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Arbitrating Statutory Employment Claims in the Aftermath of Gilmer

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ARBITRATING STATUTORY EMPLOYMENT CLAIMS IN THE AFTERMATH OF *GILMER*

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THE Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corporation*[1] appeared to open the door for extensive employer-imposed requirements on employees to arbitrate a broad range of statutory employment-related causes of action. As with the imposition of arbitration by one party's form contracts in other contexts,[2] the prospect of widespread employer-imposed arbitration on workers seeking to vindicate statutory rights has generated considerable controversy.[3] The controversy has enveloped Congress, which has seen proposals to mandate arbitration of statutory

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1. 500 U.S. 20 (1991).

2. *See, e.g.*, Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 671-72 (1986); C. Edward Fletcher III, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393 (1987); Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability:* David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 58 BROOK. L. REV. 279 (1992).

3. *See, e.g.*, Arthur Eliot Berkeley & E. Patrick McDermott, *The Second Golden Age of Employment Arbitration*, 43 LAB. L.J. 774 (1992); Christine Godsil Cooper, *Where Are We Going with* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 226-34 (1992); Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990); Matthew W. Finkin, *Commentary on "Arbitration of Employment Disputes Without Unions,"* 66 CHI.-KENT L. REV. 799 (1990); Samuel Estreicher, *Reply to Professor Finkin*, 66 CHI.-KENT L. REV. 817 (1990); Patrick O. Gudridge, *Title VII Arbitration*, 16 BERKELEY J. EMPLOYMENT & LAB. L. 209 (1995); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509 (1990); Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993).

employment claims and to prohibit employers from requiring arbitration of such claims.[4]

While the controversy has swirled, the lower courts have had to grapple with numerous questions that *Gilmer* did not answer. Most lower court decisions to date have been limited to the scope of *Gilmer*'s applicability, i.e., what types of pre-dispute agreements to arbitrate will the courts enforce? The courts have barely begun to consider issues involved in implementing statutory employment claims arbitration. These issues include the types of procedural safeguards to be required of an enforceable arbitration scheme and the relationship between arbitrators and courts in the interpretation of employment statutes.

This article addresses the latter two issues. Part I reviews *Gilmer* in the context of the Court's evolving attitude toward arbitration. Part I also dissects the *Gilmer* opinion to highlight the questions it raised. Part II reviews lower court interpretations of *Gilmer* and finds them focused predominantly on issues of arbitrability. Judicial consideration of more particularized issues involved in implementing an employment arbitration system must await future litigation. Part III addresses the procedural safeguards that should be required of any enforceable employment arbitration system. Part IV addresses the respective law-making functions of arbitrators and courts.

I. A REVIEW OF *GILMER*

Prior to *Gilmer*, the Supreme Court consistently refused to compel employees to arbitrate statutory employment claims. The Court first addressed the issue in *Alexander v. Gardner-Denver Company*.[5] There the Court held that claims under Title VII of the 1964 Civil Rights Act were independent of collective bargaining agreement grievance and arbitration procedures, and that

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4. For example, during debates over the Family & Medical Leave Act, Senator Grassley introduced an amendment that would have provided for court annexed arbitration of FMLA claims. The amendment was not adopted. 139 CONG. REC. S1095-S1107 (daily ed. Feb. 3, 1993). On the other hand, several bills have been introduced that would prohibit employers from requiring employees, as a condition of employment to agree to arbitrate employment discrimination claims. *See, e.g.*, S. 2012, 140 CONG. REC. S4266 (daily ed. Apr. 13, 1994); S. 2405, 140 CONG. REC. S12,099 (daily ed. Aug. 18, 1994); H.R. 4981, 140 CONG. REC. H8595 (daily ed. Aug. 17, 1994). In March 1994, members of the House of Representatives asked the General Accounting Office to undertake a study of the extent of compulsory arbitration of employment discrimination claims. *See* Steven A. Holmes, *Right to File Suit for Bias at Work—Arbitration is Required*, N.Y. TIMES, Mar. 18, 1994, at A1, *reprinted in* 140 CONG. REC. S4266, S4267 (daily ed. Apr. 13, 1994). The G.A.O. issued its report in July, 1995. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION, GAO/HEHS-95-150 (July 1995).

5. 415 U.S. 36 (1974).

plaintiffs may pursue the former without resort to and in spite of losing in the latter. In so holding, the Court expressed concern for the competency of arbitrators to resolve statutory claims.[6] The Court subsequently extended *Gardner-Denver* to other statutory claims.[7]

Beginning in the mid-1980's, however, in a series of commercial cases interpreting the Federal Arbitration Act (FAA), the Court enforced pre-dispute agreements to arbitrate antitrust, securities and RICO claims.[8] This marked a significant change in the Court's attitude toward arbitration. Whereas in *Gardner-Denver*, the Court opined that "the choice of forums inevitably affects the scope of the substantive right to be vindicated,"[9] its new view was, "[b]y 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."[10]

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6. The Court stated:

> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
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> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award." Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

Id. at 56-58 (citations and footnotes omitted).

7. *See, e.g.*, McDonald v. City of West Branch, 466 U.S. 284 (1984) (42 U.S.C. § 1983); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (Fair Labor Standards Act).

8. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 239-40 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

9. 415 U.S. at 56 (quoting U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring)).

10. *Mitsubishi*, 473 U.S. at 628, *quoted in Gilmer*, 500 U.S. at 26. Similarly, in Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1196 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986), the Seventh Circuit held that the union's procedure which used arbitration for resolving objections by agency shop fee payers was constitutionally inadequate because, *inter alia*, the court regarded arbitration as inherently unsuited for resolving constitutional issues. The Supreme Court

In *Gilmer*, the Supreme Court extended its commercial arbitration precedent to claims under the Age Discrimination in Employment Act (ADEA). As a condition of employment, Gilmer had signed a uniform securities registration statement which required him to arbitrate "any dispute, claim or controversy . . . required to be arbitrated under the rules . . . of the organizations with which I register."[11] Gilmer registered with the New York Stock Exchange (NYSE), whose rules required arbitration of "any controversy . . . arising out of the employment or termination of employment of [a] registered representative."[12] That Court held that Gilmer was obligated to arbitrate his claim that his discharge violated the ADEA. The Court quoted its commercial cases in that "'[h]aving 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.'"[13] The Court placed on Gilmer a heavy burden to show that Congress intended to preclude a waiver of judicial remedies in the ADEA.[14]

The Court rejected a plethora of arguments Gilmer raised in his futile effort to meet this burden. The Court agreed with Gilmer that the ADEA furthered important public policies, but concluded that there was no tension between those policies and enforcement of the agreement to arbitrate as long as Gilmer could vindicate his statutory rights in the arbitral forum.[15] The Court also rejected Gilmer's claim that compelling arbitration would undermine the EEOC's role in ADEA enforcement, observing that arbitration agreements did not preclude parties from filing charges with the EEOC and did not preclude the EEOC from taking action against discrimination.[16]

Gilmer argued that arbitration tribunals would be biased. The Court characterized that argument as speculation, observed that the New York Stock Exchange's arbitration rules provided for disclosure of background information on arbitrators, peremptory challenges and recusal for cause, and concluded that Gilmer had failed to show that these procedures were "inadequate to guard against potential bias."[17]

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brushed such concerns aside. Although it agreed that the union's arbitration procedure was inadequate for other reasons, it opined that arbitration could provide objecting fee payers the constitutionally required hearing before, and a reasonably prompt decision from, an impartial adjudicator. 475 U.S. at 308 n.21.

11. *Gilmer*, 500 U.S. at 23.
12. *Id.*
13. *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).
14. *Id.*
15. *Id.* at 27-28.
16. *Gilmer*, 500 U.S. at 28.
17. *Id.* at 30-31.

