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Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law

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ARBITRATION OF STATE-LAW CLAIMS BY EMPLOYEES: AN ARGUMENT FOR CONTAINING FEDERAL ARBITRATION LAW

INTRODUCTION

When Robin Harris's new boss demoted her, replaced her with a white man, and cut her salary, she attributed his actions to racial discrimination.[1] After she sued in a state court, she was surprised to learn that she had signed a form requiring her to arbitrate instead.[2] Like many employees, she had waived the right to assert claims against her employer in a judicial forum. She was outraged: "You had to sign it to work there."[3] In addition to losing certain procedural protections and remedies, employees like Robin Harris often find that the arbitrators are ill-suited to decide employment law claims and may be unsympathetic to employees' allegations. For example, a study of employer-employee arbitration in the securities industry indicated that the arbiters were "overwhelmingly white men in their sixties with little experience in labor law."[4]

Employers who want to prevent their nonunion employees from taking them to court have a simple weapon: inserting an arbitration clause in the employment contract. The Federal Arbitration Act (FAA), a statute that Congress originally enacted to enforce arbitra-

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1 Steven A. Holmes, *Securities Arbiters Mostly White Men Over 60*, N.Y. TIMES, Apr. 5, 1994, at B6.

2 *Id.*

3 *Id.* A similar situation is presented when an employer requires one or more current employees to consent to arbitration of employer-employee disputes as a condition of continued employment. For example, a Houston, Texas employer is alleged to have imposed such a requirement on employees who had complained of gender discrimination to the Equal Employment Opportunity Commission. Margaret A. Jacobs, *Arbitration Policy Faces EEOC Challenge*, WALL ST. J., Apr. 12, 1995, at B2.

4 Holmes, *supra* note 1. Commentary has focused on several negative consequences of mandatory arbitration of statutory claims asserted by individuals. *See, e.g.*, Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. DISP. RESOL. 157, 191-98 (1989) (arbitral procedures are less effective; relative differences in bargaining power cast doubt on consent to arbitration); Rita M. Cain, *Preemption of State Arbitration Statutes: The Exaggerated Federal Policy Favoring Arbitration*, 19 J. CONTEMP. L. 1 (1993) (procedure is biased and unfair); Jenifer A. Magyar, Comment, *Statutory Civil Rights Claims in Arbitration: Analysis of* Gilmer v. Interstate/Johnson Lane Corp., 72 B.U. L. REV. 641, 654-55 (1992) (arbitration denies critical discovery mechanisms; the arbitral forum thwarts the public interest secured by civil rights laws; the private nature of arbitration reduces visibility and lessens society's commitment to address civil rights issues); Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568, 583-86 (1990) (arbitration may retard development of age discrimination doctrine); Mark D. Klimek, Note, *Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes Too Far*, 8 OHIO ST. J. DISP. RESOL. 425 (1993).

tion agreements between business persons, gives effect to these clauses. The Supreme Court, relying on the FAA, has held all types of arbitration clauses enforceable in state and federal courts. Although the FAA expressly exempts "contracts of employment" from its scope,[5] the courts have nullified this exclusion by interpreting the FAA, paradoxically, to cover most contracts signed by employees.

Gilmer v. Interstate/Johnson Lane Corp.[6] extended federal arbitration law to statutory claims by employees, an area many thought was protected.[7] In *Gilmer*, the Supreme Court required an employee to arbitrate a federal age discrimination claim against his employer. The Court upheld arbitration under the FAA on the grounds that Congress had shown no intention to preclude arbitration when it authorized the statutory cause of action. Because the arbitration promise was in Gilmer's registration application with the New York Stock Exchange rather than his contract with Interstate/Johnson Lane, the Court found it unnecessary to address the scope of the "contracts of employment" exception in that case.

More recent decisions threaten a further—and doctrinally problematic—expansion of federal arbitration law into the area of claims by employees based on *state* law. Federal and state courts have already employed at least four different standards to require arbitration of many state-law employment claims.[8] When courts compel arbitration of state claims, employees forfeit the more advantageous forum that state law would otherwise guarantee. Although the Supreme Court has in other contexts recognized that policing the employment relationship is an important state function, this recent application of federal arbitration law by lower federal courts and state courts threatens to undermine employees' ability to vindicate their state-law rights in court.

This Note analyzes the use of permissive arbitrability standards to prevent employees from litigating state claims. It contends that the judiciary's blind deference to the "federal policy favoring arbitration"[9] has resulted in arbitrability standards that skew the analysis too heavily in favor of arbitration. This approach creates new tensions between union and nonunion arbitration law. For example, although federal

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5 9 U.S.C. § 1 (1988).

6 500 U.S. 20 (1991).

7 *See* Magyar, *supra* note 4, at 648. Pre-*Gilmer* cases had held that arbitration clauses in collective bargaining agreements did not prevent individual employees from asserting statutory rights in federal court. *See* McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). For a more extensive discussion of *Gilmer*, see *infra* part II.B.

8 *See infra* part III.A.1.

9 *See, e.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

labor law precludes union employees from asserting some state-law claims, it also preserves the option to sue in state court when resolving the claim does not require interpreting a collective bargaining agreement.[10] If the pro-arbitration trend continues in the nonunion sector, however, neither the courts nor a collective bargaining agreement may protect unrepresented workers. This incongruence in the rules governing union and nonunion employees is especially important in light of the fact that collective bargaining is losing significance as a means of regulating the employment relationship.[11]

Although arbitration has long been common in collective bargaining agreements, it has only recently become significant in the nonunion setting. The demise of the "at will" employment rule, which is subject to more and more exceptions under federal and state law, is an important cause of this change. The permissive nature of federal arbitration law has also contributed to this shift toward arbitration of employment law issues. Part I.A of this Note offers an overview of arbitration in the union and nonunion settings. Federal arbitration law governing union and nonunion employees has developed along two different lines: judicial authority to honor arbitration agreements in union contracts flows from the Labor-Management Relations Act (LMRA);[12] for nonunion employment contracts, this authority comes from the FAA. Parts I.B and I.C explain the development of the FAA in the nonunion (or "employment law") context. These sections argue that the new arbitrability doctrine stretches the FAA beyond its intended purpose, which was merely to enforce agreements to arbitrate disputes involving commercial contracts.

This Note then explains the recent case law governing the arbitrability of federal claims by employees. These decisions underlie the

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10 *See, e.g.*, Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988). For a more extensive discussion of this preemption doctrine, which is predicated on the Labor-Management Relations Act, see *infra* notes 324-29 and accompanying text.

11 The number of American workers in the private sector represented by unions has dropped to approximately 15% of the work force. *See* Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363, 377 (1995). For a general discussion of the proposition that the decline in union membership in the 1980s was especially steep, see MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 16 (1987).

Ironically, the erosion of the termination-at-will rule, discussed *infra* part I.A, may have contributed to union decline. *Compare* Willard Wirtz, *Human Rights and Responsibilities at the Workplace*, 28 SAN DIEGO L. REV. 159 (1991) (public rights are replacing private rights previously created by collective bargaining) *with* Nancy R. Hauserman & Cheryl L. Maranto, *The Union Substitution Hypothesis Revisited: Do Judicially Created Exceptions to the Termination-At-Will Doctrine Hurt Unions?*, 72 MARQ. L. REV. 317 (1989) (a study of the relationship between judicially-created exceptions to the termination-at-will rule and changes in union membership indicates that the judicial exceptions have no significant effect on union membership).

12 For a discussion of § 301 of the LMRA, see *infra* notes 15-17 and accompanying text.

expansion of federal arbitrability principles into the realm of state claims. To show the relevance of these cases to employment contracts (as opposed to the third-party contract scenario in *Gilmer*), Part II.A discusses the courts' tendency to construe the FAA's "contracts of employment" exception narrowly. That Part rejects such a narrow view of the exception, which in any event originated as a creative solution to an unrelated problem—the lack of any clear statutory basis for enforcing collective bargaining agreements. Part II.B then examines *Gilmer* and its progeny, which have yielded compulsory arbitration of a broad set of federal claims asserted by employees.

Part III analyzes the courts' application of federal arbitration law to state-law claims asserted by employees. Part III.A analyzes the viability of the competing standards of arbitrability and concludes that the most permissive standards probably coincide with the Supreme Court's extreme pro-arbitration posture. Because states have an important interest in the regulation of employment contracts, however, courts should not simply assume that Congress intended the FAA to apply in this context. Unfortunately, the Supreme Court's expansive reading of the FAA presages mandatory arbitration of many employment cases involving state-law claims.

Part III.B describes two doctrinal tensions that result from this aggressive approach to arbitrability. First, unlike the Supreme Court's approach in other areas of law, its approach to arbitrability ignores the policy prerogatives of states and may thwart states' ability to address employment termination in a comprehensive way. Second, it leads to unjustifiably inconsistent treatment of union and nonunion workers. Finally, Part III.C contends that the law need not continue its myopic development. This Note suggests that courts could address the tension between union and nonunion arbitration law by giving effect to the "contracts of employment" exception contained in the FAA and by recoguizing that the pro-arbitration policy is not the only relevant interest in the employment context. Finally, if Congress enacts legislation to protect individual employees from compulsory arbitration, such legislation should make clear that it preserves employees' right to litigate state-law claims as well as federal ones.

I
THE STAGE: ARBITRATION IN UNION AND NONUNION EMPLOYMENT AGREEMENTS

The law governing arbitration in the employment context has developed along two lines. Where employees are represented by unions, federal labor laws apply. Where employees have contracted individually, the more general laws governing arbitration apply. The Federal Arbitration Act is the centerpiece of arbitration law in all areas except

"labor law" and controls whether individual employees must arbitrate disputes with their employers.[13] This Part discusses the development of arbitration law in these two contexts and examines the courts' expansive reading of the FAA.

A. Overview: Arbitration and the Divergence of "Labor" and "Employment" Law

Arbitration[14] has become the primary means of resolving labor contract disputes since the Supreme Court decided the famous *Steelworkers* Trilogy in 1960.[15] The Trilogy requires federal courts to enforce arbitration clauses in collective bargaining agreements under section 301 of the Labor-Management Relations Act (LMRA).[16] Arbi-

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13 This distinction is consistent with the more general divergence of "labor law" and "employment law," as reflected in the tendency among American law schools to teach the subjects in different courses. *See* STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW vii (1993). As is generally true of these fields, however, there is significant overlap in the rules governing arbitration. *See, e.g.*, United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987) (indicating that the FAA is a persuasive source in the determination of substantive federal law governing arbitration clauses in union contracts); Posadas de Puerto Rico Assocs. v. Asociacion de Empleados de Casino de Puerto Rico, 873 F.2d 479, 482 (1989) (borrowing the FAA limitations period for purposes of vacating an arbitral award under § 301 of the LMRA).

14 "An arbitrator is a neutral third party who renders a decision between two contending parties who cannot mutually arrive at a satisfactory resolution of their conflict." DOUGLAS M. MCCABE, CORPORATE NONUNION COMPLAINT PROCEDURES AND SYSTEMS 65 (1988). Employers are also interested in nonjudicial dispute resolution techniques other than arbitration. For example, mediation, in which "a neutral third party who, while lacking authority to render a decision, assists the parties in achieving one of their own choice," offers a potential alternative to arbitration. *Id.* This Note does not address the legal implications of such alternatives to arbitration. The reader should keep in mind, however, that there may be no clear line between arbitration and other types of ADR. Some commentators have stressed that mediation is or should be one of the arbitrator's primary tasks. *See, e.g.*, Vincent Fischer-Zernin & Abbo Junker, *Arbitration and Mediation: Synthesis or Antithesis?*, 5 J. INT'L ARB. 21, 22 (1988) ("[T]he realization that mediation is one of the functions of arbitration should be the future trend.").

Although employers in the United States have displayed an interest in arbitration only relatively recently, the technique has ancient roots. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 2 (4th ed. 1985) (noting that Phillip II of Macedon insisted on arbitration to resolve disputes under a treaty drafted in approximately 338-337 B.C.).

15 The *Steelworkers* Trilogy consists of United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (requiring enforcement of an arbitration clause in a collective bargaining agreement without reference to the merits of the dispute), United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (requiring district courts to resolve any doubts concerning arbitrability under a collective bargaining agreement in favor of arbitrability), and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (requiring judicial enforcement of an arbitral award without reference to the merits).

