PREDISPUTE AGREEMENTS TO ARBITRATE STATUTORY EMPLOYMENT CLAIMS

SAMUEL ESTREICHER*

Over the last decade, the Supreme Court, through its interpretation of the Federal Arbitration Act of 1925 (FAA), has expanded the role of arbitration in the resolution of legal disputes, including disputes arising under federal and state statutes. Recently, much debate has arisen over the issue of whether the FAA applies to employment contracts, and whether employees can enter into binding predispute agreements to arbitrate statutory employment claims. In Gilmer v. Interstate/ Johnson Lane Corp., *the Supreme Court held that under the FAA, employees could in fact enter into such predispute agreements. Because the agreement in* Gilmer *was not part of an employment contract, however, the Supreme Court left open a critical question, namely the scope of the FAA exclusion of employment contracts for certain employees engaged in foreign or interstate commerce. In this Article, Professor Estreicher first addresses the various public policy arguments raised by opponents of predispute agreements to arbitrate statutory employment claims. Addressing each one in turn, he concludes that where certain procedural safeguards are implemented, arbitration is indeed a proper forum for the resolution of statutory employment claims, and that predispute agreements to arbitrate provide valuable benefits for both employers and employees. Turning to the issue left open by the Court in* Gilmer, *Professor Estreicher explores the confusion surrounding the scope of the FAA exclusion of employment contracts, which in large part stems from an uncertain legislative history, and suggests that, given recent Court decisions and the policies underlying them, a narrow interpretation of the exclusion by the Supreme Court is probable. Professor Estreicher concludes by stressing that a proper arbitration system can advance the public policies contained in federal and state employment statutes.*

INTRODUCTION

The Supreme Court held in its 1991 ruling in *Gilmer v. Interstate/ Johnson Lane Corp.*[1] that, in view of the strong federal policy in favor

* Professor of Law and Director, Center for Labor and Employment Law, New York University; Counsel, Cahill Gordon & Reindel. A.B., 1970, Columbia University; M.S. (Industrial Relations), 1974, Cornell University; J.D., 1975, Columbia University. An early version of these remarks was presented at the American Arbitration Association's "National Employment Enclave—The Faces of Conflict in the Workplace: The Future of Employment ADR," Sept. 22-23, 1995, and appeared in Proceedings of New York University 49th Annual Conference on Labor 93-121 (Samuel Estreicher ed., 1997). The author also filed an amicus brief on behalf of the California Employment Law Council in Duffield v. Robertson Stephens & Co., No. C95-0109 (N.D. Cal. filed Jan. 11, 1995), appeal docketed, No. 97-15698 (9th Cir. Apr. 23, 1997). The views expressed here are the author's and should not be attributed to any organization. The research assistance of Matthew Kramer and Jeffrey Hirsch of the NYU School of Law (Class of 1998) is gratefully acknowledged.

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

of arbitration embodied in the Federal Arbitration Act of 1925[2] (FAA), employees could enter into binding predispute arbitration agreements encompassing claims they have against their employers under the Age Discrimination in Employment Act of 1967[3] (ADEA) and, by extension, other federal and state employment laws. Because in *Gilmer* the arbitration agreement was part of a registration process with the New York Stock Exchange, rather than a contract of employment directly between Gilmer and his former employer, the Court was able to avoid construing the reach of the exclusion in § 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[4]

Since, in the absence of FAA compulsion, predispute arbitration agreements covering statutory employment claims generally will be denied enforcement, the scope of the FAA § 1 exclusion will have important practical implications for the future of employment law arbitration. In post-*Gilmer* rulings to date, the District of Columbia, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits[5] have read the exclusion narrowly as limited to seamen, railroad workers, and other workers directly "engaged in" interstate commerce. Despite the clear trend of post-*Gilmer* decisions, however, there remains a good deal of uncertainty and controversy over whether predispute agreements to arbitrate statutory employment claims will or should be enforced.

This Article addresses some of the policy and legal questions concerning predispute agreements between employers and employees to

---

2 9 U.S.C. §§ 1-16 (1994).

3 29 U.S.C. §§ 621-634 (1994).

4 9 U.S.C. § 1 (1994).

5 See O'Neil v. Hilton Head Hosp., 115 F.3d 272, 276 (4th Cir. 1997) (compelling arbitration of claim under federal Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 (1994 & Supp. 1995)); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835-37 (8th Cir. 1997) (affirming dismissal by district court of hospital medical technician's action against former employer alleging violations of Title VII and state antidiscrimination law); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 226-27 (3d Cir.) (affirming order of district court compelling arbitration of mortgage consultant's claims against employer pursuant to state sexual harassment law), cert. denied, 1997 U.S. LEXIS 6057 (Oct. 14, 1997); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1470-72 (D.C. Cir. 1997) (affirming district court order compelling arbitration of discharged security guard's claims against former employer alleging racial discrimination and harassment in violation of Title VII and intentional infliction of emotional distress in violation of state law); Rojas v. TK Communications, Inc., 87 F.3d 745, 747-48 (5th Cir. 1996) (affirming dismissal by district court of disc jockey's action against former employer alleging sexual harassment in violation of Title VII); Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 53 n.3 (7th Cir. 1995) (reversing denial by district court of employer's motion to compel arbitration of former employee's ADEA and state law fraudulent inducement claims); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 596-602 (6th Cir. 1995) (affirming district court order compelling arbitration of contract claims brought by chief executive officer against company which purchased his employer).

arbitrate future disputes, whether they arise as a matter of contract or under employment discrimination statutes or other employment laws. Policy considerations are considered at the outset because they are likely to influence heavily how the legal issues raised by *Gilmer* ultimately will be resolved.

I
THE CONTROVERSY OVER PREDISPUTE ARBITRATION AGREEMENTS

Postdispute agreements to arbitrate existing disputes, most would agree, do not raise especially difficult questions. At least since the Supreme Court's *Alexander v. Gardner-Denver Co.*[6] decision, the law on postdispute waivers has been relatively clear. Once disputes have arisen, plaintiffs may enter into "knowing and voluntary" waiver agreements in which they trade potential claims under federal laws like the ADEA,[7] Title VII of the Civil Rights Act of 1964,[8] and the Americans with Disabilities Act of 1990[9] (ADA) for monetary or other consideration. If claims can be traded for money, it should not be beyond the realm of contract for the parties to negotiate a fair postdispute adjudicative process.[10]

---

6 415 U.S. 36 (1974).

7 The Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 201, 104 Stat. 978, 983-84 (1990) (codified as amended at 29 U.S.C. § 626(f)(1) (1994)), sets certain minimum standards for postdispute substantive waivers of ADEA claims.

8 42 U.S.C. §§ 2000e to 2000e-17 (1994).

9 Title I of the Americans with Disabilities Act (ADA), containing the employment provisions, is codified at 42 U.S.C. §§ 12101-12117 (1994).

10 This is the premise of the voluntary postdispute arbitration experiments of the EEOC and state agencies. See EEOC Policy Statement on Alternative Dispute Resolution, 3 EEOC Compliance Manual (BNA) N:3055 (July 17, 1995) (establishing EEOC commitment to Alternative Dispute Resolution (ADR) and setting guidelines for use); Agency is Committed to ADR But Questions Remain, Miller Says, Daily Lab. Rep. (BNA), Jan. 24, 1995, available in LEXIS, BNA Library, DLABRT File (describing ADR pilot program in which four EEOC districts offered mediation in selective discharge cases resulting in 52% settlement rate). For experience under the voluntary arbitration alternative authorized by New York's Human Rights Law, N.Y. Exec. Law § 297, subd. 4, par. A, subpar. ii (McKinney 1993), see Peter A. Prosper & Joel M. Douglas, The Arbitration of Human Rights Complaints: The New York Experience, Arb. J., Dec. 1992, at 26 (describing New York's program); Peter Blackman, Claimants Wanted: Project Tries to Convince Employees to Arbitrate, N.Y. L.J., May 26, 1994, at 5 (reporting that program is wanting for claimants because of minimal promotion and because in arbitration plaintiffs pay counsel, whereas when case is before administrative law judge, plaintiffs have access to free government counsel). For a discussion of the virtues of postdispute mediation, see Dwight Golann, Employment Disputes in Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators (1996); Matthew W. Daus, Mediating Disability Employment Discrimination Claims, Disp. Resol. J., Jan. 1997, at 16, 17-19. For a model of postdispute procedures the author had a hand in drafting, see Center for Public Resources, Inc., Model

Predispute agreements to arbitrate claims arising under individual employment contracts also would seem relatively noncontroversial. If we put aside for the moment questions concerning the enforceability of such agreements under the FAA, state law would ordinarily be available to compel the parties to a contract to honor the dispute mechanism set out in the very instrument that creates the underlying substantive claim. There may be, however, cases at the margin where—because of problems of illusory promise or contracts of adhesion—generally applicable principles of state contract law preclude enforcement.[11] Also, the public policies of some states, as expressed in their arbitration statutes, may allow either party to an employment contract to disregard executory arbitration promises.[12]

However, a controversy is raging over the validity of *predispute* agreements to arbitrate *statutory* employment claims. It is here that distinguished plaintiffs' lawyers like New York's Judith Vladeck

---

ADR Procedures: Employment Termination Dispute Resolution Agreement and Procedure (1990).

[11] Compare Gibson v. Neighborhood Health Clinics, 121 F.3d 1126 (7th Cir. 1997) (holding that arbitration clause was not enforceable because of lack of consideration in form of any reciprocal employer promise), and Heurtebise v. Reliable Bus. Computers, Inc., 550 N.W.2d 243, 247, 258 (Mich. 1996) (holding that there is no enforceable obligation under Michigan law to submit sex discrimination claim to arbitration where management reserved right to change employee handbook containing arbitration clause and handbook stated that it should not be construed as binding contract; three justices also found violation of state public policy), cert. denied, 117 S. Ct. 1311 (1997), with Lang v. Burlington N. R.R., 835 F. Supp. 1104, 1106 (D. Minn. 1993) (holding that mandatory arbitration policy added to employee handbook 26 years after plaintiff was hired constituted offer accepted by plaintiff through his continued employment and barred post-termination lawsuit, and finding no evidence that provision resulted from fraud or was "inherently unfair"), and Fregara v. Jet Aviation Bus. Jets, 764 F. Supp. 940, 952 (D.N.J. 1991) (finding that grievance and arbitration procedures spelled out in employee handbook providing for appeal to supervisor and then to company's board of adjustment, with provision for selection of impartial referee if board was deadlocked, must be exhausted before fired employee can sue for breach of contract, and stating that "there is nothing futile or illusory about this process"). See generally Samuel Estreicher, Arbitration of Employment Disputes Without Unions, 66 Chi.-Kent L. Rev. 753 (1990); Alfred G. Feliu, Legal Consequences of Nonunion Dispute-Resolution Systems, 13 Employee Rel. L.J. 83 (1987).

