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EMPLOYMENT ARBITRATION AFTER GILMER: HAVE LABOR COURTS COME TO THE UNITED STATES?

Robert N. Covington*

I. INTRODUCTION

The Sunday, July 28, 1996, edition of the New York Times carried a story bannered: “Workers Who Sign Away A Day in Court.”¹ The text of the story reflects the tone of the headline. More and more employees, the story indicated, are being required by corporate employers to surrender their opportunity to seek damages in court for such wrongs as sexual harassment and age discrimination.² Instead, the article said, the employees are required by the terms of their employment contracts to submit those claims to arbitration, often under rules that limit the damages that can be awarded, and limit the procedural rights of workers to examine witnesses and seek documents from employer files.³

For a trend in the mundane business of drafting employment contracts to reach the newspapers, it must be a significant development indeed. The movement toward widespread use of alternative dispute resolution (“ADR”) in the workplace for non-unionized employees has picked up speed dramatically in recent years.⁴ As the Times story indicates, there is no reliable statistical source to tell us exactly how many employers require employees to sign arbi-

* Professor of Law, Vanderbilt University; Chair, The Labor Law Group, 1982-1989. Professor Covington’s most recent book is Individual Employee Rights in a Nutshell (with Kurt Decker; 1995) The author thanks Tom McCoy and Bob Belton, whose comments sharpened several portions of this article.

² See id.
³ See id.
⁴ See id.
tiation agreements as a condition of getting or keeping a job, but there is strong evidence of the growing importance of these clauses.\(^5\) That story cites a poll by a well-known headhunting firm that found that roughly one-third of American companies with twenty or more employees have plans to increase their use of formal employment contracts including agreements to arbitrate.\(^6\) The use of these clauses has been the subject of widespread comment by government officials, arbitration agencies, and employment lawyers.\(^7\)

Until the beginning of this decade, many observers thought that employers could not insist that employees agree to arbitrate claims under the major protective labor statutes, particularly those shielding employees from invidious discrimination.\(^8\) The reason was the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Corp.*\(^9\) The plaintiff in *Gardner-Denver* had pursued a discrimination claim through the grievance system provided by his union's collective bargaining agreement with the defendant employer.\(^10\) The arbitrator denied the claim, and the plaintiff then sued under Title VII.\(^11\) The employer sought to have the case dismissed on the grounds of the outcome of the arbitration.\(^12\) The Supreme Court held that Mr. Alexander was entitled to have his claim heard by the federal courts.\(^13\) Justice Powell's opinion for a unanimous Court found that "[t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."\(^14\) The Court specifically rejected arguments that a claimant should be required to elect between pursuit of arbitration under a collective agreement on the one hand, and pursuit of a remedy in court on the other;\(^15\) that

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5. See id.
6. See id.
8. See *Mandatory Arbitration*, supra note 7, at 58.
10. See id. at 39.
12. See *Gardner-Denver*, 415 U.S. at 43.
13. See id. at 59-60.
14. Id. at 47.
15. See id. at 47-49.
plaintiff had waived his rights under Title VII by pursuing arbitration, or that his union had—or could—make such a waiver on his behalf;\textsuperscript{16} or that the courts should defer to the factual findings of the arbitrator about the reasons plaintiff was discharged.\textsuperscript{17} In the course of the opinion, Justice Powell emphasized that an individual Title VII plaintiff does more than vindicate his or her own rights. That plaintiff also “vindic[ates] the important congressional policy against discriminatory employment practices.”\textsuperscript{18} He also commented at some length on the limitations the typical arbitrator experiences in making findings of fact:

\begin{quote}
[T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.\textsuperscript{19}
\end{quote}

The language of the \textit{Gardner-Denver} opinion as well as the outcome of the case led many lower courts and commentators to conclude that a person who claims his or her statutory rights have been violated is entitled to have that claim evaluated by a court. This did not mean that discrimination grievances were not heard by arbitrators in the years following \textit{Gardner-Denver}. Many workers chose to use the faster, cheaper arbitration forum as a place to air complaints rather than pursue a judicial remedy. A worker who believed that both her employer and also her union were engaged in gender discrimination would not, however, be likely to want to entrust that claim entirely to the union’s handling of the grievance and arbitration system at her workplace. The common belief was that she could not be forced to, and that even if the claim was pursued through arbitration, an adverse arbitrator’s decision would not be final.

Then came the Supreme Court’s 1991 decision in \textit{Gilmer v. Interstate/Johnson Lane Corp.}\textsuperscript{20} The plaintiff in \textit{Gilmer} was required by his employer, the defendant, to register as a stockbroker with the

\begin{footnotes}
16. \textit{See id.} at 51.
18. \textit{Id.} at 45.
\end{footnotes}
New York Stock Exchange ("the Exchange" or "NYSE"). One provision of the application form he had to execute in order to register stated that he agreed to abide by the rules of the Exchange. One of those rules called for the arbitration of all disputes between him and his firm. Later, he was discharged, and filed suit against his former employer, claiming that his firing violated the Age Discrimination in Employment Act ("ADEA"). The plaintiff was sixty-two at the time he was fired. The defendant filed a motion to compel the plaintiff to submit the claim to arbitration. The district court denied the motion, citing Gardner-Denver, but the Fourth Circuit Court of Appeals reversed, and the Supreme Court upheld the Circuit Court's decision in an opinion by Justice White. Justices Stevens and Marshall dissented.

Justice White's opinion begins with a brief review of how the Federal Arbitration Act ("FAA") has been interpreted in recent years. In particular, he notes that statutory rights under securities laws were held to be subject to arbitration in a well-known 1985 case. Thus, the law has come full circle from the hostility toward arbitration that existed before the FAA was passed, to a position that "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" The plaintiff argued that compelling arbitration would undermine the framework for resolving charges of discrimination set up by the Congress; a scheme that envisions conciliation attempts by the Equal Opportunity Commission ("EEOC") followed by litigation instituted either by the wronged individual or the EEOC itself. Justice White's response is to say that "mere involvement of an administra-

21. See id. at 23.
22. See id.
23. See id.
25. See Gilmer, 500 U.S. at 23.
26. See id. at 24.
27. See id.
28. See id. at 22, 36.
31. See id. at 26 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).
33. See Gilmer, 500 U.S. at 26-27.
tive agency in the enforcement of a statute is not sufficient to preclude arbitration."^{34} He points to the use of arbitration to resolve disputes that required interpretation of the securities laws.^{35} He argues, in fact, that since the principal role of the EEOC is to attempt to conciliate, the Act assumes that many disputes will be settled privately by the parties, without formal judicial involvement.^{36}

The plaintiff also complained that arbitration procedures would not be adequate for the prosecution of discrimination claims,^{37} an argument that harks back to Justice Powell's opinion in *Gardner-Denver.*^{38} The seven justice majority in *Gilmer* addresses the argument "only briefly"^{39} before rejecting it. First, given the trend toward favoring arbitration, the Court would not indulge in a presumption that "the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators."^{40} Next, Justice White's opinion reviews the rules of the New York Stock Exchange and finds they provide adequate procedural protections against bias, as well as provisions allowing limited discovery and requiring a written award that at least summarizes the arbitrator's understanding of the issues involved.^{41} These summaries are to be made available to the public.^{42} If the rules are not in fact adequate to protect against bias, Justice White notes, there is always the possibility of review by a court to overturn or deny enforcement of the arbitrator's award.^{43} He also rejects plaintiff's argument that remedies available in arbitration are likely to be more limited than those available in a judicial forum, pointing to a NYSE rule that allows arbitrators to award "damages and/or other relief."^{44} Finally, in dicta, Justice White casts aside the argument that arbitration forums are not able to

^{34} *Id.* at 28-29.
^{36} See *Gilmer*, 500 U.S. at 28.
^{37} See *id.* at 31.
^{39} See *Gilmer*, 500 U.S. at 30.
^{40} *Id.* at 30 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 673 (1985)).
^{41} See *Gilmer*, 500 U.S. at 30.
^{42} See *id.* at 32.
^{43} See *id.* at 30.
^{44} *Id.* at 32.
handle class actions, a type of proceeding that has been common in discrimination cases. The arbitration rules available in the case of the New York Stock Exchange do envision multiple claims as a possibility, he notes, and even if they did not, possible shortcomings in class actions should not be a reason to deny arbitration of an individual claim.

The plaintiff also argued that it is improper to enforce a waiver of an employee's right to a judicial forum that is contained in a contract of adhesion, a contract about which he had no power to bargain. That a person seeking employment usually has far less bargaining power than the potential employer is no reason to deny enforcement, Justice White reasons, so long as that worker was not "coerced or defrauded" into making the agreement.

The Gilmer majority also rejects the argument that requiring arbitration is inconsistent with Gardner-Denver. Justice White's opinion emphasizes two differences between the cases. First, he notes, it would not be reasonable to have read the collective bargaining agreement in the earlier case to authorize the arbitrator to resolve statutory issues; that arbitrator was limited to deciding whether the agreement had been breached. Second, there is a difference between bargaining under a collective agreement, in which the individual is represented by a union, and arbitration under an individual contract. In the latter case, there need be no concern about "the tension between collective representation and individual statutory rights . . ." This may imply that a union may sometimes be ready to surrender an individual's statutory right to achieve some other bargaining objective.

45. See id.
46. See id.
47. See Gilmer, 500 U.S. at 32. Id.
48. See id. at 33. As discussed below, this goes beyond what was truly necessary to decide here, since the employer in this case had little, if any, control over the content of the arbitration rule of the New York Stock Exchange.
50. See Gilmer, 500 U.S. at 35.
51. See id.
52. Id.
53. The lower federal courts continue to apply Alexander v. Gardner-Denver in cases involving arbitration under collective bargaining agreements. See, e.g., Martin v. Dana Corp., 114 F.3d 428 (3d Cir. 1997). One can argue, however, that if an arbitrator is clearly empowered to consider statutory rights, and if the individual grievant is given a significant
This article first summarizes some of the initial reactions to *Gilmer*. These reactions range from enthusiastic endorsement to vigorous denunciation. Taken together with the arguments made by the parties in *Gilmer* itself, they provide an overview of the competing values the courts must balance in answering the three questions this article focuses on next: (1) How many employees are excepted from the coverage of the Federal Arbitration Act by the "contracts of employment" language in section 1 of that statute? (2) If an agreement includes a promise to arbitrate future disputes between an employer and employee, what standards must be met in order to justify a court's order to take a dispute to arbitration? The *Gilmer* opinion provides limited guidance on this, leaving the lower courts to articulate more concrete requirements. (3) How extensively will the opinions of *Gilmer* arbitrators be reviewed by the courts for errors in procedure, fact-finding, or law?

The article concludes by arguing that what we see emerging after *Gilmer* could be the development of a series of labor and employment law courts in the United States. They differ from ordinary courts in being privately funded and administered, but if (1) a vigorous labor and employment bar sees to it that the firms that provide arbitrators live up to the pledges they have been making during the past two or three years, and (2) the federal courts, on their own or at the instruction of the Congress, develop meaningful standards of judicial review, then there is good reason to believe that the system will provide substantial justice to the workers and employers who pursue their claims in arbitration.

II. REACTIONS TO GILMER: PRAISE, CONDEMNATION, EXTENSION

A. Response from Practitioners and Academics

Whatever else may be said of the *Gilmer* decision, it has attracted a substantial audience. The opinion has been the subject of commentary in well over a hundred law review articles, and has been chewed over in countless academic conferences, after-dinner
speeches, and briefings for managers. Some of the issues spawned by the decision were the subject of a Task Force on Alternative Dispute Resolution in Employment that included representatives of the American Arbitration Association, the Federal Mediation and Conciliation Service, the National Employment Lawyers Association, the American Civil Liberties Union, the Society of Professionals in Dispute Resolution, the National Academy of Arbitrators, and the Labor and Employment Law Section of the American Bar Association. The end product of their work was a "Due Process Protocol," ultimately endorsed by the American Bar Association, that may have far-reaching implications.

The outcome in Gilmer has been welcomed by the organizations that provide arbitrators. One would expect that. Gilmer should mean more business for these firms, and thus promoting its broad application is in their self interest. Moreover, as promoters of alternative dispute resolution, they are "true believers" in the advantages of private over public forums. Not everything about the opinion pleases everyone in the arbitration profession, however. The members of the National Academy of Arbitrators discussed the implications of the opinion at their annual meeting in May of 1997. There was strong sentiment opposing the use of mandatory arbitration agreement as a condition of employment. The group nonetheless decided that it is appropriate for Academy members to participate in employment law arbitration cases involving statutory rights. This means that those seeking arbitrators for such cases will have access to an experienced and widely respected group of decision-makers.


56. See id.


59. See id.

60. See id.
Most management lawyers also praise the *Gilmer* result, and this, too, was predictable. Anything that might enhance employer control over the decision-making process is likely to be viewed favorably by management lawyers. Public trials of issues such as sexual harassment can be embarrassing. There may also be dollars saved in terms of lower lawyer fees and the like. If the availability of arbitration prompts the filing of a larger number of claims, or means that fewer claimants are discouraged by long delays at the EEOC and in fact go forward with their claims, that attitude may change. It is far too early, however, to know whether either of those things will happen.

The plaintiff's employment law bar has generally criticized *Gilmer*. These lawyers have become skilled over the years in the effective use of discovery to help make out a case, and are adept at developing proposals for remedies that make use of the full equitable powers of the federal courts. It is hardly surprising that they would be unenthusiastic about being required to pursue cases in forums with which they are not as well acquainted and which lack many of the procedures they have learned to employ so effectively. They are not so much hostile to arbitration per se as they are to the requirement that arbitration be the only forum available. At one point, in fact, the National Employment Lawyers Association stated that it would boycott agencies supplying arbitrators to resolve disputes under mandatory arbitration clauses that do not provide for broad remedies—including punitive damages—and procedural safeguards such as reasonable rights of discovery.

It seems likely that both the management and the plaintiff's bar share a perception that employees win more often in court than in arbitration, and that the judgments tend to be larger. A recent article by David Schwartz reviews the anecdotal as well as the very limited empirical evidence on point. As he points out, the attitude of the bar goes far beyond what the empirical evidence would demonstrate. He nonetheless concludes that the "clues" in the

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65. See id. at 66.
empirical evidence indicate a probability that the attorney perception is accurate.\textsuperscript{66} It would be surprising, one would think, for this is not true. The arbitration claims include far more cases in which no attorney participated.\textsuperscript{67} This means not only that the claim may not have been pressed vigorously, but also that there was no attorney advice to abandon claims that were unlikely to succeed. This "gatekeeper" function of the bar is one that is far from fully understood, but is clearly an important one. Even if one has attorney participation, however, it is more likely that a marginal claim may be pursued in an arbitration forum, because of the lower costs, both out-of-pocket and in scheduling. Schwartz argues that the absence of attorneys for plaintiffs is a mark against the use of arbitration, a good lawyerly attitude, of course.\textsuperscript{68} There is a countervailing argument, obviously, that there may be times when the presence of lawyers schooled in an adversary system may not be all that desirable.\textsuperscript{69}

Academic response to the \textit{Gilmer} outcome has been mixed. Much of it is relatively neutral, such as Professor Gorman's remarks in the Benjamin Aaron Lecture he gave at U.C.L.A. in 1994.\textsuperscript{70} Some is notably hostile, arguing that the \textit{Gilmer} majority seriously underestimated the importance of a public forum and judicial procedures to the uncovering and undoing of discrimination.\textsuperscript{71} Professors Joseph Grodin and Katherine Stone have written particularly effective critiques of this sort.\textsuperscript{72} Other critics chide the \textit{Gilmer} Court for failing to look beyond the surface of the rules for arbitration proceedings to which \textit{Gilmer} was subject.\textsuperscript{73} Professor Alleyne, himself a distinguished arbitrator, recently published a devastating analysis of the realities of employment dispute arbitration under

\begin{itemize}
\item \textsuperscript{66} See id. at 64.
\item \textsuperscript{67} See id. at 66 n.105.
\item \textsuperscript{68} See id. at 79-80.
\item \textsuperscript{69} See id. at 70.
\item \textsuperscript{70} See Robert A. Gorman, \textit{The Gilmer Decision and the Private Arbitration of Public-Law Disputes}, 1995 U. Ill. L. Rev. 635, 638-39; Gray, supra note 54, at 113 (providing a management educator's comments).
\item \textsuperscript{71} See, e.g., Grodin, supra note 54, at 28; Katherine Van Wezel Stone, \textit{Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s}, 73 Denver U. L. Rev. 1017, 1044 (1996) (including one section headed "Due Process or Cowboy Arbitrations?").
\item \textsuperscript{72} See, e.g., Grodin, supra note 54, at 28; Van Wezel Stone, supra note 71, at 1044.
\end{itemize}
those New York Stock Exchange rules. Some academic commentators have been generally sympathetic to *Gilmer*, citing its advantages of relative speed and low cost. The most severe criticism from the academic community has centered on the approval of making the agreement to arbitrate a condition of getting a job. It is true that the language of the opinion seems to go further than needed on this point. After all, neither employer nor employee had meaningful control over the presence of the arbitration provision in the New York Stock Exchange rules, and the nature of the employer's business made it truly necessary that both employer and broker be registered with the Exchange. Thus the "condition" that was imposed on Mr. Gilmer was imposed more by an external force than by his firm's independent decision. Justice White's opinion may therefore be unduly broad when it states that "inequality in bargaining power, [between employers and employees], is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." The language indicating that only fraud or coercion by the employer would justify non-enforcement seems irrelevant. Neither employer nor employee had the power to do away with the NYSE rule. In fact, however, Justice White's opinion closes his discussion of this point in a characteristically cautious way, saying that a "claim of unequal bargaining power is best left for resolution in specific cases." Such claims are not foreclosed, and it remains open to the lower federal courts to begin working out the specifics of what counts as abuse of the employer's economic power.