16 Section 301(a) of the LMRA, or the Taft-Hartley Act, provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties,

tration became prevalent in the union setting because it was an efficient means of settling the myriad of disputes that can arise under a private collective bargaining agreement.[17] In the context of employment contracts involving no bargaining representative, however, arbitration is still in its infancy.

Two related factors have contributed to the incongruence between arbitration of disputes under labor contracts and individual employment contracts. The first factor is the termination-at-will employment doctrine.[18] The traditional rule in American contract law is that an employer may discharge an employee for any reason or for no reason at all.[19] Employers traditionally have not been interested in agreeing to arbitrate disputes with employees—a promise to arbitrate can create liability where the at-will rule imposes none.[20]

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without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (1988).

17 *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 754 (1990) ("Virtually every collective bargaining agreement contains a formal grievance system culminating in arbitration before an outside neutral.").

18 The Tennessee Supreme Court once described the traditional "at will" employment rule in the following way:

> All may dismiss their employes [*sic*] at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong. . . . The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employes [*sic*]. The law cannot compel them to employ workmen, nor to keep them employed.

Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884).

19 *See generally* Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 131 (1976) (tracing the development of the termination-at-will rule and viewing it as a component of the development of capitalism in the United States); *cf.* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8 (1993) (arguing that courts have modified the at-will employment doctrine to give employees protection early and late in their careers, when the danger of employer "opportunism" is the greatest).

20 Such unintended liability can arise, for example, when an employer creates a grievance procedure unilaterally by incorporating it in an employee handbook. *See, e.g.*, Renny v. Port Huron Hosp., 398 N.W.2d 327, 336 (Mich. 1986) ("The fact that defendant hospital followed the grievance procedure [established in its employment manual] is evidence that a just-cause contract existed upon which plaintiff had legitimately relied."); Zeniuk v. R.K.A., Inc., 472 N.W.2d 23 (Mich. Ct. App. 1991) (enforcing an arbitration provision in an employee manual).

Moreover, courts may scrutinize the dispute resolution procedure in such situations and allow employees to sue in state court notwithstanding a prior unfavorable arbitration award. *See, e.g., Renny*, 398 N.W.2d at 339 ("This lack of elementary fairness in the procedures utilized entitled plaintiff to submit the merits of her claim to the jury to determine if, in fact, she was fired for just cause."). Other courts, however, have felt that employees whose employers publish employee manuals must "take the bitter with the sweet" and that employers can prescribe dispute resolution procedures without court intervention. *See, e.g.*, Suburban Hosp., Inc. v. Dwiggins, 596 A.2d 1069, 1076 (Md. Ct. App. 1991) ("Suburban's policy set out the procedures Dwiggins was entitled to have followed. Dwiggins is not

The second factor that helps explain the relative rarity of arbitration agreements in the nonunion context is federal law itself. Federal courts' authority to enforce arbitration clauses in collective bargaining agreements has its source in section 301 of the LMRA. On its face the LMRA merely confers jurisdiction over suits for breaches of collective bargaining agreements.[21] In *Textile Workers v. Lincoln Mills*, however, the Supreme Court construed the statute broadly, inferring a substantive law favoring arbitration from the policies underlying the LMRA.[22] The authority derived from this reading applies to collective bargaining contracts but not to individual employment contracts.[23]

Federal law governs the arbitrability of nonunion employment contracts, if at all, through the FAA.[24] The FAA requires federal and state courts to enforce agreements to arbitrate that fall within its reach, and the Supreme Court has used the Act to fashion a federal substantive law of arbitrability.[25] Although the FAA itself purports to exclude employment contracts from its coverage,[26] courts have often construed the "contracts of employment" clause narrowly.[27] Nonetheless, the extent of arbitration in the nonunion sector has not matched the influence of arbitration in labor law.

This picture is changing, however, because the formerly at-will nature of individual employment contracts is riddled with exceptions. For example, state courts have held that employee handbooks can create implied contractual obligations.[28] States have also imposed statutory exceptions to at-will employment.[29] Moreover, several federal

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entitled to have the court impose additional requirements. Dwiggins was still an at-will employee.").

21 *See supra* note 16 (full text of § 301(a)).

22 *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

23 Section 301 of the LMRA confers jurisdiction on federal district courts to hear cases involving a breach of a collective bargaining agreement. *See supra* note 16. The *Steelworkers* Trilogy demonstrates that enforcing arbitration clauses is an important part of that substantive law. *See supra* note 15. But because § 301 does not give federal courts jurisdiction to hear cases between individual employees and their employers, these decisions do not require courts to enforce arbitration agreements outside the collective bargaining setting.

24 9 U.S.C. §§ 1-18 (1994).

25 *See* discussion *infra* part I.C.

26 9 U.S.C. § 1 (1994); *see also infra* text accompanying note 43.

27 *See infra* notes 155-64 and accompanying text (discussing some courts' narrow reading of the clause excluding "contracts of employment" from the reach of the FAA).

28 Examples of judicially-created exceptions to the employment-at-will rule are found in contract law, *e.g.*, Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980) (holding that a provision in an employee manual prohibiting discharge except for cause created an enforceable promise), and in tort law, *e.g.*, Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987) (state tort action for intentional infliction of emotional distress allowed when employees alleged they were discharged for failing to fill gasoline tanks under unsafe conditions), *cert. denied*, 486 U.S. 1054 (1988).

29 The clearest example may be the Montana Wrongful Discharge from Employment Act of 1987, MONT. CODE ANN. §§ 39-2-901 to 39-2-915 (1993) (requiring "good cause" for

statutes, such as Title VII of the 1964 Civil Rights Act, effectively limit employers' ability to mistreat or fire employees.[30] These limitations on at-will employment provide more opportunities for courts to intervene in the private employment relationship. Faced with these legal constraints and the relatively high cost of litigation,[31] many employers prefer other methods of dispute resolution.[32] Arbitration, in which the parties submit the dispute to an impartial arbitrator with binding authority, is the preferred method.[33]

When an employee whose contract requires arbitration sues her employer, the court must determine "arbitrability."[34] Since the

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discharge). More common are antidiscrimination provisions such as the Missouri Human Rights Act, *see infra* note 255. The Model Employment Termination Act would abolish the at-will rule altogether for most employees. Model Employment Termination Act §§ 1-14, 7A U.L.A. 75 (West Supp. 1995). Like the Montana statute, however, the model law limits damages available to employees. *See* WILLBORN ET AL., *supra* note 13, at 255 ("The tradeoff is similar to the classic one underlying workers' compensation laws: more sure recovery of smaller damages.").

30 *E.g.*, Family and Medical Leave Act, 5 U.S.C. §§ 2105, 6381-6387 (1994); National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988); Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (1988); Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12113 (1988 & Supp. V 1993).

31 Gerald P. Cunningham, *Arbitration Provisions in Employee Handbooks: What California Employers Should Know*, L.A. LAW., June 1988, at 59, 59 ("Employers generally have three basic concerns with respect to employment-related litigation: 1) the potential adverse decision by a (possibly biased) jury, with exposure to punitive damages awards; 2) the disruption to employees and supervisors inherent in ongoing litigation; and 3) costs of litigation.").

32 *Cf.* Jacobs, *supra* note 3, at B2 ("[A] growing number of companies—trying to reduce litigation costs and bypass antibias laws—are requiring employees to sign arbitration agreements as a condition of employment or promotion."); *Employers Reluctant to Embrace Mandatory Arbitration, Survey Finds*, Daily Lab. Rep. (BNA) No. 84, at A-15 (Apr. 30, 1992) ("Despite their concern over *Gilmer*, most employers favor the use of alternative dispute resolution or ADR . . . ."). Despite employer interest in arbitration in the non-union environment, however, research indicates that employers are proceeding with caution. For example, as Professor McCabe, *supra* note 14, at 75, reports:

> [O]f 78 companies' employee-relations manuals reviewed, only six, or less than 8 percent, permit arbitration. If the two companies that permit arbitration only in the case of an employee's discharge are subtracted . . . only 5 percent . . . may be said to provide arbitration as a means for the resolving of employees' grievances.

33 *Employers Resolve Worker Complaints Through Alternatives to Litigation*, Daily Lab. Rep. (BNA) No. 1, at A-5 (Jan. 2, 1992).

34 If the dispute has already been arbitrated, the court might be called on to decide whether to enforce or vacate the arbitral award. However, because judicial review of arbitration awards is highly deferential, *see infra* note 224, it typically amounts to determining whether or not a dispute was arbitrable at the outset.

Courts use the terms "arbitrable" and "arbitrability" to describe two distinct aspects of a claim: (1) whether the claim is within the scope of the parties' agreement to arbitrate and (2) whether the claim is of a type that is susceptible to arbitration as a matter of public

landmark *Gilmer* decision, federal courts frequently have invoked the FAA to require arbitration of federal statutory claims against employers.[35] Additionally, courts are now deciding the arbitrability of state-law claims against employers under the FAA. But ambiguity in the *Gilmer* decision, coupled with the increasingly broad federal common-law of arbitration premised on the FAA, has led to divergent standards of arbitrability in the state-law cases, all of which most often lead to arbitration. This Note evaluates those standards and argues that they lead to an improper expansion of the FAA.

B. The Federal Arbitration Act of 1925

Private agreements to resolve disputes through arbitration were viewed with suspicion by common law judges.[36] In 1925, Congress enacted the FAA, so that "where there are commercial contracts and there is disagreement under the contract, . . . court[s] can [en]force

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policy or under an applicable arbitration statute. *See* Thomas E. Carbonneau & François Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 TUL. J. INT'L & COMP. L. 193, 195 (1994) (distinguishing "contractual" and "substantive" inarbitrability). Although arbitration "promises" by employees often implicate the former concern, this Note focuses on the latter aspect of the problem.

35 *See* discussion *infra* part II.B.

36 Before arbitration statutes appeared in the early twentieth century, courts generally refused to enforce arbitration promises unless an arbitral award had already been rendered. *See, e.g.*, Insurance Co. v. Morse, 87 U.S. 445, 451-53 (1874) (Arbitration agreements "oust the courts of the jurisdiction conferred by law."); U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1012 (S.D.N.Y. 1915) (the basis for the rule is questionable but *stare decisis* requires it); Lewis v. Brotherhood Accident Co., 79 N.E. 802, 803 (Mass. 1907) (A contractual term referring disputes to arbitration "is void as an attempt to oust the courts of [their] jurisdiction."); Whitney v. National Masonic Accident Ass'n, 54 N.W. 184, 185 (Minn. 1893) ("The rule is so well settled . . . that it is needless to consider the various reasons which have been assigned for it."); Pepin v. Societe St. Jean Baptiste, 49 A. 387, 388 (R.I. 1901) (Prospective waiver of a judicial forum by agreement to arbitrate violates public policy.). This posture followed a long tradition in English courts. *See* Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1309 (1985) ("English courts refused to enforce arbitration contracts on the ground that 'an agreement of the parties cannot oust [the] court' of its jurisdiction.") (citing Kill v. Hollister, 95 Eng. Rep. 532, 532 (K.B. 1746)); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942) (reviewing the history of British courts' treatment of arbitration agreements; concluding that judicial suspicion of arbitration originated as a means of protecting judges' incomes).

For an early look at the problem, see JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 281 (1918):

> Why should such a movement be hampered by the continuance of a rule unsound in public policy, bad in legal theory, obsolete historically and unsupported by sound legal precedent? Only lack of true information has kept it alive so long. But "*Ignorantia Legis Neminem Excusat.*" (Ignorance of the Law excuses no man[.]) This includes the Lawyer and the Judge, does it not?

Id. at 281. Cohen was an active member of the American Bar Association who pushed for judicial recognition of arbitral agreements among business persons.

an arbitration agreement in the same way as other portions of the contract."[37]

The FAA provides for the enforceability of arbitration clauses in contracts "involving commerce."[38] The "core" of the statute is in sections 2 through 4.[39] Section 2 makes such arbitration clauses "valid,

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37 65 CONG. REC. 11,080 (1924) (Rep. Mills of New York, speaking in favor of H.R. 646). Earlier that year, in an unsuccessful attempt to pass H.R. 646 from the House Consent Calendar, Representative Graham of Pennsylvania described the bill in the following way:

> This bill is one prepared in answer to a great demand for the correction of what seems to be an anachronism in our law, inherited from English jurisprudence. Originally, agreements to arbitrate, the English courts refused to enforce, jealous of their own power and because it would oust the jurisdiction of the courts. That has come into our law with the common law from England. This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to. It does not affect any contract that has not the agreement in it to arbitrate, and only gives the opportunity after personal service of asking the parties to come in and carry through, in good faith, what they have agreed to. It does nothing more than that. It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.