[12] Some state arbitration statutes exclude arbitration agreements contained in employment contracts or made a condition of employment. See, e.g., Ariz. Rev. Stat. Ann. § 12-1517 (West 1994); Iowa Code Ann. § 679.1(2)(b) (West 1987); Kan. Stat. Ann. § 5-401(c)(2) (Supp. 1996); Ky. Rev. Stat. Ann. § 417.050 (Michie 1992); S.C. Code Ann. § 15-48-10 (Law. Co-op. 1976 & Supp. 1997). These state law exclusions become material to the issue of arbitrability of employment claims only if the FAA is held not to apply to arbitration agreements contained in most employment contracts. For example, as the Supreme Court of Hawaii recently ruled in Brown v. KFC Nat'l Management Co., 921 P.2d 146 (Haw. 1996), reconsideration denied, 922 P.2d 973 (Haw. 1996), even where the state arbitration statute requires that the arbitration clause be in a written employment contract, "the FAA merely requires that the arbitration provision, but not necessarily the contract out of which the controversy arises, be in writing." Id. at 159. Hence, where the FAA applies, the limitations of state arbitration law have no practical effect.

charge that the law is sanctioning a new form of "yellow dog" contract.[13] Or, as San Francisco's Cliff Palefsky puts it, "an intellectual and legal scandal . . . is occurring in broad daylight."[14] Notably, opposition from the plaintiff's bar, civil rights groups, and advocacy groups led the Dunlop Commission on the Future of Worker-Management Relations (Dunlop Commission) to scuttle, at the eleventh hour, a recommendation that predispute agreements meeting certain quality standards should be enforced under existing law.[15] With mixed success, plaintiffs' lawyer groups have been pressuring organizations like J.A.M.S./Endispute and the American Arbitration Association (AAA) to decline the processing of predispute agreements.[16]

---

[13] See Judith P. Vladeck, 'Yellow Dog Contracts' Revisited, N.Y. L.J., July 24, 1995, at 7. Professor Stone adopts similar rhetoric in Katherine Van Wezel Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 Denv. U. L. Rev. 1017 (1996).

[14] Joyce E. Cutler, Arbitration: Suits Challenge Mandatory Arbitration as Depriving Employees of Their Rights, Daily Lab. Rep. (BNA), Mar. 3, 1995, available in LEXIS, BNA Library, DLABRT File (quoting Cliff Palefsky of McGuinn, Hillsman & Palefsky). Mr. Palefsky represents plaintiffs in the pending challenges in Duffield v. Robertson Stephens & Co., No. C95-0109 (N.D. Cal. filed Jan. 11, 1995) (order compelling arbitration), appeal docketed, No. 97-15698 (9th Cir. Apr. 23, 1997); Burton v. A.F.M. Servs., No. 965632 (Cal. Super. Ct. filed Dec. 6, 1994), appeal docketed, No. A073922 (Cal. Ct. App. Apr. 18, 1996).

[15] For the author's testimony before the Dunlop Commission, see Statement by Professor Samuel Estreicher to the Commission on the Future of Worker-Management Relations Panel on Private Dispute Resolution Alternatives, reprinted in Daily Lab. Rep. (BNA), Sep. 30, 1994, available in LEXIS, BNA Library, DLABRT File. His views on the Dunlop Commission's report are set out in Samuel Estreicher, The Dunlop Report and the Future of Labor Law'Reform, 12 Lab. Law. 117 (1996), earlier versions of which were published, all under the same title, in Contemporary Issues in Labor and Employment Law: Proceedings of New York University 48th Annual National Conference on Labor 291-311 (Bruno Stein ed., 1996); Regulation, Mar. 1995, at 28; and Daily Lab. Rep. (BNA), June 5, 1995, available in LEXIS, BNA Library, DLABRT File.

[16] Several plaintiffs' bar and union representatives participated in Due Process Protocol for Mediation and Arbitration of Statutory Arbitration Disputes, in 9A Lab. Rel. Rep. (BNA) No. 142, at 534:401 (May 9, 1995) [hereinafter Due Process Protocol]. However, this group could not reach consensus on whether predispute agreements to arbitrate statutory employment claims could be required as a condition of employment. See id. In July 1997, the EEOC restated its long-standing opposition to "agreements that mandate binding arbitration of discrimination claims as a condition of employment." EEOC Policy Statement on Mandatory Arbitration, reprinted in Daily Lab. Rep. (BNA) No. 133, at E-4 (July 11, 1997). Two months earlier, the National Academy of Arbitrators had adopted a similar position. See National Academy of Arbitrators' Statement and Guidelines Adopted May 21, 1997, Daily Lab. Rep. (BNA) No. 103, at E-1 (May 29, 1997).

Effective June 1, 1996, the American Arbitration Association (AAA) issued new national rules for the resolution of employment disputes. See American Arbitration Ass'n, National Rules for the Resolution of Employment Disputes (1996) [hereinafter AAA 1996 Rules]. The Association's policy is to "administer dispute resolution programs which meet the due process standards as outlined in these rules and the *Due Process Protocol*. This includes pre-dispute, mandatory arbitration programs, as a condition of employment." Id. at 3-4. The AAA rules were recently amended "to address technical issues." See Ameri-

II
THE CASE FOR FACILITATING PREDISPUTE AGREEMENTS CONFORMING TO CERTAIN ADJUDICATIVE QUALITY SAFEGUARDS

I do not share the position of these critics. In my view, arbitration of employment disputes should be encouraged as an alternative, supplementary mechanism—in addition to administrative agencies and courts—for resolving claims arising under public laws as well as contracts. It is an alternative that offers the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy. Private arbitration will never, and should not, entirely supplant agency or court adjudication. But if properly designed, private arbitration can complement public enforcement and, at the same time, satisfy the public interest objectives of the various statutes governing the employment relationship.

Admittedly, arbitration of public law disputes is not the same thing as arbitration of contractual disputes. The public policies behind the laws require that certain adjudicative quality standards be met. But these standards can be provided without turning arbitral proceedings into full fledged civil trials. The essential safeguards (drawing largely from the Dunlop Commission's report[17]) include:

- no restriction on the right to file charges with the appropriate administrative agencies;
- a reasonable place for the holding of the arbitration;[18]
- a competent arbitrator who knows the laws in question;[19]
- a fair and simple method for exchange of information;

---

can Arbitration Ass'n, National Rules for the Resolution of Employment Disputes (Including Mediation and Arbitration Rules) 4 (1997) [hereinafter AAA 1997 Rules]. Similarly, J.A.M.S./Endispute, while expressing concern "when a company requires all of its employees to arbitrate all employment disputes as an exclusive remedy," apparently will process disputes arising under such programs if a "minimum set of procedures or standards of procedural fairness" are met. These standards are set out in the organization's policy on employment arbitration. See J.A.M.S./Endispute Arbitration Policy, in 9A Lab. Rel. Rep. (BNA), Mar. 26, 1996, at 534:521.

17 See U.S. Dep'ts of Commerce and Labor, Commission on the Future of Worker-Management Relations, Report and Recommendations 31 (Dec. 1994).

18 Although this item is not mentioned in the Dunlop report, employers should not be able by means of an arbitration clause to compel claimants to litigate in a distant, inconvenient forum in circumstances where an express choice of forum clause having the same effect would be unenforceable. See Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 385-88 (criticizing Supreme Court's failure to address forum location issue, which was not briefed, in Doctor's Associates, Inc. v. Casarotto, 116 S. Ct. 1652 (1996)).

19 Rule 11(a)(i) of the AAA 1997 Rules requires that "[a]rbitrators serving under these rules shall be experienced in the field of employment law." AAA 1997 Rules, note 16, at 15.

- a fair method of cost sharing to ensure affordable access to the system for all employees;[20]
- the right to independent representation if sought by the employee;
- a range of remedies equal to those available through litigation;
- a written award explaining the arbitrator's rationale for the result;[21] and
- limited judicial review sufficient to ensure that the result is consistent with applicable law.[22]

---

[20] For example, Brown & Root, a maintenance, construction, and temporary staffing company, pays the costs of the arbitration, except for the expenses of witnesses produced by the employee and a $50 fee paid by the employee (or former employee) if the proceeding is initiated by the employee or the result of a demand served on the company by the employee. See Brown & Root, Inc., Dispute Resolution Plan and Rules 17 (1994) (on file with the *New York University Law Review*). This company also established a benefit plan to reimburse 90% of attorney's fees incurred up to an annual cap of $2500 per year, with a $25 deductible paid by the employee. See Brown & Root, Inc., Employment Legal Consultation Plan 4-5 (1994) (on file with the *New York University Law Review*). In Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1996), Chief Judge Edwards held for the court that, where the predispute agreement is silent or ambiguous on this question and arbitration "occurs only at the option of the employer," the court would interpret the agreement to require the employer to assume the arbitrator's fees and expenses. The court stated:

> Cole could not be required to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses. In light of this holding, we find that the arbitration agreement in this case is valid and enforceable. We do so because we interpret the agreement as requiring Burns Security to pay all of the arbitrator's fees necessary for a full and fair resolution of Cole's statutory claims.

Id.

