENTURY: 2013 FAIR HOUSING TRENDS REPORT 16 (Apr. 11, 2013), *archived at* <http://perma.cc/S8NU-YF9J>; *see also* NAT'L FAIR HOUS. ALLIANCE, <http://www.nationalfairhousing.org> (last visited Mar. 26, 2015), *archived at* <http://perma.cc/L6VX-QN6Y>.

²⁵⁴ NAT'L FAIR HOUS. ALLIANCE, *supra* note 253, at 16.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 17.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

people looking for homes, loans or homeowners' insurance will get the run around.²⁶⁰

Even more relevant, many fair-housing complainants are applicants—"people looking for homes, loans or homeowners' insurance."²⁶¹ To prove the assertion, consider these findings: (1) in 2012, the Department of Justice (DOJ) sued Countrywide Financial Corporation, alleging that Countrywide discriminated against more than 200,000 ethnic-minority applicants who applied for residential loans;²⁶² (2) DOJ filed a lawsuit against Wells Fargo Bank in 2012, accusing Wells Fargo of systemically discriminating against ethnic-minority applicants who applied for mortgages between 2004 and 2009;²⁶³ (3) in 2012, DOJ sued Bank of America, asserting that the lender violated the Fair Housing Act by discriminating against 25,000 disabled applicants who applied for loans;²⁶⁴ and, (4) in 2012, the NFHA reported that 220 persons—who applied for housing—were discriminated against on the basis of their sexual orientation or gender identity.²⁶⁵

Again, the evidence is incontrovertible: Congress and state legislatures enacted various consumer protection and antidiscrimination laws to help eliminate or decrease deceptive trade practices as well as irrational discriminatory practices and transactions. Furthermore, a careful examination of the various statutes discussed in Parts II.A, II.B, and II.C of this Article reveals another indisputable fact: state and federal legislators gave protected classes of dissatisfied consumers the right to use courts and formal administrative proceedings to secure legal and equitable remedies.²⁶⁶ Congress,

²⁶⁰ *Id.* at 16 (emphasis omitted).

²⁶¹ *Id.*

²⁶² *Id.* at 30.

²⁶³ *Id.*

²⁶⁴ *Id.* at 32.

²⁶⁵ *Id.* at 9.

²⁶⁶ *See, e.g.,* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 866 (2011) (holding a fiancée who was allegedly fired in retaliation after his fiancé filed a charge of discrimination with the EEOC has standing to sue under Title VII as an aggrieved person); Anjelino v. N.Y. Times Co., 200 F.3d 73, 88–93 (3d Cir. 1999) (holding that male employees had standing to assert sex discrimination claims for discrimination against female workers because they suffered pecuniary injuries); Fiedler v. Marumsco Sch., 631 F.2d 1144, 1150 (4th Cir. 1980) (concluding that a white student who was expelled from school for allegedly dating a black student had standing to sue under Section 1981); DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975) (declaring that a white man who was the victim of discrimination because he sold his house to a black person had standing to sue under Section 1981); Tessier v. Moffat, 93 F. Supp. 2d 729, 735–36 (E.D. La. 1998) (“To have standing to sue under Louisiana Unfair Trade Practices and Consumer Protection Law, a plaintiff must demonstrate that they are consumers or business competitors.”).

however, enacted the Federal Arbitration Act, which *compels contractual parties to arbitrate their disputes in private and informal dispute-resolution proceedings*.²⁶⁷ Conversely, common law rules of contract formation and interpretation are equally clear: *standing alone, standardized-preprinted application forms are not binding and enforceable contractual agreements*.²⁶⁸

Therefore, several highly FAA-related questions plead for commonsensical and intelligible answers: (1) whether Congress intended for discontented persons—who applied for goods and services—to arbitrate consumer protection claims in private arbitration hearings or to litigate those claims in state and federal courts; (2) whether Congress intended for disgruntled applicants to resolve their discriminatory practices claims before private arbitrators or before jurors in state and federal courts; (3) whether Congress intended for the FAA to preempt federal and state courts’ enforcement of antidiscrimination and consumer protection laws; and (4) whether Congress envisioned for competent state and federal judges or private nonlawyers/arbitrators to determine and enforce persons’ rights under federal antidiscrimination and consumer protection laws. To begin the search for answers, the next Section briefly reviews the FAA in pertinent part and discusses congressional intent that undergirds the statute.

III. A BRIEF OVERVIEW OF THE FEDERAL ARBITRATION ACT OF 1924

Again, section 2 of the FAA reads in relevant part: “A written provision in *any ... contract ... to settle by arbitration a controversy ... 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*.”²⁶⁹ Thus, spanning a period of nearly forty years, the Supreme Court has issued multiple decisions and stated emphatically: “judicial hostility to arbitration” was the sole impetus behind Congress’s decision to enact the FAA.²⁷⁰ To be sure, English courts had a long history of refusing

²⁶⁷ Federal Arbitration Act, Pub. L. No. 68-401, ch. 213, 43 Stat. 883, 883–84 (1925).

²⁶⁸ Giesela Ruhl, *The Battle of the Forms: Comparative and Economic Observations*, 24 U. PA. J. INT’L L. 189, 190–91 (2003).

²⁶⁹ 9 U.S.C. § 2 (2012) (emphasis added).

²⁷⁰ See *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308–09 (2013); *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (stating Congress enacted the FAA in response to widespread judicial hostility to arbitration); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (“[Congress passed the Federal Arbitration Act of 1925] to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Rodriguez de Quijas v. Shearson/American Exp.*,

to enforce arbitration provisions in private contracts.²⁷¹ The Court's repeated and single "judicial hostility" explanation,²⁷² however, overlooks some critical and historical facts.

First, unlike English courts, American courts have an exceedingly long history of enforcing arbitration clauses in contracts—especially provisions in standardized insurance contracts.²⁷³ Second, the Supreme Court's "judicial hostility" explanation does not comport with Congress's intent in 1924. The FAA's legislative history is exceptionally clear: merchants and members of exclusive trade associations encouraged Congress to enact the FAA—primarily to prevent merchants from warring among themselves and battling

Inc., 490 U.S. 477, 480 (1989); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 225 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974) ("The United States Arbitration Act ... revers[ed] centuries of judicial hostility to arbitration agreements").

²⁷¹ H.R. Rep. No. 96-68, at 1-2 (1924) ("Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law *American courts ... have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.* This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.") (emphasis added).

²⁷² See, e.g., *Scherk*, 417 U.S. at 510.

²⁷³ Using Westlaw electronic data service, the author accessed the Insurance-Law (MIN-CS) database and submitted the following query: (CONTRACT! AGREEMENT /P ARBITRATION ARBITRAT!) & DA(BEF JAN 1, 1923) (last visited Dec. 8, 2013). The search generated 904 cases. The earliest arbitration-related case was decided in 1797. See especially *Springfield Fire & Marine Ins. Co. v. Payne*, 57 Kan. 291, 46 P. 315, 317-18 (Kan. 1896) (concluding that "[a]n award is *prima facie* conclusive between the parties as to all matters submitted to the arbitrators If every award must be made conformable to what would have been the judgment of this court in the case, it would render arbitrations useless and vexatious, and a source of great litigation; for it very rarely happens that both parties are satisfied. The decision by arbitration is the decision of a tribunal of the parties' own choice and election [C]ourts have always regarded [arbitration] with liberal indulgence They have only looked to see if the proceedings were honestly and fairly conducted, and, if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators.") (emphasis added); see also *Solem v. Conn. Fire Ins. Co. of Hartford*, 109 P. 432, 433 (Mont. 1910) (declaring appraisers' award was binding upon the insured and the insurance company when the parties agreed to submit the disputed amount to arbitration under the terms of the fire insurance contract); *Caldwell v. Va. Fire & Marine Ins. Co.*, 139 S.W. 698, 704 (Tenn. 1911) (declaring that under the terms of the insurance contract, "the complainant was bound in the event of loss to submit the question of sound value of his loss and damage to arbitrators for an award").

each other in courts.²⁷⁴ More precisely, the FAA was enacted primarily “to preserve business friendships” among members of mercantile associations,²⁷⁵ to reduce “bitterness” among members of trade organizations,²⁷⁶ to “preserve trade customs,”²⁷⁷ to resolve “merchants versus merchants” disputes efficiently and amicably,²⁷⁸ and to eliminate mercantile members’ financial costs of litigating intra-association disputes in courts.²⁷⁹

²⁷⁴ See *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomm. of the Comm. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 7–8 (1924) [hereinafter *Joint 1924 Hearings on Federal Arbitration Bills*] (statement of Charles Bernheimer, Chairman, Committee on Arbitration—Chamber of Commerce of the State of New York) (“The lawyer’s work ... is an economic wastage in the everyday commercial transactions. It does not benefit the lawyer and does not benefit the client. There are four known methods ... to meet *trade disputes*, the ordinary everyday trade disputes 1) the parties [can] settle ... 2) the parties [can] settle by negotiation ... 3) the parties [can] enter into formal arbitration ... which has legal sanction, ... so that the parties cannot—as they can in most ... states—back out at the last moment when they see [that] the case is going against them; and 4) the last method is ... litigation, which is ... the worst method of all Speaking for those who have had experience and who are engaged in business, ... *arbitration saves time, saves trouble, saves money*. There is no question about that *It preserves business friendships Friendliness is preserved in business. It raises business standards. It maintains business honor, [and] prevents unnecessary litigation* [My] statement ... is backed up by 73 commercial organizations in this country who have, by formal vote, approved ... the bill before you.”) (emphasis added); *id.* at 24 (statement of Samuel M. Forbes, Secretary of Converters’ Association) (“Our association has had [much] experience under the New York arbitration act and with arbitration generally [W]e most strongly feel that the adoption of a Federal arbitration act such as is now proposed will be one of the most forward steps in commercial life. Our members have found arbitration to be expeditious, economical, and equitable, conserving business friendships and energy.”).

²⁷⁵ *Id.* at 7.

²⁷⁶ See *id.* at 28 (statement of Alexander Rose representing the Arbitration Society of America) (“[I]n closing, I need hardly add to what has been said [regarding] the ethical importance of arbitration in avoiding bitterness.”).

²⁷⁷ See *id.* at 29 (statement of Julius Henry Cohen, Member, Committee on Commerce, Trade, and Commercial Law, American Bar Association and General Counsel for the New York State Chamber of Commerce) (“The trade organizations ... have a tremendous interest and influence in establishing trade customs [One rule is,] ... if you are a member you arbitrate your differences The silk association has it; the fruit association has it; and the lumber association has it. Now, ... [the proposed arbitration act will not] increase the customs [but it will add] legal force [to the customs].”).

²⁷⁸ See *id.* at 12 (statement of R.S. French, Representing the National League of Marine Merchants of the United States, the Western Fruit Jobbers’ Association of America, and the International Apple Shippers’ Association of America) (“[T]he principles of this arbitration bill are substantially in accord with those principles which [our members] adopted and made a part of [their respective] constitutions and by-laws ... at [those organizations’] inception 25 or 30 years ago [Our] organizations [approve] ... this measure which is before this committee I represent ... large exporters and importers of perishable goods [And in our organizations], disputes may arise in domestic as well as in foreign

Yet the Supreme Court continues to embrace incessantly and unapologetically the “judicial hostility” argument in order to justify and enforce three of the Court’s engineered “judicial policies”: (1) a liberal federal policy *must favor* arbitration agreements;²⁸⁰ (2) an unequivocal federal policy *must favor* “arbitral dispute resolution”;²⁸¹ and (3) any doubt regarding the scope of arbitrable issues *must be resolved in favor of* arbitration.²⁸²

Absolutely, Congress enacted the FAA to remove any doubt about the enforceability of arbitration provisions in all types of negotiated and standardized contracts—construction, insurance, financial, goods, services, employment, trade association, real estate, and professional contracts.²⁸³ Additionally, one may conclude correctly that Congress structured the FAA to be *rationality rather than irrationally biased* in favor of arbitration. Likewise, merchants, corporations, and large financial, educational, political, and

commerce. We handle at home and from abroad over 600,000 carloads of freight annually, and naturally the opportunity for disputes arises frequently.”); *see also id.* at 35 (The American Bar Association’s Brief of the Proposed Federal Arbitration Statute which was made a part of the record) (“The United States Department of Commerce has recently made a most significant declaration regarding the policy of the business world in relation to arbitration. In its publication entitled—Trade Association Activities—[the Department] devotes an entire chapter ... to ‘Trade disputes and ethics.’ This entire chapter is largely a plea for arbitration and a suggestion of *methods which trade bodies may follow Contributions to this discussion were made by ... representative[s] of widely different lines of business.*”) (emphasis added).

²⁷⁹ *Id.* at 12.

²⁸⁰ *See* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also* *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (reaffirming the “liberal federal policy [which] favor[s] arbitration agreements”); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2001) (reaffirming the “liberal federal policy [which] favor[s] arbitration agreements”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (reaffirming the “liberal federal policy [which] favor[s] arbitration agreements”).

²⁸¹ *See* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (stating that the FAA reflects an “emphatic federal policy in favor of arbitral dispute resolution”); *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24 (observing that “questions of arbitrability [must] be addressed with a healthy regard for the federal policy favoring arbitration.”).

²⁸² *See* *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (citing *Mitsubishi Motors Corp.* and reaffirming that “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989) (reaffirming *Mitsubishi Motors Corp.* and stressing that “any doubts concerning the scope of arbitrable issues ... be resolved in favor of arbitration”); *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25 (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”).

²⁸³ H.R. Rep. No. 96-68 at 2 (1924) (“The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.”).

professional entities should be encouraged to arbitrate their contractual disagreements in “unlettered tribunals or rusticum forums.”²⁸⁴ And the reason is not terribly complicated: the proceedings in “unlettered tribunals” are generally less expensive than federal and state court proceedings.²⁸⁵

But, a compelling question remains: whether federal and state courts should be categorically, defiantly, and *irrationally biased in favor* of mandatory arbitration if disputes *arise out of* noncontractual relationships? In light of the FAA’s legislative history and congressional intent, the commonsensical answer is no. Consider Justice Thurgood Marshall’s measured and intelligible analysis in *Dean Witter Reynolds, Inc. v. Byrd*.²⁸⁶ Writing for the majority in 1985, Justice Marshall wrote:

The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of *privately made agreements to arbitrate*. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims [P]assage of the Act was motivated, first and foremost, by a congressional desire to enforce *agreements into which parties had entered* We ... are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—*must be resolved in favor of the latter* in order to realize the intent of the drafters.²⁸⁷

Even more importantly, the FAA’s savings clause reads: “[An arbitration provision in any contract] shall be valid ... and enforceable, save upon such grounds as exist at law or in equity.”²⁸⁸ Still, a cursory examination of reported cases reveals an unsettling truth: large numbers of federal judges have become irrationally or strongly biased in favor of mandatory arbitration.²⁸⁹ Additionally, one can find judicial conflicts and considerably more

²⁸⁴ Cf. *Suarez-Valdez v. Shearson Lehman/Am. Exp., Inc.*, 858 F.2d 648, 649–50 (11th Cir. 1988) (Tjoflat, J., concurring) (“[An agreement to arbitrate] indicates the parties’ preference for more informal, less expensive procedures [Litigating in court, therefore,] would subject the parties to the very complexities, inconveniences and expenses of litigation that they determined to avoid”); *Springfield Fire & Marine Ins. Co. v. Payne*, 46 P. 315, 318 (Kan. 1896) (emphasis added) (“[Arbitration] is a popular, cheap, convenient, and domestic mode of trial, which the courts have always regarded with liberal indulgence. They have never exacted from these *unlettered tribunals*—this *rusticum* forum—the observance of technical rule and formality.”) (emphasis added).

²⁸⁵ *Springfield Fire & Martine Ins. Co.*, 46 P. at 318.

²⁸⁶ 470 U.S. 213 (1985).

²⁸⁷ *Id.* at 219–21 (emphasis added); see also *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (reaffirming that *Dean Witter* “reject[ed] the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims”).

²⁸⁸ Federal Arbitration Act, 9 U.S.C.A. § 2 (West 2014).

²⁸⁹ See *Doctor’s Assocs., Inc. v. Distajo*, 66 F.3d 438, 446 (2d Cir. 1995) (noting that any prejudice from piecemeal litigation is overcome by the “strong bias in favor of

evidence of irrational judicial bias among cases in which state and federal courts decided a narrower question: whether arbitration provisions in standardized, preprinted application forms are enforceable under the FAA?

IV. "IRRATIONALLY BIASED" RULINGS AND PERSISTENT JUDICIAL CONFLICTS OVER THE ENFORCEABILITY OF ARBITRATION CLAUSES IN EMPLOYEES' AND CONSUMERS' APPLICATION FORMS

Unquestionably, the FAA permits all business and commercial entities to fashion valid contracts which contain mandatory-arbitration provisions.²⁹⁰ But, as discussed earlier, applications for employment as well as for goods and services increasingly contain arbitration clauses.²⁹¹ And to reiterate a settled common law principle of contract law, writings in standardized, preprinted application forms are not enforceable contracts.²⁹² Therefore, in light of this latter principle, several weighty, FAA-specific questions become readily apparent: (1) whether arbitration provisions in preprinted applications are enforceable contracts under the FAA's "written provisions in a contract" clause; (2) whether, under the FAA, applicants' common law and statutory claims may "arise out of" application forms rather than binding contracts; (3) whether arbitration clauses in standardized application forms are enforceable under the FAA without any bargained-for exchange consideration; and, (4) whether the FAA preempts the application of the parol evidence rule

arbitration" under the Federal Arbitration Act); *THI of N.M. at Hobbs Ctr., L.L.C. v. Spradlin*, 893 F. Supp. 2d 1172, 1179 (D.N.M. 2012) (stressing that "the FAA [has a] strong bias in favor of arbitration"); *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 364 (S.D.N.Y. 2005) ("[T]he Supreme Court has instructed that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration—whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' This bias in favor of arbitration, 'is even stronger in the context of international transactions.'") (citations omitted); *see also* *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 316 (S.C. 2012) (reiterating that there is a "strong policy favoring arbitration"); David Korn & David Rosenberg, *Concepcion's Pro-Defendant Biasing of The Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1151 (2013) ("By mandating that numerous plaintiffs litigate their common question claims separately in individual arbitrations rather than jointly in class action arbitrations, the Supreme Court in *AT&T Mobility LLC v. Concepcion* entrenched a potent structural and systemic bias in favor of defendants.").

²⁹⁰ 9 U.S.C. § 2 (2012).

²⁹¹ Stacy A. Hickox, *Ensuring Enforceability and Fairness in the Arbitration of Employment Disputes*, 16 WIDENER L. REV. 101, 106 (2010).

²⁹² *See supra* Part I.B and accompanying notes; *see also* *Wagner v. Glendale Adventist Med. Ctr.*, 265 Cal. Rptr. 412, 417 (1989) ("[An application for employment is not a contract], it is a ... mere solicitation of an offer of employment.").

and allows arbitration provisions in preprinted application forms to supersede writings in subsequent and totally integrated employment, goods, and services contracts? These questions and related issues are discussed in this Part of the Article.

A. Judicial Conflict—Whether Mandatory-Arbitration Clauses in Standardized Application Forms Are Enforceable “Written Provisions in a Contract” Under the Federal Arbitration Act

To reemphasize, under the FAA section 2, an arbitration agreement is enforceable only if it is a written provision in a contract.²⁹³ Therefore, the Supreme Court and state supreme courts have stressed repeatedly: courts must always employ *state law* principles of contract formation, interpretation, and enforcement to determine whether parties formed an arbitration agreement or an arbitration clause in a contract.²⁹⁴ In *J.M. Davidson, Inc. v. Webster*,²⁹⁵ the Texas Supreme Court was quite emphatic about the importance of judges’ carefully applying state-law principles of contract before forcing parties to enter private arbitral proceedings:

A [party] attempting to compel arbitration must first establish that the dispute ... falls within the scope of a valid arbitration agreement [A]lthough we have repeatedly expressed a strong presumption favoring arbitration, the presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists [A] federal policy

²⁹³ 9 U.S.C. § 2 (2012).

²⁹⁴ See, e.g., *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding that “courts generally ... should apply ordinary state-law principles that govern the formation of contracts” when deciding whether the parties agreed to arbitrate); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989) (reaffirming that state-law principles of contract law must be used to create, interpret and enforce arbitration agreements); *Title Max of Birmingham, Inc. v. Edwards*, 973 So. 2d 1050, 1054 (Ala. 2007) (“Arbitration is a matter of contract, and this court applies the ordinary state-law principles governing contracts in construing an agreement to arbitrate.”); *Lane v. Urgitus*, 145 P.3d 672, 677 (Colo. 2006) (“In determining whether the parties have agreed to submit the issue in question to arbitration, we follow state law principles governing contract formation.”); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156 (Del. 2002) (holding that “[t]he policy that favors alternate dispute resolution mechanisms, such as arbitration, does not trump basic principles of contract interpretation.”); *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99, 107–08 (Ill. 2006) (holding that arbitration agreements must be analyzed using ordinary principles of contract law); *Aiken v. World Fin. Corp. of S.C.*, 644 S.E.2d 705, 709 (S.C. 2007) (“Because even the most broadly worded arbitration agreements still have limits founded in general principles of contract law, [we] will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.”).