65 CONG. REC. 1,931 (1924) (statement of Rep. Graham).

38 9 U.S.C. § 2 (1994). Section one defines "commerce":

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of a controversy, would be embraced within admiralty jurisdiction; "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 such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, 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.

Id. § 1.

39 Archibald Cox used the word "core" in Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 591-92 (1954) (referring to the United States Arbitration Act). The current versions of sections 2 through 4 provide:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> § 3. Stay of proceedings where issue therein referable to arbitration
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> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to

irrevocable, and enforceable," except "upon such grounds as exist at law or in equity for the revocation of any contract."[40] Section 3 requires courts to stay a trial on an issue subject to arbitration under a contract, pending arbitral resolution of the issue.[41] Section 4 allows a contracting party to apply to a federal district court for an order compelling arbitration when the other party fails to arbitrate.[42]

Section 1 is of particular relevance in the employment context. It defines the term "commerce" for purposes of the Act and contains the provision that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[43] This language, which clearly excludes arbitration clauses contained in at least some employment contracts, has often been interpreted narrowly.[44]

Statements by the bill's author on the floor of the House of Representatives indicate that the driving force behind the FAA was the common law's refusal to enforce private agreements to arbitrate, even when the agreement was between two parties of equal bargaining power.[45] An American Bar Association (ABA) committee drafted the original version of the bill.[46] Reports accompanying the original draft

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> arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
>
> § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue . . . .

9 U.S.C. §§ 2-4 (1994).

40 9 U.S.C. § 2 (1994).

41 *Id.* § 3.

42 *Id.* § 4.

43 *Id.* § 1.

44 *See* discussion *infra* part II.A.

45 *See supra* note 37.

46 *See Report of Committee on Commerce, Trade and Commercial Law*, 47 A.B.A. REP. 288, 293-94 (1922) [hereinafter *1922 ABA Committee Report*]. With the lobbying assistance of Secretary of Commerce Hoover, *see id.* at 293, the FAA was first introduced by Senator Sterling and Representative Mills as S. 4214 and H.R. 13522 in the 67th Congress on December 20, 1922. *See Report of Committee on Commerce, Trade and Commercial Law*, 48 A.B.A. REP. 284, 286 (1923) [hereinafter *1923 ABA Committee Report*].

indicate that the ABA sought to expedite the resolution of commercial disputes.[47] The ABA modelled the bill after substantially similar statutes that state legislatures had already enacted, such as the New York Arbitration Law.[48] Although the state statutes were written in broad terms, commentary on the federal bill by the ABA[49] and by academic commentators[50] strongly suggests that the drafters did not intend the legislation to reach anything but disputes between business persons over commercial contracts. The tenor of the testimony taken at committee hearings strongly suggests that legislators did not think

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47 The testimony received . . . at the public sessions . . . confirms . . . that there is a great satisfaction on the part of business men with the principles and procedure of the New York Law and that it is desired that these principles should be made effective in interstate commerce, intrastate commerce and foreign commerce. . . . [Adoption of arbitration statutes] will raise the standards of commercial ethics. It will reduce litigation. It will enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the federal and state courts.

1922 ABA Committee Report, *supra* note 46, at 293-95.

48 J.P. Chamberlain, *Current Legislation: The Commercial Arbitration Law*, 9 A.B.A. J. 523, 524 (1923) ("The act [proposed by the ABA Committee on Commerce, Trade and Commercial Law] follows the New York statute with few modifications."). The provisions of Article II of the New York arbitration statute are much like the federal statute that eventually passed. *See* 1920 N.Y. LAWS 803 (New York Arbitration Law).

49 *Cf.* Chamberlain, *supra* note 48, at 524 (indicating that the New York statute was initiated by the Chamber of Commerce). Chamberlain's article did not completely clarify the ABA's position on the desired reach of the FAA. The author did note, however, that state statutes varied in their scope, and that certain types of disputes were not amenable to arbitration:

> It would indeed be difficult to provide by agreement in advance that any tort action should also be referred to arbitration. For example, it would be practically impossible and unfair to the passenger to compel a passenger on a railway to agree, not to sue, but to submit to arbitration his claims for an injury in the course of the carrying out of his contract of transportation with the railway company. There is no central point at which the passenger and the company can conveniently meet before the arbitrators, and the questions involved in such an action are fault, extent of injury, and probable loss which it is much safer to leave to a jury than are the questions of custom of the trade or quality of goods involved in disputes arising over business contracts.

Id. at 525.

50 For example, Chamberlain claimed that business persons preferred to have certain facts determined by experts rather than by juries. Chamberlain, *supra* note 48, at 523 n.1 (citing Moses H. Grossman, *Speeding up Justice Through Arbitration*, 5 ILL. L.Q. 135 (1923)). Grossman's article noted that arbitrators can have expertise in "the particular field of business in which the dispute has arisen." Grossman, *supra*, at 137. Grossman also contended that arbitration is superior where "an issue depends upon a question of trade custom or practice" and where "revelation of trade secrets or confidential matters" would be damaging in a public forum. *Id.*; *see also* Hollis R. Bailey, *Arbitration*, 8 MASS. L.Q. 55 (1923) ("In 1918 at the Conference of Bar Association delegates held at Cleveland under the auspices of the American Bar Association, a movement was started in favor of legislation by which agreements for arbitration should be made binding . . . as a means for settling speedily all kinds of disputes arising in business transactions."). *But cf.* Comment, *Arbitration Contracts*, 33 YALE L.J. 90, 92 (1923-24) (discussing the common law of arbitration and noting that the New York statute applies to "all agreements to arbitrate, if language appropriate for that purpose is used").

the bill would reach other types of disputes.[51] This understanding is confirmed by the reaction of the bill's proponents to the FAA's passage.[52]

C. "Pro-Arbitration Policy"—The Judiciary's Expansion of the FAA

The language of the FAA does not clearly define the statute's reach.[53] A series of Supreme Court decisions has resolved much of this ambiguity in favor of a broad interpretation of the FAA as preemptive of state law and as representative of a strong substantive policy favoring arbitration. This Part briefly traces the legal doctrine that set the stage for *Gilmer*.

Interpretive questions arose primarily in diversity cases because courts have never held that the FAA creates federal question jurisdiction.[54] The Supreme Court initially avoided federalism questions by construing the FAA narrowly.[55] In *Bernhardt v. Polygraphic Co.*, a Vermont citizen sued his employer in state court for damages resulting from his discharge.[56] Norman Bernhardt had been hired to supervise a lithography plant in North Bennington, Vermont, and his contract

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51 *See infra* notes 124-32.

52 ABA members who drafted the bill and lobbied for it in Congress wrote the following:

> The bill was supported by *business organizations* from every part of the country. . . . At a time when the Bar is charged with lack of appreciation of the needs of business in modeling legal procedure, what greater answer to the criticism can be made than that the American Bar Association, with the support of the *business men* of the country, prepared and . . . secured[ ] the enactment into law of a policy . . . providing a machinery so simple that it requires only the action by *trade bodies* throughout the country and of *business men* generally to make its application effective?

W.H.H. Piatt et al., *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153 (1925) (emphasis added).

53 *See generally* Hirshman, *supra* note 36, at 1318 ("[W]hen Congress acted in 1925 to redress the undesirable consequences of the deep-rooted common-law hostility to arbitration, it unknowingly created problems of interpretation and application that implicate fundamental federalism concerns. Courts and commentators have been wrestling with these difficulties ever since.").

54 *See id.* at 1318-19 (citing, *inter alia*, Robert Lawrences Co. v. Devonshire Fabrics, 271 F.2d 402 (2d Cir. 1959)). The Supreme Court endorsed this view in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25 n.32 (1982) ("The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create an independent federal-question jurisdiction under 28 U.S.C. § 1331 . . . .").

55 *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956) (holding that a contract between a lithography company and its plant supervisor is not a contract "in" commerce and that the FAA therefore does not apply).

56 *Id.* at 199.

contained an arbitration clause.[57] The employer removed the action to federal court on diversity grounds[58] and moved for a stay pending arbitration. On the basis of state law, the district court denied the employer's motion.[59] The Second Circuit reversed on the ground that the stay provision in section 3 of the FAA was a mandatory procedural rule applicable in all federal proceedings—not just ones involving interstate commerce—and indicated that section 3 did not violate the doctrine of *Erie Railroad v. Tompkins*[60] because it was not "substantive."[61]

The Supreme Court, speaking through Justice Douglas, avoided the potential *Erie* problem by "read[ing section 3 of the FAA] narrowly to avoid that issue."[62] Consequently, the Court reversed, holding that Bernhardt's contract was not one involving commerce and was therefore not covered by the FAA.[63] The Court manifested its reluctance to address the constitutional implications by taking the position that reading the FAA's stay provision as "procedural" might impermissibly intrude on local law.[64] According to the Court, such an interpretation would have created outcome-determinative problems, contravening the command of *Erie*.[65] Justice Douglas's opinion therefore indicated that the FAA requirement was a substantive one.[66]

Justice Douglas's opinion in *Bernhardt* suggested in dicta that arbitration leads to both a different and inferior result.[67] The Court later repudiated its suspicion of the arbitral forum and relied on the "substantive" nature of the FAA to fashion a body of federal arbitration law

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57 Bernhardt v. Polygraphic Co. of Am., 218 F.2d 948, 949-50 (2d Cir. 1955), *rev'd on other grounds*, 350 U.S. 198 (1956).

58 *Id.*

59 *Id.* at 949.

60 304 U.S. 64 (1938).

61 *Bernhardt*, 218 F.2d at 951.

62 *Bernhardt*, 350 U.S. at 202. For a discussion of federalism questions presented by the FAA, see THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 107-10 (1989).

63 *Bernhardt*, 350 U.S. at 200-01 ("There is no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce . . . .").

64 *Id.* at 202.

65 *Id.* at 203-04.

66 *Id.* at 202-03.

67 The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and . . . the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give the reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial . . . .

Id. As if those reasons were insufficient, Justice Douglas added seven more differences in a footnote. *Id.* at 203 n.4.

that would preempt state law.[68] Thus, Justice Douglas's characterization of the FAA as "substantive," which in *Bernhardt* limited the FAA's reach, opened the door for later expansion of the Act.

In 1966, over Justice Douglas's dissent,[69] the Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing* held that a defense of fraud in the making of a contract containing an arbitration promise was arbitrable under the FAA.[70] The parties had entered into a contract under which Prima Paint would acquire Flood & Conklin's operations.[71] The agreement contained a broad arbitration clause.[72] Prima Paint sued in federal court for rescission, and Flood & Conklin moved for a stay pending arbitration.[73] The Supreme Court invoked a federal rule—that an arbitration clause is analytically separable from the rest of the contract—to hold the arbitration clause enforceable.[74] The Court based the authority to fashion a federal rule on the theory that Congress exercised its commerce and admiralty powers when it enacted the FAA.[75] This resolved the *Erie* problem articulated in *Bernhardt*[76] and laid a firm foundation for the development of a federal law governing arbitration.[77]

In 1982, the Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[78] further entrenched the pro-arbitration

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68 *See infra* notes 81-100 and accompanying text. Another twist is that Justice Douglas would soon write the *Steelworkers* opinions, *see supra* note 15, which contain nearly zealous praise of arbitration in the industrial relations context.

69 *See* Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 425 (1966) (Black, J., dissenting, joined by Douglas and Stewart, J.J.) ("The plain purpose of the [FAA] as written hy Congress was this and no more: Congress wanted federal courts to enforce contracts to arbitrate and plainly said so in the Act . . . . I am completely unable to agree to this new version of the Arbitration Act, a version which its own creator in *Robert Lawrence* practically admitted was judicial legislation.").

70 388 U.S. at 406-07 (Fortas, J., writing for the majority).