[21] Rule 32 of the AAA 1997 Rules departs from the Association's customary no-opinion approach in commercial arbitrations and requires that "[t]he award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise." AAA 1997 Rules, supra note 16, at 24. The Association's *Guide for Employment Arbitrators* (effective for cases filed on or after June 1, 1997) further states, "The award must include a statement regarding the disposition of any statutory claims." American Arbitration Ass'n, Guide for Employment Arbitrators 16 (1997).

[22] The Supreme Court's *Gilmer* decision states: "'[A]lthough 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." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (1991) (quoting Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

The appropriate standard for review of arbitration of public law disputes remains an important unresolved issue. Some lower courts have recognized a "manifest disregard" standard, a judicially created addition to the statutory grounds for vacating an award set forth in the FAA. See, e.g., Siegel v. Titan Indus. Corp., 779 F.2d 891, 892-93 (2d Cir. 1986) (applying manifest disregard standard in arbitration to determine value of stock held by shareholder). The "manifest disregard" standard requires a showing that "the arbitrator 'understood and correctly stated the law but proceeded to ignore it.'" Id. at 893 (quoting Bell Aerospace Co. v. Local 516, 356 F. Supp. 354, 356 (W.D.N.Y. 1973), rev'd on other grounds, 500 F.2d 921 (2d Cir. 1974)). The Second Circuit has left open the question of

Not all companies will be willing to subject their supervisory decisions to a neutral outside arbitrator under these conditions, even if by doing so they could avoid the risks and expense of jury trials. The limitations of arbitration are reciprocal; many companies and employees may be reluctant to submit to final, binding determinations with only limited opportunity for correction by the courts.[23]

But where companies are willing to establish programs conforming to these quality safeguards, the question is whether the law should facilitate or obstruct their establishment. Consider the controversy over workers' compensation laws earlier in this century.[24] From an ex post perspective—after an accident has occurred—workers with serious injuries able to command the attention of competent trial lawyers have a better chance at substantial recoveries before a jury rather than under an administrative system. Yet from an ex ante perspective—before an accident has occurred—the workers' compensation system offers systematic advantages over tort suits, whether the objective is delivering compensation or promoting workplace safety, for both workers and their employers. Of course, the tradeoff in the con-

---

whether the "manifest disregard" standard is appropriate for arbitration of certain federal statutory claims. See DiRussa v. Dean Witter Reynolds Inc., No. 96-9068, 1997 U.S. App. LEXIS 20505, at *6-*10 (2d Cir. Aug. 5, 1997) (noting that "manifest disregard" doctrine is "severely limited"); cf. Chisolm v. Kidder Peabody Asset Management, Inc., 966 F. Supp. 218, 222-27 (S.D.N.Y. 1997) (applying, though questioning suitability of, "manifest disregard" standard for such claims).

Framed for contractual disputes, the "manifest disregard" standard may be too deferential for arbitration of public law claims. By analogy to the National Labor Relations Board's policy of deferring to labor arbitration awards that resolve statutory issues, a preferable approach would be to require that arbitrators give reasons for their disposition of statutory claims and to confirm awards only if they are not "clearly repugnant to the purposes and policies of the Act." Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). (In 1984, the Board softened its own test: "Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible of an interpretation consistent with the Act, we will defer." Olin Corp., 268 N.L.R.B. 573, 574 (1984) (footnote omitted)). The D.C. Circuit's *Cole* decision stated (in dictum): "[A]rbitration of statutory claims [is] valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." *Cole*, 105 F.3d at 1487.

[23] For a survey of employer practices, see U.S. General Accounting Office, Pub. No. GAO/HEHS-95-150, Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution (Report to Congressional Requesters) (July 5, 1995). The 1995 survey found that 10% of firms used arbitration as a dispute resolution mechanism for their nonunion employees, and in one-fourth to one-half of those firms, arbitration was mandatory. See id. at 7. In 1997, the GAO updated its survey, finding that, of firms reporting the use of ADR for employment disputes, 19% used arbitration. See U.S. General Accounting Office, Pub. No. GAO/GGD-97-157, Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace 2 (Aug. 1997).

[24] See generally Lawrence M. Friedman, A History of American Law, 587-88 (1973); Richard A. Epstein, The Historical Origins and Economic Structure of Workers' Compensation Law, 16 Ga. L. Rev. 775 (1982).

text of arbitration of employment disputes is different because arbitration will not proceed on a no-fault basis. Nevertheless, employment arbitration also offers systematic advantages over lawsuits for both workers and their employers. The policy question is this: are workers (and firms) generally better off—is the overall system of rights and remedies for employment disputes enhanced—if the law permits companies to establish binding predispute employment dispute systems that satisfy adjudicative quality safeguards?

III
OBJECTIONS TO PREDISPUTE ARBITRATION AGREEMENTS

Admittedly, people disagree passionately here. Some of the objections that have been raised include the following.

A. A New Form of "Yellow Dog" Contract?

One source of criticism is suggested by Judy Vladeck's reference to "yellow dog" contracts,[25] a phrase conjuring the image of powerless workers forced to sell their industrial birthright in order to meet the bare necessities of life. The imagery is vivid but does not quite fit the facts. What was wrong with "yellow dog" contracts in our earlier labor history was that they were used by employers as purely strategic devices to blunt unionization. These agreements served no interest of employers other than that of thwarting the associational freedom of their employees. Employers sought by these clauses to lay a predicate for obtaining injunctions against labor unions which, by the mere act of attempting, even peacefully, to organize their workforce, could be found to have engaged in tortious inducement of breach of contract. Once public policy evolved in support of the right of workers to form independent organizations—or, as of the enactment of the Norris-LaGuardia Act of 1932,[26] the right at least to be free of court injunctions in the peaceful pursuit of organizing objectives—these clauses were properly deemed to serve no legitimate interest of employers.

By contrast, predispute arbitration, if properly designed, can offer ex ante advantages for both parties to the contract. Moreover, such

[25] The "yellow dog" label has a long industrial history. It also has entered political lore. William Safire reminds us of the story about Tom Heflin, a senator from Alabama (and uncle of Howell Heflin), who tried to discourage southern Democrats from bolting the party when it nominated Al Smith, a Catholic, a wet, and (worst of all) a New Yorker. Heflin is reputed to have said, "I'd vote for a yellow dog if he ran on the Democratic ticket." See William Safire, On Language: Blue Dog Demo, N.Y. Times, Apr. 23, 1995, § 6, at 20. In short, it is not the label but the substance that counts.

[26] Norris-LaGuardia Act, ch. 90, 72 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1994)).

arbitration involves a change in the forum only—from the courts to a jointly selected neutral decisionmaker. It does not involve the waiver of substantive rights.[27] When a contract provides for arbitration of statutory claims, the arbitrator must be empowered to apply statutory standards and, if a violation is found, to award statutory remedies.[28]

A variant of the "yellow dog" theme is that workers cannot meaningfully enter into binding arbitration agreements because of an inherent inequality of bargaining power. Professor Grodin argues the following, for example:

> Before a dispute arises, it is impossible for a party to assess precisely what is being waived and the probable effect of the waiver—even if his or her attention is focused on the issue. In the employment context this is especially a problem for the employee; while the employer can take into account statistical probabilities affecting all its employees, the employee's ability to predict what may happen to him or her individually is beyond the scope of such analysis. Moreover, while a post-dispute agreement to arbitrate is likely to be the product of true negotiations against the backdrop of threatened litigation, pre-dispute agreements to arbitrate are far more likely to be part of a package of provisions imposed by the employer on a take-it-or-leave it basis.[29]

It is not clear why most job applicants or employees cannot make a rational decision whether they prefer to preserve rights to sue in

---

[27] As the Supreme Court stated in *Gilmer*, "'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.'" Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[28] But see DeGaetano v. Smith Barney Inc., No. 95 Civ. 1613, 1996 U.S. Dist. LEXIS 1140, at *18 (S.D.N.Y. Feb. 5, 1996) (holding that although arbitration procedure did not allow arbitrator to award injunctive relief, attorney's fees, or punitive damages, "[t]he mere fact that these statutory remedies may be unavailable in the arbitral forum does not in itself establish that Title VII claims must be resolved in a court of law"). It is unclear whether this ruling is consistent with the Supreme Court's approach in the *Gilmer* decision. See supra note 27 and accompanying text. Conceivably, the failure to award attorney's fees or punitive damages in an appropriate case still would be grounds for vacating the award. Cf. DiRussa v. Dean Witter Reynolds, Inc., No. 96-9068, 1997 U.S. App. LEXIS 20505, at *10-*14 (2d Cir. Aug. 5, 1997) (declining to vacate award in plaintiff's favor that did not provide attorney's fees because plaintiff had failed to make clear to arbitrators that attorney's fees were mandatory award for prevailing plaintiffs under ADEA); Amicus Brief of California Employment Law Council at 20-24, Duffield v. Robertson Stephens & Co., No. C95-0109 (N.D. Cal. filed Jan. 11, 1995), appeal docketed, No. 97-15693 (9th Cir. Apr. 23, 1997) (arguing that, in view of § 4 of FAA, procedural adequacy of arbitration should be resolved through judicial review rather than at motion to compel arbitration stage).

[29] Joseph R. Grodin, Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of *Gilmer*, 14 Hofstra Lab. L.J. 1, 29 (1996). Professors Carrington and Haagen adopt a similar view in Carrington & Haagen, supra note 18, at 87-88.

court in the event of an employment dispute rather than work for an employer that requires arbitration of such disputes.[30] Neither the fact that the rights given up may not seem particularly valuable to the employee in view of the low probability attached to the eventuality of a dispute,[31] nor that some employers will insist on arbitration as a precondition, seems a compelling reason to negate an agreement in the joint interests of both parties.[32]

In several areas our laws do stipulate minimum conditions that are nonwaivable features of the employment bargain.[33] Employees have rights to organize independent unions, to be paid statutorily declared minimum wages, to be free of discrimination on account of race, sex, national origin, age, and disability, and so forth. But in many other areas of vital importance to employees—such as the basic economic terms of the relationship, whether it be compensation, benefits, or job security—the law allows the parties to negotiate a contract that meets their joint objectives.

