

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

1999

Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended

Jean R. Sternlight

University of Nevada, Las Vegas – William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Civil Rights and Discrimination Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Sternlight, Jean R., "Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended" (1999). *Scholarly Works*. 268.

<https://scholars.law.unlv.edu/facpub/268>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

The University of Kansas Law Review

Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended

*Jean R. Sternlight**

I. INTRODUCTION

Immediately following the Union's victory in the Civil War, the Thirty-Ninth Congress passed the Civil Rights Act of 1866¹ to ensure that the newly freed African-Americans would not be re-enslaved.² The Act,

* Associate Professor of Law, Florida State University College of Law; Director of Education and Research, Florida Dispute Resolution Center. J.D. 1983, Harvard Law School; B.A. 1979, Swarthmore College. I thank Alice W. Ballard for inspiring this Article. I thank Mary McCormick and others in the Florida State University law library for their terrific support. I thank Yovannie Smith for her diligent work as my research assistant, and particularly for contending with the microfilm. Finally, I thank Florida State University College of Law for funding this work.

1. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981-1982 (1994)). The statute was re-enacted in 1870 under the authority of Section 5 of the Fourteenth Amendment. See Act of May 31, 1870, ch. 114, 16 Stat. 140, 140-46. This legislation, known as the Enforcement Act, re-enacted the entire Civil Rights Act of 1866 as section 18, and also contained a section 16, which was substantially similar to aspects of the 1866 Act. See *id.* The original section 1 was slightly revised and codified in 1874 to become what we now know as 42 U.S.C. §§ 1981 and 1982. See Act of June 20, 1874, ch. 333, 18 Stat. 113. The provisions were then codified as sections 1977 and 1978 of the Revised Statutes of 1874. They were subsequently renumbered.

2. For useful, albeit sometimes conflicting historical discussions of this period, see HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA (1978); WILLIAM BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-1867 (1966); W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA (1964); 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-1888 (1971); 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (1906); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988);

now known as 42 U.S.C. §§ 1981³ and 1982,⁴ was part of what Congress knew would be a lengthy reconstruction process. Building upon the Thirteenth Amendment's abolition of slavery in 1865,⁵ Congress established a joint committee to investigate conditions in the South and to determine what must be done before the secessionist states would be permitted to re-enter the Union.⁶ After hearing reports of both public and

ROBERT J. KACZOROWSKI, *THE NATIONALIZATION OF CIVIL RIGHTS: CONSTITUTIONAL THEORY AND PRACTICE IN A RACIST SOCIETY 1866-1883* (1971) [hereinafter KACZOROWSKI, *NATIONALIZATION OF CIVIL RIGHTS*]; ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-76* (1985) [hereinafter KACZOROWSKI, *POLITICS OF JUDICIAL INTERPRETATION*]; MILTON R. KONVITZ & THEODORE LESKES, *A CENTURY OF CIVIL RIGHTS* (1961); EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 29-34* (1871); 2 SAMUEL MORISON & HENRY COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC 17-18* (1950); KENNETH M. STAMPP, *ERA OF RECONSTRUCTION* (1965); GILBERT STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* (1910); JACOBUS TENBROEK, *EQUAL UNDER LAW* (2d ed. 1969); Will Maslow & Joseph B. Robinson, *Civil Rights Legislation and the Fight for Equality*, 20 U. CHI. L. REV. 363 (1953); Barry Sullivan, *Historical Reconstructions, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541 (1989); see also A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996) (discussing racial history of the United States from the seventeenth to the twentieth century). For an excellent collection of some of the legislative history surrounding the adoption of the reconstruction era constitutional amendments and legislation see *THE RECONSTRUCTION AMENDMENTS' DEBATE: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH AND 15TH AMENDMENTS* (Alfred Avins ed.) (1967).

3. The provision we have come to know as 42 U.S.C. § 1981(a) states:

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) (1994). As discussed below, 2 U.S.C. § 1981 was modified by the Civil Rights Act of 1991 to add two new sections. See *infra* Part II.E. The current 42 U.S.C. § 1981(a) is the original 42 U.S.C. § 1981. For a good early history of the provision, see Aaron Seth Bayer, ed., *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. REV. 29 (1980).

4. The provision we have come to know as 42 U.S.C. § 1982 states:

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.

42 U.S.C. § 1982 (1994).

5. The Thirteenth Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII. The amendment was proposed in Congress in 1864, adopted by various states in 1865, and certified by the Secretary of State as having been passed on December 18, 1865. See FAIRMAN, *supra* note 2, at 1155-59.

6. See generally *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION*

private actions being taken in the South to prevent the freed slaves from achieving anything close to equality, Congress passed the Civil Rights Act of 1866.⁷ Section 1 of this Act mandated that the freed slaves be provided with certain minimal rights, specifically the rights to contract; bring legal actions; testify in court; inherit; purchase, lease, and convey property; be protected in their person and property; and be subject to like punishment for like acts.⁸

Congress was quite cognizant that the Act would be meaningless unless it could be widely enforced. Thus, concerned that southern courts might not be vigilant in protecting the rights of freed slaves, Congress took the dramatic step of providing that federal courts would have exclusive jurisdiction to resolve criminal charges brought under the 1866 Act, and concurrent jurisdiction over civil claims made under the Act.⁹ This jurisdictional grant was particularly noteworthy given the fact that Congress had not yet seen fit to award general federal question jurisdiction to the federal courts. The United States Supreme Court has repeatedly held that the 1866 Act was intended to prohibit private acts of discrimination as well as discriminatory actions engaged in by governmental entities.¹⁰ Although the 1866 Act was originally passed primarily

(B. Kendrick ed., 1914) (setting out the journal of motions and resolutions kept by the Clerk of the Joint Committee from 1865 to 1867, and also discussing the origins of the Committee and its work).

7. See *infra* Part II.

8. Section 1 of the Act stated:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance regulation, or custom to the contrary notwithstanding.

The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. The Act also contained other sections setting out criminal penalties and describing enforcement mechanisms. See *infra* Part II.C. Following veto by President Andrew Johnson, the statute was passed by the Senate on April 6, 1866, and by the House on April 9, 1866. See CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866).

9. See *infra* Part II.C.

10. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (confirming that 42 U.S.C. § 1981 prohibits racial discrimination in making and enforcing private contracts, while holding that racial harassment perpetrated in course of employment is not prohibited by the statute); *Runyon v. McCrary*, 427 U.S. 160, 172-75 (1976) (holding that 42 U.S.C. § 1981 bars alleged race discrimination by a private school); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding that 42 U.S.C. § 1982 reaches claims of race discrimination as to the sale of a home in a private subdivision).

to prohibit certain racial discrimination against African-Americans, it now bars other discrimination as well. The United States Supreme Court has held it applies to whites' claims that they were discriminated against in favor of blacks,¹¹ and to claims of other persons who in 1866 were thought to be nonwhite.¹²

Today, more than a hundred years later, claimants' rights to bring discrimination claims under 42 U.S.C. §§ 1981 and 1982 are in jeopardy. Although Congress and the Supreme Court have made clear that the provisions are still good law, private companies and individuals are nonetheless undercutting the power of the 1866 Act.¹³ Increasingly,

11. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976) (holding that 42 U.S.C. § 1981 prohibits racial discrimination in private employment against white persons as well as against nonwhites).

12. See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610-12 (1987) (allowing a person of Arab ancestry to state a claim that he was treated less favorably than other Caucasians, in that Arabs were viewed as members of a minority race in 1866).

13. Some might argue that the loss of such claims would be insignificant, in that the Civil Rights Acts of 1964 and 1968 largely supersede the older post-Civil War legislation. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (current version at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975(a)-1975(d), 2000(a)-2000(h)(6) (1994)) (prohibiting discrimination as to race, gender, religion, national origin, public accommodations, federally assisted programs, and employment practices); Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81 (current version at 42 U.S.C. §§ 3601-3631 (1994)) (prohibiting discrimination with respect to race, religion, or national origin as it pertains to various sales, rentals, and activities connected to real estate). The Supreme Court, however, has made clear that Congress did not repeal the older civil rights laws when it passed the 1964 Civil Rights Act. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975). Nor did the 1968 Fair Housing Act repeal 42 U.S.C. § 1982. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 416-17 (1968) (stating that passage of 1968 Act had no effect on 42 U.S.C. § 1982). 42 U.S.C. §§ 1981 and 1982 remain powerful litigation tools in that their scope, remedies, and procedures differ somewhat from those of the older statutes. A recent House Judiciary Committee report, issued in connection with the 1991 amendments of both 42 U.S.C. § 1981 and Title VII, explained some of the reasons why the post-Civil War legislation remains important:

Section 1981 is the only federal law banning race discrimination in all contracts. It has been a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts.

Section 1981 covers employers of all sizes. Title VII, on the other hand, applies only to employers with 15 or more employees.

Section 1981 authorizes courts to award compensatory and punitive damages, in addition to equitable relief.

H.R. REP. NO. 102-40, pt. 2, at 35-36 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 729 (footnotes omitted). This report was issued in connection with the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

In addition, persons bringing claims under 42 U.S.C. § 1981 do not need to comply with the complex administrative requirements attached to Title VII. See, e.g., 42 U.S.C. § 2000e-5 (setting out requirement of filing charge of discrimination with the Equal Employment Opportunity Commission prior to filing suit, and also setting out the EEOC's investigative responsibilities and the work-sharing relationship between the EEOC and the state agencies).

employers, schools, realtors, businesses, and other potential defendants are seeking to prevent prospective plaintiffs from bringing race discrimination claims to court by insisting that such persons sign contractual clauses agreeing to resolve any future disputes through binding arbitration rather than through litigation.¹⁴ In recent years, courts have typically relied upon the 1925 Federal Arbitration Act¹⁵ (FAA) to uphold such "mandatory"¹⁶ arbitration clauses as applied to a variety of other statutes,¹⁷ including some that prohibit discrimination.¹⁸ While courts

14. See generally Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PENN. L. REV. (forthcoming 1999) [hereinafter Sternlight, *Forum*] (arguing that federal courts often misapply various jurisdictional doctrines when they issue injunctions against state court proceedings in an effort to ensure that disputes are arbitrated); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) [hereinafter Sternlight, *Panacea*] (arguing that the Supreme Court's expressed preference for binding arbitration is unsupported by the legislative history of the Federal Arbitration Act and is also unwise as a matter of policy); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concern*, 72 TUL. L. REV. 1 (1997) [hereinafter Sternlight, *Rethinking*] (arguing that courts' enforcement of mandatory arbitration clauses may sometimes violate constitutional rights to jury trial, to an Article III judge, and to due process).

15. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified at 9 U.S.C. §§ 1-208 (1994)). This Act was frequently referred to as the United States Arbitration Act until Congress deleted the section so naming the statute in 1947. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 231 n.48 (1992).

16. This Article, following the practice of many others, refers to as "mandatory" those arbitration clauses that require a person to agree in advance to arbitrate a dispute which may arise in the future. When courts compel arbitration based on such a clause, they are mandating arbitration. The use of the term is admittedly somewhat controversial because the individuals who are so "mandated" to arbitrate their claims may have signed the arbitration clause of their own volition rather than under duress.

17. Although for many years the courts held that claims involving significant issues of public policy were not arbitrable, see *Wilko v. Swan*, 346 U.S. 427, 440 (1953) (prohibiting arbitration of a customer's claim against a brokerage house brought under Securities Act of 1933), *rev'd*, 490 U.S. 477 (1989), the Supreme Court has backed away from a public policy exception in numerous subsequent decisions. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485-86 (1989) (overruling *Wilko* and holding arbitrable claims under Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 237-38 (1987) (permitting arbitration of a consumer's claims against a broker brought under section 10(b) of Securities Exchange Act of 1934 and under the Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.*, 473 U.S. 614, 638-40 (1985) (permitting arbitration of antitrust claim brought in international context).

18. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding plaintiffs had failed to demonstrate claims brought under the Age Discrimination in Employment Act of 1967 were not arbitrable); *Great W. Mortgage Co. v. Peacock*, 110 F.3d 222, 233-34 (3d Cir. 1997) (holding arbitrable a sexual harassment claim brought under Title VII); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1467-69 (D.C. Cir. 1997) (holding that a race discrimination claim brought under Title VII was arbitrable so long as the employer paid the cost of the arbitration and meaningful appeal was afforded). A counter trend has begun to build. Two federal courts have now held that

have focused very little on the particular question of whether private parties may require claims brought under 42 U.S.C. §§ 1981 and 1982 to be arbitrated,¹⁹ those few decisions that have addressed the question have, with little or no analysis, uniformly concluded that courts may mandate arbitration of such claims.²⁰

employers may not mandate arbitration of claims brought under Title VII. *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1189-90 (9th Cir. 1998) (holding that the Civil Rights Act of 1991 precludes employers from using predispute arbitration agreements to compel employees to arbitrate claims brought under Title VII), *cert. denied*, 119 S. Ct. 465 (1998); Rosenberg v. Merrill Lynch, 995 F. Supp. 190, 199-205 (D. Mass. 1998) (holding that section 118 of Civil Rights Act of 1991 precludes courts from mandating arbitration of Title VII claims), *aff'd*, No. 98-1246, 1998 WL 880910 (1st Cir. Dec. 22, 1998) (reversing district court holding that predispute arbitration agreements are unenforceable under section 118 of Civil Rights Act of 1991, but nonetheless affirming on grounds that the agreement failed to adequately set forth which claims would be arbitrated). Several courts have refused to enforce particular arbitration clauses in the context of employment disputes. *See, e.g.*, Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1060 (11th Cir. 1998) (refusing to compel arbitration of Title VII claims when arbitrator was precluded from awarding compensatory damages); Hooters of America, Inc. v. Phillips, No. 4:96-3360-22, 1998 U.S. Dist. LEXIS 3962 (S.D.S.C. Mar. 12, 1998) (refusing to mandate arbitration due to unconscionability and violation of public policy).

19. This Article does not focus on whether courts should enforce a clause in which employers or others explicitly require arbitration of claims brought under the 1866 Act. Such clauses are either nonexistent or at least rare. Rather, the Article looks at whether courts should apply a general arbitration clause to compel arbitration of claims brought under 42 U.S.C. §§ 1981 and 1982.

20. *See, e.g.*, Johnson v. Circuit City Stores, 148 F.3d 373, 378-79 (4th Cir. 1998) (mandating arbitration of 42 U.S.C. § 1981 claim without addressing the argument that such claims are not subject to mandatory arbitration); Kidd v. Equitable Life Assurance Soc'y, 32 F.3d 516, 519-20 (11th Cir. 1994) (concluding that 42 U.S.C. § 1981 claim is arbitrable without considering argument that claims under statute are nonarbitrable); Pitter v. Prudential Life Ins. Co., 906 F. Supp. 130, 138-40 (E.D.N.Y. 1995) (concluding that plaintiff failed to show 42 U.S.C. § 1981 claim was nonarbitrable without examining text or legislative history of that statute); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430, 1436-37 (N.D. Ill. 1993) (holding plaintiff had failed to present evidence that Congress intended to preclude arbitration of claims brought under 42 U.S.C. § 1981); Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 89 Civ. 3749 (MJL), 1992 WL 245506, at *5-7 (S.D.N.Y. Sept. 14, 1992) (stating that the argument that race discrimination claims brought under 42 U.S.C. § 1981 are not arbitrable "lacks both judicial and legislative support"); Roe v. Kidder Peabody & Co., No. 88 Civ. 8507 (CSH), 1990 WL 52200, at *6 (S.D.N.Y. Apr. 19, 1990) (concluding, without distinguishing between claims under Title VII and those under 42 U.S.C. § 1981, that both are arbitrable). It should be noted, however, that an issue may exist under the Civil Rights Act of 1866, as it does under other laws, as to whether a particular person actually agreed to arbitrate any claims of discrimination. For example, in *Peterson v. BMI Refractories*, the court held that an individual may not be required to arbitrate a 42 U.S.C. § 1981 claim merely because the union entered into a collective bargaining agreement requiring such arbitration. *See* 132 F.3d 1405, 1412 & n.12 (11th Cir. 1998) (citing *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997)); *see also* *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 394-97 (1998) (holding that union contract does not waive employee's right to litigate claim under Americans with Disabilities Act when purported waiver is not clear); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-60 (1974) (holding union member does not waive right to litigate race discrimination case under Title VII by arbitrating and losing claim based on same facts).

The Supreme Court's recent arbitration decisions provide that the enforceability of arbitration agreements, as applied to particular statutory claims, turns on the intent of Congress.²¹ In *Gilmer v. Johnson/Interstate Lane Corp.*,²² the Court stated that individual agreements to arbitrate are assumed to be enforceable contracts "unless Congress itself has evinced an intention [discoverable in a statute's text, legislative history, or through an inherent conflict between arbitration and the purpose of the statute] to preclude a waiver of judicial remedies for the statutory rights at issue."²³ Commentators such as Professor William Eskridge have criticized such an originalist approach to statutory interpretation as impossible and often undesirable.²⁴ The Court's *Gilmer* decision, nonetheless, makes quite clear that, at least for now, this is the approach that must be used. Thus, in addressing the question of whether courts may mandate binding arbitration of claims brought under the Civil Rights Act of 1866, this Article will focus on Congress's original intent in passing both the Civil Rights Act and the FAA, and on the inherent arbitrability (or not) of such claims.²⁵

Compelled arbitration of discrimination claims brought under 42 U.S.C. §§ 1981 and 1982 is fundamentally inconsistent with the purpose of that Reconstruction era legislation and with the inherent nature of those

21. Parties, in addition, may argue that arbitration is inappropriate not only by making the "public policy" argument that an entire set of claims are nonarbitrable, but also by challenging individual agreements to arbitrate on contractual grounds. See Sternlight, *Rethinking*, *supra* note 14, at 25-39 (discussing contractual challenges made to arbitration agreements).

22. 500 U.S. 20 (1991).

23. *Id.* at 24-26; see also *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.").

24. See WILLIAM N. ESKRIDGE JR., *DYNAMIC STATUTORY INTERPRETATION* 47 (1994) (arguing that purely originalist inquiries are impossible, particularly with the passage of long periods of time, and that dynamic statutory interpretation is both inevitable and, under many theories of politics, desirable); cf. Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 522 (1989) (arguing that historical scholarship necessarily entails making judgment calls and interpretive choices).

25. Using a more dynamic alternative approach to address the question of whether claims brought under the 1866 Act should be subject to mandatory arbitration, it is also clear that courts should not enforce mandatory predispute arbitration agreements. As I have argued elsewhere, such mandatory arbitration is undesirable as a matter of policy. See Sternlight, *Panacea*, *supra* note 14, at 674-712. Under many circumstances, court enforcement of mandatory arbitration is also questionable as a matter of constitutional law. See Sternlight, *Rethinking*, *supra* note 14, at 69-98. Court enforcement of mandatory arbitration is even more appalling in the civil rights context than it is in many other situations given the strong policies supporting civil rights laws and given the public interest served by such suits. See generally *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-51 (1974) (discussing public values served by litigation of employment discrimination claims).

laws.²⁶ Nor did the 1991 amendments to 42 U.S.C. § 1981 revoke this original intent to preclude mandatory arbitration of claims brought under that provision.²⁷ The Civil Rights Act of 1866 was a very special statute, designed at minimum to eliminate all “badges and incidents of slavery”²⁸ and to ensure that the freed slaves would be provided with civil rights equal to those of white persons.²⁹ Its enforcement depends on the availability of a neutral public system of justice.³⁰ Private arbitration cannot assure these characteristics.³¹ Thus, courts should not enforce agreements to arbitrate future disputes that may arise under this statute.³²

26. In focusing on the Civil Rights Act of 1866, I do not mean to imply that claims under other statutes may or should be arbitrated. See Sternlight, *Panacea*, *supra* note 14, at 674-75 (arguing that the Supreme Court’s expressed preference for binding arbitration is neither well-founded in the legislative history of the Federal Arbitration Act nor wise as a matter of policy); Sternlight, *Rethinking*, *supra* note 14, at 69-98 (arguing that favoritism of arbitration over litigation may operate to deprive persons of their constitutional rights to a jury trial, to an Article III judge, and to due process). Nor do I wish to argue that parties are absolutely prohibited from arbitrating claims under the 1866 Act. If all parties to a dispute decide that arbitration is desirable, they should be permitted to proceed in that fashion. However, when a party that has signed a predispute arbitration clause decides that it no longer wishes to arbitrate (even assuming the party ever understood the meaning of the clause), it should not be compelled to arbitrate.