B. Judicial Response: Acceptance, With Increasing Notes of Caution

For the most part, the lower federal courts have welcomed *Gilmer* with open arms. Crowded dockets may well account for some
Whatever the reason, the federal judiciary has extended the application of *Gilmer* to a variety of other federal labor protections such as Title VII, ERISA, and the Employee Polygraph Protection Act. The Second Circuit applied the broad presumption of arbitrability to an anti-retaliation provision in the Financial Institutions Reform, Recovery and Enforcement Act.

Is the extension of the *Gilmer* rationale to these other statutes proper? In recognizing that there is now a very strong federal policy favoring arbitration, the answer must be “yes.” Since rights under antitrust statutes, securities laws, and the Age Discrimination in Employment Act have all been found appropriate for the arbitration forum by the Supreme Court, there can be no doubt that the policy favoring arbitration is very strong indeed. There are, however, some distinctions among the enforcement histories of various statutes that might merit closer attention. Take, for example, the Fair Labor Standards Act (“FLSA”), the basic wage and hour law. The Ninth Circuit recently approved mandatory arbitration for FLSA claims in *Kuehner v. Dickinson & Co.* A federal district court in Texas had reached the same result in 1993. In neither case did the court refer to the long history of refusing to honor private settlements of wage claims entered into by employers and employees in the absence either of Department of Labor supervision or court approval. That is, of course, a pre-*Gilmer* history, but it is grounded in a reality that is as much with us today as earlier: employees who have an ongoing relationship with the employer are not well placed to complain about either the substance or the procedure of that employer's offer to settle relatively smaller claims. As it happens, both the cases requiring arbitration

88. 84 F.3d 316, 320 (9th Cir. 1996).
90. *See*, e.g., *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982) (holding that settlements for back wages will not be given judicial approval where the agreement was reached without supervision by the Department of Labor).
of FLSA claims under *Gilmer* involved former rather than current employees.\(^2\) Even so, it would have been welcome for the opinions to note that settlement of such claims has long been regarded as not a strictly private matter.

One other extension of the *Gilmer* opinion by the Fourth Circuit has drawn criticism and has been rejected by other circuits.\(^3\) In that case an individual employee was required to arbitrate a statutory claim under arbitration procedures created under a collective bargaining agreement.\(^4\) The agreement's arbitration clause was broad enough to cover statutory claims,\(^5\) and thus distinguishable from the agreement in *Gardner-Denver*. The other circuit courts that have considered the issue have all held that *Gilmer* is applicable only to individual contracts of employment, not collective agreements.\(^6\)

The general attitude of the federal courts has thus been to welcome the *Gilmer* outcome, and to extend it. In the process, however, the courts have begun to note the existence of serious questions about just how to apply that rationale, and some have sounded notes of caution.\(^7\) The next two sections of this article address a pair of questions that courts must answer when they are asked to order arbitration in employment law cases. What is the scope of the FAA "contracts of employment" exception?\(^8\) What defects in the execution or content of an arbitration agreement should lead a court to deny enforcement of the promise?\(^9\)

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\(^2\) See Kuehner, 84 F.3d at 318; Hampton, 829 F. Supp. at 203.

\(^3\) See Austin v. Owens-Brockway Glass Container Inc., 78 F.3d 875 (4th Cir. 1996). But see Brisentine v. Stone & Webster Eng’g Corp., 117 F.3d 519 (11th Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997).

\(^4\) See Austin, 78 F.3d at 885.

\(^5\) See id. at 885-86.


\(^7\) See, e.g., Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (offering the most searching opinion to date that addresses the issues).

\(^8\) See discussion infra Part III.

\(^9\) See discussion infra Part IV.
C. Congressional Reaction

Formal Congressional reaction to Gilmer can be summarized in a single word: None. The Civil Rights Act of 1991 does indeed include a provision encouraging voluntary arbitration, but that provision was already in the Bill at the time the House Labor and Education Committee issued its report on April 24, 1991, two weeks before the Gilmer decision was announced. Since 1991 there have been bills introduced to overrule or modify Gilmer, but none has passed.

D. Executive Agency Response

Two agencies have responded unfavorably to one aspect of the Gilmer opinion; the part of Justice White's opinion that found no problem with the fact that the plaintiff was required to execute an agreement to arbitrate as a condition of employment. As pointed out earlier, that was not done directly by the employer in Gilmer. The employer simply required that Gilmer register with the New York Stock Exchange. The Exchange imposed the arbitration requirement. Both the EEOC and the General Counsel of the NLRB have expressed strong disapproval of an employer practice requiring that employees agree to arbitrate statutory claims as a condition of employment. The General Counsel's office at the NLRB has said that requiring a worker to enforce NLRA statutory rights through individual arbitration would constitute an unfair labor practice. The EEOC has issued a formal policy statement

102. One such bill was introduced by Representatives Markey (D-Mass.) and Morella (R-Md.). See H.R. 983, 105th Cong. (1997).
103. See infra notes 110 and 112.
105. See id. at 23.
106. See id.
107. See id.
108. See infra notes 110 and 112.
condemning the practice and has filed briefs opposing the practice in several pending cases. In response to this chorus of disapproval, the National Association of Securities Dealers has proposed to change its rules, so that a registering broker can decline to agree to arbitrate statutory employment rights. The proposal must be approved by the Securities and Exchange Commission before taking effect. On the other hand, there is little, if any, opposition to voluntary arbitration. The Department of Labor continues to go forward with plans to foster voluntary arbitration of disputes involving rights created by some of the statute it administers.

III. THE FAA "CONTRACTS OF EMPLOYMENT" EXCEPTION

Section 1 of the Federal Arbitration Act defines two terms of art, "maritime transaction" and "commerce." Those two terms are significant because section 2 of the statute identifies enforceable agreements to arbitrate as those "in any maritime transaction or a contract evidencing a transaction involving commerce . . . ." Both terms are given broad meaning. However, section 1 concludes with an exclusionary clause: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The problem in interpreting this language is how to read the last phrase, "workers engaged in foreign or interstate commerce." Seafarers' employment agreements, known as "articles," are still regulated in great detail by statute. They are

111. See id. at 405:7520-7521.
113. See id.
116. Id. § 2.
117. Id. § 1.
118. Id.
119. See, e.g., 46 U.S.C. §10304 (1994) (setting out in detail the form of agreement to be used in foreign and intercoastal voyages); 46 U.S.C. §10502 (1994) (requiring employment agreements for coastal voyages to be in writing and contain certain provisions). Neither of these sections specifically refers to arbitration. While the precise terms of both sections are
enforced through the peculiar procedures of admiralty. Railroad workers are the subject of a special statute for their industry, the Railway Labor Act\(^2\) that contains its own provisions for arbitration.\(^1\) Representatives of seafarer and railroad worker unions sought exclusion from the FAA.\(^2\) Thus the reference to both those industries is fully understandable, as well as textually clear. The same cannot be said of the concluding phrase. There was precious little federal statutory protection for employees in general in 1925, and that would remain the case for another decade.

A. The Gilmer Dissent and Precedent in the Lower Federal Courts

The majority opinion in \textit{Gilmer} does not address the question of how to interpret this language.\(^2\) The issue was not raised by the discharged worker at an early enough stage.\(^4\) Justice Stevens relatively recent, they reflect a practice of close regulation of seafarer articles that has existed for well over a century. See H.R. Rep. No. 93-338 at 117 (1983). "S.46 is for the most part a restatement of the existing maritime safety and seamen protection laws . . . ." \textit{Id.}

120. 45 U.S.C. § §151-188 (1994). Although this statute was not enacted until 1926, while the FAA became law in 1925, similar provisions authorizing "boards of adjustment" to resolve grievances were already in place under Title III of the Transportation Act of 1920. See 41 Stat. 456, 469-474 (1920); see Jonathon A. Cohen & James K. Lobesenz, \textit{Grievance Resolution and the System Board of Adjustment}, 25 ALI-ABA 299, 301-302, Oct. 23, 1997. Moreover, participants in the Arbitration Act debates were no doubt aware that some form of regulation resembling the Railway Labor Act would soon be in force.


124. The opinion also justifies not addressing the issue on the ground that the arbitration agreement appears in a registration application rather than in a "contract of employment," but one should not rely too heavily on that casual dicta. Since employment is by definition contractual, and since the terms of a typical employment relationship change with the passage of time, the notion that one can find all the terms of an employment contract in a single document is not one to take seriously. That is doubtless not implied by Justice White here. The peculiarities involved in applying for registration as a stock broker as an individual, and in being a member firm of an exchange or association of dealers result in both the firm (the employer) and the individual broker (the employee) pledging to the exchange (or association of dealers) that each will arbitrate disputes with the other. Thus the exchange or association of dealers could change its arbitration rules and eliminate the arbitration duty without the specific consent of either employer or employee. That, indeed, is in the process of happening with respect to employment disputes in the industry. Since neither employer nor employee can control the nature of the duty to arbitrate it makes sense not to say this promise is "incorporated into" the employment contract. This does not mean that the simple
nonetheless considered the issue in his dissent. That opinion argues that the exception should be read broadly, so that FAA arbitration would not be available in employer-employee cases. Among other arguments, he notes that prior to the Court’s decision in *Textile Workers Union v. Lincoln Mills* that held arbitration agreements in collective bargaining agreements to be enforceable under section 301 of the Taft-Hartley Act, three Circuit Courts of Appeals had applied the exception to those types of contracts.

Precedent in the lower federal courts does not generally support Justice Stevens’s position, however. There has been a trend in recent years to restrict the FAA section 1 exception to contracts of employees in the transportation industry. The seminal case is *Tenney Engineering, Inc. v. United Electrical Radion & Machine Workers*. In *Tenney*, a labor union sought a stay of an action for damages brought against it by an employer, in order to arbitrate the employer’s claim under a clause in the employer’s arbitration agreement. The Supreme Court had not yet held that section 301 of Taft-Hartley authorized enforcement of arbitration clauses in collective bargaining agreements, and the court therefore looked to the FAA as the only source of power to grant the union’s request. By a vote of five to two, the court held that the FAA granted the federal district court power to require the employer to arbitrate. The employer’s argument that section 1 excepted employment contracts, including collective agreements, from the FAA was rejected. The opinion, by Judge Maris, noted that the legislative history of the exception was scant. He cited a report by an American Bar Association committee, which had been heav-

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129. 207 F.2d 450 (3d Cir. 1953). It is interesting to note that Justice Stevens’s dissenting opinion in *Gilmer* cites another Third Circuit opinion as support for his view that the section 1 exception should be read broadly. That case involved transportation workers. *See Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (3d Cir. 1951).
130. *See Tenney Eng’g*, 207 F.2d at 451.
131. *See id.* at 453.
132. *See id.* at 454.
133. *See id.* at 453.
134. *See id.* at 452.
ily involved in drafting the Bill that ultimately became the FAA, saying that

[object]ions to the bill were urged by Mr. Andrew Fusureth as representing the Seamen's Union, Mr. Fusureth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1...  

From this, Judge Maris reasoned that the intent underlying the exclusion was a very narrow one. He then applied the maxim *ejusdem generis* to construe the language "any other class of workers" to refer only to workers who, like seamen and railroad workers, are "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it."

Criticism of Judge Maris's opinion was not long in coming. Professor Cox quickly pointed out that the opinion led to a very strange reading of two adjoining sections of the FAA. "Commerce" was being read broadly in section 2, but very narrowly in section 1. Moreover, while the *Tenney* majority opinion correctly points out that the legislative history of the exception is scant, there are other statements in the record indicating that arbitration of labor contract disputes was never contemplated.

The Fourth Circuit specifically refused to accept the *Tenney* analysis, in *United Electrical, Radio & Machine Workers v. Miller Metal Products Inc.* also a case in which an employer was seeking damages for breach of a collective agreement, and also decided before

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135. *Tenney Eng'g*, 207 F.2d at 452.
136. *See id.*
137. *Id.*
138. *See Archibald Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591 (1954).* It is clear, he argues, that § 1 was intended to govern § 2. *See id.* 593-94.
139. *See id.* at 455 & n.17 (McLaughlin, J., dissenting) (pointing to three passages in the Congressional Record, in which the Bill is said to provide for arbitration in commercial contracts). In Professor Finkin's recent article urging a broad reading of the exemption, he quotes from the testimony of W.H.H. Piatt, of the American Bar Association, before the Senate Judiciary Committee in Jan. 1923: "It is not intended that this shall be an act referring to labor disputes, at all." Matthew W. Finkin, "Workers' Contracts" *Under the United States Arbitration Act: An Essay in Historical Clarification, 17 Berkeley J. Emp. & Lab. L. 282, 285 (1996).*
140. 215 F.2d 221, 224 (4th Cir. 1954).
Lincoln Mills.\textsuperscript{141} In dicta, however, the Supreme Court has indicated it might have less difficulty in ordering specific performance of an agreement to arbitrate in an individual contract of employment.\textsuperscript{142} The First,\textsuperscript{143} Second,\textsuperscript{144} Sixth,\textsuperscript{145} and Seventh\textsuperscript{146} Circuits have all accepted the Tenney analysis. The District of Columbia Circuit joined this group in 1997 in its Cole decision.\textsuperscript{147}

Arce v. Cotton Club of Greenville, Inc.,\textsuperscript{148} ("Arce") a recent federal district court opinion, rejects Tenney vigorously. The Arce court begins by arguing that the language of the section 1 exclusion includes no ambiguity that requires resorting to legislative history.\textsuperscript{149} If there is ambiguity, however, then it is appropriate to begin one's analysis by looking at the fact that the Congress chose to exclude from the scope of the FAA all those employment contracts that would have been thought in 1925 to fall within the scope of the Congressional power to legislate.\textsuperscript{150} When one couples this with the fact that the principal impetus for this legislation was to provide for arbitration in deals between businesses, the result is to hold that contracts of employment simply do not fit within the statute.\textsuperscript{151}

B. Reasonable Alternative Interpretations

What is a proper reading of this exception? One problem is that the definition of "commerce" in section 1 of the FAA is tautological, "commerce" is defined by using the word "commerce":

"commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any

\begin{enumerate}
\item See Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
\item See United Elec. 215 F.2d at 221.
\item See Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971).
\item See Eving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972).
\item See Pietro Scalzitti Co. v. International Union of Operating Eng'rs Local No. 150, 351 F.2d 576, 580 (7th Cir. 1965); Williams v. Katten, 837 F. Supp. 1430 (N.D. Ill. 1993).
\item See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1471 (D.C. Cir. 1997).
\item 883 F. Supp. 117, 120-21 (N.D. Miss. 1995).
\item See id. at 121.
\item See id. at 123.
\end{enumerate}
State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation. . . .152

