ARTICLE

A NEW DIRECTION FOR AMERICAN LABOR LAW: INDIVIDUAL AUTONOMY AND THE COMPULSORY ARBITRATION OF INDIVIDUAL EMPLOYMENT RIGHTS

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I. INTRODUCTION

Industrial pluralism[1] is dead. For whatever reason,

1. The theories of "industrial pluralism" call for the use of the collective bargaining agreement to erect a system of industrial self-government within which arbitration acts as the judicial function and minimizes the government's role. Note, *Arbitration After Communications Workers: A Diminished Role?*, 100 HARV. L. REV. 1307, 1309 (1987). The tenets of "industrial pluralism" include:

(1) the creation of a democratic workplace through collective bargaining;

(2) the agreed upon arbitration serving the dispute resolution/judicial role;

(3) the workplace operating as a mini-democracy without the burden of government intervention;

(4) the rights of the majority (through a union) taking priority over individual rights in collective bargaining; and

collective bargaining no longer regulates the labor market.[2] The loss of this source of bargaining power that, for the last fifty years, has given workers the power to protect their own interests and obtain socially acceptable terms of employment has created a void.[3] Professors Clyde W. Summers and Katherine Stone, pointing to federal statutes and state judicial decisions, argue that the void created by the decline of the bargaining process is being filled by legislatively and judicially created individual rights.[4] Professors Summers and Stone are correct, but only to a point. Congress in the last thirty years has indeed created numerous individual rights statutes,[5] and state courts have in the last twenty years become far less inclined to unconditionally accept the doctrine of employment at will.[6] However, to interpret from these observations the proposition that the long-term employment trend is to provide a judicial forum for individual employment rights is to ignore federal judicial attempts over the last ten years to eviscerate individual employment rights and to kick as many such cases as possible out of the court system.[7]

Even though state courts have seemed to become increasingly more receptive to individual employment claims, federal courts apparently have an entirely different vision of how to enforce employment rights.[8] Though federal judges may have rejected (or merely recognized the demise of) collective bargaining as a means of creating an autonomous mechanism for protecting workers' rights, these courts have not abandoned the vision of autonomy[9] created by the system.

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(5) the right to bargain collectively and to arbitrate all disputes as labor's only government protection.

Id. at n.13.

2. Refer to notes 15-54 *infra* and accompanying text for a discussion of the decline of union power and collective bargaining.

3. Clyde W. Summers, *Labor Law As the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10 (1988) (noting the effectiveness of collecting bargaining in providing a balance of power in the employment context).

4. *Id.* at 10-14 (discussing the federal government's stepped up efforts to pass regulations protecting certain employee rights and state courts' willingness to adjudicate certain employment abuses); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 591-93 (1992) (noting that many states have enacted legislation to protect workers' rights, thus lessening the need for collective bargaining protection).

5. Refer to part III.B.1 *infra*.

6. Refer to part III.B.2 *infra*.

7. Refer to notes 97-106 *infra* and accompanying text.

8. Refer to part III.C *infra*.

9. By "autonomy" I mean the government's non-intervention into the imposition or enforcement of workers' rights.

Courts cannot ignore congressional statutory commands or state substantive law, but courts do have the means to keep these cases out of the judicial system.[10] Professors Summers and Stone are correct to say that our system of employment law is moving away from a system of collective rights toward a system of individual rights.[11] However, they are incorrect to the extent they assume courts will be the principal medium of enforcement.[12] Instead, courts are encouraging resolution of employment disputes through compulsory arbitration.[13]

Part II of this Article describes the industrial pluralist vision of labor relations, focusing on the notion of collective autonomy and on the pivotal role arbitration plays in maintaining this autonomy. Unions, however, are fast disappearing from the American workplace, making industrial pluralism an obsolete paradigm for describing American labor relations. Part III examines a competing vision of labor relations that does not emphasize the collective power of workers to secure their own terms of employment, but rather the external imposition of universal rules by Congress and the courts. Summers and Stone have suggested that this individual rights model is in the process of supplanting industrial pluralism. Although Summers and Stone have correctly observed a shift from the internal to the external *imposition* of work rules, there has been no corresponding internal-to-external shift in the *enforcement* of these rules. Instead, federal courts, the traditional enforcers of individual rights, are retaining the industrial pluralist vision of workplace autonomy by compelling arbitration of these newly-created individual rights.[14]

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10. *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (establishing the rule that absent federal constitutional or statutory language, federal courts must use state substantive law).

11. Summers, *supra* note 3, at 10-11; Stone, *supra* note 4, at 576.

12. Summers, *supra* note 3, at 10-11; Stone, *supra* note 4, at 576.

13. By "compulsory arbitration" I mean judicial enforcement of contractual agreements to resolve employment disputes through binding arbitration. *See* BLACK'S LAW DICTIONARY 105 (6th ed. 1990) (defining compulsory arbitration as that which takes place where the consent of one of the parties is enforced by statutory provisions).

14. Stone's article argues that state judicial enforcement of state-created individual rights is supplanting industrial pluralism. *See* Stone, *supra* note 4, at 591-93. To this extent, she recognizes that federal courts are playing a decreasing role in worker protection. *Id.* at 591.

The judicial trend of compelling arbitration of statutory rights may have important implications for enforcing substantive rights. Some commentators, for example, believe the arbitral process is inadequate to enforce, and therefore compromises, substantive rights. *See, e.g.*, Patrick D. Smith, *Arbitration-The Court Opens the Door to Arbitration of Employment Disputes*: Gilmer v. Interstate/Johnson Lane Corp., 17 J. CORP. L. 865, 865-66 (1992) (recognizing the fear that arbitration may force employees to forego their substantive rights and will make it more difficult to prove a

Therefore, the fundamental transition in labor relations is not from collective autonomy to individual rights, but from collective autonomy to individual autonomy. Part IV of this Article examines the legislation that makes this transition possible, the judicial decisions that indicate it is occurring, and the hurdles that must be overcome before the transition is complete.

II. THE INDUSTRIAL PLURALIST VISION AND THE NOTION OF COLLECTIVE AUTONOMY

A. *The Industrial Pluralist Model*

Industrial pluralism constitutes an ideology of social interaction between employers and employees that eschews outside interference and instead envisions workers sufficiently empowered to look after themselves.[15] According to this model, the National Labor Relations Act (NLRA)[16] establishes a framework through which employees can organize to acquire the bargaining power necessary to significantly influence wages, working conditions, and other terms and conditions of employment.[17] Thus transformed, workplace relations are

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violation of their rights). Other commentators, however, believe compulsory arbitration has no effect whatever on substantive rights but merely affects the process by which those rights are enforced. *See, e.g,* John A. Gray, *Have the Foxes become the Guardians of the Chickens? The Post-*Gilmer *Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113, 114-15 (1992) (questioning the employee's fear that employers prefer arbitration because it offers less protection of employee's rights than litigation and arguing that there are a number of legitimate reasons employers prefer mandatory arbitration). This Article does not take a formal position on this debate. It merely argues that the transition to compulsory arbitration is occurring, and leaves to the reader to decide whether this transition is good or bad. Refer to parts IV.B.2-3 *infra* for a complete discussion of arbitral adequacy and arbitral consistency with individual rights statutes.

15. *See, e.g.*, Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955) (arguing that the collective bargaining process and the grievance procedures created therein constitute an "autonomous rule of law"); Stone, *supra* note 4, at 622-24 (discussing the industrial pluralist understanding of constructing an autonomous workplace); Richard A. Bales, Article, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J. LAW & PUB. POL'Y 161, 162-64 (1992) (describing the industrial pluralism model and how it is embodied in the NLRA); refer to note 1 *supra.*

16. 29 U.S.C. §§ 151-66 (1988).

17. *See, e.g.*, Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423 (1993) (stating that "[w]hile the diminished bargaining power of individual workers vitiated the normative force of their voluntary choice to submit to the authority of the large-scale enterprise, collective bargaining would empower workers sufficiently to cleanse that choice of duress"); Shulman, *supra* note 15, at 1000 (explaining that the NLRA es-

analogous to miniature political democracies[18] in which employers and employees, roughly coequal,[19] jointly negotiate and enforce[20] an agreement that establishes the terms and conditions of employment.[21] The process of collective bargaining thus gives employees a voice in decisions that significantly influence their lives,[22] freeing them from the dictatorships established by the lords of industry.[23]

The NLRA, according to the industrial pluralist model, confers no substantive employment rights, but rather establishes the framework through which employees may negotiate their own rights.[24] Indeed, industrial pluralism signifies an end to individual employment rights.[25] The

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tablished a "bare legal framework [that] is hardly an encroachment on the premise that wages and other conditions of employment be left to autonomous determination by employers and labor"); *see also* 29 U.S.C. § 151 (1988) (citing the "inequality of bargaining power" between centralized employers and employees "who do not possess full freedom of association or actual liberty of contract" as a reason that the NLRA was needed); 78 CONG. REC. 3678 (1934) (statement of Sen. Wagner), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 20 (1949) (arguing that there must be equality of bargaining power which is accomplished through the employees' right to participate in collective bargaining).

18. *See, e.g.*, Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 275-76 (1948) (comparing collective bargaining agreement with administrative and judicial processes); Stone, *supra* note 4, at 622-24 (stating that labor and management are like political parties in a democracy, each with its own constituency and agenda); Summers, *supra* note 3, at 9 (noting that collective bargaining provides a measure of industrial democracy).

19. JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 43 (4th rev. ed. 1936) (stating that employees are empowered by collective bargaining and minimum wage laws that create equal bargaining power between employees and their employer).

20. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 742 (1973) (noting that "[t]he enforcement mechanism . . . is the essence of the industrial collective bargaining agreement" assuming that both labor and management comply with the jointly agreed rules).

21. *See* CLINTON S. GOLDEN & HAROLD J. RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 30 (1942) (noting the role of labor and management in collective bargaining).

22. Summers, *supra* note 3, at 9 (noting the entry of democratic ideology into the workplace).

23. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-81 (1960) (noting that collective bargaining agreements allow labor and management to govern the workplace with input from both parties); *see, e.g.*, GOLDEN & RUTTENBERG, *supra* note 21, at 23-47 (noting the role of labor and management in collective bargaining); Barenberg, *supra* note 17, at 1424 (recognizing the goal of collective bargaining as "freedom for self direction, self control and cooperation"); William M. Leiserson, *Constitutional Government in American Industries*, 12 AM. ECON. REV. 56, 66 (1922) (arguing that labor gained strength by organizing and thus weakened managements' absolute power).

24. *See* Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981) [hereinafter *Post War Paradigm*] (noting that it is through collective bargaining that management and labor formulate the rules under which the workplace is governed).

25. *See* GOLDEN & RUTTENBERG, *supra* note 21, at 26 (arguing that in order to

collective bargaining process is thought to be adequate to protect whatever rights workers feel are worth negotiating for, and the essentially democratic nature of union representation ensures that workers' voices are adequately represented at the bargaining table.[26]

B. *Collective Autonomy*

The NLRA shifted workplace sovereignty from employers and the courts to employers and employees, creating a framework for the joint determination of workplace rights through the collective bargaining process.[27] Establishing an internal mechanism for resolving disputes between employers and employees was critical to maintaining this shift in sovereignty.[28] Arbitration quickly became this mechanism.[29] In the metaphor of industrial democracy, the workplace "legislature" promulgated the law of the shop through collective bargaining negotiations.[30] Arbitration, as an analog

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benefit from collective bargaining all workers must give up their freedom to bargain independently); Stone, *supra* note 4, at 624 (noting that the industrial pluralist model is not capable of handling individual employment rights issues and instead focuses on group issues).

26. *See Warrior & Gulf Navigation*, 363 U.S. at 580 (discussing how collective bargaining provides an opportunity for input to both management and labor); GOLDEN & RUTTENBERG, *supra* note 21, at 43 (noting that the collective bargaining process attempts to build a body of industrial law between a particular employer and his employees); Stone, *supra* note 4, at 593 (noting how the NLRA creates a framework upon which to construct an agreement mutually beneficial to labor and management).

27. *See Warrior & Gulf Navigation*, 363 U.S. at 580 (noting that "[a] collective bargaining agreement is an effort to erect a system of industrial self-government"). An exception to this shift in sovereignty is the doctrine of reserved management rights, which permits unilateral employer decision making over issues "at the core of entrepreneurial control." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); *accord* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686 (1981) (concluding that an employer has no duty to bargain over a decision to close part of its operations); Otis Elevator Co., 269 NLRB Dec. (CCH) No. 162, ¶ 16,181 (Apr. 6, 1984) (holding that an employer has no duty to bargain over a decision to transfer work from one facility to another).

28. *See* GOLDEN & RUTTENBERG, *supra* note 21, at 37 (noting that in the early 1940s the role of the NLRB shifted from an enforcer of collective bargaining agreements to a supervisor of elections, and that this event marked the end of an era during which unions and management looked to government for the solution of their problems); Leiserson, *supra* note 23, at 75 (noting the shift in sovereignty from the hands of owners and managers into a democratic system).

29. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 594-96 (1960) (noting that a collective bargaining agreement will often provide for the use of arbitration to settle disputes); *Warrior & Gulf Navigation*, 363 U.S. at 582 (noting that an arbitrator brings experience and competence in the subject matter to the grievance process that a judge might not possess); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568-69 (1960) (noting that arbitration will be used for all grievances involving interpretation of the collective bargaining agreement).

30. *See Warrior & Gulf Navigation*, 363 U.S. at 581 (stating that arbitration of

to the judiciary,[31] provided the mechanism by which that law was interpreted and applied. Not only did arbitration serve the instrumental function of interpreting and applying the law, it also fit the theoretical model of an autonomous system.[32] The arbitrator was chosen by, and served at the whim of, the two parties, and the arbitrator's authority was derived exclusively from the terms of the collective bargaining agreement that the parties had negotiated.[33] Arbitration thus completed the metaphor of industrial organization as a self-contained mini-democracy—"an island of self-rule whose self-regulating

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collective bargaining agreement provisions creates a "system of private law"); Leiserson, *supra* note 23, at 75 (stating that trade agreements result in a predictable, constitutional-like form of business government); Stone, *supra* note 4, at 623 (stating that workplace legislation is enacted and contained in the collective bargaining agreement).

31. *See* Leiserson, *supra* note 23, at 63 (noting how arbitration can be used to settle grievances, much like a court's judicial power); Stone, *supra* note 4, at 623 (stating that arbitration is supposed to supply a neutral vantage point for enforcing workplace rules).

32. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (noting that the integral role of the arbitrator in the industrial pluralist system helps establish "industrial self-government"); *Warrior & Gulf Navigation*, 363 U.S. at 581 (recognizing that "the grievance machinery under a collective bargaining agreement is at the very heart of industrial self-government" and that "[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise"); Shulman, *supra* note 15, at 1007 (noting that collective bargaining agreements force the parties to handle their disputes guided by contract terms).

33. *See Gardner-Denver Co.*, 415 U.S. at 36, 53 (stating that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties"); *Enterprise Wheel & Car*, 363 U.S. at 597 (upholding an arbitral award "so long as it draws its essence from the collective bargaining agreement[,]" and stating that an arbitration award that relies on external law instead of the collective bargaining agreement fails this test); *Warrior & Gulf Navigation*, 363 U.S. at 582 (noting that the arbitrator's authority is only limited by the collective bargaining agreement's terms); Harry T. Edwards, *Labor Arbitration at the Crossroads: The 'Common Law of the Shop' v. External Law*, 32 ARB. J. 65, 90-91 (1977) (stating that arbitrators should be reluctant to decide public law issues because they may be wrong and, if followed by a court out of deference to the arbitrator, they may distort the development of precedent); Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 557-59 (1967) (stating that "parties typically call on an arbitrator to construe and not to destroy their agreement"); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, 75 MICH. L. REV. 1137, 1140-43 (1977) (stating that an award must "draw its essence" from the collective bargaining agreement in order to be valid and enforceable) (quoting *Enterprise Wheel & Car*, 363 U.S. at 597). The late Dean Shulman stated that

> [a] proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather a part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.