71 *Id.* at 397.

72 *Id.* at 398.

73 *Id.* at 399.

74 *Id.* at 403-04. Thus, unless the allegation of fraud is directed specifically at the arbitration clause, the clause is valid and the parties must arbitrate the question of whether the entire contract was induced by fraud. *Id.* at 402. For an extensive comparative analysis of the doctrine of separability, see Sojuznefteexport v. Joc Oil Ltd., 4 Int'l Arb. Rep. B1-86 (Bermuda Ct. App. 1989), *in* 15 YEARBOOK COM. ARB. 384 (1990).

75 *Prima Paint*, 388 U.S. at 405.

76 Justices Black, Douglas, and Stewart preferred a more modest resolution: that the state courts' substantive rule of decision should determine the outcome. *See id.* at 411 (Black J., dissenting). This view apparently repudiates the *Bernhardt* dictum that the FAA is not simply a procedural rule for federal courts. *Cf. id.* at 411 (disapproving the view that "the Arbitration Act, designed to provide merely a procedural remedy which would not interfere with state substantive law, authorizes federal courts to fashion a federal rule to make arbitration clauses 'separable' and valid").

77 *See generally* Hirshman, *supra* note 36, at 1321-24 (discussing *Prima Paint* and its ramifications); CARBONNEAU, *supra* note 62, at 108 (*Prima Paint* "has seminal significance.").

78 460 U.S. 1 (1982).

policy premised on the FAA. A dispute over the performance of a construction contract had led to two actions: the petitioner, a hospital, sought declaratory and injunctive relief in state court to avoid arbitration, and the respondent contractor filed suit in federal court for an order compelling arbitration under the FAA. The federal district court ordered a stay of the proceedings pending the outcome of the state litigation. The Supreme Court held that the district court abused its discretion under the doctrine of deference to pending state court actions established in *Colorado River Water Conservation District v. United States.*[79] The *Moses H. Cone* majority reasoned that the "exceptional circumstances" required for abstention under *Colorado River* did not exist on the facts before the district court.[80]

Moses H. Cone, in performing the free-form interest analysis required by *Colorado River*, announced various principles of federal arbitration law as relevant "factors" in determining whether the federal court should abstain.[81] The Court endorsed these specific propositions: that the presence of a nonsignatory third party does not preclude arbitrability;[82] that the FAA applies in state courts as well as in federal courts;[83] that the FAA "declar[es] . . . a liberal federal policy favoring arbitration agreements";[84] that the FAA creates a presumption of arbitrability;[85] and that the FAA creates substantive federal rules even though it cannot independently support federal question jurisdiction.[86] According to the Court, this array of principles followed from the "substantive law of arbitrability" created by the FAA.[87]

A year later, in *Southland Corp. v. Keating*,[88] the Court resolved any doubts concerning the applicability of the FAA in state proceedings. There, several franchisees sued a franchisor on state-law theories, including a claim that the franchisor had violated disclosure requirements of the California Franchise Investment Law.[89] The California Supreme Court held that the state claims were not arbitrable, despite a provision in the franchise agreement for arbitration of "[a]ny con-

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79 *See Moses H. Cone*, 460 U.S. at 13-26. *Colorado River* is reported at 424 U.S. 800 (1976).

80 *Moses H. Cone*, 460 U.S. at 25-26.

81 *Id.* at 13-28.

82 *Id.* at 20.

83 *Id.* at 24. However, the Court did not decide whether § 4 of the FAA applies in state court. *Id.* at 26; *see supra* note 39 (full text of § 4).

84 *Moses H. Cone*, 460 U.S. at 24.

85 *Id.* at 24-25. The liberal federal policy suddenly becomes less liberal—and the presumption is reversed—when there is a dispute over whether the arbitrators or the courts are to decide the question of arbitrability. *See* First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1924 (1995).

86 *Moses H. Cone*, 460 U.S. at 25 n.32.

87 *Id.* at 24 (citing the *Prima Paint* rule as an example).

88 465 U.S. 1 (1983).

89 *Id.* at 4.

troversy or claim arising out of or relating to this [a]greement or the breach hereof."[90]

The United States Supreme Court reversed, striking down a provision in the California franchise statute that invalidated waivers of rights to litigate claims arising under state law on the ground that the provision violated the Supremacy Clause. The Court explained that "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[91]

More recently, the Court in *Allied-Bruce Terminix Companies v. Dobson*[92] declined to overrule *Southland*, thus reaffirming that the FAA is preemptive and applies in state courts, and held that the FAA extends to all contracts that are subject to the commerce power.

Southland and *Allied-Bruce Terminix* demonstrate the Court's tendency to ignore evidence of congressional intent in deciding FAA questions.[93] The FAA's authors stated only that the bill was intended to give an opportunity to "enforce an [arbitration] agreement in commercial contracts and in admiralty contracts . . . when voluntarily placed in the document by the parties" and that it "grant[ed] no new rights."[94] Likewise, as Justice O'Connor pointed out in her *Southland* dissent, the legislative history strongly suggests that Congress did not

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90 *Id.* at 4, 17.

91 *Id.* at 16.

92 115 S. Ct. 834 (1995). In *Allied-Bruce Terminix*, the Court enforced an arbitration clause in a home extermination contract on the basis that the contract "turn[ed] out, *in fact*, to have involved interstate commerce." *Id.* at 841-43. In so doing, it reversed a judgment of the Alabama high court, which had held the FAA inapplicable because the parties had not contemplated that interstate commerce would be involved when they entered into the agreement. *Id.* at 841. In determining that the FAA's reach coincides with that of the commerce clause, the Court read the words "a contract evidencing a transaction involving commerce" in § 2 as equivalent to the expansive "affecting commerce" language found in other statutes. *Id.* at 839.

Justice O'Connor, without repudiating her powerful dissent in the *Southland* case, agreed with the majority's commerce analysis and opined that *stare decisis* precludes the overruling of *Southland*. *Allied-Bruce Terminix*, 115 S. Ct. at 844 (O'Connor, J., concurring). Justice Thomas, joined by Justice Scalia, wrote in dissent that the FAA—which was enacted only as a procedural provision—was intended to apply only in federal courts. *Id.* at 848. In addition to persuasively analyzing the FAA's history, Justice Thomas's dissent emphasizes federalism concerns and the related presumption against reading a statute to displace state law. *Id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 464 (1991)).

93 *See, e.g.*, *Southland*, 465 U.S. at 21 (O'Connor, J., dissenting); *Allied-Bruce Terminix*, 115 S. Ct. at 844 (O'Connor, J., concurring) ("[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation.").

94 *See* 65 CONG. REC. 1931 (1924) (statement of Rep. Graham). For the full text, see *supra* note 37.

intend for the FAA to produce the broad substantive rules announced in *Prima Paint* and its progeny.[95]

The plain language of the FAA is consistent with a narrower understanding of its scope. For example, section 2 allows for an exception to arbitrability "upon such grounds as exist in law or in equity for the revocation of any contract."[96] This clause suggests that state substantive rules should still have effect in evaluating whether the parties have made a valid agreement to arbitrate. In addition, the remedial provisions in sections 3 and 4 apply respectively to "courts of the United States" and "United States district court[s]."[97] These provisions indicate that Congress intended the FAA to apply only in federal trial and appellate courts, not in state courts. Despite evidence of Congress's contrary intent,[98] the Court has created an amorphous "body of federal substantive law."[99] As Justice O'Connor recognized in her *Southland* dissent, the source of the problem is *Bernhardt*'s assertion that a right to arbitration is "substantive."[100]

The resulting expansion of federal arbitration law, unintended in *Bernhardt*,[101] strongly parallels the labor-law arbitrability decisions premised on section 301 of the LMRA.[102] The labor arbitration cases, set

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95 *Southland*, 465 U.S. at 25 (O'Connor, J., dissenting) ("Th[e FAA's legislative] history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts."). For example, the House report accompanying the version reaching the House floor indicated that "[w]hether an agreement for arbitration shall be enforced or not is a question of procedure." H.R. REP. No. 96, 68th Cong., 1st Sess. (1924). For excerpts from the hearings on the bill to the same effect, see *infra* note 313 and accompanying text. Because the FAA was enacted before *Erie Railroad v. Tompkins* took away Congress's power to prescribe "general" common law to be followed in diversity cases, *see Erie*, 304 U.S. 64 (1938), these comments imply that Congress did not intend to displace state substantive rules as the Court held in the *Prima Paint-Keating* line of cases.

96 9 U.S.C. § 2 (1994); *see supra* note 39 (full text of § 2).

97 *See supra* note 39 (full text of §§ 3-4).

98 *See Southland*, 465 U.S. at 28 (O'Connor, J., dissenting) ("Plainly, a power derived from Congress' Art[icle] III control over federal-court jurisdiction would not by any flight of fancy permit Congress to control proceedings in state courts.").

99 *Id.* at 12 (majority opinion) (quoting Moss H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 & n.32 (1982)).

100 *Id.* at 26 (O'Connor, J., dissenting). And, as Justice Thomas more recently pointed out in dissent in *Allied-Bruce Terminix*, the Court's characterization of § 3 of the FAA as "substantive" for *Erie* purposes in 1956 could not have changed the meaning of the FAA, which was enacted in 1925. 115 S. Ct. at 848 (Thomas, J., dissenting).

101 This proposition is supported by the fact that Justice Douglas, who authored the majority opinion in *Bernhardt*, joined Justice Black's dissent in Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 425 (1966). *See supra* note 69.

102 The similarities led Professor Hirshman to name three critical FAA cases in the 1980s the "Second Trilogy." *See* Hirshman, *supra* note 36 (referring to Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1982); Southland Corp. v. Keating, 465 U.S. 1 (1983); and Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)).

in motion by Justice Douglas's majority opinion in *Lincoln Mills*,[103] rely on section 301 of the LMRA[104] to infer the authority of "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements."[105]

The "substantive" law of section 301, however, is more justifiable than that of the FAA. First, the FAA preceded *Erie Railroad Co. v. Tompkins*;[106] section 301 followed *Erie*.[107] Pre-*Erie* law allowed Congress to prescribe substantive rules of decision for diversity cases, and thus statements in the legislative history of the FAA indicating that the FAA was "procedural" in nature strongly suggest that Congress intended no federal "substantive" law of arbitration. Congress had notice of the *Erie* decision when it enacted the LMRA, however, and the section 301(a) procedural provisions would have meant little without an implied substantive law.[108]

Second, section 301 "substantive" law is arguably less intrusive on states' interests because it is inherently limited to the collective bargaining context.[109] The FAA, on the other hand, may potentially reach almost all other contractual situations, given the Court's expansive interpretation of the commerce clause and its revisionist view that Congress enacted the FAA under its commerce clause power.[110]

Third, as Part III.B of this Note explains, the Court has shown more restraint in labor arbitration cases, by inferring congressional deference to state prerogatives when Congress enacts a broad substantive policy like that embodied in the LMRA.[111] This Note contends

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103 Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); *see supra* notes 21-23 and accompanying text.

104 *See supra* note 16 (full text of § 301(a)).

105 *Lincoln Mills*, 353 U.S. at 451 (1957). Section 301 itself, of course, does not speak in such clear terms. *See supra* note 16.

106 304 U.S. 64 (1988).

107 Congress enacted the FAA in 1925, *see supra* part I.B.; the Supreme Court decided *Erie* in 1938, 304 U.S. 64 (1938); and Congress enacted the LMRA in 1947, 61 Stat. 136 (1947).

108 *Cf. Lincoln Mills*, 353 U.S. at 450-51:

> There is one view that § 301(a) merely gives federal district courts jurisdiction in controversies that involve labor organizations in industries affecting commerce, without regard to diversity of citizenship or the amount in controversy. Under that view § 301(a) would not be the source of substantive law; it would neither supply federal law to resolve these controversies nor turn the federal judges to state law for answers to the questions. Other courts—the overwhelming number of them—hold that § 301(a) is more than jurisdictional—that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . . .

109 *See supra* note 16 (text of § 301(a)).

110 *See* Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 405 (1966) (indicating that the commerce power supported enactment of the FAA). For legislative history strongly suggesting that this was not intended, however, see *infra* note 313.

111 *See, e.g.*, Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

that courts should use the same general approach when interpreting the FAA, instead of dogmatically invoking the "liberal policy" favoring arbitration.