²⁹⁵ *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223 (Tex. 2003).

favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate; instead, ordinary contract principles [apply] Thus, [a party who attempts] to enforce an arbitration agreement must show the agreement meets all requisite contract elements.²⁹⁶

To establish a valid and enforceable contract, the vast majority of state supreme courts require a party to prove the following elements: (1) two or more contracting parties agreeing to be bound; (2) sufficient consideration; (3) a sufficiently definite agreement; (4) the parties' legal capacity to make a contract; (5) the parties' mutual assent; and (6) the contract will not violate common law and statutory law.²⁹⁷ In addition, state supreme courts also embrace several other principles:

When examining a contract, a court should first examine the four corners of the contract to determine how to interpret it. If the language in the contract is clear and unambiguous, the intent of the contract must be effectuated. *Vagueness and ambiguity are more strongly construed against the party drafting the contract.* [If] the intent of the parties is not clear, [a] court should ... resort to extrinsic evidence.²⁹⁸

Now, assume that a third-year law student applies for a consumer loan to purchase law casebooks and braces for her child. The parent-student completes and signs *only* a preprinted, standardized application form. Also assume: (1) the loan application contains an arbitration clause; (2) the lender rejects the application; (3) the student-parent sues the lender for allegedly discriminating irrationally on the basis of gender; and (4) the lender demands mandatory arbitration. Clearly, based on the rules outlined above, the student's stand-alone loan application is not an enforceable contract under common law principles of contract law.

Nevertheless, would the arbitration clause in the law student's completed and signed loan application still be enforceable under the FAA section 2? As of this writing, the Supreme Court has not squarely addressed the narrow question: whether an arbitration clause in a *stand-alone*, preprinted application form qualifies as a "written provision in a contract" *under section 2* of the FAA?²⁹⁹ On the other hand, the Supreme Court has decided two controversies involving the enforceability of an arbitration provision in a standardized application form that was "*a part of*" an enforceable contract.³⁰⁰

²⁹⁶ *Id.* at 227–28.

²⁹⁷ *Rotenberry v. Hooker*, 864 So. 2d 266, 270 (Miss. 2003).

²⁹⁸ *Id.* (emphasis added).

²⁹⁹ Federal Arbitration Act, 9 U.S.C. § 2 (2013).

³⁰⁰ *See infra* notes 301–32 and accompanying text.

First, consider the relevant facts and holding in *Gilmer v. Interstate/Johnson Lane Corporation*.³⁰¹ Interstate/Johnson Lane Corporation (Interstate) employed Robert Gilmer to serve as a financial services manager.³⁰² Under the terms of Interstate's employment contract, Gilmer had to become a member of a third party, stock exchange organization.³⁰³ Gilmer completed and signed the third party standardized application form, entitled Uniform Application for Securities Industry Registration or Transfer (UASIR).³⁰⁴ Under the terms of the UASIR, Gilmer agreed to arbitrate any dispute—between Gilmer and Interstate—that required arbitration under the third party organization's rules, constitutions or bylaws.³⁰⁵ Briefly put, Gilmer completed a membership application and formed a contractual relationship with the securities exchange organization.³⁰⁶

Six years later, Interstate fired Gilmer.³⁰⁷ In response, the sixty-two-year-old employee filed an age discrimination charge with the Equal Employment Opportunity Commission.³⁰⁸ Later, Gilmer sued Interstate in federal court.³⁰⁹ He alleged that Interstate's firing violated the Age Discrimination in Employment Act of 1967 (ADEA).³¹⁰ In response, Interstate filed a motion to compel arbitration of the ADEA claim.³¹¹ Interstate relied upon the arbitration agreement in Gilmer's securities registration application.³¹² The employee, however, cited language in FAA section 1, which reads in pertinent part: "nothing herein ... shall apply to *contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."³¹³ Gilmer argued that he should not be compelled to arbitrate his federal claim.³¹⁴

In the course of events, the controversy reached the Supreme Court. Several amici curiae supported Gilmer and argued that all disputes involving

³⁰¹ 500 U.S. 20, 23 (1991).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* ("NYSE Rule 347 provides 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.'").

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012).

³¹¹ *Gilmer*, 500 U.S. at 24.

³¹² *Id.*

³¹³ Federal Arbitration Act, 9 U.S.C. § 1 (2012).

³¹⁴ *Gilmer*, 500 U.S. at 26–27.

“contracts of employment” should be excluded from mandatory arbitration under FAA section 1.³¹⁵ However, the Court stressed:

[I]t would be inappropriate to address the scope of [the exclusion under FAA §1], because the [disputed] arbitration clause ... 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 ... is in Gilmer’s *securities registration application*—which is a *contract* with the securities exchanges.³¹⁶

Therefore, the Supreme Court embraced lower courts’ rulings and declared that the exclusionary language in FAA section 1 did not bar arbitration clauses which appear in securities exchange members’ registration applications.³¹⁷ Once more, according to the Court, a third party’s registration application and the securities organization’s membership agreement formed a binding contract between Gilmer and Gilmer’s employer.³¹⁸

Ten years after deciding *Gilmer*, the Supreme Court decided *Circuit City Stores v. Adams*.³¹⁹ The relevant facts in the latter case are fairly similar to those in *Gilmer*. Saint Clair Adams visited a Circuit City Store in Santa Rosa, California.³²⁰ He completed and signed an employment application form, which read:

I agree [to] settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and [the] law of tort.³²¹

Ultimately, Circuit City employed Adams as a sales counselor.³²² Two years later, a dispute arose between Circuit City and Adams.³²³ In response,

³¹⁵ *Id.* at 25 n.2.

³¹⁶ *Id.* (emphasis added) (“Gilmer ... did not raise the issue in the courts below, it was not addressed there, and it was not among the questions presented in the petition for certiorari.”).

³¹⁷ *Id.* (“[W]e therefore hold that § 1’s exclusionary clause does not apply to Gilmer’s arbitration agreement.”).

³¹⁸ *Id.*

³¹⁹ 532 U.S. 105 (2001).

³²⁰ *Id.* at 109.

³²¹ *Id.* at 109–10.

³²² *Id.* at 110.

³²³ *Id.*

Adams filed an employment discrimination lawsuit against Circuit City in state court alleging that the employer violated California's Fair Employment and Housing Act,³²⁴ and committed various torts under California law. Circuit City filed an action in federal court asking the district court judge to compel arbitration of Adams's claims under FAA section 1.³²⁵ Circuit City prevailed.³²⁶ The controversy reached the Supreme Court, however, where the parties asked the Court to resolve an inter-circuits conflict over whether an arbitration clause in a standardized employment form is an excluded "contract of employment" under FAA section 1.³²⁷ To resolve the conflict, the Court declared that the "contract of employment" language exempted transportation workers from mandatory arbitration under section 1 of the FAA.³²⁸

In addition, the Court stressed: "The instant case [does not involve] the basic coverage authorization under § 2 of the Act, but the exemption from coverage under § 1."³²⁹ Even more importantly, Circuit City insisted that the signed and completed application form was not an excluded contract under section 1 of the FAA.³³⁰ The Supreme Court, however, declined to grant certiorari regarding the question of whether Adams's signed employment application was a *stand alone* "contract of employment."³³¹ Still, in the end, the Court accepted implicitly—without deciding—that Adams's completed application form and his employment formed a totally integrated contract.³³² Plainly, the *Gilmer* and *Circuit City* courts did not address the

³²⁴ *Id.* (citing CAL. GOV'T. CODE §§ 12900–12907 (Deering 2013)).

³²⁵ *Circuit City Stores*, 532 U.S. at 110.

³²⁶ *Id.*

³²⁷ *Id.* at 110–11.

This comprehensive exemption had been advocated by *amici curiae* in *Gilmer*, where we addressed the question whether a registered securities representative's employment discrimination claim under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq., could be submitted to arbitration pursuant to an agreement in his securities registration application.

Id. at 112.

³²⁸ *Id.* at 112 ("Most Courts of Appeals conclude the exclusion provision is limited to transportation workers, defined, for instance, as those workers 'actually engaged in the movement of goods in interstate commerce.' As we stated at the outset, the Court of Appeals for the Ninth Circuit takes a different view and interprets the § 1 exception to exclude all contracts of employment from the reach of the FAA.") (citation omitted).

³²⁹ *Id.*

³³⁰ *Id.* at 113.

³³¹ *Id.*

³³² *Id.* The Courts' explanation is found in the employment application form, which stated in pertinent part, "I will settle any ... disputes ... relating to my application ... employment and/or cessation of employment with Circuit City ... by ... arbitration." *Id.* at 109–10.

question of whether an arbitration clause in a completed, signed, and *stand-alone* standardized application form is a “written provision in a contract” under FAA section 2. Consequently, among lower courts, this highly important question has generated conflicting rulings. To illustrate the essence of the split, consider the facts and rulings in two cases which were decided in the same year and after *Gilmer* and *Circuit City*.

In *Burch v. Second Judicial Dist. Court of State ex rel. County of Washoe*,³³³ James and Linda Burch (Burches) purchased a new house from Double Diamond (Diamond).³³⁴ Approximately four months after closing, Diamond gave Linda Burch a “thirty-one-page *warranty booklet*.”³³⁵ At that time, Diamond also offered the homeowners a “2-10 Year Home Buyers Warranty” (HBW) and asked the consumers to complete and sign a one-page “Application for Home Enrollment” form.³³⁶ In response, Linda signed the standardized application form; but, she did not read the thirty-one-page booklet.³³⁷ Purportedly, the HBW was an express warranty—promising that the house would be (1) free from materials and workmanship defects for one year; (2) free from electrical, plumbing, and mechanical systems defects for two years; and (3) free from structural defects for ten years.³³⁸ More relevant, the one-page “Application for Home Enrollment” form stated:

By signing, [the] Homebuyer acknowledges that s/he has viewed and received a video of “Warranty Teamwork: You, Your Builder & HBW,” read the warranty, ... *received a copy of this form* with the Home Buyers Warranty Booklet, and CONSENTS TO THE TERMS OF THESE DOCUMENTS INCLUDING THE BINDING ARBITRATION PROVISION contained therein.³³⁹

The arbitration clause in the HBW read in pertinent part:

Any controversy ... arising out of or relating to Builder’s workmanship/ systems limited warranty coverages ... shall be settled by *final and binding* arbitration in accordance with the Construction Arbitration Services (CAS) or other [National Home Insurance Company] NHIC/ HBW approved rules ... in effect at the time of the arbitration Any controversy concerning a claim arising out of or relating to the Builder’s ten year structural coverage (insured by NHIC) shall be settled by final

³³³ 49 P.3d 647 (Nev. 2002).

³³⁴ *Id.* at 648.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

and binding arbitration Arbitration of all structural warranty disputes will be conducted by arbitrators supplied by an NHIC approved arbitration service.³⁴⁰

Nearly two years after purchasing the house, the Burches discovered “serious problems underneath [their] house”—saturated floor joists, wet insulation, muddy ground, and a wet, moldy foundation.”³⁴¹ The consumers reported the defects to Diamond and requested certain repairs.³⁴² Put simply, the Burches did not like the offer and consequently filed a lawsuit in state court, raising several common law theories of recovery: breach of express and implied warranties, negligence, and fraud and misrepresentation.³⁴³ Diamond filed a motion to stay the trial and a motion to compel arbitration.³⁴⁴ The builder argued that the terms of the application and the booklet required the parties to arbitrate all disputes relating to the construction of the Burch’s home.³⁴⁵

The district court granted Diamond’s motion to compel arbitration.³⁴⁶ The lower court concluded that the one-page warranty application—which referenced the HBW—was a valid contract.³⁴⁷ The Burches appealed, filing a writ of mandamus and arguing that the district court’s motion to compel arbitration should be vacated.³⁴⁸ On appeal, the Nevada Supreme Court acknowledged that “the FAA establishes a strong public policy favoring arbitration for the purpose of avoiding the unnecessary expense and delay of litigation where parties have agreed to arbitrate.”³⁴⁹ But the state supreme court stressed: FAA section 2 “does not mandate the enforcement of an unconscionable contract or arbitration clause.”³⁵⁰ Examining the record, the

³⁴⁰ *Id.*

³⁴¹ *Id.* at 649.

³⁴² *Id.* (“[The Burches] requested that Double Diamond remedy the situation by removing the insulation, professionally treating the area with mildew and fungicide controls, installing upgraded insulation with proper venting, constructing a proper water barrier underneath the house, and reimbursing them for all current and future fees for professional inspections. While contesting liability, Double Diamond offered to completely dry the crawl space underneath the house, install two additional foundation vents and a six-mill vapor barrier, treat all areas of active fungus with an approved fungicide, and reinstall insulation except at the rim joist.”).

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 650.

³⁵⁰ *Id.* at 650 (citing *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that generally applicable contract defenses—such as unconscionability—may be used to invalidate an arbitration clause)).

Nevada Supreme Court outlined several reasons for reversing the district court's ruling.³⁵¹ One explanation, however, shines brightly: "The Burches did not have an opportunity to read the one-page application form, or the thirty-one-page HBW booklet ... before signing 'the application.' The arbitration clause was located on page six of the HBW booklet."³⁵² Therefore, the arbitration clause in the standardized application form was procedurally unconscionable, thereby effectively precluding the formation of a valid arbitration contract.³⁵³

Now consider the Ninth Circuit's ruling in *EEOC v. Luce, Forward, Hamilton & Scripps*,³⁵⁴ which was decided almost seven weeks after *Burch*. Donald Scott Lagatree (Lagatree) applied for a position as a full-time legal secretary with the law firm of Luce, Forward, Hamilton & Scripps LLP (Luce).³⁵⁵ Luce was impressed with Lagatree's credentials and experience.³⁵⁶ Therefore, on his first day of work, Lagatree received the law firm's standard, conditional-offer-of-employment letter.³⁵⁷ The letter outlined Lagatree's salary and benefits.³⁵⁸ In addition, the letter stated that Lagatree or the firm "could terminate [his] employment at any time, with or without cause."³⁵⁹ An arbitration provision also appeared in the letter, requiring Lagatree to submit all "claims arising from or related to his employment" to binding arbitration.³⁶⁰ More specifically, the arbitration clause read in relevant part:

In the event of any dispute ... arising from or related to your employment or the termination of your employment, we jointly agree to submit all such

³⁵¹ *Id.* ("The Burches did not receive a copy of the HBW's terms until after Double Diamond had paid the premium to enroll the Burch home in the warranty program—almost four months after they closed [the] escrow on their home. Double Diamond told the Burches that the HBW's issuance was 'automatic' and offered extra protection for their home, when in fact the warranty limited their protection under Nevada law The Burches were not sophisticated consumers, they did not understand the HBW's terms, and the HBW's disclaimers were not conspicuous.").

³⁵² *Id.*

³⁵³ *Id.* ("Under these circumstances, the Burches did not have a meaningful opportunity to decide if they wanted to agree to the HBW's terms, including its arbitration provision. As a result, the HBW was [also] procedurally unconscionable.").

³⁵⁴ 303 F.3d 994 (9th Cir. 2002).

³⁵⁵ *Id.* at 997.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

disputes or claims to confidential binding arbitration, under the Federal Arbitration Act. Any arbitration must be initiated within 180 days after the dispute or claim first arose, and will be heard before a retired State or Federal judge in the county containing the firm office in which you were last employed. The law of the State in which you last worked will apply.³⁶¹

For two days, Lagatree worked “*without a contract*.”³⁶² Moreover, as an applicant, Lagatree realized: “[Signing the arbitration provision in the letter] was the only way that he could ... become an employee of the firm.”³⁶³ Still, for various reasons, Lagatree refused to sign the conditional-offer-of-employment letter that housed the arbitration provision.³⁶⁴ Shortly thereafter, Luce *withdrew the job offer*.³⁶⁵ And the record is clear: Luce refused to employ Lagatree “only because he would not sign the arbitration provision.”³⁶⁶

The Equal Employment Opportunity Commission (EEOC) sued Luce on behalf of Lagatree.³⁶⁷ The EEOC alleged that Luce retaliated against Lagatree—which is a violation under Title VII of the Civil Rights Act of 1964,³⁶⁸ the Americans with Disabilities Act of 1990 (ADA),³⁶⁹ the Age Discrimination in Employment Act of 1967 (ADEA),³⁷⁰ and the Equal Pay Act of 1963 (EPA).³⁷¹ The EEOC asked the federal district court to award various damages³⁷² and grant injunctive relief—preventing Luce from forcing employment applicants to sign arbitration agreements as a condition of employment.³⁷³ The district court refused to award compensatory damages and rejected EEOC’s request for injunctive relief.³⁷⁴ The district court, however, ordered Luce to stop forcing applicants to arbitrate Title VII claims.³⁷⁵

³⁶¹ *Id.*

³⁶² *Id.* at 998 (emphasis added).

³⁶³ *Id.*

³⁶⁴ *Id.* at 997–98 (“[H]e ‘couldn’t sign ... the arbitration agreement’ because ‘it was unfair.’ ... [And he could] not sign an arbitration agreement under an at-will employment situation because he believed he needed to keep in place his ‘civil liberties, including the right to a jury trial and redress of grievances through the government process.’”).

³⁶⁵ *Id.* at 998 (emphasis added).

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ 42 U.S.C. § 2000e-3 (2012).

³⁶⁹ 42 U.S.C. § 12203(b) (2012).

³⁷⁰ 29 U.S.C. § 623(d) (2012).

³⁷¹ 29 U.S.C. § 215(a)(3) (2012).

³⁷² *Luce, Forward, Hamilton & Scripps*, 303 F.3d at 998 (“Lagatree sought lost wages, damages for emotional distress, and punitive damages.”).

³⁷³ *Id.* at 997.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

The lower court also declared that applicants for employment do not have to arbitrate claims under the ADA, ADEA, and EPA.³⁷⁶ Luce appealed.³⁷⁷

On appeal, the Ninth Circuit reversed the district court and issued multiple rulings.³⁷⁸ First, the Court of Appeals for the Ninth Circuit stated explicitly: employers may require *applicants* “to sign agreements to arbitrate Title VII claims as a condition of their employment.”³⁷⁹ Of course, that required Lagatree and Luce to form a binding and enforceable contract. But, the record is clear: Lagatree worked just two days “*without a contract*.”³⁸⁰ Even more importantly, the language of FAA section 2 is unambiguous: a party may compel arbitration under the FAA only if the party presents proof of an arbitration clause in a valid, written, and legally enforceable contract.³⁸¹

So, what compelled the Ninth Circuit to reject the district court’s conclusion that *employment applicants* do not have to arbitrate Title VII claims? Simply put, the court of appeals ignored settled principles of contract law, circumvented the “written contract” requirement under section 2 of the FAA, focused on the language in FAA section 1, and applied the Supreme Court’s ruling in *Circuit City*.³⁸² Once more, in *Circuit City*, the Court did not address the question of whether—absent a valid contract—applicants for goods, services or employment must arbitrate federal and state law claims under FAA section 2. Instead, citing FAA section 1, the Supreme Court simply declared that the FAA covers every “contract of employment” except transportation workers’ employment contracts.³⁸³ Without a doubt, the rulings in *Burch* and *Luce* conflict.³⁸⁴ Therefore, when the opportunity

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 998.

³⁷⁸ *Id.* at 997 (“We vacate the district court’s permanent injunction against Luce Forward We additionally reject the EEOC’s retaliation theory. Lagatree did not engage in a protected activity when he refused to sign the Luce Forward arbitration agreement, and consequently, Luce Forward did not retaliate by refusing to hire him.”).

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 998 (emphasis added).

³⁸¹ 9 U.S.C. § 2 (2012).

³⁸² *Luce, Forward, Hamilton & Scripps*, 303 F.3d at 1003.

³⁸³ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

³⁸⁴ Compare *Haynes v. Fincher*, 525 S.E.2d 405, 406–07 (Ga. App. 1999) (“[T]he Hayneses applied for the builder’s warranty [The] signed application provides that the warranty consists of that application and the warranty program booklet [T]he booklet establishes that any disputes the buyers have with the builder may be submitted to binding arbitration governed by the procedures of the Federal Arbitration Act The Hayneses argue that the binding arbitration provision ... is not an enforceable agreement because neither they nor Fincher initiated it as required by [the code]. The argument is without merit because [the code] requires parties to initial arbitration clauses *only in home sale or loan contracts*. The builder’s warranty ... *is not a home sale or loan contract* Consequently, the absence of the parties’ initials beside the warranty’s arbitration provision is

arises, the Court should address and answer intelligibly the question of whether an arbitration clause in a standardized, preprinted application form or in a conditional-offer-of-employment letter is an enforceable written contract under FAA section 2. As of this writing those instruments are not enforceable contracts under the settled principles, which are outlined intelligibly and clearly in two classic contract law cases—*Mitchill v. Lath* and *Lucy v. Zehmer*.³⁸⁵

B. Judicial Conflict—Whether Disgruntled Applicants’ Antidiscrimination, Civil Rights and Harassment Claims Arose Out of Valid Employment Contracts or From Allegedly Unenforceable Standardized Employment Application Forms

To repeat, the FAA section 2 also reads in relevant part: “[A] controversy ... arising out of such [written] contract [may be settled by arbitration].”³⁸⁶ Of course, the FAA does not define “arising out of such contract.”³⁸⁷ A conservative reading of the phrase, however, means courts may not compel arbitration unless parties’ disagreements evolve from within the four corners of a written contract. On the other hand, several courts have adopted a more liberal definition—concluding that disputes arising from non-negotiated instruments and relationships are also covered.³⁸⁸ But note that in *Hobley v. Yellow Transp., Inc.*,³⁸⁹ the federal district court judge discussed a middle position. Citing Texas law, the federal judge penned the following interpretation of the phrase “arising out of a contract”:

[Courts employ] a two-part test: (1) a valid agreement to arbitrate must exist between the parties; and (2) the dispute in question must fall within the scope of that arbitration agreement. Under Texas law, ... [a] claim is arbitrable *if it is so interwoven with the underlying contract that it could not stand alone*; however, *it is not arbitrable if the claim is so*

not fatal.”) (emphasis added), *with Mendez v. Puerto Rican Intern. Cos., Inc.*, 2010 WL 2654439, at *3 (D. Virgin Islands July 1, 2010) (Plaintiffs signed certain dispute resolution agreements (DRAs) when they applied for work. “This dispute presents a question of arbitrability Defendants contend that [a valid] agreement exists Plaintiffs contend that they never intended to agree to such a one-sided bargain. Under normal principles of contract interpretation, there is no good reason to conclude that by signing the DRAs, Plaintiffs intended to commit themselves to such an unbounded, far-reaching duty Without clear and unmistakable evidence that Plaintiffs did intend to bestow such a benefit on Defendants, this court will not assume that the parties so intended.”).