27. See *infra* Parts II.E and IV.D.

28. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968). The Supreme Court has repeatedly found that the Thirteenth Amendment empowered Congress not only to eliminate slavery itself but also “clothed ‘Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.’” *Id.* (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)). In *Jones*, the Court eloquently explained the phrase “badges and incidents of slavery” as follows:

For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its “burdens and disabilities”—included restrictions upon “those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.”

Id. at 441 (quoting *The Civil Rights Cases*, 109 U.S. at 22).

29. It has been argued that the framers’ conception of the Thirteenth Amendment was much broader than the “badges of slavery” conception expressed by the Court. For example, Robert Kaczorowski argues that the framers sought not merely to eliminate slavery but “to enforce the freedmen’s absolute rights as free men.” Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L. J. 565, 569 (1989); see also Pamela T. Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Knowledge* 92-95 (1994) (unpublished Ph.D. dissertation, Northwestern University (arguing that the purpose of the 1866 Act was to provide equal civil but not political rights)).

30. See *infra* notes 136-42 and accompanying text (discussing legislators’ concern that the 1866 Act would be useless unless a meaningful enforcement mechanism could be devised).

31. See *infra* Part IV.C (arguing that allowing compulsory arbitration of claims under the 1866 Act would be inconsistent with the purpose of that statute).

32. Some courts have taken a more narrow approach than that advocated here, refusing to compel arbitration only under those particular clauses that have been proven to be unfair or unreasonable. See, e.g., *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir.

This Article, however, does not argue that arbitration of claims under the Civil Rights Act of 1866 should be prohibited altogether. Disputants who mutually prefer arbitration to litigation should be afforded the opportunity to arbitrate. If they do so agree, courts may enforce the arbitrator's award to the extent enforcement would otherwise be appropriate. This Article only contends that a party cannot be compelled by a court to arbitrate such a claim merely because the party agreed in advance to arbitrate future disputes that might arise.³³

The problem with compelling arbitration of civil rights claims can be demonstrated intuitively if one transports oneself back to the year 1866 and visualizes a white former slave owner and a newly liberated African-American former slave. Imagine that the former slave owner demands that the former slave sign an arbitration clause before commencing his or her new paying job. The clause explicitly states that any and all disputes arising between the two parties shall be arbitrated, and specifically mentions that any claims arising under the new Civil Rights Act of 1866 shall be arbitrated rather than resolved in court. Would Congress have intended or accepted such an arrangement? This Article emphatically argues "no." At the end of the war, former slave owners looked for ways to reinstitute effectively a labor arrangement as close to slavery as possible.³⁴ Southern states passed "Black Codes," limiting freedmens'

1998) (refusing to enforce an agreement to arbitrate Title VII claims when agreement proscribed the award of compensatory damages); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (stating that an arbitration agreement would not be enforceable under Title VII if it required employees to pay a portion of arbitrator's fee or did not allow for meaningful appeal); *Hooters of America, Inc. v. Phillips*, No. 4:96-3360-22, 1998 U.S. Dist. LEXIS 3962, at *89-90 (S.D.S.C. Mar. 12, 1998) (refusing to enforce employment arbitration agreement that allowed for selection of biased arbitrators and limited employee's access to discovery and substantive relief on grounds of unconscionability and public policy); *Shankle v. B-G Maintenance Management*, No. 96 N 2932, 1997 WL 416405, at *4 (D. Colo. Mar. 24, 1997) (denying employer's motion to compel arbitration because employee was required to pay half of arbitrator's fee). Such an approach requires persons who seek to litigate to prove in each case that the arbitration required under the clause would be untenable. Courts may often find that plaintiffs have failed to make such a showing, as an evidentiary matter. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991) (concluding that plaintiff had failed to present sufficient evidence to support his allegations that arbitration panels would be biased, that discovery would be insufficient, that lack of written awards would stifle development of the law, or that arbitrators would be unable to fashion equitable relief). This Article contends that pursuant to the language, legislative history, and purpose of the Civil Rights Act of 1866, plaintiffs should not be required to make such a particularized showing of unfairness, and that courts should instead refuse to compel *any* arbitration of claims brought under that statute.

33. The distinction drawn here between agreements to arbitrate future disputes and agreements to arbitrate current disputes is not new. As discussed below, at common law, courts would not enforce agreements to arbitrate future disputes, but would enforce arbitral awards issued after parties voluntarily submitted their disputes to arbitration. *See infra* Parts II.D and III.A.

34. *See infra* text accompanying notes 48-61.

rights to work, own property, and travel.³⁵ Individual white farmers joined together to keep wages low and to prevent former slaves from leaving their old plantations.³⁶ Allowing the arbitration clauses would have given former slave owners an ideal tool with which to “gut” the new civil rights statute. By naming each other as arbitrators, by imposing high arbitration fees, by failing to issue written decisions, by ensuring the results were binding and subject to virtually no appeal, and perhaps even by limiting the available relief, former slave owners could have eluded federal court review and once again used their own private form of “justice” to maintain their superior position.³⁷ This Article argues that Congress would not have countenanced such an absurd result.

Part II of this Article discusses the Civil Rights Act of 1866 in further detail. Parts II.A and II.B focus on the circumstances leading up to passage of the Act and on the content of the statute, particularly emphasizing the Supreme Court’s conclusion that the Act was intended to cover private acts of discrimination. Part II.C then examines the federal judicial procedures Congress intended would be used to enforce the Act, and Part II.D looks at the extent to which arbitration was used to resolve disputes of this nature in 1866. Finally, Part II.E discusses the

35. See *infra* text accompanying notes 49-50.

36. See *infra* text accompanying notes 48-61.

37. Nor is it at all clear that these kinds of arbitration clauses would have been struck down for unconscionability or on other contractual grounds. Virtually all arbitration clauses call for arbitration that is private and subject to only the most limited appeal. Further, as I have argued elsewhere, many courts have proved unwilling to strike down even some of the most egregious clauses. See Sternlight, *Rethinking*, *supra* note 14, at 22-39. Requiring plaintiffs to challenge such clauses on an individual basis places a burden on them that is too difficult, too time consuming, and too expensive. For some specific examples of court decisions enforcing seemingly unfair arbitration clauses, see *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 47 (1997) (upholding arbitration clause contained in paperwork accompanying a computer ordered by mail when the clause mandated arbitration be held in Chicago pursuant to rules requiring high costs), *Sosa v. Paulos*, 924 P.2d 357, 365 (Utah 1996) (refusing to void agreement signed by hospital patient awaiting surgery that required medical malpractice claim to be heard by panel of board-certified orthopedic surgeons), and *Bakri v. Continental Airlines, Inc.*, No. CV 92-3476 SVWC(K), 1992 WL 464125, at *3 (C.D. Cal. Sept. 24, 1992) (rejecting employee’s claim that arbitration was biased, although all of the panel members were required to be company employees). Some courts have behaved more reasonably. See, e.g., *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (9th Cir. 1997) (voiding an employee’s supposed agreement to arbitrate future disputes on grounds of lack of consideration); *Cheng-Canindin v. Renaissance Hotel Assoc.*, 57 Cal. Rptr. 2d 867, 877-78 (Cal. Ct. App. 1997) (refusing to enforce, as arbitration agreement, employer policy requiring disputes to be heard by a five-person committee including the members of management and the manager of hotel as chair); *Ditto v. RE/MAX Preferred Properties, Inc.*, 861 P.2d 1000, 1003-04 (Okla. Ct. App. 1993) (refusing to enforce arbitration agreement that provided that disputes between real estate brokerage and agent would be resolved on a binding basis by three members of RE/MAX organization selected by the manager).

amendments to the Civil Rights Act of 1866, which were enacted by Congress in 1991.

Part III next examines the Federal Arbitration Act, discussing its passage in 1925, courts' initial reluctance to apply the Act to disputes involving important issues of public policy, and courts' more recent willingness to refer many types of disputes to binding arbitration. This Part summarizes the approach of those few courts that have addressed the question of whether disputes under the Civil Rights Act of 1866 are subject to mandatory arbitration.

Finally, Part IV draws upon the preceding discussions to argue that it would be inconsistent with congressional intent expressed under the 1866 Act for courts to compel arbitration of claims brought under 42 U.S.C. §§ 1981 and 1982. Specifically, the Article argues that Congress intended that such claims be resolved in court, and that Congress has at no time since 1866 demonstrated a contrary intent. To the contrary, in its 1991 amendments to the 1866 Act, Congress reiterated that it did not intend to allow employers to use mandatory arbitration clauses to deprive their employees of a judicial forum within which to challenge allegedly discriminatory acts. Part IV also argues that mandating arbitration of such claims would be inconsistent with the spirit of the Civil Rights Act, in that whereas the abolition of slavery was intended to ensure that people are not treated like commodities, the FAA applies only to the extent that individuals' transactions are found to be elements of interstate commerce.

II. AN EXPLICATION OF THE CIVIL RIGHTS ACT OF 1866

A. *Circumstances Leading to Passage of the Act*

Congress passed the Civil Rights Act of 1866 as part of its effort to "reconstruct" the nation following the end of the Civil War. General Robert E. Lee surrendered on April 9, 1865,³⁸ and President Lincoln was assassinated just five days later on April 14, 1865.³⁹ As Andrew Johnson took over the presidency, the former confederate states began to form new governments.⁴⁰ On December 18, 1865, the Secretary of State declared that enough states had ratified the anti-slavery Thirteenth Amendment for it to become law of the land.⁴¹ The Thirty-Ninth Congress convened on December 5, 1865 and immediately began to consider resolution of post-war issues.⁴² As one of the first orders of

38. See KONVITZ & LESKES, *supra* note 2, at 43.

39. See 6 FAIRMAN, *supra* note 2, at 100.

40. See *id.* at 105-10.

41. See TENBROEK, *supra* note 2, at 174.

42. See 6 FAIRMAN, *supra* note 2, at 116; TENBROEK, *supra* note 2, at 174. See generally

business, the House and Senate formed a fifteen-member Joint Committee on Reconstruction to develop policy on post-war problems.⁴³

With reconstruction beginning, northern military forces continued to occupy most southern states.⁴⁴ These forces not only quelled potential rebel uprisings but also took a role in various civil affairs.⁴⁵ In particular the Freedmen's Bureau, under the leadership of former union general Oliver Otis Howard, became actively involved in resolving legal disputes that arose between the planters and the newly freed slaves.⁴⁶ For example, military commanders issued orders instructing their subordinates to protect freedmen as well as white unionists from oppression, nullifying the discriminatory Black Codes passed by many states to replace their Slave Codes, and directly suspending civil and criminal actions brought in state courts against blacks and unpopular whites.⁴⁷

Congress was well aware that neither the surrender of the Confederacy nor even the passage of the Thirteenth Amendment would ensure the continued freedom of the newly liberated slaves. Rather, its members knew that while all of the formerly confederate states had repealed their Slave Codes,⁴⁸ by December 1865, many southern states had already

KACZOROWSKI, NATIONALIZATION OF CIVIL RIGHTS, *supra* note 2, at 26-35 (describing some of the conditions facing the North and the South as the Thirty-Ninth Congress met).

43. See 6 FAIRMAN, *supra* note 2, at 118; Sullivan, *supra* note 2, at 548 ("[T]he Joint Committee of Fifteen on Reconstruction was formed to monitor and react to conditions in the South, and to ensure that Johnson's narrowly conceived view of Northern victory did not carry the day.").

44. See KACZOROWSKI, NATIONALIZATION OF CIVIL RIGHTS, *supra* note 2, at 125-26 (discussing work of occupation forces that had been protecting rights of freedmen and union loyalists since the end of the Civil War).

45. See *id.*

46. See TENBROEK, *supra* note 2, at 175 (discussing Freedmen's Bureau role, backed by the United States Army, in coordinating wartime occupation of the South and observing that the Bureau "had jurisdiction over all controversies in which freedmen were involved, whether blacks alone were concerned or whites also were parties . . . [serving to] safeguard the freedmen against victimization by white employers, oppressive working conditions and unreasonably low wages, coercion, intimidation, or anything remotely approaching involuntary labor or actual slavery"); see also *infra* text accompanying notes 62-70 (discussing the Bureau's role in resolving contractual disputes between freed slaves and planters). For general background on the Bureau, see GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU (1970); 2 OLIVER OTIS HOWARD, AUTOBIOGRAPHY OF OLIVER OTIS HOWARD: MAJOR GENERAL UNITED STATES ARMY 206-349 (1907); WILLIAM S. MCFEELY, YANKEE STEPFATHER: GENERAL O. O. HOWARD AND THE FREEDMEN (1968); DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868 (1979); James Oakes, *A Failure of Vision: The Collapse of the Freedmen's Bureau Courts*, 25 CIVIL WAR HIST. 66 (1979), reprinted in PAUL FINKELMAN ED., RACE, LAW AND AMERICAN HISTORY, 1700-1990 (1992).

47. See Kaczorowski, *supra* note 29, at 580; see also Sullivan, *supra* note 2, at 551-52 (observing that by the time the Civil Rights Act of 1866 was adopted, the Freedmen's Bureau and the union army had largely ensured that the Black Codes were facially fair).

48. See CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865).

passed Black Codes designed to achieve many of the same ends.⁴⁹ These Black Codes “imposed special controls over blacks with no visible means of support, over black children who were apprenticed to white employers—preferably to their former whites—and especially in their movements as well as their employment.”⁵⁰

49. See *id.* at 603 (stating that while it may be true that “the black codes fell with slavery, . . . at least six of the reorganized States in their new Legislatures have passed laws wholly incompatible with the freedom of these freedmen; and so atrocious are the provisions of these laws, and so persistently are they carried into effect by the local authorities, [that various generals] have issued positive orders forbidding the execution of the black laws that have just been passed” (statement of Sen. Wilson)); *id.* at 1153 (“[I]n at least six of the lately rebellious States the reconstructed Legislatures of those States have enacted laws which, if permitted to be enforced, would strike a fatal blow at the liberty of the freedmen and render the constitutional amendment of no force or effect whatever.” (statement of Rep. Thayer)); *id.* at 1123 (“In six States of the Union formerly in rebellion laws have been passed by the reconstructed Legislatures of those States which have been so malignant in their spirit toward these freedmen, so subversive of their liberties, that the President of the United States and the commanders acting by his authority have set aside those laws and prevented their execution Vagrant laws have been passed; laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude” (statement of Rep. Cook)); see also 6 FAIRMAN, *supra* note 2, at 110-17 (observing that because planters were concerned that they would not be able to assure their harvest unless they had laborers available by a certain time in January, the statutes were designed to ensure such a labor supply by, for example, regulating work hours and prohibiting vagrancy). In Mississippi, for example, Fairman reports that the freedman

in effect . . . was compelled by early January to bind himself for a year’s work; “if the laborer shall quit the service of the employer, before expiration of his term of service, without good cause, he shall forfeit his wages for that year” A deserter incurred heavy costs for recapture, to be paid by the employer and set against wages.

6 FAIRMAN, *supra* note 2, at 113 (quoting Mississippi statute conferring civil rights on freedmen). Professor Fairman provides a chart reflecting the dates on which various states adopted their Black Codes. See *id.* at 106-07.

50. John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1141 (1990); see also 6 FAIRMAN, *supra* note 2, at 110-17 (discussing Black Codes in Mississippi); JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 32-53 (1961); TENBROEK, *supra* note 2, at 180 (“Under the [Black Codes] the freedman was socially an outcast, industrially a serf, legally a separate and oppressed class. Slavery, abolished by the organic law of the nation, was in fact revived by these statutes of the states.”). The Supreme Court’s decision in the *Slaughter-House Cases* alluded to this history, stating that Congress was aware that

notwithstanding the formal recognition by those [southern] States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value

83 U.S. 36, 70 (1872). The Court provided examples such as that African-Americans were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to

Congress was also well aware that many private individuals in the South were using violent, economic, and other means to maintain as many institutions of slavery as possible.⁵¹ Senators and Representatives read or recounted numerous incidents of killings and beatings of freed African-Americans.⁵² In addition, reports were made of southern farmers joining together to keep wages of freedmen extremely low, to impose high living costs on the freedmen, to punish "vagrancy" with indentured servitude, and to take various other steps to retain a world as close to slavery as possible.⁵³

Some of the most depressing news came from the official report of Major General Carl Schurz on the condition of the South (Schurz Report).⁵⁴ This report discussed a South filled with prejudicial attitudes,

purchase or own it. They were excluded from any occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

Id.

51. See generally Sullivan, *supra* note 2, at 549 (former masters struggled to recreate the discipline and control of a slave system).

52. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866) ("Every mail brings to us the records of injustice and outrage. Every gathering of the defeated yet struggling and defiant rebels, shows conclusively that the only purpose entertained by them is to hold on to as much of slavery as possible." (statement of Rep. Clarke)). Senator Wilson offered specific evidence of the abuse of freedmen:

The poor freedmen, who a few months ago were leaping and laughing with the joy of newfound liberty, invoking the blessings of Heaven upon the Government that had stricken the galling manacles from their limbs, are now trembling with apprehension, everywhere subject to indignity, insult, outrage, and murder. During the past four months, in Alabama alone, fourteen hundred cases of assault upon freedmen have been brought before the Freedmen's Bureau. . . . [T]he murderers go unpunished.

Id. at 140 app. (statement of Sen. Wilson).

53. See CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866) ("Any combination of men in [freedman's] neighborhood can prevent him from having any chance to support himself by his labor." (statement of Rep. Cook)); *id.* at 2404 (discussing report that some southerners made it punishable for Negroes to congregate at night or to attend schools); *id.* at 1159 (recounting incidents in which groups of planters joined together to deny freedmen the opportunity to be hired out without the permission of their former master, in which freedmen found at large without a pass were whipped, in which freedmen were denied the opportunity to run their independent business, and in which freedmen were denied the right to rent or buy homes but then were seized and sold as vagrants); S. EXEC. DOC. NO. 39-2, at 17 (1865).

54. See S. EXEC. DOC. NO. 39-2, at 2 (1865). Another influential report was made to the Thirty-Ninth Congress by General Oliver O. Howard, head of the Freedmen's Bureau, albeit not in the specific context of the debate over the Civil Rights Act of 1866. Howard took note of such conduct as white planters' formation of cartels to extort the freedmen, whites' refusal to fulfill their contractual obligations to the freedmen, and their efforts to defraud the freedmen. See H.R. EXEC. DOC. NO. 39-11, at 11-35 (1865); see also JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 274-75 (B. Kendrick ed. 1914) (reporting that many whites in Mississippi "wish to control the negro and his labor in such a way that he will be compelled to remain with them for

resentments, and ill spirit against both the freed blacks and northerners.⁵⁵ Part of this belief system included a seemingly unshakable view that “the negro [would] not work without physical compulsion.”⁵⁶ Given this conviction, Schurz reported that it was not surprising that the whites would have “a desire to preserve slavery in its original form as much and as long as possible.”⁵⁷ He stated:

Here and there planters succeeded for a limited period to keep their former slaves in ignorance, or at least doubt, about their new rights; but the main agency employed for that purpose was force and intimidation. In many instances negroes who walked away from the plantations, or were found upon the roads, were shot or otherwise severely punished, which was calculated to produce the impression among those remaining with their masters that an attempt to escape from slavery would result in certain destruction.⁵⁸

General Schurz found that many whites held the view that

the negro exists for the special object of raising cotton, rice and sugar *for the whites*, and that it is illegitimate for him to indulge, like other people, in the pursuit of his own happiness in his own way. Although it is admitted that he has ceased to be the property of a master, it is not admitted that he has a right to become his own master.⁵⁹

Schurz also reported the use of various “ingenious” contractual schemes designed to “make free labor compulsory by permanent regulations,”⁶⁰ as well as the use of violence geared to prevent the freed slaves from taking advantage of their economic freedom.⁶¹

never less than a year, and upon their own terms” (statement of Maj. Gen. Hatch)).