Gilmer argued that arbitration did not provide for adequate discovery. The Court listed the types of discovery available under the NYSE rules and concluded that Gilmer had failed to show that these procedures would be inadequate to provide litigants "a fair opportunity to present their claims."[18]

Gilmer complained that arbitrators often do not issue written opinions, thereby precluding effective judicial review and impeding development of the law. The Court observed that the NYSE rules required written awards identifying the parties and describing the issues. It further opined that compelling arbitration would not stifle development of the law, predicting that most ADEA claims will not be subject to arbitration.[19] The Court also rejected Gilmer's contention that arbitrators did not have the same remedial authority as judges, noting that the NYSE rules placed no restrictions on the arbitrator's remedial authority.[20]

The Court was not swayed by Gilmer's argument that employment arbitration agreements are the product of unequal bargaining power between employers and employees. The Court observed that arbitration agreements may be set aside where they are the result of fraud or overwhelming economic advantage, but found no evidence of such in Gilmer's case.[21] Finally, the Court rejected Gilmer's reliance on *Gardner-Denver* and its progeny. The Court distinguished *Gardner-Denver* as a case where the agreement to arbitrate was limited to grievances under the collective bargaining agreement and as a decision motivated by the tension between union enforcement of collective agreement rights and individual enforcement of statutory rights.[22]

Gilmer raises many more questions than it answers. Chief among those questions is the scope of the decision. Additionally, the decision raises issues concerning the types of procedural protections that must be available in statutory employment arbitration and the relative relationship between the arbitrator and the courts. *Gilmer's* narrow holding is that an agreement to arbitrate contained in a securities exchange registration will be enforced with respect to claims under the ADEA. Its reach, however, raises several issues.

First, although the Court distinguished *Gardner-Denver*, its revisionist view of the suitability of the arbitral forum for resolving statutory employment claims could lead to a re-evaluation of that line of precedent. Such a review might support judicial deferral to arbitration awards comparable to the policy

18. *Id.* at 31.
19. *Id.* at 31-32.
20. *Id.* at 32.
21. *Gilmer*, 500 U.S. at 32-33.
22. *Id.* at 33.

used by the National Labor Relations Board for deferring unfair labor practice charges under the National Labor Relations Act.[23]

Second, Section 1 of the FAA exempts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[24] In *Gilmer*, the Court expressly reserved the issue of how broadly to construe the FAA's employment contract exception, concluding that Gilmer's promise to arbitrate was not found in his employment contract, but in his securities exchange registration statement.[25] The dissent would have reached the issue and would have excluded Gilmer's agreement to arbitrate from the FAA's coverage because of Section 1.[26] A broad reading of the FAA's employment contract exclusion could preclude the application of *Gilmer* to the typical employment agreement to arbitrate.

Third, *Gilmer* does not address expressly any employment statutes other than the ADEA. Other statutes may evidence in their language or legislative history a legislative intent to preclude or restrict pre-dispute waivers of the judicial forum.

Fourth, the Court's distinction of *Gardner-Denver* recognizes that arbitrators continue to draw their authority from the agreement to arbitrate. Just as a collective bargaining agreement usually limits the arbitrator to resolving contractual claims, so too may an individual employment agreement. How to interpret individual employment agreements that may not expressly authorize arbitrators to resolve statutory claims was an issue not considered in *Gilmer*.

Beyond the foregoing issues of *Gilmer's* scope lie issues of arbitral procedure and the arbitral role. In its consideration of Gilmer's arguments concerning discovery and arbitral bias, the Court indicated that the procedures must allow a litigant a fair opportunity to present his or her claim. Apart from finding that, at least on their face, the NYSE procedures afforded such an opportunity, the Court offered no guidance concerning minimum standards of procedural protection.[27] Similarly, the Court gave no indication whether

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23. *See* Olin Corp., 268 N.L.R.B. 573 (1984); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

24. 9 U.S.C. § 1 (1947).

25. 500 U.S. at 25 n.1.

26. *Id.* at 36 (Stevens, J., dissenting).

27. In a recent article, Professor Stephen Hayford and attorney Michael Evers have suggested that an enforceable employment arbitration system must contain five crucial elements: a right to counsel or other representative of the employee's choosing, adequate discovery, mutual selection of the arbitrator, non-interference with the employee's ability to call other employees as witnesses, and the absence of reprisals against witnesses. Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-at-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices For At-Will Employers*, 73 N.C. L. REV. 443, 489-90 (1995).

limitations placed on the arbitrator's remedial authority could invalidate the agreement to arbitrate. Finally, the Court did not address the relative role of arbitrators and courts in the interpretation of statutory law. All of these issues were left to the lower courts to handle in future cases.

II. *GILMER* IN THE LOWER COURTS

Although a few decisions have touched on the issues of arbitral procedure which *Gilmer* raises,[28] the overwhelming majority of lower court cases have been confined to the scope of *Gilmer*'s strong endorsement of arbitration of statutory employment claims. Most of these decisions have considered *Gilmer's* applicability to arbitration under collective bargaining agreements, its applicability to employment statutes other than the ADEA, the FAA's exclusion of employment contracts, and interpretation of specific employment contracts to determine who is bound to arbitrate what.

A. Gilmer *and Collective Bargaining Agreements*

The *Gilmer* Court chose to distinguish *Gardner-Denver* rather than overrule it. Nevertheless, there are some superficial reasons which, at first glance, might seem to justify a re-evaluation of *Gardner-Denver.*

The Court actually faced two separate issues in *Gardner-Denver.* The first was whether the plaintiff's prior resort to the collective bargaining agreement's grievance procedure, which resulted in an arbitration award denying his grievance, precluded him from attacking the same adverse employment action under Title VII. A principal basis for the Court's rejection of the preclusion argument was the limitation on the arbitrator's authority confining him to the contractual issue.[29] The limitations on the grievance arbitrator's authority also served as one of two grounds on which the *Gilmer* Court distinguished *Gardner-Denver.*

The *Gardner-Denver* Court also faced a second issue: whether, even if it did not preclude the plaintiff from suing under Title VII, it should adopt a rule deferring to the result of the arbitration in appropriate circumstances. Deferral would apply even though the arbitrator was limited to the contractual issue.

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28. *See, e.g.,* EEOC v. River Oaks Imaging, 67 Fair Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. 1995); Olson v. American Arbitration Ass'n, 10 Individual Empl. Rts. Cas. (BNA) 559 (N.D. Tex. 1995). The private sector has attempted to fill this gap through a due process protocol developed by a committee comprised of representatives of the American Bar Association, National Academy of Arbitrators, American Arbitration Association, Society of Professionals in Dispute Resolution, Federal Mediation and Conciliation Service, National Employment Lawyers Association and the ACLU. *See* TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF EMPLOYMENT RELATIONSHIP (1995) (on file with the *St. Louis University Law Journal*).

29. *Gardner-Denver,* 415 U.S. at 49-51.

The Court's primary reason for rejecting a deferral rule was its view that arbitration was not an appropriate forum for vindicating statutory employment rights.[30] That rationale was rejected in *Gilmer*.

One basis on which the *Gilmer* Court distinguished *Gardner-Denver* did play a role in the rejection of a deferral rule. That was the concern expressed for potential conflict between collective and individual rights. That concern, however, played a relatively minor role in *Gardner-Denver*; the Court confined its discussion of the matter to a footnote.[31] Furthermore, just as there was no reason to question the adequacy of the arbitration procedures in *Gilmer*, there also was no reason to question the adequacy of the union's representation in *Gardner-Denver*. By analogy to *Gilmer*, one could argue that adequacy of union representation be examined on a case-by-case basis in deciding whether to defer to the arbitration award.

These arguments recently led the U.S. Court of Appeals for the Fourth Circuit to read *Gilmer* as effectively overruling *Gardner-Denver*.[32] Almost all other lower courts, however, have refused to imply an overruling of *Gardner-Denver*. The dominant view is that *Gardner-Denver* and its progeny remain good law and that statutory employment claims are independent of a collective bargaining agreement's grievance and arbitration procedures, and are independent of the "minor disputes" grievance procedures of the Railway Labor Act.[33]

These cases have decided the issue correctly. The Court could have used *Gilmer* to overrule *Gardner-Denver*, but chose to distinguish it instead. By so doing, the Court indicated its continuing approval of *Gardner-Denver*, albeit as confined to collectively bargained grievance arbitration procedures.

Moreover, the reasons for using *Gilmer* to re-examine *Gardner-Denver* are superficial because they ignore the fundamentally different nature of the grievance arbitrator's role. Grievance arbitration is not primarily a substitute for litigation; rather it is a substitute for industrial strife. Courts are fond of saying that grievance arbitration is the *quid pro quo* for the union's agreement

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30. *See supra* note 6.

31. 415 U.S. at 58 n.19.