Shulman, *supra* note 15, at 1016.

mechanisms must not be disrupted by judicial intervention or other scrutiny by outsiders."[34]

C. *The Lingering Death of Industrial Pluralism*

The legal framework of this autonomous vision of industrial relations presupposes the existence of unions capable of collective decision making. Without a collective unit, workers lack the bargaining power to influence the terms and conditions of employment.[35] Without a democratically-organized union structure, one employee lacks the authority to negotiate on behalf of another.[36]

Unions, however, have been disappearing rapidly from the American landscape.[37] From 1953 to 1989, union density[38] in the private, non-agricultural workforce fell from 36 percent[39] to 12.5 percent,[40] and the absolute number of union members in the private sector dropped from 15.5 million in 1953[41] to 10.5 million in 1989.[42] Furthermore, union decline has been most pronounced since 1980.[43]

Commentators have advanced many theories to explain the demise of industrial pluralism. The "employer-opposition theory"[44] argues that unions have declined because employers

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34. *Post-War Paradigm*, *supra* note 24, at 1515.

35. Refer to note 21 *supra* and accompanying text.

36. *See* GOLDEN & RUTTENBERG, *supra* note 21, at 26 (noting that by banding together to form unions, employees are able to bargain on behalf of each other).

37. *See* Stone, *supra* note 4, at 578-84.

38. Union density is the percentage of workers, including agricultural workers, in the labor force who belong to unions. *See* Leo Troy, *Will A More Interventionist NLRB Revive Organized Labor?*, 13 HARV. J. LAW & PUB. POL'Y 583, 583 (1990) [hereinafter *More Interventionist NLRB*].

39. Leo Troy, *The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR*, *in* UNIONS IN TRANSITION 75, 82 (Seymour M. Lipset ed., 1986) [hereinafter *The Rise and Fall*].

40. Michael Cimini, *Union Membership in 1989*, 42 CURRENT WAGE DEVS. 4, 7 (1990).

41. *The Rise and Fall*, *supra* note 39, at 82.

42. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1991, at 425 (11th ed. 1991) [hereinafter STATISTICAL ABSTRACT].

43. Union density of the private, nonagricultural workforce plummeted over 25%—from 16.8% to 12.4%—between 1983 and 1989. STATISTICAL ABSTRACT, *supra* note 42, at 425; *More Interventionist NLRA*, *supra* note 38, at 592-94. *See generally* Gary N. Chaison & Joseph B. Rose, *The Macrodeterminants of Union Growth and Decline*, *in* THE STATE OF THE UNIONS 3, 3-40 (George Strauss et al. eds., 1991) (discussing the difficulty in compiling and comparing union statistics due to the lack of standard reporting criteria). Aggregate union density figures distort the true growth/decline of industrial unions. *Id.* at 10. Despite a decline in overall union membership density, public support of unions since the mid-1980s has increased. *Id.* at 30.

44. *See* Stone, *supra* note 4, at 579 (coining and defining the term).

have intensified their attempts to avoid or eliminate unions, either because of the Reagan Administration's encouragement[45] or because unions, by demanding higher wages for union workers than non-union workers, effectively priced themselves out of the market.[46] Along a similar vein, the "broken-NLRB" school argues that the NLRB's reluctance and inability to protect union rights have rendered unions powerless to protect their constituents from employer abuses.[47] Another group, the "union-complacency" school,[48] places the blame for union decline on labor's failure to organize new members.[49]

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45. *See* Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 732 (1983) (discussing the Reagan administration's stern response to the air traffic controller's strike); David L. Gregory, Book Review, 53 GEO. WASH. L. REV. 680, 681-83 (1985) (discussing how President Reagan's crushing of the air traffic controller's strike substantially reshaped the NLRB's attitude toward labor law); *see also* Richard B. Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections?*, *in* CHALLENGES AND CHOICES FACING AMERICAN LABOR 60-61 (Thomas A. Kochan ed., 1985) (finding that "employer opposition has a substantial and highly statistically significant depressant effect on union success rates"); William N. Cooke, *The Rising Toll of Discrimination Against Union Activists*, 24 INDUS. REL. 421, 421, 436 (1985) (concluding that violations of NLRA § 8(a)(3) occurring when an employer discriminates in its hiring and tenure policy to influence labor organization membership reduce the probability of a union victory in certification elections by, on average, as much as 17%); William T. Dickens, *The Effect of Company Campaigns on Certification Elections:* Law and Reality *Once Again*, 36 INDUS. & LAB. REL. REV. 560, 574-75 (1983) (concluding that employer threats, actions taken against union supporters, written communications, and captive audience speeches all have statistically significant effects on voting in union certification elections); Thomas A. Kochan et al., *The Effects of Corporate Strategy and Workplace Innovations on Union Representation*, 39 INDUS. & LAB. REL. REV. 487, 498-500 (1986) (arguing that employers use strategic decision making, such as layoffs, plant relocations, and workplace innovations, as a significant means of union avoidance).

46. *See* Robert J. Flanagan, *NLRA Litigation and Union Representation*, 38 STAN. L. REV. 957, 984-85 (1986) (noting the economic impact on union membership depending on the union/nonunion wage differential).

47. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 118 (1990) (explaining that the failure of labor law to contain employer resistance to unions is substantially responsible for the decline of unionization); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 293-325 (1978) (citing judicial constructs such as labor contractualism, the public right doctrine, and the inhibition of worker self-activity for the inability of the unions to be effective); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771-86 (1983) (arguing that union decline is largely attributable to the failure of labor laws to protect employees from anti-union tactics).

48. *See* Stone, *supra* note 4, at 580-81 (coining the term "union-complacency theory" where union decline is seen to be the result of the unions' failure to adjust to the changing economy).

49. *See, e.g.*, DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING 142-47 (1973) (attributing organized labor's decline to its inability to organize white-collar workers, workers in the non-profit sector, blacks,

These three groups share the assumption that union decline can be reversed. In order to effect that result, one of the following must occur: employers must begin to respect labor laws; the NLRB must start enforcing the laws; Congress or the judiciary must put some teeth into labor law; or unions must campaign vigorously to recruit new members.

However, other commentators believe the problems of industrial pluralism to be much more deeply ingrained. Christopher Tomlins, for example, has argued that an inherent conflict exists between the need for industrial stability, which forces the arbitral system to retain some degree of management rights, and the need to protect workers' bargaining power, which can only be exercised by the use or threat of disruptive strikes.[50] Efficiency theorists, such as Richard Posner, posit that by monopolizing labor and raising its costs above market value, labor inevitably prices itself out of competitive markets.[51] In addition, industrial relations experts have proposed several theories of industrial transition to explain union decline.[52] Finally, legal commentators,

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and women); Freeman, *supra* note 45, at 50-51 (estimating that reduced organizing activity is linked to approximately one-third of the decline in union success); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1171-72 (1991) (noting that the influx of women into the workforce has been cited as a barrier to union growth because of the unions' belief that women are hard to organize); William T. Dickens & Jonathan S. Leonard, *Accounting for the Decline in Union Membership, 1950-1980*, 38 IND. & LAB. REL. REV. 323, 332-33 (1985) (concluding that labor's decline is the combined result of the unions' decreased organizing efforts and a decrease in worker demand for unionization); William J. Moore & Robert J. Newman, *On the Prospects for American Trade Union Growth: A Cross-Section Analysis*, 57 REV. ECON. & STAT. 435, 436-38 (1975) (attributing union decline to structural factors such as the decline in blue collar versus white collar workers, the industrial composition of the workforce, and the composition of the labor force); St. Antoine, *supra* note 33, at 645 (arguing that unions have declined in large part because they have failed to attract youth, women, minorities, and white collar workers).

50. CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960, at 317-28 (1985).

51. *See* Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1001-11 (1984) (suggesting that unionization intentionally raises labor prices above the competitive level while depressing labor supply below the competitive level); *see also* Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1004-10 (1986) (creating an economic model for unions' monopolization of labor); Robert H. Lande & Richard O. Zerbe, Jr., *Reducing Unions' Monopoly Power: Costs and Benefits*, 28 J. LAW & ECON. 297, 300-06 (1985) (discussing the causes and effects of the union/nonunion wage differential).

52. *See, e.g.*, BELL, *supra* note 49, at 129-42 (citing the shift in the American economy from manufacturing to services, as well as labor's inability to organize newly-created white collar occupations as contributing factors in union decline). *See generally* THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (1986) (arguing that environmental pressures such as deregulation, reces-

including Professors Summers and Stone, have argued that the statutory and judicial creation of individual employment rights have both signalled and caused the demise of the industrial pluralist model of collective bargaining.[53]

Regardless of the cause, labor's membership—and its concomitant political clout—are in serious decline.[54] Whether the cause or the product of this decline, individual employment rights statutes are in the process of supplanting unions as the chief guarantor of employee protection.[55] The next section examines this trend.

III. THE EMERGENCE OF INDIVIDUAL EMPLOYMENT RIGHTS

A. Dormancy Under Industrial Pluralism

The individual rights model constitutes an alternative vision for the ordering of the American workplace.[56] This model focuses on universal, externally-imposed legislative and judicial work rules as opposed to the collective power of workers to protect themselves.[57]

Early advocates of industrial pluralism thought collective bargaining would render individual employment rights superfluous by adequately protecting whatever rights workers believed warranted negotiation, and ensuring that workers' voices were represented at the bargaining table by the essentially democratic nature of union representation.[58]

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sion, foreign competition, and labor market changes, combined with strategic choices implemented by management, have created a completely new industrial relations system).

53. Stone, *supra* note 4, at 643-44 (arguing that the broad preemption doctrine of § 301 of the NLRA has caused unions to decline in numbers and in political power by hindering unionized workers' ability to implement their contractual rights and by depriving them of individual employment rights under external law); Summers, *supra* note 3, at 10-11 (arguing that because labor unions have proven to be an ineffective regulator of the labor market, individual rights laws are supplanting the NLRA as the chief guarantor of worker protection). *But see* Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 197-99 (1991) (suggesting that unions have a significant role in the enforcement of workplace rights).

54. Refer to notes 37-43 *supra* and accompanying text.

55. Refer to notes 56-106 *infra* and accompanying text.

56. Bales, *supra* note 15, at 164.

57. *See generally* Rabin, *supra* note 53 (considering the unions' role in enforcing individual rights in both the organized and non-organized workplace).

58. *See, e.g.*, GOLDEN & RUTTENBERG, *supra* note 21, at 43 (arguing that labor unions provide workers with the only effective way to participate in decision-making); *see also* Cox, *supra* note 18, at 1 (describing the collective bargaining process by which employees determine the conditions of the workplace through chosen representatives).

Externally-imposed terms of employment were anathematized because they distorted the bargaining process and destroyed the vision of industrial autonomy.[59] In the last twenty years, however, it has become increasingly obvious that unions have failed to achieve the minimal terms of employment that society has decided workers have the right to expect.[60] Congress and state legislatures have therefore imposed external terms on employment relationships.

B. Modern Rebirth

1. Congressional Protection of Individual Employment Rights. In 1960, the only major federal employment law applicable to non-union workers was the Fair Labor Standards Act (FLSA),[61] which set the minimum wage,[62] required premium pay for overtime work,[63] and restricted child labor.[64] This Act was merely intended to provide a floor to support collective bargaining.[65] However, in the last thirty years, Congress has promulgated numerous statutes establishing minimum terms for employment relationships. In 1963, for example, Congress enacted the Equal Pay Act, which prohibited wage discrimination on the basis of sex.[66] Other key statutes include Title VII of the Civil Rights Act of 1964 (Title VII),[67] the Age Discrimination in Employment Act of 1967 (ADEA),[68] the Occupational Safety and Health Act of

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59. *See* Shulman, *supra* note 15, at 1024 (noting that judicial intervention in enforcement of collective labor agreements seriously disrupts the system of self-government); *Post War Paradigm*, *supra* note 24, at 1515 (explaining the industrial pluralist view that parties in the workplace govern themselves democratically without interference from the courts and administrative tribunals).

60. Refer to notes 37-55 *supra* and accompanying text (discussing the decline of union power to enforce workers' rights).

61. 29 U.S.C. §§ 201-19 (1988 & Supp. IV 1992).

62. *Id.* § 206.

63. *Id.* § 207.

64. *Id.* § 212.

65. *See* J. JOSEPH HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 203-04 (1968) (noting that, according to Senator Wagner, the fixing of minimum wages and maximum hours was merely a foundation for future efforts of labor and industry to work out their conflicts and problems among themselves); *see also* Summers, *supra* note 3, at 9 (noting that the FLSA was intended to support collective bargaining).

66. 29 U.S.C. § 206(d) (1988).

67. 42 U.S.C. § 2000e-2 (1988 & Supp. IV 1992) (prohibiting workplace discrimination on the basis of race, color, religion, sex, or national origin).

68. 29 U.S.C. §§ 621-34 (1988 & Supp. IV 1992) (prohibiting workplace discrimination on the basis of age).

1970 (OSHA),[69] the Rehabilitation Act of 1973,[70] the Employee Retirement Income Security Act of 1974 (ERISA),[71] the Pregnancy Discrimination Act of 1978,[72] the Civil Service Reform Act of 1978,[73] the Employee Polygraph Protection Act of 1988,[74] the Worker Adjustment and Retraining Notification Act of 1988,[75] the Americans with Disabilities Act of 1990 (ADA),[76] the Civil Rights Act of 1991,[77] and the Family and Medical Leave Act of 1993.[78]

2. State Protection of Individual Employment Rights. In addition to enacting state statutes that parallel the federal statutes listed above, state legislatures have passed legislation protecting employees in a wide variety of other circumstances.[79] As of 1991, twenty-two states made retaliatory dismissal for filing a workers' compensation claim unlawful, thirty-four states have passed legislation protecting whistle-blowers, and forty-two states regulate the administration of employment-related lie detector tests.[80] In addition, many states restrict the use of drug testing in the workplace,[81] several have enforced workplace safety and health violations,[82] and some have enacted statutes to protect

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69. *Id.* §§ 651-78 (setting guidelines for workplace safety).

70. *Id.* §§ 701-961 (providing equal opportunities to individuals with disabilities).

71. *Id.* §§ 1001-461 (protecting employee pension benefits).

72. 42 U.S.C. § 2000e(k) (1988) (prohibiting workplace discrimination on the basis of pregnancy, childbirth, and related medical conditions).

73. 5 U.S.C. §§ 1101-8913 (1988).

74. 29 U.S.C. §§ 2001-09 (1988) (prohibiting the use of lie detectors and polygraphs in the workplace).

75. *Id.* §§ 2101-09 (requiring notice to employees before plant closings and mass layoffs).

76. 42 U.S.C. §§ 12101-213 (Supp. IV 1992) (prohibiting discrimination in employment on the basis of disability).

77. *Id.* § 1981a (providing for damages in cases of intentional discrimination in employment).

78. 29 U.S.C.A. § 2601 (West 1994) (allowing employees to take leave for family and medical emergencies).

79. *See* CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 160 (1988) (noting that state laws in some jurisdictions protect employees from discrimination based on sexual orientation, political involvement, marital status, medical condition and criminal records).