55. See S. EXEC. DOC. NO. 39-2, at 7, 17.

56. *Id.* at 17.

57. *Id.*

58. *Id.*

59. *Id.* at 21.

60. *Id.* at 21-22. Schurz explained:

Shortly after the close of the war some South Carolina planters tried to solve this problem by introducing into the contracts provisions leaving only a small share of the crops to the freedmen, subject to all sorts of constructive charges, and then binding them to work off the indebtedness they might incur. It being to a great extent in the power of the employer to keep the laborer in debt to him, the employer might thus obtain a permanent hold upon the person of the laborer. It was something like the system of peonage existing in Mexico. When these contracts were submitted to the military authorities for ratification, General Hatch, commanding at Charleston, at once issued an order prohibiting such arrangements. I had an opportunity to examine one of these contracts, and found it drawn up with much care, and evidently with a knowledge of the full bearings of the provisions so inserted.

Id. at 22. White planters also frequently refused to pay wages they had previously agreed to provide. See *id.* at 16, 30; see also CONG. GLOBE, 39th Cong., 1st Sess. 93 (1865) (reporting that South Carolina former slave owners had publicly agreed not to rent to freedmen nor contract with any freedman unless he could produce evidence of discharge by his former owner).

61. See S. EXEC. DOC. NO. 39-2, at 17 (stating that violence, including corporal punishment,

The Freedmen's Bureau employed a variety of steps to help protect the new contractual labor system in the South.⁶² Seeking not only to protect freed slaves against unfair treatment but also to ensure planters that their labor needs would be met, the Bureau became directly involved in reviewing and enforcing contracts between planters and the freed slaves.⁶³ In particular, the Bureau recognized that state courts did not provide a fair or viable forum for the resolution of disputes between planters and freedmen.⁶⁴ State courts often explicitly forbade blacks from testifying in cases involving white persons.⁶⁵

Responding to the perceived inadequacies of state courts, the Bureau used its military authority to step in to resolve labor disputes between freedmen and planters. On May 30, 1865, shortly after assuming office as head of the Bureau, General Howard issued Circular 5, ordering that

[i]n all places where there is an interruption of civil law, or in which local courts, by reason of old codes, in violation of the freedom guaranteed by the proclamation of the President and laws of Congress, disregard the negro's right to justice before the laws in not allowing him to give testimony, the control of all subjects relating to refugees and freedmen being committed to this bureau, the Assistant Commissioners will adjudicate, either themselves or through officers of their appointment, all difficulties arising between negroes themselves, or between negroes and whites or Indians, except those in military service, so far as recognizable by military authority, and not taken cognizance of by the other tribunals, civil or military, of the United States.⁶⁶

Pursuant to this Circular, Bureau offices throughout the South began to employ a variety of dispute resolution techniques to resolve numerous issues, often relating to employment contracts.⁶⁷ In one jurisdiction,

was "calculated to produce the impression among those remaining with their masters that an attempt to escape from slavery would result in certain destruction"; *id.* at 16-20 (describing numerous instances in which freedmen were subjected to extreme, and sometimes deadly, acts of violence).

62. See H.R. EXEC. DOC. NO. 39-11, at 11-13 (1865) (discussing General Howard's attempts not only to protect the freedmen from unfair treatment but also to ensure that freedmen do not abandon their labor but rather work diligently to ensure that the crops are planted and harvested); MCFEELY, *supra* note 46, at 149-65 (arguing that Howard and the Bureau provided substantial assistance to planters seeking to control the newly freed slaves); see also 2 HOWARD, *supra* note 46, at 246-47 (discussing supposed problem of freedman idleness and vagrancy).

63. See *infra* notes 66-70 and accompanying text.

64. See *infra* note 66 and accompanying text.

65. See, e.g., BENTLEY, *supra* note 46, at 152; NIEMAN, *supra* note 46, at 5.

66. Circular No. 5, War Dept., Bureau of Refugees, Freedmen and Abandoned Lands (May 30, 1865), reprinted in H.R. EXEC. DOC. NO. 39-11, at 45 (1865).

67. See generally H.R. EXEC. DOC. NO. 39-11, at 22-23 (discussing establishment of provost and freedmen's courts); 2 HOWARD, *supra* note 46, at 245-62 (discussing establishment of freedmen's courts); NIEMAN, *supra* note 46, at 8-11, 21-22 (discussing Bureau approach in various states). Commentator George Bentley reports that the freedmen courts resolved over 100,000 disputes per year, the majority of which involved contracts and wages. See BENTLEY, *supra* note 46, at 152, 160. Another commentator observed that in one week alone in January 1866, the freedmen's court in

Virginia, the Bureau used three-man tribunals to resolve minor contractual disputes.⁶⁸ These panels, which included representatives of the planter, the freedman, and the Bureau, were established to attempt to settle or else rule on minor disputes.⁶⁹ Elsewhere, the Bureau typically used a single judge, relying either on Bureau officers or sometimes on locally appointed magistrates.⁷⁰

By early 1866, it was widely recognized that the Bureau, despite its efforts, was failing to protect freedmen adequately from the unfair dealings of the white planters and the state courts.⁷¹ Among other problems, the Bureau simply lacked resources to resolve all such disputes.⁷² Initially with the support of the Bureau, state courts were permitted to reassume jurisdiction over disputes between freedmen and planters so long as they agreed to treat blacks equally and permit their

Mobile, Alabama heard 335 complaints from freedmen, most of which involved nonpayment of wages by white planters. See Oakes, *supra* note 46, at 67.

68. See NIEMAN, *supra* note 46, at 10. These panels were set up by Assistant Commissioner Orlando Brown in September 1865. See *id.* Several commentators have referred to these panels as "arbitration." See, e.g., JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 57-60 (1983) (criticizing post-Civil War arbitration panels as biased against freedmen); MCFEELY, *supra* note 46, at 139 (calling panels arbitral). McFeely, however, also describes the panels as "commissions" or "boards." MCFEELY, *supra* note 46, at 139-40. Other commentators, including General Howard himself, have used the terms "courts" or "tribunals." See, e.g., BENTLEY, *supra* note 46, at 152; 2 HOWARD, *supra* note 46, at 252; NIEMAN, *supra* note 46, at 10; Oakes, *supra* note 46, at 69. Certainly these panels, imposed by the militarily based Freedmen's Bureau on both planters and freedmen, were not the kind of mandatory binding arbitration that is the focus of this Article. See *infra* note 294 and accompanying text.

69. See MCFEELY, *supra* note 46, at 139-40. General Howard himself was an advocate of this mechanism. He urged that such boards should be used to settle labor disputes over \$100 or \$200 in Virginia. See 2 HOWARD, *supra* note 46, at 251-53. He subsequently advocated the use of the tripartite board during the course of an October 1865 visit to Charleston, South Carolina. See MCFEELY, *supra* note 46, at 139-40.

In Virginia, Howard attempted to secure planter support for the arbitration by stating "[i]n nine cases out of ten the freedmen will choose [as their man on the board] an intelligent white man who has always seemed to be their friend." 2 HOWARD *supra* note 46, at 252. In fact, one commentator reports that Virginia Bureau officials actually required freedmen to choose whites as their representatives. See NIEMAN, *supra* note 46, at 10. This cynicism has been sharply critiqued. See JEROLD S. AUERBACH, JUSTICE WITHOUT LAW 57-60 (1983). When Howard presented the idea in South Carolina, Bureau officials reportedly thought the boards a good idea but opposed the limitation on black representation. See MCFEELY, *supra* note 46, at 139-40.

70. See, e.g., BENTLEY, *supra* note 46, at 152-54 (discussing a variety of Bureau courts).

71. See, e.g., H.R. EXEC. DOC. NO. 39-11, at 22-23 (1865).

72. See, e.g., *id.* (observing that efforts to establish freedmen's courts have been limited by the scarcity of officers, and also observing that in some instances the freedmen's officers themselves have discriminated against the Negro); see also NIEMAN, *supra* note 46, at 11 ("Although Bureau adjudication of cases involving freedmen did help shield freedmen from injustice, it fell far short of providing them adequate legal protection. In most states, assistant commissioners had insufficient personnel to deal with cases in a thorough and effective manner.").

testimony.⁷³ The problem, as General Howard soon came to recognize, was that southern states often purported to treat blacks equally by providing equal rights on paper, but then actually continued to discriminate as to results.⁷⁴ State courts often proved to be unfair forums for the freedmen, even though Bureau representatives attempted to assist the freedmen and sometimes acted as their advocates.⁷⁵ Thus, in his December 1865 report to Congress, General Howard urged that a federal law be passed "extending United States jurisdiction to the freedmen while they remain wards of the government."⁷⁶ Following the enactment of the Civil Rights Act of 1866, Howard wrote that he thought it "would enable his Assistants to 'correct what the State courts may have undone.'"⁷⁷

Responding to the concerns of Howard and others that state courts provided unfair forums but that the federal government could not indefinitely continue military occupation of the South, Congress sought to use federal legislation to protect the freed slaves.⁷⁸ Introducing the proposed Civil Rights Act of 1866, Senate Judiciary Chair Trumbull stated:

73. See H.R. EXEC. DOC. NO. 39-11, at 22-23, (discussing the trend to allow state courts to resume jurisdiction); NIEMAN, *supra* note 46, at 17-23 (discussing transfer of jurisdiction from the Bureau back to state courts, beginning in Alabama, and discussing Howard's initial support of this measure).

74. See BENTLEY, *supra* note 46, at 156-57 (observing that Bureau agents soon learned that the appearance of equality was not the same as actual equality); MCFEELY, *supra* note 46, at 267-68 ("As soon as the states were reorganized and the courts re-established, there was a systematic denial of the processes of justice to the freedmen. Congress sought to meet this problem with the Civil Rights Bill of 1866."); NIEMAN, *supra* note 46, at 23-28, 65-66, 103 (observing that the result of the experiment transferring jurisdiction over freedmen-planter disputes back to state courts soon proved disappointing to the Bureau, and concluding that congressional rescue would be necessary to prevent further backsliding); see also Oakes, *supra* note 46, at 68-73 (although southern state courts began to allow the admission of Negro testimony in order to put freedmen's courts out of business, they did so in a conniving way so as to preclude blacks from actually obtaining relief in state courts).

75. See BENTLEY, *supra* note 46, at 156 (outlining the Bureau's role in helping freedmen pursue their rights); 2 HOWARD, *supra* note 46, at 254 (stating all available Bureau officers and agents were instructed to act as advocates for freedmen in state court proceedings).

76. H.R. EXEC. DOC. NO. 39-11, at 23; see also MCFEELY, *supra* note 46, at 68-69 (linking the failure of the Bureau and state courts to provide justice to freedmen to the passage of the Civil Rights Act of 1866).

77. BENTLEY, *supra* note 46, at 157 (quoting a letter from Howard to Georgia Assistant Commissioner Davis Tillson).

78. The Civil Rights Act of 1866 was not the first legislation passed by Congress in an attempt to deal with the legacy of slavery. Earlier in 1866, both the Senate and House passed a bill, S. 60 39th Cong. (1866), to increase the power of the Freedmen's Bureau by extending military jurisdiction over certain areas in the South where civil rights continued to be denied to African-Americans. See CONG. GLOBE, 39th Cong., 1st Sess. 129, 209, 421, 688, 748, 775 (1866). President Johnson, however, vetoed the bill on July 16, 1866, and the Senate failed to override his veto. See *id.* at 915-16, 943, 3849.

I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.⁷⁹

Representative Windom directly linked the Act to the economic harm the planters sought to impose:

[The Act] does not attempt to confer on the freedmen social privileges. It merely provides safeguards to shield them from wrong and outrage, and to protect them in the enjoyment of that lowest right of human nature, the right to exist. Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.⁸⁰

Congress ultimately passed the Civil Rights Act of 1866, following an override of President Johnson's veto, on April 9, 1866.⁸¹

As the United States Supreme Court stated in the *Civil Rights Cases*⁸² in 1883, the purpose of the 1866 Act was "to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom."⁸³ Section 1 of the Act contained both the general listing of contractual and other civil rights that eventually would become 42 U.S.C. § 1981, and also the property rights that would become 42 U.S.C. § 1982. It provided

[t]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and

79. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

80. *Id.* at 1159.

81. *See id.* at 1861. The Senate had previously passed the bill on April 6, 1866. *See id.* at 1809.

82. 109 U.S. 3 (1883) (holding that the Civil Rights Act of 1875 was unconstitutional in that it exceeded the scope of Congress's authority under either the Thirteenth or Fourteenth Amendments).

83. *Id.* at 22.

to none other, any law, statute, ordinance regulation, or custom to the contrary notwithstanding.⁸⁴

Section 2 of the Act provided for criminal sanctions to be afforded against "any person who, under color of any law, statute, ordinance, regulation, or custom," shall deprive any persons of their rights under the statute.⁸⁵ Section 3 discussed which courts had jurisdiction to hear both civil and criminal suits brought under the Act,⁸⁶ and the remaining seven provisions discussed such issues as mandatory prosecution by district attorneys, duty to honor warrants, sanctions for aiding and abetting, and the availability of military forces to enforce the Act.⁸⁷

B. Congressional Intent to Prohibit Private Acts of Discrimination

Although the applicability of the Act to private as well as state-sponsored acts of discrimination has been hotly disputed by both historians⁸⁸ and dissenting Supreme Court Justices,⁸⁹ the Supreme Court

84. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

85. *Id.* § 2, 14 Stat. at 27. The complete section provided:

[t]hat any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Id.

86. *See id.* § 3, 14 Stat. at 27; *see also infra* Part II.C.

87. *See* Civil Rights Act of 1866, ch. 31, §§ 3-9, 14 Stat. 27, 27-29.

88. Compare BELZ, *supra* note 2, at 124, FAIRMAN, *supra* note 2, at 1218-60, and NIEMAN, *supra* note 46, at 12-13, 150 n.24 (arguing that the Act was intended only to prohibit state-sponsored discriminatory acts), with Brief of Eric Foner, John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward and Mary Frances Berry as Amici Curiae for Petitioner at 15-20, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (No. 87-107) (arguing that the Civil Rights Act of 1866 was intended to apply to private conduct), FONER, *supra* note 2, at 199-201, JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 60-61 (1961) (arguing that the Act was intended to bar private as well as public acts of discrimination), LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 364-71 (1980), TENBROEK, *supra* note 2, at 179-80, Kaczorowski, *supra* note 29, at 579-90, and Sullivan, *supra* note 2, at 545.

89. *See, e.g.,* Runyon v. McCrary, 427 U.S. 160, 192 (1975) (White & Rehnquist, J.J., dissenting) (concluding that the majority's interpretation of 42 U.S.C. § 1981 as prohibiting private racial discrimination is "contrary to the language of the section, to its legislative history, and to the clear dictum of this Court in the *Civil Rights Cases*, 109 U.S. 3, 16-17 (1883)"); *id.* at 189 (Stevens, J., concurring) (concluding that the Court should follow *Jones* precedent although that case was incorrectly decided, and observing "[t]here is no doubt in my mind that that construction of the statute would have amazed the legislators who voted for it"); *Jones v. Alfred H. Mayer Co.*, 392 U.S.

has now explicitly held on multiple occasions that the Act was intended to prohibit private discriminatory acts. In *Jones v. Alfred H. Mayer Co.*,⁹⁰ in 1968, the Court ruled by a 7-2 majority that 42 U.S.C. § 1982 could be used to prohibit a private owner of real estate from refusing to sell a home to African-Americans because of their race.⁹¹ Justice Stewart's opinion for the Court concluded that both the plain language of the statute and also the surrounding legislative history demonstrated an intent to proscribe private discrimination.⁹²

Looking first at the language of the statute, the Court emphasized that section 1 of the Act barred discriminatory acts supported not only by "State or local law" but also by "custom."⁹³ The Court also looked at section 2 of the statute, the criminal enforcement provision, concluding that the statute "was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed."⁹⁴ In light of this drafting, the Court explained, section 1 must cover private as well as state action or else "much of § 2 would have made no sense at all."⁹⁵ Given the

409, 450 (1968) (Harlan & White, J.J., dissenting) (concluding that based on analysis of text and legislative history, "the Court's construction of § 1982 as applying to purely private action is almost surely wrong, and at the least is open to serious doubt"). Note that a majority of the *Patterson* Court was sufficiently unsure of the validity of the application of 42 U.S.C. § 1981 to private action that they took the unusual step of requesting reargument so that the parties could focus on the issue that had been resolved just 12 years earlier in *Runyon*. See *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988). However, following reargument and intense opposition to reversal by numerous state attorneys general, 66 members of the Senate, the United States Solicitor General, and many public interest organizations, the Court (including previous dissenters) declined to overrule *Runyon* on grounds of stare decisis. See *Patterson*, 491 U.S. at 171-74. The Court stated that "[w]hether *Runyon*'s interpretation of Section 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country." *Id.* at 174. See generally John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1137-48 (1990) (criticizing sharply the Court's reconsideration of the *Runyon* decision in *Patterson*). Professor Franklin observed that "[w]hen the Court indicated in 1987 that it wished to reconsider the decision in *Runyon*, it could hardly have anticipated the avalanche of criticism that it would provoke on the part of historians, lawyers, civic and labor groups, and civil rights organizations [as well as forty-seven state attorneys general]." *Id.* at 1143.

90. 392 U.S. 409 (1968).

91. See *id.* at 421-22.

92. See *id.* at 421-37.

93. *Id.* at 423.

94. *Id.* at 425.

95. *Id.* at 424. As the dissent pointed out, the majority's distinction here seems rather questionable, in that section 2 contains the same word, "custom," that the majority thought connoted private action in section 1. See *id.* at 454 (Harlan, J., dissenting). Specifically, section 2 subjects to criminal liability "any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act." *Id.* (quoting the Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (emphasis added)).

language of both provisions, the Court found that section 1 "plainly meant to secure that right against interference from any source whatever, whether governmental or private."⁹⁶

The *Jones* majority also drew extensively from both the legislative debates and histories of the period. While recognizing that a substantial amount of the legislative discussion focused upon the goal of eradicating the recently enacted Black Codes,⁹⁷ the Court found that "the same Congress that wanted to do away with the Black Codes also had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation."⁹⁸ The Court stated:

"Accounts in newspapers North and South, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced" to show that "private outrage and atrocity" were "daily inflicted on freedmen . . ." The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities."⁹⁹

The Court also focused on the Schurz Report¹⁰⁰ and on the comments of individual legislators including particularly the bill's sponsor, Senator Trumbull.¹⁰¹ The Court concluded as follows:

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.¹⁰²

96. *Id.* at 423.

97. *See id.* at 426.

98. *Id.* at 426-27.