II
ARBITRATION OF FEDERAL EMPLOYMENT CLAIMS UNDER THE FAA

Two features of federal arbitration law allow employers to force employees to arbitrate. First, although the FAA explicitly excludes "contracts of employment" from its scope, many courts have relied on obsolete case law to hold that the Act reaches all but a small set of employees. These cases involved employer-union disputes and arose before the 1957 *Lincoln Mills* decision broadly interpreted the LMRA to create a substantive federal law governing collective bargaining agreements. The pre-*Lincoln Mills* cases used the FAA to achieve a similar goal, but in so doing did violence to the FAA provision excluding employment contracts. Second, the recent *Gilmer* decision precluded an employee from litigating an employment discrimination claim against his employer.[112] These two lines of authority have allowed employers to avoid litigation of a variety of claims by employees.

A. War is Peace: Interpretation of the "Contracts of Employment" Exclusion

Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[113] Although several lower federal courts have construed the clause narrowly,[114] the Supreme Court has yet to define the scope of this exception.[115]

An interpretive problem arises from Congress's use of the word "commerce" twice in section 1.[116] That section first uses the term, "as herein defined," to delineate the reach of the remedial provisions of the Act.[117] Courts interpret this use of the term as consonant with the

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112 Note, however, that *Gilmer* involved an arbitration promise in an agreement between an employee and a third party. *See supra* notes 6-7 and accompanying text.

113 9 U.S.C. § 1 (1994). *See supra* note 38 for the full text of § 1.

114 *See, e.g.*, Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, (U.E.) Local 437, 207 F.2d 450, 452-53 (3d Cir. 1953) (excluding from the scope of the exception employees engaged in production of goods for subsequent sale in interstate commerce).

115 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (leaving the issue "for another day").

116 9 U.S.C. § 1 (1994).

117 *See id.* §§ 1, 3-4.

full reach of the Congress's Article I commerce clause power.[118] "Commerce" is then used in the last sentence of section 1 to specify the scope of the exclusion clause for "contracts of employment."[119] Ordinary principles of statutory construction would suggest that Congress intended the same broad meaning for the word "commerce" in the exclusion clause.[120]

This broad reading of the exclusion clause would effectively preclude mandatory arbitration of any employment dispute that would otherwise be within the reach of the FAA.[121] Nevertheless, federal courts do not agree on whether to read the clause broadly or narrowly, largely because of the dearth of legislative history concerning the intended scope of the clause.[122]

One federal district court observed that interpreting the exclusion clause presents "[a] certain amount of confusion."[123] This probably understates the difficulties. The exclusion clause did not appear in the ABA committee's original draft.[124] It was inserted at the insistence of labor representatives who feared that the FAA would reach

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118 *See, e.g.*, Perry v. Thomas, 482 U.S. 483, 489-90 (1987) ("[T]he Federal Arbitration Act embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause."); *cf.* Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 839-40 (1995) (interpreting the words "involving commerce" in § 2 of the FAA as corresponding to Congress's full power under the commerce clause).

119 9 U.S.C. § 1 (1994).

120 This is particularly true because "commerce" is in the first instance "herein" defined; whether "herein" means "in section 1" or "in the entire Act," the term should mean the same thing in the very same *sentence* in § 1. *Compare* Cox, *supra note* 39, at 601 (indicating that the argument of textual inconsistency can be advanced, but concluding that a narrow interpretation of the clause is preferable because it is consistent with the current congressional attitude toward judicial enforcement of agreements to arbitrate) *with* Michael J. Gallagher, Note, *Statutory Rights and Predispute Agreements to Arbitrate in Contracts of Employment*, 66 ST. JOHN'S L. REV. 1067, 1084-85 (1993) (concluding that the legislative history and the Supreme Court's treatment of the exclusion clause support a broad interpretation).

Furthermore, although the Supreme Court has recently emphasized the words "involving commerce" to support a broad reading of § 2, *Allied-Bruce Terminix*, 115 S. Ct. at 840; *see supra* note 118, there is nothing in the legislative history of the FAA to suggest that Congress had in mind a narrower meaning for "workers engaged in . . . commerce" in § 1. As the Court pointed out, *see Allied-Bruce Terminix*, 115 S. Ct. at 840, Congress used the language of the commerce clause itself when defining "commerce" in § 1—the very section that included the exception for "contracts of employment." Moreover, there is no valid policy justification for limiting the exclusion clause on the basis of workers' relative involvement in commerce. *See also infra* note 341.

121 *Cf.* Estreicher, *supra* note 17, at 762 (1990) ("It remains to be seen whether section 1 should be read as a flat exclusion of all individual employment contracts. The 'plain meaning' of the clause suggests one answer.").

122 *See id.*

123 United Indus. Workers v. Virgin Islands, 792 F. Supp. 420, 425 n.12 (D.V.I. 1992) (discussing the Third Circuit's handling of the issue of the reach of the FAA § 1 exclusion clause), *aff'd*, 987 F.2d 162 (3d Cir. 1993).

124 *See* S. 4214, 67th Cong., 4th Sess. (1922); *see supra* note 46.

labor controversies.[125] ABA reports describing the lobbying initiative confirm that labor opposition was the motivation for including the amendment.[126]

Although some commentators have suggested that the concerns voiced by organized labor were limited to protecting unions' ability to use economic weapons to achieve a stronger bargaining position,[127] the purpose of the exclusion clause was probably broader.[128] The bill's supporters assured labor organizations that the FAA was only intended to apply to disputes between business persons, and that the exclusion clause merely clarified what was already in the bill as originally drafted.[129] At least one ABA publication from the period explained the clause without confining it to the context of industrial disputes.[130] Moreover, a letter from Secretary of Commerce Hoover

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125 *See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcommittee of the Committee on the Judiciary on S.4213 and S.4214*, 67th Cong., 4th Sess., at 9 (Jan. 31, 1923) [hereinafter *Senate Hearings*].

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

1923 ABA Committee Report, *supra* note 46, at 287.

127 Professor Estreicher maintains that union opposition was premised on potential government intervention in the bargaining process, which might have led to mandatory "interests" arbitration:

> Since there was very little arbitration of "rights" disputes under collective bargaining agreements at the time—something organized labor, in any event, generally favored—labor's opposition was aimed at what it feared might be government-imposed arbitration of "interests" disputes in derogation of its right to strike. This was consistent with the AFL's general opposition during this period to "compulsory arbitration, compulsory investigation of industrial disputes, industrial courts, and similar devices which involve limitations upon the right to strike and regulation of relations between employers and employees by law."

Estreicher, *supra* note 17, at 761 n.25 (quoting LEWIS L. LORWIN, THE AMERICAN FEDERATION OF LABOR: HISTORY, POLICIES, AND PROSPECTS 401-02 (1933)). The goal of "interests" arbitration is to establish contractual obligations when the parties cannot agree to them, whereas "rights" arbitration refers to the resolution of disputes arising under an agreement that already exists.

128 *See generally* Cox, *supra* note 39, at 606 (arguing that a broad interpretation of the FAA § 1 exclusion clause tracks Congress's likely views in 1925, but that a narrow interpretation is consistent with the more modern congressional understanding of arbitration in the labor context); Gallagher, *supra* note 120, at 1078-85 (arguing for a broad interpretation of the FAA § 1 exclusion clause).

129 *See Senate Hearings*, *supra* note 125, at 9.

130 J.P. Chamberlain, in an article describing the ABA's lobbying initiative, explained the amendment creating the "contracts of employment" exclusion in the following way:

> [In] the matter of the Amalgamated Association of Railroad Employees, . . . [t]here was a contract between the company and the employees containing an arbitration provision, but the court refused the motion [to refer to arbitration] since in this case the men had struck and thus themselves broken the contract before they made the motion. It, furthermore, held that the contract to arbitrate did not extend to the question directly involved, but

to a Senate subcommittee does not suggest that business interests opposed a broad exclusion clause.[131]

Most compelling, however, is that the most expansive explanations of the exclusion clause were presented at committee hearings in the presence of House and Senate members. Secretary Hoover's letter was presented to the relevant committees and did not indicate that the clause was aimed at workers in a particular union or those with a particular kind of contract.[132] Similarly, the chairperson of the ABA committee that conceived the bill told Senate members that the clause did not "refer[ ] to labor disputes *at all*," but only applied to "merchants."[133]

> there would seem to be no reason why under the decision an agreement to arbitrate written into a contract between employer and employee could not be enforced under the [New York arbitration] statute. The bill providing for arbitration in the federal courts was amended at the instance of the representatives of the Seamen's Union who did not want seamen's wages to be subject to compulsory arbitration.

Chamberlain, *supra* note 48, at 525 (citation omitted). Chamberlain's reference to *In re* Division 132 of Amalgamated Association of Street & Electric Railroad Employees, 188 N.Y.S. 353 (Sup. Ct. 1921), a case involving workers employed by a traction company, suggests that the ABA (and, presumably, the bill's congressional sponsors) may have intended the clause to reach beyond seamen and even other workers directly involved with interstate commerce.

131 Secretary of Commerce Herbert Hoover, in a letter to Senator Sterling, who was the chairperson of a joint subcommittee that heard testimony on the bill, indicated that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Arbitration of Interstate Commercial Disputes, Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 1st Sess. 21 (1924) [hereinafter *Joint Hearings*].

132 Hoover wrote generically about the problem of including "workers' contracts." *Id.*

133 *Senate Hearings*, *supra* note 125, at 9 (emphasis added). This elaboration of the exclusion clause is sufficiently expansive to warrant rejection of Professor Estreicher's argnment, *see supra* note 127, that the clause applies only to "interests" disputes. Even if "rights" arbitration were unheard of at the time of the FAA's passage—a proposition that Estreicher does not defend—the ABA committee chair's testimony explained the clause as clarifying what must have already seemed obvious to most members: that the FAA was "purely an act to give the *merchants* the right [to agree to arbitrate]." *Senate Hearings*, *supra* note 125, at 9 (emphasis added). That the clause merely stated the obvious is confirmed by the utter lack of controversy over the amendment. Professor Estreicher's allusion to "interests" arbitration is therefore beside the point. The portion of the Senate committee hearings in which Mr. Piatt disclosed the amendment excluding "contracts of employment" is so compelling that it should be quoted at length. In this passage, Mr. Piatt, the chair of the ABA committee that drafted the bill, reassured Senator Walsh that the bill was intended to cover *only merchants*, not contracts involving employees, or other types of contracts of adhesion, which likewise were never intended to be covered by the Act:

> Mr. Piatt. .... [Mr. Furuseth of the Seamen's Union] has objected to [the federal bill], and criticised it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, it was not the intention of this bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense; and . . . if your honorable committee should feel that there is any danger of that, they should add to

The drafters of the exclusion clause arguably did not intend the exception to reach all employment contracts, having included qualifying language following the words "contracts of employment."[134] The drafters' inclusion of the words "classes of workers" suggests that they viewed contracts of "workers" as a subset of "employment" contracts.[135] Union opposition to the bill clarifies what type of employee Congress meant by the word "worker." Organized labor was most likely concerned about preserving its role with respect to employees who were union members or who might join unions.[136]

The federal circuits have split in their interpretations of the section 1 proviso. They have faced two principal questions in interpreting the clause: (1) whether it excludes arbitration clauses in collective bargaining agreements from the FAA's coverage and (2) whether it applies to a narrower range of "interstate commerce" activities than those otherwise reached by the Act. Litigants and *amici curiae* have

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> the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all. *It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.*
>
> . . . .
>
> Senator Walsh of Montana. The trouble . . . is that a great many of these contracts that are entered into are really not voluntarily [*sic*] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. *It is the same with a good many contracts of employment. A man says "There are our terms. All right, take it or leave it."* Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Id. (emphasis added). The exchange continued, and Mr. Piatt allayed Senator Walsh's fears by indicating that the bill was not intended to apply to such situations:

> Senator Walsh of Montana. And then [carriers] have the regular bill of lading contract, but they have a further provision that any controversy arising under the contract shall be submitted to arbitration; and the fellow says "Well, I haven't any confidence in it. If I have a controversy I would like to have it tried before a court, where I feel I can get justice."
>
> Mr. Piatt. . . . . I would not favor any kind of legislation that would permit the forcing [*sic*] a man to sigu that kind of a contract.