32. Austin v. Owens-Brockway Glass Container, Inc., No. 94-1213, 1996 U.S. App. LEXIS 4370 (4th Cir. Mar. 12, 1996).

33. *See, e.g.*, Tran v. Tran, 54 F.3d 115 (2d Cir. 1995); Bates v. Long Island R.R., 997 F.2d 1028 (2d Cir.), *cert. denied*, 114 S. Ct. 550 (1993); Block v. Art Iron, Inc., 866 F. Supp. 380 (N.D. Ind. 1994); Bruton v. Southeastern Pa. Transp. Auth., 147 L.R.R.M. (BNA) 2167 (E.D. Pa. 1994); Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994); Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802 (C.D. Ill. 1994); Bintner v. Burlington N., Inc., 857 F. Supp. 1484 (D. Wyo. 1994); Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141 (D. Conn. 1993). *See also* EEOC v. Board of Governors, 957 F.2d 424 (7th Cir.), *cert. denied*, 113 S. Ct. 299 (1992) (holding that a collective bargaining agreement may not deny access to grievance procedure to employee who is pursuing Title VII claim arising out of same incident).

not to strike.[34] In so stating, they recognize that collective bargaining agreements do not confer specific rights on individual employees in the same way as statutes, or even individual contracts. Instead, they provide a general code governing wages, hours and working conditions. This code is refined into specific contract rights through case-by-case negotiation between the union and employer through the grievance procedure. Deferral of the refinement to case-by-case negotiation facilitates the reaching of a collective bargaining agreement by enabling the parties to provide generalized standards governing situations, such as discipline and discharge, which are likely to be so varied as to make further specificity impractical. It also enables the parties to resolve issues by agreeing on the language to be placed in the contract, even though they do not agree on what the language means. If, in the grievance procedure, the parties are unable to agree on the resolution of a particular dispute, they agree to be bound by an arbitrator's ruling, rather than resort to economic weapons.[35]

Thus, grievance arbitrators play a pivotal role in a purely private system of workplace self-government. Their decisions generate the private law of the collective bargaining agreement, often referred to as the "common law of the shop." In carrying out their role, grievance arbitrators have discretion to decide whether to employ public law principles.[36] If they do resort to public law, they do so in the guise of interpreting the private contract. Errors of law which they may make are not the basis for judicial review; those errors are merged with the contract and become part of the private law of that shop.[37]

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34. *See* Boys Market, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 249 (1970).

35. Elsewhere, I have discussed this aspect of grievance arbitration and its implications for other issues more fully. *See* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187, 1192-1200 (1993); Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 169-77 (1992).

36. Of course, such discretion may be circumscribed by express direction of the parties.

37. U.S. Court of Appeals Judge Harry Edwards, a noted labor law scholar and former arbitrator, has articulated the rationale:

> When construction of the contract implicitly or directly requires an application of "external law," i.e., statutory or decisional law, the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the "contract reader," his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties to the contract. Thus, the parties may not seek relief from the courts for an alleged mistake of law by the arbitrator. . . . The parties' remedy in such cases is the same remedy they possess whenever they are not satisfied with the arbitrator's performance of his or her job: negotiate a modification of the contract or hire a new arbitrator.

American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 6-7 (D.C. Cir. 1986).

In *Austin*, the Fourth Circuit completely missed the distinction between the private law of the collective bargaining agreement and the public law of federal employment statutes. The court affirmed a grant of summary judgment against the plaintiff's Title VII and ADA claims, holding that Austin was required to submit those claims to arbitration under the collective bargaining agreement between her union and her employer. The collective bargaining agreement provided:

> 1. The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status.
> 2. This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act. Before taking action relative to this Section, the Company will meet with the Local Union, and both parties will have sufficient opportunity to express their opinions regarding an anticipated action.
> 3. Any disputes under this Article as will all other Articles of this Contract shall be subject to the grievance procedure.[38]

The court rejected the idea that "*Gilmer* has no effect at all and that *Alexander* is still the law . . . ."[39] It recognized the tensions between collective representation and individual statutory rights that were not present in *Gilmer*.[40] The court dismissed this concern, however, because "Miss Austin is a party to a voluntary agreement which has explicitly agreed to the arbitration of her statutory complaints."[41] The court analogized to union waivers in collective bargaining of employees' rights under the National Labor Relations Act (NLRA), and concluded that the union had the right and the duty to negotiate for a provision binding employees to arbitrate their statutory claims.[42]

The fallacy behind the *Austin* court's reasoning can be seen readily by comparing the procedural rights that Gilmer had in his arbitration to those that Austin would have in a grievance proceeding. Gilmer could be represented by counsel of his own choosing and controlled the entire claim. Gilmer, through his counsel, had rights of discovery and preemptory and for cause challenges to the arbitration panel. Gilmer's attorney was accountable to him and would be liable to him for malpractice if his handling of the claim was negligent.

In contrast, the union would maintain complete control over Austin's grievance. It could drop the grievance, compromise it, or take it all the way

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38. *Austin*, 1996 U.S. App. LEXIS 4370, at *9.
39. *Id.* at *17.
40. *Id.* at *20.
41. *Id.*
42. *Id.* at *27.

to arbitration. It would select the arbitrator, together with the company. It may not have any discovery rights and, in any event, it would not be accountable to Austin for how it pursues discovery. The union's only accountability to Austin would lie in its duty of fair representation. That duty only requires that the Union not act arbitrarily, discriminatorily or in bad faith.[43] It does not require the union to furnish Austin with a lawyer.[44]

Furthermore, the union could bar Austin's attorney from the proceeding.[45] If the union were to use an in-house lawyer to represent the grievant and the lawyer were to be professionally negligent, the lawyer would not be liable to the employee unless the lawyer's actions amount to a breach of the duty of fair representation.[46]

The limitations on the union's accountability to the employee in its handling of grievances are a direct result of the grievance procedure's role in developing a purely private law to govern the workplace. The union's grant of exclusive representative status is key to the development of this private self-regulating system. It also renders any suggestion that Austin voluntarily waived her statutory right to litigate her Title VII and ADA claims simply absurd.

One might suggest that the idea that Gilmer or any other securities industry employee made a voluntary waiver is equally absurd as they were presented with take it or leave it form contracts. But, at least they had the theoretical possibility of negotiating a separate deal with their employers which did not require arbitration. Austin, or any other unionized employee, has no such choice. Any separate deal she might negotiate would be void because the union is her exclusive bargaining representative.[47] Consequently, even under the NLRA, the union is restricted to waiving collective rights. It may not waive individual employee rights, such as the right to solicit employees in support of or in opposition to the union.[48]

In summary, the grievance arbitrator is confined to a system of private law, totally outside the system of public law of which employment statutes are a

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43. For detailed discussion of the union's duty of fair representation, see MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 391-418 (1988).

44. Castelli v. Douglas Aircraft Co., 752 F.2d 1480 (9th Cir. 1985); Grovner v. Georgia-Pacific Corp., 625 F.2d 1289 (5th Cir. 1980); Walden v. Local 71, International Brotherhood of Teamsters, 468 F.2d 196 (4th Cir. 1972).

45. Castelli v. Douglas Aircraft Co., 752 F.2d 1480 (9th Cir. 1985); National Treasury Employees Union v. FLRA, 721 F.2d 1402 (D.C. Cir. 1983); Del Casal v. Eastern Airlines, Inc., 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981).

46. Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985). If the union employs outside counsel, the attorney will be liable to the grievant for malpractice. Aragon v. Federated Dep't Stores, Inc., 750 F.2d 1447 (9th Cir.), *cert. denied*, 474 U.S. 902 (1985).

47. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

48. NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322 (1974).

part.[49] In contrast, the employment arbitrator, as envisioned in *Gilmer*, provides a forum for the vindication of public law rights. In light of the completely different nature of the two types of arbitration, *Gilmer* cannot be read to justify a re-examination of *Gardner-Denver*.

B. The FAA's Employment Contract Exclusion

Section 1 of the FAA provides: "[N]othing herein . . . shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[50] The lower courts are divided over the scope of the Section 1 exclusion. The controversy centers on how to interpret the words "engaged in . . . interstate commerce." Read narrowly, the exclusion refers only to employees involved in actual interstate transportation. Read broadly, the exclusion encompasses all employees involved in interstate commerce.

There is no dispute over the origins of the Section 1 exclusion. Congress enacted the FAA in 1925. The American Bar Association's Committee on Commerce proposed the FAA in response to state law which refused to enforce arbitration agreements in commercial contracts. Section 1 resulted from concerns expressed by the president of the Seamen's Union that its contracts not be subject to employer-controlled arbitration systems, but that it retain its rights to common law enforcement.[51] The chair of the ABA committee, in a much quoted passage from the hearings on the FAA, explained the reason for the Section 1 exclusion as follows: "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."[52]

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49. This is in contrast to the grievance arbitrator in Canada, who operates within the public law system. The Canadian arbitrator is obliged to consider public law in resolving grievances and is held to a standard of legal correctness and subject to judicial review for errors of law. For further discussion, see Randi Hammer Abramsky & Martin H. Malin, *Cross Border Perspectives on the Use of External Law in Labor Arbitration, in* SEEKING COMMON GROUND: PROCEEDINGS OF THE 21ST ANNUAL INTERNATIONAL CONFERENCE OF SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION 199 (James B. Boskey et al. eds., 1994).