The pertinent question is whether, in the overall mix, the nature of the forum for future disputes is a subject that may be determined by contract or whether this term belongs to the nonwaivable, nonmodifiable category and, hence, is outside of the realm of contract. The answer cannot be supplied simply by speaking in terms of a nonwaivable "right" to go to court, for that in a sense begs the question. Rights are created by statute or decision and are the result of policy judgments. A judgment has to be made on the merits whether the benefits of allowing the parties to shape their own dispute resolu-

---

[30] Where all employers in a given industry require predispute arbitration agreements as a condition of employment, the employee's practical ability to shop for employers that will not require arbitration is substantially diminished. The *Duffield* litigation, see supra note 14, raises this issue in the securities industry context, where all registered representatives for now, see infra note 34, must agree to arbitration of employment claims as a condition of employment in that industry. See Plaintiff-Appellant's Opening Brief at 54-59, Duffield v. Robertson Stephens & Co., No. C95-0109 (N.D. Cal. filed Jan. 11, 1995), appeal docketed, No. 97-15698 (9th Cir. Apr. 23, 1997) (arguing that industry-wide requirement of predispute arbitration agreements forced upon plaintiff the "Hobson's choice" of forfeiting constitutional rights or forfeiting employment in securities industry).

[31] See Mayer G. Freed & Daniel D. Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 Emory L.J. 1097, 1105-07 (1989) (discussing "perceptual distortion" argument for mandating "just cause" termination rules).

[32] Again, at the margin there may be situations where, under the jurisdiction's general law of contracts, the conditions for a valid, enforceable agreement are not met. The question here is whether, as Professors Grodin, see Grodin, supra note 29, at 20-28, and Carrington and Haagen, see Carrington & Haagen, supra note 18, at 401, suggest, we should assume that all predispute arbitration agreements insisted upon by employers as a condition of employment are unenforceable contracts of adhesion.

[33] For a critical view of such regulations, see Christopher T. Wonnell, The Contractual Disempowerment of Employees, 46 Stan. L. Rev. 87 (1993).

tion mechanism outweigh the attendant costs to the parties and to the public policy objectives of the statutes in question.

B. Procedural Adequacy: Fresh Apples Versus Spoiled Oranges?

A second source of criticism points up the supposed deficiencies of arbitration: that the process is supposed to be informal, with scant opportunity for prehearing discovery and little adherence to evidentiary scruples. The suggestion is that arbitration is a kind of second-class justice system.

Much of this criticism, too, is overdrawn. To some extent, apples are being compared not with oranges but with spoiled fruit. On the one hand, we are offered a picture of private litigation under ideal conditions (a world of substantial monetary claims warranting the attention of able advocates like Vladeck and Palefsky, quick and cheap access to the courts, and hefty jury awards). On the other hand, arbitration is depicted at its worst (claimants without lawyers confronting their former employers in skewed industry panels[34] and proceedings rife with bias). This is good rhetoric but, analytically, a mistake. We should be assessing the relative merits of litigation and arbitration under the real-world conditions that *most* employees and employers will face.

The assertion is often made, for example, that under arbitration employers enjoy systematic advantages as "repeat players" that would not be available in civil litigation. Although having some force in the context of industry panels, the point is considerably overstated if arbitration is conducted, as is likely, before arbitrators chosen by the parties on an ad hoc basis. An employer may be a repeat player in the sense that it likely will be arbitrating disputes with more than one employee (or former employee), but arbitrators chosen on prior occasions are unlikely to be deemed acceptable by claimant representatives. Moreover, the real repeat players will be the lawyers for both defense and plaintiff bars in the area—such as the members of the National Employment Lawyers Association, a plaintiff group—who can be counted on to share information within their group about the track records of proposed arbitrators.

---

[34] In May 1997, the National Association of Securities Dealers (NASD) formed a special panel to consider whether the NASD should continue to require predispute agreements to arbitrate employment discrimination claims. See Patrick McGeehan, Bias Panel Is Formed by NASD, Wall St. J., May 29, 1997, at C1. Three months later, the NASD proposed eliminating from its U-4 registration form any requirement that registered representatives must agree to arbitrate their statutory employment discrimination claims. See George Gunset, Securities Group Yields on Suits, Chi. Trib., Aug. 8, 1997, § 3, at 1.

There are, of course, some important issues of procedural design that have to be considered. How extensive should the opportunity for discovery be in order to provide a meaningful hearing without at the same time replicating the costs and delay of a court action? Can we provide a mechanism for publication of awards, so that representatives of employers and employees can monitor the performance and impartiality of arbitrators, while still preserving the benefits to both parties of low visibility, informal claims resolution? Can the standard for judicial review of awards be modified to ensure adherence to statutory requirements without converting arbitrators into administrative law judges writing detailed opinions? These questions should be addressed; they do not, however, present insurmountable barriers.

C. *Private Law*

Opponents also assume a world dominated by private arbitration of statutory claims in which no public law, no guidance from prior decisions, is generated.[35] Mandatory publication of awards is a close question, for such a requirement would diminish an important benefit of the arbitration alternative. But the private law objection plainly overshoots the mark. As with private postdispute settlement agreements, which also preempt a publicly accessible decision on the merits—and are clearly lawful at present—there would remain under any realistic scenario plenty of claims for the civil courts. Indeed, precisely because arbitration reduces access costs for claimants in addition to other costs faced by employers, many firms will be reluctant to promulgate arbitration policies. In any event, even if the unimaginable were to occur, and all private claimants were confined to arbitration,[36] surely this would free up the resources of administrative agencies to pursue systemic litigation.

D. *Absence of Jury Trials*

A fourth objection highlights the absence of jury trials. Jury trials indeed play, and will continue to play, an important role in the overall system. But consider the following:

First, civil litigation resulting in substantial jury awards is a realistic prospect for relatively few claimants. For the vast majority, a private lawyer cannot be secured and their claims will be addressed, if at

[35] See, e.g., Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1089-90 (1984) (criticizing those advocating emphasis on settlement rather than adjudication because settlement fails to fulfill essential public law function).

[36] Widespread resort to private arbitration of statutory employment claims, however, would change the calculus and support an argument for mandatory publication of awards.

all, by overworked, understaffed administrative agencies. These agencies—after considerable delay—typically offer little more than a perfunctory investigation.

Second, while some individuals with substantial claims—often white senior managers with age discrimination grievances[37] or, if they work in California, Michigan, and a few other places, wrongful dismissal allegations—may lose access to jury trials, the jury trial is a relatively recent innovation in employment law (introduced as late as 1991 for Title VII and ADA lawsuits).

We should not assume that jury trials are an essential feature of the employment law landscape. Major strides were made in the discrimination field for over twenty-five years without resort to juries. Our basic labor laws do not provide for jury trials.[38] European countries with wrongful dismissal laws rely on specialized labor tribunals (essentially tripartite arbitration boards), with well-defined, scheduled recoveries; there is no access to the ordinary civil courts, let alone civil juries, for such disputes.[39]

Jury trials have their downside. They inject an element of uncertainty because of the unpredictability of juries and the risk that, in certain cases, jurors will dispense their own view of social justice rather than make appropriate findings of fact in accordance with the law. This specter of liability undermines society's interest in enabling firms to make sound personnel decisions and, as RAND Institute studies[40] suggest, may have negative effects on the willingness of firms to hire additional workers. In short, we have a system in which a few individuals in protected classes win a lottery of sorts, while others queue up in the administrative agencies and face reduced employment opportunities.

---

37 See, e.g., Michael Schuster & Christopher S. Miller, An Empirical Assessment of the Age Discrimination in Employment Act, 38 Ind. & Lab. Rel. Rev. 64, 68 (1984) (indicating that majority of complaints under the ADEA are filed by male professionals and managers, and inferring from indirect evidence that most such plaintiffs are white).

38 See, e.g., National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1994)); Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1994)).

39 See Samuel Estreicher, Unjust Dismissal Laws: Some Cautionary Notes, 33 Am. J. Comp. L. 310, 313, 315, 316 (1985) (describing use of specialized boards and tribunals to adjudicate such matters in Britain, Germany, and France).

40 See James N. Dertouzos & Lynn A. Karoly, RAND Inst. No. R-3989-ICJ, Labor-Market Responses to Employer Liability 46-61 (1992) (arguing that state adoption of wrongful termination doctrine reduces aggregate employment); see also James N. Dertouzos, Elaine Holland & Patricia Ebener, RAND Inst. No. R-3602-ICJ, The Legal and Economic Consequences of Wrongful Termination 48 (1988).

E. "Voluntary" Agreements?

Some have suggested that predispute arbitration agreements should be enforceable only when truly "voluntary"; presumably, any evidence of insistence by employers would taint the validity of such agreements.[41] There is certainly a justification for requiring a "knowing" waiver for ensuring that arbitration clauses make it clear if their intended scope encompasses statutory employment claims.[42] Moreover, arbitration clauses should be invalidated if they fail to satisfy general principles of contract law, in the absence of other circumstances indicating that the employee understood what he was waiving. But to go further and insist that these clauses will be upheld only if they satisfy some vague test for "voluntariness" is problematic.

What will be deemed a "voluntary" agreement will be subject to the vagaries of after-the-fact litigation. It is unclear, for instance, whether under this standard applicants could be required to agree to an arbitration clause as a condition of employment, whether improvements in benefits could be exchanged for agreements to submit future disputes to arbitration, or whether voluntary agreements would ever be found except for a narrow category of high level executives. A "voluntariness" test injects an additional element of uncertainty—on top of the doubts under existing law over whether these agreements are binding. This additional layer of uncertainty will have the effect of discouraging such agreements.

A voluntariness standard also detracts from the desired uniformity of internal dispute resolution programs if predispute agreements will be upheld for some employees but not others who are similarly

---

[41] See, e.g., Lewis Maltby, Paradise Lost—How the *Gilmer* Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights, 12 N.Y.L. Sch. J. Hum. Rts. 1, 10 (1994) (arguing that best approach is to allow only "knowing and voluntary" waivers of statutory rights); Lewis L. Maltby, American Civil Liberties Union, Statement of the American Civil Liberties Union Submitted to the Commission on the Future of Worker-Management Relations 4 (Apr. 6, 1994) (on file with the *New York University Law Review*) (insisting that ADR programs are only acceptable if truly "voluntary").