Id. at 10.

134 9 U.S.C. § 1 (1994).

135 Alternatively, the drafters may have meant to use "workers' " contracts as an example of "employment" contracts. This is unlikely, however, because (1) the enumeration following "contracts of employment" appears to be restrictive, at least according to the maxim *inclusio unius est exclusio alterius*, and (2) the exclusion clause already uses seamen and railroad employees as specific examples of workers whose contracts would be excluded. *Id.*; *see also* Bernhardt v. Polygraphic Co. of Am., 218 F.2d 948, 951-52 (2d Cir. 1955) (holding that a plant supervisor is not a "worker" within the meaning of § 1), *rev'd on other grounds*, 350 U.S. 198 (1956). The Supreme Court specifically declined to decide whether the supervisor was a "worker" under § 1 of the Act. 350 U.S. at 201 n.3.

136 *See* discussion *infra* part III.C.2 (arguing for a "power" test for determining whether an employee is a "worker" for purposes of the exclusion clause).

twice submitted briefs to the Supreme Court on the clause's scope, but the Court has not decided the issue.[137] The *Steelworkers* Trilogy,[138] which held that arbitration clauses in collective bargaining agreements are enforceable under section 301 of the LMRA, diminishes the importance of the FAA's applicability to collective bargaining agreements. However, the federal courts of appeals' decisions shed light on the applicability of the exclusion clause to individual contracts of employment.[139]

In *International Union United Furniture Workers v. Colonial Hardwood Flooring*,[140] an employer sued a union in federal court for damages resulting from a strike allegedly violating a collective bargaining agreement. The union moved for a stay pending arbitration under section 3 of the FAA. The district court denied the stay on the ground that the section 1 exclusion clause made the FAA inapplicable to collective bargaining agreements.[141] On appeal, the Fourth Circuit affirmed, holding that the agreement was "a contract relating to the employment of workers engaged in interstate commerce, within the clear meaning of the exclusion clause."[142]

The *Colonial Hardwood Flooring* court had no trouble finding that a union contract was a "contract of employment"; instead it focused on whether the exclusion clause applies to the entire Act or only to the sections that explicitly refer to "commerce."[143] The court ultimately held that the exclusion clause applies to all sections of the FAA and excludes employment contracts to the same extent that the Act reaches other contracts, because Congress used the term that demarcates the scope of the act generally—"commerce"—in the exclusion clause as well.[144] Other circuits had held that the stay and order provi-

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137 The following organizations briefed the issue in *Gilmer*: the American Federation of Labor and Congress of Industrial Organizations, the American Association of Retired Persons, and the Lawyers' Committee for Civil Rights Under Law. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 1, 36 (1991) (Stevens, J., dissenting). The litigants in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), also briefed the issue, but the Court decided the case without even mentioning the FAA. *Id.* at 466 (Frankfurter, J., dissenting) (criticizing the Court's "silent treatment" of the question).

138 *See supra* notes 15-16 and accompanying text.

139 *See also* Douglas E. Ray, *Court Review of Labor Arbitration Awards Under the Federal Arbitration Act*, 32 VILL. L. REV. 57, 66-67 (1987) (arguing that the applicability of the FAA to collective bargaining agreements is important insofar as it affects post-arbitral judicial review).

140 168 F.2d 33 (4th Cir. 1948).

141 *Id.* at 34-35. The district court held, in the alternative, that the collective bargaining agreement in question did not provide for arbitration of the dispute. *Id.*

142 *Id.* at 35. The court also affirmed the district judge's holding that the dispute was not arbitrable under the collective bargaining agreement. *Id.*

143 *Id.* at 37.

144 *Id.* The court quoted a Sixth Circuit case, Gatliff Coal Co. v. Cox, 142 F.2d 876, 882 (6th Cir. 1944):

sions in sections 3 and 4 are not limited by sections 1 and 2.[145] This section-by-section reading of the FAA gave courts significant authority to enforce arbitration clauses by avoiding explicit limitations when deciding cases under sections 3 or 4.[146]

Although section-by-section analysis of the FAA enjoyed early support in some circuits[147] and even in one Supreme Court decision,[148] it was based on a pre-*Erie* view of federal procedure[149] and a narrow understanding of the commerce clause power.[150] The Supreme Court repudiated this section-by-section analysis in *Bernhardt*, holding that a section 3 stay was unavailable because the parties' agreement to arbitrate did not appear in a contract involving "commerce."[151] Thus, the Court held, the section 3 stay provision should be read with sections 1 and 2 as "integral parts of a whole."[152] The Court also indicated that the FAA was enacted under the commerce clause.[153] This prevented the lower courts from viewing the section 3 stay provision as a procedural mechanism enacted under Congress's Article III powers and applicable to all actions in federal court; rather, it required the lower

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> The office of an exception in a statute is well understood. It is intended to except something from the operative effect of a statute or to qualify or restrain the generality of the substantive enactment to which it is attached and it is not necessarily limited to the section of the statute immediately following or preceding. The scope of the exception or proviso in the statute must be gathered from the view of the whole law, and if the language of the exception is in perfect harmony with the general scope of the entire statute, the exclusion is applicable to the whole act. It is clear that the exception here in question was deliberately worded by the Congress to exclude from the [FAA] all contracts of employment of workers engaged in interstate commerce.

Id. at 37-38.

145 *See, e.g.*, Donahue v. Susquehanna Collieries Co., 138 F.2d 3 (3d Cir. 1943).

146 For example, in 1945 the Third Circuit held that a collective bargaining agreement requiring arbitration was subject to § 3 of the FAA, which authorizes a stay pending arbitration, even though it was excluded by the § 1 "contracts of employment" clause. Watkins v. Hudson Coal Co., 151 F.2d 311, 320-21 (3d Cir. 1945), *cert. denied*, 327 U.S. 777 (1946).

147 *E.g.*, Agostini Bros. Bldg. Corp. v. United States, 142 F.2d 854 (4th Cir. 1944). *Agostini* held that a contractor's motion to stay proceedings in a breach-of-contract action by a subcontractor should have been granted under § 3, even though the transaction did not involve "commerce" for purposes of § 1 or § 2. *Id.* at 855-56.

148 *See* Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449, 452-53 (1935) (holding that a district court's authority to grant a stay pending arbitration, under FAA § 3, was not conditioned upon its power to compel arbitration under § 4 of the FAA).

149 For example, *Shanferoke* allowed a stay in a diversity action in the Southern District of New York in a situation in which a New York state court would have denied the stay. 293 U.S. at 452-53.

150 *See, e.g.*, Watkins v. Hudson Coal Co., 151 F.2d 311, 321 (3d Cir. 1945) ("We do not think that the limitation in the definition [of commerce] in section 1 should be applied as an over-all limitation elsewhere to the section where the defined term is not used.").

151 Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 200-01 (1956).

152 *Id.* at 201.

153 350 U.S. at 201-02 (citing H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924)).

courts to apply section 3 only to contracts otherwise falling within the FAA.[154]

In *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers*,[155] the Third Circuit avoided the contortions of section-by-section analysis by narrowing the scope of the exclusion clause. As in *Colonial Hardwood Flooring*, a union was defending a LMRA section 301 suit for breach of a collective bargaining agreement.[156] The Third Circuit reversed the district court's denial of a stay, holding that section 3 of the FAA applied to the arbitration clause in the agreement.[157] Because the court conceded that a collective bargaining agreement was a "contract of employment,"[158] it needed to avoid the section 1 exclusion clause.[159] The court resolved the problem by holding that the exclusion clause applies to a narrower set of contracts than the FAA otherwise reaches.[160] The court reasoned that since the clause mentions seamen and railroad workers, the exclusion can only apply to workers who are "actually engaged in the movement of interstate or foreign commerce."[161]

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154 The Fourth Circuit's *Agostini Bros.* decision exemplifies the older view, which holds that the commerce clause power is not broad enough to support a general rule requiring arbitration, and that § 3 of the FAA is a general procedural rule applicable in federal courts:

> [T]he second section [of the FAA] proceeds to lay down a rule of substantive law regarding the validity of an agreement for arbitration in case of any maritime transaction or contract evidencing a transaction involving commerce. Congress was here making a rule concerning subject matter within its own constitutional legislative authority. It was not seeking to confer validity to arbitration agreements generally, a matter outside the scope of federal powers.
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> Then in § 3 the statute deals with the conduct of suits in federal courts, again a subject matter of congressional power. The language becomes general: "any suit or proceeding," upon "any issue referable to arbitration under an agreement in writing for such arbitration" are the words. Congress is not limited, in legislating as to law suits in federal courts, to those suits involving matters where the substantive rights of the parties may be controlled by federal legislation. . . . We think it clear that the provisions of § 3 are not to be limited to the specific instances dealt with in § 2.

Agostini Bros. Bldg. Corp. v. United States, 142 F.2d 854, 856 (4th Cir. 1944) (quoting Donahue v. Susquehanna Collieries Co., 138 F.2d 3, 5 (3d Cir. 1943)).

155 207 F.2d 450 (3d Cir. 1953).

156 *Id.* at 451.

157 *Id.* at 453-54.

158 *Id.* at 451-52 (citing Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944); International Union United Furniture Workers v. Colonial Hardwood Flooring Co., 168 F.2d 33 (4th Cir. 1948); Amalgamated Ass'n v. Pennsylvania Greyhound Lines, 192 F.2d 310 (3d Cir. 1951); Pennsylvania Greyhound Lines v. Amalgamated Ass'n, 193 F.2d 327 (3d Cir. 1952)).

159 The court phrased the issue as "whether the plaintiff's employees, who are engaged in the manufacture of goods for commerce and plant maintenance incidental thereto, are to be regarded as a 'class of workers engaged in foreign or interstate commerce' within the meaning of the exclusionary clause." *Tenney Engineering*, 207 F.2d at 452.

160 *Id.* at 452-53.

161 *Id.*

Thus, the *Tenney Engineering* court looked to the FAA for a substantive federal rule supporting the enforcement of an arbitration clause in a collective bargaining agreement.[162] *Lincoln Mills* and the *Steelworkers* cases would soon announce broad federal authority to enforce labor contract arbitration clauses based on section 301 itself.[163] *Tenney Engineering*'s narrow reading of the exclusion clause served the same goal of enforcing these arbitration clauses, but it rested on two questionable rationales: (1) the legislative history of the FAA and (2) Congress's understanding of the commerce clause when it enacted the FAA.[164]

The legislative history does not persuasively support the Third Circuit's view. *Tenney Engineering* erroneously suggested that a particular ABA committee report contained "[t]he only reference to the clause in question."[165] That report indicated that a lobbyist for the Seamen's Union had opposed the bill as originally drafted by the ABA and that the ABA subsequently amended the draft by adding the "contracts of employment" proviso.[166] The court also noted that federal law had already mandated an adjustment procedure for disputes involving seamen and railroad workers[167] and that both groups were "engaged directly in . . . the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it."[168] Since Congress specifically mentioned these workers in the exclusion clause, the court found an intent to limit the clause to those who work directly in interstate transportation.[169]

Tenney Engineering rests on a dubious version of the FAA's history. The ABA report itself does not explain the reasons for the Seamen's Union's opposition to the ABA bill.[170] Furthermore, the opinion ignores subsequent legislative history suggesting that the amendment was not directed solely at contracts of seamen and railroad workers.[171]

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162 The jurisdictional basis of the employer's claim for damage was § 301 of the Taft-Hartley Act. *Id.* at 451.

163 *See supra* notes 16, 21-23 and accompanying text.

164 *Tenney Engineering*, 207 F.2d at 452-53.

165 *Id.* at 452 (citing *1923 ABA Committee Report*, *supra* note 46).

166 *1923 ABA Committee Report*, *supra* note 46, at 287 (1923) ("Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to [the 'contracts of employment'] amendment . . . .").

167 *Tenney Engineering*, 207 F.2d at 452.

168 *Id.*

169 *Id.* at 452-53 ("The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.").

170 The report only indicates that the Seamen's lobbyist did not want the bill to apply to wage disputes involving seamen, but says nothing about existing dispute resolution procedures. *See 1923 ABA Committee Report*, *supra* note 46, at 287.