50. 9 U.S.C. § 1 (1947).

51. For an excellent discussion of the Section 1 issue, including the legislative history, see Christine Godsil Cooper, *Where Are We Going with* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 226-34 (1992).

52. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before a Subcomm. of the Committee on the Judiciary*, 67th Cong., 4th Sess. 9 (1923) (statement of W.H.H. Piatt, Chairman of the Committee of Commerce, Trade and Commercial Law of the American Bar Association), *quoted in* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991) (Stevens, J., dissenting).

Tenney Engineering, Inc. v. United Elec., Radio & Machine Workers, Local 437,[53] decided en banc by the Third Circuit Court of Appeals over forty years ago, remains the most prominent decision interpreting the Section 1 exclusion. The four-to-three majority read the exclusion narrowly, emphasizing that the exclusion was a response to concerns voiced by the Seaman's union, relying on the interpretive principle *ejusdem generis*, and noting that the concept of interstate commerce as understood in 1925 was much narrower than the contemporary view. One judge concurred, rejecting the narrow view of the exclusion, but opining that collective bargaining agreements were not contracts of employment. Two judges dissented, emphasizing that the FAA's purpose was to enforce commercial arbitration agreements and did not touch on employment contracts at all.

Most of the pre-*Gilmer* decisions involved the application of the FAA to collective bargaining agreements.[54] As Judge Posner has observed, this issue would appear to be academic because the law developed under Section 301 of the Labor Management Relations Act would seem to supersede any effort to apply the FAA to collective bargaining agreements.[55] Nevertheless, the divisions within the *Tenney* court reflect the continuing divisions over how to interpret Section 1.

The post-*Gilmer* decisions arise out of individual employment arrangements. They recognize that *Gilmer* adds a new wrinkle to the Section 1 issue. As Justice Stevens observed in his *Gilmer* dissent, the Supreme Court has expanded the FAA to cover numerous statutory claims to which the drafters of the statute never envisioned it applying.[56] It has done so in the name of a broad judicial policy favoring arbitration. A number of post-*Gilmer* decisions use this broad policy to justify reading the Section 1 exclusion narrowly.[57] The most extreme of these is *Kropfelder v. Snap-On Tools Corp.*[58] The plaintiff was a warehouse manager who received goods trucked to the warehouse from facilities in other states, pulled and packaged dealer

53. 207 F.2d 450 (3d Cir. 1953).

54. *See, e.g.*, Pietro Sclazitti Co. v. International Union of Operating Engineers, Local 150, 351 F.2d 576 (7th Cir. 1965); Signal-Stat Corp. v. Local 475 United Elec., 235 F.2d 298 (2d Cir. 1956); United Elec., Radio & Machine Workers v. Miller Metal Prods. Co., 215 F.2d 221 (4th Cir. 1954); Tenney Engineering, Inc. v. United Elec., Radio & Machine Workers, Local 437, 207 F.2d 450 (3d Cir. 1953).

55. Miller Brewing Co. v. Brewery Workers Local 9, 739 F.2d 1159 (7th Cir.), *cert. denied*, 469 U.S. 1160 (1984).

56. *Gilmer*, 500 U.S. at 42-43 (Stevens, J., dissenting).

57. *See, e.g.*, Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952 (D. Md. 1994); Crawford v. West Jersey Health Sys., 847 F. Supp. 1232 (D.N.J. 1994); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993); Hampton v. ITT Corp., 829 F. Supp. 202 (S.D. Tex. 1993); Hull v. NCR Corp., 826 F. Supp. 303 (E.D. Mo. 1993).

58. 859 F. Supp. 952 (D. Md. 1994).

orders and loaded them onto trucks for shipment to the dealers. The court, offering no reasoning other than a recitation of the "liberal federal policy favoring arbitration,"[59] concluded that the plaintiff was "not engaged in work which is substantially similar to that of seamen or railroad employees."[60]

Other courts have disagreed with such reliance on the liberal policy favoring arbitration.[61] They reason that this policy is expressed in Section 2 of the FAA, but that Section 1's exclusion of employment contracts limits that policy. In their view, it is necessary to determine the scope of the Section 1 exclusion before applying the pro-arbitration policy.[62]

Section 1's reference to seamen and railroad employees probably reflects the narrow view of what constituted interstate commerce in 1925. As the *Tenney* court observed, interstate commerce was regarded as limited to employees engaged in interstate transportation or work that was practically a part of it.[63] The broad view of interstate commerce did not receive Supreme Court approval until more than ten years later in *NLRB v. Jones & Laughlin Steel Company*.[64] If the 1925 view of interstate commerce governs the current interpretation of the FAA, one would expect it also to apply to Section 2, which specifies that the statute governs contracts "evidencing a transaction involving commerce."[65] The Supreme Court, however, has read Section 2 expansively.

In *Allied-Bruce Terminix Cos. v. Dobson*[66] the Court interpreted Section 2 to reach the limits of Congress' power under the Commerce Clause. The Court recognized that the Congress which enacted the FAA probably did not regard its commerce power to reach as far as contemporary doctrine regards it, but held that the scope of the statute should expand along with the evolving interpretation of the Commerce Clause.[67] Furthermore, the Court held that Section 2 covered all contracts governing transactions involving commerce, regardless of whether the parties contemplated that the contract would involve interstate commerce. In so doing, the Court recognized that its interpretation rendered the word "evidencing" essentially superfluous.[68]

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59. *Id.* at 959.

60. *Id.*

61. *See, e.g.*, Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 310-11 (6th Cir. 1991).

62. *See, e.g.*, Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117, 123 (N.D. Miss. 1995).

63. *Tenney*, 207 F.2d at 453.

64. 301 U.S. 1 (1937).

65. 9 U.S.C. § 2 (1947).

66. 115 S. Ct. 834 (1995).

67. *Id.* at 836.

68. *Id.* at 842 ("That interpretation, we concede, leaves little work for the word 'evidencing'. . . .").

By analogy to *Allied-Bruce Terminex*, the term "commerce" in Section 1 could be read as broadly as Congress' power under the Commerce Clause, and the words "engaged in" should not be used to limit the scope of the exclusion. The driving force behind the Court's interpretation in *Allied-Bruce Terminex*, however, was its desire to interpret the FAA's coverage expansively to effectuate the policy favoring arbitration. An expansive interpretation of the Section 1 exclusion, arguably, would impede that policy. Thus, the ultimate resolution of the Section 1 exclusion issue probably will turn on how far the Court is willing to stretch the pro-arbitration policy.

In the long term, however, the resolution of the Section 1 exclusion controversy will not have a major effect on the degree to which statutory employment claims are arbitrated. If Section 1 is read broadly, the enforceability of employment arbitration clauses will be governed by state law, rather than the FAA. Although some states retain their traditional refusal to enforce pre-dispute agreements to arbitrate,[69] many states have been inspired by *Gilmer* to compel arbitration of claims under state employment law.[70]

C. *Applying* Gilmer *Beyond the ADEA*

Gilmer adopted a heavy presumption in favor of arbitrating statutory employment claims. The Court made it clear that the burden of demonstrating congressional intent to preclude arbitration rests on the party opposing arbitration. Just as in *Gilmer*, that burden is extremely difficult to meet in the absence of express language in the statute itself or in its legislative history. Consequently, courts have held arbitrable a wide range of statutory claims, including those arising under the Fair Labor Standards Act,[71] the Employment Retirement Income Security Act,[72] the Jury Systems Improvement Act,[73] and numerous state laws.[74]

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69. *See, e.g.*, Arce v. Cotton Club, 883 F. Supp. 117 (N.D. Miss. 1995) (applying Mississippi law); Lambdin v. District Court, 903 P.2d 1126 (Colo. 1995) (holding unenforceable a pre-dispute agreement to arbitrate as applied to claims under the Colorado Wage Claim Act).

70. *See, e.g.*, Spellman v. Securities, Annuities & Ins. Serv., 10 Cal. Rptr. 2d 427 (Cal. Ct. App. 1992); Skewes v. Shearson Lehman Bros., 829 P.2d 874 (Kan. 1992); Fletcher v. Kidder, Peabody & Co., 619 N.E.2d 998 (N.Y.), *cert. denied*, 114 S. Ct. 554 (1993).