[42] The Ninth Circuit, in Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994), held that a waiver of the judicial forum must be a knowing one, and because the NASD rules at the time did not expressly refer to arbitration of employment claims, there was no knowing waiver in that case. See id. at 1304-05. On October 1, 1993, the Securities and Exchange Commission amended its NASD rules to provide "for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of [NASD] or arising out of the employment or termination of employment of associated person(s) with any member." Kuehner v. Dickinson & Co., 84 F.3d 316, 320-21 (9th Cir. 1996) (enforcing arbitration under new rule); see Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 658 (5th Cir. 1995) (quoting amended NASD rule). See supra note 34 for discussion of subsequent proposal by NASD to eliminate from its registration forms any requirement that registered representatives agree to arbitrate statutory employment discrimination claims.

situated in a particular workforce. A dispute resolution system, like a pension plan, is what economists call a "collective" or "public" good. It is efficiently provided, if at all, on a collective basis. This is because the costs of such a program (an in-house claims processing office, ombudsmen, possible mediators, etc.), even when justified by the collective benefits to the affected employees, typically exceed the benefits to individual employees. Piecemeal application of a dispute resolution program could threaten to unravel the program for all other similarly situated employees.

We should face up to the policy question of whether, in the overall mix, predispute arbitration, if conducted under the right standards, is socially desirable, rather than introduce a voluntariness standard that seeks indirectly to achieve the same outcome as a flat prohibition of such agreements.

IV

THE SUPREME COURT'S *GILMER* DECISION

The Supreme Court, in a number of rulings over the last decade, has interpreted the FAA as a broad statement of congressional policy in favor of agreements to arbitrate both existing and future statutory and contractual claims. The Court's recognition of a strong federal presumption of arbitrability culminated in the 7-2 ruling in 1991 in *Gilmer v. Interstate/Johnson Lane Corp.*[43]

Robert Gilmer was hired by Interstate as a Manager of Financial Services in 1981. As a condition of his employment, he was required to register as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). The NYSE required an agreement to arbitrate "any dispute, claim or controversy" arising between him and Interstate.[44] The NYSE's Rule 347 expressly required arbitration of any dispute "arising out of the employment or termination of employment of such registered representative."[45] Discharged six years later at age sixty-two, Gilmer filed an age discrimination charge with the EEOC and then brought suit under the ADEA in the federal district court in North Carolina. Interstate then filed a motion to compel arbitration under the FAA. The district court denied the motion.[46] It cited the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.*,[47] which held that union-represented employees who pursued arbitration under collective bargaining

[43] 500 U.S. 20 (1991).
[44] Id. at 23.
[45] Id.
[46] See id. at 24.
[47] 415 U.S. 36 (1974).

agreements could not be precluded from bringing suits on their independent statutory claims.[48] The Court of Appeals reversed, finding nothing in the text, legislative history, or purposes of the ADEA to prevent arbitration of age bias claims.[49] Writing for himself and six others, Justice White agreed that arbitration could be compelled.[50]

V

LEGAL CHALLENGES FORECLOSED BY *GILMER*

Gilmer left certain issues open, but others were clearly resolved. In all likelihood, registered representatives in the securities industry—who are now required by third party registration organizations to enter into predispute arbitration agreements over claims arising out of their employment—will have to pursue their statutory employment (and other) claims in arbitration.[51]

---

[48] See *Gilmer*, 500 U.S. at 24 (citing *Gardner-Denver*). The courts of appeals are presently divided over whether *Gilmer* requires a reconsideration of *Gardner-Denver*'s holding, at least in a case where the collective bargaining agreement authorizes the arbitrator expressly to consider statutory claims and the individual employee to pursue arbitration irrespective of the union's wishes. Compare, e.g., Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 526-27 (11th Cir. 1997) (arbitration clause does not bar ADA lawsuit where employee has not "agreed individually to the contract containing the arbitration clause"; the agreement does not "authorize the arbitrator to resolve federal statutory claims"; and the agreement does not "give the employee the right to insist on arbitration if the federal statutory claim is not resolved to his satisfaction in any grievance process"), and Pryner v. Tractor Supply Co., 109 F.3d 354, 363 (7th Cir. 1997) (labor arbitration does not preclude lawsuit of Title VII and ADA claims unless employee "consents to have them arbitrated"), with Martin v. Dana Corp., 114 F.3d 421 (3d Cir. 1997) (requiring arbitration of Title VII claim where collective agreement authorizes arbitrator to resolve statutory claim and employee can insist on arbitration), vacated & reh'g en banc granted, No. 96-1746, 1997 WL 368629 (3d Cir. July 1, 1997), and Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879 (4th Cir.), cert. denied, 117 S. Ct. 432 (1996) (requiring arbitration of Title VII and ADA claims where collective agreement requires that employer comply with "all laws preventing discrimination").

For an alternative to *Gardner-Denver* in the union-represented sector, see Committee on Labor and Employment Law of the Association of the Bar of the City of New York, Arbitration of Statutory Discrimination Claims Under Collective Bargaining Agreements: Comments to the Secretary of Labor on the Report and Recommendations of the Commission on the Future of Worker-Management Relations, 51 Record of N.Y.C.B.A. 154 (Mar. 1996) (offering interesting "election of remedies" proposal).

[49] See Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990).

[50] See *Gilmer*, 500 U.S. at 23.

[51] If the NASD proposal to eliminate mandatory arbitration of discrimination claims, see supra note 34, is ultimately approved by the SEC, registered representatives who are required by their employers to agree to predispute arbitration clauses will be treated the same as employees in other industries subject to the FAA. Note should also be taken of the *Duffield* litigation, see supra note 14, where plaintiff argued that *Gilmer* involved only a rejection of facial challenge to securities industry arbitration in a context where the record was bare regarding procedural deficiencies of arbitration under NASD or NYSE auspices. See Plaintiff-Appellant's Opening Brief at 38-39, Duffield v. Robertson Stephens &

There is also no persuasive basis for treating Title VII, the ADA, the Family and Medical Leave Act,[52] or laws like the Employee Polygraph Protection Act[53] differently than the ADEA[54]—particularly in view of the Supreme Court's statement that the party opposing arbi-

---

Co., No. C95-0109 (N.D. Cal. filed Jan. 11, 1995), appeal docketed, No. 97-15698 (9th Cir. Apr. 23, 1997).

Moreover, in a recent pair of rulings authored by Judge Reinhardt, panels of the Ninth Circuit appear to have extended the *Lai* requirement of a "knowing waiver" to require that "the employee must explicitly agree to waive the specific right in question." Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 760-62 (9th Cir. 1997) (employee handbook required that new employee "read and understand" its contents but did not explicitly require that employee agree to its contents); Renteria v. Prudential Ins. Co. of Am., 113 F.3d 1104, 1106-08 (9th Cir. 1997) (registered representative did not make "knowing waiver" because she signed U-4 agreement prior to October 1, 1993 amendment of NASD Code, even though document bound plaintiff to arbitrate all disputes listed in NASD Code "as may be amended from time to time"). Other courts are likely to find a "knowing waiver" if the arbitration agreement expressly refers to employment disputes, whether or not the specific statute that is the basis for a later claim is explicitly listed. See, e.g., Mugnano-Bornstein v. Crowell, 677 N.E.2d 242 (Mass. App. Ct. 1997) (finding employee, by signing arbitration agreement specifically referring to employment disputes, to have agreed to submit sexual harassment and gender discrimination claims to arbitration).

[52] 29 U.S.C. §§ 2601-2653 (1994).

[53] 29 U.S.C. §§ 2001-2009 (1994).

[54] For an attempt to distinguish claims under Title VII from claims under ADEA for arbitrability purposes, see Patrick O. Gudridge, Title VII Arbitration, 16 Berkeley J. Emp. & Lab. L. 209 (1995).

Hortatory language endorsing alternative dispute resolution in provisions of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified at 42 U.S.C. § 12212 (1994)), cannot fairly be read to change preexisting law with respect to predispute arbitration. Because Congress did not amend Title VII to *restrict* arbitration—indeed, section 118 is, if anything, supportive of arbitration "[w]here appropriate and to the extent authorized by law"—statements such as those contained in the conference committee report on the pre-*Gilmer* 1990 version of the 1991 law do not resolve the arbitrability issue:

> The Conferees emphasize . . . that the use of alternative dispute resolution mechanisms is intended to supplement not supplant, the remedies provided by Title VII. Thus, for example, the Conferees believe 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* . . . . The Conferees do not intend *this section* to be used to preclude rights and remedies *that would otherwise be available.*

Conf. Rep. on S. 2104, Civil Rights Act of 1990, reprinted in 136 Cong. Rec. H8050 (daily ed. Sept. 26, 1990) (submitted by Rep. Hawkins) (emphasis added). In the debates over the 1991 law, some legislators were supportive of *Gilmer*. See 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (remarks of Rep. Hyde); 137 Cong. Rec. S15,478 (daily ed. Oct. 30, 1991) (remarks of Sen. Dole). Others were disapproving. See 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (remarks of Rep. Edwards); Stephen Breyer, On the Uses of Legislative History in the Interpretation of Statutes, 65 S. Cal. L. Rev. 845, 845-46 (1992) (quoting Judge Harold Leventhal's observation that legislative history of this type is akin to "looking over a crowd and picking out your friends").

tration bears the heavy burden of showing that "'Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'"[55] And, not surprisingly, the courts of appeals have so ruled.[56]

After *Gilmer*, if the FAA is held to apply, broad arguments based on the supposed inferiority of arbitration as a mechanism for adjudicating statutory claims or on the inherent inequality of bargaining power between the parties—despite Justice White's characterization of Gilmer as "an experienced businessman"[57]—will be unavailing. Nor is there any probability of success in pressing the view, in the absence of clear statutory language precluding or limiting arbitration, that policies against prospective waivers of rights and remedies in the federal statute in question override the FAA's presumption of arbi-

---

[55] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[56] See, e.g., Patterson v. Tenet Healthcare, Inc. 113 F.3d 832 (8th Cir. 1997) (requiring arbitration of Title VII and state law discrimination claims; finding support in section 118 of the Civil Rights Act of 1991); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir.) (requiring arbitration of claim brought under New Jersey Law Against Discrimination), cert. denied, 1997 U.S. LEXIS 6057 (Oct. 14, 1997); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith Inc., 7 F.3d 1110 (3d Cir. 1993) (requiring arbitration of claims under Employee Retirement Income Security Act); Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir. 1992) (requiring arbitration of claim of retaliation for refusal to take lie detector test allegedly in violation of Employee Polygraph Protection Act); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (requiring arbitration of claims under Title VII); see also McNulty v. Prudential-Bache Sec. Inc., 871 F. Supp. 567 (E.D.N.Y. 1994) (requiring arbitration of sales representative's claim that he was demoted for failure to meet production quota on account of time out for jury service allegedly in violation of federal Jury Systems Improvement Act, 28 U.S.C. § 1875 (1994)).