99. *Id.* at 427-28 (footnotes omitted). The Court cited several historical sources in support of these propositions. *See id.* (citing BROCK, *supra* note 2, at 124 (1963); J. MCPHERSON, THE STRUGGLE FOR EQUALITY 332 (1964); STAMPP, *supra* note 2, at 75, 131-32; TENBROEK, *supra* note 2, at 181). The Court also cited various speeches made by legislators. *See id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 95, 339-40, 1160, 1833, 1835 (1866)).

100. *See id.* at 428-29. The Court observed that "[t]he report concluded that, even if anti-Negro legislation were 'repealed in all the States lately in rebellion,' equal treatment for the Negro would not yet be secured." *Id.* at 429 (quoting S. EXEC. DOC. NO. 39-2, at 35 (1865)). *See supra* text accompanying notes 54-61 for further discussion of this report.

101. *See Jones*, 392 U.S. at 429-35. For example, Senator Trumbull called the bill "sweeping and efficient," observed that it would secure for all "the great fundamental rights," and claimed that the bill would "break down all discrimination between black men and white men." CONG. GLOBE, 39th Cong., 1st Sess. 43, 475, 599 (1866). Senator Trumbull also jumped into a debate to emphasize that the Act would subject to punishment "[n]ot State officers especially, but everybody who violates the law. It is the intention to punish everybody who violates the law." *Id.* at 500.

102. *Jones*, 392 U.S. at 436.

The Court also found that the re-enactment of the Act in 1870 did not alter its scope to prohibit only state-sponsored discriminatory acts.¹⁰³

Although *Jones* only involved a claim brought under 42 U.S.C. § 1982, which bars certain property discrimination, and not under the broader 42 U.S.C. § 1981, the Court soon decided that because both provisions derived from Civil Rights Act of 1866, 42 U.S.C. § 1981 must also apply to private acts of discrimination. The Court initially made this determination, in passing, in *Tillman v. Wheaton-Haven Recreation Ass'n Inc.*¹⁰⁴ and *Johnson v. Railway Express Agency*.¹⁰⁵ The Court, however, finally focused specifically on the issue in *Runyon v. McCrary*.¹⁰⁶ In *Runyon*, several African-American students and their parents challenged segregated private schools.¹⁰⁷ Relying on *Jones*'s conclusion that 42 U.S.C. § 1982 covered private discrimination, the Court easily concluded that 42 U.S.C. § 1981 equally applied to private acts.¹⁰⁸ The Court further emphasized that Congress, in passing the Equal Employment Opportunity Act of 1972,¹⁰⁹ had "specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted . . . in *Jones*, insofar as it affords private-sector employees a right of action based on racial discrimination in employment."¹¹⁰ The *Runyon* Court

103. See *id.* at 436-37. While recognizing that the 1870 re-enactment was believed necessary, by some, to base the statute on the Fourteenth Amendment, the Court nonetheless found "not the slightest factual basis for any speculation" that "the subsequent readoption of the Civil Rights Act [was] meant somehow to limit its application to state action." *Id.* (emphasis omitted). Such an assumption was particularly unwarranted, explained the Court, given that by 1870, "most, if not all, of the former Confederate States, then under the control of 'reconstructed' legislatures, had formally repudiated racial discrimination, and the focus of congressional concern had clearly shifted from hostile statutes to the activities of groups like the Ku Klux Klan, operating wholly outside the law." *Id.*

104. 410 U.S. 431, 440 (1973) (stating that "[i]n light of the historical interrelationship between section 1981 and section 1982, [there is] no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club," and therefore remanding the case for further proceedings "free of the misconception that Wheaton-Haven is exempt from sections 1981, 1982 and 2000a").

105. 421 U.S. 454, 466 (1975) ("Congress clearly has retained Section 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII.").

106. 427 U.S. 160 (1976).

107. See *id.* at 170-73.

108. See *id.* at 173. The Court also addressed and rejected the argument that the 1870 re-enactment of the statute was based exclusively on the Fourteenth Amendment and did not cover private discrimination. See *id.* at 168 n.8. Although recognizing that the historical note appended to 42 U.S.C. § 1981 states that the section derives solely from section 16 of the 1870 Act and fails to mention the section 18 re-enactment provision, the Court refused to place much emphasis on the note, instead concluding that the omission was essentially inadvertent. See *id.* at 168-69 n.8.

109. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (as amended at 42 U.S.C. §§ 2000e to 2000e-17).

110. *Runyon*, 427 U.S. at 174; see also *Johnson*, 421 U.S. at 459 (discussing rejected proposed

then concluded that "[t]here could hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination."¹¹¹ Later, in *Patterson v. McLean Credit Union*,¹¹² after having requested reargument on the question of whether *Runyon* should be reversed,¹¹³ the Court issued an opinion in which all members of the Court declined to overrule *Runyon*'s conclusion that 42 U.S.C. § 1981 applied to private discrimination.¹¹⁴

In 1991, Congress erased any doubts that may have remained as to whether 42 U.S.C. § 1981 reaches private conduct by amending the statute to make this goal explicit.¹¹⁵ As amended, 42 U.S.C. § 1981 now contains a new subsection, which provides as follows: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."¹¹⁶ A House Report issued in connection with the legislation explicitly states that "[t]his section amends 42 U.S.C. § 1981 . . . to codify *Runyon v. McCrary*."¹¹⁷

C. Enforcement of the Act

In designing the enforcement provisions of the 1866 Act, Congress chose to provide for both criminal and civil suits¹¹⁸ that would be brought

amendment to Title VII at 118 CONG. REC. 3371-73 (1972)).

111. *Runyon*, 427 U.S. at 174-75 (emphasis omitted).

112. 491 U.S. 164 (1989).

113. *See id.* at 171; *see also* *Patterson v. McLean Credit Union*, 485 U.S. 617, 617 (1988) (requesting reargument on *Runyon* issue).

114. *See Patterson*, 491 U.S. at 171. While some members of the Court dissented from the majority's conclusion that 42 U.S.C. § 1981 applied only to the initial formation of an employment contract and not to discriminatory harassment that might occur during the course of employment, *see id.* at 189 (Brennan, Marshall, Blackmun & Stevens, J.J., concurring in part and dissenting in part), all members of the Court agreed that *Runyon* should not be reversed. *See id.* at 171, 191, 219. Justices Brennan, Marshall, and Blackmun, wrote separately to emphasize that they believed *Runyon* should be upheld based not only on stare decisis, but also because it was correctly decided. *See id.* at 191. In the concurring opinion, the Justices drew extensively from the legislative history to support their position. *See id.* at 189-99. The Justices also argued that, in any event, Congress had ratified the Court's application of 42 U.S.C. § 1981 to private discriminatory acts. *See id.* at 199-205.

115. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071.

116. *Id.*

117. H.R. REP. NO. 102-40, pt. 2, at 35 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 728. This report observed that "[m]any Supreme Court decisions have held that Section 1981 prohibits intentional race discrimination in the making and enforcement of private contracts, as well as in state action affecting individuals' ability to make and enforce contracts." *Id.* at 35, *reprinted in* 1991 U.S.C.C.A.N. 694, 729. The report also emphasized the particular importance of the statute, even given the existence of other more recent antidiscrimination legislation. *See id.* at 35-37, *reprinted in* 1991 U.S.C.C.A.N. 694, 728-31.

118. Some of the Act's proponents made clear that they believed the criminal enforcement would

in court.¹¹⁹ Representative Thayer stated that citizens would enforce their rights

through the quiet, dignified, firm, and constitutional forms of judicial procedure. The bill seeks to enforce these rights in the same manner and with the same sanctions under and by which other laws of the United States are enforced. It imposes duties upon the judicial tribunals of the country which require the enforcement of these rights.¹²⁰

The right to appear in court was seen both as critical to the effort to enforce civil rights and as a crucial part of the rights to which all citizens were entitled.¹²¹

In providing for judicial remedies, Congress took the very unusual step for the time of establishing federal court jurisdiction.¹²² Section 3 of the Act provided that the United States district courts should have exclusive jurisdiction "of all crimes and offences committed against the provisions of this act,"¹²³ and concurrent jurisdiction with the federal circuit courts

be much more meaningful than the provision of civil damages. *See generally* Kaczorowski, *supra* note 28, at 583 (discussing high cost of civil enforcement). Section 3, nonetheless, expressly provided for civil relief, and the availability of such damages were part of the debate. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 479 (1866) (expressing outrage at the fact that civil claims ranging from ten cents to thousands of dollars might be brought in federal court).

119. One of the few commentators to look extensively at the enforcement provisions of the 1866 Act, rather than merely at its substantive provisions, is Professor Robert Kaczorowski. *See* Kaczorowski, *supra* note 29, at 565. Part II.C draws extensively on his work.

120. CONG. GLOBE, 39th Cong., 1st Sess. 1153 (1866) (statement of Rep. Thayer); *see also id.* at 1758 (statement of Sen. Trumbull) (arguing that creation of clear remedy of judicial enforcement is necessary if statute is to have significance); *id.* at 601 (statement of Sen. Hendricks) (noting that bill permits persons to bring civil claims for damages as well as criminal cases in federal courts but objecting to that portion of statute allowing for appointment of commissioners to enforce law).

121. Senator Sherman observed, "To say that a man is a freeman and yet is not able to assert and maintain his right in a court of justice is a negation of terms." CONG. GLOBE, 39th Cong., 1st Sess. 41 (1866); *see also id.* at 605 (statement of Sen. Trumbull) ("All the rest of the bill provides for doing it [enforcing sections 1 and 2] through the courts, in no other way. It is a court bill; it is to be executed through the courts, and in no other way.").

122. In 1866, no general federal question jurisdiction existed. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 5 (5th ed. 1994). Federal courts had jurisdiction only over diversity cases. *See id.* Federal courts gained federal question jurisdiction under the Judiciary Act of 1875. *See id.*

123. Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27. Section 3 provided, in full, [t]hat the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by

"of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act."¹²⁴ The section further provided that defendants who found themselves in state court would have the right to remove the suit to federal court if they had been charged civilly or criminally based on actions taken that were justified by the Act.¹²⁵

The creation of federal jurisdiction over these claims was quite controversial. Opponents of the Act argued vehemently that it exceeded federal powers, would seriously impinge upon states' rights,¹²⁶ and was

virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Id.

124. *Id.*

125. See *id.*; see also *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 591-93 (1871) (interpreting the concurrent jurisdiction clause narrowly to include only those cases in which *parties* to the action may be precluded from enforcing their rights under section 1 of the statute, and not cases in which either the victim or witnesses to the crime may potentially be deprived of such rights).

126. In 1866, states' rights were understood differently than they are today. For a detailed discussion of the Act's framers' and opponents' understanding of these complex issues, see Kaczorowski, *supra* note 29, at 567-73, (discussing 1866 conceptions of dual sovereignty and states' rights, and arguing that given these conceptions, Congress could not have intended to legislate only as to state action).

therefore unconstitutional.¹²⁷ Senator Davis proclaimed his fierce opposition to the statute as follows:

The result would be to utterly subvert our Government; it would be wholly incompatible with its principles, with its provisions, or with its spirit. It would leave the General Government no longer a limited Government of delegated authority, with no powers except those expressly or by necessary implication given to it by the Constitution. It would produce a perfect and despotic central consolidated Government. All the State governments and State constitutions would be brought in ruins prostrate to the feet of the oligarchy of Congress.¹²⁸

Representative Eldridge was equally eloquent in voicing his opposition, stating:

This bill is, it appears to me, one of the most insidious and dangerous of the various measures which have been directed against the interest of the people of this country. It is another of the measures designed to take away the essential rights of the States. . . . [I]t seeks to lay prostrate at the feet of the Federal Government the judiciary of the States.¹²⁹

Many of the Act's critics were particularly disturbed by the fact that the proposed statute would allow virtually any and all suits to be brought in or transferred to federal court.¹³⁰ Senator Saulsbury, for example,

127. Several recently decided cases provided the background for the constitutional arguments. *Prigg v. Pennsylvania* held that Congress could compel enforcement of the fugitive slave clause by imposing enforcement duties on federal courts and federal officials, but cast doubt on whether states could be compelled to enforce the clause. See 41 U.S. (16 Pet.) 539, 622, 625 (1842). *Prigg* was explicitly cited to by many of the supporters of the 1866 Act. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (statement of Rep. Wilson) (citing *Prigg* to support the concept that a right implies a remedy); *id.* at 1836 (statement of Rep. Lawrence) (using *Prigg* to support the idea that state laws and constitutions "cannot stand in the way of the constitutional power of Congress"); see also *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107 (1860) ("[T]he Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.").

128. CONG. GLOBE, 39th Cong., 1st Sess. 598 (1866) (statement of Sen. Davis).

129. *Id.* at 1154 (statement of Rep. Eldridge); see also *id.* at 1265 (statement of Rep. Davis) ("I will support and advocate any bill which does not trench upon the constitutional rights of the States, which is not an invasion of legitimate State authority, which is not a usurpation by the General Government of powers which were never delegated to it."); *id.* at 1267 (statement of Rep. Raymond) (arguing that an Act which subjects a state court judge to fine or imprisonment by a federal court for enforcing a state law is unconstitutional); *id.* at 1122-23 (statement of Rep. Rogers) ("[T]he Congress or the men who will strip the people of these rights will be handed down to perdition for allowing this bright and beautiful heritage of civil liberty embodied in the powers and sovereign jurisdiction of the States to pass away from us.").

130. See, e.g., *id.* at 603 (statement of Sen. Cowan) (stating that the proposed bill substitutes military power for the writ of error or certiorari, effectively repealing state legislation and thereby violating the Constitution); *id.* at 601 (statement of Sen. Hendricks) (expressing strong opposition to section 4 of the bill which allows for the appointment of "extraordinary commissioners" to enforce its mandate); *id.* at 1155 ("None can say this second section is not aimed directly at the State judiciary. No one who reads the section or who heard the argument of the gentleman from Iowa can

contended that "every little petty case of a civil character in which from ten cents to thousands of dollars are involved" might soon be brought in federal court,¹³¹ and that "the whole criminal code of a State, if the Federal courts can have the power of administering it, will be administered by the Federal courts and not the State courts."¹³² Representative Kerr complained that the bill's creation of federal court jurisdiction "takes a long and fearful step toward the complete obliteration of State authority and the reserved and original rights of the States"¹³³ and expressed particular discomfort at the empowerment of federal court judges to create common law as may prove necessary.¹³⁴ He concluded sarcastically that the bill is defective in that it fails to appoint "an executioner, who should be of the favored race and color, and should march in the forefront of the procession with a guillotine."¹³⁵

Notwithstanding these serious expressions of concern, the drafters forged ahead and created federal jurisdiction because they believed that state courts and state officials could not be trusted either to treat African-Americans fairly or to apply the new federal law.¹³⁶ As Representative Wilson explained, because "the practice of the States leaves us no avenue of escape, . . . we must do our duty by supplying the protection which the States deny."¹³⁷ Senator Lane similarly stated:

hesitate a moment to admit the purpose and object of this section is to control the judges of the State courts and to prevent them from executing the laws of the States."); *cf. id.* at 600 (statement of Sen. Guthrie) (urging optimism that states would, without the need for federal legislation, "remodel their laws upon the subject of offenses"). President Johnson's veto message, a veto which was ultimately overridden, also claimed that the Act unconstitutionally trammelled on state sovereignty. *See id.* at 1679-80.

131. *Id.* at 479 (statement of Sen. Saulsbury) (opposing strongly the prospect that any civil action, such as one for ejectment, might be brought in federal court merely because the state court refused to permit negro testimony, and arguing that the creation of federal jurisdiction to hear these matters "attempts to deprive the States of these rights which the Supreme Court say are undoubted rights of the State[s]," and is "flagrantly unconstitutional").

132. *Id.* at 479 (statement of Sen. Saulsbury) (expressing outrage, for example, that an African-American, who commits a murder in Kentucky and whose "guilt is proved beyond a reasonable doubt by a hundred people who saw him commit the act," would have a right to be tried in federal court if the Kentucky judges—presumably being "men of learning, character, knowledge, dignity"—would prohibit a Negro witness from providing testimony, and arguing further that all criminal defendants might secure a federal court trial in those states that prohibit African-American testimony merely by asking a black "Sambo" to testify); *see also id.* at 1809 (statement of Sen. Saulsbury) (describing the statute as "grossly, palpably, flagrantly unconstitutional").

133. *Id.* at 1271.

134. *See id.*

135. *Id.*

136. Professor Kaczorowski has observed that the legislators were likely also motivated to create federal jurisdiction over these cases by the belief that Congress lacked the authority to ensure enforcement of federal rights in state court. *See Kaczorowski, supra* note 29, at 567.

137. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866); *see also id.* at 1294-95 (statement of Sen.

But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision

. . . .
 . . . We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the constitutional amendment; but because we believe they will not do that, we give the Federal officers jurisdiction.¹³⁸

Many others echoed these legislators' sentiments.¹³⁹ The Supreme Court itself, in its 1871 decision in *Blyew v. United States*,¹⁴⁰ recognized this basis for the Act's jurisdictional grant: "It is also well known that in many quarters prejudices existed against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of the race was a party accused."¹⁴¹ In short, as commentator Robert Kaczorowski has observed, the framers

sought to void racially discriminatory state laws which infringed civil rights secured by the Constitution, eliminate racial and political prejudice in the administration of civil and criminal justice in the State courts, and provide an alternative system of civil and criminal justice when individuals could not enforce or were denied their civil rights in the state courts.¹⁴²

Wilson) (observing that when a state deprives a citizen of rights, the federal government necessarily has the power and duty to protect that citizen).

138. *Id.* at 602-03 (statement of Sen. Lane).

139. *See id.* at 600 (statement of Sen. Trumbull) (observing that denial of states' "right" to discriminate is no loss, and that those states which do not discriminate need not fear the operation of the statute); *id.* at 1124-25 (statement of Rep. Cook) (leaving freed slaves at the mercy of the southern states would doom them to re-enslavement); *see also id.* at 601 (statement of Sen. Hendricks) (recognizing the desirability of that portion of the statute which "sends the people with their causes into the courts of the United States," and accepting that "if a great wrong be done in any of the inferior courts perhaps an appeal will lie to a court where justice will be done," but opposing that section of the statute which would allow for creation of special commissioners).

140. 80 U.S. (13 Wall.) 581 (1871).

141. *Id.* at 590-91, 593-94 (holding that while the Act provided jurisdiction to federal circuit courts over all causes "affecting persons who are denied, or cannot enforce in the courts of judicial tribunals of the State . . . any of the rights secured to them by . . . the [A]ct," the jurisdictional grant should not be interpreted to apply to a case involving an African-American murder victim and African-American witnesses who were denied the opportunity to testify in state court because neither the deceased nor the witnesses' rights could be directly affected by the criminal trial).

142. Kaczorowski, *supra* note 29, at 581 (noting that this approach was modeled upon measures taken by the military during the wartime occupation of the South). Carl Schurz's investigation also supported the creation of federal jurisdiction. Schurz summed up his report with the conclusion that unless the federal government intervened, the freed African-Americans would be subjected to "a system of coercion, the enforcement of which will be aided by the hostile feeling against the negro now prevailing among the whites, and by the general spirit of violence which in the south was fostered by the influence slavery exercised upon the popular character." S. EXEC. DOC. NO. 39-2,

D. Arbitration in 1866

Neither the text of the 1866 Act nor its legislative history specifically mentions the possibility of arbitrating civil claims brought under that statute. It is, nonetheless, relevant to consider the extent to which claims, in general, were being resolved through arbitration in that era in order to determine whether Congress might have intended to allow arbitration of civil rights claims. Surprisingly little historical work has been done to determine how arbitration was handled or viewed in this country prior to the passage of "modern" arbitration statutes, such as the FAA in the 1920s.¹⁴³ Thus, this section will focus on those few conclusions as to which legal historians concur.