The Tenney court was quite right in pointing out that the concept of "commerce" in 1925 was different from the concept of "commerce" applied in the court after 1936.153 The Tenney suggestion that only those employees engaged in the movement of goods or people would have been viewed as "engaged in commerce" in 1925, however, goes too far.154 While the notion that major league baseball is, not; "commerce," as the Supreme Court held in 1922,155 seems odd indeed; the Court had long since expanded the notion of commerce to include sending messages by wire156 or operating a correspondence school whose students resided in multiple states.157

Moreover, as the district court pointed out in Arce, the choice Congress made in 1925 was to exclude from the scope of the FAA all contracts of employment that they felt would lie within their power to regulate, namely workers engaged in the movement of goods.158 Viewed in this way, the exclusion from coverage should be interpreted to be as broad as the category of employment contracts within the sphere of Congressional power today. Succinctly put, "contract evidencing a transaction commerce" language in section 2 is interpreted in the broader sense in which "commerce" is currently regarded.159

There is, finally, the clear focus of the advocates of this legislation on "commercial contracts," contracts of merchants and traders. The readiness with which the ABA committee pushing the statute agreed to exclude employment contracts indicates how little interest there was in arbitrating employment disputes.160

On the whole, Justice Stevens, Professor Cox, Professor Finkin, and other academic commentators and federal district courts like the court in Arce, would seem to have the better argument: that the

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154. Id. at 463.
156. See Western Union Tel. Co. v. Foster, 247 U.S. 105, 106 (1918); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 1 (1878).
159. See id.
160. See id.
Federal Arbitration Act was not meant to cover contracts of employment.\(^{161}\)

The logical appeal of that position, however, runs counter to a very strong trend by courts favoring the use of alternative dispute resolution techniques. That policy is given such weight these days, as evidenced by the large number of courts approving Tenney; despite weaknesses in the opinion that have been widely pointed out that some sort of narrow reading of the section 1 exception may well be the end result.\(^{162}\)

Is there a “narrow” reading of the section 1 exception that is less objectionable than restricting it entirely to transportation workers? Another argument in the Tenney opinion may have a sounder basis. Judge Maris notes that thirteen years after the enactment of the FAA, Congress passed the federal wage and hour law,\(^{163}\) the Fair Labor Standards Act of 1938 ("FLSA").\(^{164}\) The duties to pay the minimum wage and premium pay for overtime were imposed to benefit any employee who “in any workweek is engaged in commerce or in the production of goods for commerce.”\(^{165}\) If “engaged in commerce” in section 1 of the FAA is read to mean roughly the same thing as FLSA, it is not necessary to think of “commerce” in a narrow fashion. The term can have the same meaning in both section 1 and section 2, surely a desirable result. The exception then means that the FAA is available to handle disputes involving those employees who are engaged in “production” but not those involved in “commerce.”

Who are these? Since the FLSA was amended in 1961 to make coverage depend primarily on whether one works for an “enterprise” in commerce,\(^{166}\) there have been very few cases interpreting

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162. See, e.g., Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (7th Cir. 1997). Judge Posner acknowledges the force of much of what Professor Finkin has written, but goes on to say that to read the section one exclusion by giving the term commerce its “modern meaning” would “give the exclusion a breathtaking scope.” See id. Thus, Judge Posner accepts the Tenney limitation of the exclusion to transportation employees. See also Schulte v. Prudential Ins. Co., 133 F.3d 225, 231 (3d Cir. 1998) (holding that ambiguities in arbitration clauses are to be read in favor of requiring a party to go forward with arbitration).

163. See Tenney Eng’g, 207 F.2d at 453.


165. Id. § 206(a).

166. See id. § 203(r)(1).
the "engaged in commerce" phrase. Prior to that, however, the cases were numerous. Those covered under this language included, for example, stockroom workers who handle goods ordered from out of state in contemplation of their sale to known repeat customers,167 construction workers rebuilding roads used to carry freight from state to state,168 and a clerical employee working up his employer's out-of-state purchasing orders every week.169 What about a financial institution employee who spends a large part of each day at the computer sending messages to exchanges in New York, London, and Frankfurt, relaying the decisions of customers phoned in from cities around the country? To deny that such an employee is "engaged in commerce" would seem hard to defend.

C. Post-Gilmer Legislation

Have post-Gilmer amendments to employment laws shifted the balance of the argument? Section 118 of the 1991 Civil Rights Act provides:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes under the Acts or provisions of Federal law amended by this title.170

What influence should this have, if any, on interpreting the section 1 exception?

Professor Abrams reasons that the probable intent of the drafters of this statute was the same intent associated with nearly identical language in other statutes.171 That is to indicate to the federal courts that arbitration of a case should be regarded as appropriate even if rights under one of the statutes should happen to be

This was thought necessary for many years because of the Supreme Court's perceived hostility to arbitration of statutory issues in its 1953 opinion in *Wilko v. Swann*. Abrams argues that the legislative history of the language makes it clear that the drafters intended that arbitration be available as a supplement for judicial remedies, not a replacement for litigation in court. He therefore argues, for instance, that *de novo* judicial review should continue to be available after an arbitrator's decision. If Professor Abrams's interpretation is right (he makes a very strong case for his position), then this language does no more than what the *Gilmer* decision itself did; remove from federal jurisprudence any hostility toward arbitration of cases involving statutory rights that might still reflect the *Wilko* rationale. It does not bear at all on how the section 1 exception should be read.

As Professor Abrams points out, however, the congressional intent issue is clouded to some degree by an interpretive memorandum inserted by Senator Dole of Kansas. That memorandum states that the provision "encourages the use of alternative means of dispute resolution, including binding arbitration..." By slipping in the word "binding" before "arbitration," a term that does not appear in the text of the statute, it becomes possible to argue that judicial review is precluded except on the limited basis provided by the FAA itself.

If a stockbroker in *Gilmer*’s position comes before the Supreme Court again in a similar action and raises the section 1 exception, the Court must choose among several options. First, it could accept Tenney, thus giving "commerce" different meanings in adjacent locations. Second, it could agree with Justice Stevens, Professors Cox and Finkin, and others that all employment contracts are exempt from the FAA, thus undoing the practical impact of *Gilmer*.  

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174. See Abrams, supra note 171, at 558.

175. See Abrams, supra note 171, at 559-60.

176. See Abrams, supra note 171, at 557.

177. See Abrams, supra note 171, at 557 (emphasis added).

mer. Third, the Supreme Court may adopt an intermediate reading of “workers engaged in commerce” based on the FLSA cases, thus widening the exception beyond the Tenney reading but applying the FAA to the great majority of employment. Finally, they may find that Congress in the last several years has modified the exception in the 1925 Act to give it greater breadth. While none of these is a totally satisfying outcome, one hopes the Court will avoid the first option. To adopt inconsistent readings of “commerce” is sufficiently discomforting so that it ought to be done only if the text or other clear Congressional statement requires that result.

D. Does the FAA Exception Really Matter?

If an employment dispute is not subject to binding arbitration under federal law, but is subject to binding arbitration under state law, the end result is the same. Section 1 of the Uniform Arbitration Act provides:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].

More than thirty states have now enacted this statute, and the majority of them have enacted it without any change to the language of this section. Since the law of so many states is now as receptive to arbitration as is federal law, does the Federal Arbitration Act’s section 1 exception for worker contracts really merit much attention? I believe that it most certainly does.

First, to the extent that arbitrability is made a matter of federal law, states lose the opportunity to decide a policy issue about which

180. See supra notes 160-62.
181. See Abrams, supra note 171, at 556-60.
182. 173 UNIF. ARB. ACT. § 1, 7 U.L.A 6 (1955) (emphasis in original).
183. See id. at 6-10.
184. See id.
they have traditionally had the last say. At one time or another, Arizona, Arkansas, Idaho, and Kansas have excepted employment contracts from the application of this statute. The two Carolinas provide that the statute applies to employer-employee contracts only if the contracts specifically provide so, and Missouri has excepted contracts of adhesion from operation of the Act. As the Supreme Court made clear in *J.I. Case Co. v. NLRB* many years ago, most individual contracts of employment as well as contracts of hire are created under state contract law. Suits for breach of these agreements have been decided by applying that state law. The state law respecting employment contracts has been changing in many ways in recent years. If a state wishes to keep its courts actively involved in fashioning the details of those changes, it should be allowed to do so.

Second, just because both a federal and a state forum may have policies favoring arbitration does not mean that they will be administered in the same way. A state court asked to send a case to an arbitral forum may insist that the moving party demonstrate the regularity of procedures in that forum by more than a citation to a body of rules. Professor Alleyne has demonstrated that the Supreme Court's acceptance of the New York Stock Exchange rules simply on their face may have reflected a less than adequate understanding of how those rules work in practice. At this point, the position the federal courts will take as to the adequacy of an arbitration forum before entrusting statutory rights to its care is still being worked out. Surely, state courts are entitled to participate in

192. See id. at 340 (explaining that individual employment contracts are not within the scope of the NLRA).
that process, given the number of states that have enacted their own
discrimination laws.

IV. SETTING STANDARDS FOR DECIDING WHAT AGREEMENTS
TO ARBITRATE ARE ENFORCEABLE

A. Introduction

Now that suits to enforce arbitration agreements under *Gilmer*
have become more common, the federal courts have found them-
selves deciding just what questions need to be answered before
granting or denying these requests. This has meant evaluating both
arguments about the content of arbitration clauses, as well as the
circumstances in which some of the alleged agreements have been
made. Several thoughtful opinions focus on whether it is important
that an agreement to arbitrate be knowingly made, and just what
level of awareness might be required. Others have asked traditional
contract law questions about whether consideration has been given
in exchange for a promise to arbitrate. At least one case, *Stirlen v.
Supercuts, Inc.*,¹⁹⁵ raises the question of whether the FAA pre-
cludes applying general state standards of unconscionability to a
contract to arbitrate.¹⁹⁶ The most significant recent developments
concern how far, if at all, a court should inquire into the adequacy
of the proposed arbitration forum to handle a particular claim. A
central point in all these cases, although sometimes implied rather
than express, is that the threshold issue of arbitrability remains a
matter for judicial scrutiny.¹⁹⁷

B. "Knowing" Waiver of Procedural Rights

In *Prudential Insurance Co. of America v. Lai*,¹⁹⁸ the Ninth Cir-
cuit held that a waiver of access to a judicial forum for enforcement
of Title VII statutory rights must be a knowing waiver.¹⁹⁹ *Lai*
involved a registration form used by members of the National Asso-
ciation of Securities Dealers ("NASD"), familiarly known as the U-4.²⁰⁰ The U-4 form is similar to the one executed by the plaintiff in

¹⁹⁵. 12 *INDIVIDUAL EMPLOYMENT RIGHTS CASES* 684 (1997).
¹⁹⁶. See id. at 695-96.
there is no special standard governing review of district court's arbitration decisions).
¹⁹⁸. 42 F.3d 1299 (9th Cir. 1994).
¹⁹⁹. See id. at 1305.
²⁰⁰. See id. at 1301.

http://scholarlycommons.law.hofstra.edu/hlelj/vol15/iss2/2
Gilmer, but varies slightly in wording. In Lai, the employees had signed the form after being told it was necessary in order for them to take a “test” that was required before they could work for the employer. They were not given the NASD manual that would have explained the meaning and effect of the arbitration clause. Even had they received the manual, the court indicated, it was unlikely that the workers would have recognized the possibility that they were agreeing to arbitrate employment rights. In many contexts, we accept the notion that a person who executes a document without reading it, takes the risk that the document includes things not specifically brought to the signer’s attention. In the case of Title VII, however, the “public policy of protecting victims of sexual discrimination and harassment through the provision of Title VII and analogous state statutes” is sufficiently strong to require that any waiver of a substantive or a procedural right under that statute be conscious and deliberate. That public policy, the court reasoned, “is at least as strong as our public policy in favor of arbitration.” The Ninth Circuit reiterated this position in Renteria v. Prudential Insurance Co.

The Seventh Circuit has said that it agrees with this position so far as “substantive” provisions of Title VII are concerned, but declined to take a position on waivers of a judicial forum. Some district courts have rejected Lai, insisting that the usual principle that one is bound by what he or she signs is as applicable to waivers of judicial forum for Title VII as to waivers of any other right.

The fidelity of the Lai opinion to Justice White’s opinion in Gilmer, and the calculated wordings of legislative memoranda accom-

201. See id.
202. See id.
203. See id. at 1305.
204. Lai, 42 F.3d at 1305.
205. Id. at 1305.
206. 113 F.3d 1104 (9th Cir. 1997).
panying the 1991 Civil Rights Acts, memoranda from both sides of the aisle, strongly suggest that the Ninth Circuit's attitude should prevail.209 Those opinions do not, after all, require that a worker who signs an arbitration agreement need to know all that much, only that the agreement extends to employment rights. There is a tradition in much of labor and employment law that waiver of public rights is either not allowed at all210 or is to be done only under strict safeguards.211 That tradition of discouraging waiver has, as the Seventh Circuit has noted, been applied ordinarily to substantive rather than adjective law rights.212

Is there reason to extend it as the Ninth Circuit has done?213 At least two reasons exist for thinking this is proper. First, given the importance Congress has attached to making jury trials available to workers who suffer from discrimination, it would not go too far to require so basic a level of awareness.214 Second, employment law, particularly discrimination law, is an area in which adjective law, rules of procedure, concepts of burdens of persuasion and the like are very tightly interwoven with the substantive rights involved.215 Consider the 1991 Civil Rights Act.216 Some of the most hard-fought provisions in that statute concern the order and allocation of burdens of proof.217 A court asked to entrust a substantive right under such a statute to a forum that has traditionally paid less attention to the niceties of legal procedure and rules of evidence may therefore sensibly require that the agreement to accept the arbitrator's judgment be made with at least some level of awareness of what one is doing.218

The approach taken in Lai is also consistent with traditional contract law principles.219 It is true, as the district court opinions declining to follow Lai point out, that the law ordinarily holds peo-

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209. See supra note 194 and accompanying text.
212. See Daniels v. Pipe Fitters Ass'n, 113 F.3d 685 (7th Cir. 1997).
213. See Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994).
214. See id. at 1305.
215. See id.
218. See Pipe Fitters, 112 F.3d at 685; Lai, 42 F.3d at 1299.
ple to the terms of contract memorials they sign, even if they do not read them.220 It is also true that individuals are held to the reason-
able expectation that a party would have after reading the docu-
ment.221 If one views the Rules of the National Association of
Securities Dealers as incorporated by reference into the registration
form and treat a registrant as having read those rules, then what?
The Ninth Circuit very sensibly suggests applying the familiar doc-
trine that one reads a written contract as a whole.222 The thrust of
the NASD document predominantly focuses on matters dealing
with selling stocks, bonds and other financial instruments.223 To
read the disputes settlement clauses as having to do with that class
of disputes is perfect in keeping with traditional contract interpreta-
tion principles. Suppose, however, that one could reasonably argue
that the rule on dispute settlement could be read two ways: either
as limited to disputes about the sales of securities or as covering a
broader range of disputes. What then?

The Ninth Circuit's approach is still in keeping with the traditions
of contract law. When a party is required to accept the terms of a
contract on a strict "take it or leave it" basis, we speak of the con-
tract as a contract of adhesion.224 The terms of such a contract are
regularly construed against the party who proffers it, so that when
there are competing reasonable readings, the reading favoring the
position of the party who did not draft the agreement is the one to
be selected.225 This is particularly the case when the contract cre-
ates an ongoing relationship.226 Nor do we expect the bulk of out-
of-work job applicants to ask all that many questions about the
quirks of the forms used by the particular place that may be able to
provide the job he or she intensely needs.

221. See Restatement (Second) of Contracts § 211.
222. See Lai, 42 F.3d at 1302.
223. See NASD Manual.
224. See Restatement (Second) of Contracts § 208.
225. See Restatement (Second) of Contracts § 206.
C. Interpreting the Scope of the Promise To Arbitrate

In *Farrand v. Lutheran Brotherhood*, the Seventh Circuit found that the language of the U-4 arbitration clause did not cover employment disputes, largely because of an inartful placing of a colon. The Eleventh Circuit disagreed with this interpretation of the language, but the Ninth Circuit agreed, as another basis for its decision in *Lai*. Given the context in which the arbitration provision appears in the Rules of the NASD, the Seventh Circuit reasoned, it must be interpreted to apply to securities matters, not employment disputes. The language has since been modified to refer explicitly to employment matters.