³⁸⁵ See discussion *supra* Introduction.

³⁸⁶ 9 U.S.C.A. § 2 (2012) (emphasis added).

³⁸⁷ *Id.*

³⁸⁸ See *infra* notes 391–437 and accompanying text.

³⁸⁹ No. 3:09-CV-1160-K, 2010 WL 286690 (N.D. Tex. Jan. 21, 2010).

*independent of the contract that it can be maintained without reference to the contract The court must look to the facts forming the basis of each claim to determine whether it could be maintained without reference to the contract, ... not simply whether it references the contract.*³⁹⁰

Still, the “arising out of a contract” language continues to produce conflicting rulings among state and federal courts over the enforceability of arbitration clauses in standardized application forms. Again, an important principle of contract law must be stressed: stand-alone, standardized, pre-printed application forms are not valid contracts. Yet, when deciding whether to compel arbitration of various claims, several courts have ignored that principle. Quite simply, several tribunals have created exceptions to the FAA’s arising-out-of-a-contract requirement and granted motions to compel arbitration when movants simply established: (1) the controversy only arose out of the application process; (2) the dispute was only related to an application form; and (3) a disagreement was related in any manner to the intake process and application.³⁹¹

Consequently, in the wake of those exceptions, a questionable and controversial multi-part doctrine has evolved among some inferior federal courts. Under the FAA section 2, arbitration is mandatory if (1) disgruntled individuals complete and sign preprinted stand-alone applications,

³⁹⁰ *Id.* at *1 (emphasis added).

³⁹¹ See, e.g., *Adams v. Republic Parking Sys., Inc.*, No. CIV-12-1310-HE, 2013 WL 1450507, at *1 (W.D. Okla. Apr. 9, 2013) (The non-negotiated instrument read: “[Parties agree to arbitrate all] controversies *arising out of or relating to the applicant’s application or candidacy for employment, promotion, demotion, or termination of employment with the [c]ompany.*”) (emphasis added); *Mendez v. Puerto Rican Int’l Cos.*, Nos. 05-cv-00174-LDD, 05-cv-00199-LDD, 2010 WL 2654439, at *2, n.8 (D.V.I. July 1, 2010) (The arbitration clause read in pertinent part: “Regardless of whether Wyatt offers me employment, both Wyatt and I agree to resolve ... all ... controversies *arising out of or relating to ... my application or candidacy for employment.*”) (emphasis added); *Hobley*, 2010 WL 286690, at *1 (“I agree to resolve all ... controversies arising out of, or related to, my application for employment, my employment, or the cessation of my employment.”); *Griffen v. Alpha Phi Alpha, Inc.*, No. 06-1735, 2007 WL 707364, at *2 (E.D. Pa. Mar. 2, 2007) (“The aspirant ... and [the Fraternity] ... agree that any and all disputes ... *arising out of or relating in any manner whatsoever to the Intake process and application* shall be subject to and resolved by compulsory and binding arbitration.”) (emphasis added); *Allen v. Labor Ready Sw.*, B237673, 2013 WL 1910293, at *2 (Cal. App. May 9, 2013) (The employment application read: “I agree that *any disputes arising out of my application for employment or employment ... will be resolved by final and binding arbitration.*”) (emphasis added); *Dish Network L.L.C. v. Brenner*, Nos. 13-12-00564-CV, 13-12-00620-CV, 2013 WL 3326640, at *4 (Tex. App. June 27, 2013) (The instrument read: “[A]ny claim, controversy and/or dispute ... *arising out of and/or in any way related to [the] application for employment, employment and/or termination of employment*’ would be ‘resolved by arbitration.’”) (emphasis added).

absent any evidence of valid and enforceable employment contracts; (2) the standardized application forms contain arbitration clauses; and (3) the complainants' employment discrimination claims are *interwoven* with the arbitration provisions in completed and signed application forms.³⁹² To be sure, the exceptions to the FAA's arising-out-of-a-contract rule effectively marginalize or undermine a previously discussed FAA's requirement: federal courts must apply ordinary state-law principles of contract to determine whether a valid arbitration contract exists or whether an arbitration clause is valid and enforceable.³⁹³

To help prove the latter assertions, consider the Indiana district court's analysis and decision in *Baumann v. The Finish Line, Inc.*³⁹⁴ Tonya Baumann applied for a position at Finish Line's call center in Indianapolis, Indiana.³⁹⁵ Finish Line required her to complete and sign a standardized employment-application form before hiring her.³⁹⁶ The application contained an "Applicant Statement," which read in relevant part:

I agree [to settle all] ... controversies *arising out of or relating to my application or candidacy for employment* and/or cessation of employment with The Finish Line ... exclusively by final and binding arbitration [C]laims include claims under federal, state, and local statutory or common law, such as ... Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991 Complete details of my agreement to submit these claims to arbitration are contained in [the] ... Employee Dispute Resolution Plan, *which has been made available for my review prior to the execution of this application*. I have read and understand the above paragraph and have voluntarily agreed to it.³⁹⁷

The Employee Dispute Resolution Plan (Plan) read: "Application for employment, initial employment, or continued employment ... constitutes consent and agreement by both the Employee and the Company to be bound by this Plan."³⁹⁸ The record, however, revealed that Finish Line and Baumann never executed a written employment contract.³⁹⁹ Instead, Baumann began working as an at-will employee—again, without contract

³⁹² See *infra* note 551 and accompanying text.

³⁹³ See *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) (reaffirming the principle that courts apply general state-law principles of contract to determine whether an arbitration agreement falls within the scope of the FAA).

³⁹⁴ No. 108-cv-1385-LJM-JMS, 2009 WL 2750094 (S.D. Ind. Aug. 26, 2009).

³⁹⁵ *Id.* at *1.

³⁹⁶ *Id.*

³⁹⁷ *Id.* (emphasis added).

³⁹⁸ *Id.*

³⁹⁹ *Id.* at *1–2.

of employment.⁴⁰⁰ As things progressed, Baumann became dissatisfied with her work environment and filed a sex discrimination charge against Finish Line.⁴⁰¹ In response, the company fired her.⁴⁰² Later, Baumann commenced an employment discrimination suit under Title VII of the Civil Rights Act of 1964, as amended (Title VII).⁴⁰³ Finish Line filed a motion to compel arbitration, asserting that “a valid and binding arbitration agreement” barred the Title VII lawsuit.⁴⁰⁴

The federal district court embraced Finish Line’s argument and granted summary relief.⁴⁰⁵ What influenced the judge’s decision? The court began its analysis by citing the settled rule of contract law: arbitration agreements are treated as ordinary contracts.⁴⁰⁶ But, after applying that principle, the federal district court rejected Baumann’s arguments.⁴⁰⁷ In her answer, Baumann argued that the Applicant Statement and the Plan did not comprise a valid and enforceable arbitration contract.⁴⁰⁸ She stressed: (1) the Plan did not contain an effective date; and (2) she received a copy of the Plan before Finish Line formally adopted the instrument.⁴⁰⁹ Put simply, the judge concluded: the application and Plan comprised a totally integrated, written employment contract.⁴¹⁰ The judge also declared that Baumann acknowledged receiving the Plan when she signed the Applicant Statement.⁴¹¹

The federal district court judge’s analysis and ruling in *Baumann* are less than stellar for several reasons. First, a conservative reading of the facts in *Baumann* strongly suggests that Finish Line’s Plan was nothing more than words and phrases in an employee handbook. Indiana law is exceedingly clear; employee handbooks are not unilateral contracts of employment.⁴¹² In *Orr v. Westminster Village North, Inc.*,⁴¹³ the Indiana Supreme

⁴⁰⁰ *Id.* at *4.

⁴⁰¹ *Id.* at *1.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* (Finish Line filed a motion to dismiss the complaint and to compel arbitration. The court converted the request “into a Motion for Summary Judgment on the sole issue of whether the Court must dismiss the complaint and compel arbitration.”).

⁴⁰⁵ *Id.* at *6.

⁴⁰⁶ *Id.* at *3.

⁴⁰⁷ *Id.* at *6.

⁴⁰⁸ *Id.* at *3.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.* (“Baumann has not apprised the Court of a single provision in either the Applicant Statement or the Plan that was conditioned upon the Plan having an effective date The Court concludes that the blank line is legally insignificant.”).

⁴¹² *City of Indianapolis v. Byrns*, 745 N.E.2d 312, 317 n.3 (Ind. Ct. App. 2001).

⁴¹³ 689 N.E.2d 712 (Ind. 1997).

Court outlines the test to determine whether an employee handbook might be an enforceable employment contract.⁴¹⁴ The *Baumann* court, however, never applied or mentioned the *Orr* test.⁴¹⁵

Second, the FAA's arising-out-of-a-written-contract test was not satisfied because Baumann's stand-alone, completed application form was not a written contract under Indiana law.⁴¹⁶ Consequently, the application and the Plan could not comprise a totally integrated employment contract. Third, the indisputable facts in the record undermined the court's implicit summary judgment ruling: she was an employment-at-will worker, performing without the protection of a written employment contract. Still, the federal judge concluded implicitly that Baumann's statutory sexual harassment claim evolved from a written employment contract.⁴¹⁷ Furthermore, assuming that a valid employment contract existed between the applicant and the employer, the court did not explain *how* the sexual harassment claim arose from the written contract.⁴¹⁸

The material facts in *Heseman v. Hensler*⁴¹⁹ and *Baumann* are quite similar. The holdings, however, conflict. In *Heseman*, the defendant, Joseph Hensler, was the owner, president, and chief executive officer of Clarklift, Inc.⁴²⁰ Carolyn Heseman, the applicant and plaintiff, applied for a job at Clarklift.⁴²¹ She completed and signed an application form, which contained an arbitration clause.⁴²² The latter read in pertinent part:

In the event you contend that Clarklift-Team Power ... [violated] ... any of your rights, you and Clarklift-Team power agree to submit any such matter to binding arbitration pursuant to the provisions of the Federal Arbitration Act. If the company does not receive a written request for

⁴¹⁴ *Id.* at 720–22 (The Indiana Supreme Court requires a party to prove several elements: (1) proof of an employee handbook that contains an unambiguous promise or an offer of employment; (2) proof of an employee handbook that adequately informs employees about the scope and parameters of the offer; (3) proof that an employee read the handbook and the offer, and (4) proof that the employee accepted the offer by beginning to work.).

⁴¹⁵ *Id.* at 712–22.

⁴¹⁶ *See, e.g.,* *W.S.K. v. M.H.S.B.*, 922 N.E.2d 671, 695 (Ind. App. 2010) (reiterating that “mutuality of obligation” must be present to create a contract and concluding applications for medical-staff positions are not contracts).

⁴¹⁷ *Baumann v. The Finish Line, Inc.*, No. 108-cv-1385-LJM-JMS, 2009 WL 2750094, at *1 (S.D. Ind. Aug. 26, 2009) (“The court has considered the parties’ arguments and, without addressing the merits of the complaint.”).

⁴¹⁸ *Id.* at *1–6.

⁴¹⁹ No. C044769, 2005 WL 941362 (Cal. App. 3d Dist. Apr. 22, 2005).

⁴²⁰ *Id.* at *1.

⁴²¹ *Id.* at *1–2.

⁴²² *Id.*

arbitration from you within 6 months of the date of this application, you agree you will have waived any right to raise any claim.⁴²³

Clarklift hired Heseman to manage the accounts payable department, and she “received several promotions and pay raises.”⁴²⁴ But, all was not well. Allegedly, one of Clarklift’s mechanics began harassing Heseman.⁴²⁵ After Heseman complained about the harassment, Hensler terminated Heseman, claiming that her job performance was substandard.⁴²⁶ Later, Heseman filed a complaint under California’s antidiscrimination code, asserting that Hensler and Clarklift condoned and practiced sexual harassment, sexual discrimination, and retaliation.⁴²⁷ Defendants filed a motion to compel arbitration, citing the arbitration provision in the Application for Employment.⁴²⁸ The superior court denied the motion and Clarklift and Hensler appealed.⁴²⁹

The California court of appeals began its analysis by asking whether the application form was a valid contract.⁴³⁰ Embracing the superior court’s ruling, the appellate court concluded that the application and the arbitration clause were procedurally unconscionable.⁴³¹ But even more importantly, the court of appeals found that the arbitration provision covered only “claims

⁴²³ *Id.* at *2.

⁴²⁴ *Id.* at *1.

⁴²⁵ *Id.* (Allegedly, the mechanics harassed Heseman by “repeatedly commenting on her physical appearance and attractiveness, offering to take her out to lunch even though ... [she] told him that she was married and not available, proposing that he was more virile than her husband, telephoning her with sexual overtures, telling a female coworker that he wanted to have sex with [Heseman], and asking the coworker about ... [Heseman’s] personal life.”).

⁴²⁶ *Id.*

⁴²⁷ *Id.*; see also CAL. GOV’T CODE § 12940(a) (West 2014) (“It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California ... [f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.”).

⁴²⁸ *Heseman*, 2005 WL 941362, at *1.

⁴²⁹ *Id.*

⁴³⁰ *Id.* at *3.

⁴³¹ *Id.* at *2 (“The arbitration provision is both procedurally unconscionable, as it is presented to each applicant on a take it or leave it basis, and substantively unconscionable, as it forces the employee to agree to arbitrate all claims while the employer does not have to arbitrate any of its claims.”).

arising out of the application process itself.”⁴³² Heseman’s sexual harassment, sexual discrimination, and retaliatory discharge claims “arose more than six months after” she completed and signed the standardized application form.⁴³³ Therefore, the non-negotiated, standardized arbitration provision did not cover the claims outlined in Heseman’s complaint.⁴³⁴

The court’s analyses and conclusion in *Heseman* are more intelligibly convincing than those in *Baumann*. And the reason is not terribly complicated. The California court carefully reviewed settled principles of contract law and applied those principles to address two important FAA-related questions: (1) whether Clarklift and Heseman formed a valid contract that contained an arbitration clause; and (2) whether Heseman’s claims evolved from the terms of the written contract.⁴³⁵ In the end, the answer to both questions was no.⁴³⁶ Still, in the near future, the Supreme Court will have to address the following question directly: whether FAA section 2 requires workers to arbitrate their antidiscrimination, civil rights, and harassment claims if those claims evolved from standardized employment application forms or arose out of an employment application process?⁴³⁷

C. Judicial Conflict—Whether Applicants’ Consumer Protection Claims and Lawsuits Arose Out of Valid and Enforceable Financial Services Contracts or Out of Allegedly Unenforceable Standardized Application Forms

In the wake of Superstorm Sandy’s widespread destruction in 2012, the New Jersey Department of Community Affairs encouraged storm victims

⁴³² *Id.* at *5.

⁴³³ *Id.* at *2.

⁴³⁴ *Id.* at *5.

⁴³⁵ *Id.* at *3.

⁴³⁶ *Id.* at *2 (“[Heseman] opposed the motion on the grounds that the agreement, by its terms, did not apply to [her] claims, which arose more than six months after her employment commenced; the agreement was procedurally unconscionable because it required her to waive her right to judicial redress of further claims as a condition of employment; the agreement was substantively unconscionable because it applied *only to her* claims against Clarklift, and not to any claims Clarklift might have against her; and the agreement did not encompass her noncontractual, statutory claims against the individual defendants.”).

⁴³⁷ Compare *McLean v. Byrider Sales of Ind. S, L.L.C.*, No. 2:13-cv-524, 2013 WL 4777199, at *4 (S.D. Ohio Sept. 5, 2013) (concluding that plaintiffs’ claims under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311, and Ohio Revised Code § 4112.02 arose out of plaintiffs’ applications or candidacies for employment), with *Niolet v. Rice*, 20 So. 3d 31, 33 (Miss. Ct. App. 2009) (finding that plaintiff’s assault and battery claims were not directly or indirectly related to plaintiff’s employment (citing *Smith v. Captain D’s, L.L.C.*, 963 So. 2d 1116, 1121 (Miss. 2007) (holding that a sexual-assault claim had no connection with the employee’s employment))).

to apply for home rebuilding grants.⁴³⁸ On Sandy's first anniversary, however, thousands of homeowners and consumers in New Jersey filed a racial discrimination lawsuit against Governor Christopher Christie and his administration.⁴³⁹ In particular, the fairly large group of disgruntled consumers alleged: "Latino and African-American applicants were disproportionately rejected for rebuilding funds."⁴⁴⁰ Governor Christie and the state disputed the allegations.⁴⁴¹

As the author was penning this Article, a legal question evolved: whether Governor Christie would ask a court to force the complaining consumers into binding arbitration under the FAA section 2. Arguably, the answer to

⁴³⁸ Melissa Hayes, *Group Claims Sandy Aid Has Been Discriminatory*, NORTHJERSEY.COM (Nov. 27, 2013, 6:46 AM), http://www.northjersey.com/news/Group_claims_Sandy_aid_has_been_discriminatory.html, archived at <http://perma.cc/V5X8-35J3> ("The department oversees two main housing programs: the Reconstruction, Rehabilitation, Elevations and Mitigation grants, often called RREM, which provide up to \$150,000 for repairs and home elevations; and separate \$10,000 resettlement grants for storm victims who agree to stay in their county for three years.").

⁴³⁹ *Id.*; see also Star-Ledger Editorial Board, *Christie Administration Is Blowing Smoke On Sandy* (Dec. 4, 2013, 9:46 AM) http://blog.nj.com/njv_editorial_page/2013/12/the_christie_administration_is.html, archived at <http://perma.cc/P4AP-EFHV> ("As thousands of Hurricane Sandy victims desperately wait for word on whether or not they'll get relief money to rebuild, the Christie administration continues to brush off the most basic questions about its grant programs [M]ore than a year after the devastating storm, it's [sic] distributed only 10 percent of its funds for rebuilding homes Some were told they're ineligible and have no idea why The state says Sandy victims who were rejected were informed in writing of the reason for their ineligibility, and can always appeal. But applicants say ... they were never informed that they can appeal a wide variety of state decisions 'Just so it's general notice to all of you, don't ask me any questions about Fair Share Housing,' said Christie, declaring its team of lawyers not worth 'my time or my breath.' Never mind that this so-called 'hack' group has been advocating for fair housing in New Jersey for almost 40 years, and just won three major court victories over the administration, this year alone.").

⁴⁴⁰ Hayes, *supra* note 438 ("[According to the Fair Share Housing Center, state] documents reveal a disorganized system of processing applications that in effect discriminated against Latino and African-American applicants, and that changed its policies without ... informing the public Adam Gordon, Fair Share's staff attorney, said ... it was clear that Latino and African-American applicants were disproportionately rejected for rebuilding funds The rates of success in terms of people getting funding vary dramatically by race, ethnicity and geography.").

⁴⁴¹ *Id.* ("[T]he commissioner of the New Jersey Department of Community Affairs ... disputed the allegations, [asserting that] '[r]ace and ethnicity absolutely did not factor in to the application processing' [and that] the state used a random application process to ensure that low- and moderate-income and elderly and disabled residents were given equal access to funds to rebuild their homes or move elsewhere in the same county."); see also *Hurricane Sandy and New Jersey's Poor*, N.Y. TIMES, Dec. 24, 2013, at A22.

the latter question depends in part on answers to the following questions: (1) whether the Superstorm Sandy home rebuilding application contains an arbitration clause; and (2) whether Governor Christie believes that he can continue an otherwise successful political career without maintaining the support of Latino and African American voters in New Jersey and elsewhere. As of this writing, the answer to the political question is no. Conventional wisdom strongly indicates that a Republican-designated Christie will need support from significant numbers of minority voters to win the White House in 2016.⁴⁴² Therefore, assuming that an arbitration clause appears in the home rebuilding application form, the Governor has decided to defend its administration in a court of law instead of seeking the assistance of private arbitrators.⁴⁴³

Unlike Governor Christie, however, numerous other defendants have filed motions to compel arbitration, after displeased consumers and financial services applicants filed lawsuits.⁴⁴⁴ Again, FAA section 2 requires arbitral claims to arise out of written contracts.⁴⁴⁵ Yet, a review of consumer protection cases reveals that federal and state courts are split on whether financial services claimants must enter binding arbitration if consumer protection disputes *arose out of* completed and signed application forms.⁴⁴⁶ Below, the controversies and decisions in two representative cases are discussed to help illustrate the essence of this particular judicial conflict.