1. Court Enforcement of Contracts to Resolve Disputes by Binding Arbitration

Although voluntary arbitration did exist in 1866, American courts typically refused to use their equitable powers to enforce parties' contractual agreements to resolve their future disputes by arbitration rather than in court.¹⁴⁴ Thus, a party who had signed an agreement to resolve future disputes by arbitration could, nonetheless, typically bring suit in court without fear either that the court would order her to resort to arbitration or that the court would treat the failure to arbitrate as a bar or defense to the litigation.¹⁴⁵ Courts' refusal to issue such equitable

at 32 (1865). Professor Hyman's history of Schurz's investigation recounts that "[w]hen Schurz objected that, loaded against blacks, state courts were most unlikely to punish a white abuser of a black employee for assault and battery, he was told: 'You must make some allowance for the prejudices of our people.'" HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 421 (1973).

143. See MACNEIL, *supra* note 15, at 16 (noting lack of in-depth scholarship comparing nineteenth century arbitration legislation to judge-made arbitration law); IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 4.3.2 (1995) (stating that arbitration in the period from 1800-1920 has not been studied systematically).

144. See MACNEIL, *supra* note 15, at 15; MACNEIL ET AL., *supra* note 143, at 4:4; WESLEY A. STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* § 15 at 45 (1930); Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 267 (1988); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 193. *But see, e.g.,* Fox v. Hempfield R. Co., 9 F. Cas. 627 (C.C.W.D. Pa. 1857) (No. 5010) (concluding that when parties had agreed to submit their construction dispute to arbitration, failure to do so served as a bar to litigation).

145. See MACNEIL ET AL., *supra* note 143, at 4:7; Addison C. Burnham, *Arbitration as a Condition Precedent*, 11 HARV. L. REV. 234 (1897) (urging courts to accept bargained for arbitration as a condition precedent to litigation, while citing numerous decisions in which courts had refused to do so). As Professor Sturges explained in his 1930 treatise on arbitration, agreements to arbitrate future disputes were deemed revocable at common law. See STURGES, *supra* note 144, § 15, at 45.

relief has been termed the “ouster doctrine” because many courts’ refusal to enforce arbitration clauses stemmed from their reluctance to allow private parties to “oust” the courts of jurisdiction.¹⁴⁶ This reluctance, in turn, arose at least in part from courts’ concern that arbitration, which lacked various procedural safeguards, might permit abuse that would not be allowed in the courtroom setting.¹⁴⁷ While courts might occasionally award damages against a party who had breached her agreement to arbitrate, such damages awards were difficult to calculate and would not have served as much of a deterrent against breach.¹⁴⁸

The Supreme Court explicitly endorsed the ouster doctrine, in dicta, in its 1874 decision in *Insurance Co. v. Morse*.¹⁴⁹ The Court stated:

He stated:

By the term “revocable” either or both of the following rules are generally intended:

- (1) That a party to such a clause or provision can maintain an action in court although the action is based upon a cause which is embraced in the arbitration agreement, such a clause or provision cannot be pleaded in abatement of or in bar to such an action;
- (2) That either party to such a clause or provision can terminate the powers of the other party, and of any third person who may be acting thereunder, including the powers of arbitrators who may have been duly appointed thereunder, by giving sufficient notice of revocation of the arbitration agreement.

Id. § 15, at 45.

146. Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 599-601 (1997) (discussing history of ouster doctrine and observing that it remained the rule in the United States until the early twentieth century); see also *Kill v. Hollister*, 95 Eng. Rep. 532 (K.B. 1746) (ruling that arbitration agreements improperly “oust” courts of their jurisdiction); MACNEIL ET AL., *supra* note 143, at 4:7 (discussing “ouster”); STURGES, *supra* note 144, § 15, at 45-46 (discussing public policy said to be violated when courts are ousted of their jurisdiction).

147. See *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320-21 (C.C. Mass. 1845) (No. 14,065) (Story, J.) (citing policy reasons why courts have historically refused either to accept arbitration as a bar to litigation or to enforce arbitration agreements in equity); Reuben, *supra* note 146, at 599-600; see also Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 610-11 (1928) (discussing policy of protecting weaker parties as the basis for refusing to enforce predispute arbitration agreements, while urging that parties nonetheless be permitted to enter into irrevocable agreements to arbitrate future disputes). Professor Sturges noted that

[t]he mere executory agreement to submit is generally revocable. Otherwise, nothing would be easier than for the more astute party to oust the courts of jurisdiction. By first making the contract and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy.

STURGES, *supra* note 144, § 15, at 46 (quoting *Parsons v. Ambos*, 48 S.E. 696, 697 (Ga. 1904)).

148. See MACNEIL ET AL., *supra* note 143, at 4:18; STURGES, *supra* note 144, § 22, at 82 (observing that while statements often appear in cases to the effect that a party who is aggrieved by breach of a future agreement to arbitrate may maintain an action for damages, so few cases exist involving such an action that “if there is such a rule of law it rests upon this popular acclaim”).

149. 87 U.S. (20 Wall.) 445 (1874) (refusing to enforce party’s agreement not to remove dispute to federal court).

Should a citizen . . . enter into an agreement . . . , upon whatever consideration, that he would in no case, when called into the courts . . . , demand a jury . . . , but that such rights should in all cases be submitted to arbitration or to the decision of a single judge, the authorities are clear that he would not thereby be debarred from resorting to the ordinary legal tribunals of the State. There is no sound principle upon which such agreements can be specifically enforced.¹⁵⁰

The Court further explained that

[e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights In a civil case he may submit his particular suit by his own consent to an arbitration He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.¹⁵¹

Although *Morse* was decided several years after the passage of the Civil Rights Act of 1866, the Court did not base its analysis on events subsequent to 1866, but rather on decisions and commentary that were extant in 1866.

It would be wrong to exaggerate courts' hostility to arbitration during the nineteenth century. Private parties, particularly commercial entities, could and frequently did agree to arbitrate their disputes.¹⁵² So long as neither party objected to the arbitration at the time of the dispute, the arbitration could proceed.¹⁵³ Once the arbitrators had entered an award, courts would typically enforce that award.¹⁵⁴ It seems that, at least in certain industries arbitration was quite common.¹⁵⁵ Some industries even used form contracts that called for all disputes to be resolved through arbitration, rather than in court.¹⁵⁶

150. *Id.* at 450.

151. *Id.* at 451. The *Morse* Court stated:

And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements.

Id. at 452 (citation omitted).

152. See MACNEIL, *supra* note 15, at 15-21 (observing that arbitration was common at the end of the nineteenth century, particularly in financial centers such as New York and Chicago, and emphasizing that courts were supportive of arbitration although unwilling to specifically enforce agreements to arbitrate future disputes); Jones, *supra* note 144, at 213 (observing that disputes between merchants, particularly those who were members of trade associations or exchanges, were frequently resolved through arbitration in the period from 1820-1860).

153. See Jones, *supra* note 144, at 215.

154. MACNEIL, *supra* note 15, at 19; STURGES, *supra* note 144, § 18, at 57 (stating that power to revoke a future disputes clause was extinguished once award was duly rendered).

155. See Jones, *supra* note 144, at 213-15.

156. See *id.*

The bottom line, however, is that with very few exceptions, courts refused to specifically enforce agreements to arbitrate future disputes in 1866.¹⁵⁷ Thus, had white planters or others entered into contracts with freedmen that required all disputes to be resolved through arbitration, the freedmen could nevertheless have brought suit in court in 1866.

2. The Freedmen's Bureau's Use of "Arbitration" as an Alternative to State Court

As discussed above, the perceived extreme bias of southern state courts against former slaves led the Freedmen's Bureau to establish its own tribunals to resolve disputes that arose between planters and freedmen.¹⁵⁸ One version of this tribunal, a tri-partite body including a representative of the planter, the freedman, and the Bureau, has been referred to as "arbitration" by several commentators, although others, including General Howard, have not used the term.¹⁵⁹ Regardless of its name, this so-called "arbitration" was very different from the contractual binding arbitration that is the subject of this Article. First, the Bureau's dispute resolution was not a contractual process agreed to voluntarily by private parties, but rather was imposed on both planters and freedmen by the Bureau.¹⁶⁰ Second, because the dispute resolution technique was imposed by the Bureau, the Bureau had the power—though perhaps not always used—to ensure that the process was fair.¹⁶¹ Third, courts were not asked to enforce such arbitration clauses as an alternative to litigation. Rather, the Freedmen's Bureau, using its power as an arm of the War Department, directly substituted its own jurisdiction for that of the state courts in certain situations.¹⁶² Thus, this procedure, even if called arbitration, is entirely different from the contractual binding arbitration discussed here.

E. *The 1991 Amendment of the Act*

The Civil Rights Act of 1991¹⁶³ was passed "to strengthen and improve Federal civil rights laws."¹⁶⁴ Primarily geared to overturn or address

157. See *supra* notes 144-56 and accompanying text.

158. See *supra* text accompanying notes 46-47, 62-77.

159. See *supra* text accompanying notes 46-47, 62-77.

160. See *supra* notes 66-70 and accompanying text (discussing imposition of the process by Bureau officials).

161. See *supra* note 69 and accompanying text (discussing some Bureau officials' refusal to allow freedmen to select a black member for the panel).

162. See *supra* notes 66-70 and accompanying text (describing Circular 5, which authorized Freedmen's Bureau officials to hear disputes between freedmen and planters when state court would not be a fair forum).

163. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

164. See *id.* In the preamble to the statute, the House Education and Labor Committee stated:

recent Supreme Court decisions that were seen as weakening the scope and effectiveness of federal civil rights laws,¹⁶⁵ the statute included various revisions and additions to the Title VII of Civil Rights Act of 1964.¹⁶⁶ The 1991 statute made two changes which, while by no means its central focus, are relevant to this Article. First, as has already been mentioned, the 1991 Act codified the Supreme Court's decision in *Runyon* that 42 U.S.C. § 1981 governs private discrimination as well as state actions.¹⁶⁷ Second, the 1991 Act contained an endorsement of alternative dispute resolution (ADR) with respect to all of the statutes amended by the Act, including, therefore, 42 U.S.C. § 1981.¹⁶⁸ This endorsement, section 118 of the Act, states:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.¹⁶⁹

The legislative history accompanying section 118 emphasizes that, while the amendment was intended to encourage parties to resolve their disputes through alternative means, it was not meant to deprive parties of

"In enacting Title VII, Congress intended to vindicate the substantial public interest in a discrimination-free workplace by encouraging private citizens to enforce the statute's guarantees." H.R. REP. NO. 102-40, pt. 1, at 75 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 613.

165. See, e.g., *Lorance v. A.T. & T. Techs., Inc.*, 490 U.S. 900, 908-09 (1989) (holding that statute of limitations for challenging discriminatory seniority plans begins to run at adoption of plan); *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (holding that persons who have chosen not to participate in lawsuit may, following issuance of consent decree, challenge decree in separate lawsuit); *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (holding that 42 U.S.C. § 1981 covers only racially motivated interference with formation of contract, and not harassment or other discrimination subsequent to formation of contract); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657-59 (1989) (requiring plaintiffs who seek to prove disparate impact to link statistical disparity to a specific facially neutral practice, and also holding that once a prima facie case is established, the burden of production only, not proof, shifts to the employer); *Evans v. Jeff D.*, 475 U.S. 717, 719 (1986) (precluding the court from setting aside settlement requiring waiver of all attorney fees); *Marek v. Chesny*, 473 U.S. 1, 12 (1985) (providing that a party who rejects offer of judgment more favorable to that obtained at trial is barred from recovering attorney fees incurred after rejection of offer).

166. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994); see, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 104, 109(a), 105 Stat. 1074, 1077. For some of the many articles discussing the 1991 Act and its impact, see Symposium, *The Civil Rights Act of 1991: Theory and Practice*, 68 NOTRE DAME L. REV. 911 (1993); Symposium, *The Civil Rights Act of 1991: Unraveling the Controversy*, 45 RUTGERS L. REV. 889 (1993).

167. See *supra* text accompanying notes 115-17.

168. As the 1991 Act does not mention claims brought under 42 U.S.C. § 1982, it seemingly has no relevance whatsoever to those claims.

169. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified at 42 U.S.C. § 1981 note (1994)).

their judicial forum. The House Judiciary Committee Report reads as follows:

The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.¹⁷⁰

Most tellingly, Congress explicitly rejected a Republican substitute ADR provision that would have encouraged use of ADR “*in place of judicial resolution*.”¹⁷¹ The House Education and Labor Committee Report explains why the Republican version was rejected:

The Republican substitute, however, encourages the use of such [ADR] mechanisms “in place of judicial resolution.” Thus, under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII-complaints. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment opportunity rights. American workers should not be forced to choose between their jobs and their civil rights.¹⁷²

Despite this seemingly clear legislative history, courts have differed rather sharply over the proper interpretation of section 118. The inherent ambiguity of the phrase “where appropriate and to the extent authorized by law” has been amplified by the timing of the passage of the Act in relation to the Supreme Court’s issuance of *Gilmer v. Interstate/Johnson Lane*,¹⁷³ in which the Court held that claims brought under the Age

170. H.R. REP. NO. 102-40, pt. 2, at 41. The report further provides: “This view is consistent with the Supreme Court’s interpretation of Title VII in *Alexander v. Gardner-Denver Co.* 415 U.S. 36 (1974). The Committee does not intend for the inclusion of this section be used to preclude rights and remedies that would otherwise be available.” *Id.* *Alexander* held that a union member was not precluded from bringing a Title VII claim in court, even though he had already lost an arbitration involving a claim based on the same facts. *See Alexander*, 415 U.S. at 59-60; *see also* H.R. REP. NO. 102-40, pt. 1, at 97 (stating that alternative dispute resolution mechanisms are intended to supplement rather than supplant Title VII litigation remedies).

171. H.R. 1375, 102d Cong. § 12 (1991) (LEXIS through Legislation & Politics—U.S. Congress—Full Text of Bills) (emphasis added). Section 12 provided: “Where knowingly and voluntarily agreed to by the parties, reasonable alternative means of dispute resolution, including binding arbitration, shall be encouraged in place of the judicial resolution of disputes arising under this Act and the Acts amended by this Act.” *Id.*

172. H.R. REP. NO. 102-40, pt. 1, at 104 (citations omitted).

173. 500 U.S. 20, 26 (1991) (holding that an employee who had agreed to arbitration in signing application to be a securities representative must arbitrate rather than litigate an ADEA claim).

Discrimination in Employment Act¹⁷⁴ could be subject to mandatory arbitration.¹⁷⁵ Whereas section 118 and the accompanying legislative history were drafted prior to the Court's decision in *Gilmer*, the Act was not actually adopted until several months after *Gilmer* was handed down.¹⁷⁶ Relying on the fact that the Act was enacted subsequent to *Gilmer*, several courts have interpreted section 118 as a positive endorsement of mandatory arbitration under Title VII, concluding that despite the section's legislative history, Title VII in general fails to evince a congressional intent not to permit arbitration of claims brought under that statute.¹⁷⁷ By contrast, two courts recently held that section 118 and

174. 29 U.S.C. §§ 621-634 (1994).

175. See *Gilmer*, 500 U.S. at 23. In a previous decision, *Alexander v. Gardner-Denver Co.*, the Court had held that a union member retained his right to bring a Title VII race discrimination claim in court, although the collective bargaining agreement contained both an arbitration clause and a prohibition against race discrimination, and although he had lost in arbitration on a claim based on the same facts he sought to pursue in court. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974). *Gilmer* distinguished but did not expressly overrule *Alexander*. See *Gilmer*, 500 U.S. at 35; see also *McDonald v. City of W. Branch*, 466 U.S. 284, 292 (1984) (allowing an employee to bring a civil rights claim under 42 U.S.C. § 1983 in court, even though there had been "an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement"); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 745 (1981) (permitting union employee to litigate claims under Fair Labor Standards Act, although he had failed to bring the claims before arbitrator as allowed under collective bargaining agreement).

The Court recently refused to resolve the "tension" between *Alexander* and *Gilmer*, instead holding that the language of a union contract was not sufficiently clear to constitute a waiver of the worker's rights to litigate his claim under the Americans with Disabilities Act. See *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 394-97 (1998).

176. *Gilmer* was issued on May 13, 1991. See *Gilmer*, 500 U.S. at 20. The Civil Rights Act of 1991 was finalized on November 21, 1991. See Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991).

177. See *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182-83 (3d Cir. 1998) (relying on section 118 to find Title VII claims are arbitrable, and concluding that the text defeats some contrary legislative history); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880-82 (4th Cir. 1996) (stating that despite the legislative history of section 118, plaintiff failed to show that Congress intended to preclude mandatory arbitration of Title VII claims); *Mathews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.4 (7th Cir. 1995) (citing section 118 to support conclusion that Title VII claims are arbitrable); *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 503-04 (E.D. Mich. 1997) (enforcing compulsory arbitration of Title VII claims "notwithstanding the legislative history of [the 1991 Act]" because the plaintiff failed to show Congress intended to preclude voluntary agreements to arbitrate such claims); *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1457-58 (D. Minn. 1996) (concluding that section 118 "reveals express congressional approval for the use of arbitration to resolve Title VII disputes," and that, despite the seemingly contrary legislative history, plaintiff "failed to demonstrate the existence of an express congressional intent to preclude a waiver of judicial remedies for the violation of her statutory rights under Title VII in both the statute itself and its legislative history"); see also *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 148-51 (1st Cir. 1998) (concluding that the Americans with Disabilities Act, containing section 12212, which is identical to section 118 of the Civil Rights Act of 1991 and has a similar legislative history, does not prohibit court enforcement of prospective arbitration agreements); *Miller v. Public Storage Mgmt., Inc.*, 121

its legislative history express a clear congressional intent to proscribe courts from enforcing agreements requiring employees to arbitrate rather than litigate their Title VII claims.¹⁷⁸

To date, no courts have focused on the relevance of section 118 of the Civil Rights Act of 1991 to the question of whether claims brought under the Civil Rights Act of 1866 may be arbitrated. This Article suggests that section 118 has a different applicability to claims brought under the Civil Rights Act of 1866 than it does to claims brought under Title VII. With respect to Title VII, courts have asked whether section 118 or its surrounding history are sufficient to constitute the explicit rejection of mandatory arbitration called for by the Supreme Court in *Gilmer*.¹⁷⁹ With respect to claims brought under 42 U.S.C. § 1981, however, the proper question is instead whether section 118 *reversed* Congress's intent, expressed clearly in 1866, to preclude mandatory arbitration of claims brought under the 1866 Act.¹⁸⁰

Even if Congress, in 1866, did not intend to permit mandatory arbitration of claims brought under the 1866 Civil Rights Act, some might argue that the 1925 Federal Arbitration Act was intended to permit mandatory arbitration of such claims. Part III explores that argument and concludes that Congress expressed no such intent in 1925.

F.3d 215, 218 (5th Cir. 1997) (concluding that the plaintiff failed to meet the burden of showing that Congress did not intend to permit courts to enforce agreements to arbitrate claims under the ADA).

178. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1189-99 (9th Cir. 1998) (concluding that in reading section 118 in context, particularly in light of its legislative history, it is clear that Congress intended to adopt *Alexander* rule precluding enforcement of compulsory agreements to arbitrate future Title VII claims, rather than *Gilmer*'s acceptance of such agreements), *cert. denied*, 119 S. Ct. 465 (1998); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 200-05 (D. Mass. 1998) (concluding that the express language of section 118, its legislative history, and the purpose of the Civil Rights Act of 1991 endorsed *Alexander* and evidenced Congress's intent to preclude mandatory arbitration of Title VII claims), *aff'd*, No. 98-1246, 1998 WL 880910 (1st Cir. Dec. 22, 1998) (reversing district court holding that predispute arbitration agreements are unenforceable under section 118 of Civil Rights Act of 1991, but nonetheless affirming on grounds that the agreement failed to adequately set forth which claims would be arbitrated); see also *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.) (holding that union members could not be compelled by collective bargaining agreement to arbitrate claims under Title VII, the ADEA, or the ADA, and observing that section 118 is a mere "polite bow to the popularity of 'alternative dispute resolution'"), *cert. denied*, 118 S. Ct. 294 (1997), *cert. denied*, 118 S. Ct. 295 (1997).

179. See *supra* text accompanying notes 173-78.

180. See *infra* Part IV.D for an argument that section 118 did not so reverse Congress's expressed intent.

III. THE FEDERAL ARBITRATION ACT OF 1925

The Federal Arbitration Act¹⁸¹ (FAA) does not explicitly address the question of whether civil rights claims brought under the 1866 Act are subject to mandatory arbitration. That is, it neither states affirmatively that courts must enforce agreements to arbitrate such claims nor prohibits courts from granting motions to compel arbitration of such claims. Thus, Part III examines the background of the FAA and its subsequent interpretation by the courts to determine how the FAA ought to be interpreted as relating to the prior Civil Rights Act of 1866.

A. Circumstances Leading up to Passage of the Federal Arbitration Act

When Congress passed the FAA in 1925, it did not intend to allow employers or sellers of goods or services to require employees or consumers of such goods or services to resolve civil rights disputes through arbitration rather than in court. Nothing in the wording of the statute or in its legislative history supports such an interpretation. Rather, the FAA was passed at the urging of various business groups to allow two or more well-informed businesses to select arbitration in lieu of litigation voluntarily and knowingly, and to require courts to enforce such an agreement. The centerpiece of the FAA, 9 U.S.C. § 2, simply provides that

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁸²

To understand the FAA, one must understand its historical setting. Prior to the passage of a New York statute in 1920,¹⁸³ federal courts were typically quite reluctant to enforce parties' predispute agreements to arbitrate.¹⁸⁴ While they would allow parties to submit a dispute to arbitration if the parties so chose and would often enforce an arbitral

181. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified at 9 U.S.C. §§ 1-208 (1994)).

182. 9 U.S.C. § 2 (1994). 9 U.S.C. §§ 3 and 4 provide enforcement mechanisms that require courts, upon motion, to *compel* arbitration when a party is refusing to honor its prior agreement to arbitrate, and to *stay* any litigation that has been brought notwithstanding the agreement to arbitrate. See *id.* §§ 3-4.

183. New York Arbitration Act, ch. 275, § 2, 1920 N.Y. Laws 804 (codified at N.Y. C.P.L.R. 7501-7514 (McKinney 1980)).

184. See STURGES, *supra* note 144, § 15, at 88; see also *supra* Parts II.D and III.A.

award, courts would not typically require a party that no longer wished to arbitrate to submit its claim to an arbitrator.¹⁸⁵ As court dockets became increasingly overcrowded, businesses found courts' reluctance to enforce their predispute arbitration agreements extremely frustrating and pushed for legislative reform.¹⁸⁶ The 1920 New York statute, passed at the urging of various business groups, called upon courts to enforce "a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract."¹⁸⁷ Reformers quickly learned that federal courts would not necessarily honor the new state arbitration laws,¹⁸⁸ and thus pushed for a federal law that would require courts to honor predispute agreements to arbitrate.¹⁸⁹

All of the testimony and committee reports surrounding the FAA show that Congress focused on allowing two or more business entities to agree voluntarily to arbitrate their commercial disputes, not on allowing business entities or others to deprive civil rights claimants of a judicial forum. First, the bill was sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar Association.¹⁹⁰ Second, the discussions repeatedly referred to resolution of commercial, business, or trade disputes as opposed to all disputes.¹⁹¹ Finally, the Act was endorsed and supported by a series of trade organizations.¹⁹²

At no point during the discussion of the Act was it ever suggested that it might cover civil rights claims. Moreover, when a few legislators questioned whether the Act might prohibit employers, insurers, or others to impose arbitration on a "take-it-or-leave-it"

185. See generally MACNEIL, *supra* note 15, at 20; Reuben, *supra* note 146, at 599-601; Sternlight, *Panacea*, *supra* note 14, at 644-46.

186. See MACNEIL, *supra* note 15, at 25-26 (discussing important role of commercial interests in securing arbitration reform); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926) (discussing history and purpose of arbitration statutes in general); Sternlight, *Panacea*, *supra* note 14, at 645.

187. New York Arbitration Act, ch. 275, § 2, 1920 N.Y. Laws 804. New York's highest court upheld the constitutionality of this Act in *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 291-92 (N.Y. 1921) (concluding New York Act did not violate right of trial by jury, impair the jurisdiction of New York courts, or infringe on contractual obligations).

188. See *Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319, 323 (S.D.N.Y. 1921) (holding that, because state remedial and procedural statute did not govern admiralty cases brought in federal court, a merchant who had entered a contractual agreement to arbitrate could nonetheless litigate the dispute in federal court), *aff'd*, 5 F.2d 218 (2d Cir. 1924).

189. See MACNEIL, *supra* note 15, at 84-85.

190. See *Hearings on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary*, 67th Cong. 2 (1923) [hereinafter *Senate Judiciary Hearings*].

191. See, e.g., *id.* at 1, 3, 8; *Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 6, 7 (1924) [hereinafter *Joint Hearings*].

192. See *Joint Hearings*, *supra* note 191, at 21-22.

basis, the bill's sponsors quickly attempted to reassure the legislators that the Act would not have such an effect. In 1923, at the first hearing on the Act, Senator Walsh questioned Mr. W. H. H. Piatt, Chair of the ABA Committee on Commerce, Trade and Commercial Law, which had drafted the bill.¹⁹³ Senator Walsh stated:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all. Take an insurance policy: there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.¹⁹⁴

Mr. Piatt initially attempted to reassure the Senators that the bill would not cover such cases, observing that the Act was not intended to regulate insurance matters¹⁹⁵ and that the exclusion of labor associations also would protect against such mandated arbitration.¹⁹⁶ Ultimately, however, Mr. Piatt stated that he understood the Senators' concern and that he personally "would not favor any kind of legislation that would permit the forcing [sic] a man to sign that kind of a contract."¹⁹⁷ He then agreed to take up the matter with other members of his ABA Committee.¹⁹⁸

In 1924, the bill was again presented, having been redrafted since its initial consideration in 1923, in part, to respond to questions raised by Senator Walsh.¹⁹⁹ When questioned as to how the bill would affect "take-it-or-leave-it" provisions, such as those between railroads and shippers, the bill's drafter, Julius Cohen, responded, "There is nothing to that contention . . ."²⁰⁰ He explained that because "people are protected today as never before"²⁰¹ through legislation, such as laws regulating railroads and insurance, this objection was unfounded.²⁰² Significantly, neither Piatt nor Cohen nor anyone else attempted to argue that the Act

193. See *Senate Judiciary Hearings*, *supra* note 190, at 7-12.

194. *Id.* at 9.

195. See *id.*

196. See *id.*

197. *Id.* at 10.

198. See *id.* at 11.

199. See *Joint Hearings*, *supra* note 191, at 10.

200. *Id.* at 15.

201. *Id.*

202. See *id.*; see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting) (citing to legislative history in concluding that the FAA was not intended to cover "take-it-or-leave-it" contracts).

would in fact cover such “take-it-or-leave-it” provisions, much less that it would cover the denial of a right to litigate civil rights claims due to such a contract. The fact that no one spoke in opposition to the FAA at the final hearing²⁰³ is also evidence that it was not viewed at the time as a statute that would allow employers or others to mandate arbitration of civil rights claims. Surely, had the Act been envisioned as replacing the right to litigate civil rights claims with a potential contractual requirement of arbitration, it would have garnered some opposition.²⁰⁴

B. Courts’ Initial Reliance on a Public Policy Exception to Protect Against Unfair Arbitration

For the first several decades following the FAA’s enactment, it appears that no one attempted to argue that arbitration agreements could be used to prevent employees, consumers, or other weaker parties from bringing civil rights claims in court.²⁰⁵ In the 1930s and 1940s, however, some commentators began to argue more generally that business interests might attempt to use one-sided arbitration agreements to undermine the public’s interest in justice.²⁰⁶

The United States Supreme Court first considered the question of whether certain purported arbitration agreements should be held unenforceable as a matter of public policy in its 1953 decision in *Wilko v. Swan*.²⁰⁷ The case involved a customer’s attempt to sue a brokerage house under the Securities Act of 1933.²⁰⁸ When the customer attempted to litigate the claim, the brokerage argued that the plaintiff had traded his

203. See *Joint Hearings*, *supra* note 191, at 24.

204. The drafters of the FAA also sought to secure passage of a Uniform Arbitration Act, and they once again provided assurances that arbitration would not be unfairly used by businesses against consumers or employees. See MACNEIL, *supra* note 15, at 54-57.

205. See MACNEIL, *supra* note 15, at 59-63 (discussing early history of FAA and noting “little early trace of the public regulation concern”).

206. See MACNEIL, *supra* note 15, at 61-63; see also AUERBACH, *supra* note 68, at 111-12 (describing concern that “[d]ominant business interests . . . would use compulsory arbitration clauses as a shield for their efforts to control prices, suppress competition, and thwart legislative regulation while they removed their private rules from public supervision”). See generally Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36, 68 (1944) (contending that modern arbitration is “[a]n instrument of cartels and monopolistic trade associations” and that courts are abandoning their constitutional duties by condoning private organizations’ usurpation of judicial power); Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 601-02 (1934) (voicing undesirability of allowing private interests to shield practices from public control); Philip G. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258, 1267 (1933) (arguing that mandatory arbitration is not true arbitration).

207. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

208. See *id.* at 428.

right to litigate for a right to arbitrate by signing the margin agreement.²⁰⁹ By a 7-2 vote, the Supreme Court rejected the argument, concluding that "the right to select the judicial forum is the kind of 'provision' that cannot be waived" pursuant to the Securities Act of 1933.²¹⁰ In so doing, the Court interpreted the 1933 Act as a determination that customers lack the requisite information to select arbitration in the securities context.²¹¹ Subsequently, in *Alexander v. Gardner-Denver Co.*,²¹² the Court held that a union member could file a Title VII race discrimination claim in court, even though he had already lost on the claim in contractually mandated arbitration.²¹³

For a number of years, lower federal courts applied the *Wilko* and *Alexander* rulings in many contexts, holding specifically that courts could not compel the arbitration of civil rights claims brought under Title VII.²¹⁴ More recently, however, as discussed below, the Supreme Court reversed *Wilko* and made clear that at least age discrimination claims are subject to arbitration that is required by the employer of its employees.²¹⁵ Many lower courts also have limited *Alexander* to its facts and hold that individual employees can be required to arbitrate rather than litigate their civil rights claims, without questioning *Alexander's* holding that union members do not lose their right to litigate by taking a claim to arbitration.²¹⁶

209. See *id.* at 432-33.

210. *Id.* at 435.

211. See *id.* at 438. The Court found that the Securities Act of 1933 "was drafted with an eye to the disadvantages under which buyers labor." *Id.* at 435.

212. 415 U.S. 36 (1974).

213. See *id.* at 54-55; see also *McDonald v. City of W. Branch*, 466 U.S. 284, 292 (1984) (allowing discharged employee to litigate constitutional claims under 42 U.S.C. § 1983 even though he had already lost arbitration based on the same claim); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 734-46 (1981) (permitting individual employees to litigate Fair Labor Standards Act claims although they had previously lost wage claims based on the same facts which they presented to joint labor and management grievance committee).

214. See, e.g., *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994) ("[*Alexander*] was widely interpreted as prohibiting any form of compulsory arbitration of Title VII claims."); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989) ("[T]he text of Title VII, while promoting conciliation and informal resolution, does not mandate exhaustion of arbitration before allowing an employee to proceed to a judicial forum."); *EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1431 (9th Cir. 1983) (dictum). This author was not able to locate any cases from this era discussing the arbitrability of claims brought under 42 U.S.C. §§ 1981 and 1982, but presumably courts would have shown the same reluctance to mandate arbitration of these claims.

215. See *infra* notes 231-35 and accompanying text.

216. See, e.g., *Great W. Mortgage Co. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997) (holding that a sexual harassment claim brought under Title VII was arbitrable); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1479-87 (D.C. Cir. 1997) (holding that a race discrimination claim brought under Title VII was arbitrable so long as the employer paid the cost of the arbitration and a meaningful appeal process was afforded); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700

C. *Courts' Increasing Willingness to Mandate Binding Arbitration*

In the 1970s, the Supreme Court began to whittle away the public policy exception that prevented employers and businesses from using contracts to mandate binding arbitration as an alternative to litigation. Initially, the Court held that binding arbitration agreements entered between two business entities should be honored in the international context because, in that arena, binding arbitration helped assure mutual respect and efficient results.²¹⁷ First, in *Scherk v. Alberto-Culver Co.*,²¹⁸ the Court found that a securities law claim that might not be arbitrable domestically was arbitrable based on an agreement between an American company and a German citizen who owned businesses incorporated under the laws of Germany and Lichtenstein.²¹⁹ Later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²²⁰ the Court held that even if claims brought under the 1890 Sherman Act²²¹ could not be required to be arbitrated domestically, an agreement to arbitrate antitrust disputes should be honored and enforced in the international context, so long as the arbitration forum was not shown to be inadequate.²²²

Throughout the 1980s, the Supreme Court applied the same pro-arbitration philosophy to the domestic context as well. *Moses H. Cone*

(11th Cir. 1992) (concluding that Title VII claims are subject to mandatory arbitration when the employee "individually, entered into an agreement whereby [he or she] promised to arbitrate all disagreements with [his or her] employer"); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991) (concluding that securities registration application is enforceable as an agreement to arbitrate employee's sexual harassment claims, notwithstanding employment exclusion of FAA); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) (holding that individual Title VII claims may be subject to compulsory arbitration given the Court's decision in *Gilmer* as to the ADEA). The continuing validity of *Alexander* was questioned in *Wright v. Universal Maritime Service Corp.*, but the Supreme Court refused to resolve the issue. See 119 S. Ct. 391, 394-97 (1998).

217. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). The Court stated:

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Id. (citation omitted). Interestingly, the Court had to stretch a bit to call *Mitsubishi Motors* an international transaction case, in that one of the two parties was a Puerto Rican (and thus United States) car dealership. See *id.* at 616-17.

218. 417 U.S. 506 (1974).

219. See *id.* at 515-16.

220. 473 U.S. 614 (1985).

221. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1994)).

222. See *Mitsubishi Motors Corp.*, 473 U.S. at 629.

*Memorial Hospital v. Mercury Construction*²²³ enunciated for the first time the now oft-quoted phrase that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."²²⁴ In *Shearson/American Express, Inc. v. McMahon*,²²⁵ the Court ruled that consumer claims brought under section 10(b) of the Securities Exchange Act of 1934²²⁶ and the Racketeer Influenced and Corrupt Organizations Act²²⁷ (RICO) were arbitrable given the agreement between the consumer and his broker.²²⁸ Then, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,²²⁹ the Court explicitly overruled *Wilko*, holding that the arbitration agreement between customers and their broker required customers to bring their section 12(2) securities fraud claim as an arbitration matter rather than in court.²³⁰

The Supreme Court and lower federal courts have now held that discrimination claims brought under federal law also can be required to be resolved through binding arbitration rather than in court. In *Gilmer v. Interstate/Johnson Lane Corp.*,²³¹ the Supreme Court found that Mr. Gilmer, a brokerage employee, had agreed to arbitrate any future disputes with his employer when he registered as a securities representative with various exchanges.²³² The Court held, therefore, that Gilmer would be required to arbitrate his age discrimination claim, unless he could show that "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."²³³ The Court announced that Gilmer failed to make such a showing because he could neither point to statutory language or legislative history that precluded the arbitration of ADEA claims in general,²³⁴ nor establish that the particular arbitration procedures would be inadequate to secure enforcement of the

223. 460 U.S. 1 (1983).

224. *Id.* at 24-25 (holding that a defense of waiver should be interpreted narrowly and stating more generally that "[t]he 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, 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").

225. 482 U.S. 220 (1987).

226. 15 U.S.C. § 78j(b) (1994).

227. 18 U.S.C. §§ 1961-1968 (1994).

228. *See McMahon*, 482 U.S. at 242.

229. 490 U.S. 477 (1989).

230. *See id.* at 483. The Court explained that there was no reason to believe that the plaintiff's rights would not be protected in arbitration. *See id.*

231. 500 U.S. 20 (1991).

232. *See id.* at 23.

233. *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

234. *See id.* at 28.

statute.²³⁵ After *Gilmer*, many lower federal courts applied its analysis to claims brought under other civil rights statutes, including Title VII;²³⁶ the Americans with Disabilities Act;²³⁷ and, as discussed below, 42 U.S.C. § 1981.²³⁸

Two federal courts have now bucked this trend, concluding that the legislative histories of Title VII and, in particular, the 1991 amendments to that Act demonstrate that Congress intended to prevent employers from requiring employees to resolve their discrimination complaints through binding arbitration rather than in court.²³⁹ These decisions are, however,

235. See *id.* at 30-32. The Court found that *Gilmer* failed to present specific evidence showing that the arbitrators would be biased, that discovery would be insufficient, that the lack of written awards would preclude proper development of the law, or that the arbitrators would be prevented from fashioning adequate relief. See *id.*

236. See, e.g., *Great W. Mortgage Co. v. Peacock*, 110 F.3d 222, 233-34 (3d Cir. 1997) (finding Title VII sexual harassment claim is arbitrable); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1481-85 (D.C. Cir. 1997) (concluding that Title VII race discrimination claim is arbitrable so long as employer pays cost of arbitration and the procedures provide for meaningful appeal); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879-86 (4th Cir. 1996) (holding that union must arbitrate Title VII claim pursuant to arbitration clause in collective bargaining agreement); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992) (stating that individuals may enter contracts to arbitrate future Title VII claims); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991) (mandating arbitration of individual's Title VII claim); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) (same).

237. See, e.g., *Austin*, 78 F.3d at 875-76 (holding that union must arbitrate ADA claim pursuant to arbitration clause in collective bargaining agreement); see also *Brisentine v. Stone & Webster Eng. Corp.*, 117 F.3d 519, 523 (11th Cir. 1997) (stating that a mandatory arbitration clause may bar litigation of an ADA claim, but only when certain requirements are met). The *Brisentine* court stated that the following three requirements must be satisfied in order for a mandatory arbitration clause to bar litigation of an ADA claim:

First, the employee must have agreed individually to the contract containing the arbitration clause—the union having agreed for the employee during collective bargaining does not count. Second, the agreement must authorize the arbitrator to resolve federal statutory claims—it is not enough that the arbitrator can resolve contract claims, even if factual issues arising from those claims overlap with the statutory claim issues. Third, the agreement must give the employee the right to insist on arbitration if the federal statutory claim is not resolved to his satisfaction in any grievance process.

Brisentine, 117 F.3d at 526-27.

238. See *infra* notes 241-47 and accompanying text. An argument can be made that the Court's decision in *Gilmer*, regarding arbitration of claims under the ADEA, should not be applied to other statutes that preclude discrimination on the basis of race, ethnicity, or gender. The right not to be discriminated against on the basis of age is arguably not a civil right in the same sense as the right not to be discriminated against on the basis of these other characteristics. The fact that the ADEA is codified as part of the Fair Labor Standards Act, rather than as a civil rights statute, also supports this argument. See Fair Labor Standards Act, 29 U.S.C. § 621 (1994). Nonetheless, courts issuing decisions subsequent to *Gilmer* have thus far failed to draw such a distinction. See cases cited *supra* note 236.

239. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1189-90 (9th Cir. 1998) (holding that section 118 of the Civil Rights Act of 1991 precludes employers, as a condition of employment,

at least at present, exceptions to the general rule permitting mandatory arbitration of such claims. It also should be noted that in holding that employment discrimination claims are arbitrable given the terms of the FAA, numerous courts have rejected the seemingly viable argument that 9 U.S.C. § 1 specifically excludes employment claims from the ambit of the statute.²⁴⁰

Courts have focused very little on the central question addressed in this Article—whether agreements to resolve future disputes under the Civil Rights Act of 1866 through binding arbitration are enforceable. This author has located just six cases that even consider the question of whether claims brought under 42 U.S.C. § 1981 are subject to mandatory arbitration,²⁴¹ and no cases that explore whether claims brought under 42 U.S.C. § 1982 must be arbitrated. The six decisions regarding 42 U.S.C. § 1981 have uniformly concluded, many without analysis, that courts may enforce an agreement to arbitrate future claims under the Civil Rights Act of 1866.²⁴² None of the six cases addresses in any detail the question of whether Congress intended to preclude a waiver of judicial remedies with

from requiring employees to waive their right to bring future Title VII cases in court), *cert. denied*, 119 S. Ct. 465 (1998); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 200-05 (D. Mass. 1998) (holding that section 118 of Civil Rights Act of 1991 precludes mandatory arbitration of Title VII claims), *aff'd*, No. 98-1246, 1998 WL 880910 (1st Cir. Dec. 22, 1998) (reversing district court holding that predispute arbitration agreements are unenforceable under section 118 of Civil Rights Act of 1991, but nonetheless affirming on grounds that the agreement failed to adequately set forth which claims would be arbitrated).

240. The FAA states that the Act shall not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). Numerous courts, nonetheless, have held that it applies to virtually all employees involved in interstate commerce. *See, e.g.*, *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-37 (8th Cir. 1997); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 226-27 (3d Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997). For criticism of the broad application of the FAA to employees involved in interstate commerce, see Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 329 (1997); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259. *See generally* STURGES, *supra* note 144, § 15, at 108-09 (observing that many arbitration statutes, including the FAA, excluded coverage of labor disputes). *But see* *Craft v. Campbell Soup Co.*, No. 98-15060, 1998 WL 828105, at *8 (9th Cir. Dec. 2, 1998) (*per curiam*) ("Based on the wording of Section 2, the pre-New Deal understanding of the Commerce Clause, the legislative history of the FAA, and the suggestions gleaned from *Lincoln Mills*, *Gilmer*, and *Terminix*, we hold that the FAA does not apply to labor or employment contracts.").

241. *See* *Johnson v. Circuit City Stores*, 148 F.3d 373 (4th Cir. 1998); *Kidd v. Equitable Life Assurance Society of the United States*, 32 F.3d 516 (11th Cir. 1994); *Pitter v. Prudential Life Ins. Co.*, 906 F. Supp. 130, 138-40 (E.D.N.Y. 1995); *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993); *Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 89 Civ. 3749, 1992 WL 245506, at *6-7 (S.D.N.Y. Sept. 14, 1992); *Roe v. Kidder Peabody & Co.*, No. 88 Civ. 8507, 1990 WL 52200, at *2 (S.D.N.Y. Apr. 19, 1990).

242. *See* cases cited *supra* note 241.

respect to claims brought under 42 U.S.C. § 1981. The only two circuit court decisions, *Johnson v. Circuit City Stores*²⁴³ and *Kidd v. Equitable Life Assurance Society*,²⁴⁴ failed even to consider the question of whether claims brought under 42 U.S.C. § 1981 may be arbitrated, but nonetheless reversed district court decisions refusing to compel arbitration and remanded the disputes for arbitration.²⁴⁵ Two district courts, also without engaging in extended analysis, found 42 U.S.C. § 1981 claims to be arbitrable, concluding that the plaintiffs had failed to provide evidence that Congress intended to preclude arbitration of such claims.²⁴⁶ Two other district courts ordered 42 U.S.C. § 1981 claims to arbitration but, like the circuit courts, did not even focus on the possibility that claims under that particular statute might not be susceptible to court-mandated arbitration.²⁴⁷

243. 148 F.3d 373 (4th Cir. 1998).

244. 32 F.3d 516 (11th Cir. 1994).

245. See *Kidd*, 32 F.3d at 518-20; *Johnson*, 148 F.3d at 374. *Kidd* involved race discrimination claims brought by securities brokerage employees under both Title VII and 42 U.S.C. § 1981. See *Kidd*, 32 F.3d at 517-18. In response to plaintiffs' lawsuit, defendant Equitable asked the district court to compel arbitration of the claims and stay the federal proceedings. See *id.* at 518. The district court denied the request without issuing an opinion, and Equitable appealed. See *id.* The Eleventh Circuit ordered the dispute to arbitration, citing the favoritism expressed toward arbitration by the Supreme Court in *Moses H. Cone Memorial Hospital*. See *id.* at 519 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

Johnson similarly involved a race discrimination claim brought by an African-American job applicant under 42 U.S.C. § 1981. See *Johnson*, 148 F.3d at 374. The district court refused to compel arbitration on the ground that the alleged arbitration agreement was void for lack of consideration. See *id.* at 376. The Fourth Circuit reversed, concluding that the company's agreement to be bound by the arbitrator's decision constituted sufficient consideration, even though the company did not agree to arbitrate disputes it might have against the applicant, and even though the company never actually agreed to consider the job application. See *id.* at 378. The court did not consider whether claims brought under the Civil Rights Act of 1866 were exempt from mandatory arbitration.

246. See *Williams*, 837 F. Supp. at 1436-37 (stating that the plaintiff failed to present evidence that Congress intended to preclude arbitration of 42 U.S.C. § 1981 claims); *Scott*, 1992 WL 245506, at *6-7 (concluding that the argument that 42 U.S.C. § 1981 claims are nonarbitrable lacks legislative and judicial support).

247. See *Pitter v. Prudential Life Ins. Co.*, 906 F. Supp. 130, 138-40 (E.D.N.Y. 1995) (concluding that 42 U.S.C. § 1981 claim was arbitrable while discussing only text and legislative history of Title VII); *Roe v. Kidder Peabody & Co.*, No. 88 Civ. 8507, 1990 WL 52200, at *7 (S.D.N.Y. Apr. 19, 1990) (finding 42 U.S.C. § 1981 claim arbitrable without specifically discussing that statute or its history); cf. *Greene v. American Cast Iron Pipe Co.*, 871 F. Supp. 1427, 1433 (N.D. Ala. 1994) (interpreting consent decree entered pursuant to class action to require employees to arbitrate, rather than litigate, future race discrimination claims under Title VII or 42 U.S.C. § 1981, and concluding that such decree was valid without examining the history of 42 U.S.C. § 1981).

IV. IT IS INCONSISTENT WITH CONGRESSIONAL INTENT TO COMPEL ARBITRATION OF CLAIMS BROUGHT UNDER 42 U.S.C. §§ 1981 AND 1982

A. *Gilmer's Requirement That Courts Look for Affirmative Evidence that Congress Intended to Preclude Arbitration of Certain Claims*

Gilmer involved a claim of age discrimination brought under the Age Discrimination in Employment Act²⁴⁸ (ADEA).²⁴⁹ When the employer argued that *Gilmer's* claim must be arbitrated given the terms of the registration application he had signed, *Gilmer* responded that ADEA claims should not be subject to mandatory arbitration.²⁵⁰ To prevail on this argument, the Court stated that

the burden is on *Gilmer* to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes. Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."²⁵¹

Because the Court found that the 1925 FAA imposed "a liberal federal policy favoring arbitration agreements,"²⁵² claims brought under statutes passed subsequent to that date are assumed to be arbitrable unless Congress has expressed a contrary intent.²⁵³

B. *The Gilmer Test Makes Little Sense as Applied to a Statute Enacted More Than Fifty Years Before the FAA*

While the *Gilmer* analysis has some coherence to the extent it is applied to statutes passed after the enactment of the FAA in 1925,²⁵⁴ it

248. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1994 & Supp. 1996).

249. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

250. See *id.* at 24, 26-27.

251. *Id.* at 26 (citations omitted). According to the Court, *Gilmer* conceded that "nothing in the text of the ADEA or its legislative history explicitly precludes arbitration." *Id.* *Gilmer* argued, however, that "compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA." *Id.* at 27. The Court rejected his argument, finding that ADEA claims were not per se exempt from compulsory arbitration, and that *Gilmer* had failed to show that the particular arbitration process being used was so flawed as to be inconsistent with the purpose of the ADEA. See *id.* at 28-29, 30-32.

252. *Id.* at 25 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

253. See *id.* at 25-26.

254. Even as applied to those statutes enacted after the FAA, the doctrine may be criticized. As I and others have argued elsewhere, it is by no means clear that Congress intended to enact a general preference for arbitration over litigation when it passed the FAA. See, e.g., MACNEIL, *supra* note 15, at 170; Sternlight, *Panacea*, *supra* note 14, at 641, 644-74. Rather, a more accurate history

makes little sense to apply the same test to those statutes enacted prior to the FAA. In fact, all but one of the statutory causes of action the Supreme Court has now proclaimed to be arbitrable were founded upon the following laws passed subsequent to 1925: the Securities Exchange Act of 1934,²⁵⁵ the Racketeer Influenced and Corrupt Organizations Act²⁵⁶ (RICO), the Securities Act of 1933,²⁵⁷ and the Age Discrimination in Employment Act of 1967.²⁵⁸ The Court's decision in *Mitsubishi Motors Corp.* may at first appear to be an exception to this general rule because the decision compelled arbitration of a claim brought under the 1890 Sherman Act.²⁵⁹ *Mitsubishi Motors Corp.*, however, is easily distinguished for two reasons. First, the decision carefully refused to reach the question of whether all claims under the Sherman Act are arbitrable,²⁶⁰ instead making a much narrower ruling that antitrust claims brought *in the context of international business transactions* are arbitrable.²⁶¹ The

reveals that the FAA was passed only to allow commercial entities of roughly equal bargaining power to enter into binding agreements to arbitrate future disputes. See MACNEIL, *supra* note 15, at 170 (calling the Supreme Court's history of the FAA "pathological"); Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401-02 (concluding that the arbitration law made by the Court is a "shantytown" and that Congress would never have passed the law that the Court has interpreted to allow consumers, patients, employees, investors, and others to be deprived of their rights); Sternlight, *Panacea*, *supra* note 14, at 641, 644-74 (tracing the development of arbitration law by the Court and the evolution of the myth of arbitrator preference). In light of this history and the fact that it was not until the 1983 decision in *Moses H. Cone Memorial Hospital* that the Court began to proclaim that arbitration should be favored, it is not at all clear why Congress in 1967 would have felt it necessary to state that age discrimination claims could not be forced into arbitration. See generally Sternlight, *Panacea*, *supra* note 14, at 660-61 (discussing *Moses H. Cone Memorial Hospital* decision).

255. Securities Exchange Act of 1934, ch. 304, § 10, 48 Stat. 891 (codified at 15 U.S.C. § 78j(b) (1994)); see *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (concluding that the consumer's section 10(b) claim against the brokerage was arbitrable).

256. Racketeer Influenced and Corrupt Organizations Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941, 941-44 (codified at 18 U.S.C. §§ 1961-68 (1994 & Supp. 1996)); see *McMahon*, 482 U.S. at 238-42 (concluding that the court could compel arbitration of the consumer's RICO claim against the brokerage).

257. Securities Act of 1933, ch. 463, § 806, 39 Stat. 799 (codified at 15 U.S.C. § 77 (1994 & Supp. 1996)); see *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (holding that securities customers who had signed agreements to arbitrate disputes with the brokerage could not bring those claims in court).

258. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602 (codified at 29 U.S.C. § 621 (1994 & Supp. 1996)); see *supra* text accompanying notes 231-35.

259. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1994 & Supp. 1996)).

260. See *Mitsubishi Motors Corp.*, 473 U.S. at 628-29 ("We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions.").

261. See *id.* at 629. The Court stated:

bulk of the decision emphasized the unique contributions that arbitration can make to the resolution of international business disputes.²⁶² Second, at no point in *Mitsubishi Motors Corp.* did the Court address the significance of the fact that the Sherman Act was passed prior to the FAA. That is, the argument made in this Article apparently was not presented to, and certainly was not ruled on, by the Supreme Court.

It would only be reasonable to expect the 1866 Congress to explicitly exempt claims brought under the 1866 Act from binding arbitration if Congress thought such arbitration was even a remote possibility. Yet, it makes no sense to expect that the 1866 Congress would have been able to anticipate the passage of the Federal Arbitration Act in 1925 or the interpretation the Court would give to that statute. Thus, it is hardly surprising that Congress did not see fit, in either the language of the statute or its legislative history, to specify that courts should not compel arbitration of claims brought under the Civil Rights Act of 1866.

Nor can it reasonably be argued that arbitration was sufficiently well-established in 1866 that Congress should have made clear that civil rights claims could not be compelled to be arbitrated, even prior to the passage of the FAA. The one point on which everyone seems to agree is that prior to the passage of the FAA, courts would not specifically enforce agreements to arbitrate future disputes. This point has been recognized over and over again by the drafters of the FAA,²⁶³ by the Supreme Court,²⁶⁴ by lower courts,²⁶⁵ and by commentators.²⁶⁶ When Congress

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Id.

262. *See id.* at 629-40.

263. *See, e.g.,* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270 (1926) (discussing how the law prior to the passage of the FAA and Uniform Arbitration Act permitted parties to refuse to comply with contractual agreements to arbitrate).

264. *See, e.g.,* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (stating that the FAA was enacted to reverse courts' "longstanding judicial hostility" to arbitration agreements); *Southland Corp. v. Keating*, 465 U.S. 1, 10, 13 (1984) (stating that "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," and that the FAA sought "to 'overcome the rule of equity, that equity will not specifically enforce an[y] arbitration agreement'"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

265. *See, e.g.,* *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-85 (2d Cir. 1942) (summarizing courts' refusal, at common law, to enforce agreements to arbitrate future disputes).

266. *See, e.g.,* MACNEIL, *supra* note 15, at 15; MACNEIL ET AL., *supra* note 143, § 4.1.2; Carrington & Haagen, *supra* note 254, at 339-43; Linda R. Hirshman, *The Second Arbitration*

passed the Civil Rights Act of 1866, it had no reason to protect against courts' enforcement of agreements to arbitrate future disputes that might arise under that statute.²⁶⁷ In short, to conclude that the absence of such expressed intent is an endorsement of the arbitration of those disputes is absurd.

C. Allowing the Compulsory Arbitration of Claims Brought Under the 1866 Act Would Be Inconsistent with the Purpose and Intent of That Statute

While Congress did not, for the reasons set forth above, expressly address the question of whether claims brought under the Civil Rights Act of 1866 could be compelled to be arbitrated, allowing the compulsory arbitration of such claims is demonstrably inconsistent with the purpose and intent of that statute. Specifically, in recognition of the fact that discriminatory attitudes prevailed among private parties and even state court judges, Congress established a set of enforcement mechanisms to allow persons claiming discrimination to have their disputes heard in federal court.²⁶⁸ The new federal court jurisdiction provided an alternative to the Freedmen's Bureau tribunals, which could not, at least on a long-term basis, take the place of state courts.²⁶⁹ Given courts' refusal in 1866 to enforce agreements to arbitrate future disputes, allowing employers or others to insist that civil rights disputes be resolved through arbitration seems particularly inconsistent with the purpose of the Act. Furthermore, in light of the 1866 Act's purpose to ensure that all persons be treated as people, rather than as commercial objects,²⁷⁰ it would be inappropriate to use a commercial arbitration statute to undercut the 1866 Act.

Trilogy: The Federalization of Arbitration Law, 71 VA. L. REV. 1305, 1309 (1985).

267. Some might argue that because some disputes between planters and freedmen were being "arbitrated" by the Freedmen's Bureau in 1865, Congress should have spoken clearly if it did not intend to permit arbitration of claims brought under the Civil Rights Act of 1866. *See supra* text accompanying notes 158-62. Such an argument, however, would fail. As discussed above, even if the Bureau's tribunals could be described as arbitration, they were not private contractual arbitration. *See supra* text accompanying notes 158-62. At no time prior to the passage of the Civil Rights Act of 1866 were courts compelling freedmen to arbitrate disputes according to terms set out in private contracts with planters. Rather, the Bureau's tribunals were designed to provide freedmen with a fairer alternative to the discriminatory state courts. *See supra* text accompanying notes 62-70, 158-62.

268. *See supra* Part II.C.

269. *See supra* notes 62-70 and accompanying text for a discussion of the Freedmen's Bureau tribunals.

270. *See infra* Part IV.C.4.

1. The Civil Rights Act of 1866 Provided That Disputes Under the Act Should Be Resolved in Federal Court

As discussed above, the drafters of the 1866 Act saw civil and criminal litigation in court as the most effective means of enforcing the substantive provisions of the new Civil Rights Act.²⁷¹ Not satisfied with merely offering a right of appeal to the Supreme Court, they instead took the highly unusual step for the time of creating federal court original jurisdiction over civil rights claims.²⁷² The drafters viewed federal courts as critical to providing a potentially fair forum in which the civil rights claims might be heard. As Representative Thayer put it, a judicial forum was desirable because it would be "quiet, dignified, firm and constitutional."²⁷³ State courts could not be trusted to be fair and neutral in their consideration of claims brought under the 1866 Act.²⁷⁴ Nor could the Freedmen's Bureau tribunals take the place of state courts on a long-term basis. While such tribunals had proved somewhat effective during the military occupation of the South,²⁷⁵ pressure was mounting to return general jurisdiction to the state courts.²⁷⁶

2. Allowing Civil Rights Disputes to Be Resolved Through Private Arbitration Would Be Inconsistent with the Act's Goal of Protecting Against Private Bias

The question facing courts today is whether to enforce agreements to resolve future civil rights disputes in arbitration, rather than in court. To

271. See *supra* Part II.C.

272. See *supra* Part II.C.

273. CONG. GLOBE, 39th Cong., 1st Sess. 1153 (1866) (statement of Rep. Thayer); see *supra* text accompanying note 120.

274. See *supra* text accompanying notes 136-42.

275. As discussed above, there was substantial variety among the Freedmen's Bureau tribunals, even within a given state. See *supra* notes 66-70. General Howard's 1865 report to Congress similarly recognized that the "provost courts," also under the control of the military, upon occasion issued decisions that were prejudiced against the freedmen. H.R. EXEC. DOC. NO. 39-11, at 22 (1865). Howard stated:

In the great majority of instances that have come to my knowledge these courts have decided fairly, but there are some exceptions, where officers composing them, having the infectious prejudice against the negro, have discriminated very much against his interest, and meted out to those who abused him, either by extortion or violence, punishments in no way commensurate with the offenses.

Id. at 22.

276. See H.R. EXEC. DOC. NO. 39-11, at 23 (discussing trend to return jurisdiction to state courts); see also Oakes, *supra* note 46, at 70 (discussing the collapse of Freedmen's Bureau courts beginning in late 1865). As a result of his discontent with state court jurisdiction, General Howard urged the provision of federal jurisdiction to support federal freedmen's courts. H.R. EXEC. DOC. NO. 39-11, at 23. The Civil Rights Act of 1866 instead simply allowed freedmen to bring their claims directly to regular federal courts. See *supra* Part II.C.

examine whether or not such enforcement would be consistent with the purpose and intent of the Civil Rights Act of 1866, one must consider what enforcement of such agreements would have meant in 1866. In the employment setting, it is possible to imagine that a southern planter might have asked or demanded that his newly freed workers not only agree to accept certain wages and working conditions, but also agree to resolve any claims under the new Civil Rights Act by arbitration, rather than in court. In the real estate context, it is conceivable that a realtor or seller of property might have imposed a similar contractual term. Perhaps, schools or public accommodations also might have required all persons to accept arbitration of future civil rights claims in lieu of litigation.