D. Lack of Consideration

A promise to arbitrate future disputes, like any other promise, is enforceable only if there is consideration given in exchange for it. That is a familiar principle of state contract law, and to the extent that the FAA does not displace state law, the ordinary law of the state governs an agreement to arbitrate. Analyzing consideration issues may be more or less difficult depending on where the alleged promise is found. Arbitration clauses appear in a number of different places, including employee handbooks, application forms, broker registration forms, as well as documents that purport to be employment contracts. In the case of the broker registration form, consideration is easy enough to find. The securities exchange or dealer association involved gives the registrant access to trading privileges in return for the registrant's bundle of promises to abide by its rules. In two recent cases, however, one involving a handbook and one an application form, consideration for the employee's
alleged promise was found lacking. The claimant in *Gibson v. Neighborhood Health Clinics, Inc.* was hired on December 22, 1994, and told to report for work on January 9, 1995. When she arrived for her first day of work, she was given a stack of papers to execute, including one called an “Associates Understanding.” This Understanding included the following language of waiver:

> I agree to the grievance and arbitration provisions set forth in the Associates Policy Manual. I understand that I am waiving my right to a trial, including a jury trial, in state or federal court of the class of disputes specifically set forth in the grievance and arbitration provisions on pages [eight thru ten] of the Manual.

The “Manual” referred to was an “Associates Policy Manual,” a type of employee handbook. It included a disclaimer of the “reservation of rights” type:

> [The employer] reserves the right at any time to modify, revoke, suspend, terminate or change any or all terms of this Manual, plans, policies, or procedures, in whole or in part, without having to consult or reach agreement with anyone, at any time, with or without notice.

> ... While [the employer] intends to abide by the policies and procedures described in this Manual, it does not constitute a contract nor promise of any kind. Therefore, employees can be terminated at any time, with or without notice.

Given this disclaimer, the court reasoned, there was simply no promise made by the employer that could serve as consideration for the promise by the employee to use arbitration procedures rather than litigate. Nor could the employer claim the promise to hire served as consideration, since the employee had been hired weeks before she executed the understanding. A similar decision was

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237. 121 F.3d at 1126.

238. *See id.* at 1128.

239. *See id.*

240. *Id.*

241. *See Gibson,* 121 F.3d at 1126.

242. *Id.* at 1128 (alterations in original).

243. *See id.* at 1131.

244. *See id.* at 1131.
reached on much the same facts in *Stewart v. Fairlane Community Mental Health Centre*.245

The potential employer in *Brooks v. Circuit City Stores, Inc.*246 positioned its "Dispute Resolution Agreement" in the application for employment.247 When the claimant sued for violation of the Civil Rights Act of 1866248 to protest an alleged discriminatory refusal to hire her for a full time position, the defendant sought to have the matter referred to arbitration.249 The Court agreed with the claimant's argument that no consideration was given for her promise to arbitrate.250 The potential employer urged that considering her application was consideration.251 The court found that was not sufficient, since the defendant in no way promised to consider the application if the applicant agreed to arbitration.252 Thus, at the time claimant signed the application, including the "agreement" to arbitrate, no consideration was given in exchange.253 Several courts have held that a promise to consider an applicant could serve as consideration, if given in exchange for the arbitration promise.254

**E. State Law Unconscionability Principles**

*Stirlen v. Supercuts,*255 like most *Gilmer*-connected cases thus far, involved an employer's motion to compel an ex-employee to arbitrate a wrongful discharge claim based in part on statutory grounds, in this instance, a provision of the state labor code.256 The California Court of Appeals affirmed the trial court's denial of the motion.257 The court did so because it found the arbitration clause to be "unconscionable" under state law.258 The doctrine of uncon-

247. See id. at 1839.
249. See Brooks, 73 Fair Empl. Prac. Cas. (BNA) at 1838.
250. See id. at 1841.
251. See id.
252. See id.
253. See id.
254. See id. at 1839.
256. See id. at 701.
257. See id. at 700-01.
258. See id.
scionability is statutory in California, under a provision borrowed from the Uniform Commercial Code.\textsuperscript{259} The court found this arbitration agreement to be substantively unconscionable because it was unduly one-sided; the employer retained the ability to pursue remedies against the employee in court, but could, at its option, require the employee to pursue any of his claims solely through arbitration.\textsuperscript{260} The arbitration agreement also restricted the remedies available to the employee in arbitration.\textsuperscript{261}

Whether the California court was correct in finding that the FAA does not preempt state law depends on one’s reading of the Supreme Court’s 1996 decision in \textit{Doctor’s Associates, Inc. v. Casarotto}.\textsuperscript{262} There, the Court reversed a Montana decision that refused to enforce an arbitration clause.\textsuperscript{263} The state court had found the provision to be unconscionable because the clause failed to conform to a state statute requiring arbitration clauses to be especially prominent.\textsuperscript{264} Is the situation different in \textit{Stirlen} because the California unconscionability provision applies to all contracts, rather than to arbitration agreements only?\textsuperscript{265} The language of \textit{First Options} calls for a “yes” answer, but one could argue that so specific an application of the unconscionability doctrine to an arbitration agreement is in practice very much like the statute in \textit{Doctor’s Associates}.

\textbf{F. Adequacy of the Alternative Forum}

\textit{Cole v. Burns International Security Services}\textsuperscript{266} addresses a different set of concerns: the adequacy of the procedures that would govern the arbitration, and whether the arbitral forum is available to claimants at an affordable cost.\textsuperscript{267} The court held the arbitration clause in the employment agreement enforceable, but only after

\footnotesize{\textsuperscript{259} See \textsc{Cal. Civ. Code} § 1670.5 (West 1994).  
\textsuperscript{260} See \textit{Stirlen}, 12 Individual Employment Rights Cases at 695.  
\textsuperscript{261} See \textit{id}. at 694. The employer also attempted to waive this restriction, but its waiver was found ineffective. See \textit{id}.  
\textsuperscript{262} 517 U.S. 681 (1996).  
\textsuperscript{263} See \textit{id}. at 689.  
\textsuperscript{264} See \textit{id}. at 687-88; see also \textsc{Mont. Code Ann.} § 27-5-114(4) (stating that notice of arbitration must be typed on the first page of the contract).  
\textsuperscript{266} 105 F.3d 1465 (D.C. Cir. 1997).  
\textsuperscript{267} See \textit{id}. at 1481-82.}
interpreting one of the rules governing the arbitration to require
that employees cannot be required to pay for arbitration "in order
to pursue their statutory rights." The opinion was written by
Judge Harry Edwards, himself an arbitrator, under collective
bargaining agreements before being named to the bench, as well as
a well-known teacher of labor law and editor of coursebooks in the
field. In an early paragraph of the opinion, Judge Edwards states:
"We do not read Gilmer as mandating the enforcement of all
mandatory agreements to arbitrate statutory claims; rather, we read
Gilmer as requiring the enforcement of arbitration agreements that
do not undermine the relevant statutory scheme. The agreement in
this case meets that standard."

In order to decide whether the arbitration agreement met "that
standard," the majority opinion in Cole examines the rules under
which the matter would be heard; in this case the National Rules for
the Resolution of Employment Disputes issued by the American
Arbitration Association in 1996. The opinion emphasizes several
aspects of the rules; providing for such discovery as the arbitrator
considers "necessary to a full and fair exploration of the issues . . . ."
The opinion must be in writing and signed by a majority of
the arbitrators. The arbitrator has broad power to grant relief.
Then the opinion turns to the matter of allocating the costs of arbi-
tration. The AAA Rules provide for the parties to share the
expenses of the proceeding (apart from the arbitrator's fee), for the
initiating party to pay a $500 filing fee, which the arbitrator may
later allocate or the AAA may waive. The Rules are silent on
the allocation of the arbitrator's fee, which, Judge Edwards notes,
may be expected to run between $500 and $1,000 a day, but which
may be substantially more. The opinion poses the question:

268. Id. at 1468 (noting as well that employers will bear the cost of the arbitrator's fee).
269. See id. at 1466.
270. Id. at 1468 (emphasis in original).
271. See Cole, 105 F.3d at 1480.
272. Id.
273. See id.
274. See id. ("The arbitrator may grant any remedy or relief that the arbitrator deems
just and equitable . . . .")
275. See id. at 1481.
276. See id.
277. See Cole, 105 F.3d at 1480-81.
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If an employee . . . is required to pay arbitrators' fees ranging from $500 to $1,000 per day or more . . . is it likely that he will not be able to pursue his statutory claims? We think not.

Arbitration will occur in [Cole] only because it has been mandated by the employer as a condition of employment. Absent this requirement, the employee would be free to pursue his claims in court without having to pay for the services of a judge. In such a circumstance—where arbitration has been imposed by the employer and occurs only at the option of the employer—arbitrators' fees should be borne solely by the employer.278

Then, having supplied the gap in the AAA Rules on arbitrator fees, the court orders the claimant to use the private forum.279 A district court in Colorado has agreed with the Cole majority on the fee issue.280

A district court judge in Massachusetts has allowed a plaintiff to pursue a different line of attack: an argument based on allegations about an arbitral forum's systematic bias.281 The claimant in Rosenberg v. Merrill Lynch, Inc., sought relief for both age discrimination (under the ADEA) and gender discrimination (under Title VII).282 The former employer moved to stay the action and order arbitration, on the basis of a U-4 clause.283 Claimant challenged the motion on several grounds, including one based on the fact that an overwhelming majority of securities industry arbitrators are middle-aged to senior white males.284 The court, noting that this very fact had worried the GAO in its 1994 review of this arbitration system,285 denied the defendant's motion to require arbitration pending further development on this and other issues.286 Judge Gertner also expresses concern over whether these arbitrators lack the power to award the expanded relief provided by the 1991 Civil

278. Id. at 1484-85.
279. See id. at 1485.
282. See id. at 191.
283. See id. at 191-92.
284. See id. at 201.
285. See id.
286. See id. at 203.
Rights Act, or to entertain claims under some of that Act’s liability provisions. The question of adequate remedies is an important one. In many, very likely most cases involving an individual claimant, the remedy sought is likely to be monetary, and sometimes, a reinstatement order. Such a remedy requires no ongoing supervision. In cases involving groups, on the other hand, many Title VII and ADEA remedial orders have called for ongoing monitoring of hiring and promotion practices. The typical arbitrator is not set or is even ambivalent to provide that sort of long-term supervision. This creates the possibility that a federal district court might find itself asked to enforce an arbitrator’s award over a period of time, as circumstances change in the employer’s business. When gaps or ambiguities in the arbitrator’s award appear, what is the court to do? This suggests that the ability of a given arbitral forum to provide ongoing relief may be a significant factor in deciding whether arbitration is appropriate, and that courts examining the question may find the likelihood of the need for retained jurisdiction a reason not to order arbitration. One possible solution to the problem, in some cases at least, may be a change in the attitude of arbitrators about retaining jurisdiction. Professor John Dunsford, a former president of the National Academy of Arbitrators, has recently suggested in an extensive article that the time has come for arbitrators dealing with labor grievances to adopt the routine practice of retaining jurisdiction for the purpose of being available to clarify awards. He reasons that section 6C of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, which calls for “definite” and “certain” awards should not prevent routine retention of jurisdiction for this purpose. Not to be available to clarify an award can itself foster further disputes between parties and delay enforcement of an award. To the extent that Professor Dunsford’s attitude prevails in the employment arbitration community, this objection to arbitration loses some of its force.

289. See id. at 204-05.
290. See id. at 249-50.
291. See id. at 203.
Some courts have reached the same result without benefit of an explicit provision in a labor arbitrator’s award retaining jurisdiction.292

Is this concern with the costs, procedures, and remedies in arbitration appropriate? Yes, for reasons similar to those that support the Ninth Circuit’s decision; agreements to arbitrate future employment disputes must be knowing.293 First, there is the reasonable expectation of the employee who signs the agreement. Saying “yes” to arbitration in no way implies consent to a loss of one’s substantive rights. We expect appraisers appointed to resolve disputes between insurers and insureds about the value of destroyed property to apply the same principles that a court would.294 The same expectation ought reasonably to apply in the employment context.

But what if employer and employee knowingly agreed to decide future disagreements by flipping a coin or throwing darts at a board? It is this point that seems more important to the majority in Cole. Their concern for not undermining the statutory scheme is fully consistent with the strong tradition disfavoring waiver of statutory rights given employees vis-à-vis their employers by the Congress. A half century ago, the Court identified the reasons for this in Brooklyn Savings Bank v. O’Neil,295 a case involving a worker’s waiver of liquidated damages for a violation of the FLSA by his employer. The “unequal bargaining power as between employer and employee” led Congress to enact minimum wage protection.296 The Court reasoned that “the same policy considerations which forbid waiver of the basic minimum . . . also prohibit waiver of the employee’s right to liquidated damages.”297 The Court also empha-

292. See e.g., Brotherhood of Teamsters Local 631 v. Silver State Disposal Serv., Inc., 109 F.3d 1409 (9th Cir. 1997). The court rejects arguments based on the language of the Code of Professional Responsibility, and discusses cases from the Third Circuit applying Pennsylvania law that would imply authority on the part of an arbitrator to complete an incomplete award even over the objection of a party. See id. at 1412.
293. See Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 761 (9th Cir. 1997).
294. See generally Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1487 (D.C. Cir. 1997) (stating that “[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum.” (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991))).
296. Id. at 706.
297. Id. at 707.
sizes "the deterren[ce] effect which Congress plainly intended" the damages provision to have.298 Finally, the Court reasoned that "[a]n employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims . . . than are those of his competitor."299

G. Summary

These cases, taken as a group, demonstrate that at least some federal courts are willing to take seriously the concerns about arbitration forum adequacy that Justice Powell expressed in Gardner-Denver.300 A claimant who mounts more than the generalized objections made in Gilmer, therefore, has a good chance of getting a full hearing on specific charges that he did not consent to arbitration knowingly or willingly, or that the proposed arbitration forum is inadequate to provide relief, either because the forum lacks sufficient procedures or remedial powers, or because its panel of arbitrators is flawed by lack of assurances of competence or because the panel is itself the product of discriminatory practices.

V. Deciding Whether To Enforce Arbitration Awards

Gilmer involved whether a federal court should order an unwilling party to go forward with arbitration.301 This issue of "arbitrability" was also the focus of the Gilmer dissent,302 and of the cases discussed in sections III and IV above. Once an arbitration is concluded, new issues arise: Can a party who is pleased with the outcome have the assistance of the courts in having the award enforced? Can a party who is dissatisfied with the outcome of the arbitration have the award modified or set aside? Assuming that either can persuade a court to examine the procedures used in the arbitration or the merits of the arbitrator’s decision, what standard of review is to be used? While these issues are different from whether to order arbitration in the first place, many of the same concerns are present.

298. Id. at 710.
299. Id.
302. See id. at 36.
A necessary starting point, of course, is the statute itself. Section 9 gives the federal courts jurisdiction to "confirm" awards. Sections 10 and 11 provide for vacating or correcting awards. It is immediately obvious that the words of the statute call for the courts to play a limited role in cases that have gone to arbitration. It is equally obvious that these words do not require federal district courts to roll over and play dead. Language, such as "undue means" and "other misbehavior by which the rights of any party have been prejudiced," is elastic enough to permit the development of meaningful minimum standards of fairness.

304. See id. § 10. Section 10 provides in part:
(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
(1) Where the award was procured by corruption, fraud, or undue means.
(2) Where there was evident partiality or corruption in the arbitrators, or either of them.
(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id.

305. See id. § 11. Section 11 states:
In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —
(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Id.