80. Stone, *supra* note 4, at 592 (citing *Individual Employment Rights Manual*, 9A LAB. REL. REP. (BNA) 540-92 (1991)).

81. *See, e.g.*, Scott S. Cairns & Carolyn V. Grady, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 GEO. MASON U. L. REV. 491, 520-30 (1990) (recognizing private employers' use of drug testing and discussing statutory limits such as requirements of probable cause, confidentiality, and notice); Judith M. Janssen, *Substance Abuse Testing and the Workplace: A Private Employer's Perspective*, 12 GEO. MASON U. L. REV. 611, 636-39 (1990) (citing examples of state laws limiting drug and alcohol testing by private employers).

82. *See* Joleane Dutzman, Comment, *State Criminal Prosecutions: Putting Teeth*

employees from the adverse effects of corporate takeovers.[83] Montana enacted the first state statute protecting workers from wrongful discharge,[84] and similar statutes have been passed in Puerto Rico[85] and the Virgin Islands.[86]

While federal and state legislatures have been imposing minimum terms on employment relationships, state courts have applied contract and tort principles to open gaping holes in the doctrine of employment at will.[87] As of 1988, courts in twenty-nine states had used contract law to bind employers to the tenure promises and discharge procedures outlined in employee handbooks.[88] Eleven states had used the covenant of good faith and fair dealing to give employees a cause of action for wrongful termination.[89] Most states use contract

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in the Occupational Safety and Health Act, 12 GEO. MASON U. L. REV. 737, 738-39 (1990) (noting the recent use of criminal penalties to supplement OSHA and enforce health and safety mandates); S. Douglas Jones, Comment, *State Prosecutions for Safety-Related Crimes in the Workplace: Can D.A.'s Succeed Where OSHA Failed?*, 79 KY. L.J. 139, 143-47 (1990-91) (discussing the increasing use of state criminal prosecutions to enforce workplace safety requirements).

83. *See, e.g.*, Katherine Van Wezel Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 45-47 (1991) (discussing nonshareholder constituency statutes, which create fiduciary duties on the part of corporate directors toward those other than shareholders). For examples of such statutes, see *Appendix*, 21 STETSON L. REV. 279, 279-93 (1991).

84. MONT. CODE ANN. §§ 39-2-901 to -915 (1993) (prohibiting discharge of an employee in retaliation for the employee's refusal to violate public policy; for reporting a violation of public policy; in violation of express provisions of employer's personnel manual; or without good cause after completion of employee's probationary period).

85. P.R. LAWS ANN. tit. 29, § 185a (1985 & Supp. 1990) (providing indemnity for workers dismissed without good cause).

86. V.I. CODE ANN. tit. 24, § 65 (1993) (protecting employees from wrongful discharge).

87. Summers, *supra* note 3, at 13.

88. *Id.* at 13-14; *see, e.g.*, Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980) (holding that employer statements of policy, such as personnel manuals, can give rise to contractual rights in employees); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1264 (N.J.) (concluding that courts should construe promises of employment benefits discussed in personnel manuals, including job security provisions, in accordance with the employee's reasonable expectations, and that these promises are contractually enforceable), *modified*, 499 A.2d 515 (N.J. 1985).

89. Summers, *supra* note 3, at 13; *see, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 398 (Cal. 1988) (recognizing an employee's cause of action for an employer's breach of the implied covenant of good faith and fair dealing, but limiting recovery to contractual remedies); Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256-57 (Mass. 1977) (finding that an implied covenant of good faith precludes a principal's termination of an agent's employment in order to avoid compensation substantially earned under the contractual relationship). *But cf.* Hinson v. Cameron, 742 P.2d 549, 554 (Okla. 1987) (holding that even if there is an implied covenant of good faith and fair dealing in every at-will employment relationship, that covenant does not require the employer to have good cause before it can terminate any employee).

law to enforce employers' explicit oral promises concerning job tenure,[90] and at least one has implied such a promise from an employee's length of service.[91]

At least thirty-two states have adopted a public policy exception to employment at will.[92] State courts use this exception, which gives employees a cause of action in tort, most frequently to protect employees who are fired for refusing to commit an unlawful act,[93] for exercising a statutory right,[94] or for performing a public duty.[95] Many states have also given employees tort actions for intentional infliction of emotional distress.[96]

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90. *See, e.g.*, Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101, 103-04 (2d Cir. 1985) (affirming judgment under New York contract law for a plaintiff who was promised lifetime employment unless he "screwed up badly"); Hetes v. Schefman & Miller Law Office, 393 N.W.2d 577, 578 (Mich. Ct. App. 1986) (reversing summary judgment for employer where the plaintiff alleged an oral contract made by her employer that "she would remain employed as long as she did a good job" because a jury could reasonably believe the statement conveyed on oral contract for just-cause termination). *But see* Cucchi v. New York City Off-Track Betting Corp., 818 F. Supp. 647, 653 (S.D.N.Y. 1993) (stating that it is doubtful whether, under current New York law, mere oral assurances about termination are sufficient to alter an employee's at-will status).

91. Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 925-27 (Cal. Ct. App. 1981) (recognizing an implied-in-fact promise for continued employment based on an employee's longevity of service).

92. Summers, *supra* note 3, at 13.

93. *See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1035 (Ariz. 1985) (upholding a tort action where an employee refused to join a parody of "Moon River" where the performers mooned the audience because mooning violated the spirit of an indecent exposure statute); Phipps v. Clark Oil & Ref. Corp., 396 N.W.2d 588, 592-94 (Minn. Ct. App. 1986) (upholding a tort action by a gas station attendant fired for refusing to pump leaded gasoline into an automobile equipped only for unleaded gasoline, a violation of the Clean Air Act), *aff'd*, 408 N.W.2d 569 (Minn. 1987); *see also* Johnston v. Del Mar Distrib. Co., 776 S.W.2d 768, 769 (Tex. App.—Corpus Christi 1989, writ denied) (denying summary judgment to an employer where an employee, after being ordered to package a semi-automatic weapon, label it "fishing gear," and send it by United Parcel Service, telephoned law enforcement officials to find out whether such action was legal and was subsequently fired).

94. *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (upholding a tort action by an employee who was fired for filing a workers' compensation claim).

95. *See, e.g.*, Palmateer v. International Harvester Co., 421 N.E.2d 876, 879-81 (Ill. 1981) (reversing summary judgment where an employee alleged wrongful discharge for reporting a possible crime to the police); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (prohibiting an employer from discharging an employee for fulfilling her jury duty obligation).

96. *See, e.g.*, Wilson v. Monarch Paper Co., 939 F.2d 1138, 1139-41 (5th Cir. 1991) (applying Texas law to uphold a $3.4 million jury verdict for intentional infliction of emotional distress of a sixty-year-old vice president demoted to an entry-level warehouse position with duties including sweeping the warehouse floor and cleaning the warehouse cafeteria); Agis v. Howard Johnson Co., 355 N.E.2d 315, 317-18 (Mass. 1976) (allowing a cause of action for intentional or reckless infliction of emotional distress where an employer dismissed employees in alphabetical order until

C. Rejection by the Federal Judiciary

Noting the simultaneous decline of industrial pluralism and the rise of individual employment rights, Professors Summers and Stone conclude that the collective protection of the former is being eclipsed by the individual protection of the latter. Professor Stone, for example, states that

> [t]he increased state protection for individual workers in the past decade seems paradoxical in light of the deterioration of the federal protection for collective labor rights. However, the paradox disappears if we see that the emerging regime of individual employee rights represents not a complement to or an embellishment of the regime of collective rights, but rather its replacement. Viewed in this light, the emerging individual rights constitute a new system for organizing labor relations, one that is distinct from and opposed to the New Deal system of collective bargaining.[97]

Professor Stone thus concludes that state judicial enforcement of state-created individual rights is supplanting the NLRA as the principal guarantor of worker protection.[98] Likewise, Professor Summers concludes that

> [w]e are now beginning to acknowledge the unwelcome fact that for most employees, collective bargaining does not exist, and they have no guardian. This has motivated the judicial attacks on the employment at will doctrine and legislative initiatives to protect individual employees. There is now a changing of the guard for those who are not protected by collective bargaining. The prospect is that this process will continue through the turn of the century.[99]

The federal judiciary does not share this vision of judicial enforcement of externally-imposed employment rights.[100] Federal courts over the last fifteen years have become increasingly hostile toward plaintiffs' employment actions.[101] While federal

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one admitted to employee theft). *See generally* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 2 (1988) (discussing the role of tort law in curbing the infliction of abuse by employers on employees).

97. Stone, *supra* note 4, at 593.

98. *Id.*

99. Summers, *supra* note 3, at 27.

100. Professor Stone implicitly recognizes this when she argues that industrial pluralism is being supplanted by state, but not necessarily federal, base-line employment rights. Stone, *supra* note 4, at 592-93.

101. *See generally* Christine G. Cooper, *Employment Discrimination Law and the Need for Reform*, 16 VT. L. REV. 183 (1991) (discussing recent Supreme Court deci-

judges may have rejected (or merely recognized the demise of) industrial pluralism as an autonomous system for protecting workers' rights, federal judges have not abandoned the vision of autonomy. Federal judges do not want their courts clogged with individual employment complaints today[102] any more than they did at the zenith of the industrial pluralist movement.[103]

Federal courts cannot ignore federal and state statutes and state common-law doctrines and thus are compelled to recognize the external imposition of minimum employment terms.[104] However, courts do possess the means to reject external enforcement of these minimal terms by keeping individual claims out of the judicial system.[105] Abandoning collective

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sions that have changed discrimination law to the disadvantage of employees and advantage of employers); refer to parts IV.B-C *infra.*

102. Transcript of Proceedings before District Court Judge James B. McMillan in Joint Appendix to Briefs of Petitioner and Respondent, Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991) (No. 90-18) (available on Lexis) (statement of Judge McMillan) ("[T]here's no form of litigation I would more gladly forego than employment discrimination suits."). Commentator Thomas Geoghegan wrote that "I am so sick of judges writing psalms to arbitration. Have they ever seen one? No. All they know is, they can kick these cases out of court." THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 164 (1991). Another commentator has asserted that also contributing to this trend of judicial attempts to remove discrimination claims from the court system

> are the changing views of federal judges concerning civil rights enforcement. The federal judiciary has become increasingly conservative and increasingly sympathetic to institutional concerns. Many judges may feel that too many discrimination suits are brought and that too many lack a substantial evidentiary foundation. Some may even believe that discrimination is no longer a significant societal problem.

Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 LAB. LAW. 43, 68 (1993); *see also* Christine G. Cooper, *Where Are We Going With* Gilmer*? — Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 203 (1992) [hereinafter *Where Are We Going*] (commenting that the decision in *Gilmer* threatens to "kick employment discrimination suits out of court"); Thomas B. Stoddard, *Lesbian and Gay Rights Litigation Before A Hostile Federal Judiciary: Extracting Benefit from Peril*, 27 HARV. C.R.-C.L. L. REV. 555, 555-56 (1992) (noting the conservative ideology of the Reagan and Bush benches and arguing that courts are increasingly hostile to civil rights and antidiscrimination claims).

103. *See, e.g.*, U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 376-77 (1971) (White, J., dissenting) (stating that a dispute involving an unfair labor practice is not removed from the arbitral process and noting that the court had compelled arbitration in a wide variety of cases); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 460 (1955) (citing § 301 of the NLRA and concluding that Congress did not intend "to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation").

104. *See, e.g.*, Wilson v. Monarch Paper Co., 939 F.2d 1138, 1139-41 (5th Cir. 1991) (applying Texas law to uphold tort action against an employer for intentional infliction of emotional distress); refer to note 10 *supra* and accompanying text.

105. Refer to part IV *infra.*

rights in favor of individual rights[106] does not mean that the courts should be the principal medium of enforcement. These rights can, and have, been maintained through the use of arbitration.

IV. COMPULSORY ARBITRATION OF STATUTORY CLAIMS

In the 1960 *Steelworkers'* trilogy, the Supreme Court strongly endorsed arbitration as a mechanism for resolving industrial disputes arising under collective bargaining agreements.[107] In *Wilko v. Swan*,[108] however, the Court held that a claim under Section 12(2) of the Securities Act of 1933 was nonarbitrable because the Court doubted arbitration's ability adequately to resolve statutory claims.[109] Based on this holding, lower federal courts created a "public policy defense" to compulsory arbitration of statutory claims.[110] This defense focused on the belief that (1) a judicial forum was superior to arbitration for enforcing statutory rights; (2) compulsory arbitration constituted a waiver of one's statutory right to a judicial forum in contravention of public policy; and (3) the informality of arbitration made it difficult for courts to correct errors in statutory interpretation.[111]

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106. Refer to notes 97-99 *supra* and accompanying text.

107. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569 (1960).

108. 346 U.S. 427 (1953) (holding that *Wilko* was incorrectly decided) *overruled by* Rodriquez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

109. *Id.* at 435-37.

110. *See* Michael G. Holcomb, *The Demise of the FAA's "Contract of Employment" Exception?*, 1992 J. DISP. RESOL. 213, 216; G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on* Shearson/American Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397, 404 (1988); *see, e.g.*, Romyn v. Shearson Lehman Bros., Inc., 648 F. Supp. 626, 629-32 (D. Utah 1986) (balancing the countervailing policy considerations presented by RICO and the Federal Arbitration Act and finding that the RICO claims should not be arbitrated); Breyer v. First Nat'l Monetary Corp., 548 F. Supp. 955, 959 (D.N.J. 1982) (holding an arbitration clause unenforceable and recognizing an exception to the Arbitration Act in cases involving protective federal legislation); Aimcee Wholesale Corp. v. Tomar Prods., Inc., 237 N.E.2d 223, 225 (N.Y. 1968) (concluding that the enforcement of antitrust legislation should not be left to arbitrators).

111. *See* American Safety Equip. Corp. v. J.P. Maguire & Co., Inc., 391 F.2d 821, 827-28 (2d Cir. 1968); Hunt v. Mobil Oil Corp., 444 F. Supp. 68, 69-71 (S.D.N.Y. 1977); *see also* Holcomb, *supra* note 110, at 216. *But cf.* Mitsubishi Motors Corp. v. Soler—Plymouth, Inc., 473 U.S. 614, 631 (1985) (upholding arbitration of antitrust claims arising from international transactions, while expressing "skepticism of certain aspects of the *American Safety* doctrine").

A. *Alexander v. Gardner-Denver Co.*

Alexander v. Gardner-Denver Co.[112] involved a statutory claim, seemingly non-arbitrable under *Wilko*, which an employer argued was arbitrable pursuant to the terms of a collective bargaining agreement and the *Steelworkers'* trilogy presumption of arbitrability.[113] Harrell Alexander, Sr., an African-American, alleged that he was discharged because of race.[114] Gardner-Denver, Alexander's employer, claimed the firing was justified because of poor work performance.[115] Alexander, who was unionized and covered by a collective bargaining agreement, filed both a grievance and a Tile VII action.[116] Pursuant to a collective bargaining agreement provision compelling arbitration of such matters, the grievance was presented to an arbitrator, who, without referring to Alexander's claim of race discrimination, found that Alexander had been discharged for just cause.[117] The employer then moved for summary judgment on the Title VII action.[118] The district court, holding that Alexander was bound by the arbitral decision and thereby precluded from suing his employer under Title VII, granted summary judgment.[119] The Court of Appeals for the Tenth Circuit, per curiam, affirmed.[120]

The Supreme Court reversed,[121] holding that an employee does not forfeit her private cause of action under Title VII by first pursuing her grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement.[122] The Court presented four reasons why arbitration was inappropriate for the final resolution of Title VII claims.[123] First, the Court noted that labor arbitrators have neither the experience[124] nor the authority[125] to resolve Ti-

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112. 415 U.S. 36 (1974).
113. *Id.* at 45-47.
114. *Id.* at 38, 42.
115. *Id.* at 38.
116. *Id.* at 39, 42-43.
117. *Id.* at 40, 42.
118. *Id.* at 43.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 49.
123. *Id.* at 53-58.
124. *Id.* at 57 (stating that "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land"). *But cf.* FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 376 (4th ed. 1985) (stating that "'[c]ourts aren't right more often than arbitrators and the parties because they are wiser. They are 'right' because they have the final say.'") (quoting James E.

tle VII claims. Second, the Court, noting the relative informality of arbitration hearings as compared to judicial proceedings, stated that arbitral factfinding procedures were inadequate to protect employees' Title VII rights.[126] Third, the Court pointed out that arbitrators were under no obligation to issue written opinions.[127] Fourth, the Court noted the union's exclusive control over the manner and extent to which an employee's grievance is presented.[128] The Court was particularly concerned that a discriminatory union might not adequately pursue an employee's legitimate claim of racial discrimination.[129] If arbitration were an employee's exclusive remedy, a union and an employer, acting in concert, would be able to discriminate on the basis of race without fear of legal reprisal.[130]

After the *Gardner-Denver* decision, the Court employed similar reasoning to hold that a collective bargaining agreement's compulsory arbitration clause would not preclude a subsequent suit to enforce the Fair Labor Standards Act,[131] Section 1983,[132] or the Federal Employers' Liability Act.[133] Several circuit courts also extended the *Gardner-Denver* analysis, holding that compulsory arbitration clauses contained in individual employment contracts would not preclude subsequent suits under antidiscrimination laws.[134]

Westbrook, *The End of an Era in Arbitration: Where Can You Go If You Can't Go Home Again?* (1980), unpublished).