What would this arbitration have looked like? Arbitration, by definition, is private justice. Arbitration agreements would have required that disputes be resolved by certain private persons, rather than by judges. In an era when racial discrimination was rife, when African-Americans still could not vote,²⁷⁷ when integration was in most contexts unthinkable,²⁷⁸ and when legislation had been required to provide African-Americans with equal rights to contract or serve as witnesses or jurors, it seems fair to assume that the white drafters of such clauses would have insisted upon white arbitrators. Without being overly cynical, it also seems fair to assume that such drafters would have attempted to use the arbitration clauses to weaken the provisions of the Civil Rights Act as much as possible. The 1866 Act was strongly opposed. Even after the close of the Civil War and the adoption of the Thirteenth Amendment, many southern planters and others were doing whatever they could to restore slavery in fact, if not in name. They were, for example, creatively using both statutes and private contracts to keep wages as low as possible, to limit the freedmen's right to work and travel, to prevent the freedmen from purchasing property, and even to re-impose a form of servitude as a punishment for vagrancy or excessive debts.²⁷⁹ Thus, had such arbitration clauses existed, their drafters might not only have insisted claims be heard by potentially biased arbitrators but also shortened the

277. The Fifteenth Amendment, granting African-Americans the right to vote, was not adopted until 1870. See U.S. CONST. amend. XV.

278. Even the supporters of the Civil Rights Act of 1866 could not imagine integrated marriages. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 420 (1866) (stating that the law does not interfere with statutes prohibiting interracial marriage, because they apply equally to all races); see also *id.* at 600 (statement of Sen. Trumbull) (joking with Sen. Davis that Kentuckians must be prone to enter into interracial marriages). Nor did the Act's supporters typically seek to provide equal rights in all areas, but rather only to ensure equal treatment as to certain limited, fundamental rights. Compare CONG. GLOBE, 39th Cong., 1st Sess. app. at 182 (1866) (raising concern that passage of the Act would void all legislation and rules providing best seats and other accommodations to whites), with *id.* at 1836 (explaining that the Act only provides for equality of certain fundamental rights).

279. See *supra* text accompanying notes 51-61.

statute of limitations for bringing claims, limited arbitrators' ability to award significant relief, required that arbitration claims be filed in distant inaccessible venues, or imposed high administrative costs for filing the claims. After all, these types of mechanisms have been used even today to limit the ability of consumers, employees, and others to file arbitration claims.²⁸⁰

It seems clear that the 1866 Congress would have refused to countenance enforcement of such potentially abusive agreements. First, that Congress was well aware of the need to provide a fair and adequate mechanism for enforcing the substantive provisions of the Act.²⁸¹ Congress recognized that merely passing a good statute would not suffice if it could be enforced only in racist state courts.²⁸² Certainly, Congress would have had similar concerns about the elimination altogether of a judicial role. Second, the 1866 Congress was quite cognizant of the existence and import of private discrimination.²⁸³ It knew and strongly objected to the fact that private individuals were using violence and economic means in an attempt to make an end run around the new Thirteenth Amendment.²⁸⁴ Surely, this same Congress would have been concerned with the possibility that arbitration as well might be used as a tool of oppression.

3. Given the State of Arbitration Law in 1866, It is Inconceivable that Congress Would Have Intended to Allow Courts to Enforce Predispute Agreements to Arbitrate Claims under the Civil Rights Act of 1866

Some might argue that the 1866 Congress could well have endorsed court enforcement of voluntary arbitration of civil rights disputes in order to allow parties to minimize their expenditures of money and time in resolving such disputes. Evidence does show that advocates of the 1866 Act had some concern with the costliness of civil litigation and, for this reason, included criminal as well as civil enforcement mechanisms in the Act.²⁸⁵ Modern arbitration advocates might bolster this argument by

280. See Sternlight, *Panacea*, *supra* note 14, at 680-86 (discussing mechanisms that have been included in arbitration agreements by drafters to obtain strategic advantages over others).

281. See *supra* Part II.C.

282. See *supra* text accompanying notes 136-42.

283. See *supra* Part II.B.

284. See *supra* text accompanying notes 51-61, 97-102.

285. See Kaczorowski, *supra* note 29, at 583. He states:

A second obstacle to effective civil rights enforcement was the cost involved in enforcing civil rights through civil litigation in the federal courts. This cost would have rendered federal civil remedies a virtual nullity for those impoverished freedmen who needed them the most. The framers believed that penal remedies were more effective than civil

suggesting that the courts could have been expected to refuse to enforce the worst and most unfair agreements to arbitrate, such as those described above. While perhaps appearing reasonable at a superficial level, this analysis is ultimately fallacious and ahistorical in that it seeks to apply current thinking and even bodies of law to an era in which they were not applicable.

Courts in 1866 did not, with very few exceptions, enforce agreements to arbitrate future disputes.²⁸⁶ Thus, even assuming that there was a concern in 1866, as there is today, with the costliness of litigation, neither courts nor legislatures responded to this concern by enforcing predispute arbitration agreements. In that era, policy makers apparently felt that the costs of enforcing such agreements would outweigh any efficiency gains.²⁸⁷ Instead, the 1866 Congress dealt with the expense of civil litigation by including in the Civil Rights Act both criminal penalties and mandatory enforcement by federal officials.²⁸⁸

Nor is there any evidence that the 1866 courts could have or would have selectively refused to enforce results secured in an arbitration setting. To the extent that parties did voluntarily submit their claims to arbitration in 1866, courts were quite willing to enforce the decisions reached by the arbitrators.²⁸⁹ While the courts might, at times, refuse to enforce an award that was reached through dishonest or unfair proceedings,²⁹⁰ in general, they were willing to sanction arbitral results without examining them too closely.²⁹¹ Various modern arbitration decisions have

remedies because the government would bear the cost of this protection, and because the deterrent effect of criminal penalties was greater than that of civil damages. The framers expressed these views in rejecting an amendment to the Civil Rights Bill that would have substituted civil remedies for the penal sanctions of section two.

Id. (footnote omitted). Kaczorowski quotes Representative Wilson, who observed that to obtain civil remedies a discrimination victim would have to "press his own way through the courts and pay the bills attendant thereon. This may do for the rich, but to the poor, who need protection, it is a mockery." *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1295 (1866)); see also NIEMAN, *supra* note 46, at 181-82 (discussing barriers of cost and delay faced by those freedmen who did choose to file court actions seeking payment of wages or crops which were due).

286. See *supra* Part II.D.

287. These costs were seen to include the ouster of court jurisdiction as well as possible negative consequences for persons who would be denied the opportunity to resolve their disputes in court. See *supra* Part III.A.

288. See *supra* Part II.C; see also Civil Rights Act of 1866, ch. 31, §§ 2, 4-9, 14 Stat. 27 (providing for criminal penalties and federal enforcement).

289. See, e.g., MACNEIL, *supra* note 15, at 19. See generally Jones, *supra* note 144 (discussing use of arbitration from the seventeenth through the nineteenth centuries).

290. See, e.g., MACNEIL, *supra* note 15, at 19 ("[Courts] 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." (quoting *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, 361 (N.Y. Ch. 1817))).

291. See *supra* Parts II.D and III.A.

shown that it is often quite difficult to prove arbitral bias to the satisfaction of a court on a case-by-case basis.²⁹²

Finally, the Bureau's use of tribunals, which some have called "arbitral," to resolve disputes between freedmen and planters supports, rather than undercuts, the argument made here. These courts were established by the Freedmen's Bureau to protect freedmen from potentially oppressive treatment at the hands of planters and state courts.²⁹³ The government's use of such specialized tribunals was in no way equivalent to allowing planters to structure their own arbitral tribunals through private contract. Rather, the same prejudice that led the Bureau to create tribunals as an alternative to the state courts would have made legislators extremely wary of a private arbitral system. In short, given the attitude toward arbitration in 1866, it is quite difficult to reconcile the purposes of the 1866 Act with the endorsement of mandatory arbitration.

4. Applying the FAA to Claims Brought Under the Civil Rights Act of 1866 Would Be Inconsistent with the Premise of the Act and of the Thirteenth Amendment Not to Treat Persons as Commercial Objects

The FAA and the Civil Rights Act of 1866 are two entirely different types of statutes. They were passed for very different purposes in very different times. Whereas the Civil Rights Act of 1866 grew directly out of the Thirteenth Amendment's prohibition on treating persons as slaves or commercial objects,²⁹⁴ the FAA was designed to allow two or more businesses involved in interstate commerce to enter into a mutually desirable arbitration agreement.²⁹⁵

Yet, the statutes are ultimately reconcilable so long as courts do not attempt to apply them beyond their intended scopes. When courts today

292. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-31 (1991) (refusing to assume that a New York Stock Exchange arbitration panel made up of brokerage managers would be biased against plaintiff's age discrimination claim); *DeGaetano v. Smith Barney, Inc.*, No. 95 Civ. 1613, 1996 WL 44226, at *6 (S.D.N.Y. Feb. 5, 1996) (holding arbitration agreement valid even though it precluded employee bringing Title VII action from obtaining attorney fees or punitive damages); *Bakri v. Continental Airlines, Inc.*, No. CV 92-3476 SVWC(K), 1992 WL 464125, at *3 (C.D. Cal. Sept. 24, 1992) (rejecting an employee's claim that arbitration was biased when all of the panel members were required to be company employees, and observing that the employee would have to show bias rising to the level of corruption to vacate arbitral award); *Sosa v. Paulos*, 924 P.2d 357, 361 (Utah 1996) (finding that patient had failed to show bias in arbitration agreement requiring that medical malpractice claim be heard by panel of board-certified orthopedic surgeons).

293. See *supra* notes 62-70 and accompanying text; see also 2 HOWARD, *supra* note 46, at 253 ("These lesser bureau courts were often necessary for the protection of negroes against small personal persecutions and the hostility of white juries.").

294. See *supra* text accompanying notes 38-61.

295. See MACNEIL, *supra* note 15, at 34-58 (outlining forces leading to passage of FAA and Uniform Arbitration Act); Sternlight, *Panacea*, *supra* note 14, at 644-49 (discussing origin of FAA).

find that claims brought under 42 U.S.C. §§ 1981 and 1982 ought to be subject to compulsory arbitration, they typically rely on the FAA and the “favoritism for arbitration” the Supreme Court has found in that statute.²⁹⁶ However, relying on the FAA’s supposed favoritism for arbitration as to transactions involving *interstate commerce* to support arbitration of civil rights claims is antithetical to the 1866 Act’s edict that all people must be afforded certain civil rights and *not* merely treated as *commercial* objects. The fact that the Supreme Court found the FAA relevant to the employment context in *Gilmer*²⁹⁷ and that most courts have narrowly interpreted the FAA’s employment exclusion to apply the FAA to employment contracts²⁹⁸ does not undercut the argument presented here. This Article does not assert that the FAA is generally inapplicable to employment contracts,²⁹⁹ but only that it is wrong to apply its policy of favoring arbitration as to *interstate commerce* to claims brought under a statute that was drafted explicitly to avoid treating persons as *commercial* objects.

D. The 1991 Amendments Reflect Congress’s Continued Opposition to Mandatory Arbitration of Civil Rights Claims Under 42 U.S.C. § 1981

Some might attempt to argue that section 118 of the Civil Rights Act of 1991 was designed to make clear that claims under 42 U.S.C. § 1981,

296. See, e.g., *Kidd v. Equitable Life Assurance Soc’y of the United States*, 32 F.3d 516, 519 (11th Cir. 1994) (quoting the Supreme Court’s edict in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration” to support the conclusion that a 42 U.S.C. § 1981 claim must be arbitrated), *cert. denied*, 118 S. Ct. 626 (1997); *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1433-1436 (N.D. Ill. 1993) (citing FAA’s “broad federal policy favoring arbitration” to support the conclusion that plaintiff failed to show 42 U.S.C. § 1981 claims are nonarbitrable); *Scott v. Merrill Lynch, Pierce, Tenner & Smith, Inc.*, No. 89 Civ. 3749, 1992 WL 245506, *3, *6-7 (S.D.N.Y. Sept. 14, 1992) (emphasizing FAA’s favoritism for arbitration in compelling arbitration of 42 U.S.C. § 1981 claim); *Roe v. Kidder Peabody and Co.*, No. 88 Civ. 85071990, WL 52200, at *4-7 (S.D.N.Y. Apr. 19, 1990) (citing recent Supreme Court cases interpreting FAA as favoring arbitration to support finding that 42 U.S.C. § 1981 claim is arbitrable).

297. *Gilmer* carefully sidestepped the question of whether the FAA’s section 1 employment exclusion excludes application of the statute to all contracts of employment. See *Gilmer*, 500 U.S. at 25 n.2. Rather, the Court noted that *Gilmer* had failed to raise this issue in the courts below, and also emphasized that as a technical matter *Gilmer*’s agreement to arbitrate was contained in an application to serve as a broker in a particular securities exchange, rather than in an employment agreement. See *id.*

298. See *supra* note 240 and accompanying text.

299. Nor certainly does this Article dispute such a contention. In fact, the historical arguments of commentators such as Jeffrey Stempel and Mathew Finkin, that the section 1 exclusion was intended to preclude application of the FAA to any employment contracts, do appear to be correct. See sources cited *supra* note 240.

while perhaps not originally intended to be subject to compulsory binding arbitration, are now arbitrable.³⁰⁰ As noted above, this is a very different argument than that which has been addressed by several courts in the context of claims brought under Title VII.³⁰¹ The issue in those cases has been whether, assuming that Congress did not evince an intent to preclude mandatory arbitration when it originally passed Title VII in 1964, the Civil Rights Act of 1991 may be found to evince such congressional intent.³⁰² Courts have split on this question.³⁰³

The argument some might attempt to make as to the relationship between section 118 of the 1991 Act and the 1866 Act is very different and much more extreme. If one accepts the arguments set out in this Article—that the 1866 Act itself evinces a hostility to mandatory arbitration, whether in its language, legislative history, or purpose—then advocates of such arbitration would have to show that the Civil Rights Act of 1991 *reverses* Congress's original intent. One can at least argue with a straight face that the ambiguous pro-arbitration language of section 118, combined with the post-*Gilmer* timing of the passage of the 1991 Act, fails to evince a hostility to mandatory arbitration sufficient to overcome the general pro-arbitration presumption employed by the Court.³⁰⁴ By contrast, it is very difficult to see how one could credibly argue that this confused language and legislative history are sufficiently strong to override Congress's previously expressed view that claims brought under the Civil Rights Act of 1866 should not be subject to mandatory arbitration.³⁰⁵ The explicit language of section 118 states only

300. The 1991 Civil Rights Act did not amend 42 U.S.C. § 1982, and thus would not affect the arbitrability of claims under that statute.

301. See *supra* text accompanying notes 179-80.

302. See *supra* text accompanying note 180.

303. See *supra* text accompanying notes 173-80; see also *supra* Part IV.D. Compare *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1189-90 (9th Cir. 1998) (“[U]nder the Civil Rights Act of 1991 employees may not be required, as a condition of employment, to waive their right to bring future Title VII claims in court.”), *cert. denied*, 119 S. Ct. 465 (1998), and *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 199-205 (D. Mass. 1998) (holding that the Civil Rights Act of 1991 precludes employers from using predispute arbitration agreements to compel employees to arbitrate claims brought under Title VII), *aff’d*, No. 98-1246, 1998 WL 880910 (1st Cir. Dec. 22, 1998) (reversing district court holding that predispute arbitration agreements are unenforceable under section 118 of Civil Rights Act of 1991, but nonetheless affirming on grounds that the agreement failed to adequately set forth which claims would be arbitrated), with *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182-83 (3d Cir. 1998) (holding that the Civil Rights Act of 1991 “evinces a clear Congressional intent to encourage arbitration of Title VII”), and *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880-86 (4th Cir. 1996) (holding that Title VII claims are arbitrable).

304. See *supra* text accompanying notes 173-80; see also *supra* Part IV.D. This author, however, finds the contrary reasoning of the *Duffield* decision and the *Rosenberg* trial court decision to be much more compelling. See cases cited *supra* note 178.

305. As I have argued throughout this Article, although the 1866 Congress did not explicitly bar

that various forms of alternative dispute resolution shall be encouraged *where appropriate and to the extent authorized by law*.³⁰⁶ As one court observed, it is likely significant that most of the ADR techniques listed by Congress—negotiations, conciliation, facilitation, mediation, factfinding, and minitrials—are non-binding in nature.³⁰⁷ As discussed above, moreover, the legislative history of the 1991 Act reflects a clear unwillingness to allow employers to require their employees to resolve their civil rights claims through binding arbitration rather than in court.³⁰⁸ In drafting the legislative reports that accompanied the Civil Rights Act of 1991, Congress could hardly have been clearer in stating that the ADR provision was not intended to deny persons their day in court. Surely, it would therefore be wrong, as well as highly ironic, to use that amendment to deprive claimants under 42 U.S.C. §§ 1981 and 1982 of their day in court.

V. CONCLUSION

Courts must not allow their enthusiasm for binding arbitration to overwhelm their sense of justice or common sense. At a momentous time in our history, the 1866 Congress enacted legislation to safeguard the citizenship of the newly freed slaves and to fight the special evil of racial discrimination. The Act's drafters recognized that the way in which this new law would be enforced was crucial. As Representative Trumbull put it,

the only question is, will this bill be effective to accomplish the object, for the first section will amount to nothing more than the declaration in the Constitution itself unless we have the machinery to carry it into effect. A law is good for nothing without a penalty, without a sanction to it, and that is to be found in the other sections of the bill.³⁰⁹

To make the new legislation as effective as possible, Congress provided the strongest procedural safeguard it could—allowing claims under the 1866 Act to be brought in federal court. That same Reconstruction Congress would not have countenanced courts subverting that judicial process by mandating that race discrimination plaintiffs resolve their disputes through private arbitral mechanisms.

mandatory arbitration of claims brought under that statute, such a prohibition is implicit in, and thus expressed by, the statute.

306. See Civil Rights Act of 1991 § 118, 42 U.S.C. § 1981 (1994 & Supp. 1996).

307. See *Rosenberg*, 995 F. Supp. at 199-205. While arbitration, of course, is referenced as well, it seems in context that Congress was referring to either non-binding arbitration or to voluntary submission of a dispute that had already arisen to arbitration.

308. See *supra* Part II.E.

309. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

Congress has at no time announced that courts should now lend their authority to mandating the arbitration of race discrimination claims brought under the Civil Rights Act of 1866. It made explicit no such policy when it passed the Federal Arbitration Act in 1925. Nor did it announce such a policy when it passed the Civil Rights Act of 1991. And why should Congress make such a change? Although racist attitudes and behavior have moderated since 1866, they continue to plague our society. Vigorous enforcement of civil rights claims remains critical to enforcing antidiscrimination legislation. Employers and others still possess the power and incentives to use private arbitration agreements to insulate themselves from liability for discriminatory behavior.

The Supreme Court has repeatedly made clear that Congress has the power to restrict courts from compelling arbitration in certain areas. In this particular area, race discrimination claims brought under the Civil Rights Act of 1866, Congress has clearly spoken. Persons asserting such claims cannot be forced into binding arbitration. We must not allow present day concerns for docket-clearing to overcome our respect for racial justice.