⁴⁴² Cf. Kate Zernike & Jonathan Martin, *Chris Christie Coasts to 2nd Term as Governor of New Jersey*, N.Y. TIMES, Nov. 6, 2013, at A1. (“Governor Christie won decisively, making impressive inroads among younger voters, blacks, Hispanics and women—all groups that Republicans nationally have struggled to attract. Gov. Chris Christie of New Jersey won re-election by a crushing margin ... a victory that vaulted him to the front ranks of Republican presidential contenders and made him his party’s foremost proponent of pragmatism over ideology Mr. Christie’s gains among black and Hispanic voters at the polls are the result of an aggressive, years-long effort: He has held more than 100 town hall-style meetings, including several in predominantly black areas that he lost in 2009.”).

⁴⁴³ Cf. *Come Clean On Sandy Grants*, ASBURY PARK PRESS, Sept. 15, 2013, available at 2013 WLNR 23037333 (“Families denied superstorm Sandy rebuilding help are now suing the state just to get answers as to why they were denied funds [What was the] response ... to the lawsuit by the state Department of Community Affairs? ‘No comment’ Information about funding eligibility requirements, the criteria used in deciding which applications to approve, and data about the number of applications received, rejected and approved should be online now.”).

⁴⁴⁴ See, e.g., *Rogers v. Royal Caribbean Cruise Line*, 547 F. 3d 1148, 1150 (9th Cir. 2008); *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1027 (11th Cir. 2003); *Hopkins v. World Acceptance Corp.*, 798 F. Supp. 2d 1339, 1399 (N.D. Ga. 2011).

⁴⁴⁵ 9 U.S.C.A. § 2 (West 2013).

⁴⁴⁶ Compare *Edwards v. Costner*, 979 So. 2d 757, 759, 765–66 (Ala. 2007) (concluding that a nonsignatory third-party cannot be forced to arbitrate his claims, even if the

First, consider the most salient facts in *Pake v. Fry*.⁴⁴⁷ Before his death, Norman E. Luster (Luster) was legally incompetent and had approximately \$115,000 in assets.⁴⁴⁸ A court appointed Luster's cousins—Joseph Pake (Pake) and Regina Rose (Rose)—as coguardians of Luster and his estate.⁴⁴⁹ SouthTrust Securities, Inc. and AXA Financial Inc. are subsidiaries of The Equitable Life Assurance Society of the United States (Equitable).⁴⁵⁰ Stephen Fry (Fry) was SouthTrust's agent.⁴⁵¹ Pake and Rose decided to invest Luster's cash and contacted the agent.⁴⁵² Fry *completed* the customer cash account application form, which contained an arbitration clause.⁴⁵³ Pake signed the application form.⁴⁵⁴ However, "Rose did not sign the Account Application."⁴⁵⁵

Embracing Fry's recommendation, Pake purchased shares in several mutual funds.⁴⁵⁶ But, after considering Fry's subsequent recommendations, Pake sold the mutual fund shares and purchased an annuity from AXA Financial.⁴⁵⁷ According to Pake, Fry promised that "the owners of the annuity ... would receive not less than the principal amount and a 5% return annually."⁴⁵⁸ In truth, "the value of the annuity ... dropped to approximately

arbitration agreement covers "all disputes ... resulting from or arising out of ... [a] transaction ... sought to be entered into ... [or] taking place either before or after the parties entered into this agreement"), *and* *S. Pioneer Life Ins. Co. v. Thomas*, 385 S.W.3d 770, 774 (Ark. 2011) (declaring that the insurer could not enforce the arbitration provision in the application for insurance under the FAA § 2), *with* *Nichelson v. Soeder*, No. 4:06CV1403, 2006 WL 3079109, at *2 (E.D. Mo. Oct. 27, 2006) (compelling the arbitration of "any claim ... arising out of ... any application ... to obtain [a] loan"), *and* *Salvadori v. Option One Mortg. Corp.*, 420 F. Supp. 2d 349, 352 (D.N.J. 2006) (concluding that any federal or state contract, tort, statutory, regulatory, common law or equitable claim must be arbitrated even if the arbitration clause included "[a]ny claim ... arising out of ... any application ... to obtain [a] [l]oan").

⁴⁴⁷ No. COA05-325, 2005 WL 3046532 (N.C. App. Nov. 15, 2005).

⁴⁴⁸ *Id.* at *1.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at *4.

⁴⁵² *Id.* at *1.

⁴⁵³ *Id.* 3 ("With respect to their negligent misrepresentation claims, plaintiffs assert defendants 'prepared the application and all accompanying documents for the annuity purchased from [AXA Financial], and said application and all data and information furnished to [AXA Financial] by [Fry and SouthTrust] contained substantial errors regarding the identity of the annuitant as [Pake] and [Luster] as owner.'").

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* (internal quotations omitted).

\$60,400.00.”⁴⁵⁹ But Fry reported that the total value of “the life insurance and annuity interest would total approximately \$121,965.70.”⁴⁶⁰

After Luster’s death, Equitable refused to pay the insurance proceeds, alleging that (1) Pake rather than Luster was “named annuitant”; (2) Luster was the owner of the annuity; (3) the annuity did not provide death benefits for Pake; and (4) a penalty had been assessed for “withdrawing more than 10% of the annuity’s total.”⁴⁶¹ As administrators of Luster’s estate, the cousins sued AXA Financial, Fry and SouthTrust (SouthTrust).⁴⁶² The complaint listed several common law and statutory claims: negligent misrepresentation, fraud and securities violations.⁴⁶³ In response, SouthTrust filed a motion to compel arbitration.⁴⁶⁴

The trial judge concluded that Pake and Rose’s claims—on behalf of Luster’s estate—“[arose] out of the relationship between Luster and SouthTrust” and “[fell] within the scope of the arbitration clause in the Account Application.”⁴⁶⁵ Still, the trial court denied SouthTrust’s motion to compel arbitration for two reasons: (1) Rose did not ratify Luster’s contract with the defendants; and (2) Rose did not sign the application form that contained the arbitration clause.⁴⁶⁶ In the end, the trial court declared that Pake’s sole signature on the account application form could not bind Luster’s estate; therefore, arbitration was not required.⁴⁶⁷

SouthTrust appealed and the North Carolina Court of Appeals reversed the trial court’s ruling in part.⁴⁶⁸ The appellate court simply concluded: “By its terms, the scope of the arbitration provision covers the transactions involving Luster and Luster’s estate.”⁴⁶⁹ The court of appeals, however,

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at *2.

⁴⁶⁶ *Id.* at *1, *4. The Account Application contained a hand-added “X” beside the first of two “Applicant’s Signature” lines, the first of which was signed by Pake. The Account Application also contained a hand-added “X” beside the second “Applicant’s Signature” line, to the immediate right of the signature line signed by Pake. However, the second Applicant’s Signature line was left blank. Rose did not sign the Account Application. *Id.* at *1.

⁴⁶⁷ *Id.* at *2.

⁴⁶⁸ *Id.* at *1.

⁴⁶⁹ *Id.* at *2. “In the instant case, there is no issue regarding whether the dispute between plaintiffs and defendants falls within the substantive scope of the arbitration clause in the Account Application.” *Id.* at *3.

did not explain how they reached that conclusion, because the court never cited an arbitration clause in any contract.⁴⁷⁰ Instead, the appellate court simply reported that a phantom arbitration clause appeared in one of SouthTrust's preprinted application forms.⁴⁷¹ But again, it is important to stress that FAA section 2 is unequivocal; a tribunal may not compel parties to arbitrate a dispute unless a disagreement arose out of a written contract that contains an arbitration provision.⁴⁷² The appellate court's ruling is problematic for another reason: Under North Carolina's settled principles of contract law, a completed, signed and stand-alone application for various services is not a valid contract.⁴⁷³

Finally, the facts in *Pake* are incontrovertible: Pake purchased several mutual fund contracts.⁴⁷⁴ Many months later, he cancelled those investment instruments and purchased an annuity contract on behalf of Luster.⁴⁷⁵ Therefore, one is compelled to ask whether the arbitration clause in the completed and signed application became an integral part of the respective mutual fund and annuity contracts. If the answer is yes, the appellate court failed to discuss and explain why the parol evidence rule would not apply. And if the application never became an integral part of the controversial annuity contract, the application—and its arbitration clause—stood alone as an unenforceable instrument under North Carolina's law.

In *Johnson v. Branch Banking & Trust Co.*,⁴⁷⁶ the federal district court also addressed whether parties must arbitrate a consumer protection dispute that allegedly arose out of a completed and signed application form.⁴⁷⁷ But, the federal court's analysis and disposition are remarkably different from those in *Pake*.

⁴⁷⁰ *Id.* at *1–5.

⁴⁷¹ *Id.* at *2.

⁴⁷² 9 U.S.C. § 2 (2012).

⁴⁷³ See *Kerik v. Davidson County*, 551 S.E.2d 186, 193, 232–33 (N.C. Ct. App. 2001) (concluding the board of commissioners approval of a rezoning application was not an illegal contract, even though the rezoning applicant made promises to the board of commissioners and the board did not obligate itself to the applicant); *City of Winston-Salem v. Robertson*, 344 S.E.2d 838, 839 (N.C. Ct. App. 1986) (“The granting of an application for a driveway permit is not a contract.”); *Gaynoe v. First Union Direct Bank, N.A.*, No. 97 CVS 16536, 2001 WL 34000142, at *7 (N.C. Super. Jan. 18, 2001) (concluding that a contract was not formed by a credit-card application alone).

⁴⁷⁴ *Pake*, 2005 WL 3046532, at *1.

⁴⁷⁵ *Id.*

⁴⁷⁶ Civ. A. No. 10-918, 2011 WL 93062 (E.D. Pa. Jan. 10, 2011).

⁴⁷⁷ *Id.* at *1.

Sisc Johnson was a co-owner of Choice Carpet and Floors (CCF).⁴⁷⁸ BB&T Bankcard Corporation (Bankcard) issued credit cards.⁴⁷⁹ In 2007, Johnson secured a commercial credit card application from Bankcard.⁴⁸⁰ A “Commercial Card Plan Agreement” (Agreement) and a personal guaranty agreement were attached to the application form.⁴⁸¹ Johnson and the other coowner of CCF executed the “signature and authorization” provision on the application, which read in pertinent part: “[CCF] by the signature of its authorized officer(s) below, requests that a BB & T Commercial Card(s) to be issued to the authorized Cardholders as set forth on the BB & T Bankcard Corporation Commercial Card Application.”⁴⁸²

In addition, referencing an arbitration provision, the attached Agreement stated: “By applying for a card, Cardholder agrees that if a dispute of any kind arises out of or relates to this Agreement or Cardholder’s application for a Card, either Cardholder or [BB & T Bankcard] can choose to have that dispute resolved by binding arbitration as set forth in the Arbitration Provision.”⁴⁸³

The latter provision also stated:

‘Claim’ ... means any claim, dispute or controversy between Cardholder and Bank arising from or including the validity and scope of this Arbitration Provision or the Agreement The term [also] includes ... any claim, dispute, or controversy between Cardholder and Bank that arises from or relates to ... your application for the Account ... Upon the election of either Cardholder or Bank, any claim between Cardholder and Bank shall be resolved by binding arbitration pursuant to this Arbitration Provision.⁴⁸⁴

In late January 2008, Johnson traveled to Branch Banking and Trust Company (Branch) for two purposes: (1) to remove herself as a guarantor for the credit card debt; and (2) to return the credit card.⁴⁸⁵ At that time, Branch’s agents assured Johnson that her status as a guarantor had been terminated.⁴⁸⁶ Yet that assurance did not stop Branch from sending multiple debt collection letters to Johnson.⁴⁸⁷ In each letter, Branch alleged that

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* at *2.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

Johnson was responsible for the outstanding credit card debt.⁴⁸⁸ Later, Johnson learned that Bankcard had reported the delinquencies to several credit report agencies.⁴⁸⁹

Ultimately, the erroneous information on the credit reports adversely affected Johnson's credit.⁴⁹⁰ Johnson filed a lawsuit against Branch and BB&T Financial (BBT).⁴⁹¹ Generally, Johnson alleged that BBT and Bankcard furnished inaccurate information to credit reporting agencies and failed to investigate disputed items.⁴⁹² More specifically, the complaint included statutory and common law claims: alleged violations under the Fair Credit Reporting Act (FCRA),⁴⁹³ defamation, invasion of privacy, and negligence.⁴⁹⁴ Citing an allegedly ironclad and enforceable agreement between CCF and Bankcard, the defendants filed a motion to compel arbitration.⁴⁹⁵ The federal district judge denied the motion.⁴⁹⁶

How did the *Johnson* court reach its conclusions? First, given the diversity of the various litigants, the federal district judge researched both Georgia's and Pennsylvania's common law rules.⁴⁹⁷ In both jurisdictions, courts must apply ordinary state law principles of contract formation and interpretation to determine whether parties have agreed to arbitrate.⁴⁹⁸ In addition, a court may not grant a motion to compel arbitration, unless: (1) a valid arbitration contract exists; and (2) a particular dispute falls within the scope of the agreement.⁴⁹⁹ But even more importantly, to be enforceable, a valid contract requires competent contracting parties, sufficient consideration, each party's willingness to be bound, and a clear subject matter or undertaking.⁵⁰⁰

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* at *1.

⁴⁹² *Id.*

⁴⁹³ 15 U.S.C. § 1681 (2012).

⁴⁹⁴ *Johnson*, 2011 WL 93062, at *1.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at *3 ("With regard to claims against BB & T Financial, Johnson argues without dispute that Georgia law governs whether the arbitration agreement is enforceable.").

⁴⁹⁸ See *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 524 (3d Cir. 2009) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)); *Simmons Co. v. Deutsche Fin. Servs. Corp.*, 532 S.E.2d 436, 440 (Ga. Ct. App. 2000) (quoting *First Options*, 514 U.S. at 944).

⁴⁹⁹ See *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 160 (3d Cir. 2009).

⁵⁰⁰ See *Cone Fin. Grp., Inc. v. Emp'rs Ins. Co. of Wausau*, Civ. A. No. 7:09-CV-118(HL), 2010 WL 4639295, at *3 (M.D. Ga. Nov. 4, 2010); *SKF USA, Inc. v. W.C.A.B. (Smalls)*, 714 A.2d 496, 500 (Pa. Commw. Ct. 1998) ("To form a valid contract, all of the essential

Johnson admitted that she completed and executed a commercial credit card application.⁵⁰¹ She also admitted that an arbitration provision was attached to the application.⁵⁰² But, fighting defendant's motion to compel arbitration, she insisted that the application was not a valid contract under the FAA.⁵⁰³ Ultimately, the district court found: (1) Johnson "did not assent to be personally bound" under the terms of the Arbitration Provision;⁵⁰⁴ (2) BB&T and Johnson never formed an arbitration agreement; (3) assuming that a valid arbitration agreement was formed, it was between Choice Carpet and Floors and Bankcard/BB&T;⁵⁰⁵ and (4) the agreement included an ambiguous term, "Cardholder," which was construed in favor of Johnson. Therefore, in light of its findings, the court denied the motion to compel arbitration and allowed Johnson to proceed with her lawsuit.⁵⁰⁶

But, the federal district court judge's intelligent analysis did not end there. The defendants argued that the broad scope of the arbitration clause covered all of Johnson's claims—those falling within the eight corners the Application and Agreement as well as those resulting from the relationship between the Application and Agreement.⁵⁰⁷ In contrast, Johnson stressed that her lawsuit was beyond the scope of the Arbitration Provision for two reasons: (1) Choice Carpet and Floors—a party to the Arbitration Clause—was not a complainant in the lawsuit; and (2) several irregularities surrounding Johnson's personal credit history formed the foundation for her FCRA claim.⁵⁰⁸

To determine whether a claim falls within the scope of an arbitration agreement, the prevailing rule is uncomplicated: a court must examine factual allegations in an underlying complaint instead of focusing solely on the underlying theories of recovery.⁵⁰⁹ And if the factual allegations of the dispute are reasonably connected to the arbitration provision in a contract, a court may grant a motion to compel arbitration.⁵¹⁰ Applying these principles,

elements, including consideration, must exist.") (citing *Dep't of Transp. v. First Pa. Bank*, 466 A.2d 753 (Pa. Commw. Ct. 1983)).

⁵⁰¹ *Johnson*, 2011 WL 93062, at *1.

⁵⁰² *Id.*

⁵⁰³ *Id.* at *3.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.* at *5.

⁵⁰⁷ *Id.* at *4.

⁵⁰⁸ *Id.*

⁵⁰⁹ *See, e.g., Medtronic AVE., Inc. v. Advanced Cardiovascular Sys.*, 247 F.3d 44, 55 (3d Cir. 2001).

⁵¹⁰ *See, e.g., Dusold v. Porta-John Corp.*, 807 P.2d 526, 530 (Ariz. Ct. App. 1990) ("[O]nly those disputes that the parties could *reasonably intend to be submitted to*

the federal district judge found that the Agreement and the attached Arbitration Provision covered only line of credit disputes between Choice Carpet and Floors and Bankcard/BB&T.⁵¹¹ On the other hand, Johnson's amended complaint included "allegedly erroneous information ... on Johnson's personal credit report."⁵¹² Consequently, the judge declared that Johnson's statutory and common law claims were beyond the scope of the Arbitration Provision.⁵¹³ But even more importantly, the judge ruled, assuming that the commercial credit card application was a valid arbitration contract between Johnson and the defendants, Johnson's statutory and common law claims did not fall within the scope of that contract.⁵¹⁴

D. Judicial Conflict—Whether Arbitration Clauses in Standardized Application Forms Are Enforceable Under the FAA Without Any Probative Evidence of Bargained-For Exchange Consideration

Again, under the common law, two elements must be satisfied before courts will enforce a contract: (1) the contract must be *valid*;⁵¹⁵ and (2) each party must present *sufficient consideration* to support the valid contractual agreement.⁵¹⁶ Once more, it is important to reiterate that a vast majority of

arbitration should be encompassed within their contractual agreement [T]he better-reasoned cases start with the premise[:] ... [I]n order for the dispute to be characterized as arising out of or related to the subject matter of the contract, and thus subject to arbitration, it must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself. The relationship between the dispute and the contract is not satisfied simply because the dispute would not have arisen absent the existence of a contract between the parties. If such a connection to the contract is not present, tort claims between the parties *could not reasonably be intended* to have been subject to arbitration within the meaning of an arbitration clause requiring this method of resolution only for claims 'arising out of or related to' the contract.") (citation omitted) (emphasis added).

⁵¹¹ *Johnson*, 2011 WL 93062, at *4.

⁵¹² *Id.*

⁵¹³ *Id.* at *5.

⁵¹⁴ *Id.* at *4.

⁵¹⁵ See, e.g., *Orthodontic Ctrs. of Am., Inc. v. Hanachi*, 564 S.E.2d 573, 575 (N.C. Ct. App. 2002) ("Generally, a party seeking to enforce a contract has the burden of proving the essential elements of a valid contract."); *Anderson v. Gibbs Lumber Co.*, 10 P.2d 416, 417 (Okla. 1932) ("[T]o enforce [a] contract, the agreement between the promisor and promisee ... must be a valid contract.").

⁵¹⁶ See, e.g., *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368, 1376 (11th Cir. 2005) ("[I]n determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts Georgia law provides that mutual promises and obligations are sufficient consideration to support a contract."); *Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 26–27 (Iowa 1997) (stressing that consideration is a necessary element).

state supreme courts have adopted the rule that stand-alone, completed, and signed applications—for goods, services, employment, and membership—are not valid contracts.⁵¹⁷ Yet, among state and federal courts a serious divide exists over whether standardized, preprinted application forms are valid contracts if the applications contain arbitration clauses.⁵¹⁸ But assume that the terms and arbitration provisions in executed application forms comprise valid contracts. Still, an important question remains: whether a “promise for a promise” may serve as sufficient and bargained-for exchange consideration to enforce the arbitration provisions in the application forms?

Section 71 of the Restatement (Second) of Contracts reads awkwardly in relevant part: “To constitute consideration, a ... return promise must be bargained for [A] return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”⁵¹⁹ Certainly, an overwhelming majority of state supreme courts have adopted the “promise for a promise” rule.⁵²⁰ Nevertheless, state and federal courts are thoroughly divided over the question of whether an employer’s promise to consider an individual’s application and the applicant’s promise to arbitrate disputes may serve as sufficient consideration to enforce an arbitration clause in a standardized application form. Below, cases are discussed which highlight the depth of the conflict among and between federal and state courts.

First, consider the brief facts, analysis, and holding in *Henry v. Pizza Hut of America, Inc.*⁵²¹ David Henry applied for employment at a Pizza Hut.⁵²² He completed and signed a two-page application form.⁵²³ It contained an arbitration clause, which read in pertinent part:

⁵¹⁷ See *supra* Part I.A and accompanying text and notes.

⁵¹⁸ See *supra* Part IV and accompanying text and notes.