306. See id. §§ 9-11.
307. See id.
A. Types of Standards of Review

The examination of the work of one tribunal by another takes many different forms and employs many different standards. The most common instance is review of the work of a lower court by another court that ranks higher — what we typically refer to as "appellate review." The term "review" is typically used in this sort of hierarchical setting, and thus may seem to imply a "higher tribunal-lower tribunal" relationship. That is obviously not the case here, nor is it the case in all other settings. Many statutes call for the courts to review the quasi-judicial work of administrative agencies.\textsuperscript{309} The work of private judges — the class to which arbitrators belong — has also been subject to court examination for many years.\textsuperscript{310} The 1943 standard fire insurance form,\textsuperscript{311} for example, provides that if an insurer and insured cannot agree about the value of a loss the insured has suffered, either can demand that the issue be settled by an appraisal procedure chaired by a disinterested umpire. Challenges to the work of these panels have been relatively rare, but also regular.\textsuperscript{312} Thus when one speaks of "review" of arbitration awards, that should not be read to imply a "higher-lower" relationship within a single system of tribunals. Arbitrator jurisdiction exists in these employment law cases by virtue of agreement, not because of grant of public power. The term is so commonly used, however, that it seems sensible to use it, but with the caution that this examination of the arbitrator's work has a different function from the examination of a lower court's work.

The answers to two major questions define the scope of review: (1) what segments of the first decision-making are to be examined? and (2) how critically does the reviewing court inquire into whether the first tribunal decided the case properly?

Neither question is all that easy. Take the first: What segments of the prior decision-making are to be reviewed? How ought we go

\textsuperscript{309} See, e.g., 29 U.S.C. § 160(f) (1994) (providing that "[a]ny person aggrieved by a final order of the [National Labor Relations] Board . . . may obtain a review . . . .")


\textsuperscript{311} See, e.g., Massey v. Farmers Ins. Group, 837 P.2d 880, 885 (Okla. 1992) (stating the appraisal procedure results were not binding on objecting party under state constitutional provision); Jefferson Ins. Co. of N.Y. v. Superior Court of Alameda County, 475 P.2d 880, 883 (Cal. 1970) (refusing to enforce an award because of appraiser's misconception of applicable law).

\textsuperscript{312} See id.
about deciding that? It is often useful to think of challenges to the work of that first decider of the case — whether lower court, administrative agency, or arbitrator — as focusing on three different aspects of the case: procedure, fact finding, and interpretation and application of the law. By subdividing a case into such components, one makes it easier to identify appropriate questions. In the case of "procedural" matters, for instance, questions relating to fairness and to the likelihood that the decision-maker had enough evidence in hand to make a sensible decision emerge fairly quickly as right things to ask. Anyone with experience of the legal system, however, knows that such analytical separation is artificial. Deciding whether to characterize a relationship as "employment" or "independent contractorship" is so much a mixture of fact-finding and law-applying that calling it a "question of law" versus a "question of fact" is a largely arbitrary matter. The term "procedure" is also misleading, for it ought to cover not just the technical rules about the order in which proof is to be presented or what evidence is admissible, but also questions about the adequacy of the forum as an unbiased decision-maker. Nonetheless, using the three categories is likely to be helpful more often than harmful, and it is so conventional that most lawyers and legislators probably think in those terms. Often, identifying the nature of what is challenged even more precisely than typing it as "law" or "fact" determines how deferential the reviewing court should be. In the famous Chevron decision, to take probably the best known example, the Supreme Court held that if an administrative agency is given responsibility to administer a statute, and if that statute is silent or ambiguous on an issue then "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

The second question — how searching a review should be — is no easier. A reviewing court (or a legislature fixing a norm) has a large number of standards of review from which to choose. It may choose one for procedural matters, and another for questions of fact. When examining fact findings, for example, a reviewing court usually applies "presumptions of correctness" of one sort or another. The stronger the presumption of correctness, the

greater the chance of affirming the prior decision.\textsuperscript{315} If the question is whether proper procedures were followed, a reviewing court might ask only whether the prior hearing met minimal standards of fair play,\textsuperscript{316} or might instead ask whether a procedural error could have had any significant effect on the outcome of the case.\textsuperscript{317} In \textit{Gilbert v. Homar},\textsuperscript{318} the Supreme Court recently set out three factors to be considered in deciding what constitutes due process in cases involving adverse action against public employees: (1) the private interest involved; (2) the risk of a mistaken deprivation of that interest, and the extent to which added or alternative procedures might reduce that risk; and (3) the government interest.\textsuperscript{319}

A useful starting place may be to draw a line between \textit{de novo} review, in which the reviewing court essentially starts all over to try the matter, and review to correct error. In \textit{de novo} review, what has happened in the first hearing of the case may matter very little. That earlier proceeding need not be totally disregarded, however. In a famous footnote in \textit{Gardner-Denver},\textsuperscript{320} for example, Justice Powell suggested that what a collective bargaining arbitrator had done might well be admitted in evidence, and entitled to weight depending on a number of factors, including, one gathers, the apparent skill of the arbitrator in handling the issues in the case.\textsuperscript{321} Because the arguments for true \textit{de novo} review are so distinctive in nature, and because some of those arguments are affected by the way in which other types of review might operate, discussion of these is postponed for the next section.

\textsuperscript{315} See, e.g., 29 U.S.C. § 160(e) (1994) (stating that "[t]he findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive"). \textit{But see} TENN. CODE ANN. § 50-6-225(e)(2) (1996) (contrasting the NLRB provision of a state workers’ compensation law calling for more searching review, by stating "[r]eview of findings of fact by the trial court shall be \textit{de novo} upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise").

\textsuperscript{316} See, e.g., Palmer v. Merluzzi, 868 F.2d 90, 93-94 (3d Cir. 1989) (discussing how much process is due before a public high school student may be suspended from class for 10 days and from playing football for 60 days). By applying Goss v. Lopez, 419 U.S. 565 (1975), the court found an informal interview satisfies adequate notice. \textit{See Palmer}, 868 F.2d at 95, 96.

\textsuperscript{317} This is much like the "harmless error" standard of criminal litigation.

\textsuperscript{318} 65 U.S.L.W. 4442 (U.S. June 9, 1997).

\textsuperscript{319} \textit{See id.} at 4444.


\textsuperscript{321} \textit{See id.} at 60 & n.21.
Review for error, on the other hand, looks more or less search-
ingly into what happened in the first tribunal.322 It is at this point
that presumptions of correctness and similar concepts come into
play.323 The verbal changes that can be rung on the contrapuntal
themes of the need for substantial justice and the desire for quick
and affordable decision-making seem almost infinite in number.324
For our purposes here, however, it is wise to recognize that stan-
dards that begin as different often merge into one another.325 One
Tennessee court recently observed, for example, that "[o]ver time,
the standards of ‘fairly debatable,’ ‘rational basis,’ and ‘arbitrary
and capricious’ have been used interchangeably and have come to
hold the same meaning."326 It thus makes sense not to concentrate
on a particular verbal formulation so much as on whether a rela-
tively “narrow” or a relatively “extensive” review is appropriate.327

B. Arguments for General De Novo Review on All Issues

Critics of Gilmer sometimes suggest that the harm done by that
decision can be undone in part by providing for de novo review of
arbitrators’ decisions.328 Opponents of de novo review point out,
however, that providing this “second bite at the apple” comes with
a serious price tag.329 The loss of finality not only increases out-of-
pocket expenses, it means delay, and very well could mean that
counsel will be tempted to treat the arbitration proceeding as a spe-
cialized form of discovery.330

It seems fair to predict that the Supreme Court is likely to reject
many of the reasons advanced for general de novo review. Two
principal arguments advanced on its behalf are essentially the same
as the arguments rejected in the Gilmer opinion itself: (1) discrimi-
nation cases are too complex to be finally disposed of through the
inadequate procedures of arbitration, and (2) widespread use of
arbitration in employment law matters will stifle the growth of the

323. See id.
324. See id.
325. See id.
326. Id. (quoting McCallen v. City of Memphis, 786 S.W.2d 633, 641 (Tenn. 1990)).
327. See Carter, 928 S.W.2d at 40.
328. See Douglas E. Abrams, Arbitrability in Recent Federal Civil Rights Legislation: The
329. See id. at 580.
330. See id. at 565-67.
The third argument is that made by the *Gilmer* dissent: whatever the underlying merits of arbitration, Congress simply has not authorized its use in the employment law area. Whether that may attract additional Justices when squarely presented is an open question, but the tendency of the present Court to strongly favor alternative dispute resolution leads this writer to believe, as the prior discussion indicates, that the Court is likely to reject this argument also. A fourth argument, probably best captured in an article by Professor Abrams, is that while the Congress has decided to authorize arbitrators to consider statutory issues, the Congress has meant arbitration to be an added forum, not a substitute forum for discrimination matters. There is, however, a chance that a more limited argument, one made by Professors Malin and Landenson, for *de novo* review limited to questions of law, might ultimately attract support either in the courts or in Congress. It is discussed below.

**C. Examining the Adequacy of Forum and Procedures**

If one looks at section 10 of the Federal Arbitration Act, it seems clear that the federal courts could reasonably develop a relatively stringent standard of review for procedural irregularity. While “corruption” and “fraud” may seem fairly narrow in scope, such terms as “undue means,” “evident partiality” and “other misbehavior by which the rights of any party have been prejudiced” could justify quite extensive review. Certainly this language indicates that the federal court should look carefully at the general adequacy of the forum to accomplish a fair and even-handed result. How far can one reasonably expect the courts to go in this review of the general fairness of the arbitration forum?

Review of arbitration procedure may well depend primarily on two factors: (1) how closely the courts are willing to consider the adequacy-of-forum factors sketched out in Justice White’s opinion

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332. See id. at 41.


336. See id.

337. See id.
in *Gilmer* at the post-arbitration rather than pre-arbitration stage, and (2) how much attention the courts are willing to pay to the development of minimum standards for employment arbitration by the major arbitration agencies.

In approving the order to use arbitration in *Gilmer*, Justice White enumerated briefly a number of aspects of the New York Stock Exchange rules that seemed to promise the rudiments of fair play. He pointed specifically to rules prohibiting biased panels; rules providing for at least rudimentary discovery through “document production, information requests, depositions, and subpoenas”; and a requirement that decisions be public and written and include at the least a summary of the issues and a description of the award. The discussion of the rules is brief, and there have been charges that Justice White and the other members of the *Gilmer* majority read those rules with much too tolerant an eye. Professor Alleyne, for example, points out that the requirement that the “award” be in writing under New York Stock Exchange Rules does not in fact typically result in fully reasoned “opinion” writing. He cites an instance in which a sex discrimination hearing lasted fifty-five days and it was disposed of in an arbitration panel’s one-paragraph opinion. Even though the Court’s cursory treatment of the adequacy of the forum is subject to this criticism, it at least indicates willingness on the part of the Court to entertain objections based on flaws in a particular arbitration process. The opinion also notes that if the arbitration forum fails to measure up to basic standards of fairness, the Federal Arbitration Act provides for review.

The concern of the employment law bar and the arbitrator community about *Gilmer*’s implications led to the formation of the special task force, including representatives of the American Arbitration Association, Federal Mediation and Conciliation Service, National Academy of Arbitrators, National Employment Law-

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339. See id. at 30.
340. See id.
341. Id. at 31.
342. See id. at 31-32.
344. See id. at 414 n.212.
345. See *Gilmer*, 500 U.S. at 25.
yers Association, The Labor and Employment Law Section of the American Bar Association, the American Civil Liberties Union and the Society of Professionals in Dispute Resolution that produced the report mentioned earlier entitled: *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship.* No agreement was reached on one fundamental issue: whether it is appropriate to require an employee to agree to arbitrate future statutory disputes as a condition of getting or keeping a job. Section A of the Protocol simply lays out the principal arguments on both sides and leaves the matter there. Section B states first that an employee must be given a right to counsel. It then commends the practice of some companies in providing for at least part of the cost of that counsel, and that the employee is entitled to access to information that is "reasonably relevant" to the claim, both at the hearing and before. Section C addresses the qualification of arbitrators, insisting that steps must be taken to ensure that the members of an arbitration panel "possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace." Section D deals with judicial review and contains a single sentence: "[t]he arbitrator's award should be final and binding and the scope of review should be limited." Since the issuance of the Protocol, two of the major arbitrator-providing agencies have issued further statements about their own policies and procedures. J.A.M.S./Endispute announced in the spring of 1996 that "it no longer will accept such cases if the arbitration agreements don't allow for full remedies, reasonable discovery, the right to counsel and other safeguards. Remedies must include punitive damages and attorney fees." Soon after, the American Arbitration Association released its *National Rules for the Resolution of Employ-

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347. *See Due Process, supra* note 346, at 37.


349. *See Due Process, supra* note 346, at 38.


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Among other things, AAA Rule Seven states that the arbitrator "shall have the authority to order such discovery . . . as the arbitrator considers necessary to a full and fair exploration of the issues in dispute." Rule Eight calls for a pre-hearing conference, involving the arbitrator and the parties, to help refine the issues to be litigated and explore such procedural matters as special rules of evidence or burdens of proof that may be involved. Rule Fourteen provides for the right of counsel. Rules Twenty-two and Twenty-three govern the admission of evidence, providing the arbitrator with considerable discretion to admit material that might be excludable in court. Rule Thirty-two deals with the nature and content of the award to be made. The award is to be "in writing . . . and shall provide the written reasons for the award unless the parties agree otherwise." The rules go on to say that the arbitrator "may grant any remedy or relief that the arbitrator deems just and equitable, including, but not limited to, any remedy or relief that would have been available to the parties had the matter been heard in court.

What will be the impact of the Protocol and of these and similar rules? One impact has already been mentioned. When the District of Columbia Circuit panel considered the fairness of the AAA Rules, one of the places it turned for guidance was the Protocol. Another possibility is that at the review stage, they will be treated by the federal courts as defining what constitutes the "undue means" referred to in paragraph (1) of section 10 of the FAA, or the "other misbehavior" mentioned in paragraph (3). A strong argument can be made that if the employment law community — representatives of management interests as well as employee inter-

353. AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (1996) [hereinafter AAA].
355. AAA, supra note 353, at Rule 7.
356. See AAA, supra note 353, at Rule 8.
357. See AAA, supra note 353, at Rule 14.
358. See AAA, supra note 353, at Rules 22, 23.
359. See AAA, supra note 353, at Rule 22.
360. AAA, supra note 353, at Rule 22.
361. AAA, supra note 353, at Rule 22.
364. See id. § 10(a)(3).
have reached agreement on these procedural matters, that this ought to guide the courts in deciding what are the minimum standards that an arbitration forum should meet in order for that forum's award to be entitled to enforcement. If, for example, an arbitration clause forbids an arbitrator to ask for or examine any document the employer has labeled "confidential," such a drastic departure from what the AAA Rules call for should probably lead to a willingness on the part of the court to overturn what the arbitration panel has done.

This does not mean, however, that the court should overturn an arbitrator's decision simply because the arbitrator has admitted or excluded some bit of evidence the court would treat differently. Elsewhere the author has argued, for example, that arbitrators ought not to think themselves totally bound to follow the Supreme Court's decision in McKennon v. Nashville Banner Publishing Co., which instructs the federal courts to admit so-called "after-acquired" evidence that an employee who has been fired for a legally wrong reason (age discrimination in that case) has also been guilty of other misconduct that would legally justify firing her. That evidence is to be used not to excuse the employer entirely, but rather to decide how generous a remedy is appropriate. The author suggests that in most cases, an arbitrator dealing with a statutory rights case will want to reach the same result as a court would reach, but that there are at least two reasons why a private arbitrator might reject "after-acquired evidence" when a court would accept it. The first reason is limits on the arbitrator's powers contained in the submission of the case. If the parties' submission says that what the arbitrator is to decide is whether the employer's stated reasons for firing the worker were good reasons, then that is what the arbitrator has power to do — not consider some other reason that emerges only in the last moments of the hearing. The second reason is the arbitrator's stake as a creature of the individual contract of employment. Implicit in that contract is a duty of good faith and fair dealing — by which we mean that the parties

367. See McKennon, 513 U.S. at 360.
to the contract owe one another the duty to give the other party a fair chance to earn the benefits of that contract. An arbitrator could, in an extreme case, conclude that for an employer to fire a worker on a "trumped up" charge and then start looking for a good reason to justify that discharge is so inherently unfair that she ought not to consider the results of that late-in-the-day investigation, as a matter of basic state contract law. What is required, then, is not that an arbitration panel be identical to a court in structure or procedures, but rather that it meet the emerging community standards of what constitutes due process for employment law arbitration.