71. Hampton v. ITT Corp., 829 F. Supp. 202 (S.D. Tex. 1993).

72. Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993).

73. McNulty v. Prudential-Bache Sec., Inc., 871 F. Supp. 567 (E.D.N.Y. 1994).

74. Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992) (state polygraph statute and state defamation law); Schooley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 867 F. Supp. 989 (W.D. Okla. 1994) (state common law claims); Nazon v. Shearson Lehman Bros., Inc., 832 F. Supp. 1540 (S.D. Fla. 1993) (Florida Human Rights Act); Hull v. NCR Corp., 826 F. Supp. 303 (E.D. Mo. 1993) (Missouri Human Rights Act); Spellman v. Securities, Annuities & Ins. Serv., 10 Cal. Rptr. 2d 427 (Cal. Ct. App. 1992) (California anti-discrimination statute); Skewes v. Shearson Lehman Bros., 829 P.2d 874 (Kan.

The early federal court reaction to *Gilmer* suggests that courts will be very reluctant to find a legislative intent to preclude enforcement of pre-dispute agreements to arbitrate even when faced with specific language in the legislative history or the statute itself. The Americans with Disabilities Act and the Civil Rights Act of 1991 each contain provisions encouraging the use of arbitration and other ADR techniques.[75] The House Report accompanying the ADA explained, "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 this Act."[76] The House Report on the Civil Rights Act contained a virtually identical statement of intent regarding pre-dispute agreements to arbitrate.[77] Nevertheless, most courts considering the issue have applied *Gilmer* mechanically to enforce pre-dispute agreements to arbitrate Title VII claims.[78]

The Ninth Circuit has retreated from the mechanical application of *Gilmer* to Title VII cases. In *Prudential Insurance Co. v. Lai*,[79] the court, relying on *Gardner-Denver* and the legislative history behind the alternative dispute resolution provision of the Civil Rights Act of 1991, held that to be enforceable, an agreement to arbitrate Title VII claims must be made knowingly. The court reasoned that only knowing waivers of the judicial forum would be consistent with congressional policies underlying Title VII. In so holding, however, the court reaffirmed its earlier decisions that pre-dispute agreements

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1992) (Kansas common law tort claim); Fletcher v. Kidder, Peabody & Co., 619 N.E.2d 998 (N.Y.), *cert. denied*, 114 S. Ct. 554 (1993) (New York Human Rights Act). *But see* Lambdin v. District Court, 903 P.2d 1126 (Colo. 1995) (holding that the Colorado Wage Claim Act precludes waiver of access to a judicial forum).

75. 42 U.S.C. § 12212 (1990) (ADA); Civil Rights Act of 1991 § 118, 42 U.S.C. § 1981 (1977 & Supp. I 1991). For an exhaustive analysis of these provisions, see Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521 (1994).

76. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt.3, at 76 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 499-500. The representative who suggested the ADR language also clarified, "[U]nder no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA." 136 CONG. REC. H2421, H2431 (daily ed. May 17, 1990) (statement of Rep. Glickman).

77. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt.1, at 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635.

78. *See, e.g.*, Nghiem v. NEC Elecs., Inc., 25 F.3d 1437 (9th Cir. 1994); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993); Hull v. NCR Corp., 826 F. Supp. 303 (E.D. Mo. 1993); Fletcher v. Kidder, Peabody & Co., 619 N.E.2d 998 (N.Y.), *cert. denied*, 114 S. Ct. 554 (1993).

79. 42 F.3d 1299 (9th Cir. 1994).

to arbitrate may be applied to Title VII claims in appropriate circumstances. Thus, the long term effect of *Lai* may be limited to forcing employers to revise their form arbitration agreements.[80]

Even express statutory language has not prevented employers from successfully compelling employees to arbitrate their claims. The Employee Polygraph Protection Act contains an express preclusion of waiver of the statute's "rights and procedures."[81] Nevertheless, the Ninth Circuit, relying on *Gilmer*, found no congressional intent to preclude enforcement of a pre-dispute agreement to arbitrate a claim under the act.[82] In sum, the courts appear to be reading *Gilmer* to require a very explicit prohibition of arbitration before they will conclude that claims under a given statutory scheme are not arbitrable.

D. Who is Bound to Arbitrate What Against Whom?

As the Court in *Gilmer* recognized, an arbitrator's authority is controlled, in the first instance, by the contract's arbitration clause. Nevertheless, *Gilmer*'s extension of the policy favoring arbitration to individual statutory employment claims signals that doubts in interpreting contracts will be resolved in favor of arbitration. The lower courts have read this signal and applied it broadly.

The courts have not confined the obligation to arbitrate to the immediate parties to the contract. Courts have held that non-parties are bound to arbitrate if they have sufficient privity with the parties to the agreement.[83] Courts have been quick to infer agreements to arbitrate statutory claims. In situations where employees signed contracts of specified durations which contained arbitration clauses but continued to work after the written agreements expired, courts have held that the arbitration clauses survived the terminations of the

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80. *See* Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) (finding a voluntary waiver).

81. 29 U.S.C. § 2005(d) (1988).

82. Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992). *But see* Lambdin v. District Court, 903 P.2d 1126 (Colo. 1995) (interpreting similar language of Colorado Wage Claim Act to preclude enforcement of pre-dispute agreements to arbitrate).

83. *See, e.g.*, Messing v. Rosenkrantz, 872 F. Supp. 539 (N.D. Ill. 1995) (agents of corporation that signed arbitration agreement may compel arbitration of claims brought against them); Siegel v. Daiwa Sec. Co., 842 F. Supp. 1537 (S.D.N.Y. 1994) (parent corporation and its officers may rely on arbitration agreement signed by its subsidiary). *But see* Kresock v. Bankers Trust Co., No. 92C7994, 1993 WL 322807 (N.D. Ill. Aug. 23, 1993) (Employer may not compel former employee to arbitrate even though employee signed Form U-4 and registered with NASD, where employer is not a member of NASD, notwithstanding that employer's sister corporation is an NASD member.).

written contracts and required employees to arbitrate their post-termination claims.[84]

In *Williams v. Katten, Muchin, & Zavis*,[85] the plaintiff's employment agreement required her to arbitrate "'any controversy or claim arising out of or relating to any provision of this Agreement or any other document or agreement referred to herein . . . .'"[86] The court, relying on the broad presumption of arbitrability, interpreted the clause to encompass the plaintiff's Title VII claim, even though that claim arose out of the statute rather than the employment agreement. Indeed, although the courts are divided, there is authority to compel arbitration of employment claims even though the arbitration agreement does not mention employment but speaks only to arbitration of claims arising out of the employee's business.[87]

Lang v. Burlington Northern Railroad Co.[88] presents an extreme example which stretches the presumption in favor of arbitrability to the breaking point. Lang had been employed by Burlington for sixteen years when the company advised him and his co-workers that it was revising its employee handbook to require arbitration of all employment claims. Over a year later, the company demoted Lang. Thereafter, he sued challenging the demotion.

The court compelled Lang to arbitrate his claim. It held that by continuing to work for Burlington, he accepted the handbook amendment and agreed to arbitrate all future disputes. Furthermore, the court asserted that because the arbitration clause was not inherently unfair, the agreement to arbitrate did not result from fraud or overwhelming economic power that would provide grounds for its revocation.

The court's analysis completely missed the relevant issue. If the court requires that an arbitration clause be inherently unfair as a condition of revocation, it will never order an arbitration agreement revoked. Arbitration is not inherently unfair. The issue, however, is not the fairness of the clause, but rather the presence of economic duress. The fairness of the clause may be evidence relevant to the issue of duress, but it is not dispositive. The key

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84. Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir. 1993); Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952 (D. Md. 1994).

85. 837 F. Supp. 1430 (N.D. Ill. 1993).

86. *Id.* at 1432.

87. The issue has arisen in connection with the National Association of Securities Dealers Code. *Compare* Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (Norris, J., concurring) and Farrand v. Lutheran Bhd., 993 F.2d 1253 (7th Cir. 1993) (both holding that the provision did not encompass employment claims) *with* Kidd v. Equitable Life Assurance Soc'y, 32 F.3d 516 (11th Cir. 1994) (holding that the provision mandated arbitration of employment claims). The NASD has since amended its Code expressly to require arbitration of employment disputes. *See* Williams v. Cigna Financial Advisors, Inc., 56 F.3d 656 (5th Cir. 1995); F.N. Wolf & Co. v. Brothers, 613 N.Y.S.2d 319 (N.Y. Sup. Ct. 1994).