⁵¹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

⁵²⁰ See, e.g., *Knack v. Indus. Comm’n*, 503 P.2d 373, 376 (Ariz. 1972) (“A promise for a promise is adequate legal consideration to support a contract.”); *Stub v. Belmont*, 124 P.2d 826, 829 (Cal. 1942) (concluding that the promise for a promise was good consideration); *Grossman v. Schenker*, 100 N.E. 39, 41 (N.Y. 1912) (“[A] promise for a promise ... constitutes a good consideration.”); *Stewart v. Herron*, 82 N.E. 956, 959 (Ohio 1907) (“Among the considerations recognized in law as sufficient to support a contract is ... mutual promises, or ... a promise for a promise.”); *Copeland v. Alsobrook*, 3 S.W.3d 598, 606 (Tex. App. 1999) (“A promise for a promise is sufficient consideration in Texas.”); *Omni Group, Inc. v. Seattle-First Nat’l Bank*, 645 P.2d 727, 729 (Wash. Ct. App. 1982) (“A promise for a promise is sufficient consideration to support a contract.”); *Ferraro v. Koelsch*, 368 N.W.2d 666, 672 (Wis. 1985) (“It is black letter law that a promise for a promise, or the exchange of promises, will constitute consideration to support any contract of this bilateral nature.”).

⁵²¹ No. 6:07-cv-01128-Orl-DAB, 2007 WL 2827722 (M.D. Fla. Sept. 27, 2007).

⁵²² *Id.* at *1.

⁵²³ *Id.*

Because of the delay and expense of the court systems, Pizza Hut and I agree to use confidential binding arbitration, instead of going to court, for any claims that arise between me and Pizza Hut Without limitation, such claims would include any concerning compensation, employment (including, but not limited to, any claims concerning sexual harassment or discrimination), or termination of employment In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration Association will apply, except that Pizza Hut will pay the arbitrator's fees, and Pizza Hut will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I gone to court.⁵²⁴

After Henry began working, he and Pizza Hut executed another written instrument entitled, "Acknowledgment of Receipt and Understanding."⁵²⁵ Among other obligations, the Acknowledgment required Henry to admit that he had received a copy of Pizza Hut's orientation handbook and sexual harassment policy.⁵²⁶ Additionally, a slightly different arbitration provision appeared in the Acknowledgment.⁵²⁷ Put simply, the words and phrases in the two arbitration provisions did not mirror each other.⁵²⁸

After working for a period of time, Pizza Hut fired Henry.⁵²⁹ Alleging that the firing was racially motivated and citing 42 U.S.C. § 1981,⁵³⁰ Henry filed a civil rights lawsuit in a state court.⁵³¹ Pizza Hut removed the case to federal court and filed a motion to compel arbitration and stay the underlying lawsuit.⁵³² In its motion, Pizza Hut argued that Henry's § 1981 claim fell within the scope of the arbitration clause in the application.⁵³³ Henry

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.* at *2.

⁵²⁸ *Id.* ("The second arbitration clause contains two textual differences from the first clause. The second sentence omits the words 'Without limitation' and begins with 'Such.' In addition, the second arbitration clause omits language requiring Pizza Hut to pay arbitration fees and any increase in filing fees associated with arbitration. Instead, the last sentence of the clause reads: 'In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration Association (and, to the extent not inconsistent, the then prevailing rules of the Federal Arbitration Act) will apply.'").

⁵²⁹ *Id.* at *1.

⁵³⁰ The Civil Rights Act of 1866 reads as follows: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a) (2012).

⁵³¹ *Henry*, 2007 WL 2827722, at *1.

⁵³² *Id.*

⁵³³ *Id.*

disagreed, arguing that the less offensive or burdensome arbitration provision in the Acknowledgment should apply.⁵³⁴ In the end, the court read the two clauses together and found a single, valid arbitration agreement.⁵³⁵

As an alternative affirmative defense in the motion to compel arbitration proceedings, Henry argued that sufficient and mutual consideration did not support the parties' purportedly valid arbitration agreement.⁵³⁶ Specifically, Henry argued that the mutuality-of-obligation doctrine required Pizza Hut "to expressly promise to provide a written response to employee complaints and ... to provide all employees with copies of the arbitration rules before signing the arbitration agreement."⁵³⁷ Conversely, Pizza Hut argued that a promise for a promise may serve as sufficient consideration.⁵³⁸ To support its assertion, Pizza Hut stressed: (1) Henry gave a written promise to arbitrate when he "signed the employment application";⁵³⁹ and, (2) the company's promise to consider Henry for employment was sufficient consideration to support the arbitration agreement.⁵⁴⁰ Ultimately, the United States District Court for the Middle District of Florida agreed with Pizza Hut and forced Henry into binding arbitration.⁵⁴¹

Several other federal courts have cited somewhat comparable language in other application forms, applied the promise-for-a-promise rule, and reached similar conclusions like the one in *Henry*. For example, in *Carman v. Wachovia Capital Markets, LLC*,⁵⁴² the United States District Court for the

⁵³⁴ *Id.* at *2–3.

⁵³⁵ *Id.* at *3 ("These two clauses do not differ in a way that will significantly affect this court's analysis The second arbitration clause does not contain language that demonstrates an intent to supersede the first clause. Thus, the two clauses should be read together, to the extent they are consistent ... for purposes of assessing Pizza Hut's motion to compel arbitration and stay proceedings.") (citing *Sammons v. Sonic-North Cadillac, Inc.*, No. 6:07-cv-277, 2007 WL 2298032, at *1 n.1 (M.D. Fla. Aug. 7, 2007) (considering two substantially similar arbitration clauses together in assessing a motion to compel arbitration)).

⁵³⁶ *Id.* at *6.

⁵³⁷ *Id.* (emphasis added).

⁵³⁸ *Id.* at *5.

⁵³⁹ *Id.* (emphasis added).

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.* ("Pizza Hut considered him for employment. When Henry signed the second arbitration clause, Pizza Hut hired him as an employee. Both of these acts constitute consideration under modern contracts law."); see, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981); *Cintas Corp. No. 2 v. Schwaier*, 901 So. 2d 307, 309 (Fla. Dist. Ct. App. 2005).

⁵⁴² No. 4:08CV1547 CDP, 2009 WL 248680, at *1 (E.D. Mo. Feb. 2, 2009) ("Christopher Carman is an investment banker who was formerly employed by A.G. Edwards & Sons Wachovia Capital Markets ... succeeded to all assets and liabilities of A.G. Edwards. Following the takeover by Wachovia, Carman's employment was terminated Carman claims that Wachovia breached the contract he had with A.G. Edwards, and that Wachovia now owes him certain sums for work performed while he was still employed. Wachovia has moved to stay this case and compel arbitration, or in the alternative to dismiss for

Eastern District of Missouri concluded: "The plain language of Carmen's employment application demonstrates that there was a bargained-for agreement A.G. Edwards undertook to consider Carmen's application for employment in exchange for Carmen's agreement to arbitrate any dispute arising out of that employment."⁵⁴³ And, in *Sheller ex rel. Sheller v. Frank's Nursery & Crafts, Inc.*,⁵⁴⁴ the signed employment application comprised an arbitration clause.⁵⁴⁵ The latter read in relevant part: "[The employer agrees] to consider Plaintiffs for employment if plaintiffs, upon employment, [agree] to abide by [the company's] rules which include[s] the arbitration of all claims."⁵⁴⁶ The United States District Court for the Northern District of Illinois declared that the written promise for a promise was sufficient bargained-for consideration.⁵⁴⁷

failure to state a claim. Wachovia argues that Carmen agreed in his employment application to arbitrate any dispute arising from his employment or termination. Additionally, Carmen agreed to submit any claims to arbitration when he registered to sell securities by completing his Securities Industry Form U-4 Carmen argues that the agreement to arbitrate found in his employment application is unenforceable.").

⁵⁴³ *Id.* at *2.

⁵⁴⁴ 957 F. Supp. 150 (N.D. Ill. 1997).

⁵⁴⁵ *Id.* at 152. ("Frank's Nursery & Crafts ... sells lawn and garden products, plants, flowers, home decorative items, and crafts. Plaintiffs Rebecca Bennett and Kimberly Sheller ... are former employees At the time Plaintiffs applied for employment and were terminated they were minors. Each signed an employment application that provided: 'any claim that I may wish to file against the Company ... must be submitted for binding and final arbitration before the American Arbitration Association; arbitration will be the exclusive remedy for any and all claims unless prohibited by applicable law I have reviewed, understand and agree to the above.' Following their discharge, Plaintiffs filed a charge of sexual discrimination ... [and sued] in this Court alleging sexual harassment in violation of Title VII, 42 U.S.C. § 2000e, *et seq.* Plaintiffs allege that during their employment, they were subjected to a constant hostile work environment due to the sexual harassment by defendant's assistant manager Defendant denies the allegations of sexual harassment.").

⁵⁴⁶ *Id.* at 154.

⁵⁴⁷ *Id.* In *Chatman v. Pizza Hut, Inc.*, the District Court for the Northern District of Illinois reached the same conclusion.

Alfredo Chatman filed a class action complaint in state court ... asserting claims against ... Pizza Hut ... and franchise owners ... under the Illinois Wage Payment and Collection Act ("IWPCA"), 820 ILCS § 115/1, *et seq.* and the Illinois Minimum Wage Law ("IMWL"), 820 ILCS § 105/1, *et seq.* Chatman electronically signed and submitted to Pizza Hut an online job application. The application contains [an] ... 'Agreement to Arbitrate' Pizza Hut argues that the Arbitration Provision is supported by three forms of consideration: (1) Pizza Hut's promise to consider the plaintiff for employment; (2) Pizza Hut's obligation to submit to binding arbitration; and (3) Pizza Hut's continued employment of the plaintiff. We agree. Under Illinois law, each of these acts is sufficient to support the agreement [W]here an employer promises to consider an applicant for employment in exchange for the applicant's return promise to

But, three years after the Federal District Court for the Eastern District of Missouri issued its promise-for-a-promise ruling in *Carman*, the Missouri Court of Appeals for the Eastern District decided *Marzette v. Anheuser-Busch, Inc.*⁵⁴⁸ and reached a contrary promise-for-a-promise ruling. In *Marzette*, Alisha Marzette and Kathy Dunmire applied for employment at Anheuser-Busch, Inc. (Anheuser).⁵⁴⁹ Both Marzette and Dunmire completed and signed an employment application form, which contained an arbitration clause.⁵⁵⁰ In applicable part, the latter provision read:

I agree that if I become employed by [Anheuser], and unless a written contract provides to the contrary, any claim I may have against [Anheuser] will be subject to final and binding arbitration in accordance with [Anheuser's] dispute resolution program, and that arbitration will be the exclusive method I will have for final and binding resolution of any such claim I acknowledge that *no promise regarding employment has been made to me.*⁵⁵¹

Anheuser hired Marzette and Dunmire to be security guards.⁵⁵² And during their employment, both employees received hourly wages and became union members.⁵⁵³ In the course of events, the two employees filed an employment discrimination suit against Anheuser.⁵⁵⁴ They alleged that the company violated provisions under the Missouri Human Rights Act.⁵⁵⁵ To counter, Anheuser filed a motion to compel arbitration.⁵⁵⁶ The employer asserted: (1) the terms and arbitration clause in Marzette's and Dunmire's signed employment applications were binding contractual agreements; and, (2) both employees had a contractual duty "to arbitrate any claims arising out of their employment" with Anheuser.⁵⁵⁷ The Missouri trial court denied

abide by company rules upon employment—including the arbitration of all claims—there is sufficient consideration to establish a valid, enforceable contract.

Chatman v. Pizza Hut, Inc., No. 12 C 10209, 2013 WL 2285804, at *1–4 (N.D. Ill. May 23, 2013) (citations omitted); *see also* *Ravenscraft v. BNP Media, Inc.*, No. 09 C 6617, 2010 WL 1541455, at *2 (N.D. Ill. Apr. 15, 2010) (finding consideration where "defendant agreed to consider the plaintiffs for employment if the plaintiffs, upon employment, agreed to abide by the company rules").

⁵⁴⁸ 371 S.W.3d 49 (Mo. App. 2012).

⁵⁴⁹ *Id.* at 50 nn.1–2.

⁵⁵⁰ *Id.* at 51.

⁵⁵¹ *Id.* (emphasis added).

⁵⁵² *Id.*

⁵⁵³ *Id.*

⁵⁵⁴ *Id.* at 50.

⁵⁵⁵ MO. ANN. STAT. §§ 213.010–213.137 (West 2012).

⁵⁵⁶ *Marzette*, 371 S.W.3d at 51.

⁵⁵⁷ *Id.*

Anheuser's motion to compel arbitration, finding that the employees and Anheuser never formed a valid arbitration agreement.⁵⁵⁸ Moreover, even assuming that the parties formed a valid contract, the trial court declared that sufficient consideration did not support the purported valid arbitration agreement.⁵⁵⁹ Anheuser appealed.⁵⁶⁰

Citing federal and state courts' promise-for-a-promise holdings in *Sheller, Carmen, Henry and Martindale v. Sandvik*,⁵⁶¹ Anheuser encouraged the Missouri Court of Appeals to embrace those decisions and reverse the trial court's ruling.⁵⁶² Although recognizing that this issue has generated a split among courts, the court of appeals refused.⁵⁶³ Instead, the Missouri Court of Appeals cited the United States District Court for the Southern District of Indiana's decision in *Geiger v. Ryan's Family Steak Houses, Inc.*⁵⁶⁴

In *Geiger*, the court declared that an employer's promise to consider an employment application was insufficient consideration for an applicant's promise to arbitrate.⁵⁶⁵ Finding the *Geiger* court's analysis and conclusion persuasive, the Missouri Court of Appeals held that Anheuser's willingness to consider Marzette's and Dunmire's employment applications was insufficient consideration to support promises to arbitrate in purportedly valid arbitration contracts.⁵⁶⁶ It is important to stress that the Supreme Court of West Virginia as well as the Courts of Appeals for the Sixth and Seventh Circuits have also embraced the *Geiger* court's holding.⁵⁶⁷

⁵⁵⁸ *Id.* at 52–53.

⁵⁵⁹ *Id.* at 51.

⁵⁶⁰ *Id.*

⁵⁶¹ 800 A.2d 872, 879 (N.J. 2002).

⁵⁶² *Marzette*, 371 S.W.3d at 52.

⁵⁶³ *Id.* at 52 n.5 (“[C]ourts in other jurisdictions are split [over this issue; however, defendants] urge us to follow the holding in *Sheller* [in which] ... the United States District Court for the Northern District of Illinois found sufficient consideration for an arbitration agreement contained in an employment application.”).

⁵⁶⁴ 134 F. Supp. 2d 985, 989, 1001–02 (S.D. Ind. 2001).

⁵⁶⁵ *Id.* at 1001–02.

⁵⁶⁶ *Marzette*, 371 S.W.3d at 52 n.6 (“[A]n employer’s willingness to consider an applicant for employment is insufficient consideration to support a prospective employee’s waiver of the right to a jury trial for employment disputes wholly unrelated to the application or hiring process.”).

⁵⁶⁷ See *Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005) (“We ... conclude that Ryan’s has failed to demonstrate that, under Tennessee law, an employer’s promise to consider an employment application is adequate consideration for a promise to arbitrate employment disputes that are wholly unrelated to the application or hiring process.”); *Penn v. Ryan’s Family Steak Houses, Inc.*, 269 F.3d 753, 760 (7th Cir. 2001) (finding no evidence under Indiana law that a mere promise to consider an application for employment may serve as consideration for an applicant’s contractual promise to arbitrate); *State ex rel. Saylor v. Wilkes*, 613 S.E.2d 914, 924 (W. Va. 2005) (“[A]n employer’s promise merely to review an employment application in exchange for a job

V. EMPIRICAL AND STATISTICAL ARGUMENTS AGAINST
ENFORCING MANDATORY-ARBITRATION CLAUSES IN EMPLOYMENT,
FINANCIAL SERVICES AND OTHER TYPES OF STANDARDIZED
APPLICATIONS—FINDINGS FROM A CASE STUDY

Again, FAA section 2 requires state and federal courts to compel arbitration if parties' controversies "arose out of" written contracts or transactions.⁵⁶⁸ On the other hand, to determine whether a dispute falls within the scope of an arbitration agreement, courts must apply states' traditional rules of contract construction and interpretation.⁵⁶⁹ Additionally, among the states, a universal rule has emerged: courts must ignore particular causes of action or the "legal labels attached to allegations" and consider only the underlying factual allegations and defenses to determine whether the disputed claims fall within the scope of arbitration clauses.⁵⁷⁰

But reconsider some earlier observations, which appear in this Article: each day, extremely large universes of individuals apply for all types of goods, services, positions and affiliations.⁵⁷¹ Invariably, the preprinted, standard application forms contain mandatory-arbitration clauses.⁵⁷² And, more frequently than not, compelling circumstances force applicants to sign those forms and forfeit their constitutional or statutory right to litigate a claim before a jury.⁵⁷³

Now, consider a general as well as an interrelated legal and empirical question: whether state and federal court judges weigh—wittingly or unwittingly—more than the factual allegations in disgruntled applicants/plain-tiffs' underlying complaints before deciding to grant or deny defendants' motions to compel arbitration? Or stated more succinctly, the questions are: (1) do state and federal courts consider complainants' underlying theories of recovery when deciding whether to compel arbitration?; (2) are state and

applicant's promise to submit employment-related disputes—not associated with the application process—to arbitration does not represent consideration sufficient to create an enforceable contract to arbitrate such employment disputes.").

⁵⁶⁸ 9 U.S.C. § 202 (2012)

⁵⁶⁹ *Entrekin v. Internal Med. Assocs. of Dothan, P.A.*, 689 F.3d 1248, 1251 (11th Cir. 2012).

⁵⁷⁰ *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 622 n.9 (1985); *see also Medtronic AVE., Inc. v. Advanced Cardiovascular Sys.*, 247 F.3d 44, 55 (3d Cir. 2001) (declaring that courts must examine factual allegations in complaints instead of focusing on legal theories to determine whether claims fall within the scope of arbitration agreements); *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex. 1995) (declaring that courts must focus on factual allegations in complaints, rather than on underlying causes of action to determine whether claims fall within the scope of arbitration agreements).

⁵⁷¹ *See supra* notes 115–20 and accompanying text.

⁵⁷² *See supra* notes 115–20 and accompanying text.

⁵⁷³ *See supra* notes 115–20 and accompanying text.

federal courts more or less likely to grant or deny a motion to compel arbitration if the applicants-complainants are, say, consumers, hourly employees, or professionals?; (3) are state and federal courts more or less likely to grant or deny a motion to compel arbitration if defendants are, say, financial institutions and corporations?; (4) are state courts or federal courts significantly more likely to deny a motion to compel arbitration?; and (5) are state and federal judges equally likely to allow allegedly “irrational biases” or extrajudicial variables to sway the disposition of motion to compel arbitration disputes?

Over two decades, the author cautiously and methodically analyzed a sizable number of reported cases and performed a content analysis on each case.⁵⁷⁴ That methodology allowed the author to assemble a large database of empirical evidence to determine whether allegedly “irrational judicial bias” appears in state and federal courts’ opinions, and, if so, whether such bias stains judges’ procedural and substantive rulings.⁵⁷⁵ In a series of published law journal articles, the author documented and reported that judges often allow immaterial or extralegal variables to significantly influence all sorts of litigants’ likelihoods of prevailing procedurally and on the merits in both state and federal courts.⁵⁷⁶

As reported earlier, judicial conflicts proliferate over whether mandatory-arbitration provisions in standardized applications are enforceable under the Federal Arbitration Act.⁵⁷⁷ Therefore, in light of these continuing splits, the author decided to conduct an empirical study to determine whether irrelevant or prejudicial factors are systematically affecting—consciously or unconsciously—federal and state court judges’ dispositions of motion to compel arbitration disputes. Certainly, many jurists and commentators assert that well-educated and well-intentioned judges only apply settled common law rules, statutes and/or public policy to achieve fair outcomes.⁵⁷⁸ As

⁵⁷⁴ See generally Robert Edward Mitchell, *The Use of Content Analysis for Explanatory Studies*, 31 PUB. OPINION Q. 230, 237 (1967); Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman’s Theory of Constitutional Change*, 122 YALE L.J. 1990, 2010–13 (2013) (“In order to test the ‘constitutional moments’ thesis, some metric is required for quantifying public attention to various topics. With technology making it easier to manipulate larger and larger sets of data, several tools have become available in recent years that purport to offer this kind of analysis Social scientists engaged in content analysis have long recognized that such studies often have embedded causal assumptions.”).

⁵⁷⁵ See Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 77, 88, 90–91 nn.58, 103, 111–12 (2008) (presenting a fairly comprehensive history and description of Professor Rice’s published content-analysis studies and theoretical analyses of various common law and statutory questions).

⁵⁷⁶ *Id.*

⁵⁷⁷ *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 215 (1985).