D. Examination for Errors in Fact Finding

Unless the Court or the Congress decides to opt for de novo review, it seems highly unlikely that courts asked to enforce awards will be willing to re-weigh evidence and decide whether the arbitrator was correct in determining the facts of a case. The initial fact finder enjoys advantages, such as seeing the witnesses, for example, and enjoying at least some opportunity to seek clarification of a muttered answer or a barely legible document, that reviewing courts regularly defer to that first sifter of the evidence. This is typically true of the review of lower court decisions just as it is of arbitrator decisions.

The more serious problem is about evidence that is not submitted or findings of fact that are not made. Suppose, for instance, that an arbitrator finds that failing performance would justify a discharge and states that in her opinion, but does not go on to address the issue the fired worker has asked her to address: would the employer have fired the worker but for his age? If, after all, the employee was in court, he would be entitled to judgment if he showed that age was a motivating factor in his firing, even though the employer can demonstrate it would have fired him anyhow for other reasons.

Judge Constance Baker Motley, of the Southern District of New York, recently confronted a case much like this. The claimant urged that his employer had constructively discharged him, by

369. See Restatement (Second) of Contracts § 205a.
changes in work responsibilities, adverse performance reviews, and suggestions he consider part-time work. He resigned because of this allegedly intolerable treatment. This constructive discharge, he argued, violated the ADEA. He brought suit, and the employer obtained a stay in order to have the case arbitrated under securities industry rules. The arbitration panel heard testimony and argument, received more than 157 exhibits, and issued an opinion. The opinion stated the parties' arguments, then stated simply, "[t]he claims of Claimant O. Beirne Chisolm... are dismissed in their entirety." The panel gave neither a statement explaining the basis for this outcome, nor did it make findings of fact or state conclusions of law.

Judge Motley expresses sympathy for the claimant's plight, but nonetheless enforces the arbitration panel's decision. Second Circuit precedent, she notes, clearly states that "arbitrators are not required to provide the rationale for their award. . . . [T]he party challenging the award must show that no proper basis for the award can be inferred from the facts of the case." Here, the record would clearly support a finding that the claimant's working conditions never became so intolerable that he was justified in claiming he was constructively discharged.

The crucial point in Judge Motley's reasoning is the doctrine that an arbitrator is not required to offer a rationale for a decision. If the record would justify a fact finding unfavorable to claimant, that is enough. When the Second Circuit has an opportunity to review this doctrine again, will it hold to it? Here, one sees clearly the artificiality of distinguishing between review of fact finding and review of the adequacy of arbitral procedure. The Due Process Protocol states: "The arbitrator should issue an opinion and award
setting forth... a statement regarding the disposition of any statutory claim(s)." The AAA Rules are even more explicit: "The award shall be in writing... and shall provide the written reasons for the award..." The Dunlop Commission report quoted in the Cole opinion is similar: "[I]f private arbitration is to serve as a legitimate form of private enforcement of public employment law, these systems must provide:... a written opinion by the arbitrator explaining the rationale for the result..." If, as suggested above, the courts find these expressions of consensus on the part of management and employee representatives to be worthy of judicial respect, then "invisible" fact finding will no longer be acceptable. This does not, of course, mean that detailed findings of fact on every possible argument are necessary. In the Chisolm case, for example, a single sentence saying the panel found the claimant had not shown he was constructively discharged would be enough to justify enforcing the award. Insisting on explicit fact-finding would, however, protect him from the possibility that what the panel really concluded was that Chisolm's employer did in fact make his work situation intolerable, and did this because of a belief that he was too old. Taking that into account, he was not entitled to relief anyhow because a non-discriminating employer would have objectively found his work so inferior that he ought to have been fired. As things stand, neither Chisolm, nor his employer, nor the reviewing courts, will ever know why the panel ruled as it did.

Another recent District of Columbia Circuit opinion suggests that there is at least one other basis for refusing to enforce an award based on a particular type of truly egregious fact finding: finding for a party on an issue in the absence of any evidence at all. The claim in Clark Construction Group, Inc. v. Alcon Demolition, Inc., was based on a contract for demolition services, not an employment agreement, but the principle involved should clearly

385. AAA, supra note 353, at Rule 32.
387. See Chisolm, 73 Fair Emp. Prac. Cas. (BNA) at 1628.
The arbitration panel ruled for Alcon on two issues: whether its claim was arbitrable and whether the other party wrongfully terminated the contract on the basis of Alcon's alleged poor performance ("wrongful default termination"). The reviewing panel affirmed on the first issue, but reversed on the second. It applied the principle, mentioned in dicta in Cole, that an arbitrator's decision may be set aside if it is in "manifest disregard of the law," a phrase discussed in more detail below. The panel stated:

However broadly a review for "manifest disregard of the law" sweeps, the parties here agree that there must be some evidence presented to prove a claim. Alcon has pointed to nothing in the record that could be thought "some evidence" of wrongful default termination. . . . We therefore remand to the district court for a determination of whether relevant evidence supportive of the award exists outside of the portions of the record to which appellee has directed our attention. . . .

The decision as such obviously applies only to extreme cases, but the brief memorandum opinion implies two significant points: First, once a party challenging an arbitral decision has overcome any presumption of correctness to which it is entitled, the burden of persuasion is on the proponent of the award to show that the award is nonetheless fairly entitled to enforcement. Second, a proponent may demonstrate that the award ought to be enforced even though the award itself is irregular or incomplete. Both points seem obviously in keeping with sections 10 and 11 of the FAA. The second gives particular weight to the importance of making arbitration outcomes final whenever that is fairly possible.

E. Examination for Errors of Law

Perhaps the greatest difference between the review that an appellate court would give to a lower court opinion and the examination a court will provide for an arbitration decision has to do with errors of law. If a trial court makes an error in interpreting a statute, the

391. See id.
392. See id. at *2.
393. Id. at *2-3.
appellate court simply corrects the mistake and decides whether the mistake is likely to have had any real impact on the outcome of the case. If so, the decision below will be reversed and the matter sent back. In the case of arbitration, however, the fact that an arbitrator misreads the law is not a reason to set her award aside. 395

Several federal circuit courts, applying language in Wilko v. Swan, 396 have suggested that an award might be unenforceable, however, if it is made “in manifest disregard of the law.” 397 Many of these statements are dicta, however, and occur in the course of opinions that order arbitration or uphold an arbitrator’s award. 398 Judge Edwards reviews these briefly in his opinion in Cole. 399

What would such a standard mean? The phrase itself captures the two most likely types of situations in which overturning an award might be the right course. The first is a refusal by an arbitrator to listen to arguments based on one or more provisions of law. Suppose, for example, an arbitrator were to say: “There was good cause here for the discharge; that’s all I need to know, don’t bother me with a lot of claptrap about discrimination.” That would clearly demonstrate that to the arbitrator the requirements of public law are simply not relevant. The second situation is one in which the arbitrator is aware of the requirements of public law, but chooses for some reason not to apply that law. 400 Suppose, for example, that the arbitrator, Ms. A, says something like this:

“I realize that sexual harassment of a male by another male is not treated as unlawful conduct in this Circuit, and that the contract does not call for this employer to do more than abide by the


397. See, e.g., Saxis S.S. Co. v. Multifacs Int’l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967) (stating that in Wilko, the Supreme Court held that an award, based on “manifest disregard” of the law, will not be enforced).

398. See, e.g., Drayer v. Krasner, 572 F.2d 348, 352 (2d Cir. 1978) (denying motions to vacate arbitration award and continuing the award).


400. See, e.g., Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1266-67 (7th Cir. 1992).
law. But that rule is so out of touch with the realities of modern society that I am going to order the employer here to provide relief to this worker who was hounded from his job because that is how the Circuit Court should have interpreted Title VII.\(^{401}\)

Would such an award be enforceable in the individual employment context?

Ms. B, a less forthright arbitrator, could make enforcement more likely by reaching the same outcome, but basing her award on a contractual good faith and fair dealing rationale (taking the defensible view that an employer who permits same-sex sexual harassment has unfairly deprived the harassed worker of the opportunity to earn the benefits of the employment contract). Should enforcement depend on such analytical niceties?

A broader view of what “manifest disregard” means appears in dicta in the majority opinion in the District of Columbia Circuit’s Cole opinion.\(^{402}\) Judge Edwards quotes two passages from the Gilmer opinion, one emphasizing that agreeing to use an arbitral rather than a judicial forum does not imply a waiver of substantive rights; the other stating the judicial review available under the FAA, though limited, is “sufficient to ensure that arbitrators comply with the requirements of the statute’ at issue.”\(^{403}\) From these statements he derives a view that in cases involving “novel or difficult legal issues” a court is “empowered to review an arbitrator’s award to ensure that its resolution of public law issues is correct.”\(^{404}\)

To say that a federal court needs to insist that the arbitrator’s decision be “correct” seems to imply something very like de novo review on issues of law.

Two well-known academicians, Professor Martin Malin, a labor and employment law specialist, and Professor Robert Ladenson, a teacher of philosophy, have likewise urged that there should be de novo review of arbitrators’ decisions on issues of law.\(^{405}\) They base their arguments on their view of what is required by the traditions

\(^{401}\) This could have happened in the Fifth Circuit prior to Oncale v. Sundowner Offshore Servs., 118 S.Ct. 998 (1998).

\(^{402}\) See Cole, 105 F.3d at 1486-87.

\(^{403}\) Id. at 1487 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (1991)).

\(^{404}\) Cole, 105 F.3d at 1487.

of Anglo-American jurisprudence. The basic problem they pose is "why an adjudicator acting under color of legal authority has a moral right to decide issues for others and why persons subject to those decisions have a duty to regard them as binding." After reviewing Supreme Court precedent on the enforcement of arbitration agreements and awards, including the Steelworkers Trilogy and Gilmer, they turn to the jurisprudential literature. Here, they suggest "that all adjudication presupposes ethical constraints grounded in what may be termed a moral minimalist conception of natural law," which they identify with the work of Thomas Hobbes in the 17th Century and Michael Walzer in the 20th. They derive from the work of those writers the proposition that a judge has two fundamental duties. First, she must apply the civil law fairly, so that all of the parties in a given case receive their due under the law. Second, if a case presents an issue of interpretation in regard to a particular law, the judge must make every effort to interpret the law in a way that results in a just decision.

But what is a "just" decision for the purposes of this second duty? The authors discuss three jurisprudential theories that might provide an "appropriate standard of justice": legal realism, as expressed in the work of Karl Llewellyn; the positivist theories of H.L.A. Hart; and the notion of "law as integrity" developed by Ronald Dworkin. They interpret the legal realist view of judging as one that allows a judge full authority to apply her personal view of justice in deciding cases, a position that "raises the questions of why anyone should regard themselves as having a duty to comply with her personal law, and of why anyone should consider the use of governmental power to enforce her personal law as morally justified." The other two views, by contrast, insist that there are sub-

406. See id. at 1190.
407. Id. at 1217.
410. Malin & Ladenson, supra note 405, at 1209.
411. See Malin & Ladenson, supra note 405, at 1209-10.
412. Malin & Ladenson, supra note 405, at 1211.
413. See Malin & Ladenson, supra note 405, at 1212, 1214-17.
stantial constraints on a responsible judge.\textsuperscript{415} Hart insists that a judge's range of choice extends only to issues in a "penumbral zone" of debatable cases that is relatively small compared to the "core [area] of settled meaning" of particular statutes.\textsuperscript{416} The duty to follow precedent thus acts as a moral and ethical constraint to conform to a body of doctrine to which the body politic has consented.\textsuperscript{417} Dworkin is, like the realists, skeptical that the body of precedent is sufficiently determinate to prevent a particular adjudicator from justifying almost any outcome on the basis of decisions that are part of that precedent. Despite that, the authors say, Dworkin finds a sufficient ethical constraint exists because of the judge's duty to consider the whole body of sources of law, including precedent, when deciding a particular case.\textsuperscript{418} The judge must seek to find a "coherent set of principles" in the legal literature of the system against which to test her decision by asking whether her interpretation can conform to a "coherent theory" of the system.\textsuperscript{419}

The authors then ask whether the approaches of Llewellyn, Hart, and Dworkin can supply a reasonable moral basis for the work of an arbitrator and for the use of public authority to enforce an arbitrator's decision.\textsuperscript{420} Here, they compare and contrast the work of arbitrators under collective bargaining agreements and that of arbitrators appointed under individual contracts of employment: "grievance arbitrators" and "employment arbitrators"\textsuperscript{421} for short. For both types, they posit situations in which two arbitrators, acting for different parties, read identical language to justify opposite decisions.\textsuperscript{422} In the case of grievance arbitration, this is adequately justified, the authors reason, by the tenets of legal realism.\textsuperscript{423} What the company and union bargained for was an arbitrator's reading of their contract.\textsuperscript{424} They should be aware that grievance arbitration is a non-precedental system, one in which variant readings of similar

\begin{thebibliography}{99}
\bibitem{415} See Malin & Ladenson, \textit{supra} note 405, at 1214-17.
\bibitem{416} Malin & Ladenson, \textit{supra} note 405, at 1215.
\bibitem{417} See Malin & Ladenson, \textit{supra} note 405, at 1213-15.
\bibitem{418} See Malin & Ladenson, \textit{supra} note 405, at 1215-17.
\bibitem{419} See Malin & Ladenson, \textit{supra} note 405, at 1217.
\bibitem{420} See Malin & Ladenson, \textit{supra} note 405, at 1218.
\bibitem{421} See Malin & Ladenson, \textit{supra} note 405, at 1219, 1226.
\bibitem{422} See Malin & Ladenson, \textit{supra} note 405, at 1222, 1227.
\bibitem{423} See Malin & Ladenson, \textit{supra} note 405, at 1223.
\bibitem{424} See Malin & Ladenson, \textit{supra} note 405, at 1225.
\end{thebibliography}
or even identical language are fairly common. If an arbitrator's interpretation is wrong, the aggrieved employer or union has a chance to bargain to overrule it when the next collective agreement is negotiated. When a court enforces a grievance arbitrator's award, as it is to do under United Steelworkers of America v. Enterprise Wheel and Car Corp. so long as the award is in a broad sense based on the collective agreement, it is simply holding the parties to what they bargained for: an arbitrator's reading of their contract language. The theories of Hart and of Dworkin would be out of place in such a system, for they presuppose a concern with prior decisions that does not apply in the grievance arbitration context.

In employment arbitration, Malin and Ladenson argue, the situation is different. Here, inconsistent decisions about the meaning of a federal statute exist "in a single system of public law." They point to three concerns. First, the employer that has lost its argument about the meaning of the statute is likely to bear costs that may put it at a competitive disadvantage. While that may also be true in grievance arbitration, there the losing employer must itself share responsibility for its plight since it participated in drafting the language the arbitrator has misread. The employer does not participate directly in the drafting of a statute. Second, while an employer can get relief from an adverse grievance arbitrator's decision by bargaining for it, and by choosing other arbitrators in the future, it has much less of an individual role in amending a statute. Third, there are different levels of concern about public justice values in the two systems. The central public values in grievance arbitration are (1) reducing workplace strife, through settling disputes by bargaining or through arbitration rather than by the use of economic force through strikes or lockouts; and (2)

425. See Malin & Ladenson, supra note 405, at 1223.
426. See Malin & Ladenson, supra note 405, at 1219.
428. See Malin & Ladenson, supra note 405, at 1225.
429. See Malin & Ladenson, supra note 405, at 1227.
430. See Malin & Ladenson, supra note 405, at 1225.
431. Malin & Ladenson, supra note 405, at 1227.
432. See Malin & Ladenson, supra note 405, at 1227-28.
433. See Malin & Ladenson, supra note 405, at 1225.
434. See Malin & Ladenson, supra note 405, at 1228.
435. See Malin & Ladenson, supra note 405, at 1228.
436. See Malin & Ladenson, supra note 405, at 1229.
ensuring that a collective representative gives reasonable consideration to the claims of all those it represents, not just a few, a value embodied in the duty of fair representation.\textsuperscript{437} Both these values are generally consistent with the operation of market forces; we assume bargaining consists of attempts by both unions and management to maximize returns to their constituencies, workers, or shareholders. Statutes may, on the other hand, involve attempts to change the behavior of parties so that they do not always pursue “market” objectives. In the case the writers hypothesize, for example, the two employers, both life insurers, reacted to biased potential buyers of insurance by assigning African-American sales agents to offices in black neighborhoods and white sales agents to offices in white neighborhoods.\textsuperscript{438} Each was seeking simply to maximize sales, and the officers who assigned employees were personally unbiased and acted only out of an accurate perception that a racially neutral job assignment would yield lower sales.\textsuperscript{439} The arbitrator who held for one of the insurers acted incorrectly in not subordinating the market value—maximized sales—to the public justice value—non-discrimination in workplace opportunities. “It follows,” Malin and Landenson write, “that the private expectations of the parties that provide the principal check on the labor arbitrators use of her own justice values can not serve the same function for the employment arbitrator.”\textsuperscript{440} These three points largely echo the thrust of Judge Edward’s opinion in \textit{Cole},\textsuperscript{441} and while it is tempting to find fault with some of the writers’ other arguments—as conclusory, for example, in beginning with the assumption that the Hobbes and Walzer positions are those of our tradition\textsuperscript{442}—most of those arguments can be made to come out as sensible. Even if one qualifies considerably their characterization of legal realism by pointing out that others differed with Professor Llewellyn on a fair number of points, it is nonetheless true that his description of the judicial process was widely accepted. It is ultimately then these three arguments on which the proposition rests that

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\item \textsuperscript{437} See generally Vaca v. Sipes, 386 U.S. 171 (1967) (explaining that arbitration can settle disputes when the union follows its duty of fair representation).
\item \textsuperscript{438} See Malin & Ladenson, \textit{supra} note 405, at 1227.
\item \textsuperscript{439} See Malin & Ladenson, \textit{supra} note 405, at 1227.
\item \textsuperscript{440} Malin & Ladenson, \textit{supra} note 405, at 1229.
\item \textsuperscript{441} See Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1467 (D.C. Cir. 1997).
\item \textsuperscript{442} See Malin & Ladenson, \textit{supra} note 405, at 1210-12.
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employment arbitrators’ interpretations of public law should be subject to *de novo* review.