88. 835 F. Supp. 1104 (D. Minn. 1993).

issue raised in *Lang* was whether a sixteen-year employee acts under economic duress when he agrees to an arbitration clause where the only alternative is termination of employment. The court never addressed this issue. In a case involving similar facts, however, the Louisiana Court of Appeal found duress and voided an employment contract modification mandating arbitration where the employee's agreement was obtained under threat of discharge.[89]

Thus, it appears that the lower courts are reading *Gilmer* expansively and ordering most claims to arbitration when given the opportunity to do so. The lower courts' reaction to *Gilmer* underscores the importance of how the courts police the employment arbitration schemes which result. Such policing must focus on the procedural protections available in arbitration and on the relative roles of arbitrators and courts in the development of the substantive law. The following two sections explore these issues.

III. ENSURING JUST ARBITRATION PROCEDURES

The FAA contains some very minimal procedural safeguards. It provides for awards to be vacated where they were procured by fraud or corruption, for evident partiality in the arbitrator, or for arbitral misconduct in refusing to postpone the hearing upon sufficient cause, refusing to hear pertinent evidence or other misbehavior prejudicial to a party's rights.[90]

The FAA will be of limited value in policing the procedural fairness of statutory employment claims arbitration.[91] Of greater importance will be the need to ensure that arbitration of these claims does not undermine the policies behind the statutes under which the claims arise.

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89. Standard Coffee Service Co. v. Babin, 472 So. 2d 124 (La. Ct. App. 1985). Other courts have held that contracts obtained under threat of discharge may be voidable for duress. *See, e.g.*, Shurleff v. Giller, 527 S.W.2d 214 (Tex. Civ. App. 1975) (holding that a promissory note was unenforceable when the employee signed the note only after his superior's threat of termination); Laemarr v. J. Walter Thompson Co., 435 F.2d 680, 682 (7th Cir. 1970) (holding that "the threat of discharge from one's employment may constitute duress which would make voidable a contract executed while a party was under such a threat"); Mayerson v. Washington Mfg. Co., 58 F.R.D. 377 (E.D. Pa. 1972) (holding that threat to fire and blackball employee amounted to duress). *But see* Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564 (Ala. 1992) (holding that covenant not to compete agreed to under threat of discharge was not void for duress).

90. 9 U.S.C. § 10(a)-(b) (1947 & Supp. II 1992).

91. *See* Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995) (holding that arbitrator had a duty to disclose that he was a high ranking officer of a company that did more than a trivial amount of business with respondent). The only Supreme Court decision interpreting these provisions is Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), where the Court invalidated an arbitration award because the arbitrator failed to disclose that he had served, from time to time, as a consultant to one of the parties. The case did not produce a majority opinion and has been characterized as being of limited precedential value. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983).

The Court in *Gilmer* recognized that the arbitration procedure must afford the claimant a fair opportunity to present his or her claim for it to be consistent with the policies underlying the ADEA. Moreover, key to the Court's analysis—that compelled arbitration was consistent with the ADEA's policies—was its view that enforcement of the arbitration agreement did not vitiate Gilmer's ADEA claim but merely changed the forum in which he was to seek vindication. That rationale dissipates if the arbitral forum does not meet minimum standards of procedural justice.

Considering minimum standards of arbitral procedural justice, it is necessary to address two concerns. First, for procedures to be just, they must provide the means for factually accurate decisionmaking. This is a primary concern in evaluating the availability of discovery. The *Gilmer* Court, however, correctly observed that this does not require discovery provisions comparable to those available under the Federal Rules of Civil Procedure. For example, some state administrative procedures governing litigation of analogous state statutory claims, do not provide for the breadth of discovery as is available in federal court.[92]

Procedures that produce factually accurate results still may not be just. Each litigant is an autonomous moral actor entitled to respect. As such, each litigant is entitled to procedures that not only are fair in fact, but that also are perceived by a reasonable individual to be fair. Litigants are entitled to procedures that provide reasonable assurances that they will be heard and that the outcome will be based on the merits of the dispute, rather than irrelevant corrupting factors.[93] This second concern underlies the general view that adjudicators must not only be impartial in fact, but must avoid the appearance of bias or prejudice. It is implicated by doubts raised about the composition of some employment arbitration panels, such as a recent General Accounting Office finding that securities industry panels are dominated by older white males.[94]

Although any adjudication system should be designed so that a reasonable litigant will accept the result as having been decided fairly on the merits of the dispute, this concern is particularly strong in employment arbitration for two reasons. First, statutes such as Title VII, the ADA and the ADEA serve to protect groups that historically were excluded from society's power structure. Second, employers, a major element of the societal power structure, will have

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92. *See, e.g.*, ILL. ADMIN. CODE tit. 56, § 5300.720 (1994); MASS. REGS. CODE tit. 804, § 1.09 (1995); W. VA. CODE ST. RULES tit. 77, § 7.16 (1994).

93. *See* R.A. DUFF, TRIALS AND PUNISHMENTS 110-19 (1986) (making a similar point with respect to criminal procedures).

94. GAO REP., *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, Mar. 30, 1994, at 8-9.

promulgated the employment arbitration system unilaterally in most cases. Consequently, a reasonable claimant may be expected to regard most employment arbitration systems with considerable suspicion.

Although the policies underlying many of our employment statutes require close scrutiny of the fairness of any arbitration system resolving claims under the statutes, the policies underlying the FAA require a high degree of arbitral finality and, consequently, a minimal amount of collateral judicial attack on arbitration awards. Reconciling these two policies requires the development of a system of arbitral procedural fairness that is largely self-regulating. Such a system already exists in the form of grievance arbitration under collective bargaining agreements.

A fundamental basis for grievance arbitration's self-regulation is the presence of institutional repeat players on both sides of the dispute (i.e., unions and employers) who mutually select the arbitrator. Because the parties mutually select the arbitrator, either party may strike any potential arbitrator who it perceives to be biased. Because both parties are repeat players, there is substantial incentive for any arbitrator selected in a particular case to avoid even the appearance of partiality. An arbitrator who is perceived by one party to be biased toward the other is not likely to garner future appointments.

Almost twenty years ago, Professor Julius Getman noted these features of grievance arbitration and questioned whether they could be replicated in employment arbitration.[95] Although the employer remains a potential repeat player, the individual claimant, unlike a union, is not.[96] Successful self-regulating arbitration systems, however, are not confined to grievance arbitration.[97] The question becomes what features will facilitate the development of a self-regulating, procedurally just system of arbitration for statutory employment claims.

The plaintiffs' bar is the most likely institutional repeat player to balance the employers' presence in the arbitration.[98] Their involvement can screen

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95. Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 905, 916 (1979).

96. The repeat player need not be an actual party to the arbitration, but its influence as a check against arbitral partiality must be present. For example, in union security fee arbitration, the employer typically is not a party but, because the employer may be lurking in the background, the arbitrator is not likely to display partiality toward the union. *See* Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After* Chicago Teachers Union v. Hudson, 29 B.C. L. REV. 857, 891 n.230 (1988).

97. *See* Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISCIPLINARY L.J. 59 (1993); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

98. Professor Samuel Estreicher, an advocate of statutory employment claims arbitration, has focused on the plaintiffs' bar as a means of solving the repeat player problem. Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 765 (1990).

out potential arbitrators perceived to be partial to employers and their involvement in future cases can provide an incentive for the arbitrator selected to avoid appearing to be biased. Furthermore, as plaintiffs' lawyers begin to keep tabs on employment arbitrators, they may lurk in the background and thereby check arbitrator bias in cases where they do not represent the claimant.[99]

Consequently, an employer-promulgated arbitration scheme which restricts the claimant's ability to be represented by an advocate of his or her choice should be denied enforcement. Not only do such restrictions undermine the development of a self-regulating, procedurally just arbitration scheme, they also deny claimants a fair opportunity to present their claims. Moreover, they are inconsistent with the provisions in some employment statutes which authorize courts to appoint counsel for plaintiffs in appropriate circumstances.[100]

The second key to developing a self-regulating, procedurally just arbitration system concerns the process for selecting the arbitrator. Clearly, the arbitrator may not be the employer's unilateral choice. In the context of union security fee arbitration, the Supreme Court has held that unilateral selection of the arbitrator by one party is inconsistent with constitutionally required due process.[101] There is no reason to afford any less protection to claimants bringing statutory employment claims.