⁵⁷⁸ See, e.g., Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again*, 30 REV. LITIG. 671, 673 (2011) (reporting that historically judges were presumed to be impartial

discussed below, however, federal courts are more willing to weigh legally immaterial variables and issue arguably “irrationally biased” motion to compel arbitration rulings.⁵⁷⁹ Furthermore, that same propensity increases the likelihood of motion to compel arbitration splits within and between state and federal judiciaries.⁵⁸⁰

A. Data Sources and Sampling Procedures

The general proposition in this study is simple: there is no statistically significant difference between federal and state courts’ disposition of applicants-respondents and defendants-movants’ motion to compel arbitration disputes. Thus, to construct a reasonably sound motion to compel arbitration database, the author used several research methodologies. First, Westlaw’s and Lexis’s data retrieval systems were used to locate every reported motion to compel arbitration decision that terminated in a trial, an appellate, or a supreme court. Also, if the electronically reported cases discussed or cited other unreported motion to compel arbitration cases, the author read the regional reporters and analyzed those cases.

Using an encompassing query, this method identified more than 10,000 state and federal court cases.⁵⁸¹ Therefore, the author took a proportional stratified random sample⁵⁸² of the disputes, which were decided procedurally, or on the merits between 1925 and 2014.⁵⁸³ The proportional sample comprises 563 cases, which center on the enforceability of arbitration clauses in written contracts.⁵⁸⁴ Employing a different query, the author uncovered 115

and “courts refused to entertain even the possibility of judicial bias); Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 140 (2013) (reporting that some judges refuse to believe their biases and wealthy backgrounds color judicial deliberations).

⁵⁷⁹ See *supra* Part IV.A.

⁵⁸⁰ See *supra* Part IV.B.

⁵⁸¹ The following query was constructed: *sy(arbitration/p contract)*. Executing that expression in Westlaw’s ALLSTATES and ALLFEDS databases generated 6,319 and 3,698 cases, respectively.

⁵⁸² See, e.g., *Ratanasen v. Cal. Dep’t of Health Servs.*, 11 F.3d 1467, 1470–72 (9th Cir. 1993) (explaining the differences between and the efficacy of employing “simple random sampling” and “stratified random sampling”); Bruce M. Price, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (And Some Unintended Consequences)*, 26 YALE L. & POL’Y REV. 135, 138 (2007) (“Using a proportional, stratified, random sample of bankruptcy cases from [two twelve-month periods, the author created a] ... database of cases for every state in the Tenth Circuit.”).

⁵⁸³ The investigator searched Westlaw’s MIN-CS, ALLSTATES, ALLFEDS, CTA and DCT databases between May 2013 and June 2014. In addition, the author searched various regional reporters as well as LEXIS’s Genfed COURTS File during the same period.

⁵⁸⁴ See *infra* Table 1 and the accompanying discussion.

cases involving the enforceability of arbitration provisions in standardized, preprinted applications.⁵⁸⁵ To be sure, the relatively small number of the latter cases belies their significance. Among the application-dispute cases, many were class actions in which large classes of applicants argued that arbitration provisions in standardized application forms are not enforceable under the FAA.⁵⁸⁶

Furthermore, since the enactment of the FAA, private arbitrators have decided thousands of cases each year.⁵⁸⁷ These latter cases involve all types of disputes and complainants—both aggrieving applicants and non-applicants. Moreover, studies suggest that private arbitrators are “biased,” too.⁵⁸⁸

⁵⁸⁵ *The following query was fashioned: “applicant’s” “applied for” “application for” /p “federal arbitration act”*). An execution of that query in Westlaw’s ALLCASES database generated 115 state and federal court cases. *See also infra* Table 1 and the accompanying discussion.

⁵⁸⁶ *See, e.g.,* Labor Ready Nw., Inc. v. Crawford, Civ. No. 07-1060-HA, 2008 WL 1840749, at *1–3 (D. Or. Apr. 21, 2008) (an arbitration dispute involving a large multistate employer who raised an FAA-preemption defense against a large class of applicants who signed employment applications that contained arbitration clauses and sued under Oregon’s Oregon wage-and-hour laws); Battels v. Sears Nat’l. Bank, 365 F. Supp. 2d 1205, 1210 (M.D. Ala. 2005) (a controversy involving Sears who raised an FAA-preemption defense against a large class of credit cardholders who signed applications that contained arbitration clauses and sued under the Fair Credit Billing Act and the Truth in Lending Act); Allen v. Labor Ready Sw., No. B237673, 2013 WL 1910293, at *1 (Cal. Ct. App. May 9, 2013) (a case involving an employer who raised an FAA-preemption defense against a class of approximately 600,000 temporary employees in the United States, Canada, and Puerto Rico who signed applications that contained arbitration clauses); Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 912 A.2d 88, 90 (N.J. 2006) (a case involving a payday lender who raised an FAA-preemption defense against a large class of borrowers who signed applications that contained arbitration clauses and sued under the New Jersey Consumer Fraud Act and New Jersey Racketeer Influenced and Corrupt Organizations Act).

⁵⁸⁷ *See, e.g.,* PUB. CITIZEN REPORT, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), available at <http://www.citizen.org/publications/publicationredirect.cfm?ID=7545>, archived at <http://perma.cc/7CQC-EE8C> (reporting that private arbitrators decided 33,948 consumer arbitration cases between January 1, 2003 and March 31, 2007).

⁵⁸⁸ *See, e.g.,* Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCI. MONITOR, July 16, 2007, at A2 (“The National Arbitration Forum (NAF), one of the nation’s largest private arbitration firms, is commonly used by creditors and secondary debt buyers [The Monitor] found that the 10 most frequently used arbitrators—who decided almost 60 percent of the cases heard—decided in favor of the consumer only 1.6 percent of the time, while arbitrators who decided three or fewer cases decided for the consumer 38 percent of the time. NAF would not comment on the findings because it had not participated in the analysis, but maintains that its arbitrators are neutral [T]he knowledge that rulings bring repeat business may create financial pressures for arbitrators. ‘Arbitration work is often very lucrative, and arbitrators know that if they rule against a corporate defendant too frequently or too generously (from the

They exhibit an “irrational” tendency to decide arbitral disputes more often in favor of defendants than in favor of (1) consumers, or (2) applicants—specifically individuals who apply for financial services, employment, housing, and benefits.⁵⁸⁹ In light of these findings, some jurists have suggested that federal and state courts’ procedural and substantive dispositions of arbitral controversies might be similar to arbitrators’ dispositions.⁵⁹⁰ Therefore, to secure enough cases to test this latter proposition, the author accessed exceedingly large databases of arbitrators’ decisions—which were reported between 1925 and 2014.⁵⁹¹ Next, the author took several proportional stratified random samples of arbitrators’ decisions.⁵⁹² Slightly more than three hundred (303) private-arbitrator cases are included in this study.⁵⁹³ In the end, the author’s entire database comprises 981 cases.⁵⁹⁴

B. Characteristics of Motion to Compel Arbitration Litigants in State and Federal Courts, 1925–2014

In a typical motion to compel arbitration trial, the movant/plaintiff is the person who raised a defense in an underlying lawsuit; and, the respondent/defendant is the applicant/plaintiff in the underlying action. Table 1 illustrates some selected demographic attributes of the persons who resolved disputes before private arbitrators.

*standpoint of that corporation), they will lose the work,’ wrote F. Paul Bland, staff attorney at Public Justice, a Washington, D.C.-based nonprofit legal services group that opposes mandatory binding arbitration agreements in consumer contracts, in comments for the Congressional hearing. NAF’s Anderson denies any charges of *pro-business bias*. He says the arbitrators who work for NAF are former judges and attorneys with at least 15 years’ experience. Strict guidelines prevent any financial conflicts of interest.”) (emphasis added).*

⁵⁸⁹ *Id.*

⁵⁹⁰ *See, e.g., id.* (“A Monitor analysis of the last year of available data from [the National Arbitration Forum] found that arbitrators *awarded in favor of creditors and debt buyers in more than 96 percent of the cases. Such results may be similar to outcomes in court.*”) (emphasis added).

⁵⁹¹ To secure a proportional and stratified sample of arbitrators’ decisions, several research queries were executed—respectively—in the following Westlaw and Lexis databases: (1) AAA Employment Arbitration Awards—SEARCH: “*discrim*”; (2) AAA Employment Arbitration Awards—SEARCH: “*find! for claimant!*” “*in favor of claimant*”; (3) Financial Industry Regulatory Authority (FINRA/NASD) Arbitration Awards—SEARCH: “*breach w/8 stocks*” (4) Washington Arbitration Decisions—SEARCH: “*injury*” (N=2705) and “*defense award*” (N=2267). Only 60 cases were sampled; (5) WASHINGTON ARBITRATION AWARDS—SEARCH: “*injury*,” plus (“*plaintiff award*” and *Insurance*) and (not “*admitted liability*”); and (6) WASHINGTON ARBITRATION DECISIONS—SEARCH: “*injury*” (N=2705) and “*plaintiff award*” (N=2445). Only 150 cases were sampled.

⁵⁹² *Id.*

⁵⁹³ *See infra* Table 1 and the accompanying discussion.

⁵⁹⁴ *See infra* Table 1 and the accompanying discussion.

TABLE 1. SELECTED DEMOGRAPHIC CHARACTERISTICS OF PERSONS WHO LITIGATED DISPUTES BEFORE ARBITRATORS AND WHO PETITIONED COURTS TO DECIDE WHETHER ARBITRATION CLAUSES IN BOTH APPLICATIONS AND CONTRACTS REQUIRED MANDATORY ARBITRATION (N = 981)

Demographic Characteristics	Mandatory Arbitration Proceedings (N = 303)	Court Proceedings—Arbitration Clauses Were In Applications (N = 115)	Court Proceedings—Arbitration Clauses Were In Contracts (N = 563)
	(Percent)	(Percent)	(Percent)
JURISDICTIONS:			
State Proceedings	99.0 ***	58.3 ***	47.8
Federal Proceedings	1.0	41.7	52.2 ***
GEOGRAPHIC REGIONS:			
East	19.8 ***	15.8	18.3
Midwest	15.2	16.7	22.4 ***
South	8.2	22.8 ***	27.3 ***
Southwest	6.3	20.2	11.0
West	50.5 ***	24.5 * **	21.0
FEDERAL CIRCUITS:			
First	2.3	1.0	4.3
Second	13.9 ***	6.1	7.5
Third	2.9	7.8	4.6
Fourth	3.3	7.8	7.6
Fifth	5.6	19.0 * **	12.4
Sixth	6.9	5.2	10.8
Seventh	4.3	6.1	7.1
Eighth	4.9	7.0	5.7
Ninth	47.9 ***	20.0 ***	18.7 ***
Tenth	2.3	7.0	4.1
Eleventh	5.6	13.0	17.2 ***
UNDERLYING LAWSUITS—			
TYPES OF PLAINTIFFS:			
Consumers	52.2 ***	39.1 ***	59.0 ***
Employees	36.3	34.0	19.0
Partners & Professionals	1.3	21.7 ***	7.4
Others	10.2	5.2	14.6 ***
UNDERLYING LAWSUITS—			
TYPES OF DEFENDANTS:			
Corporations, Generally	41.0	52.2 ***	64.0 ***
Financial Institutions, Only	32.3	36.5 ***	21.7
Insurers & Others	26.7 ***	11.3	14.3
UNDERLYING LAWSUITS —			
PLAINTIFFS' THEORIES OF RECOVERY:			
Common-Law Contract & Tort Actions	38.3 ***	28.7 ***	42.6 ***
State/Federal AntiDiscrimination Acts	28.7 ***	30.4 ***	16.0
Consumer-Protection Statutes	5.3	26.9	31.0 ***
Securities & Financial Statutes	27.7 ***	14.0	10.4

Level of Statistical Significance for Chi Square test: ***p < .0001

Also, the table presents background information for litigants who petitioned courts to decide whether arbitration clauses in standardized applications and in certain written contracts were enforceable under the FAA. The first variable in Table 1 is “Jurisdictions.” Significantly, disputes involving the enforceability of arbitration clauses in applications were more likely to be resolved in state courts. Conversely, federal courts were more likely to decide the enforceability of arbitration provisions in contracts. The reported percentages are 58.3% and 52.2%, respectively.

The second variable—“Geographic Regions”—describes the origin of arbitral disputes. The reported percentages reveal two significant and interesting findings. First, disputes involving the enforceability of arbitration clauses in *applications* are significantly more likely to originate in the *West* and *South*—24.5% and 22.8%, respectively. Also, disagreements surrounding the enforceability of arbitration provisions in contracts are more likely to evolve in the South and West—27.3%, 22.4%, respectively. On the other hand, litigants in the Southwest are significantly more likely (20.2%) to litigate disputes involving the enforceability of arbitration clauses in applications. And, in the Midwest, parties are considerably more likely (22.4%) to litigate the enforceability of arbitration clauses in contracts.

In Table 1, the variable—“Types of Plaintiffs in the Underlying Lawsuits”—is self-explanatory. First, when movants filed lawsuits to enforce arbitration clauses in standardized applications (N = 115), the respondents or plaintiffs in the underlying lawsuits were significantly more likely to be (1) dissatisfied applicants who applied for consumers’ good and services; or (2) dissatisfied applicants who applied for employment. The reported percentages are 39.1% and 34.0%, respectively. Similarly, when movants filed actions to enforce arbitration clauses in contracts (N = 563), nearly 60 percent (59.0%) of the respondents were dissatisfied persons who applied for consumers’ good and services before commencing underlying lawsuits. And approximately 20 percent (19.0%) of the respondents filed employment applications before suing the movants in underlying lawsuits. On the other hand, when movants sued to enforce arbitration clauses in applications as well as in contracts, nearly equal numbers of plaintiffs in the underlying lawsuits were aggrieved persons who applied for professional memberships and “other” services. The combined percentages for the two groups are 26.9% and 22.0%, respectively.

In Table 1, the variable—“Types of Defendants in the Underlying Lawsuits”—is also self-explanatory: the movants were the defendants in the underlying lawsuits. Now, compare the movants who filed actions to enforce arbitration provisions in applications with those who filed motion to enforce arbitral clauses in contracts. A significantly larger percentage of corporations

filed motions to enforce arbitration clauses in contracts than in applications. The percentages are 64.0% and 52.2%, respectively. Conversely, a substantially larger percentage of financial institutions filed motions to enforce arbitration clauses in standardized applications than in contracts. The respective percentages are 36.6% and 21.7%.

The final variable in Table 1 is entitled, “Plaintiff’s Theories of Recovery in the Underlying Lawsuits.” Before movants commenced actions to enforce arbitration clauses in application forms, the plaintiffs-respondents in the underlying lawsuits were significantly more likely to sue the movants-defendants (1) for violating state and federal antidiscrimination laws (30.4%); or (2) for violating various breach-of-contract and tort-based rules (28.7%). Now, consider the movants-defendants who filed actions to enforce arbitration clauses in contracts. In the underlying lawsuits, the plaintiffs-respondents were significantly more likely to sue this latter group of movants (1) for violating consumer protection statutes (30.4%); or (2) for violating various breach of contract and tort-based rules (42.6%).

C. Motions to Enforce Arbitration Provisions in Applications and the Bivariate Relationships Between Litigants’ Characteristics and the Disposition of Motions to Compel Arbitration in State and Federal Courts

Again, the demographic variables in the previous Section present a description of movants and respondents who litigated motion to compel arbitration disputes in state and federal courts between 1925 and 2014. Therefore, in light of the reported findings, reconsider section 2 of the FAA. It reads in relevant part: “[A] written provision ... to settle by arbitration a controversy ... arising out of [a] 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.”⁵⁹⁵ In *AT&T Mobility LLC v. Concepcion*,⁵⁹⁶ the Supreme Court declared that under the FAA’s savings clause, “generally applicable contract defenses”—such as fraud, duress, or unconscionability—may invalidate arbitration clauses in contracts.⁵⁹⁷

Read more broadly, the FAA’s “savings clause” permits courts to weigh and apply judiciously settled principles of contract law as well as equitable doctrines when deciding whether to enforce arbitration clauses in contracts.⁵⁹⁸

⁵⁹⁵ 9 U.S.C. § 2 (2012) (emphasis added).

⁵⁹⁶ 131 S. Ct. 1740, 1741 (2011).

⁵⁹⁷ *Id.* at 1746.

⁵⁹⁸ *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 555 (W. Va. 2012) (“[U]nder the savings clause of Section 2, general state contract principles still apply to assess whether

Also, reconsider an important principle of contract law: independently, standardized applications are not binding and enforceable contracts.⁵⁹⁹ But, assume that applications are indeed legally binding contracts. The FAA's savings clause would allow courts to apply common law principles of contract law. Under the savings clause, however, judges do not have authority to use extrajudicial factors—for instance, types of defendants, or litigants' respective legal status—to decide whether to enforce arbitration clauses in application forms.

Yet, as illustrated in Table 2, state and federal judges ignore or marginalize the explicit admonitions appearing in the FAA's language—"arising out of a contract" and "save upon such grounds as exist at law or in equity." Instead, trial and appellate judges consciously or unconsciously allow impermissible extralegal factors to determine whether to enforce arbitration clauses in application forms—again, instruments that are not valid and enforceable contracts.

[See Table 2 on the next page.]

those agreements to arbitrate are valid and enforceable, just as they would to any other contract dispute arising under state law.”).

⁵⁹⁹ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (finding that a securities registration application was not a “contract of employment.”); *C.I.T. Corp. v. United States*, 150 F.2d 85, 95 (9th Cir. 1945) (“The application is not a contract It is an application for a loan.”); *Harris Wayside Furniture Co., Inc. v. Idearc Media Corp.*, Civ. No. 06-CV-392-JM, 2007 WL 1847313, at *3 (D.N.H. June 25, 2007) (“[U]nder both New Hampshire and Texas law, [an] application is not a contract, so its provisions are not binding on the parties [Therefore], the [publishing] application was an offer to contract, not a contract.”).

TABLE 2. THE DISPOSITION OF "MOTION TO COMPEL ARBITRATION" ACTIONS IN TRIAL AND APPELLATE COURTS BY SELECTED PREDICTORS
VARIABLES ONLY AMONG APPLICANTS WHO APPLIED FOR VARIOUS POSITIONS AND SERVICES (N = 115)

Predictor Variables	Subcategories	Applications, Arbitration Clauses & Disposition of Movants' Motions to Compel Arbitration in Trial Courts (N = 115)				Applications, Arbitration Clauses & Disposition of Movants' Motions to Compel Arbitration in Appellate Courts (N = 115)			
		Motion Denied	Motion Granted	Percent	Number	Motion Denied	Motion Granted	Percent	Number
TYPES OF COURTS	State Courts	67.2	32.8		(N = 67) ***	55.2	44.8		(N = 67) ***
	Federal Courts	41.7	58.3		(N = 48) ***	29.2	70.8		(N = 48) ***
ALLEGED VICTIMS AND PLAINTIFFS IN THE UNDERLYING STATE AND FEDERAL LAWSUITS	Consumers	66.7	33.3		(N = 45)	51.1	48.9		(N = 45) ***
	Hourly Employees	48.7	51.3		(N = 39)	48.7	51.3		(N = 39) ***
	Professionals & Partners	44.0	56.0		(N = 25)	16.0	84.0		(N = 25) ***
	Other Alleged Victims	83.3	16.7		(N = 6)	83.7	16.7		(N = 6) ***
TYPES OF DEFENDANTS IN THE UNDERLYING STATE AND FEDERAL LAWSUITS	Corporations	61.7	38.3		(N = 60) *	53.3	46.7		(N = 60)
	Financial Institutions	42.9	57.1		(N = 42) *	35.7	64.3		(N = 42)
	Insurers & Others	77.0	23.0		(N = 13) *	30.8	69.2		(N = 13)
PLAINTIFFS' CLAIMS AND THE ALLEGED VIOLATIONS IN THE UNDERLYING STATE AND FEDERAL LAWSUITS	Common-Law Claims	75.8	24.2		(N = 33) *	51.5	48.5		(N = 33)
	Discrimination Claims	45.7	54.3		(N = 35) *	34.3	65.7		(N = 35)
	Securities/Financial Violations	37.5	62.5		(N = 16) *	31.2	68.8		(N = 16)
	Consumer Violations	58.0	42.0		(N = 31) *	54.8	45.2		(N = 31)

***Chi square test statistically significant at $p \leq .001$

**Chi square test statistically significant at $p \leq .01$

*Chi square test statistically significant at $p \leq .05$

To help prove the latter assertion, consider Table 2. It presents the findings among applicants who filed underlying lawsuits and sued various defendants for allegedly violating the applicants' rights under state and federal laws. First, consider the findings, which are located under the heading, "Applications, Arbitration Clauses & Disposition of Movants' Motions to Compel Arbitration in Trial Courts." Focus on the variable entitled, Types of Courts. Unexpectedly, the finding reveals that federal district courts are significantly more likely (58.3%) to enforce arbitration clauses in standardized applications; and state trial courts are significantly less likely (67.2%) to grant motions to compel arbitration. Again, this is a surprising and somewhat puzzling finding. And the reason is not complex. State trial court judges—like federal district court judges—embrace unquestionably a frequently cited Supreme Court's policy: "As a matter of federal law, *any doubts* concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁶⁰⁰ Yet, a major split exists—between state trial court judges and federal district court judges—over the enforceability of arbitrations provisions in preprinted application forms.