171 *See supra* notes 127-33 and accompanying text.

For example, the chairperson of the ABA committee that produced the initial draft of the bill testified before a congressional committee that "[i]t is not intended that this shall be an act referring to labor disputes at all."[172] This indicates that legislators probably understood that the bill was opposed by organized labor in general, or at least that the proper response to opposition by one union was to exempt all workers' contracts. In addition, the legislative record indicates that the primary motivation for the bill was to ensure the arbitrability of contracts between merchants.[173] Because the exclusion clause amendment was presented to Congress against this backdrop, there is every reason to believe Congress intended the clause to sweep broadly.

Second, the *Tenney Engineering* court based its narrow reading of the exclusion clause on Congress's much narrower understanding of the commerce clause in 1925.[174] Although the court's premise that "[c]ongressional power over . . . interstate commerce had not developed to the extent to which it was expanded in the succeeding years" is correct, it does not support a narrower interpretation of "commerce" in the exclusion clause than in the definition of the scope of the Act. Assuming a narrow understanding of the commerce clause, *Tenney Engineering* should also have held that the FAA itself only reaches contracts linked directly to interstate or foreign commerce. But the court faced a dilemma: If the FAA provided no basis for requiring arbitration, then the courts would have been powerless to effectuate the Taft-Hartley Act's mandate to enforce collective bargaining agreements.[175]

An alternate approach to the bifurcated interpretation of "commerce" is to base the courts' authority to enforce collective bargaining agreements on the Taft-Hartley Act itself, as recognized by other federal courts of appeals reviewing section 301 decisions before the *Steelworkers* Trilogy.[176] The bifurcated view, however, has survived in post-

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172 *Senate Hearings, supra* note 125, at 9 (quoting W.H.H. Piatt of the American Bar Association).

173 *See supra* note 133 and accompanying text (quoting *Senate Hearings, supra* note 125, at 9 (The FAA is "purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other.")).

174 *Tenney Engineering*, 207 F.2d at 453.

175 This dilemma was resolved by *Lincoln Mills* and its *Steelworkers* progeny. *See supra* notes 21-23 and accompanying text.

176 *See, e.g.*, Shirley-Herman Co. v. International HOD Carriers, Bldg. & Common Laborers Union, Local Union No. 210, 182 F.2d 806, 809-810 (2d Cir. 1950) (holding that the FAA's exclusion of employment contracts, including union contracts, does not prevent the enforcement of an arbitration clause to effectuate the purposes of the Taft-Hartley Act); International Union United Furniture Workers v. Colonial Hardwood Flooring Co., 168 F.2d 33 (4th Cir. 1948). This rationale presaged the "body of federal substantive law" that would soon materialize in *Lincoln Mills*.

Trilogy decisions, limiting the exclusion clause in section 1 of the FAA to a small subset of employment contracts.

Subsequent cases limiting the scope of the exclusion clause to workers directly involved in interstate transportation rely heavily on *Tenney Engineering*, importing its questionable analysis into the context of individual employment contracts. For example, when basketball great Julius "Doctor J" Erving signed a contract to play for the Atlanta Hawks, he sued to set aside his contract with the Virginia Squires on grounds of fraud.[177] The Squires contract contained an arbitration clause.[178] Following *Tenney Engineering*, the Second Circuit held that the contract was not within the scope of the FAA exclusion clause, and that Erving was therefore required to arbitrate.[179]

Similarly, the First Circuit in *Dickstein v. duPont*[180] relied on *Tenney Engineering* to condition an employee's exemption from the FAA on being "involved in, or closely related to, the actual movement of goods in interstate commerce."[181] The court in *Dickstein* required a stockbroker to arbitrate a contract claim against duPont, his former employer, because his application to the New York Stock Exchange contained an agreement to arbitrate disputes concerning his employment.[182] In *Hydrick v. Management Recruiters International, Inc.*,[183] a federal district court applied the same test to justify a stay of a lawsuit by an employee of a personnel recruitment company.

Although *Tenney Engineering* is the majority position,[184] its construction of the exclusion clause is not universally accepted. For example, the Fourth Circuit rejected the *Tenney Engineering* position in *United Electrical, Radio & Machine Workers v. Miller Metal Products, Inc.*[185] In that case, an employer sued a union under section 301 for violating a no-strike clause in a collective bargaining agreement.[186] The Fourth Circuit rejected a narrow reading of the exclusion clause and affirmed

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177 *See* Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1066 (2d Cir. 1972).

178 *Id.*

179 *Id.* at 1067.

180 443 F.2d 783 (1st Cir. 1971).

181 *Dickstein*, 443 F.2d at 785.

182 *Id.* at 784-85.

183 738 F. Supp. 1434 (N.D. Ga. 1990).

184 *See, e.g.*, Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971); Dancu v. Coopers & Lybrand, 778 F. Supp. 832, 834 (E.D. Pa. 1991) ("Since *Tenney*, other courts have adopted a similar construction of the [§ 1] exemption.") (citing Bacashihua v. United States Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988)); Management Recruiters Int'l v. Nebel, 765 F. Supp. 419, 421-22 (N.D. Ohio 1991); *see also* Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117, 123 (N.D. Miss. 1995) (former CEO's claim under employment agreement not covered by the FAA).

185 215 F.2d 221 (4th Cir. 1954).

186 *Miller Metal Prods.*, 215 F.2d at 222.

the district court's denial of a stay because the FAA did not apply to the collective bargaining agreement in question.[187]

The Third Circuit (which decided *Tenney Engineering*) has since suggested in dicta that developments in labor arbitration cast doubt on *Tenney Engineering*.[188] In *Service Employees International Union, Local No. 36 v. Office Center Services, Inc.*, Judge Rosenn insightfully explained that *Lincoln Mills* and its progeny have made the FAA much less relevant to labor arbitration.[189] Without explicitly repudiating *Tenney Engineering*, Judge Rosenn cited several cases suggesting that "[i]n part because of this infrequent use, there is a serious question as to whether the applicability of the [FAA] to labor arbitration agreements retains any vitality in this circuit."[190] In other dicta, the Third Circuit has implied that the FAA's exclusion clause may in fact exclude all collective bargaining agreements, *Tenney Engineering* notwithstanding.[191]

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187 *Id.* at 223-24 (affirming district court's denial of a stay). The court correctly indicated that nothing in the legislative history shows that Congress intended a narrower scope for the exclusion clause than for the reach of the FAA's substantive provisions, both of which are framed in "commerce" terms:

> Nor are we impressed by the argument that the excepting clause of the statute should be construed as not applying to employees engaged in the production of goods for interstate commerce as distinguished from workers engaged in transportation in interstate commerce, as held by the majority in Tenney Engineering Co. v. United Electrical Radio & Mach. Workers .... Congress in enacting the arbitration act was endeavoring to exercise the full extent of its power with relation to the subject matter. There is no reason to think that it was not intended that the exception incorporated in the statute should not reach also to the full extent of its power. As said by Professor Cox: "One should not rely on one policy in interpreting the phrases relating to commerce and an opposite conception in reading 'contract of employment.' "

Id. at 224 (citation omitted). *But cf. supra* note 120; *infra* note 341 (noting the potential complication arising from Congress's use of the words "involving commerce" in § 2 of the FAA but not in § 1).

188 *See* Service Employees Int'l Union v. Office Ctr. Servs., 670 F.2d 404, 406 n.6 (3d Cir. 1982).

189 *Id.* at 407 n.6 ("Since the landmark decisions of the Supreme Court announcing broad principles of arbitral primacy and judicial deference to labor arbitration ... parties to labor arbitration agreements have been able to enforce the terms of those agreements directly under § 301 without reference to the Federal Arbitration Act."). *But cf. supra* note 13 (indicating that the FAA is a persuasive source for filling gaps in § 301 cases).

190 *Service Employees*, 670 F.2d at 407 n.6.

191 *See* Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1127 & n.18 (3d Cir. 1969) ("We have previously held that the [FAA] is inapplicable to appeals from labor arbitration awards due to the exclusion of 'contracts of employment.' "). Indeed, the *Ludwig Honold Mfg.* dictum cites a pre-*Tenney* case excluding union contracts under the § 1 proviso. *Id.* (citing Amalgamated Ass'n of Street, Elec., Ry. & Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc., 192 F.2d 310 (3d Cir. 1951)).

B. *Gilmer*: Arbitrability of Federal Statutory Employment Claims

Gilmer v. Interstate/Johnson Lane Corp.[192] is the latest Supreme Court decision interpreting the FAA in the employment context. Robert Gilmer's job as a stock broker required him to register with the New York Stock Exchange (NYSE).[193] The registration application required arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative."[194] Gilmer's firm discharged him, and he sued his former employer under the Age Discrimination in Employment Act (ADEA) in federal court.[195] The Supreme Court held that the FAA required arbitration "unless Congress itself ha[d] evinced an intention [in the ADEA] to preclude a waiver of judicial remedies for the statutory rights at issue."[196] Since Congress had evinced no such intention when it enacted the ADEA, the FAA required arbitration of the claim.[197]

Justice White, writing for the Court, placed the "burden . . . on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims."[198] The Court's analysis of congressional intent took policy considerations into account. For example, the Court indicated that there was no "inherent inconsistency between [the social policies of the ADEA] and enforcing agreements to arbitrate age discrimination claims"[199] and that the applicable NYSE arbitration rules contained safeguards sufficient to prevent bias.[200]

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192 500 U.S. 20 (1991).

193 *Id.* at 23.

194 *Id.* (quoting appendix to brief for respondent).

195 *Id.*

196 *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)). *Mitsubishi* involved antitrust claims by an automobile distributor against a manufacturer where the parties had agreed to arbitrate disputes before an international tribunal. 473 U.S. at 617. The Supreme Court held that the FAA required arbitration of the federal statutory antitrust claims. *Id.* at 628. The Court clarified that the FAA issue involved a two-step inquiry, which asks (1) whether the parties agreed to arbitrate the dispute and (2) whether, notwithstanding the agreement to arbitrate, external legal constraints foreclosed arbitration of the matter. *Id.* The Court emphasized that the "federal substantive law of arbitrability" informs the first stage of the inquiry. *Id.* at 626.

197 *Gilmer*, 500 U.S. at 27-29.

198 *Id.* at 26.

199 *Id.* at 27.

200 *Id.* at 30. The *Gilmer* Court also indicated that the less pervasive discovery in arbitration does not warrant a rejection of the alternative forum, that the NYSE rules require arbitrators to issue written opinions, that the inability of grievants in arbitration to bring class actions is mitigated by the ADEA's provision for actions by the Equal Employment Opportunity Commission, and that the potential for unequal bargaining power between employers and employees "is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at 31-33.

Gilmer explicitly avoided addressing the scope of the section 1 exclusion clause by holding that a securities registration application is not a "contract of employment" but a contract with a third party.[201] This conclusion rests on a questionable reading of both the FAA and the facts of *Gilmer*. First, the FAA does not contemplate the enforcement of arbitration agreements between a litigant and a third party. Sections 3 and 4, which authorize courts to order arbitration when an agreement provides for it,[202] suggest that Congress intended this power to apply only to disputes between actual parties to an agreement to arbitrate.[203] Second, the Court's assertion that the arbitration promise was not part of Gilmer's employment contract is unpersuasive, given that "Gilmer was . . . required as a condition of his employment to become a registered representative of several stock exchanges, including the New York Stock Exchange (NYSE)."[204] If Gilmer's employment contract required him to register with the NYSE, then that contract implicitly required arbitration.

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201 *Id.* at 25 n.2 ("[I]t would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment . . . . Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate.").

202 9 U.S.C. §§ 3-4 (1994); *see also supra* note 39 (complete text).