In union security fee disputes, many unions have adopted the procedures of the American Arbitration Association (AAA), whereby the AAA appoints the arbitrator from a list that it has developed of arbitrators qualified to handle such matters. Courts have approved this approach to arbitral selection.[102]

Courts reviewing statutory employment claims arbitration systems should resist the temptation to analogize to the union security fee cases and should not

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The importance of the plaintiffs' bar as a repeat player to balance employers as repeat players is underscored in the remarks of employer attorney Paul Salvator. Mr. Salvator advises employers to mandate arbitration. He suggests that, among other advantages, "arbitrators are much more hesitant to impose punitive or emotional distress damages; arbitrators who routinely grant such damages risk becoming unacceptable as 'neutral' third parties." Paul Salvatore, *Alternative Dispute Resolution in Employment Law: The Pros, The Cons, and the How*, C976 ALI-ABA COURSE OF STUDY 537, 543 (Dec. 15, 1994). As long as employers are the only repeat players, arbitrators who award punitive and emotional distress damages will risk their future business. If the plaintiffs' bar develops as a countervailing repeat player, however, arbitrators will run the same risk if they are overly reluctant to award such damages.

99. *See supra* note 83 (discussing how employers, lurking in the background, can check against arbitral pro-union bias in union security fee arbitrations).

100. *See, e.g.*, 28 U.S.C. § 1875(d)(1) (1978 & Supp. I 1983); 42 U.S.C. § 2000e-5(f) (1994).

101. Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

102. *See, e.g.*, Damaiano v. Matish, 830 F.2d 1363, 1371-72 (6th Cir. 1987); Andrews v. Educ. Ass'n of Cheshire, 829 F.2d 335, 340 (2d Cir. 1987).

approve systems whereby the employer unilaterally has delegated the appointment of the arbitrator to a third party, such as AAA. Union security fee disputes often involve numerous objecting fee-payers, thereby rendering mutual selection of the arbitrator impractical. Appointment by a neutral third party is the next best thing, even though that third party was designated unilaterally by the union. Statutory employment claims that are to be arbitrated typically involve a single individual claimant, thereby making mutual selection of the arbitrator feasible. Furthermore, at least one circuit court has held that the union security fee objector is not obligated to use the arbitration procedure, but may bypass it and sue the union in federal court.[103] At stake in the statutory employment claim is whether the claimant's sole forum will be in arbitration.

A reasonable claimant may regard the neutrality of the arbitrator appointed by the employer's unilaterally selected appointing agent with suspicion. Unlike the union security fee cases, there is no reason to justify excluding the claimant from involvement in selecting the arbitrator. Providing for mutual selection will further the development of a self-regulating, procedurally just system of employment arbitration.[104]

IV. THE RELATIVE ROLES OF ARBITRATORS AND COURTS[105]

One of Gilmer's arguments against compelling arbitration of his ADEA claim was the concern that entrusting such matters to private arbitrators would impede the development of the law. The Court gave this argument little attention, dismissing it with the assertion that most ADEA claims would continue to go to court rather than arbitration.[106] The Court's lack of analysis is most unfortunate because it demonstrates a lack of appreciation of the different roles of arbitrators and courts and the impact of those differences on the policies which underlie most employment statutes.

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103. Tierney v. City of Toledo, 917 F.2d 927, 939-40 (6th Cir. 1990); *but see* Hudson v. Chicago Teachers Union Local 1, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991).

104. Even where the system provides for mutual selection of the arbitrator, the employer, as a practical matter, still will have to designate the source of lists of arbitrators unilaterally. Many providers of labor arbitrators, such as AAA, require that applicants for membership on their lists provide equal numbers of employer and union references. Similar requirements of references from employer and employee advocates for candidates for inclusion on employment arbitration rosters would go a long way to furthering the development of a self-regulating process. In any event, where the employer unilaterally designates the source of lists of arbitrators from which the parties will mutually select the arbitrator to hear the case, the employer should not be allowed to add any arbitrary restrictions on who may be placed on the list submitted for selection.

105. The analysis in this section draws on my prior work. Malin & Ladenson, *supra* note 34, at 1226-38.

106. *Gilmer*, 500 U.S. at 31-32.

Most employment statutes represent congressional determinations to provide uniform labor standards, often in response to perceived market failures. For example, individual workers are not likely to bargain successfully with their employers for improvements in workplace safety because workplace safety is a collective good. An employer who agrees to improve working conditions must make the improvements for all workers, not just the ones who bargained for it. Thus, those who negotiate for safer working conditions are likely to bear, through trade-offs in wages and benefits, the costs of conferring that benefit on most of their co-workers. Under these circumstances, they are not likely to bargain for it. Instead, statutes such as the Occupational Safety and Health Act provide a mechanism for imposing uniform standards on all employers and workers.

Uniform standards also solve a second problem. Absent statutory intervention, competitive pressure is likely to plunge working conditions to the bottom as each employer attempts to cut labor costs to get an edge on its competition. Thus, in enacting the Family and Medical Leave Act, the Senate explained:

> Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers.[107]

Judges are part of the public justice system which effectuates these uniform labor standards. Judges are screened publicly prior to assuming office either through direct election (in many state courts) or through the nomination and confirmation process. Their decisions are subject to a hierarchy of review in higher courts, culminating in review in a Supreme Court. Even decisions of the Supreme Court are subject to further revision by the legislature. Indeed, the history of employment discrimination law is replete with instances where Congress has corrected what it perceived to be judicial mistakes. When the Supreme Court held that discrimination on the basis of pregnancy was not *per se* discrimination on the basis of sex,[108] Congress responded with the Pregnancy Discrimination Act of 1978.[109] When the Court held that mandatory retirement did not violate the Age Discrimination in Employment Act,[110] Congress responded with the 1978 Amendments to the ADEA.[111]

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107. S. REP. NO. 3, 103d Cong., 1st Sess. 5 (1993).
108. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).
109. 42 U.S.C. § 2000e(k) (1984).
110. United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977).

When the Court held that the ADEA does not require that age differentials in fringe benefits be cost-justified,[112] Congress responded with the Older Workers Benefits Protection Act.[113] When the Court held that employers do not have the burden of proving a business necessity to justify practices which have a disparate impact on protected classes,[114] that Section 1981 does not cover post-hiring racial discrimination,[115] and that allegations that a change in a seniority system must be attacked at the time the change is made, rather than when the change results in layoffs,[116] Congress responded with the Civil Rights Act of 1991.[117]

Arbitrators, on the other hand, fall outside the public justice system. They are appointed privately and their decisions are binding only on the parties in the actual case. Consequently, unlike judges, they are not linked together through a unified public justice system designed to produce a single, socially binding interpretation of the law.

Title VII amply illustrates how reliance on private arbitrators to interpret employment statutes can undermine the legislative policy of setting uniform labor standards. Employers who have no subjective desires to discriminate on the basis of race, sex, religion or national origin may still do so because competitive pressures force them to pander to customer preferences. Any competitor who does not do so runs the risk of losing business to competitors who do. Even if all competitors do not wish to discriminate, as long as they act alone, they face a prisoner's dilemma whereby each will discriminate out of fear of what its competitor will do.

An arbitrator who erroneously interprets Title VII to allow customer preferences to justify discrimination confers on the employer a competitive advantage that is improper under the statute. In so doing, the arbitrator not only undermines the uniform federal labor standard set by Title VII, but also tempts that employer's competitors to stay even by violating the statute. A judge, of course, could make the same mistake, but the error would be subject to correction through the hierarchical review of the public justice system.[118] Similarly, an arbitrator who erroneously orders an employer to accommodate

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111. 29 U.S.C. § 623(f)(2) (1967 & Supp. IV 1984).

112. Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989).

113. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended in scattered sections of 26 U.S.C.).

114. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

115. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

116. Lorance v. A.T. & T. Technologies, Inc., 490 U.S. 900 (1989).

117. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

118. *See, e.g.*, Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981), *rev'g*, 20 Fair Emp. Prac. Cas. (BNA) 1162 (C.D. Cal. 1979).

an employee's religious practices, even though the accommodation imposes more than a *de minimis* cost,[119] improperly places that employer at a competitive disadvantage and undermines Congress' policy of maintaining uniform labor standards in areas where it legislates.

The solution is to subject arbitral interpretations of law to meaningful judicial review. Unfortunately, the standard developed in commercial arbitration cases enforces arbitration awards unless they display a manifest disregard for the law.[120] Although the Supreme Court has yet to rule directly on this issue, it has indicated its acceptance of the manifest disregard for the law standard of review.