125. *Alexander*, 415 U.S. at 53-54 (stating that the arbitrator only has authority to resolve questions of contractual, not statutory, rights); refer to note 33 *supra* and accompanying text.

126. *Alexander*, 415 U.S. at 57-58 (noting that the arbitration record is often incomplete; that rules of evidence do not apply; and that discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable in arbitration procedures).

127. *Id.* at 58.

128. *Id.* at 58 n.19.

129. *Id.*

130. *See id.*

131. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 734 (1981) (voluntary submission to arbitration does not bar the assertion of a statutory claim in federal court).

132. McDonald v. City of West Branch, 466 U.S. 284, 290 (1984) (finding that arbitration could not provide an adequate substitute for a judicial proceeding in order to protect the statutory and constitutional rights protected by § 1983).

133. Atchison, T. & S.F. Ry. Co. v. Buell, 480 U.S. 557, 564-65 (1987) (holding that Congress did not intend an injured worker to be limited to the grievance procedures allowed under the Railway Labor Act).

134. *See* Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (holding that Title VII does not require arbitration prior to a suit for sexual discrimination even when employee has signed an agreement to arbitrate such claims), *cert. denied*, 493 U.S. 1045 (1990); Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 230 (3d Cir. 1989) (holding that contracts mandating arbitration do not displace the right to

B. The Federal Arbitration Act and Gilmer v. Interstate/Johnson Lane Corp.

Although courts consistently denied compulsory arbitration of statutory claims in the employment context,[135] subsequent to *Gardner-Denver* the Supreme Court handed down three decisions approving compulsory arbitration of statutory claims arising under antitrust,[136] securities,[137] and racketeering[138] laws. These cases, known collectively as the *Mitsubishi* trilogy, were predicated on the Federal Arbitration Act (FAA).[139] The Act's "centerpiece provision" creates a body of federal substantive law enforcing agreements to arbitrate in maritime transactions and transactions involving commerce.[140] The FAA also permits a party to an arbitration agreement to obtain a stay of proceedings in federal district court when an issue is referable to arbitration,[141] and permits such a party to obtain

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a judicial forum conferred by the ADEA); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1307 (8th Cir. 1988) (concluding that in passing Title VII Congress recognized that arbitration was insufficient to enforce the public's interest), *cert. denied*, 493 U.S. 848 (1989); Jones v. Baskin, Flaherty, Elliot & Mannino, P.C., 670 F. Supp. 597, 604 (W.D. Pa. 1987) (holding that because an employee cannot waive any statutory claim of discrimination, contractually mandated arbitration need not precede a suit under the ADEA); Steck v. Smith Barney, Harris Upham & Co., 661 F. Supp. 543, 547 (D.N.J. 1987) (holding that congressional intent precludes waiver of judicial remedies under the ADEA); Horne v. New England Patriots Football Club, Inc., 489 F. Supp. 465, 467-70 (D. Mass. 1980) (holding that while an arbitrator may be an expert in the law of the shop, such expertise does not necessarily extend to statutory and constitutional questions, therefore an employee may not contractually waive discrimination claims before a judicial forum). *But see* Pihl v. Thomson McKinnon Sec., 48 Fair Empl. Prac. Cas. (BNA) 922, 926 (E.D. Pa. 1988) (holding that ADEA claims are subject to compulsory arbitration).

135. Refer to notes 121-30 *supra* and accompanying text.

136. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-29 (1985) (compelling enforcement of a private contract to arbitrate claims arising under the Sherman Antitrust Act).

137. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989) (compelling enforcement of a private contract to arbitrate claims arising under § 12(2) of the Securities Act of 1933).

138. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238, 242 (1987) (compelling enforcement of a private contract to arbitrate claims arising under both RICO and § 10(b) of the Securities Act of 1934).

139. 9 U.S.C. §§ 1-208 (1988 & Supp. IV 1992).

140. *Id.* §§ 1-2 (1988). Section 2 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, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. § 2. *See also Mitsubishi*, 473 U.S. at 625.

141. 9 U.S.C. § 3 (1988).

an order compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement.[142]

In the *Mitsubishi* trilogy, the Court interpreted the FAA as creating a presumption of arbitrability.[143] In other words, the Court presumes that Congress did not intend to prohibit arbitration of statutory claims unless the language of the statute in question expressly indicates otherwise.[144] Furthermore, the Court has explained that the burden of proof is on the party opposing arbitration to show that Congress intended to preclude a waiver of existing remedies.[145] This fact, as several commentators have noted, has made the presumption virtually irrebuttable.[146] Additionally, the Court explicitly rejected arguments questioning the competence of arbitrators and the sufficiency of arbitral procedures.[147]

In this context of increasing confidence in arbitral resolution of statutory claims, the Court granted certiorari in *Gilmer v. Interstate/Johnson Lane Corp.*[148] Robert Gilmer was fired by his employer, Interstate/Johnson Lane Corp. ("Interstate"), from his position as a manager of financial services.[149] A term of his employment had been to register with several stock exchanges, including the New York Stock Exchange

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142. *Id.* § 4.

143. *Mitsubishi*, 473 U.S. at 628.

144. The Court stated that it

> must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. 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.

Id. (citation omitted).

145. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987).

146. *See, e.g.*, Michael Lieberman, *Overcoming the Presumption of Arbitrability of ADEA Claims: The Triumph of Substantive Over Procedural Values in* Nicholson v. CPC International, Inc., 138 U. PA. L. REV. 1817, 1826 (1990); Shell, *supra* note 110, at 398 (suggesting that "virtually all existing federal statutory claims that arise in commercial contexts are subject to arbitration"). The FAA presumption of arbitrability articulated in the *Mitsubishi* trilogy is analogous to the § 301 presumption of arbitrability enunciated by the Court in the *Steelworkers* trilogy. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569 (1960).

147. *See, e.g., Mitsubishi*, 473 U.S. at 628. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.*; *accord McMahon*, 482 U.S. at 232 (stating that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights").

148. 111 S. Ct. 1647 (1991).

149. *Id.* at 1650-51.

(NYSE).[150] The NYSE registration application contained a clause by which the applicant "'agree[d] to arbitrate any dispute, claim, or controversy'" between the applicant and his employer "'arising out of the employment or termination of employment of'" the applicant.[151]

Gilmer, sixty-two when Interstate discharged him, filed an Equal Employment Opportunity Commission charge and a civil suit alleging that Interstate had fired him because of his age in violation of the ADEA.[152] In response, Interstate filed a motion to compel arbitration, arguing that the arbitration agreement in Gilmer's NYSE registration application, coupled with the FAA's presumption of arbitrability, foreclosed Gilmer's opportunity to litigate the issue in court.[153] The district court disagreed and, relying on *Alexander v. Gardner-Denver Co.*,[154] denied the motion.[155] The Fourth Circuit, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements," reversed.[156]

Before the Supreme Court, Gilmer advanced three broad arguments for his claim that the compulsory arbitration clause should not preclude his ADEA suit. First, Gilmer argued that *Gardner-Denver* compelled the conclusion that an individual could not waive, through an arbitration agreement, the right to bring a statutory employment claim in a judicial forum.[157] Second, Gilmer argued that the arbitral forum was inadequate to protect statutory employment rights.[158] Finally, he argued that compulsory arbitration was inconsistent with the statutory purposes and framework of the ADEA, and that this inconsistency rebutted the presumption of arbitrability created by the *Mitsubishi* trilogy.[159] The Supreme Court rejected all three arguments, answered Gilmer's criticisms of the arbitral process, and affirmed the decision of the Fourth Circuit.[160]

1. Gardner-Denver *Distinguished.* Gilmer argued that *Gardner-Denver*, which had upheld an employee's right to sue

150. *Id.* at 1650.
151. *Id.* at 1650-51.
152. *Id.* at 1651.
153. *Id.*
154. 415 U.S. 36 (1974).
155. *Gilmer*, 111 S. Ct. at 1651.
156. *Id.* (citing *Gilmer*, 895 F.2d 195, 197 (4th Cir. 1990)).
157. *Id.* at 1656.
158. *Id.* at 1654-56.
159. *Id.* at 1653-54.
160. *Id.* at 1652-57.

on a statutory claim even though a clause in that employee's collective bargaining agreement compelled arbitration, protected Gilmer's right to sue in court on his ADEA claim.[161] The Court distinguished *Gardner-Denver* in three ways. The Court first noted that because a labor arbitrator's authority is limited to resolving conflicts in interpretation of the collective bargaining agreement at issue, a labor arbitrator, like the one who decided the plaintiff's case in *Gardner-Denver*, lacked the authority to resolve statutory claims.[162] Gilmer, on the other hand, was not covered by a collective bargaining agreement, and the arbitrator who would decide his case would be given explicit authority to resolve "'any dispute, claim or controversy'" arising out of Gilmer's employment.[163]

The Court's second basis for distinguishing *Gardner-Denver* was that Gilmer, unlike the plaintiff in *Gardner-Denver*, did not depend on a union to enforce his statutory claims.[164] In the collective bargaining agreement context of *Gardner-Denver*, the Court worried that a discriminatory union might not adequately pursue an employee's discrimination claim.[165] If union-controlled arbitration were an employee's exclusive remedy, the employee would be incapable of enforcing her statutory rights.[166] Gilmer, however, was not covered by a collective bargaining agreement and, hence, did not depend on union goodwill to provide adequate representation at the arbitration hearing.[167] Consequently, the Court concluded that the tension in *Gardner-Denver* between collective representation and individual rights did not apply to Gilmer's case.[168]

Finally, the Court noted that *Gardner-Denver* was not decided under the FAA.[169] Citing *Mitsubishi*, the Court imported the presumption of arbitrability from the commercial arbitration context of the *Mitsubishi* trilogy to the non-collective bargaining agreement employment context of *Gilmer*.[170] Because *Gardner-Denver* was thus distinguished, it was not explicitly overruled. However, it is unclear how *Gardner-Denver* would be decided today if an employer were to argue the applicability of the FAA to the collective bargaining context.[171]

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161. *Id.* at 1656.
162. *Id.*
163. *Id.* at 1650.
164. *Id.* at 1657.
165. Refer to notes 115-16 *supra* and accompanying text.
166. *Gilmer*, 111 S. Ct. at 1657.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *See Where Are We Going*, *supra* note 102, at 213 (recognizing the uncertain-

2. Arbitral Adequacy. Gilmer's second major argument was that arbitration, because of its informality, was inadequate to protect statutory employment rights.[172] The Court, first noting that the *Mitsubishi* trilogy had rejected this argument as "'far out of step with our current strong endorsement'" of arbitration,[173] then cited the relatively formal NYSE arbitration rules to rebut Gilmer's specific challenges.[174] To Gilmer's charge that arbitration panels might be biased in favor of employers, the Court noted that the NYSE rules provide that the parties be informed of the arbitrator's background, allow one peremptory challenge and unlimited challenges for cause, and require arbitrators to disclose "'any circumstances which might preclude [them] from rendering an objective and impartial decision.'"[175] Further, the Court indicated that the FAA, by providing that courts may overturn arbitration

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ty of cases arising out of collective bargaining agreements after *Gilmer*); refer to notes 246-53 *infra* and accompanying text. *But see* Austin v. Owens-Brockway, 2 AD Cas. 1649, 1651-52 (W.D. Va. 1994) (following *Gilmer* and enforcing a compulsory arbitration clause in a collective bargaining agreement); Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141, 147 (D. Conn. 1993) (following *Gardner-Denver* and holding that a collective bargaining agreement cannot require an employee to arbitrate individual statutory claims).

172. *Gilmer*, 111 S. Ct. at 1654-55.

173. *Id.* at 1654 (quoting Rodriquez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989)).

174. *Id.* at 1654-55 (noting that the NYSE arbitration rules provide ample protection).

175. *Id.* at 1654. The entire pool of potential arbitrators, however, are appointed by the exchange's Director of Arbitration, leading one commentator to conclude that there is no effective way to screen arbitrators for bias. *See* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 569 (1990). Similarly, the arbitral systems of major league sporting associations generally provide that the arbitration panel be presided over by the league commissioner. *See id.* at 569 n.437; *see, e.g.*, Horne v. New England Patriots Football Club, Inc., 489 F. Supp. 465, 468 (D. Mass. 1980). Because the securities industry's Director of Arbitration and the sporting associations' league commissioners are chosen exclusively by the employers, they may be "steeped in the kind of discriminatory biases the plaintiff seeks to remedy." Shell, *supra*, at 569 n.437.

It is unclear whether a demonstration of built-in bias would persuade the Court to abandon compulsory arbitration in such arbitral systems, or whether, as seems more likely given the tenor of *Gilmer*, the Court would compel the employee to submit to arbitration, then review the arbitration decision under the "evident bias" review standard contained in § 10(b) of the FAA. *Id.* Shell argues that the bias issue proves that there is an "inherent conflict" between statutory employment rights and compulsory arbitration. *Id.* This position, however, was emphatically rejected by the Court in *Gilmer*. Refer to notes 180-86 *infra* and accompanying text.

Note that Shell, in the references cited in this and subsequent footnotes, was evaluating the merits of compelling arbitration of Title VII claims. Shell, *supra*, at 566. The specific analysis for which he is cited here is equally applicable to ADEA cases such as *Gilmer*.

decisions "[w]here there was evident partiality or corruption in the arbitrators," also protects employees from biased arbitrators.[176]

Gilmer also complained that arbitral discovery was more limited than that available through federal courts, and that this would limit an employee's ability to prove discrimination.[177] The Court, first noting that NYSE rules permitted "document production, information requests, depositions, and subpoenas,"[178] declared that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom' for the simplicity, informality, and expedition of arbitration.'"[179]

Gilmer further attacked arbitral adequacy on the ground that arbitrators are not required to issue written opinions.[180] This, he argued, would result in the public being unaware of employers' discrimination policies,[181] hampering effective appellate review,[182] and stifling the development of the law.[183] The Court answered Gilmer's attack with three

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176. *Gilmer*, 111 S. Ct. at 1654 (citing 9 U.S.C. § 10(b) (1988)).