Let us turn to the first. It amounts to an assertion that while consent to having an arbitrator read one’s contract justifies imposing on a party the cost of a misreading, consent to having an arbitrator read a statute does not. The proposition is not self-evident, as the writers clearly understand. After all, the importance to a party of a given right or duty does not depend on whether it is grounded in public law or in contract. Indeed, a reasonable thesis might be that a person is most likely to negotiate over those things that are most important to him. The justification Malin and Landenson offer is different: the party bearing the cost of the misreading in the grievance context participated in the drafting of the contract.443

There are two objections to this: First, it is only a partly accurate version of what happens in collective bargaining; while outright “take it or leave it” bargaining may violate subsections 8(a)(5) and 8(b)(3) of the National Labor Relations Act,444 pattern bargaining and other instances of permitting the stronger party to set the terms of an agreement are common. Second, even if one must accept another setting of rights and duties, does it matter? Justice White’s opinion recognizes fully that the claimant had no power at all over the terms of the stock exchange registration form.445 His employer, as a single member of the exchange, also had very limited power in setting the rules of that body.446 The *Gilmer* opinion makes it clear that inequality in bargaining power is not enough to justify refusing to honor an agreement to arbitrate, there must be coercion or fraud.447 So long as only the parties are concerned, there is little if any cause not to extend this reasoning to the review of awards.448 There are, however, good reasons to accept the Malin and Landenson argument when the impact of an award will extend to the rights of others. Suppose, for example, that the arbitration of the insurance sales agent grievance purported to cover the rights of other agents, including those not yet hired. If a federal district court were

443. See Malin & Ladenson, *supra* note 405, at 1239.
446. See id. at 33.
448. See Malin & Ladenson, *supra* note 447, at 1203.
to enforce such an award, it would sanction conduct that would con-
tinue to violate Title VII for years to come, and in situations the
arbitrator had not considered. That would, indeed, take the con-
sent of a single individual to be subject to a possible mistake by an
arbitrator and give it a far broader public law impact. This would
take a "competitive disadvantage" of the sort Malin and Ladenson
identify well beyond those whose consent led to the award. Those parties' consent cannot surely be allowed to have such a
broad effect. Thus, the writers have identified an important reason
why post-award review of employment law awards must at times be
more searching than in the case of grievance arbitration: An award
that goes beyond an award or denial of damages to the parties to
the arbitration may have an effect on the public law rights of
others.

Professors Malin and Landenson might well respond by saying:
But what of the public interest in vindicating public law rights in
every case, not just those with broad affirmative relief? This argu-
ment is linked to the authors' third point, and is entitled to much
the same response: Yes, errors in law are important and arbitration
opinions and awards should be subject to some sort of review.
Finality of awards is also important, however, and simply to state
two important competing values does not itself dictate how to strike
a balance between them.

Professors Malin and Landenson's second argument is that griev-
ance arbitration affords its parties reasonable protection against
unfair awards in (a) the constraints that in practice affect labor arbi-
trators, and (b) the opportunity to renegotiate troublesome con-
tract language at the next collective bargaining session. The
constraints on arbitrators to which they refer seem to boil down to
the parties' ability to screen arbitrators and not to hire those who
render unprincipled or manifestly unreasoned decisions. This in
turn means that an arbitrator who wishes to stay in the business will
seek to make her rulings conform to some general norm of accepta-

449. See Malin & Ladenson, supra note 447, at 1227.
450. See Malin & Ladenson, supra note 447, at 1207.
451. See Malin & Ladenson, supra note 447, at 1191.
452. See Malin & Ladenson, supra note 447, at 1192.
453. See Malin & Ladenson, supra note 447, at 1195, 1199.
454. See Malin & Ladenson, supra note 447, at 1224.
Employment Arbitration After Gilmer

To which an appropriate answer would seem to be: "Yes, but." The "but" has at least two components. First, whether careful screening by the parties is aimed more at competence or at eliminating arbitrators who are "too liberal" or "too pro-company" is a familiar debate topic, as is the question of whether an arbitrator who wants to continue to draw assignments and who has also just delivered nine consecutive awards for grievants may not feel a bit nervous heading into the next hearing. Put briefly, the beneficence of present techniques of arbitrator choice is at least open to question.

Second, this article may make too little of the constraints posed on individual arbitrators by the arbitral community. Conferences sponsored by AAA, the Federal Mediation and Conciliation Service ("FMCS"), the National Academy of Arbitrators, and the Labor and Employment Law Section of the ABA as well as the existence of the Code of Ethics for Arbitrators, whatever its shortcomings, all contribute to creating a set of institutional expectations. These constraints are as likely to affect employment arbitrators as well as grievance arbitrators.

The writers' other argument on this—that a wronged party in grievance arbitration can more readily negotiate a remedy, in the form of new contract language, than a wronged party in an individual employment law arbitration can effect a change in a statute is also flawed to a degree. If the wronged party is an individual claimant, it is scant comfort to him that his union may have a chance to protect the interest of other workers in bargaining some three years hence. A wronged employer may, of course, have a better chance, but if the employer in question is a small enterprise in an industry in which large employers set the patterns, the likelihood of change is small. Once again, though, while the reasons given for an argument may not fully justify their conclusion, the writers have pointed out a truly valid concern: how best to limit the future consequences of a misreading of a statute while preserving the general finality of arbitration.

This leaves, then, the third point. An arbitrator's wrong reading of a statute is just that—wrong. Therefore, it ought to be corrected.

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455. See Malin & Ladenson, supra note 447, at 1224.
456. See Malin & Ladenson, supra note 447, at 1205-06.
457. See Malin & Ladenson, supra note 447, at 1206.
Here, the argument gets a bit more complex. There is more than one way an arbitrator can go wrong in interpreting a statute. One is to fail to follow applicable precedent, thus violating the principles set out by Hart.\textsuperscript{458} Another is to be so slavish to precedent that the arbitrator confronted with a novel question is excessively cautious in her reading of a statute even though she believes "that better law would result from a more creative interpretation."\textsuperscript{459} The first sort of wrongness is a serious problem for followers of Hart. To allow a court to enforce an award based on a reading of a statute that is out of step with precedent is to use public power without legitimacy.\textsuperscript{460} To fail to act creatively when creativity is called for is to fail the system Dworkin terms Law as Integrity. (The authors choose Hart's model as the better description of employment arbitration as now practiced.)\textsuperscript{461} Either way, the problem is whether a court, legitimately vested with power by public action, can require a party to honor an arbitration award that is wrong, simply because the parties to the arbitration have agreed to be bound by the arbitrator's decision. Malin and Landenson assert that this is an illegitimate use of public power.\textsuperscript{462} In so doing, they ignore some important bodies of precedent in our tradition.\textsuperscript{463} A court asked to enforce the judgment of another jurisdiction will routinely do so without reviewing the merits of the matter.\textsuperscript{464} The Supreme Court reiterated the point early this year, stating: "[a] court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy.... But our decisions support no roving 'public policy exception' to the full faith and credit judgments."\textsuperscript{465} The "law of the case" doctrine, insulating decided issues from further review in future proceedings between the same parties in the same case, has much the same effect.\textsuperscript{466} A doctrine admittedly most often applied

\textsuperscript{458} See Malin & Ladenson, \textit{supra} note 447, at 1217.
\textsuperscript{459} Malin & Ladenson, \textit{supra} note 447, at 1233.
\textsuperscript{460} See Malin & Ladenson, \textit{supra} note 447, at 1225.
\textsuperscript{461} See Malin & Ladenson, \textit{supra} note 447, at 1218, 1233.
\textsuperscript{462} See Malin & Ladenson, \textit{supra} note 447, at 1232.
\textsuperscript{463} See Malin & Ladenson, \textit{supra} note 447, at 1233.
\textsuperscript{464} See Francis v. Francis, 945 S.W.2d 752 (Tenn. Ct. App. 1997) (rejecting argument that giving full faith and credit would violate public policy of enforcing state); Matson v. Matson, 333 N.W.2d 862, 868 (Minn. 1983) (holding a foreign judgment must be enforced to its full extent, including any errors or irregularities contained therein); \textsc{Restatement (Second) of Conflict of Laws} \S 117 (1971).
to fact findings. Such doctrines do provide "outs" for serious problems, of course. A foreign judgment will not be enforced if entered by a court without jurisdiction. These exceptions, however, have a ring much more like "manifest disregard of the law" than like de novo review for error. The point here is that any finality-enhancing doctrine, from res judicata on, is likely to have an effect of lessening the vigor of examination for error. And the price of arbitrator error for a middle-aged woman fired allegedly for tardiness but in fact because she had the courage to complain of sexual harassment can be a high price indeed. Professor Grodin constructs just such a hypothetical for his critique of Gilmer. But making arbitral judgments subject to full-scale review for errors of law has its price too. Critics of Gilmer regularly point to the difference between employer resources and those of workers. In the context of litigation, one implication of that difference is that delay is more likely to prejudice the situation of the weaker party, who stands in need of cash, not more litigation costs. Each time a new doctrine providing for review is created, a worker whose debatable claim has won out in arbitration is likely to see the day when she gets money put further and further off, as briefs are filed and arguments heard, and appeals taken to the next higher court. If a court applies a standard like "manifest disregard" under which it looks only for glaring errors and obvious flaunting of the law, review is likely to be both less appealing to a losing employer, and quicker if the employer nonetheless asks for it. It is this potential for delay that in part refutes the point made by Judges Edwards and Silberman in Cole, that most arbitration cases are

467. See, e.g., Midessa Television Co. v. Motion Pictures for Television, Inc., 290 F.2d 203 (5th Cir. 1961).
471. See Maria Whittaker, Gilmer v. Interstate: Liberal Policy Favoring Arbitration Trammels Policy Against Employment Discrimination, 56 ALB. L. REV. 273, 276 (1992). "In recent U.S. history . . . the courts . . . essentially shifted the balance of power more equitably in favor of those who have long possessed far less bargaining power, such as consumers, employees, blacks, and women. Recently, however, both the [Supreme] Court and presidential administrations have been dismantling these gains." Id.
more fact-based than law-based. They point to a study indicating that roughly five of six grievance arbitrations involving discrimination claims turned mainly on factual findings. In consequence, they urge that review for correctness of legal issues will result in few delays. This conclusion does not follow. Even if one assumes that employment arbitrations will for the most part resemble grievance arbitrations on similar issues, a finding that a decision hinges more on fact than law does not mean that debatable legal points were not involved, points on which arguments about correctness could be made plausibly enough to require briefing and argument, with the attendant delay.

What of the value of maintaining a core of precedent that is both consistent and coherent, though? Here Malin and Landenson are very telling. It is absolutely necessary that courts that enforce employment arbitration awards do so in a way that says: “It is only the award we enforce. There may be debate about some of what is said in the opinion. Those issues of law remain ripe for us when raised here. What the arbitrator has said on these is not precedent for us or for other arbitrators.” By keeping the non-precedental nature of this sort of arbitration clear, the system of precedent that Hart and Dworkin value (in different ways) can be preserved. Nor should a legal realist be affronted by such an outright disavowal of a ruling, even though he might explain it differently.

A refusal by a court to rule on an arbitrator’s interpretation of a statute can, however, raise yet another problem. If virtually all litigation activity under a statute comes to be arbitration, is the public deprived of adequate guidance about what is lawful and what is not? This prospect was put before the Court in Gilmer and rejected. Responding to it, Justice White wrote: “Furthermore, judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements. . . . Finally, it should be

473. See id.
474. See id.
476. Id.
478. See id.
remembered that arbitration agreements will not preclude the EEOC from bringing actions. . . ." To this point, Justice White’s observation seems to be a fair one. Employment law case filings continue at a good clip, and decisions continue to flow from the courts at a rapid pace. But what if this changes? That would seem to be a matter for the Congress.

Can one rely on the Congress to note either a marked drop-off in the volume of discrimination law precedent coming from the courts, or a pattern of error-filled arbitration decisions? Malin and Landenson argue that “judicial mistakes are . . . more likely to be corrected legislatively because of their sweeping precedential value than are arbitral mistakes which have no stare decisis value.” Were Congressional staffs the only source of oversight, this might well be a telling point. In fact, however, there are both public agencies, like the EEOC, and a host of private groups representing both employer and employee interests ready to bring perceived failings of the arbitration systems to the attention of the Congress. It will then be for the legislative branch to decide whether misreading of its statutes call for corrective action.

This review of the arguments made by Professors Malin and Landenson, some of them echoed in Cole, leads, then, to the conclusions, first, that the advocates of broad review for errors of law in employment arbitration cases have some strong arguments; and, second, that in cases that involve only the interests of those who are parties to an arbitration under review, those arguments are not strong enough to compel de novo review. In such cases, seeking to correct truly blatant errors or flouting of the law by an arbitrator should be an adequate protection for the participants. The United States District Court for the Southern District of New York, for instance, recently overturned an arbitration panel’s denial of attorney fees to a prevailing plaintiff since this was a “manifest disregard” of the law developed by the federal courts.

479. Id. at 32. The second sentence quoted is focused primarily on another point but is clearly relevant to the concept articulated in the first.
480. The most recent bound volume of BNA’s Fair Employment Practice Cases, Volume 73, covers the period from Mar. 3, 1997 to June 30, 1997. It runs 1,888 double-spaced pages.
481. Malin & Ladenson, supra note 475, at 1237.
482. See Malin & Ladenson, supra note 475, at 1203 (discussing past congressional corrections of judicial misreading).
For non-participants, however, the balance shifts. Whenever an award infringes the protections provided by public law to those who are not parties, due regard for the public decisions made by the Congress requires that a reviewing court see to it that the interpretations of public law reached by the arbitrator are not merely debatable but are, in the court's judgment, correct.\textsuperscript{484} If deference is due from a court with respect to such issues, it is due not to an arbitrator, but to the EEOC, as the agency entrusted most fully with enforcement of the nation's laws against discrimination.\textsuperscript{485}

\textbf{F. Consistency With Public Policy}

A further reason to deny enforcement of an arbitration award is the "public policy" rationale. If what an arbitration award calls for a party to do violates a clear public policy, the award may not be entitled to enforcement. The most typical case seems to be that in which an arbitration panel orders an employer to restore a drug user to a job involving significant safety hazards.\textsuperscript{486} The Supreme Court indicated in its \textit{Misco} decision dealing with arbitration in the collective bargaining context that such refusals to enforce are proper only in the most extreme cases.\textsuperscript{487} This very limited doctrine extends at least to an award that by its terms would require a complying employer to violate public law.\textsuperscript{488} Thus, if an arbitrator's award should order an employer to hire only males, or senior citizens, or Asian Americans, surely that order would be denied enforcement.\textsuperscript{489} If the award was simply to re-hire "John Smith" because the arbitrator decided that Smith was fired in violation of the ADEA, enforcement would not be denied simply because the court would not have found Smith to be fully qualified for the job in question.