In 1953, refusing to enforce a pre-dispute agreement to arbitrate claims under the Securities Act of 1933, the Court gave as one of its reasons the concerns about the absence of meaningful judicial review under the manifest disregard standard.[121] Thirty-two years later, in compelling arbitration of statutory antitrust claims, the Court observed that judicial review would be limited to whether "the tribunal took cognizance of the antitrust claims and actually decided them."[122] Most recently, in holding that arbitrators' arbitrability decisions are subject to independent judicial review, the Court observed that arbitral decisions on the merits are reviewed under the manifest disregard of the law standard.[123]

The manifest disregard for the law standard works well when applied to disputes arising under private contracts. *Northrop Corp. v. Triad International Marketing S.A.*[124] illustrates its utility. Triad contracted to market Northrop's products in Saudi Arabia. When the Saudi Council of Ministers issued a decree prohibiting the payment of commissions in arms sales, Northrop ceased

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119. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

120. *See, e.g.*, Health Servs. Management Corp. v. Hughes, 975 F.2d 1253 (7th Cir. 1992); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991); Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930 (2d Cir. 1986); *In re* Sobel, 469 F.2d 1211 (2d Cir. 1972). Even this narrow standard of review in not available in all federal circuits. Some courts expressly have declined to review arbitration awards for manifest disregard of the law. *See, e.g.*, Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1269 (1993); R.M. Perez & Assocs. v. Welch, 960 F.2d 534, 540 (5th Cir. 1992); Robbins v. Day, 954 F.2d 679, 684 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 201 (1992); Chamelson Dental Prods. Inc. v. Jackson, 925 F.2d 223, 226 (7th Cir. 1991); Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412 (11th Cir. 1990).

121. Wilko v. Swann, 346 U.S. 427, 436-37 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

122. Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985).

123. First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1923 (1995).

124. 811 F.2d 1265 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987).

paying Triad. Triad brought a claim against Northrop in arbitration.[125] The Northrop-Triad contract also contained a choice of law clause which adopted California law. Northrop defended based on a California statute which excused performance of contracts prevented by operation of law.[126] The arbitrator rejected the defense and Northrop sued to overturn the award.[127]

The court, however, enforced the award. It found that the arbitrator did not display a manifest disregard for California law.[128] The court's holding was appropriate. When the choice of law clause and arbitration clause are read together, they reveal that the parties agreed to be governed by California law as interpreted by an arbitrator. Thus, any errors made by the arbitrator became merged with the choice of law clause of the contract and were beyond judicial review. The situation is the same as where a labor grievance arbitrator relies on external law in interpreting a collective bargaining agreement.[129]

On the other hand, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*[130] illustrates the deficiencies of applying the manifest disregard standard to arbitration awards in statutory cases. Philips Petroleum Company had issued a pro-rated tender offer for its stock. Bobker instructed Merrill Lynch to tender all 4,000 shares of Philips in his Merrill Lynch account. Merrill Lynch complied. Bobker subsequently instructed Merrill Lynch to sell short 2,000 shares of Philips stock. Merrill Lynch refused to do so.[131]

Bobker instituted arbitration proceedings to recover the profits he would have made had Merrill Lynch executed the sell short order. Merrill Lynch defended on the ground that the instruction violated Rule 10b-4 of the Securities Exchange Commission.[132] The arbitration panel awarded Bobker $12,500.00.[133]

Upon Merrill Lynch's petition, the trial court vacated the award. The court, aided by a requested amicus brief of the SEC, reasoned that Rule 10b-4 prohibited hedged tendering of the type in which Bobker attempted to engage. Rule 10b-4 provided that a person tendering shares in a pro-rated tender offer must be net long in all shares tendered both at the time of tender and as of the offer's cutoff date.[134] Had Merrill Lynch executed the sell short order,

125. *Id.* at 1267.
126. *Id.* at 1267, 1268.
127. *Id.* at 1268.
128. *Id.* at 1269-70.
129. *See supra* notes 35-37 and accompanying text.
130. 808 F.2d 930 (2d Cir. 1986).
131. *Id.* at 931.
132. *Id.* at 931, 932.
133. *Id.* at 933.
134. *Id.* at 934.

Bobker would have been net long for only 2,000 of the 4,000 shares he had tendered and would have been in violation of Rule 10b-4.

The court reviewed the arbitration transcript and found that the arbitrators were aware of Rule 10b-4 and proceeded to ignore it. The court vacated the award because of the arbitrators' manifest disregard for the law, observing, "[p]ermitting this award to stand would have the unacceptable result of penalizing Merrill Lynch for acting in accordance with the law."[135]

The Second Circuit reversed. The court criticized Rule 10b-4's net long requirements, suggesting that the rule was not a valid interpretation of section 10(b) of the Securities and Exchange Act.[136] The court, however, did not decide whether Rule 10b-4 was a valid rule. It merely observed that because of doubts concerning the validity of the rule and because those doubts were raised in the arbitration, the award did not display a manifest disregard for the law.[137]

Had the arbitrators applied Rule 10b-4 and denied the claim, their award clearly would not have displayed a manifest disregard for the law. The application of the manifest disregard standard thus leaves securities arbitrators free of institutional constraints to enforce Rule 10b-4 or not as they see fit. As a result, investors have no way of knowing whether hedged tendering is lawful. Brokers are in an untenable position. If they refuse hedged tender orders they risk liability for doing so and if they accept them they risk liability for violating Rule 10b-4.

The *Gilmer* Court's response to the problem which *Bobker* illustrates appears to be that the issue probably will receive a judicial resolution in future litigation between other parties. This response, however, is inadequate. The policy of uniform labor standards which underlies federal employment statutes remains undermined as long as a single arbitration award misinterprets the law and is not susceptible to judicial correction.

Just as the Ninth Circuit has recognized that the policies behind the Civil Rights Act of 1991 mandate that pre-dispute agreements to arbitrate be made knowingly and voluntarily,[138] so too courts should recognize that the policies behind federal employment statutes mandate that arbitral interpretations of law be subject to *de novo* judicial review. Such a standard is not likely to erode significantly the finality of employment arbitration awards. Most employment disputes are fact-based and not likely to raise the kind of legal issues that would call for significant judicial review. Courts routinely defer to arbitral

135. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 636 F. Supp. 444, 447-48 (1986).

136. *Merrill Lynch*, 808 F.2d at 935-36.

137. *Id.* at 936-37.

138. *See supra* note 79 and accompanying text.

findings of fact.[139] On the other hand, the absence of meaningful judicial review is one factor which inhibits many parties, including many employers, from arbitrating statutory cases. Adopting a *de novo* review standard for arbitral legal interpretations may actually encourage the use of arbitration.

V. CONCLUSION

The Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.* has given a major boost to the arbitration of statutory employment claims. Most lower courts have interpreted *Gilmer*'s liberal policy in favor of arbitration broadly and have compelled employees to arbitrate a wide range of claims. The lower courts, however, have yet to consider issues involved in implementing statutory claims arbitration systems, including the types of procedural safeguards required and the relative roles of arbitrators and courts.

The Federal Arbitration Act will be of very limited utility as a vehicle for establishing minimal procedural standards in statutory employment arbitration. Instead, courts should scrutinize the procedural adequacy by relying on the underlying employment statutes. For arbitration not to run afoul of the policies behind employment statutes, the system must provide the claimant with a procedurally just opportunity to present his or her claim. Such a system must provide for sufficient discovery to reasonably ensure accurate factfinding, must not restrict the employee's right to counsel of his or her choosing and must provide for mutual selection of the arbitrator.

Federal employment statutes reflect policy determinations that the areas the statute regulates require uniform minimum labor standards. The current level of judicial review of arbitration awards, which vacates those awards only where they display a manifest disregard for the law, does not ensure that arbitration of statutory employment claims will be consistent with this policy. To ensure such consistency, arbitral interpretations of statutory law must be subject to *de novo* judicial review. Such a standard will not undermine the finality of most arbitration awards and may actually encourage resort to

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139. The Supreme Court has highlighted the extensive judicial deference to arbitral findings of fact:

> The Company's position, simply put, is that the arbitrator committed grievous error in finding that the evidence was insufficient to prove that Cooper had possessed or used marijuana on company property. But the Court of Appeals, although it took a distinctly jaundiced view of the arbitrator's decision in this regard, was not free to refuse enforcement because it considered Cooper's presence in the white Cutlass, in the circumstances, to be ample proof that Rule II.1 was violated. No dishonesty is alleged; only improvident, even silly, factfinding is claimed. This is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts.

United Paper Workers v. Misco, 484 U.S. 29, 39 (1987).

arbitration by remedying what many advocates see as a major deterrent to using arbitration—inadequate judicial review.