177. *Id.* Christine Cooper, criticizing *Gilmer*, explains that

> [d]etermining an employment discrimination case in the absence of full discovery would be particularly problematic . . . . [Even] the ordinary disparate treatment case requires the presentation of similarly situated non-class members in order to determine whether or not discrimination occurred. Proof of discrimination on the basis of race, for example, requires proof that similarly situated members of another race were treated better. Without full prehearing discovery, what can the arbitrator know?

Where Are We Going, *supra* note 102, at 218.

178. *Gilmer*, 111 S. Ct. at 1654.

179. *Id.* at 1655 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

180. *Id.*; *see also* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960) (noting that arbitrators "have no obligation to the court to give their reasons for an award").

181. *Gilmer*, 111 S. Ct. at 1655.

> Imagine a sexual harassment case in private arbitration. If the arbitrator ruled that the employer did not perform an adequate investigation of the sexual harassment complaint, who will learn what kind of investigation should have been performed? Indeed, in the typical commercial arbitration, where arbitrators are discouraged from writing opinions containing findings of fact and conclusions of law, not even the immediate parties would know that the wrong committed was an inadequate investigation: they would know only that the employer lost the sexual harassment case.

Where Are We Going, *supra* note 102, at 215 (footnotes omitted).

182. *Gilmer*, 111 S. Ct. at 1655; *see also Where Are We Going*, *supra* note 102, at 215-18 (describing the inadequacies of judicial review of arbitrations).

183. *Gilmer*, 111 S. Ct. at 1655; *see also Where Are We Going*, *supra* note 102, at 218 (asserting that arbitrators "are completely inadequate to develop the law" and drawing as examples the disparate impact theory of discrimination and environmental sexual harassment). Cooper also points out that prior arbitration awards, even if written, only bind the parties to the original arbitration. *Id.* at 219.

responses. First, the Court pointed out that the NYSE arbitration rules require arbitrators to issue written, detailed opinions, and to make those opinions publicly available.[184] Second, the Court reasoned that courts would continue to issue judicial opinions because not all employers and employees are likely to sign binding arbitration agreements.[185] Third, the Court attacked the uniqueness of Gilmer's argument, noting that settlement agreements, which are encouraged by the ADEA, similarly fail to produce written opinions.[186]

As a separate attack on arbitral adequacy, Gilmer argued that judicial review of arbitral decisions is too limited.[187] The Court, responding in a footnote and citing a case from the *Mitsubishi* trilogy, stated that "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue."[188]

Gilmer's final attack on arbitral adequacy concerned the arbitrators' limited power to award relief.[189] The Court answered by first noting that NYSE rules granted NYSE arbitrators the authority to award equitable relief and to hear class

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> Even if the arbitration award were given great publicity, there would be no legal effect of the opinion beyond the immediate parties. The employer may not even be held to the legal conclusion in a later case with a different employee . . . . While the general rule is that an arbitrator's valid award is binding on the parties during the life of the contract, the same parties will rarely be involved in private commercial arbitration.

Id. (footnotes omitted).

184. *Gilmer*, 111 S. Ct. at 1655.

185. *Id.*

186. *Id. But see Where Are We Going*, *supra* note 102, at 222 (stating that "settlement is based on a prediction of the outcome of litigation; arbitration [when it is the product of the employer's coercion and the employer's expectation that she will more likely win in arbitration than litigation] is based on an avoidance of the outcome of litigation").

187. *Gilmer*, 111 S. Ct. at 1655 n.4; *see also Where Are We Going*, *supra* note 102, at 216-17 (noting that arbitral awards may only be vacated under the FAA for "manifest disregard of the law," and concluding that "very few arbitration awards will be vacated for manifest disregard of the law, even when the law is not followed. The gravest worry is not that the law will fail to develop further, but that it will not be followed at all").

188. *Gilmer*, 111 S. Ct. at 1655 n.4 (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

189. *Id.* Shell points out that the remedial powers of arbitrators in securities industry employer-employee disputes "are limited to granting or denying relief requested by the particular parties before them and do not include monitoring long-term injunctive relief or making sweeping institutional reforms." Shell, *supra* note 175, at 568. Shell concludes that securities arbitration procedures "simply would not be suited to implementing the systemic, institutional interests embodied in Title VII." *Id.* The *Gilmer* Court, at least in the context of the ADEA, obviously disagreed. Refer to notes 194-97 *infra* and accompanying text.

actions.[190] The Court further stated that even if such authority were lacking, this fact would not justify a conclusion that arbitral procedures were inadequate to protect employees' statutory rights.[191]

The Court thus rejected all of Gilmer's complaints concerning arbitral adequacy.[192] Because the NYSE rules created a relatively formal arbitral setting, it is possible that the courts could interpret *Gilmer* to require a formal arbitral setting as a condition precedent for a judicial grant of an order compelling arbitration. However, because the *Gilmer* Court did not rely exclusively on NYSE formality to reject Gilmer's arguments,[193] such an interpretation is not preordained.

3. Arbitral Consistency with Individual Rights Statutes. Gilmer asserted that compulsory arbitration is inconsistent with the statutory framework and the purposes of the ADEA as a third major argument that his arbitration agreement should not preclude his ADEA suit.[194] This inconsistency, he claimed, rebutted the *Mitsubishi* trilogy's presumption of arbitrability.[195] Gilmer advanced four reasons why compulsory arbitration defeated the congressional purposes underlying the ADEA. He first argued that compulsory arbitration subverted the congressional goal of furthering important social policies.[196] The Court rejected this argument, asserting that the arbitral forum was adequate to protect these social policies.[197]

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190. *Gilmer*, 111 S. Ct. at 1655.

191. *Id.* " '[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.' " *Id.* (brackets in original) (quoting Nicholson v. CPC Int'l Inc., 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)). The Court also noted "that arbitration agreements [would] not preclude the EEOC from bringing actions seeking class-wide and equitable relief." *Id. But see Where Are We Going*, *supra* note 102, at 219-20 (arguing that the EEOC offers employees little protection because the Commission files suit in less than one percent of the claims it receives).

192. *Gilmer*, 111 S. Ct. at 1654-55.

193. *See, e.g., id.* (basing its decision, in part, on the impartiality of arbitrators).

194. *Id.* at 1652.

195. *Id.* at 1652-53.

196. *Id.* at 1653.

> Title VII is not only a remedial statute; it is an attempt to address a systemic social ill—discrimination—that is deeply embedded in the cultural fabric. The adjudication of a Title VII claim is both an opportunity to reverse an instance of discrimination and an occasion for examining the institutions that made discrimination possible . . . . Commercial arbitration is not well situated to serve this institutional goal because it is essentially transactional in focus.

Shell, *supra* note 175, at 568.

197. *Gilmer*, 111 S. Ct. at 1653 (stating that " 'so long as the prospective litigant

Second, Gilmer argued that compulsory arbitration would undermine the role of the EEOC in enforcing the ADEA.[198] If the Court held the arbitrator's decision to be binding, the ADEA would not require grieving employees to file an EEOC charge before proceeding to arbitration[199] as they must before filing suit. This situation would effectively shut the EEOC out of the enforcement process, in violation of a strong congressional policy to encourage voluntary conciliation of disputes between employer and employee with the EEOC as intermediary.[200] Once again the Court rejected Gilmer's argument, reasoning that an arbitration agreement would not preclude an employee from filing an EEOC charge, and thus did not shut the EEOC out of the dispute resolution process.[201]

In addition, Gilmer argued that compulsory arbitration denied employees the judicial forum provided by the ADEA.[202] The Court disagreed with Gilmer's assertion that this denial was contrary to congressional intent.[203] First, the Court pointed out that the ADEA never explicitly precluded compulsory arbitration and that Gilmer had thus failed to overcome the *Mitsubishi* presumption of arbitrability.[204] The Court next stated that the congressional directive to the EEOC to pursue "'informal methods of conciliation, conference, and persuasion'"

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effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function' ") (brackets in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 620 (1985)).

198. *Id.*

199. 29 U.S.C. § 625(d) (1988).

200. *See, e.g.*, St. John v. Employment Dev. Dep't., 642 F.2d 273, 275 (9th Cir. 1981) (noting that the preferred method for promoting Title VII's goal of nondiscrimination is voluntary compliance and that this is the very reason the EEOC exists).

201. *Gilmer*, 111 S. Ct. at 1653 (stating that inability to file a private judicial action would not prevent one from filing a charge with the EEOC). The Court further argued that the EEOC's role in fighting discrimination was not dependent on individual employees filing a charge. *Id.* First, the EEOC can investigate claims even when a charge is not filed. *Id.* The Court also asserted that "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes." *Id.* Finally, the Court, citing the Securities Exchange Commission's involvement in enforcing securities statutes, stated that the mere involvement of an administrative agency in the enforcement of a statute does not preclude compulsory arbitration. *Id.*

202. *Id.* One commentator argued that "[t]itle VII's overlapping system of state, federal, and administrative remedies expresses a strong congressional concern that victims of discrimination have access to multiple forums . . . . This multiforum structure would be frustrated if Title VII claimants were given only one chance to present their case before commercial arbitrators." Shell, *supra* note 175, at 568-69 (footnotes omitted).

203. *Gilmer*, 111 S. Ct. at 1653-54 (noting that Congress did not preclude arbitration in its recent ADEA amendments).

204. *Id.* at 1654.

indicated that Congress did not intend to preclude out-of-court dispute resolution methods such as arbitration.[205] The Court also asserted that arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts because arbitration agreements further an objective of permitting parties to chose a forum, whether judicial or otherwise, for dispute resolution in much the same way as the provision for concurrent jurisdiction.[206]

Finally, Gilmer argued that compulsory arbitration agreements should not be enforced because they are often the product of unequal bargaining power between employers and employees.[207] The Court flatly rejected this argument, stating that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[208] Instead, the Court held that such agreements would be enforced except in cases of fraud or gross disparity in bargaining power in much the same manner as a court might hold any other contract revocable.[209]

4. The FAA Exclusion of Employment Contracts. The final argument against compulsory arbitration of an ADEA suit proposed that an FAA provision excluding "contracts of employment" rendered the FAA—and its presumption of

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205. *Id.* (quoting 29 U.S.C. § 626(b) (1988)).

206. *Id.*; *cf.* 29 U.S.C. § 626(c)(1) (1988) (allowing plaintiffs to file ADEA suits in any competent jurisdiction).

207. *Gilmer*, 111 S. Ct. at 1655; *see also Where Are We Going*, *supra* note 102, at 220-21 (arguing that Gilmer probably never actually thought about the boilerplate arbitration agreement when he signed the NYSE application form); Gray, *supra* note 14, at 118 (noting that "while it is one thing . . . to agree in advance of a dispute to mandatory arbitration, it is quite another to be required to accept the arbitral forum as a condition of employment"); Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 486-87 (1981) (arguing that courts should not enforce arbitration agreements when they are "the product of unequal bargaining power, or of unequal transaction costs that make it likely that one party will draft an agreement that the other will sign without first questioning or reviewing the agreement's arbitration clause"). Commentators have advanced several different solutions to protect employees from coerced bargains. *See, e.g.* Joseph E. Herman, *Arbitrate, Don't Litigate, at Work*, N.Y. TIMES, Apr. 14, 1991, at F11 (suggesting that employees be given a choice of whether to sign a compulsory arbitration agreement only *after* they have been hired, not as a condition of employment); G. Richard Shell, *Is Arbitration A Just Route?*, NAT'L L.J., Feb. 11, 1991, at 14 (arguing that because discrimination claims involve more than commercial contract disputes, agreements to arbitrate antidiscrimination claims should never be enforceable).

208. *Gilmer*, 111 S. Ct. at 1655.

209. *Id.* at 1656. Indeed, the Court's recognition that Gilmer was "an experienced businessman" suggests that it will be nearly impossible for white collar employees to make such a showing. *Id.*

arbitrability—inapplicable to this case.[210] Section 1 of the FAA, the definitional section, states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[211] The Court noted that Gilmer had not presented, and the courts below had not considered, the issue.[212] However, the Court commented that because the arbitration agreement was contained in Gilmer's registration application with the NYSE, it was not part of his "contract of employment" with Interstate, and therefore did not address the issue.[213] The "contracts of employment" exclusion is discussed in greater detail below.

The Court thus rebuffed all of Gilmer's arguments and held that the FAA entitled Interstate to compel arbitration of Gilmer's ADEA claim. Two further hurdles remain, however, before concluding that *Gilmer* signifies general judicial approval of resolving statutory employment disputes through commercial arbitration. First, courts must extend *Gilmer's* analysis beyond the ADEA to other antidiscrimination laws, particularly Title VII. Second, courts must find a way to avoid the FAA's exclusion of "contracts of employment."

C. Applicability of the FAA to Other Employment Laws

Courts must interpret the FAA broadly enough to permit compulsory arbitration of all, or at least substantially all, employment disputes for the argument that American labor relations are in transition from collective autonomy to individual autonomy to have merit. *Gilmer* made a giant step in that direction by permitting compulsory arbitration of ADEA claims. The following discussion addresses employment issues that lie outside the direct reach of *Gilmer*. Specifically, courts must interpret the FAA to reach (1) federal legislation other than the ADEA (most importantly, Title VII) and (2) state legislation and state common law doctrines.

1. Title VII and Other Federal Legislation. To date, the Fifth,[214] Sixth,[215] Ninth,[216] and Eleventh[217] Circuits have

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210. *Id.* at 1651-52 n.2. Several *amici curiae* raised this argument for the first time before the Supreme Court. *Id.*

211. 9 U.S.C. § 1 (1988).

212. *Gilmer*, 111 S. Ct. at 1651-52 n.2.

213. *Id.*

214. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (following *Gilmer* in comparing the similarities of Title VII and the ADEA and concluding that because of similar goals, they should both be subject to arbitration), *rev'g*

held that *Gilmer* subjects Title VII claims to compulsory arbitration.[218] Two other circuits, the First and the Eighth, have

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905 F.2d 104 (5th Cir. 1990); *see also* Hirras v. National R.R. Passenger Corp., 10 F.3d 1142, 1146 (5th Cir. 1994) (holding that Title VII claims are subject to the compulsory arbitration provisions of the Railway Labor Act).

215. Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991) (holding that, in light of *Gilmer*, a Title VII sex discrimination claim was subject to arbitration).

216. Bierdeman v. Shearson Lehman Hutton, Inc., 963 F.2d 378 (9th Cir.) (text in Westlaw) (citing *Mago* and holding a sex discrimination claim pursuant to Title VII arbitrable), *cert. denied*, 113 S. Ct. 328 (1992); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992) (holding that because the ADEA and Title VII "are similar in their aims and substantive provisions," the latter could be held to compulsory arbitration); *see also* Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877, 882 (9th Cir.) (holding that an employer may compel arbitration of a claim brought under the Employee Polygraph Protection Act), *cert. denied*, 113 S. Ct. 494 (1992).

217. Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700-01 (11th Cir. 1992) (holding Title VII claims arbitrable finding "no reason to distinguish between ADEA claims and Title VII claims").