[57] *Gilmer*, 500 U.S. at 33. Although Justice White's opinion appears to leave open some room, the context makes clear that challenges to arbitration agreements covered by the FAA are confined to the narrow straits of § 2 of the statute:

> [T]he FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for revocation of any contract. There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

Id. (internal quotes and citations omitted). States can apply customary contract doctrines such as fraud and unconscionability. However, as the Court reaffirmed in Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1656-57 (1996), the FAA preempts any state law that targets arbitration agreements for different regulatory treatment than other contracts. See infra note 93. For a survey of state law contract defenses, see Jonathan E. Breckenridge, Note, Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements, 1991 Ann. Surv. Am. L. 925, 973-81.

trability. These arguments were expressly rejected in *Gilmer*.[58] The Court reaffirmed that a no-waiver policy in a statute ordinarily refers to substantive rights and not the right to a judicial forum, and that arbitration is strongly presumed to be as competent as a civil court or administrative agency in adjudicating statutory rights. Thus, the Fifth Circuit has ruled that the safeguards Congress enacted for waivers of "any" rights under the ADEA in the Older Workers Benefit Protection Act of 1990[59] (OWBPA) refer only to waivers of substantive rights and do not apply to predispute waivers of a judicial forum.[60]

VI
THE CRITICAL OPEN QUESTION: THE SCOPE OF THE § 1 EXCLUSIONARY CLAUSE

Gilmer did leave open one very important issue for our purposes—the applicability of the exclusion in § 1 of the FAA. This provision 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."[61] Justice White noted for the Court that the § 1 issue had not been raised below.[62] In any event, he added, the arbitration promise in this case was not contained in an employment agreement between Gilmer and his former employer. Rather, "the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate."[63]

Justice White's reasoning leaves room for improvement. It could be argued that the securities registration was tantamount to an employment agreement; since Gilmer did not otherwise have an employment agreement, he had to sign the registration statement as a condition of employment, and the arbitration clause included disputes arising out of his employment with Interstate. Moreover, Interstate is a member organization of the exchanges that require execution of the registration statement. (Also, Justice White's citations to lower court decisions did not support his reading of what constitutes a "contract of employment" for purposes of the § 1 exclusion.[64]) Perhaps this

---

[58] 500 U.S. at 26.

[59] 29 U.S.C. § 626(f)(1) (1994).

[60] See Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656 (5th Cir. 1995).

[61] 9 U.S.C. § 1 (1994).

[62] See *Gilmer*, 500 U.S. at 25 n.2.

[63] Id.

[64] See id. (citing Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971)); Malison v. Prudential-Bache Securities, Inc., 654 F. Supp. 101 (W.D.N.C. 1987); Legg, Mason & Co. v. Mackall & Coe, Inc., 351 F. Supp. 1367 (D.D.C. 1972); Tonetti v. Shirley, 219 Cal. Rptr. 616 (Ct. App. 1985). These decisions acknowledged that employment contracts were involved,

proves nothing more than that the Supreme Court is infallible because it is final, not the other way around.

A. *Arbitration Required by Third Party Organizations*

If the Supreme Court ultimately resolves the issue it left open by holding that predispute agreements to arbitrate statutory employment claims are enforceable only when those agreements are required by third party registration organizations, the reach of the *Gilmer* decision effectively will be limited to registered representatives in the securities field.[65] The Court is not likely to accept agreements among employers to establish third party organizations whose only purpose is to secure arbitration promises from employees of the participating employers.[66] Such arrangements, in all likelihood, will be viewed as subterfuges. Few, if any, industries are like the securities industry in maintaining self-regulatory organizations with licensure and other functions that operate under the sanction of federal law and with the imprimatur of a federal regulatory agency.

B. *Arbitration Pursuant to State Statutes*

It has been urged that, whatever the scope of the § 1 exclusion, state arbitration statutes—many of which do not contain a similar exclusionary clause[67]—are available to enforce predispute arbitration

---

but read the exclusionary clause as limited to employees in transportation industries. See Estreicher, supra note 11, at 753-54.

[65] But cf. supra note 34.

[66] For example, Garry Ritzky is a risk and human resources manager for Turner Brothers Trucking Inc., a company that participates in a peer review adjudication program maintained by Employment Dispute Resolution, Inc. (EDR), an alternative dispute resolution firm based in Atlanta. Ritzky writes:

> This company operates as a third-party entity that contracts with employees and employers separately to provide binding arbitration of all employment-related disputes, including personal injury, age, race, sex, disability and religion. The concept is based on the third-party arrangement used by stockbrokers . . . and all investors who use their services.

Garry M. Ritzky, Reducing Employment-Related Litigation Risks, Risk Mgmt., Aug. 1994, at 49, 50 (discussing benefits of employment dispute resolution). The program comes complete with a defense fund shared by participating employers and involves training of employees who become adjudicators available for other companies. EDR provides a list of three trained nonexempt employees from other companies, three trained management employees from other companies, and three retired judges/attorneys. EDR, founded by Lynn Laughlin (formerly counsel with the Jackson Lewis firm), is reported to have a half dozen companies as clients in addition to Turner. See Wade Lambert, Employee Pacts to Arbitrate Sought by Firms, Wall St. J., Oct. 22, 1992, at B1; see also Stephanie Overman, Why Grapple with the Cloudy Elephant?: Alternative Dispute Resolution, HR Magazine, Mar. 1993, at 60.

[67] See supra note 12.

clauses.[68] The FAA by itself would not preempt state laws *enforcing* arbitration agreements excluded from its reach.[69] These state laws thus could be invoked to compel compliance with promises to arbitrate claims arising under state common law and employment statutes. It is unclear, however, whether they provide a basis for requiring arbitration of claims under *federal* statutes that by their terms contemplate judicial remedies for violations. *Gilmer* and its antecedents relied on a federal presumption of arbitrability based on the FAA, requiring evidence that "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[70] Presumably, that presumption would be unavailable if the arbitration agreement falls within the § 1 exclusion. The issue would then turn on whether—without regard to a federal presumption of arbitrability—the particular federal law precludes binding predispute arbitration agreements.

C. Alternative Readings of § 1

On the FAA's applicability, two different textual readings of the § 1 exclusion are available. One position argues that "employment contracts," in ordinary parlance, means all employment contracts, and that the phrase "workers engaged in foreign or interstate commerce" should be taken to embrace all workers in industries that are subject to the reach of the commerce power of Congress. On this view, as Justice Stevens urged in his *Gilmer* dissent, § 1 reflects Congress's central purpose in the FAA to enforce "commercial" contracts among merchants, not agreements between employers and employees.[71]

---

[68] See, e.g., Todd H. Thomas, Using Arbitration to Avoid Litigation, 44 Lab. L.J. 3, 13-14 & n.58 (1993).

[69] As the Court noted in Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989), the FAA "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." Id. at 477. *Volt* held that parties to an arbitration agreement covered by the FAA could elect to be governed by a state arbitration statute because such choice of law clauses did not conflict with the pro-arbitration policy of federal law. See id. at 479.

[70] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[71] See id. at 39 (Stevens, J., dissenting). In his dissent, Justice Stevens also quoted a portion of the hearings on the proposed bill:

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

The alternative reading—embraced in virtually all of the post-*Gilmer* decisions in the lower courts—maintains that Congress used limiting language in § 1 to exclude only contracts of employment for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[72] On this account, the reference to seamen and railroad employees suggests that Congress intended to exclude only employment contracts of classes of workers directly engaged in interstate transportation rather than of all workers in industries "affecting" commerce. Moreover, in view of Supreme Court decisions from the period, Congress might have understood the term "engaged in foreign or interstate commerce" to connote only workers "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it."[73] Thus, the Sixth Circuit stated in *Asplundh Tree Expert Co. v. Bates*:[74]

> We conclude that the exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are. We believe this interpretation comports with the actual language of the statute and the apparent intent of the Congress which enacted it. The meaning of the phrase "workers engaged in foreign or interstate commerce" is illustrated by the context in which it is used, particularly the two specific examples given, seamen and railroad employees, those being two classes of employees engaged in the movement of goods in commerce.[75]

The post-*Gilmer* decisions also rely on precedents originating in the 1950s[76] that considered the FAA's applicability to disputes arising

---

> have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Id. (emphasis added) (quoting 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 Senate Comm. on the Judiciary, 67th Cong. 9 (1923) (statement of Sen. Walsh)).

72 9 U.S.C. § 1 (1994).

73 Shanks v. Delaware, Lackawanna, & W. R.R. Co., 239 U.S. 556, 558 (1916) (construing Federal Employers' Liability Act of 1908).

74 71 F.3d 592 (6th Cir. 1995).

75 Id. at 600-01.

76 See Signal-Stat Corp. v. Local 475, United Elec. Radio & Mach. Workers of Am., 235 F.2d 298, 302 (2d Cir. 1956) (determining that employees of automotive electrical equipment manufacturers were not involved in interstate commerce and hence not within § 1 exclusion); Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., 207 F.2d 450, 452-53 (3d Cir. 1953) (holding that employees engaged in production of goods for subsequent sale in interstate commerce were not exempt under § 1).