Furthermore, an examination of the statistics in Table 2 reveals a similar split between state and federal appellate courts. Consider the statistics appearing under the heading, "Applications, Arbitration Clauses & Disposition of Movants' Motions to Compel Arbitration in Appellate Courts." Federal appellate courts are substantially more likely (70.8%) to grant movants' motions to compel arbitration. Conversely, state appellate courts are significantly less likely (67.2%) to grant motions to compel arbitration, or significantly less likely to enforce arbitration clauses in standardized applications. Again, an earlier observation needs repeating: The FAA's savings clause does not

⁶⁰⁰ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1982) (emphasis added). Compare *Green Tree Fin. Corp. of Ala. v. Vinton*, 753 So. 2d 497, 501–02 (Ala. 1999) (citing *Moses H. Cone*, 460 U.S. at 24–25, and stressing that "trial courts are required to stay or dismiss proceedings and to compel arbitration when the parties have entered into a valid contract containing an arbitration agreement"), and *State v. Philip Morris USA, Inc.*, No. 98CVS 14377-I, 2006 WL 3490937, at *7 (N.C. Super. Dec. 4, 2006) (embracing the federal arbitration policy), with *Blankenship v. T.D. Ameritrade, Inc.*, Civ. Act. No. 1:13-8048, 2014 WL 637144, at *5 (S.D. W. Va. Feb. 18, 2014) (reiterating that arbitration agreements must be construed with due regard to the federal policy favoring arbitration, and ambiguities must be resolved in favor of arbitration.), and *Schwartz v. CACH, L.L.C.*, 2014 WL 298107, at *2 (D. Mass. Jan. 27, 2014) (citing *Moses H. Cone*, 460 U.S. at 24–25, and embracing the "liberal federal policy favoring arbitration agreements," while stressing that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

encourage judges to consider litigants' legal statuses or any extrajudicial factor when deciding whether to enforce arbitration clauses in contracts or in preprinted application forms.

The second variable in Table 2 is entitled, "Alleged Victims and Plaintiffs in the Underlying State and Federal Lawsuits." In state and federal trial courts, one finds general—although not statistically significant—trends: Lower court judges are generally more likely to enforce arbitration clauses in applications when the underlying applicants-victims are hourly employees and professionals/partners. The corresponding percentages are 51.3% and 56.0%, respectively. In contrast, state and federal trial courts generally deny motions to compel arbitration when the underlying applicants are consumers and other alleged victims. The respective percentages are 66.7% and 83.3%.

On the other hand, the statistics in Table 2 reveal that the legal statuses of the plaintiffs and victims in the underlying lawsuits had a statistically significant effect on the disposition of motions in both state and federal appellate courts. For example, in these latter tribunals, justices are substantially and statistically more likely to enforce arbitration clauses in applications when underlying applicants-victims are hourly employees and professionals/partners. The corresponding percentages are 51.3% and 84.0%, respectively. In contrast, both state and federal appellate courts are substantially and statistically less likely to grant motions to compel arbitration when the underlying applicants are consumers and other alleged victims. The respective percentages are 51.1% and 83.7%.

The statistics in Table 2 also answer the question of whether courts allow the legal statuses of movants—the defendants in the underlying lawsuits—to influence the disposition of motions to compel arbitration. State and federal trial courts are statistically and significantly more likely to enforce arbitration clauses in applications (57.1%) when financial institutions are the movants. But trial court judges are statistically and significantly less likely to enforce arbitration provisions in standardized applications when movants are corporations (61.7%) and insurers/others (77.0%). Although not statistically significant, fairly similar trends are found among cases decided in state and federal appellate courts. Judges sitting on courts of appeals are also less likely to enforce arbitration clauses in preprinted application forms when movants are corporations (53.3%). Contrarily, appellate court justices are more likely to enforce arbitration provisions in applications when movants or underlying defendants are financial institutions (64.3%) and insurers/others (69.2%).

Arguably, the remaining statistics in Table 2 reveal the most important and informative findings for practitioners who litigate motion to compel arbitration disputes in state and federal courts. Consider the last variable in the table entitled, "Plaintiffs' Claims and the Alleged Violations in the Underlying State and Federal Lawsuits." Trial court judges are significantly and

statistically more likely to enforce arbitration clauses in application forms when respondents or plaintiffs—in the underlying lawsuits—sue movants/defendants for purportedly violating antidiscrimination and securities/financial laws. The corresponding percentages are 54.3% and 63.5%, respectively.

On the other hand, trial court judges are substantially and statistically less likely to enforce arbitration clauses in applications when plaintiffs—in the underlying lawsuits—sue movants/defendants for allegedly breaching contracts or committing torts (common law claims), and for violating consumer protection laws. Respectively, the latter percentages are 75.8% and 58.0%. And, although not statistically significant, similar and notable trends appear among the cases which were decided in state and federal appellate courts.

Arguably, FAA policies are rationally biased in favor of enforcing arbitration clauses in contracts. But the results reported in this study are equally clear. Courts act irrationally by allowing extrajudicial variables to influence the disposition of motions to compel arbitration. Briefly put, such variables should have no “predictive” power. Therefore, in light of the statistically significant findings in Table 2, two additional questions ask for answers: (1) whether extralegal factors are more or less likely to influence courts’ decisions to enforce or not enforce arbitration clauses in negotiated or standardized contracts?; and (2) whether courts are likely to enforce arbitration clauses in applications more often than arbitration provisions in contracts?

[See Table 3 on the next page.]

TABLE 3. DISPOSITION OF "MOTION TO COMPEL ARBITRATION" ACTIONS BY TYPES OF ARBITRATION PROVISIONS AND BY SELECTED ATTRIBUTES OF THE LITIGANTS (N = 678)

Selected Attributes	Subcategories	Mandatory-Arbitration Provisions in Applications & the Disposition of Movants' Motions to Compel Arbitration (N = 115)				Mandatory-Arbitration Provisions in Contracts and the Disposition of Movants' Motions to Compel Arbitration (N = 563)			
		Motion Denied	Motion Granted	Percent	Number	Motion Denied	Motion Granted	Percent	Number
TRIAL COURTS' DISPOSITIONS	State Trial Courts	67.2	32.8	***	(N = 67)	60.0	40.0	***	(N = 269)
	Federal District Courts	41.7	58.3	***	(N = 48)	48.6	51.4	***	(N = 294)
COURTS OF APPEALS' DISPOSITIONS	State Courts of Appeals	55.2	44.8	***	(N = 67)	37.5	62.5	***	(N = 269)
	Federal Courts of Appeals	29.2	70.8	***	(N = 48)	40.5	59.5	***	(N = 294)
FEDERAL/STATE TRIAL COURTS RESPONDENTS	Consumers	68.5	31.5	**	(N = 54)	54.8	45.2	***	(N = 436)
	Employees	46.0	54.0	**	(N = 61)	51.2	48.8	***	(N = 127)
FEDERAL/STATE APPEALS COURTS RESPONDENTS	Consumers	51.8	48.2		(N = 54)	40.0	60.0	***	(N = 436)
	Employees	37.7	62.3		(N = 61)	36.2	63.8	***	(N = 127)
TRIAL & DISTRICT COURTS: Consumers' & Employees' Underlying Statutory & Common Law Theories Of Recovery	Antidiscrimination Statutes	46.5	53.5	***	(N = 43)	45.4	54.6	*	(N = 108)
	Financial & Securities Statutes	36.4	63.6	***	(N = 22)	64.0	36.0	*	(N = 75)
	Consumer & DTPA Statutes	74.0	26.0	***	(N = 50)	52.1	47.9	*	(N = 140)
	Breach—Form Contracts	—	—		—	58.4	41.6	*	(N = 154)
	Breach—Negotiated Contracts	—	—		—	51.2	48.8	*	(N = 86)
COURTS OF APPEALS: Consumers' & Employees' Underlying Statutory & Common Law Theories Of Recovery	Antidiscrimination Statutes	37.2	62.8	*	(N = 43)	37.0	63.0		(N = 108)
	Financial & Securities Statutes	31.8	68.2	*	(N = 22)	37.3	62.7		(N = 75)
	Consumer & DTPA Statutes	56.0	44.0	*	(N = 50)	40.7	59.3		(N = 140)
	Breach—Form Contracts	—	—		—	38.3	61.7		(N = 154)
	Breach—Negotiated Contracts	—	—		—	41.9	58.1		(N = 86)

***Chi square test statistically significant at $p \leq .001$ **Chi square test statistically significant at $p \leq .01$ *Chi square test statistically significant at $p = .08 \leq .09$

-Uniform Deceptive Trade and Practices Act (DTPA)

The statistics appearing in Table 3 address both questions. First, in the center of Table 3, three columns of statistics appear under the heading, “Mandatory-Arbitration Provisions in Applications and the Disposition of Movants’ Motions to Compel Arbitration.” And, on the right side of the table, three additional columns of statistics are illustrated under the heading, “Mandatory-Arbitration Provisions in Contracts and the Disposition of Movants’ Motions to Compel Arbitration.”

Consider the first variable in the table—Trial Courts’ Dispositions. The findings are clear, regarding the enforceability of arbitration clauses in applications. Again, state trial courts are statistically and significantly more likely to deny motions (67.2%) and refuse to enforce arbitration provisions in applications. Conversely, federal district courts are statistically and meaningfully more likely to enforce (58.3%) arbitration provisions in applications. Regarding the enforceability of arbitration clauses in negotiated or standardized contracts, the results are similar: State trial courts are substantially less likely to enforce (60.0%) arbitration clauses in contracts. And federal district courts are significantly more likely to grant motions (51.4%) and enforce arbitration provisions in contracts.

Now, examine the statistics in Table 3 which are associated with the second variable—Courts of Appeals’ Dispositions. One of the findings among courts of appeals is a mirror image of a finding appearing among trial courts: like state trial courts, state appellate courts are significantly more likely to deny motions (55.2%) and refuse to enforce arbitration provisions in applications. On the other hand, federal courts of appeals are statistically and substantially more likely to grant motions (70.8%) and enforce arbitration provisions in applications. Even more revealing, both state and federal courts of appeals are equally likely to grant motions and enforce arbitration provisions in standardized and negotiated contracts. The reported percentages are 62.5% and 59.5%, respectively.

In Table 3, the third and fourth variables are labeled, Federal & State Trial Courts Respondents, and Federal & State Appeals Courts Respondents, respectively. Review the corresponding rows of statistics in the center of the table. They confirm two earlier findings: state trial courts and federal district courts are less likely to enforce arbitration clauses in applications (68.5%) when respondents or underlying plaintiffs are consumers. State trial courts and federal district courts, however, are more likely to enforce arbitration provisions in applications (54.0%) when respondents are employees or individuals who applied for employment. Among state and federal appellate courts’ dispositions, the same patterns appear: Courts of appeals are less likely to enforce arbitration clauses in applications (51.8%) when respondents are consumers. On the other hand, courts of appeals are more likely to enforce arbitration provisions in applications (62.3%) when respondents are employees.

Are the same statistical outcomes observed among state and federal courts when the question concerns the enforceability of arbitration clauses in negotiated and standardized contracts? The answer is no. Reviewing the statistics on the right side of Table 3, we discover that state trial courts and federal district courts are equally unlikely to enforce arbitration provisions in standardized and negotiated contracts when the respondents are consumers or hourly employees. The reported percentages are 54.8% and 51.2%, respectively. In contrast, state and federal courts of appeals are equally more likely to grant motions and enforce arbitration clauses in contracts when the respondents are consumers or hourly employees. Respectively, the percentages are 60.0% and 63.8%.

The final two variables in Table 3 and the corresponding statistics illustrate the effects of consumers' and employees' theories of recovery on the disposition of motions to compel arbitration in state and federal courts. Regardless of their respective jurisdictions, all trial and appellate courts are significantly more likely to enforce arbitration clauses in both applications and contracts when consumers and employees file antidiscrimination lawsuits against the movants. The respective percentages are 53.5%, 54.6%, 62.8%, and 63.0%. In addition, when respondents sue movants for violating financial and securities laws, the greater majority of state and federal, trial and appellate courts are statistically more likely to enforce arbitration clauses in both applications and contracts. The reported percentages are 63.6%, 68.2% and 62.7%, respectively. In contrast, the overwhelming majority of state and federal, trial and appellate courts are significantly less likely to enforce arbitration clauses in applications and contracts when respondents sue movants for violating consumer protection and deceptive trade practices laws. The corresponding percentages are 74.0%, 52.1% and 56.0%. Did Congress intend to foster these types of statistically significant and, arguably, irrational judicial outcomes when that body enacted the FAA section 2? Conservative readings of numerous primary sources—the FAA, its legislative history, and the Supreme Court's FAA-related decisions—provide a resounding answer: no.

D. A Two-Stage, Multivariate Probit Analysis of the Interrelationships Between Movants and Respondents' Attributes and the Dispositions of Motions to Compel Arbitration in State and Federal Courts of Appeals

Above, numerous statistically significant findings were discussed. Unquestionably, one's focusing exclusively on the stand-alone or sole effect of any particular variable prohibits a jurist or statistician from arguing convincingly: (1) state and federal courts are irrefutably "irrationally biased;" and (2) the irrational bias determines whether movants or respondents are more or less likely to win the majority of motion to compel arbitration disputes. In an earlier published article, the author cautioned jurists against embracing

such hasty and unwarranted conclusions.⁶⁰¹ Why? Serious and careful research always requires one's conducting multiple tests to determine whether sufficient, statistical and probative evidence exist before concluding that judges' dispositions are "irrationally biased."⁶⁰²

Furthermore, an impartial researcher must address straightforwardly an important question regarding the quality of the researcher's sample data: Whether published cases in regional law reporters describe fairly and comprehensively the universe of judicial decisions in state and federal courts?⁶⁰³ Therefore, to increase the likelihood of one's implementing a comprehensive study, an investigator must (1) use statistical tests that generate "inferential" or "causal" coefficients, which are more "powerful" than simple percentages; (2) measure both independent and simultaneous effects of legal and extra-legal variables on the disposition of, say, motions to compel arbitration; and (3) test for "selectivity bias" in the sample data.⁶⁰⁴

One important reason explains why a researcher must test for "selectivity bias" in choice data. Unlike state trial courts or federal district courts' decisions, courts of appeals' decisions are significantly more likely to be respected and authoritative—since appellate decisions are markedly more likely to be "final decisions." In addition, state trial courts and federal district courts often issue unfavorable rulings in, say, motion to compel arbitration trials. In response, some movants and respondents accept the adverse rulings

⁶⁰¹ Willy E. Rice, *Allegedly "Biased," "Intimidating," and "Incompetent" State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly "Impartial" and "Competent" Federal Courts—A Historical Perspective and an Empirical Analysis of Class Action Dispositions in Federal and State Courts, 1925–2011*, 3 WM. & MARY BUS. L. REV. 419, 466 (2012).

⁶⁰² See generally Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1900–1997*, 47 AM. U. L. REV. 1131, 1194–1214, 1208–09 (1998) [hereinafter Rice, *Insurance Contracts and Judicial Discord*] (presenting a case study of state and federal courts' disposition of lawsuits involving corporate entities, insurers, and insurance consumers, and discussing statistical problems which are associated with a researcher's using only reported cases and simple percentages to make "causal" inferences).

⁶⁰³ *Id.* at 1208–09.

⁶⁰⁴ Elsewhere, the author has discussed "selectivity bias," the inferential problems associated with it, and the tests for detecting such bias in sample data. See Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900–2000*, 35 TORT & INS. L.J. 995, 1088–89 nn.431–32 (2000); Rice, *Insurance Contracts and Judicial Discord*, *supra* note 602, at 1209 n.386 (testing for "selectivity bias" in "other- and self-selection data"); Willy E. Rice, *Judicial Bias, The Insurance Industry and Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900–1991*, 41 CATH. U. L. REV. 325, 371–76 nn.157–59 (1992) (explaining and testing for "selectivity bias" in "choice data").

and decide not to seek appellate review.⁶⁰⁵ But, other litigants do not accept the rulings. In the end, some members of this latter group decide to seek more favorable rulings in state or federal courts of appeals.⁶⁰⁶

Put simply, the purpose of a “selectivity bias” test is to determine whether statistically significant differences exist between the population of litigants who choose to appeal (“appellants”) adverse rulings and the population that decided not to appeal (“non-appellants”). And, if the researcher finds significant differences between appellants and non-appellants, the aggregate of the dissimilar personal and background characteristics—rather than “irrational judicial bias” or other impermissible attributes—provides a better explanation of appellants’ likelihood of winning or losing motion to compel arbitration lawsuits in state and federal courts of appeals.

As illustrated in Tables 1, 2 and 3, the current sample contains information about appellants’ and non-appellants’ characteristics. Therefore, a “selectivity bias” test must be performed before trying to determine whether state and federal appellate judges’ allegedly “irrational bias” explains the rather questionable, puzzling and unexpected outcomes in motion to compel arbitration lawsuits.⁶⁰⁷ And, if selection bias is not, the next challenge is to secure the individual and statistical effects (“explanations”) of certain variables on courts’ dispositions of motions to compel arbitration—while controlling for and determining the multiple and simultaneous effects of other “presumed” predictors.

Now, consider Table 4. It presents a multivariate, two-stage probit analysis⁶⁰⁸ of the disposition of motions to compel arbitration in state and federal appellate courts.⁶⁰⁹ The table illustrates several distributions, probit values, and statistics.

⁶⁰⁵ See *infra* Table 4 and compare the total sample size (N=981) with the number of litigants (N=669) who decided to appeal adverse decisions to state and federal courts of appeals.

⁶⁰⁶ See *infra* Table 4.

⁶⁰⁷ See Rice, *Insurance Contracts and Judicial Decisions*, *supra* note 604, at 1088–89 nn.431–32 (discussing measuring bias in sample data).

⁶⁰⁸ In multiple published law review articles, the author has discussed and employed this statistical procedure to measure simultaneously independent and multiple effects of “independent variables” on the disposition of court decisions. See Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent”*, *supra* note 601, at 544–551 nn.790–838; Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts’ Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes with the McCarran-Ferguson Act—1941–1993*, 43 CATH. U. L. REV. 399, 445–49 nn.213–19 (1994); Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX, and Section 504: A Pre- and Post-Grove City Analysis*, 5 REV. LITIG. 219, 287 nn.406–09 (1986) (using StataCorp’s Stata Statistical Software to analyze the data generally and to compute the multivariate-probit coefficients in particular); Rice, *Judicial Bias, The Insurance Industry and Consumer Protection*, *supra* note 604, at 369–77 nn.157–60 (explaining multivariate probit analysis).

⁶⁰⁹ A copy of the author’s database is on file with the author.

TABLE 4. MULTIVARIATE EFFECTS OF PREDICTORS ON COURTS OF APPEALS' DISPOSITION OF MANDATORY-ARBITRATION DISPUTES AMONG MOVANTS WHO DECIDED TO ENFORCE ARBITRATION PROVISIONS IN APPLICATIONS FOR SERVICES AND EMPLOYMENT AND IN CONTRACTS (N = 981)

INDEPENDENT VARIABLES	DECISIONS TO APPEAL MOTION TO COMPEL ARBITRATION RULINGS TO STATE AND FEDERAL COURTS OF APPEALS (N = 669)					DISPOSITION OF MOTION TO COMPEL ARBITRATION LAWSUITS IN STATE AND FEDERAL COURTS OF APPEALS (N = 669)				
	Probit Coefficients	Robust Std. Errors	Z-Statistics Absolute Values	Statistical Significance		Probit Coefficients	Robust Std. Errors	Z-Statistics Absolute Values	Statistical Significance	
UNDERLYING LEGAL INSTRUMENTS:										
Contracts, Only	.3076	.1830	1.68			-.0619	.0565	1.10		$p = .04$
Applications, Only	.5931	.7804	0.76			-.1711	.0867	1.97		$p = .007$
State Applications, Only	2.2434	.9313	2.41	$p < .01$.2730	.1016	2.69		
LITIGANTS BY JURISDICTIONS:										
State-Based Disputes, Only	-0.8740	.4866	1.80			-.4917	.1108	4.43		$p < .0001$
State Appellate Courts, Only	7.1343	.2374	30.04	$p < .0001$		-.0782	.0708	1.11		
Federal Appellate Courts, Only	2.2833	.5700	4.01	$p < .0001$		-.5502	.1260	4.36		$p < .0001$
Second Circuit, Only	-1.0302	.2368	3.77	$p < .0001$		-.1307	.0677	1.93		$p = .05$
Fifth Circuit, Only	-0.0197	.2223	0.09			-.0265	.0538	0.49		
Ninth Circuit, Only	-1.1020	.1601	6.88	$p < .0001$.1095	.0531	2.06		$p = .03$
TYPES OF DEFENDANTS IN UNDERLYING LAWSUITS:										
Employers	2.2897	.4710	4.86	$p < .0001$.3166	.1371	2.31		$p = .02$
Financial Institutions	-0.8303	.1646	5.04	$p < .0001$		-.0994	.0455	2.18		$p = .02$
PLAINTIFFS IN THE UNDERLYING ANTI-DISCRIMINATION LAWSUITS:										
Anglo-Americans, Only	-1.2303	.2028	6.06	$p < .0001$		-.0202	.0626	0.32		
Ethnic Minorities, Only	-1.0282	.5112	2.65	$p = .008$		-.0277	.0886	0.31		
Males, Only	2.0457	.4850	4.00	$p < .0001$		-.5028	.1387	3.62		$p < .0001$
CONSTANT	1.1519	.5396	2.13	$p < .05$		1.0082	.1353	7.45		$p < .0001$

Wald test for independent equations ($\rho = 0$) is a test for "selectivity bias." It computes the correlation between the errors in the two equations. STATA gives an estimate for ρ , and tests that estimate. In this case, the null hypothesis ($\rho = 0$) is not rejected, suggesting that sample-selection bias is absent. Chi square statistic = 2.81, $df = 1$, $p = .0937$

Wald test for the model's "fit": Chi square statistic = 90.40, $df = 14$, $p = .00001$

To begin, it is important to underscore that the findings in Table 4 are based on a multivariate probit analysis of 981 cases. Of this latter number, approximately 70 percent (678) of the litigants appealed motions to compel arbitration decisions to federal and state appellate courts. The remaining 30 percent (312) decided not to appeal. Consequently they were “unobserved” in either state or federal courts of appeals. Again, the absence of the unobserved litigants *could be* a source of “selectivity bias,” which would effectively preclude three interrelated and unequivocal conclusions: (1) appellate courts are “irrationally biased” in favor of arbitration or the Federal Arbitration Act; (2) appellate courts’ irrational bias explains in part the disposition of motions to compel arbitration; and (3) courts of appeals weigh heavily extrajudicial factors when deciding whether to grant or deny motions to enforce arbitration provisions in standardized applications, which are not contracts under the FAA.