218. Several district courts have reached the same conclusion. *See, e.g.*, Crawford v. West Jersey Health Sys., No. Civ. 92-4572, 1994 WL 113654, at *9 (D.N.J. Mar. 31, 1994) (compelling arbitration of Title VII sex discrimination claim); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430, 1443 (N.D. Ill. 1993) (compelling arbitration of claims brought pursuant to Title VII and 42 U.S.C. § 1981); Felt v. Atchison, T. & S.F. Ry., 831 F. Supp. 780, 784 (C.D. Cal. 1993) (discussing compulsory arbitration of Title VII religious discrimination claims); Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76, 77, 80 (D. Mass. 1993) (holding that alleged claims of pregnancy discrimination are arbitrable); Hull v. NCR Corp., 826 F. Supp. 303, 306 (E.D. Mo. 1993) (compelling arbitration of Title VII and state law antidiscrimination claims); DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947, 952 (W.D.N.Y. 1992) (holding that *Gilmer* compels arbitration, and precludes direct judicial enforcement, of Title VII and state claims of sex discrimination, sexual harassment, and hostile work environment); Newton v. Southern Pac. Transp. Co., 59 Fair Empl. Prac. Cas. (BNA) 1568, 1570 (W.D. Tex. 1992) (holding that the compulsory arbitration provision of the Railway Labor Act compels arbitration, and precludes direct judicial enforcement, of Title VII race discrimination claims); Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. Civ. 89—3749, 1992 WL 245506, at *6 (S.D.N.Y. Sept. 14, 1992) (compelling arbitration of Title VII and state claims of race discrimination); Bender v. Smith Barney, Harris Upham & Co., 789 F. Supp. 155, 160 (D.N.J. 1992) (holding that arbitration of a Title VII action is not against public policy); Roe v. Kidder Peabody & Co., 52 Fair Empl. Prac. Cas. (BNA) 1865, 1868-70 (S.D.N.Y. 1990) (holding that the *Mitsubishi* trilogy compels arbitration of Title VII race discrimination claims).

Additionally, several courts have concluded that the FAA compels arbitration of discrimination suits brought under state laws. *See, e.g.*, Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 699 (11th Cir. 1992) (upholding the district court's ruling compelling arbitration of state law claims); *Willis*, 948 F.2d at 312 (reversing the district court's denial of the defendant's motion to arbitrate state law claims); Sacks v. Richardson Greenshield Sec., Inc., 781 F. Supp. 1475, 1476, 1483 (E.D. Cal. 1991) (finding arbitration appropriate for state labor code disputes); ITT Consumer Fin. Corp. v. Wilson, 8 Individual Empl. Rights Cas. (BNA) 802, 807 (S.D. Miss. 1981) (referring state invasion of privacy claims to arbitration); Spellman v. Securities, Annuities & Ins. Servs., Inc., 10 Cal. Rptr. 2d 427, 433-34 (Ct. App. 1992) (holding that state law claims are subject to compulsory arbitration under the FAA); Higgins v. Superior Court, 1 Cal. Rptr. 2d 57, 62 (Ct. App. 1991) (noting that

held that a compulsory arbitration clause does not preclude a judicial remedy.[219] The holdings of these two circuits is of doubtful applicability, however, because both predate *Gilmer*. Further, the Supreme Court's treatment of *Alford v. Dean Witter Reynolds, Inc.*[220] indicates the Supreme Court's apparent conclusion that the reasoning of *Gilmer* should be extended to Title VII claims.[221]

Because the post-*Gilmer* federal decisions have unanimously held that *Gilmer* applies to Title VII claims,[222] and because the Supreme Court has indicated that it agrees with this reasoning, it appears that *Gilmer* and the FAA compel courts to enforce compulsory arbitration clauses in Title VII cases. The language of the Civil Rights Act of 1991[223] (Civil Rights Act) seems to support this conclusion.

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the FAA preempts conflicting state law); Cook v. Barratt Am., Inc., 268 Cal. Rptr. 629, 630, 632 (Ct. App. 1990) (adopting federal policy to compel arbitration of a violation of the California Government Code), *cert. denied*, 111 S. Ct. 2052 (1991); Fletcher v. Kidder, Peabody & Co., 584 N.Y.S.2d 838, 839-40 (App. Div. 1992) (compelling arbitration of state racial discrimination claim); Nelson v. Colleary, 574 N.Y.S.2d 912, 913-14 (Sup. Ct. 1991) (directing the parties to arbitrate state discrimination claim).

219. Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (holding that "an employee cannot waive prospectively her right to a judicial forum at any time, regardless of the type of employment agreement which she signs"), *cert. denied*, 493 U.S. 1045 (1990); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1309 (8th Cir. 1988) ("Congress has articulated an intent through the text and legislative history of Title VII to preclude waiver of judicial remedies for violation of both federal Title VII rights and parallel state statutory rights."), *cert. denied*, 493 U.S. 848 (1989).

220. 905 F.2d 104 (5th Cir. 1990) (Alford I), *vacated and remanded*, 111 S. Ct. 2050 (1991).

221. Dean Witter Reynolds, Inc. v. Alford, 111 S. Ct. 2050 (1991). In *Alford II*, a stockbroker had signed an arbitration agreement similar to the one signed by Gilmer. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 n.* (5th Cir. 1991) (Alford II) (noting that the arbitration agreements in both *Gilmer* and *Alford* were contained in a contract with a securities exchange), *rev'g* 905 F.2d 104 (5th Cir. 1990). The broker sued her employer in federal district court alleging Title VII violations of sex discrimination and sexual harassment. *Alford I*, 905 F.2d at 105. The employer, pointing to the FAA and the *Mitsubishi* trilogy, moved to dismiss the complaint and to compel arbitration. *Id.* The district court denied the motion, *see id.* and the Fifth Circuit, relying on *Gardner-Denver*, affirmed. *Id.* at 108. After the Fifth Circuit's affirmance, the Supreme Court decided *Gilmer*. On petition for certiorari in *Alford I*, the Court vacated and remanded for further consideration in light of *Gilmer*. 111 S. Ct. at 2050. The Fifth Circuit then reversed its earlier decision, concluding that "*Gilmer* requires us to reverse the district court and compel arbitration of Alford's Title VII claim." *Alford II*, 939 F.2d at 229-30.

222. Refer to notes 214-18 *supra* and accompanying text.

223. Amending Title VII, the ADEA, and the Americans with Disabilities Act, § 118 of the Civil Rights 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

This language is very similar to, indeed it is a much stronger endorsement of arbitration than, the ADEA language upon which the *Gilmer* Court relied when it concluded that Congress had not intended to preclude compulsory arbitration.[224] One commentator who has considered the effect of the Civil Rights Act on *Gilmer* has concluded that the "clear meaning of" the Act was to "recognize[] the arbitrability of discrimination claims arising under [Title VII, the ADEA, and the ADA]."[225] However, the legislative history of the Civil Rights Act indicates the opposite conclusion. Using identical language, the House Committee on Education and Labor and the House Committee on the Judiciary, describing the purpose of Section 118, stated that

> [t]he 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. 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 [sic] be used to preclude rights and remedies that would otherwise be available.[226]

In fact, the Republican version of the Civil Rights Act, proposed by President Bush and introduced as an amendment in the nature of a substitute,[227] would have encouraged the use of arbitration "'in place of judicial resolution.'"[228] Noting that this proposal would allow employers to "refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints,"[229] the House Committee

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encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. No. 102-166, 105 Stat. 1071, 1081 (codified in scattered sections of 42 U.S.C.).

224. *Compare id. with* Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1652 (1991) (stating that the ADEA's purpose was "'to help employers and workers find ways of meeting problems'") (quoting 29 U.S.C. § 621(b) (1988)).

225. Gray, *supra* note 14, at 131 n.64; *see also* Todd H. Thomas, *Using Arbitration To Avoid Litigation*, 44 LAB. L.J. 3, 14 (1993) (arguing that the Civil Rights Act of 1991 provides "another source of authority" for compelling arbitration of statutory claims).

226. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 41 (1991).

227. H.R. REP. NO. 40(I), 102d Cong., 1st Sess., pt. 1, at 97 (1991).

228. *Id.* at 104.

229. *Id.*

on Education and Labor rejected this proposal, stating that

> [s]uch 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.[230]

This legislative history suggests that *Gilmer*'s post-1991 progeny were wrongly decided; that Congress did *not* intend for statutory employment claims to be subject to compulsory arbitration. If this is true, however, the statutory language of the Civil Rights Act is hard to explain. Why would Congress, if it wished to preclude compulsory arbitration, endorse arbitration using virtually the same language that the Court had previously construed to prove Congressional *approval* of compulsory arbitration? Because *Gilmer* was decided six months before the Civil Rights Act was passed and signed, Congress had plenty of time to amend the proposed Act to express clearly its intent regarding compulsory arbitration. Perhaps its failure to do so, and its reliance on the legislative history of *Gardner-Denver*, indicates its agreement with the Court's analysis distinguishing *Gilmer* from *Gardner-Denver*.

Even assuming Congress intended to preclude compulsory arbitration on the facts of *Gilmer*, it is unclear how broadly Congress intended that preclusion to reach. Legislative history of the Civil Rights Act indicates that Congress' main concern was that unequal bargaining power would allow an employer to coerce an otherwise-unwilling employee to sign a compulsory arbitration agreement as a condition of employment.[231] An employer who gives her employees a bona fide choice concerning whether or not to agree to compulsory arbitration, rather than merely presenting the employee with a take-it-or-leave-it contractual offer of employment, avoids the issue with which Congress was primarily concerned.[232]

The foregoing discussion indicates that congressional intent on this issue is ambiguous at best, and hence is malleable into whatever an advocate or a court wants it to be. Although several compulsory arbitration cases have been decided since *Gilmer* and the passage of the Civil Rights Act, none have

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230. *Id.* (citations omitted).

231. *Id.*

232. Refer to note 207 *supra* (providing examples of proposed ways to protect employees from coerced bargains).

considered the impact of the Act or its legislative history.[233] The issue of whether employment statutes[234] should be subject to compulsory arbitration thus appears open to the courts, which, as noted above, are inclined to favor compulsory arbitration.[235]

2. State Legislation and Common Law. Another area of employment law not directly addressed by *Gilmer* is state law. Two Supreme Court decisions[236] and innumerable lower court decisions[237] have made it clear that the FAA preempts state

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233. Mago v. Shearson Lehman Hutton Inc., 956 F.2d 932 (9th Cir. 1992); Newton v. Southern Pac. Transp. Co., 59 Fair Empl. Prac. Cas. (BNA) 1568 (W.D. Tex. 1992); DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947 (W.D.N.Y. 1992); Bender v. Smith Barney, Harris Upham & Co., 789 F. Supp. 155 (D.N.J. 1992).

234. Employment statutes other than Title VII also appear amenable to enforcement by compulsory arbitration. *See, e.g.*, Perry v. Thomas, 482 U.S. 483, 491 (1987) (compelling arbitration of a wage collection claim under the California Labor Code); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110, 1118 (3d Cir. 1993) (compelling arbitration of an ERISA claim); Bird v. Shearson Lehman/Am. Express, Inc., 926 F.2d 116, 122 (2d Cir.) (same), *cert. denied*, 111 S. Ct. 2891 (1991); Austin v. Ownes-Brockway, 2 AD Cas. 1649, 1651-52 (W.D. Va. 1994) (compelling arbitration of a claim brought under the Americans with Disabilities Act); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430, 1433 (N.D. Ill. 1993) (compelling arbitration of a race discrimination claim brought under 42 U.S.C. § 1981); Foley v. Presbyterian Ministers' Fund, Civ. A. No. 90-1053, 1992 WL 63269, at *1-2 (E.D. Pa. March 19, 1992) (compelling arbitration of an ERISA claim); Peter M. Panken et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's*, C779 ALI-ABA 63, 70 (1992) (arguing that Congress intended to encourage arbitration of claims brought under the Americans with Disabilities Act); Shell, *supra* note 175, at 570 (arguing that the FLSA presents a better case for enforcing compulsory arbitration than does Title VII); *id.* at 556-65 (arguing that claims arising under the Employee Retirement Income Security Act of 1974 (ERISA) should be subject to compulsory arbitration).

235. Refer to notes 97-106 *supra* and accompanying text.

> Section 118 [of the Civil Rights Act], while not likely to end the debate, is scarcely phrased in such a way that would prevent the Court from broadly upholding such arbitration agreements in the employment context, and the House Committee Report to the contrary is not likely to be given much weight. Indeed, to the extent that there is a "spirit" to § 118, it is that ADR techniques such as arbitration are to be favored.

CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION: SPECIAL RELEASE ON THE CIVIL RIGHTS ACT OF 1991, at 94 (2d ed. 1992)

236. Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

237. *See, e.g.*, David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 249-50 (2d Cir.) (holding that the FAA preempted a Vermont law voiding any arbitration agreement where a specific acknowledgement of arbitration had not been signed by both parties), *cert. dismissed*, 112 S. Ct. 17 (1991); Saturn Distribution Corp. v. Williams, 905 F.2d 719, 722 (4th Cir.) (stating that "if a state law singles out arbitration agreements and limits their enforceability it is preempted" by the FAA), *cert. denied*, 111 S. Ct. 516 (1990); Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 841 F.2d 508, 511 (3d Cir. 1988) (holding that the FAA clearly preempted certain provisions of the Pennsylvania Securities Act); Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 285 (9th Cir. 1988) (holding that the

law on the issue of whether courts may compel arbitration. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[238] the Court affirmed a Fourth Circuit judgment enforcing an arbitration clause. The Court, holding that the FAA governed the issue of arbitrability, stated that

> Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.[239]

The Court reversed the California Supreme Court's holding that the California Franchise Investment Law invalidated an arbitration clause in a franchise agreement[240] in *Southland Corp. v. Keating*.[241] The Court stated that "[i]n enacting [Section] 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."[242] Courts have consistently held that this preemption applies to state antidiscrimination law, as well as to state commercial law.[243] The FAA thus requires courts to compel arbitration of

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FAA preempts "any state laws or policies to the contrary"); Webb v. R. Rowland & Co., 800 F.2d 803, 806 (8th Cir. 1986) (holding that "federal law preempts state law with respect to the interpretation and construction of arbitration agreements"); Ommani v. Doctor's Assocs., Inc., 789 F.2d 298, 299-300 (5th Cir. 1986) (holding that arbitration could not be denied because a claim comprehended within the scope of the arbitration clause was also based on the Texas Deceptive Trade Practices Act); Societe Generale de Surveillance, S.A. v. Raytheon European Management & Sys. Co., 643 F.2d 863, 867 (1st Cir. 1981) (holding that the FAA "supplants only that state law inconsistent with its express provisions"); Georgia Power Co. v. Cimarron Coal Corp., 526 F.2d 101, 107 (6th Cir. 1975) (holding that Georgia law must yield to the paramount federal law of the FAA), *cert. denied*, 425 U.S. 952 (1976).

238. 460 U.S. 1 (1983).

239. *Id.* at 24.

240. *Id.* at 3-6.

241. 465 U.S. 1 (1984).

242. *Id.* at 10.

243. *See, e.g.*, Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 306 (6th Cir. 1991) (allowing FAA preemption of Kentucky statute prohibiting gender discrimination); Sacks v. Richardson Greenshield Sec., Inc., 781 F. Supp. 1475, 1483 (E.D. Cal. 1991) (allowing FAA preemption of California statute prohibiting gender discrimination); Spellman v. Securities, Annuities and Ins. Serv., Inc., 10 Cal. Rptr. 2d 427, 432-34 (Ct. App. 1992) (allowing FAA preemption of California statute prohibiting racial discrimination); Higgins v. Superior Court, 1 Cal. Rptr. 2d 57, 62-63 (Ct. App. 1991) (allowing FAA preemption of California statute prohibiting gender discrimination); Cook v. Barratt Am., Inc., 268 Cal. Rptr. 629, 630-32 (Ct. App. 1990) (allowing FAA preemption of California statute prohibiting gender discrimination), *cert. denied*, 111 S. Ct. 2052 (1991); Reid v. Goldman, Sachs & Co., 590 N.Y.S.2d 497, 497-98

employment disputes arising under state law, whether that state law is a creation of statute[244] or common law.[245]

D. *The FAA Exclusion*

The second post-*Gilmer* hurdle to concluding that *Gilmer* signifies judicial approval of resolving statutory employment disputes through commercial arbitration is to find a way to avoid the FAA's exclusion of "contracts of employment." Section 1 of the FAA states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[246] The issue is whether courts should broadly interpret the phrase "workers engaged in interstate commerce" to include all workers *affecting* interstate commerce, or whether they should interpret the phrase narrowly to include only workers directly engaged in interstate transportation.