These rulings were reaffirmed in later cases. See, e.g., Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984) (explaining that § 1 exclu-

under collective bargaining agreements prior to the Supreme Court's 1957 decision in *Textile Workers Union of America v. Lincoln Mills of Alabama*.[77] Fearful that the anti-arbitration premises of state common law would undermine labor arbitration, the courts in these cases strove mightily to preserve some role for the FAA in enforcing arbitration promises in collective agreements.[78] They did so by reading § 1 either as inapplicable to collective bargaining agreements altogether or as limited to employees in particular transportation industries. The Supreme Court's tour de force in *Lincoln Mills*—recognizing a federal common law of collective bargaining contracts under section 301 of the Labor Management Relations Act[79]—essentially removed the need for such creative readings.

Despite its pedigree, the "transportation industry only" reading of § 1 suffers from at least two problems. It requires, as the Sixth Circuit noted (by way of dicta) in *Willis v. Dean Witter Reynolds, Inc.*,[80] that the term "commerce" in § 1 be read narrowly while construing expansively the "transaction involving commerce" language in

---

sion applied only to workers in transportation industries); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) (holding exclusionary language of § 1 not to apply to contract of professional basketball player); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971) (explaining that § 1 exemption applied only to employees involved in, or closely related to, actual movement of goods in interstate commerce).

77 353 U.S. 448 (1957).

78 The union in *Lincoln Mills* offered the FAA as an alternative basis for enforcing the employer's executory promise to arbitrate. See David E. Feller, End of the Trilogy: The Declining State of Labor Arbitration, Arb. J., Sept. 1993, at 18, 19 (discussing union reliance primarily on section 301 of the Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136, 156-57 (codified as amended at 29 U.S.C. § 185 (1994)), "because of the hostility of the courts to arbitration under the FAA. As a back-up [the union] also argued that the exclusion in Section 1 of the FAA of contracts of employment applied only to individual contracts and was inapplicable to collective bargaining agreements."). The union also relied, in the alternative, on the "transportation industry only" reading of § 1:

> [If] the Court should find that the exemption of contracts of employment contained in Section 1 of the Act was intended to exempt all labor arbitration because those who drafted it would not have recognized the distinction . . . between collective agreements and contracts of hire, then, on the same principles, the exemption should be read as covering only what it was intended to cover, that is, contracts of seamen, railroad employees, and other workers engaged directly in foreign or interstate commerce. It cannot simultaneously be urged that the 1925 exemption should be read as it would have been read in 1925, but that the class of workers affected by the exemption should not be limited to the class of workers intended to be covered by the 1925 language. The workers in this case are not engaged in interstate commerce. They are engaged in industry affecting interstate commerce . . . .

Petitioner's Brief at 58-59, *Lincoln Mills* (No. 211).

79 29 U.S.C. § 185 (1994).

80 948 F.2d 305 (6th Cir. 1991).

§ 2, which defines the FAA's substantive reach.[81] Indeed, the Supreme Court in *Allied-Bruce Terminix Cos., Inc. v. Dobson*[82] held that the language of § 2 should be read broadly as coextensive with the reach of the Commerce Clause—even though the pre-New Deal Congress that passed the Act in 1925 was working with a narrower conception of the commerce power.[83]

Another difficulty with the "transportation industry only" reading is the absence of evidence that such a limitation reflects a discernible purpose of Congress. While it is hard to assume Congress would have any purpose to exclude arbitration agreements signed by highly-placed executives, it is no less difficult to attribute to Congress some purpose for excluding individual employment contracts of seamen, railroad employees, and others directly engaged in interstate shipment of goods while covering individual employment contracts of all others who work for firms subject to its commerce power. In a 1953 ruling, the Third Circuit attempted to justify such line drawing by noting that Congress had provided grievance machinery for seamen and railroad workers and presumably sought to exclude from the FAA workers "as to whom special procedure for the adjustment of disputes had previously been provided."[84]

---

[81] See id. at 310-11. Section 2 makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (1994).

[82] 513 U.S. 265 (1995).

[83] See id. at 275. Thus, Professor Finkin argues:

> In 1925, Congress had no power to legislate regarding contracts of employment of accountants or secretaries even if they worked for railroads or steamship companies, or of deliverymen if they did not cross state lines. It was irrelevant whether or not the statute dealt with employees "in" interstate commerce, "engaged in" interstate commerce, or who were "involved in" interstate commerce, for however the statute was phrased, these employees were wholly outside the power of Congress to regulate at the time, and Congress could not have intended to include them. It should follow that as the Court expanded the scope of the commerce power to reach all these employees, the scope of the exemption expanded as well, leaving their status just as Congress contemplated, *i.e.*, as not reached by the arbitration act.

Matthew W. Finkin, Employment Contracts Under the FAA—Reconsidered, 48 Lab. L.J. 329, 333 (June 1997).

A somewhat different argument for excluding FAA coverage is suggested by Rushton v. Meijer, Inc., No. 199684, 1997 WL 476366, at *9 (Mich. App. Aug. 19, 1997) (arguing that store's floor detective's duties "did not facilitate, affect, or arise out of interstate or foreign commerce"). The suggestion cannot be squared, however, with the Supreme Court's *Dobson* ruling.

[84] Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., 207 F.2d 450, 452 (3d Cir. 1953). As the court stated in *Tenney*:

> 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

Both readings of the § 1 exclusion are hampered by a murky legislative history. What evidence there is suggests only that the exclusionary clause was inserted in response to objections from organized labor—principally voiced by Andrew Furuseth, then-head of the Seafarers' Union—that the FAA would somehow operate as a "compulsory labor" measure. The original bill, introduced in 1922, did not contain the exclusionary clause.[85] In the congressional hearings, representatives of the American Bar Association (ABA), which had been actively involved in the drafting process, urged that labor's concern was misplaced:

> It was not the intention of this bill to make an *industrial arbitration* in any sense; and so I suggest that . . . if your honorable committee should feel 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.[86]

> 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 likewise engaged directly in commerce, that is, 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 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.

Id. at 452-53. The Sixth Circuit quoted this passage with approval in Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 598 (6th Cir. 1995).

Chief Judge Edwards of the D.C. Circuit and Chief Judge Posner of the Seventh Circuit take a similar view in, respectively, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1471 (D.C. Cir. 1997) (upholding parties' arbitration agreement and supporting narrow reading of exclusionary clause based in part on reasoning of *Tenney*) and Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (7th Cir. 1997) (finding that legislative history supports narrow reading of exclusionary clause).

[85] See 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 Senate Comm. on the Judiciary, 67th Cong. 9 (1923) (statement of W.H.H. Piatt, chairman of the Committee of Commerce, Trade, and Commercial Law of the American Bar Association).

[86] Id. (emphasis added).

When the bill was reintroduced in December 1923, it contained the exclusionary clause.[87] Apparently, organized labor was satisfied because it played no role in the subsequent hearings.

Based on a review of the *internal* proceedings of the American Federation of Labor and the Seafarer's Union, the argument has been offered that labor's objections were misstated by the ABA representatives.[88] On this account, the unions' principal concern was not that the FAA would mandate "industrial arbitration" of labor disputes but rather that ship masters would be able to foist arbitration and compulsory service on seamen who were required by federal law to have individual contracts of hire. Accordingly, the § 1 exclusion should be read as a response to broad-based concerns over the inherent inequality of individual workers' bargaining power.[89]

There is, unfortunately, little, if any, evidence that Congress in 1925 shared this understanding when it enacted the FAA.[90] If the is-

---

[87] See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 2 (1924) (including recitation of bill text that contained exclusionary clause).

[88] See Matthew W. Finkin, "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 Berkeley J. of Emp. & Lab. L. 282, 295-96 (1996).

[89] Consider Judge Posner's reaction to Professor Finkin's essay in Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.), cert. denied, 1997 WL 275009 (Oct. 14, 1997):

> Professor Finkin argues that the prevailing view, which limits the exclusion in section 1 to employment contracts in transportation, is wrong. His review of the legislative history . . . has persuaded him that Congress's intention was to exclude *all* employment contracts. Yet, as he acknowledges, the impetus for the exclusion came entirely from the seafarers union, concerned that arbitrators would be less favorably inclined toward seamen's claims than judges were. Judges favored such claims, the union thought, in part because of a tradition that seamen were "wards in admiralty," in part because of peculiarities of maritime law that would make it easy to slip an arbitration clause into a maritime employment contract without the seaman's noticing it, and in part because the maritime employment relation was already heavily regulated by federal law. It was soon noticed that the railroad industry's labor relations were also heavily regulated—by a statute (the Railway Labor Act) that included provisions for compulsory arbitration of many disputes. Motor carriers were not yet comprehensively regulated, but it may have seemed (and was) only a matter of time before they would be: hence the expansion of the exclusion from seamen to railroad to other transportation workers. It seems to us, as it did to the Third Circuit [in the *Tenney* decision], that this history supports rather than undermines limiting "engaged in foreign or interstate commerce" to transportation.

Id. at 358.

[90] Professor Finkin acknowledges:

> No "paper trail" has been left of the history of the exemption. A search of the files of the Commerce Department, the Senate Judiciary Committee, then Secretary Hoover, Senator Walsh (who left a voluminous archive), the legislative files of the AF of L, and Victor Olander (for the files of the [International Seamen's Union]) yielded a scanty record bearing upon the Act and *no record whatsoever concerning the exemption.*

sue of interpretation turns on the specific intent of Congress at the time, the most that can be said is that Congress intended to exclude disputes involving collective bargaining agreements from the reach of the FAA.[91] Yet the language that Congress used in the exclusionary clause cannot easily be made to fit an exclusion limited to labor disputes, even if this were Congress's principal focus in 1925.

The Supreme Court will have to choose between two alternatives. One interpretation of the exclusionary clause essentially reads the FAA out of the picture for all employment disputes outside of the security industry. The second offers a narrow reading of the clause that seeks to preserve a substantial role for the FAA in this area.

Although prediction is a hazardous enterprise—especially when dealing with the Supreme Court—a broad interpretation of the exclusion is improbable. The Court would have to reject the essential thrust not only of *Gilmer* but also its prior ruling in *Perry v. Thomas*,[92]

Finkin, supra note 88, at 295 n.61 (emphasis added). For Senator Walsh's statement, see supra note 71.