\textsuperscript{485} See \textit{id.} at 51, 53.

\textsuperscript{486} See, e.g., Exxon Corp. v. Esso Workers' Union, 155 L.R.R.M. 2782 (1st Cir. 1997).


\textsuperscript{488} See \textit{id.}

\textsuperscript{489} See \textit{id.} at 43 (stating that a court may refuse to enforce a collective bargaining agreement where the specific terms contained violate public policy).

http://scholarlycommons.law.hofstra.edu/hlelj/vol15/iss2/2
VI. LABOR COURTS OR COWBOY ARBITRATIONS?

If the conclusions suggested thus far are even approximately correct, the next decade may well witness a development some have long advocated: creation of a series of specialized employment tribunals. These will resemble in part tribunals in other countries, but differ in being private, although subject to limited “review” by public courts. Two obstacles might prevent this from happening, or result in a system so bad it would have to be dismantled. One would be the lack of an effective bar ready to represent workers in these proceedings. The other would be the withdrawal of employer consent, should the frequency of arbitration requests and the costs of these tribunals make the courts seem a better bargain.

First, a quick review of the conclusions suggested up to this point: (1) Despite well-reasoned decisions and commentaries to the contrary, the majority position of the federal courts is that the exception in section 1 of the FAA precludes mandatory arbitration of claims of only a very small number of workers. That view is likely to prevail in the Supreme Court. (2) Despite vigorous criticism of the Gilmer decision to order arbitration of an individual’s claim that his statutory right to be free from employment discrimination, there has been no unequivocal rejection of the decision by the Congress. It thus remains “good law.” The only serious criticism at the Congressional level has been requiring agreement to arbitrate statutory rights disputes as a condition of employment. (3) While most federal courts have read Gilmer generously, extending it to statutes other than the ADEA, there are increasing indications that these same courts are also taking seriously the language of the Gilmer opinion that sets basic standards for the adequacy of the arbitral forum. Outside the courts, a consensus is emerging—expressed, for example, in the Dunlop Commission Report and the Due Process Protocol—about what the characteristics of an adequate forum are. These consensus documents should influence the standards the courts ultimately set. (4) “Review” of the opinions and awards of employment arbitrators will be limited, but will probably be more extensive than review of grievance arbitration awards, both because in employment arbitration the claimant does not have the experienced advice of a union, and because in some cases, an employment arbitrator’s award may affect the public law rights of persons who are not participants in the arbitration process. In the latter case, de novo consideration of questions of law ought to be made.
available. Courts are also likely to refuse to enforce any award that would require a party to engage in ongoing unlawful activity; an award given after a hearing in which the arbitrator flagrantly violated the rules under which she operates so as to deny the parties the process due them; an award based on conclusions of fact that have absolutely no basis in the evidence taken; and, of course, any award that violates the explicit standards of the FAA.

All well and good, one might say, but does examination, on request, by a court of the procedures, fact finding, or legal conclusions of an arbitrator mean there is a “system” of adjudication? The probable answer is “yes,” because the bulk of employment arbitration is likely to occur within the framework provided by a limited number of agencies whose business is to provide arbitrators and administrative support for arbitration cases. Reading the opinions in *Gilmer* and *Cole* makes it clear why this is so. In each case, the claimant challenged the adequacy of the arbitration forum.\(^\text{490}\)

In each, the order to arbitrate was given only after an examination of the rules governing the arbitration process, rules set by the securities industry and amplified by New York law in *Gilmer*,\(^\text{491}\) the more recent (and more exacting) rules for employment arbitration issued by the American Arbitration Association in *Cole*.\(^\text{492}\) The *Gilmer* review included examining the institutional protections against biased arbitrators, suggesting that some sort of screening process for these private adjudicators is desirable.\(^\text{493}\) Developing reasonable procedures, screening and training arbitrators, providing assistance in scheduling hearings, finding hearing rooms, and the like, are all far more likely to be done by organizations like the AAA or the FMCS than by an individual arbitrator or employer. Employer-developed procedures would seem likely to be regarded with at least a modest amount of suspicion in any event, because of the obvious temptation to make them one-sided. The best chance an employer will have, then, of making an arbitration clause pass judicial scrutiny is to provide that the arbitration will go forward under the aegis of an established reputable organization. In consequence, what we are likely to see over the next decade is an increasing number of individual employment contracts that provide for arbi-

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\(^{490}\) See *Gilmer*, 500 U.S. at 30; *Cole*, 105 F.3d at 1467.

\(^{491}\) See *Gilmer*, 500 U.S. at 30.

\(^{492}\) See *Cole*, 105 F.3d at 1480-81.

\(^{493}\) See *Gilmer*, 500 U.S. at 30.
Employment Arbitration After Gilmer

If employment arbitration becomes a process conducted within an organization structure, it will share many characteristics with "labor courts" in other countries. A brief comparison of arbitration under AAA rules (as in Cole) to pursuing a case through a British industrial tribunal should make the point. The underlying philosophy of the British tribunal system is well-captured by a passage in a well-known management handbook, Roger Greenhalgh's Industrial Tribunals. Others, he notes, had identified early on, certain characteristics which often gave tribunals (not just industrial tribunals) advantages over courts, including cheapness, accessibility, less technicality, expedition and expert knowledge of their particular subject. He goes on:

Industrial tribunals are cheaper, more accessible, less technical and quicker than the ordinary courts. They have detailed knowledge of industrial and commercial employment which the ordinary courts lack. The characteristics overlap.

One reason why tribunals are cheaper is that there are fewer procedural technicalities. They are not bound by complicated rules about how cases should, before hearing, be defined on paper. Their proceedings are less formal. Any applicant or respondent may appear in person or be represented by any other person, legally qualified or not. Strict rules of evidence do not apply. Tribunal members will question unrepresented or poorly represented litigants and their witnesses to discover what, in legal terms, their cases are all about.

Lack of technicality and reduction in actual or potential expense in turn increase tribunals' accessibility. Potential litigants are less likely to be frightened off by legal mumbo-jumbo and the prospect of huge lawyers' fees. They sit in numerous locations, making them physically as well as psychologically more accessible.

The speed with which tribunals can deal with cases is also influenced by their lack of technicality. Where there are no pre-trial procedures a case can, from the tribunal administrator's point of

494. ROGER GREENHALGH, INDUSTRIAL TRIBUNALS (2d ed. 1995).
It would be a simple business to substitute "arbitrators" for "tribunals" in this passage and then slip it into Justice White's opinion in *Gilmer*. Many of the concerns about competency and bias now being expressed in the United States are also mirrored in the British tribunal statutes. Most tribunal panels consist of three members. One, who chairs the panel, must be a barrister or solicitor who has been called or admitted to practice for at least seven years; the other two members are non-lawyers, one drawn from an employer panel, the other from an employee panel. Appeal of findings of fact by tribunals is extremely limited, the fairness and wisdom of which has been criticized there just as "unjust finality" is here. There are also, of course, notable differences. The tribunals are public bodies. The members of tribunals are selected by public officials, not by the parties. In the United States, most arbitrators are selected from panel lists furnished by a public or private agency by a "striking" process in which the parties alternate in removing names from the list until only one remains; agency selection is an option, but not one much used. Appeal on errors of law is broader in the UK than review is likely to be under a "manifest disregard" approach, although the Employment Appeal Tribunal (and any court to which appeal is allowed) is to reverse only if the error in law was critical to the outcome. If the decision is also based on an alternative correct ground, the appeal must be dismissed. That appeals do cause significant delay is clear. The average time for an appeal is roughly a year. If a remittal (remand) is necessary, much more time will be taken. The tribu-

495. *Id.* at 8-9. The statutes authorizing tribunals have largely been replaced by a consolidating and amending statute, the Industrial Tribunals Act 1996 (Acts 1996 ch. 17), but that statute does not affect the quoted passages. *See id.*
496. *See id.* at 9.
497. *See id.*
500. *See Greenhalgh, supra note 494, at 9.*
501. *See, e.g., 29 C.F.R. § 1404.12(d) (1997).*
502. *See Greenhalgh, supra note 494, at 52.*
503. *See Pritchard, supra note 498, at 161.*
504. *See Pritchard, supra note 498, at 152-63.*
Employment Arbitration After Gilmer

In the U.K., the public funding system in the U.K. is publicly funded, so that the parties have fewer administrative costs to bear than in U.S. arbitration. There is no arbitrator's fee to be paid.\textsuperscript{505}

Despite these differences, the similarities between British industrial tribunals and the private arbitration tribunals are great enough to justify the assertion that if the concerns over procedural regularity mentioned in \textit{Gilmer} and elaborated in greater detail in \textit{Cole} and other decisions do indeed lead to widespread use of a limited number of professional dispute resolution entities, then we will indeed have a system of "American Labor Courts." Is this paradise? Of course not. Even experienced arbitrators can be overwhelmed by the intricacy of some recent employment legislation. The British make the same complaint: "Whether experience in employment equips tribunal members with 'expert knowledge of [the] particular subject' of racial and sexual discrimination is open to question," says one U.K. commentator, who complains most bitterly about language in the \textit{Equal Pay} Act.\textsuperscript{506} Technicality in statutes means delay in decision; delay means higher cost.

The key to making this emerging system work effectively is getting effective representation for the parties. It is the problem Elliott Cheatham addressed so elegantly, of "A Lawyer When Needed."\textsuperscript{507} Counsel in litigation perform many functions besides advocacy. They are the gatekeepers, who can recognize hopeless cases and steer parties away from asserting baseless claims and defenses. They are familiar with the costs of litigation, in money and also in time and energy, and can thus help in knowing at what point settlement is a sensible option. To perform these functions best, however, the lawyer in question needs to have (or have access to) specialized knowledge of employment law and practice.\textsuperscript{508} A substantial grievance arbitration bar already exists in the United

\begin{thebibliography}{99}
\bibitem{505} \textit{See Cole}, 105 F.3d at 1483-84. \textit{If the view of the Cole majority prevails in the U.S., so that employers pay this fee, this difference will affect only them.}
\bibitem{506} \textit{See Greenhalgh, supra note 494, at 11.}
\bibitem{507} \textit{Elliott Evans Cheatham, A Lawyer When Needed} (1963).
\bibitem{508} \textit{That knowledge also matters, of course, in advocacy. In British industrial tribunals, where cases can be tracked as a matter of public record, one formal study shows that employers represented by counsel fare better than those who represent themselves. The same study did not find that correlation in the case of claimants. They actually fared slightly better when representing themselves. The sample size of the study was small enough to make these findings of limited value. \textit{See Nigel Tremlett & Nitya Barenii, The 1992 Survey of Industrial Tribunal Applications} (1975).}
\end{thebibliography}
States, along with a substantial body of experienced grievance arbitrators. What will happen in the case of employment arbitration? There is good reason to suppose that the law firms representing management will be just as able and just as willing to function in these forums as in grievance arbitration and the courts. On the claimant's side, the issue is more complex. Almost all grievance arbitration counsel for claimants have been furnished by unions. Not many U.S. white-collar workers are members of unions in the private sector these days. The non-union employment claimant's bar is still taking shape. It is a mix of plaintiff's counsel who are better acquainted with courts than with arbitration, some traditional union-representing attorneys who have begun to branch out in response to the recent shrinkage in the organized percentage of the work force, and a handful of persons for whom this work is a full-time preference. Will this amalgam coalesce into a bar that has high standards of qualification and an ethos of professionalism? The answer depends in part, of course, on whether the economic rewards will justify the existence of such a bar. The volume of potential work is great. Filing levels at the EEOC alone make that clear.\(^5\) Whether that will ultimately translate into a large enough body of substantial successful claims one simply does not know. Fears that arbitrators will be less generous than juries may or may not prove well founded. One other source of representation has not yet been tapped much: legal services programs. Relatively few wrongful discharge plaintiffs have probably met indigency standards except in race and gender discrimination cases. Those have been handled by private practitioners in court on a contingency fee basis. The likelihood of collecting a fee has been enhanced by the Equal Access to Justice Act.\(^5\) Whether this pattern will continue in an arbitration regime one cannot know. If legal services office representation of individual claimants becomes more common, it will probably be either because a wider range of claimants came forward to press claims, or because private practitioners find they

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\(^5\) See, e.g., EEOC Fiscal Year 1994 Ann. Rep. The most recent statistics generally available indicate that charges received by the EEOC in fiscal year 1994 totaled 173,465, up from 164,474 in fiscal year 1993. See EEOC Fiscal Year 1994 Ann. Rep. at 6. Charges of violations decreased in only one category, age, and that by less then two percent. See id. at 10. There was, however, a modest decrease in the number of cases filed by the agency, from 398 in 1993 to 357 in 1994. See id. at 20. This number remains adequate, however, to generate substantial numbers of precedents.

cannot afford to continue. If the latter is true, it will be necessary to inquire into whether arbitrators, out of habit formed in other types of arbitration, are refusing to award fees when the courts would. Such a refusal could well qualify as a “manifest disregard of the law” as readily as refusal to entertain disparate impact claims.

If arbitrators prove to be effective protectors of individual employee rights, there is, of course, the danger that employers will cease to see arbitration as a way out of high cost litigation and will withdraw their consent to participate. Whether this will happen it is far too early to forecast. What little evidence there is, however, suggests that an increasing number of non-union firms have been adopting grievance and arbitration systems, even though there is less and less “union avoidance” reason to do so. This suggests that firms who have tried private adjudication have been pleased, even though they lose cases. What might change that is if the availability of arbitration results in a significant increase in the number of claims made. This is another reason the “gate keeper” function of counsel is so important.

Will the decisions be perfect? No. But it is wrong to think the choice is between fast, but nearly always wrong, decisions on the one hand and slow, but nearly always right, decisions on the other. Courts too err, and even if clients can afford appeals, there is a limit to what can be accomplished. Nor need we fear that the courts will have no role in the continuing development of the law of discrimination. Not every employment contract is going to include an agreement to arbitrate. Moreover, the EEOC and other agencies will continue to have their day in court. More importantly, to the extent that class action claims lie beyond what a private forum can


513. One recent decision by a district court may make this a less meaningful remedy. In EEOC v. Kidder, Peabody & Co., the court held that the EEOC may seek only class wide or equitable relief on behalf of employees who have assigned arbitration agreements, and may not seek money damages. See 979 F. Supp. 245, 247 (S.D.N.Y. 1997). The court purports to base this on language in the Gilmer opinion. See id. To require a second proceeding—in an arbitration forum—to deal with the money damages remedy, in addition to the EEOC-brought action could be discouraging to claimants.
reasonably handle, the courts should refuse to require that those cases be heard by arbitrators. The justification for denying an order to arbitrate is that the issues involved affect interests beyond those of the parties so that the matter is not an "issue . . . referable to arbitration" under section 3 of the FAA.\textsuperscript{514} Those two bodies of case should provide a fully adequate opportunity for development of the law. In the meantime, the average claim will have a chance to be heard by a specialist in a tribunal whose rules are designed to serve that sort of case.

At bottom, then, the most serious questions about whether arbitration can be an adequate forum for employment law claims and defenses are not structural. Judicial enforcement of standards, particularly if sensitive to the concerns expressed in the Due Process Protocol and the Dunlop Commission Report, can see to that. The real questions are personnel questions: How resourceful, open, and otherwise competent will the arbitrators prove to be? Will a highly qualified employment bar be ready to serve the needs of workers and employers in arbitration? If the answer proves to be "yes," then what will be available to individual American workers is not "cowboy arbitration" but the sort of affordable, quick and principled labor court that those workers deserve. If that is true, then the typical worker should embrace an agreement to arbitrate statutory rights in individual cases, even if the Congress chooses to forbid employers from consenting to arbitration as a condition of employment.

\textsuperscript{514} See 9 U.S.C. § 3 (1994).