Justice White, writing for the *Gilmer* majority, buried the issue in a footnote, avoiding the exclusion on two grounds. He first noted that Gilmer had not presented, and the lower courts had not considered, the issue.[247] Second, Justice White concluded that because the arbitration agreement was contained in Gilmer's registration application with the NYSE, it was not part of his "contract of employment" with Interstate.[248] These excuses are flimsy at best. As Justice Stevens, writing for the

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(App. Div. 1992) (allowing FAA preemption of New York statute prohibiting gender discrimination); Fletcher v. Kidder Peabody & Co., 584 N.Y.S.2d 838, 835-41 (App. Div. 1992) (allowing FAA preemption of New York statute prohibiting racial discrimination; Nelsen v. Colleary, 574 N.Y.S.2d 912, 913-14 (Sup. Ct. 1991) (allowing FAA preemption of New York statute prohibiting racial and religious discrimination); refer to notes 237-42 *supra* and accompanying text.

244. *See* Perry v. Thomas, 482 U.S. 483, 492 (1987) (holding that the FAA preempted a state statute which provided that parties can maintain breach of contract claims in a judicial forum without regard to the existence of any private agreement to arbitrate).

245. *See, e.g.*, Bender v. A.G. Edwards & Sons, 971 F.2d 698, 699 (11th Cir. 1992) (compelling arbitration of common law claims of battery, intentional infliction of emotional distress, and negligent retention); Singer v. Jefferies & Co., 575 N.E.2d 98, 102-04 (N.Y. 1991) (compelling arbitration of a tort claim for damage to professional reputation); DeSapio v. Josephthal & Co., 540 N.Y.S.2d 932, 937 (Sup. Ct. 1989) (ordering arbitration of state disability law claims, breach of express contract, breach of implied contract, breach of covenant of good faith and fair dealing, wrongful discharge, and intentional infliction of emotional distress); Prudential-Bache Sec., Inc. v. Garza, 848 S.W.2d 803, 806-08 (Tex. App.—Corpus Christi 1993, no writ) (compelling arbitration of defamation and intentional infliction of emotional distress claims).

246. 9 U.S.C. § 1 (1988).

247. Gilmer v. Interstate Johnson/Lane Corp., 111 S. Ct. 1647, 1651 (1991).

248. *Id.*

dissent, pointed out, the Court had twice before in the 1991 Term decided cases on grounds neither argued below nor in the petitions for certiorari.[249] Likewise, the conclusion that Gilmer's arbitration agreement was not part of his "contract of employment" ignores the fact that Gilmer was required, as a condition of his employment, to register with the NYSE, and that in order to register with the NYSE, he was required to fill out the NYSE application form containing the arbitration clause.[250] The language and tenor of Justice White's majority opinion clearly indicates a ringing endorsement of arbitrating statutory employment disputes. His failure to provide an adequate answer to the "contracts of employment" exception indicates either that he was unable to articulate one or that the one he proposed was unable to command a majority of the Court.

Many commentators have argued that both the "plain meaning" and the legislative history of the FAA compel courts to construe the "contracts of employment" exception to exclude all employment contracts.[251] If courts accept this argument, *Gilmer* becomes a very narrow decision applicable only to employees in the securities industry whose arbitration

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249. *Id.* at 1658 (Stevens, J., dissenting) (deciding an issue that was not raised at any point during oral argument before the court) (citing Arcadia v. Ohio Power Co., 498 U.S. 73 (1990)).

250. *Id.* at 1648. Justice Stevens opined that the exclusion of § 1 of the FAA "should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment." *Id.* at 1659 (Stevens, J., dissenting).

251. *Where Are We Going*, *supra* note 102, at 226, 234 (contending that "the language seems clear and unambiguous [and that] . . . it should be given effect"); *id.* at 228-29 (discussing the legislative history of the FAA and concluding that the evidence clearly indicates that the exclusion was to protect employees from being forced into arbitration agreements); Holcomb, *supra* note 110, at 220 (arguing that Congress intended to exclude all contracts of employment from FAA coverage, but noting that courts have largely ignored this intent); Jenifer A. Magyar, *Statutory Civil Rights Claims in Arbitration: Analysis of* Gilmer v. Interstate/Johnson Lane Corp., 72 B.U. L. REV. 641, 653 (1992) (citing Congress' "clear intent that the FAA not apply to contracts of employment"). *But see* James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97, 114 (1993) (arguing that the "FAA is best interpreted as excluding only those individual and collective contracts of employees in the transportation industry or who are otherwise directly engaged in interstate or foreign commerce"); Gerard Morales & Kelly Humphrey, *The Enforceability of Agreements to Arbitrate Employment Disputes*, 43 LAB. L.J. 663, 668-69 (1992) (arguing that Congress intended the exclusion to apply only to workers in the transportation industry); Patrick D. Smith, *The Court Opens the Door to Arbitration of Employment Disputes*: Gilmer v. Interstate/Johnson Lane Corp., 17 J. CORP. L. 865, 885 n.200 (1992) (arguing that the plain language of the exclusion affects only a particular category of workers); SULLIVAN ET AL., *supra* note 235, at 93 (arguing the rational reading of § 1 of the FAA excludes contracts with "classes of workers" only).

agreements are contained not in their formal employment contract, but rather in their registration application with the NYSE.[252] As noted above, however, the Court does not apparently intend to go in this direction.[253] Therefore, the fundamental question becomes whether it is possible to interpret the FAA exclusion narrowly so that all, or nearly all, employees can be compelled to arbitrate their statutory employment claims. Courts and commentators have suggested four possibilities.

1. Ignore It. The first possibility is to ignore the FAA exclusion altogether. The Ninth Circuit apparently took this approach in *Mago v. Shearson Lehman Hutton, Inc.*[254] in which the compulsory arbitration clause was contained in the employment application, not the NYSE registration application.[255] However, the Court in *Gilmer*, by addressing the issue, indicated that ignoring the exclusion is not an acceptable alternative.[256]

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252. Slawsky v. True Form Founds. Corp., No. 91-1822, 1991 WL 98906, at *1 (E.D. Pa. June 4, 1991) (distinguishing *Gilmer* because the plaintiff's compulsory arbitration clause was located in a contract of employment, not in a securities registration application); Gray, *supra* note 14, at 131. With the exception of *Slawsky*, the post-*Gilmer* federal cases have avoided this issue the same way the Court in *Gilmer* did—by arguing that because the arbitration agreements at issue were contained in the plaintiffs' registration applications with the NYSE, the agreements were not part of a "contract of employment." *See, e.g.*, Bierdeman v. Shearson Lehman Hutton, Inc., No. 90-16024, 1992 WL 112255, at *1 (9th Cir. May 28, 1992) (finding that securities industry registration form compelling arbitration is not excluded under the FAA), *cert. denied*, 113 S. Ct. 328 (1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 310-12 (6th Cir. 1991) (contrasting a contract for employment with a securities registration form in compelling arbitration on facts very similar to *Gilmer*); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 & n.* (5th Cir. 1991) (observing that the arbitration clause at issue was not contained in the employment contract, but in the contract with a securities exchange, as in *Gilmer*). The courts thus have not yet had to confront the issue of whether the FAA may be used to compel arbitration where the arbitration agreement is contained in an employment contract.

253. Refer to notes 211-13 *supra* and accompanying text; *see also* Smith, *supra* note 251, at 885 (noting that "[t]he majority's reasoning in *Gilmer* supports the conclusion that the Court will continue to endorse a favorable view of arbitration [and that] [t]he ambiguous language of the FAA's exclusionary clause is not likely to override the FAA's underlying policy favoring the enforcement of agreements to arbitrate") (footnote omitted); *Arbitration Pacts, Other Forms of ADR on Rise to Solve Workplace Disputes*, 10 Employee Rel. Wkly. (BNA) No. 43, at 1179 (Nov. 2, 1992) (interpreting the Court's treatment of the issue in *Gilmer* as providing an "inclination" that the Court would welcome a narrow interpretation of the FAA exclusion).

254. 956 F.2d 932 (9th Cir. 1992).

255. *Id.* at 935; refer to notes 211-13 *supra* and accompanying text (discussing *Gilmer*'s relegation of the issue to a footnote).

256. Refer to notes 211-13 *supra* and accompanying text.

2. Exclude Only "Workers." Another possibility is to interpret the word "workers" to exclude owners, supervisors, and managers, to whom the FAA presumption of arbitrability would therefore apply.[257] This would be consistent with the notion, implied in *Gilmer*, that "professional" employees are sufficiently astute and possess sufficient bargaining power to look out for themselves, while workers are in need of special protection.[258] Even though this possibility would narrow the exclusion significantly as compared to an exclusion of "all employees," it still would leave a large percentage of the workforce outside the scope of the FAA.[259]

3. Exclude Only Workers "Directly Engaged in Interstate Commerce." A third possibility for narrowing the scope of the FAA exclusion is to interpret the clause to exclude only those workers directly involved in interstate commerce. This method has been adopted by virtually all the lower courts that have considered the issue,[260] and is supported by Supreme Court

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257. *See* Bernhardt v. Polygraphic Co. of Am., 218 F.2d 948, 951-52 (2d Cir. 1955), *rev'd on other grounds*, 350 U.S. 198 (1956):

> The words "any other class of workers", read in connection with the immediately preceding words, show an intention to exclude contracts of employment of a "class" of "workers" like "seamen" or "railroad employees." Plaintiff was not hired as a "worker" but as a plant superintendent, at a salary of $15,000 a year, with managerial duties fundamentally different from those of "workers."

218 F.2d at 951-52 (footnotes omitted).

258. *See* Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1656 (1991) (noting that there was "no indication in this case . . . that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause").

259. The precise percentage would depend, of course, on how courts define "worker."

260. In the First Circuit, see Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971) (holding the FAA exclusion inapplicable because an account executive employed by a brokerage firm was not "engaged in foreign or interstate commerce"); Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76, 77-78 (D. Mass. 1993) (applying a narrow construction of the FAA's exclusion of contracts of employment for workers engaged in foreign or interstate commerce) (citing Tenney Eng'g, Inc. v. United Elec. Workers, 207 F.2d 450, 452 (3d Cir. 1953)). In the Second Circuit, see Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298, 303 (2d Cir. 1956) (holding the FAA exclusion inapplicable because plaintiffs, who merely manufactured goods for sale in interstate commerce, were not themselves actually engaged in interstate commerce), *cert. denied*, 354 U.S. 911 (1957); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) (holding the FAA exclusion inapplicable to a basketball player because he was not "actually in the transportation industry"); DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947, 953 (W.D.N.Y. 1992) (noting that "the reference to 'seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,' suggests that Congress intended to refer to workers engaged in commerce *in the same way* that seamen and railroad workers are"). In the Third Circuit, see Tenney Eng'g, Inc. v. United Elec. Workers, 207 F.2d 450,

dicta.[261]

Courts have advanced two justifications for interpreting the FAA clause to exclude only those workers directly involved in interstate commerce. First, they point to the statute's "plain meaning." Second, they recount the statute's legislative history.

a. Plain meaning. In *DiCrisci v. Lyndon Guaranty Bank*,[262] the district court held that the language of the FAA exclusion only reaches workers directly engaged in interstate commerce. The court explained:

> Although at first glance it might seem likely that Congress would have intended "commerce" to have the same meaning throughout the Act, the reference to "workers engaged in

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452 (3d Cir. 1953) (holding that the FAA excludes only those workers who are "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it"); Dancu v. Coopers & Lybrand, 778 F. Supp. 832, 834 (E.D. Pa. 1991) (holding that a consultant for state and local governments was not "actively involved in interstate transportation," and therefore not excluded by the FAA), *aff'd mem.*, 972 F.2d 1330 (3d Cir. 1992). In the Fourth Circuit, see Malison v. Prudential-Bache Sec., Inc., 654 F. Supp. 101, 104 (W.D.N.C. 1987) (holding that although the work of a stockbroker involved interstate commerce, the FAA exception was inapplicable because it was "aimed at employees in transportation industries"). In the Fifth Circuit, see Weston v. ITT-CFC, 8 Individual Empl. Rights Cas. (BNA) 503, 505 (N.D. Tex. 1992) (finding that the "weight of persuasive authority favors a narrow interpretation" of the FAA exclusion for workers engaged in interstate commerce); ITT Consumer Fin. Corp. v. Wilson, 8 Individual Emp. Rights Cas. (BNA) 802, 806 (S.D. Miss. 1991) (compelling arbitration, in part because the defendants were not "involved in the transportation industry"). In the Sixth Circuit, see Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 523 F.2d 433, 436 (6th Cir. 1975) (recognizing that the parties had stipulated that their claims arose directly from their employment with Merrill Lynch in interstate commerce and did not seriously contend that as account executives, they fell within the exception from coverage in the FAA); Management Recruiters Int'l, Inc. v. Nebel, 765 F. Supp. 419, 422 (N.D. Ohio 1991) (holding the FAA exclusion inapplicable to an account executive because she was not engaged in interstate commerce or transportation). In the Seventh Circuit, see Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984) (holding that the FAA exclusion applies only to persons employed in transportation industries), *cert. denied*, 469 U.S. 1160 (1985); Pietro Scalzitti Co. v. International Union of Operating Eng'rs, 351 F.2d 576, 580 (7th Cir. 1965) (holding the FAA exclusion applicable only to "workers engaged in the movement of interstate or foreign commerce"). In the Eleventh Circuit, see American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (holding that postal workers are " 'engaged in interstate or foreign commerce' within the meaning of the statutory exclusion"); Hydrick v. Management Recruiters Int'l, Inc., 738 F. Supp. 1434, 1435 (N.D. Ga. 1990) (holding the FAA exclusion applicable only to "workers actually engaged in interstate commerce") (quoting *American Postal Workers*, 823 F.2d at 473).

261. *See* Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (holding that the FAA withdrew from the states the power to require resolution in a judicial forum a claim that the parties had agreed to arbitrate, excepting arbitration agreements that are "part of a written maritime contract or a contract 'evidencing a transaction involving commerce' ").

262. 807 F. Supp. 947 (W.D.N.Y. 1992).

> foreign or interstate commerce in [section] 1 would be surplusage if it were simply coextensive with Congress's powers under the commerce clause. Under *Southland Corp.*,[263] [Section] 2 gives the Act as a whole the same reach as Congress's commerce clause power. Therefore, if Congress had wanted to excluded [sic] *all* employment contracts from the Act, it could simply have said "employment contracts" and left it at that. Any workers beyond the reach of the commerce clause would not be covered by the Act in the first place.[264]

While this interpretation of the language of the FAA exclusion makes logical sense, it is not the judicial path most traveled. Instead, most courts focus on the FAA's legislative history.

b. Legislative history. The FAA was proposed by the American Bar Association's (ABA) Committee on Commerce, Trade, and Commercial Law (the Committee).[265] Labor objected to the FAA, arguing that weak unions would be forced to sign arbitration clauses and that arbitrators would be controlled by employers.[266] In response, the chair of the Committee stated that "[i]t was not the intention of this bill to make an industrial arbitration [sic] in any sense."[267] He further stated:

> [To counter the concern] that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.[268]

In response to opposition to the bill by the Seamen's Union, the present language was inserted into the FAA at the behest of then Secretary of Commerce Hoover.[269]

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263. 465 U.S. 1 (1984).
264. 807 F. Supp. at 953.
265. *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong., 1st Sess. 21 (1924) [hereinafter *Joint Hearings*].
266. *Sales and Contracts to Sell in Interstate and Foreign Commerce and Federal Arbitration: Hearing Before the Subcomm. of the Comm. on the Judiciary*, 67th Cong., 4th Sess. 9 (1923).
267. *Id.*
268. *Id.*
269. *Id.* at 14; *Joint Hearings*, *supra* note 265, at 21.