[91] See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987) (quoting § 1 exclusion and observing that "the federal courts have often looked to the [FAA] for guidance in labor arbitration cases"). The clear implication is that § 1 excludes collective bargaining agreements.

Consider also the Fourth Circuit's assessment of the legislative purpose in United Elec. Radio & Mach. Workers of Am. v. Miller Metal Prods., 215 F.2d 221 (4th Cir. 1954):

> It appears that the exclusion clause of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union; and certainly such objection was *directed at including collective bargaining agreements rather than individual contracts of employment under the provisions of the statute*. The terms of the collective bargaining agreement become terms of the individual contracts of hiring made subject to its provisions and the controversies as to which arbitration would be appropriate arise in almost all instances, not with respect to the individual contracts of hiring, but with respect to the terms engrafted on them by the collective bargaining agreement. It is with respect to the latter that objection arises to the compulsory submission to arbitration which the Arbitration Act envisages. *No one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring divorced from the provisions grafted on them by the collective bargaining agreements*.

Id. at 224 (emphasis added) (quoted with approval in Kropfelder v. Snap-Tools Corp., 859 F. Supp. 952, 957 (D. Md. 1994)).

On the other hand, the Court in *Miller Metal Products* was "[not] impressed by the argument that the excepting clause of the statute should be construed as not applying to employees engaged in the production of goods for interstate commerce as distinguished from workers engaged in transportation in interstate commerce, as held by the majority in Tenney . . . ." *Miller Metal Products*, 215 F.2d at 224. Attempting to qualify this language, the district court in Kropfelder v. Snap-on Tools Corp., 859 F. Supp. 952 (D. Md. 1994), suggested, "[t]hat statement was made in the context of arbitration agreements contained in collective bargaining agreements." Id. at 957 n.11.

[92] 482 U.S. 483 (1987) (holding that FAA preempted anti-arbitration provision of California wage payment law so as to compel arbitration).

which likewise involved statutory employment claims. Moreover, although one can say that the Court simply would be interpreting the scope of the § 1 exclusion—an issue not squarely resolved in any prior ruling—the underlying policy justification that would be attributed to Congress for such a broad reading clashes with much of the reasoning that undergirds the Court's FAA jurisprudence. The Justices would be, in a sense, disowning their earlier pronouncements of arbitral competence—that arbitration is not a disfavored institution for resolving statutory claims and that generalized concerns over inequality of bargaining power cannot be raised to prevent arbitration (unless the federal statute in question evinces a clearly stated policy against arbitration or the contract would be invalid under the state's general law of contracts).[93] In addition to the obstacles created by prior rulings, the caseload and "litigation explosion" considerations that implicitly prompted the Court in the first place to find in the FAA a broadly preemptive pro-arbitration sword argue against a broad reading of the exclusion which is compelled neither by text nor available legislative history.

VII
ROLE OF PUBLIC POLICY CONSIDERATIONS

It is important to remember, however, that, irrespective of the scope of the exclusionary clause, the federal agencies enforcing the employment statutes have an important role to play in the process of ensuring that arbitration of statutory claims broadly conforms to the public policies contained in those laws.

A. Anti-Retaliation Provisions

If we decide as a policy matter that predispute agreements are enforceable, even if insisted upon as a condition of employment, that determination should foreclose use of the anti-retaliation provisions of the employment laws[94] to attack, without more, such insistence on

[93] In Doctor's Associates., Inc. v. Casarotto, 116 S. Ct. 1652 (1996), the Supreme Court examined a Montana statute that declared arbitration clauses unenforceable unless they contained a prominent notice on the first page of the agreement stating that the contract was subject to arbitration. The Court held (8-1) that the statute was preempted by § 2 of the FAA, 9 U.S.C. § 2 (1994), because it singled out arbitration for regulation not applicable to contracts generally. See id. at 1656-57.

[94] Section 704(a) of Title VII provides in pertinent part that an employer may not discriminate against the employee (or former employee) "because he has opposed any practice made an unlawful employment practice by this subchapter [so-called opposition clause], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [so-called participation clause]." 42 U.S.C. § 2000e-3(a) (1994). The legal issue would be whether an employer's

the agreement itself. These provisions should not be used as a back-door vehicle for relitigating the policy judgment already made. If an employer has a right under the FAA to insist on a predispute arbitration clause, the refusal to hire a job applicant who declines to agree to such a clause cannot be actionable retaliation under the discrimination laws.

There would, however, be some role for the anti-retaliation provisions. As the *EEOC v. River Oaks Imaging and Diagnostic*[95] litigation in Texas makes clear, employers should not be able to use arbitration agreements as a club to retaliate against employees who have filed charges with the EEOC.[96]

B. Right to File Charges with the EEOC

A more productive route for regulatory oversight is provided by the right of claimants to file charges with the EEOC and other enforcement agencies even when they have signed predispute arbitration agreements. Under current law, employees may not waive, and employers cannot require waiver of, the right to initiate a proceeding with the EEOC and other agencies.[97] The filing of a charge gives the

---

insistence on a predispute arbitration clause, or in its adherence once a dispute has arisen, violates either the "opposition" or "participation" clause.

[95] Civ. A. No. H-95-755, 67 Fair Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. Apr. 19, 1995) (granting preliminary injunction preventing employer from requiring employees to agree to dispute resolution procedure that interferes with employees' right to file complaints with EEOC).

[96] Consider, however, some of the decisions rejecting an "election of remedies" approach for union-represented employees. See, e.g., EEOC v. Board of Governors of State Colleges and Univs., 957 F.2d 424 (7th Cir. 1992) (holding that collective bargaining agreement prohibiting grievances from proceeding to arbitration if employee filed lawsuit or age-bias charge with EEOC violated ADEA); EEOC v. General Motors Corp., 826 F. Supp. 1122 (N.D. Ill. 1993) (determining that employer violated anti-retaliation provisions of Title VII and ADEA by withdrawing access to internal dispute resolution procedure when employees filed charges with EEOC). Employers (and unions) should be prevented from withholding contractual processes simply because employees have filed charges with the EEOC or other enforcement agencies. But query whether the anti-retaliation provisions should bar the parties to a collective bargaining relationship from establishing a program for internal resolution of disputes that, if invoked by employees, forecloses any later court suit, provided that the arbitrator has the authority to consider statutory issues and award statutory remedies for violations. For a related proposal, see supra note 48.

[97] See Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)(4) (1994) (stating that "No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the [EEOC]"); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1089-90 (5th Cir. 1987) (holding employee waiver of right to file charge with EEOC void as against public policy). The validity of postdispute settlement agreements that preclude the filing of charges with the EEOC is the subject of EEOC v. Astra U.S.A., Inc., 929 F. Supp. 512 (D. Mass. 1996) (issuing preliminary injunction restraining employer from enforcing settlement agreements prohibiting employees from assisting EEOC in its investigation of sexual harassment charges), aff'd in part and

agency an important window of opportunity to monitor employer practices (including the fairness and integrity of arbitration procedures) and to decide whether to file a lawsuit. Even if the courts ultimately hold, as Judge Sprizzo did in the *EEOC v. Kidder, Peabody & Co.*[98] litigation, that the EEOC has no authority to seek monetary relief for an employee who has agreed to arbitrate his employment dispute, the agencies retain authority to pursue injunctive relief where appropriate and sue on behalf of employees who have not agreed to submit disputes to arbitration.[99]

C. Promulgation of Quality Standards by Agency Rulemaking

Another route would be for the EEOC and other agencies to use their rulemaking authority (if they have it), or at least to issue regulatory guidance (if they do not), to set the quality standards that should govern arbitration of statutory employment claims. One step they could readily take is to endorse the model procedures of dispute resolution organizations like the AAA[100] and the Center for Public Resources[101] (and those suggested by the Dunlop Commission and the Due Process Protocol). "Moral suasion," to use a term favored by Felix Frankfurter, would go a long way to improve the process.[102]

---

vacated in part, 94 F.3d 738 (1st Cir. 1996) (dissolving injunction but affirming that nonassistance covenants prohibiting employee communication with EEOC are void as against public policy).

98 No. 92 Civ. 9243, 1997 WL 620809 (S.D.N.Y. Oct. 6, 1997) (holding that EEOC may not seek only monetary relief on behalf of individual employees who have signed binding predispute arbitration agreements); accord EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500 (E.D. Mich. 1997).

99 The Supreme Court in *Gilmer* stated that "arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief," Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991), but did not resolve whether such agreements could preempt an EEOC action seeking monetary relief on behalf of individual employees who had agreed to arbitration. Cf. EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1290-92 (7th Cir. 1993) (holding that prior ADEA judgment precluded subsequent EEOC action seeking individual relief for employee, as opposed to injunctive relief against further violation). Because in the *Kidder, Peabody* litigation the employer had gone out of business, and no theory of successor liability was pursued against the purchaser of its assets, the EEOC conceded that it lacked any basis for seeking injunctive or other prospective relief. See EEOC v. Kidder, Peabody & Co., No. 92 Civ. 9243, 1997 WL 620809 (S.D.N.Y. Oct. 6, 1997).

100 See supra note 16.

101 See Center for Public Resources, Institute for Dispute Resolution, Employment ADR: A Dispute Resolution Program for Corporate Employers (1995).

102 Rather than play this leadership role in prodding companies to develop arbitration systems meeting essential adjudicative quality standards, the EEOC is content to rail against the prevailing winds and state its implacable opposition to predispute arbitration of employment discrimination claims. See EEOC Policy Statement on Mandatory Binding Arbitration, reprinted in Daily Lab. Rep. (BNA) No. 133, at E-4 (July 11, 1997) (setting forth position that agreements mandating binding arbitration of discrimination claims as

CONCLUSION

A well-designed private arbitration alternative for employment claims is in the public interest and is achievable. The law should encourage, rather than hinder, arbitration of employment disputes that are conducted in a manner that satisfies the standards for a fair hearing before a neutral arbiter empowered to apply the law and, where warranted, to award statutory remedies.

condition of employment are contrary to the policy of the employment discrimination laws).