Now, consider more carefully the variables and coefficients in Table 4. Fourteen (14) “dummy” variables⁶¹⁰ or predictors appear in the table under four headings: “Underlying Legal Instruments” comprising three variables; “Litigants by Jurisdictions” containing predictors; “Types of Defendants in the Underlying Lawsuits” comprising two dummy variables; and “Plaintiffs in the Underlying Antidiscrimination Lawsuits” containing three dummy predictors. In addition, Table 4 illustrates two distributions of probit coefficients along with their respective distributions of robust standard errors, z-statistics, and levels of statistical significance.⁶¹¹

On the left, the first distribution of probit coefficients appears under the label “Decisions to Appeal Motion to Compel Arbitration Rulings to State and Federal Appellate Courts (N = 669).” Those probit coefficients answer whether the multiple, individual and simultaneous effects of fourteen dummy variables significantly influenced litigants’ decisions to appeal adverse motion to compel arbitration rulings. The findings show that some probit coefficients are statistically significant. Thus, we may conclude that some

⁶¹⁰ Put simply, the subcategories or subgroups are individual binary (0, 1) or “dummy variables.” See WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 116–18 (5th ed. 2003) (explaining the purpose and use of dummy variables in regression analysis).

⁶¹¹ See ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 93, 233–34 n.4 (2010) (stating that “[w]hen a result has less than a 5 percent chance of having been observed but is observed anyway, it is said to be statistically significant”, and explaining that a 1 percent chance “represents a ‘higher’ level of significance because it indicates a less probable outcome and hence a more rigorous statistical test”); David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J.L. & TECH. 429, 460 n.184 (2013) (“Statistical significance is the probability that an observed relationship is not due to chance A *p*-value of less than 0.05 is usually considered statistically significant A 5% probability is equal to a *p*-value of 0.05 or less. Results with a *p*-value of less than 0.01 are considered highly statistically significant.”).

of the fourteen factors influenced movants and respondents' decisions to appeal unfavorable trial and district courts' rulings to state and federal appeals courts.

More specifically, litigants' decisions to appeal or not appeal can be explained by (1) knowing the movants who wanted to enforce arbitration provisions only in state-approved application forms; (2) knowing that movants in the Second and Ninth Circuits tried to enforce arbitration clauses; (3) knowing the movants who wanted to enforce arbitration clauses only in state appellate courts; (4) knowing the movants want to enforce arbitration clauses only in federal courts of appeals; (5) knowing that movants were either defendants-employers or defendants-financial institutions in the underlying lawsuits; and (6) knowing the ethnicity or gender of respondents/plaintiffs who filed the underlining antidiscrimination lawsuits against the movants.

To repeat, some predictors influenced appellants and non-appellants' decision to appeal adverse rulings to courts of appeals. And, some of the same predictors influenced courts of appeals' dispositions of motions to compel arbitration. Thus, it is prudent to determine whether "selectivity bias" appears in the data. Or stated somewhat differently, it is necessary to assess whether there are any meaningful similarities between two equations or the two distributions of probit coefficients. At the bottom of Table 4, the findings of a Wald test for independent equations appear. The Chi-square value is not statistically significant—suggesting that no disquieting "selectivity bias" appears in the sample data.

Therefore, absent any meaningful "self-selection bias," the next task is to determine the simultaneously individual and multiple effects of the fourteen dummy variables on the dispositions of motions to compel arbitration. More specifically, the mission is to assess whether the predictors are significantly more or less likely to influence appellate courts' dispositions of motions to enforce arbitration clauses in standardized applications as well as in negotiated or standardized contracts.

Even a hasty review of the four columns of statistics in Table 4 reveals that several of the fourteen predictors have statistically significant effects on motions to compel arbitration outcomes in state and federal courts. To illustrate, consider the subheading that appears on the right side of Table 4—"Disposition of Motion to Compel Arbitration Lawsuits in State and Federal Courts of Appeals." Four distributions of coefficients and statistics appear under that subheading in bold print. A closer look reveals that *nine* of the fourteen predictors have statistically significant probit coefficients.⁶¹²

⁶¹² At all times, the interpretation of the "positive" and "negative" probit coefficients under this heading must be viewed from the perspectives of (1) the plaintiffs who filed the underlying lawsuits in state trial courts and in federal district courts, or (2) the respondents

First, the “Applications Only” variable has a negative (-.1711) probit coefficient. This means that generally, plaintiffs—who commenced underlying lawsuits—were statistically less likely to prevail when movants/defendants asked appellate courts to enforce arbitration provisions only in standardized applications. Again, the “State Applications Only” predictor represents various applications that were fashioned and sanctioned under state laws.⁶¹³ And, the positive (.2730) probit coefficient associated with this latter variable reveals that the respondents or the plaintiffs in the underlying lawsuits are statistically more likely to win when appellate courts decide the enforceability of arbitration clauses in state-sanctioned application forms.

Do state and federal courts’ jurisdictions or jurisdictional powers affect those tribunals’ dispositions of motions to compel arbitration? Do types of legal disputes influence the outcomes? The answer to each question is yes. In Table 4, locate these two predictors: “State-Based Disputes Only,” and “Federal Appellate Courts Only.” Their corresponding probit coefficients are negative and statistically significant. Put simply, the -.4917 coefficient

in the motion to compel arbitration proceedings. Of course, defendants in the underlying lawsuits also filed motions to compel arbitration in those same lower state and federal courts. So, focusing on the motion to compel arbitration litigation in the trial and district courts, this question arose: *What was the outcome of each motion-to-compel-arbitration dispute?* A dependent “dummy” variable—“OUTCOME-Trial-Court”—was created. It comprised two values (0, 1). If an underlying plaintiff prevailed in a state trial court or in a federal district court, the value 1 was assigned; and if the underlying plaintiff did not prevail, the value 0 was assigned. For cases decided in state and appellate courts, a second dependent “dummy” variable—“OUTCOME-Appellate-Court”—was fashioned. And the same coding scheme was applied. Thus, in Table 4, a *negative* probit coefficient means that the corresponding predictor *decreased* plaintiffs’ likelihood of winning a motion-to-compel-arbitration dispute. On the other hand, a *positive* probit coefficient means that the corresponding predictor *increased* plaintiffs’ likelihood of winning a motion-to-compel-arbitration dispute.

⁶¹³ See, e.g., *Gov’t Emps. Ins. Co. v. Graham-Gonzalez*, 107 P.3d 279, 286 (Alaska 2005) (“At the request of GEICO we have taken judicial notice that the Division of Insurance has *approved application forms* submitted by insurers and by agencies serving insurers that ... list the various levels of coverage required but do not state the premium that will be charged for each level of coverage.”) (emphasis added); *Rosshirt v. Cincinnati Ins. Co.*, 336 S.E.2d 612, 615 (Ga. Ct. App. 1985) (“The Allstate agent did not attach to his affidavit a copy of the *state-approved application form* which was in use.”) (emphasis added); *Hall v. Shah*, 953 N.Y.S.2d 758, 761 (App. Div. 2012) (“The date of *application* is the date that ... a signed *state-prescribed application form*, or a *state-approved equivalent form* ... is received by the facilitated enroller or the local district”) (emphasis added); *Corcoran v. Atascocita Cmty. Improvement Ass’n, Inc.*, No. 14-12-00982-CV, 2013 WL 5888127, at *5 (Tex. App. Oct. 31, 2013) (“There is no specific provision in the 1997 Guidelines authorizing homeowners to appeal [the Architectural Control Committee] disapproval to [Atascocita Community Improvement Association]. Furthermore, *approved application forms* attached to the 1997 Guidelines do not mention an ability to appeal to ACIA.”) (emphasis added).

indicates that plaintiffs are substantially less likely to win motion to compel arbitration disputes when plaintiffs' underlying lawsuits comprise only state-law claims.⁶¹⁴ The -.5502 probit coefficient also has a similar meaning: in federal courts of appeals generally, respondents who filed the underlying lawsuits are substantially less likely to win in motion to compel arbitration proceedings.

On the other hand, an underlying plaintiff's likelihood of winning a motion to compel arbitration lawsuit increases or decreases substantially, depending on the location of the federal court of appeals. For example, the predictor variable "Second Circuit Only" has an accompanying negative probit coefficient (-.1307). And the predictor "Ninth Circuit Only" has an accompanying positive probit coefficient (.1095). Interpreting the two coefficients, we discover that respondents-plaintiffs are substantially less likely to win motion to compel arbitration disputes in the Court of Appeals for the Second Circuit. But, in the Ninth Circuit, plaintiffs who commenced the underlying lawsuits are substantially and statistically more likely to prevail in motion to compel arbitration proceedings.

Similarly, plaintiffs-respondents are more likely to prevail in motion to compel arbitration proceedings when the defendants-movants in the underlying lawsuits are employers. The corresponding positive probit coefficient (.3166) is statistically significant. Conversely, plaintiffs-respondents are less likely to prevail when financial institutions file motions to enforce arbitration provisions in applications and contracts. The corresponding and statistically significant probit coefficient is negative (-.0994).

⁶¹⁴ Without knowing more, this finding is arguably suspect or puzzling. And the reason is not very complex. In Table 3, the percentages show that state courts are significantly *more likely* to deny motions to enforce arbitration provisions in both standardized applications and valid contracts. Thus, one could argue that state courts rather than federal courts are more "pro-plaintiff." But, many *state-law claims*—which are filed in state courts—are removed to federal courts. *See, e.g.,* *Montero v. Carnival Corp.*, 523 Fed. Appx. 623, 635 (11th Cir. 2013) ("Montero [sued] Carnival in Florida state court, asserting claims of Jones Act negligence, unseaworthiness, and maintenance and cure under maritime law. Carnival removed the case to federal court and filed a motion to compel arbitration based on the arbitration provision [in] the employment contract between Montero and Carnival."); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 767 (8th Cir. 2011) ("Mack Green and other current or former shuttle bus drivers [sued] SuperShuttle in Minnesota state court alleging violations of the Minnesota Fair Labor Standards Act After SuperShuttle removed the action to federal court, the district court granted SuperShuttle's motion to compel arbitration."); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1118 (9th Cir. 2008) ("Cox filed a Charge of Discrimination with the Hawai'i Civil Rights Commission, and ... the Commission granted him the right to sue. Cox then filed a complaint in state court, which Ocean View removed to federal district court."). Ultimately, in federal courts, the state law disputes or *any accompanying motions to compel arbitration* are greatly more likely to be adjudicated in favor of defendants. *See Montero*, 523 Fed. Appx. at 627; *Green*, 653 F.3d at 767; *Cox*, 533 F.3d at 1126; *see also supra* Table 3.

Earlier, an examination of the percentages in Tables 2 and 3 revealed that plaintiffs' underlying theories of recovery or claims influence federal and state courts' likelihood of granting or denying motions to enforce arbitration clauses in application forms and in valid contracts. Again, in many underlying lawsuits, plaintiffs often sued defendants for allegedly violating consumer-protection, financial, securities, and/or deceptive trade practices laws. Furthermore, we discovered that state and federal courts occasionally grant defendants' motions by enforcing arbitration clauses in standardized applications, and denying plaintiffs' requests for a trial by jury.⁶¹⁵ On other occasions, however, state courts refuse to enforce arbitration clauses in applications or in contracts, when consumer-protection, financial fraud, and/or deceptive trade practices claims appear in plaintiffs' underlying complaints or pleadings.

In addition, as reported earlier, applications forms are ubiquitous. And each year, several million persons use such forms to apply for various goods, services, benefits and memberships.⁶¹⁶ Furthermore, billions of contracts are formed annually.⁶¹⁷ Consequently, such large numbers of applications and contracts guarantee that some persons will experience bad events. Therefore, the question arises: are courts more or less likely to enforce arbitration clauses in applications or in contracts when disgruntled plaintiffs accuse defendants of violating *state and federal antidiscrimination and civil rights laws*? Again, in both Tables 2 and 3, one finding is unequivocally clear and consistent: courts are always *substantially more likely* to compel arbitration when plaintiffs commence *antidiscrimination lawsuits* against defendants-movants.⁶¹⁸

Of course, the next, narrower, and even more important question becomes whether courts of appeals permit plaintiffs' *ethnicity* or *gender* to substantially increase or decrease the likelihood of enforcing arbitration provisions in standardized applications and in contracts when *plaintiffs file underlying antidiscrimination lawsuits*? The unexpected answer appears in Table 4. Consider the three "dummy" predictors that appear under the general category, "Plaintiffs in the Underlying Antidiscrimination Lawsuits." The first coefficient (-.0202) is *negative*; which means that courts of appeals are *likely*

⁶¹⁵ See *supra* Table 3.

⁶¹⁶ See *supra* note 79 and accompanying text; see also *supra* Part II.A and II.D and accompanying text.

⁶¹⁷ See, e.g., D. Bruce Johnston, *Internet Business Transactions Near 450 Billion a Day—The Truth about Digital Universe*, WEBLOGIC.SYS-CON.COM, <http://weblogic.sys-con.com/node/1404879> (last visited Mar. 26, 2015), archived at <http://perma.cc/62ZN-2RUP> ("Commerce on the Internet continues to skyrocket IDC estimates that by 2020, business transactions on the internet—[business to business] and [business to consumer]—will reach 450 billion a day.").

⁶¹⁸ See *supra* Tables 2 and 3.

to compel arbitration when *Anglo-American plaintiffs* commence *antidiscrimination* lawsuits against defendants. Additionally, the second negative probit coefficient (-.0277) indicates that federal and state appellate courts are more likely to compel arbitration when *ethnic minorities* file civil rights and antidiscrimination against defendants.

But note that although the latter probit coefficients underscore a previously uncovered and discussed *trend* in Tables 2 and 3, the coefficients are *not statistically significant*. On the other hand, the effects of the last predictor in Table 4—"Males Only"—is statistically significant. The corresponding and negative probit coefficient (-.5028) reveals that state and federal courts of appeals are statistically and substantially more likely to enforce arbitration provisions in standardized applications and in contracts when *males* commence *antidiscrimination* lawsuits against defendants.

Once more, it is important to ask: Did Congress enact FAA section 2, intending for numerous extrajudicial variables as well as plaintiffs' theories of recovery to influence state courts' decisions to enforce or not to enforce arbitration clauses in standardized applications? Did congressional members expect a conservative or a liberal reading of FAA section 2 to influence federal courts' decisions to enforce or not to enforce arbitration clauses in standardized or negotiated contracts? Based on a careful review of the FAA's legislative history, the answer to each question is no.

CONCLUSION

Elsewhere, a general consensus has emerged about the U.S. Supreme Court and many lower federal courts that they readily ignore or marginalize states' common law and statutes—those which get in the way of conclusions and rulings that the Court and inferior judges want to deliver.⁶¹⁹ The statistically significant findings—which appear in this Article—lend credence to that consensus. Indisputably, the overwhelming majority of state

⁶¹⁹ Stephen Givens, *Looking Through the Wrong End of the Telescope: The Japanese Judicial Response to Steel Partners, Murakami, and Horie*, 88 WASH. U. L. REV. 1571, 1594 (2011); see also Shawn Eisele, *Environmental Defense v. Duke Energy Corp.: Paving the Way for Cap and Trade?*, 35 ECOLOGY L.Q. 363, 382 (2008) ("The Supreme Court ... found ... '[c]ontext counts' when it comes to statutory interpretation [Therefore], the Court did not authorize EPA to take action essentially marginalizing the PSD statute by removing modifications from the purview of PSD."); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 570–71 (2007) ("[T]he Supreme Court's decision in *Milwaukee II*—which removed the federal common law of nuisance as a tool to address interstate water-pollution issues—may have influenced the marginalization of state common law."); Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1722–30, 1742 (1989) (arguing that the Supreme Court decided *Monroe v. Pape* using "constitutional rhetoric" and demonstrating that the Court marginalized a federal statute by focusing on tort rhetoric).

supreme courts have embraced two important common law rules: (1) a stand-alone and standardized application form is not a contract; and (2) the terms and clauses in an application form may not alter, or contradict terms and clauses in a totally integrated and written contract.⁶²⁰

In fact, after carefully studying the state supreme courts' rulings in the renowned contract law cases *Mitchill v. Lath* and *Lucy v. Zehmer*, even the greater majority of motivated first-year law students understand and appreciate the importance of those legal principles.⁶²¹ Yet, as reported and documented in this Article, we have learned that (1) federal appellate courts readily enforce mandatory-arbitration clauses in standardized applications as if the latter were binding and enforceable contracts; and (2) most federal courts and some state courts of appeals allow arbitration clauses in various types of stand-alone and standardized applications to modify or expand the language in subsequent, totally integrated written contracts. But even more unsettling, both state and federal appellate court judges consider and allow intentionally or unintentionally extralegal factors to influence their motion to compel arbitration decisions.

The assertion is true: in the early twentieth century, *some* courts refused to enforce arbitration agreements or arbitration clauses in contracts.⁶²² And, in response, Congress enacted the FAA to arrest purportedly federal and state courts' *universal bias* against arbitration.⁶²³ Therefore, the FAA's "strong bias in favor of arbitration" is not and should not be a surprise or an issue.⁶²⁴ On the other hand, the FAA was not enacted to foster an *irrational bias* in favor of mandatory arbitration and barring jurors from hearing plaintiffs' statutory and common law claims. Yet, based on the statistically significant findings which are reported in this Article, a striking conclusion emerges: Most federal courts of appeals and some state appellate courts are *irrationally biased* against weighing and applying intelligently common law and statutory rules when deciding whether to enforce arbitration provisions in completed and signed application forms. Furthermore, in motion to compel arbitration proceedings, appellate courts are significantly more likely to be *irrationally biased* in another significant way—they completely ignore the FAA's "arising out of a written contract" test and enforce cavalierly arbitration clauses in applications. Once more, the latter standardized forms are not binding and enforceable contracts.

⁶²⁰ *Mitchill v. Lath*, 160 N.E. 646, 649 (N.Y. 1928); *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954).

⁶²¹ *Mitchill*, 160 N.E. at 646; *Lucy*, 84 S.E.2d at 522.

⁶²² See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

⁶²³ Willy E. Rice, *The Court of Appeals for the Fifth Circuit: A Review of Selected 2009-2010 Insurance Decisions*, 43 TEX. TECH L. REV. 971, 985–87 (2011).

⁶²⁴ *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 446 (2d Cir. 1995).

What would be a timely and effective remedy to address the motion to compel arbitration problems raised in this Article? Without a doubt, historical and congressional evidence is clear that Congress did not enact the FAA to govern the enforceability of arbitration clauses in standardized application forms.⁶²⁵ Therefore, Congress should enact a statute that prevents courts from enforcing arbitration provisions in paper and electronic applications for goods, services, and employment.⁶²⁶

In recent years, attempts have been made to enact several versions of a proposed “Arbitration Fairness Act.”⁶²⁷ For example, the proffered “Arbitration Fairness Act of 2013” read in pertinent part: “[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”⁶²⁸ Certainly, that proposed language is broad enough to arrest a substantial and persistent judicial problem: Irrationally biased and excessively pro-arbitration appellate courts’ propensity to ignore the FAA-related congressional intent by (1) enforcing arbitration clauses in standardized application; (2) marginalizing federal and state consumer protection, anti-discrimination, and civil rights statutes, and (3) undermining states’ traditional principles of contract formation, interpretation and enforcement.

⁶²⁵ See *supra* notes 388–92 and accompanying text.

⁶²⁶ After accessing Westlaw’s ALLCASES database and employing the query—[(online /3 applied application) /p arbitrat!], the findings reveal: Many federal and state courts have addressed whether arbitration provisions in online applications are enforceable under the FAA. But even more disquieting, even within the same court or jurisdiction, split decisions can be found over the enforceability of online arbitration clauses in electronic applications. *Compare* *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172–73 (N.D. Cal. 2002) (declaring that the arbitration clause in the online application was unenforceable under the FAA), *with* *Swift v. Zynga Game Network, Inc.*, 805 F. Supp.2d 904, 917–18 (N.D. Cal. 2011) (enforcing the online arbitration provision in an application and requiring class members to enter binding arbitration).

⁶²⁷ See Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(2) (2009); and, Arbitration Fairness Act of 2013, S. 878 1st Session (2013).

⁶²⁸ S. 878, 118th Cong. § 402(a) (1st Sess. 2013).