> "Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[270]

Furthermore, the Third Circuit in *Tenney Engineering, Inc. v. United Electrical Workers*,[271] concluded that Congress intended the FAA exclusion to apply only to workers engaged directly in interstate commerce.[272] The Court explained:

> It thus appears that the draftsmen of the Act were presented with the problem of exempting seamen's contracts. Seamen constitute a class of workers as to whom Congress had long provided machinery for arbitration. In exempting them the draftsmen excluded also railroad employees, another class of workers as to whom special procedure for the adjustment of disputes had previously been provided. Both these classes of workers were engaged directly in interstate or foreign commerce. To these the draftsmen of the Act added "any other class of workers engaged in foreign or interstate commerce." We think that the intent of the latter language was, under the rule of ejusdem generis, to include only those other classes of workers who are . . . actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.[273]

The vast majority of lower courts that have considered the issue have agreed with the *Tenney* court's interpretation of congressional intent, and have thus significantly narrowed the scope of the FAA exclusion.[274] Many commentators, however, have concluded that Congress intended precisely the opposite.[275]

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270. 48 ABA REP. 287 (1923), *in* Tenney Eng'g, Inc. v. United Elec. Workers, 207 F.2d 450, 452 (3d Cir. 1953).

271. 207 F.2d 450 (3d Cir. 1953).

272. *Id.* at 451-53.

273. *Id.* at 452-53 (footnotes omitted).

274. Refer to note 237 *supra.*

275. *Where Are We Going, supra* note 102, at 231-34 (asserting that "[t]he purpose of expressly excluding contracts of seamen and railroad employees seems to

4. Exclude Only Those Workers Whose Statutory Claims Are Subject to Compulsory Arbitration Under the Terms of a Collective Bargaining Agreement. A fourth alternative to narrow the scope of the FAA exclusion is to interpret it as excluding only those workers whose statutory claims are subject to compulsory arbitration under the terms of a collective bargaining agreement. This approach is consistent with, though not compelled by, the *Gilmer* and *Gardner-Denver* decisions.[276] It is also consistent with the Act's legislative history:[277] It was *labor,* not non-union employees, who objected to the original terms of the Act,[278] who proposed the amendment that created the exception,[279] and on whose behalf the ABA and Congress acted in accepting the amendment.[280]

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have been to make sure they were excluded, not to limit the exclusion of others" and criticizing *Tenney*'s use of ejusdem generis); Holcomb, *supra* note 110, at 220-21 (asserting that the Act was not meant to apply to disputes between employer and employee); Magyar, *supra* note 251, at 652-53 (noting that the courts should be constrained because it was clear that Congress did not intend for the FAA to apply to contracts of employment). *But see* King et al., *supra* note 251, at 114 (favoring a narrow interpretation of the FAA's contracts of employment provisions arguing that "the FAA is best interpreted as excluding only those individual and collective contracts of employees in the transportation industry or who are otherwise directly engaged in interstate or foreign commerce").

276. Gray, *supra* note 14, at 132-33; *see also* SULLIVAN ET AL., *supra* note 235, at 93 ("The more natural reading of [the FAA exclusion] is that it concerns collective bargaining agreements—contracts with "classes of workers.").

277. *See, e.g.*, United Elec. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954) (discussing the legislative history of the FAA exclusion and concluding that while "[n]o one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring," the FAA could not be construed to permit compulsory arbitration of collective bargaining agreements); Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 168 n.43 (1989) ("Congress probably intended to exclude collective bargaining agreements from the scope of the FAA.").

278. Refer to note 266 *supra* and accompanying text. Of course, non-union employees had no spokesperson who could have testified before Congress on their behalf to voice objections.

279. Refer to notes 268-70 *supra* and accompanying text.

280. Refer to note 272 *supra* and accompanying text; *see also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). In dissent Justice Frankfurter stated:

> Naturally enough, I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion . . . . I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts . . . . Congress heeded the resistance of organized labor, uncompromisingly led in its hostility to this measure by Andrew Furuseth, president of the International Seamen's Union and most powerful voice expressing labor's fear of the use of this remedy against it.

Congressional intent to exclude collective bargaining agreements is further buttressed by the ABA Commerce Committee's proposition, a year after the passage of the FAA, of a bill to require arbitration of collective bargaining agreement disputes.[281] Once again, labor opposed the bill.[282] The ABA committee abandoned the proposal, concluding that "public opinion is not yet ready for this legislation," and that "it would be a mistake to press it actively at the present time."[283] These facts demonstrate that both the ABA and the unions, one year after the FAA passed, did not consider the FAA to cover collective bargaining agreements. Because the ABA and the unions played such a pivotal role in the passage of the FAA,[284] imputing this understanding to Congress seems justified. This approach is also consistent with lower federal court decisions[285] in concluding that collective bargaining agreements are "contracts of employment" and thus excluded by the FAA exception.[286]

Id. at 466-67 (citations omitted).

281. *Report of the Standing Comm. on Commerce, Trade, and Commercial Law*, 51 A.B.A. REP. 385, 394 (1926); *see also Where Are We Going*, *supra* note 102, at 229.

282. 19 Am. Fed. of Lab. Weekly News Services, No. 5 (April 13, 1929).

283. *Report of the Standing Comm. on Commerce, Trade, and Commercial Law*, 55 A.B.A. REP. 328, 328 (1930).

284. Refer to notes 265-75 *supra* and accompanying text.

285. *E.g.*, American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (recognizing that the position that collective bargaining agreements are not "contracts of employment" is the minority view with only two courts so holding); Shell, *supra* note 175, at 527 n.113.

286. The Supreme Court has never ruled on this issue but has instead relied on § 301 of the Labor Management Relations Act to enforce arbitration agreements in collective bargaining agreements. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957); General Elec. Co. v. Local 205, United Elec. Workers, 353 U.S. 547, 548 (1957); *see also Lincoln Mills*, 353 U.S. at 466-68 (Frankfurter, J., dissenting) (finding that the Court had rejected the FAA as a mechanism to enforce arbitration clauses in collective bargaining agreements). Before the Supreme Court's *Lincoln Mills* decision, the circuit courts were split, several of them holding that the FAA applied to collective bargaining agreements because they were not "contracts of employment." *See, e.g.*, Local 19, Warehouse Workers Union v. Buckeye Cotton Oil Co., 236 F.2d 776, 781 (6th Cir. 1956) (following *Hoover Motor Express*), *cert. denied*, 354 U.S. 910 (1957); Local 205, United Elec. Workers v. General Elec. Co., 233 F.2d 85, 98 (1st Cir. 1956) (holding that the term "contract of employment" refers to an individual transaction rather than to a union-negotiated collective agreement), *aff'd on other grounds*, 353 U.S. 547 (1957); Hoover Motor Express Co. v. Teamsters Local Union No. 327, 217 F.2d 49, 53 (6th Cir. 1954) (arguing that the FAA exception was not intended to apply to collective bargaining agreements). Since *Lincoln Mills*, however, the circuits have universally held that collective bargaining agreements are "contracts of employment," and that they are outside the scope of the FAA. *See, e.g.*, United Food & Commercial Workers v. Safeway Stores, Inc., 889 F.2d 940, 944 (10th Cir. 1989); Bacashihua v. United States Postal Serv., 859 F.2d 402, 404-05 (6th Cir. 1988); Occidental Chem. Corp. v. Int'l Chem. Workers Union, 853 F.2d 1310, 1315

5. State Arbitration Acts. Despite these persuasive arguments for a narrow interpretation of the FAA's "contracts of employment" exclusion, the Supreme Court may opt to interpret it broadly. Even a narrow interpretation of the exclusion, however, would still leave some employment contracts beyond the scope of the FAA. For example, if the Court adopts the "directly engaged in interstate commerce" test, then the contracts of interstate truckers would not be subject to compulsory arbitration under the FAA. These contracts may, however, be subject to compulsory arbitration under state law.

To date, thirty-five states have adopted the Uniform Arbitration Act[287] (UAA) which, like the FAA, provides that a "written agreement to submit to arbitration any controversy existing or arising after the effective date of the agreement is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[288] In addition, many states that have not enacted the UAA have enacted statutes that courts may use to compel arbitration.[289]

Courts should have little difficulty compelling arbitration of employment claims arising out of state law. It is less clear, however, whether a court could use a state compulsory arbitration statute to compel arbitration of claims arising out of federal law. The Supreme Court can potentially limit the scope of the compulsory arbitration in two ways. First, it might hold,

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(6th Cir. 1988); American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987).

287. UNIF. ARBITRATION ACT T-1, 7 U.L.A. 1 (Supp. 1993) (listing adopting jurisdictions).

288. UNIF. ARBITRATION ACT § 1, 7 U.L.A. 5 (1985).

289. *See, e.g.*, CAL. CIV. PROC. CODE §§ 1280-90 (West 1982 & Supp. 1992); CONN. GEN. STAT. ANN. §§ 52-408 to -424 (West 1991); GA. CODE ANN. §§ 9-9-1 to -133 (Michie 1982); N.Y. CIV. PRAC. L. & R. 7501-14 (McKinney 1980 & Supp. 1992). An amendment to the Texas antidiscrimination statute, effective September 1, 1993, provides that "the settlement of a disputed claim under this Act that results from the use of traditional or alternative means of dispute resolution is binding on the parties to the claim." Act effective Sept. 1, 1993, Tex. H.B. 860, 73d Leg., R.S., ch. 276, § 6.01(b), 1993 Tex. Gen. Laws 1285, 1289 (to be codified at TEX. REV. CIV. STAT. ANN. art 5221K, § 6.01(b)). One commentator has interpreted this as explicitly permitting compulsory arbitration of state antidiscrimination claims. Brian S. Greig, *Texas Legislature Passes Human Rights Bill*, TEXAS BUS. REP., June 1, 1993, at 2 (noting that "employees who agree to private dispute resolution processes for workplace disputes cannot seek additional relief from the [Texas Human Rights C]ommission or the courts"). A closer reading of the statutory language indicates that this amendment can only be used *after* an arbitration award to preclude administrative or judicial review of that award, not *before* arbitration to compel arbitration. Nonetheless, the pro-arbitration tenor of this new statutory language, especially when juxtaposed with the Texas version of the UAA, makes it likely that Texas courts will honor private compulsory arbitration agreements.

Alford[290] notwithstanding, that compulsory arbitration is inconsistent with the statutory framework and the purposes of antidiscrimination statutes such as Title VII. In this instance, the Supremacy Clause of the United States Constitution[291] would prevent a state statute from compelling arbitration of such federal statutory claims.

Alternatively, however, the Supreme Court might limit the scope of compulsory arbitration by interpreting the FAA exclusion broadly to encompass *all* employment contracts. This would raise two issues: First, whether the FAA preempts all state law in the area of arbitration; and second, whether a federal statute with a judicial enforcement provision, such as Title VII, preempts state compulsory arbitration statutes. The Supreme Court has already answered the first question in the negative, holding that the "FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[292] Thus, no conflict between the FAA and state arbitration laws would exist.[293] The second issue might potentially be more problematic in that courts might refuse to enforce a state compulsory arbitration statute on the grounds that it is preempted by a federal statute with a judicial enforcement provision. On the other hand, if courts hold, as per *Alford*, that compulsory arbitration is not inconsistent with federal statutes, courts might hold state law competent to compel arbitration of even federal statutory claims.[294]

V. CONCLUSION

The FAA, interpreted broadly, allows courts to withhold judicial enforcement of individual employment rights. The Supreme Court in *Gilmer* has served notice that it intends to so construe the FAA, and lower federal decisions are already forging in this direction. Only two major hurdles remain. First, Title VII and other federal employment legislation must be subject to compulsory arbitration under the FAA. The Supreme

290. 111 S. Ct. 2050 (1991); refer to note 221 *supra* and accompanying text.
291. U.S. CONST. art. VI, cl. 2.
292. Volt Info. Sciences, Inc. v. Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989); *see also* Bernhardt v. Polygraphic Co., 350 U.S. 198, 200 (1956) (holding an arbitration provision to be outside the FAA's definition of a contract evidencing "a transaction involving commerce," and directing the lower court to apply state arbitration law).
293. Thomas, *supra* note 225, at 13.
294. King et al., *supra* note 251, at 116; SULLIVAN ET AL., *supra* note 235, at 93.

Court's vacation of *Alford* and recent circuit court decisions indicate that this is, for all practical purposes, a *fait accompli.* Second, courts must narrowly interpret the FAA exclusion of "contracts of employment." Although *Gilmer* avoided this issue, lower court decisions provide several interpretations that would significantly narrow the scope of the FAA exclusion. The strongly pro-arbitration tenor of *Gilmer* indicates that the Court is likely to adopt one of these interpretations in the near future.

The only thing remaining is for employers to begin writing compulsory arbitration clauses into their employment contracts. Although relatively few employers have done so to date,[295] momentum in this direction is building[296] as employers begin to learn the advantages arbitration offers over litigation, such as speed, reduced costs, confidentiality, union avoidance, and the possibility of preserving an amicable relationship between the parties.[297] There is no doubt even more employers will follow suit once the law becomes more established, and employers realize they can compel arbitration without litigating the issue up to the circuit courts.

We are thus witnessing a fundamental transition in American labor relations. Although conventional legal wisdom is that the transition is from the collective autonomy of industrial pluralism to the judicial enforcement of individual rights, the transition is actually from collective autonomy to individual

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295. Virtually all the reported cases involve the securities industry, and arise from the compulsory arbitration clauses found in the New York Stock Exchange's application agreement. Refer to notes 215-21 *supra* and accompanying text. The paucity of other employers offering compulsory arbitration clauses no doubt results from the fact that, until the *Gilmer* case in 1991, such clauses could not be used to compel arbitration of statutory claims. Refer to part III *supra*; *see also* Committee on Employee Rights and Responsibilities of the Labor Law Section of the American Bar Association, *Corporate Survey of Alternative Dispute Resolution in the Wake of* Gilman v. Interstate/Johnson Lane Corp. (April 8, 1992) (concluding that most employers are waiting to see whether courts will compel arbitration of cases brought outside the securities industry). The General Accounting Office is currently conducting a comprehensive survey to examine the extent of compulsory arbitration by non-union employees. *House Labor Committee Leaders Ask GAO to Review Mandatory Arbitration of EEO Disputes* Daily Lab. Rep. (BNA) No. 53, at A-8 (Mar. 21, 1994).

296. *See, e.g.*, Panken et al., *supra* note 234, at 74-75 (encouraging employers to require employees to sign compulsory arbitration clauses); Robert A. Shearer, *The Impact of Employment Arbitration Agreements on Sex Discrimination Claims: The Trend Toward Nonjudicial Resolution*, 18 EMPLOYEE REL. L.J. 479, 485-87 (1992-93) (encouraging employers to offer compulsory arbitration clauses, but stressing the necessity of avoiding the appearance of employer coercion); Thomas, *supra* note 225, at 17 (arguing that current legal developments "will encourage many employers to expand their use of arbitration agreements"); *Arbitration Pacts*, *supra* note 253, at 1179 (noting that the use of arbitration in the non-union sector is increasing).

297. *See, e.g.*, Thomas, *supra* note 225, at 3, 5.

autonomy. Industrial pluralism is dead, and with it the internal promulgation of work rules by employer and union. In order to keep employment disputes out of the courtroom, however, courts have resurrected the industrial pluralist vision of arbitral autonomy. The rulemakers have changed, but the medium of enforcement has not.