203 Section 3 provides for a stay pending arbitration, when the lawsuit is "brought . . . upon any issue referable to arbitration under an agreement in writing for such arbitration . . . on application of one of the parties." 9 U.S.C. § 3 (1994). Although this language does not clearly limit such stays to situations in which the applicant is a party to the agreement to arbitrate, other parts of the FAA indicate such a limitation. For example, the proviso at the end of § 3 that "the applicant [may not be] . . . in default in proceeding with such arbitration" strongly suggests that Congress did not contemplate stays premised on arbitration promises made to third parties not involved in the action. *Id.* In addition, the language of § 4, which authorizes arbitration orders following petitions to federal district courts, apparently applies only when the arbitration agreement is between the litigants. That section allows "[a] party aggrieved by the alleged failure . . . to arbitrate under a written agreement for arbitration" to petition for an order compelling arbitration. 9 U.S.C. § 4 (1994); *see also supra* note 39 (complete text). The court may then "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* Thus, the words "party" and "parties" denote the parties to the alleged arbitration agreement. This language, therefore, in theory should not apply when a party seeking arbitration is not involved in the alleged agreement to arbitrate. In practice, of course, the courts have allowed third-party beneficiaries to invoke the FAA. *See, e.g.*, Kidder, Peabody & Co. v. Zinsmeyer Trusts Partnership, 41 F.3d 861, 863-64 (2d Cir. 1994).

204 *Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting). Justice Stevens went on to address the issue of the § 1 proviso, concluding as follows:

> When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship. In recent years, however, the Court "has effectively rewritten the statute," and abandoned its earlier view that statutory claims were not appropriate subjects for mandatory arbitration.

Id. at 42-43 (citations omitted).

The *Gilmer* court also considered the applicability of *Alexander v. Gardner-Denver Co.*,[205] a 1974 case in which the Court held that a completed arbitration of a discrimination claim under a collective bargaining agreement did not preclude a subsequent federal lawsuit under Title VII of the 1964 Civil Rights Act.[206] Commentators understood *Gardner-Denver* and its progeny[207] to establish a general rule that an employee could litigate a statutory claim regardless of a contractual promise to arbitrate.[208] *Gilmer* distinguished *Gardner-Denver* on three grounds: (1) *Gilmer* involved the arbitration of a statutory claim rather than a claim predicated on a collective bargaining agreement; (2) the union context in *Gardner-Denver* brought into play a tension between unions' collective interests and individual claimants' rights; and (3) *Gardner-Denver* was decided without reference to the FAA.[209]

As *Gilmer* and *Gardner-Denver* illustrate, an employee's membership in a union significantly influences the arbitrability determination. Indeed, these cases emanate from two distinct lines of authority, one dealing with the union context, the other with individual employment contracts. The *Gilmer* majority's attempt to justify the application of different rules on policy grounds,[210] however, suggests that the Supreme Court does not view the doctrines of labor and individual contract arbitration as completely separate. Rather, the Court attempted to harmonize the two lines of authority by emphasizing the vulnerability of union members who assert individual employment rights.

Gilmer involved a federal age discrimination claim and arguably established a clear rule governing the arbitrability of federal statutory employment claims.[211] However, many employment law cases involve

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205 415 U.S. 36 (1974). The *Gardner-Denver* Court also took policy considerations into account in determining that a Title VII claim was not barred by prior arbitration of a claim under a collective bargaining agreement. *Id.* at 59-60 ("[T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.").

206 *Id.* Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993).

207 *See* McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981).

208 *See* Magyar, *supra* note 4, at 647-48.

209 *Gilmer*, 500 U.S. at 33-34.

210 *Id.*

211 *But cf.* Cunningham, *supra* note 31, at 59 (noting that employers are concerned about the costs of litigating state employment claims and addressing issues regarding the finality of arbitration proceedings); Martha S. Weisel, *Effectiveness of Arbitration Clauses in Employment Contracts*, ARB. J., June 1992, at 19, 25 ("[E]mployers are well advised to proceed with caution . . . . The U.S. Supreme Court did not give a clear signal in *Gilmer*. The [C]ourt's decision concerning the arbitrability of federal employment claims appears to be a yellow light . . . .").

only state claims or a combination of state and federal claims.[212] *Gilmer* does not establish a clear arbitrability standard for state claims. Courts deciding motions to compel arbitration of state employment claims consequently have developed a variety of standards purportedly grounded in *Gilmer*.

Lower federal courts have interpreted *Gilmer* as imposing a heavy burden on litigants seeking to avoid arbitration of federal statutory claims against employers. For example, federal courts of appeals have required arbitration of Title VII claims for race and gender discrimination[213] and of Employee Polygraph Protection Act claims.[214] The overwhelming trend is to require arbitration in such cases. Part III analyzes the related issue of arbitrability when an employee asserts a state-law claim instead of (or in addition to) a federal statutory claim.

III
EMPLOYEE CLAIMS UNDER STATE LAW: THE LIMITS OF *GILMER*

The cases involving the arbitrability of state-law claims by employees appear to follow the pro-arbitration trend of the cases involving federal claims. Courts have applied at least four analytically distinct standards for determining the arbitrability of state claims, all of which purportedly follow from *Gilmer*: (1) the parallel federal claim standard; (2) preemption analysis; (3) state legislative intent analysis; and (4) interest analysis. This Part describes these arbitrability standards and highlights their drawbacks. Given the current pro-arbitration mood, the "interest analysis" approach, which may be the most defensible, is probably the least likely to prevail.

Recognizing that the standards will generally force employees to arbitrate disputes with their employers, this Part considers the standards' doctrinal implications. These standards may yield inconsistent treatment of union and nonunion employees, a result that the decisions do not attempt to justify. Another anomaly is the courts' unwillingness to recognize the states' interest in regulating the employment relationship—an interest the Supreme Court has emphasized in similar litigation involving union members. Finally, this Note argues that the FAA itself contains limits to the arbitrability of employee claims.

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212 *See supra* notes 28-30 and accompanying text.

213 *See, e.g.*, Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir.), *cert. denied*, 113 S. Ct. 494 (1991); Bender v. Smith Barney, Harris Upham & Co., 789 F. Supp. 155 (D.N.J. 1992).

214 *See* Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir. 1992). The Employee Polygraph Protection Act is codified at 29 U.S.C. §§ 2001-2009 (1988).

A. Post-*Gilmer* Arbitrability of State-Law Claims

When litigants seek to arbitrate employment claims based on state statutes or common-law theories, courts must decide how broadly to interpret *Gilmer*, which requires arbitration of a federal statutory claim unless Congress has manifested an intention to preclude the parties from agreeing to do so. This inquiry is hampered by the lack of direct evidence of congressional intent regarding cases involving state legislative action. Congress may or may not have "intended" to preclude arbitration of state employment claims, and evidence of such intent may or may not lie in analogous federal legislation authorizing causes of action against employers. Therefore, when deciding cases involving state employment claims, courts have used standards that differ slightly from the *Gilmer* formulation.

1. *Four Approaches to the Problem*

State and federal courts have developed a variety of standards to determine the arbitrability of state claims. One standard analyzes state statutes in terms of the congressional intent for a "parallel" federal statute. Similarly, when federal and state claims are joined in the same action, some courts base the arbitrability determination entirely on Congress's intent regarding the federal claims. A second standard truncates the intent inquiry by asserting the primacy of the FAA over state law and concluding that the FAA renders employees' claims arbitrable. A third standard performs a *Gilmer*-type analysis, using the state legislature's intent as the point of reference. A fourth standard analyzes congressional intent in terms of the interests at stake.

a. *The Parallel Federal Claim Test*

The New York Court of Appeals' decision in *Fletcher v. Kidder, Peabody & Co.*[215] illustrates courts' application of the parallel federal claim standard. The plaintiff, a registered stock broker employed as a trade analyst,[216] alleged that his employer, the defendant, constructively discharged him after denying him compensation to which he was entitled under his employment contract.[217] Fletcher brought a race discrimination action under the New York Human Rights Act.[218]

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215 619 N.E.2d 998 (N.Y.), *cert. denied*, 114 S. Ct. 554 (1993).

216 *Id.* at 1006 (Smith, J., dissenting).

217 *Id.* The complaint alleged that the "defendant concluded that 'the amount it was obligated to pay Mr. Fletcher was simply too much money to pay a young black man.' " *Id.* Fletcher also relied on "a conversation he allegedly had with defendant's head of human resources/equal employment opportunity officer wherein plaintiff was advised that he should not complain because he was 'one of the highest paid black males' in the country." *Id.*

218 *Id.* at 1000; N.Y. EXEC. LAW § 296 (McKinney 1993) provides that:

> 1. It shall be an unlawful discriminatory practice:

Because Fletcher had signed an agreement with the New York Stock Exchange requiring arbitration of all disputes with his employer, the New York Court of Appeals held that the trial court should have granted the employer's motion to compel arbitration under the FAA.[219]

The New York Court of Appeals analyzed the arbitrability of state claims as a *Gilmer* question.[220] Without detailed justification, the court articulated the parallel federal claim standard: "Where the right is predicated on a State or local statute rather than on a congressional enactment, it is undisputed by these parties that the courts are obliged to draw an analogy to the equivalent Federal law, where possible, and to consider Congress' intentions with regard to the rights created by that law."[221] The claims were subject to mandatory arbitration because Title VII of the Civil Rights Act does not indicate a congressional intention to preclude an arbitral forum for race discrimination claims.[222]

Fletcher illustrates the potential tension between state employment laws and the federal policy favoring arbitration as a means of resolving contract disputes. Although the New York antidiscrimination statute explicitly provides for judicial review,[223] mandatory arbitration permits review of an arbitrator's decision only under extremely limited circumstances.[224]

> (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

219 *Fletcher*, 619 N.E.2d at 1003 ("[W]e . . . hold that these cases are governed by the presumption of arbitrability that is established by the FAA.").

220 *Id.* at 1001-02.

221 *Id.* at 1002. The parties stipulated that this approach was appropriate; the issue was therefore not litigated. *Id.*

222 *Id.* at 1002-03. The New York Court of Appeals relied on federal court of appeals cases, which have reached the same result where the employee asserts a federal Title VII claim, by analogy to *Gilmer*. *Id.*

223 *See* N.Y. EXEC. LAW § 298 (McKinney 1993).

224 Judge Posner stated the general principle in Hill v. Norfolk & W. Ry., 814 F.2d 1192 (7th Cir. 1987), in the context of contract interpretation:

> As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award—whether the award is made under the Railway Labor Act, the Taft-Hartley Act, or the United States Arbitration Act,—is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. If they did, their interpretation is conclusive. By making a contract with an arbitration clause the parties agreed to be bound by the arbitrators' interpretation of the contract. A party can complain if the arbitrators don't interpret the contract—that is, if they disregard the contract and implement their own notions of what is reasonable or fair. A party can complain if the arbitra-

Several courts have applied the parallel federal claim test. *Spellman v. Securities, Annuities & Insurance Services, Inc.*[225] involved a stockbroker's race discrimination claim under the California Fair Employment and Housing Act and related contract and tort theories. Citing *Gilmer*, the California Court of Appeals upheld mandatory arbitration under the FAA.[226] The opinion emphasized the similarities between claims under the ADEA and claims under Title VII, which are analogous to claims under the California antidiscrimination statute.[227] After concluding that federal law requires arbitration of Title VII claims, the *Spellman* court asserted that "[r]eliance on a state statutory anti-discrimination scheme, as here, rather than on a federal title VII claim, does not alter the analysis."[228] The opinion did not justify its use of the parallel federal claim standard, except insofar as it read *Gilmer* and subsequent federal cases[229] as "stand[ing] for the proposi-

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> tors' decision is infected by fraud or other corruption, or if it orders an illegal act. . . . But once the court is satisfied that [the arbitrators] were interpreting the contract, judicial review is at an end . . . .

Id. at 1194-95 (citations omitted); *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("[T]he courts play only a limited role when asked to review the decision of an arbitrator [in the collective bargaining agreement context]."). *See generally* Speidel, *supra* note 4, at 191-98 (discussing grounds for judicial review of arbitral awards under the FAA).

Limited judicial review was firmly established in one of the famous *Steelworkers* Trilogy cases, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) ("The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."). One commentator has stated the underlying rationale as follows:

> Much of the benefit of labor arbitration . . . appears to be premised on the finality of the arbitrator's ruling. The informality of the arbitration process, and its relative speed and low cost, would not be of much help if the arbitration proceeding [were] routinely followed by an additional procedural step from which a final and binding ruling on the contract dispute emerged. . . . [A]rbitration would amount to a largely superfluous additional step. . . .

Mark Berger, *Judicial Review of Labor Arbitration Awards: Practices, Policies and Sanctions*, 10 HOFSTRA LAB. L.J. 245, 248 (1992). This reasoning applies regardless of the particular federal (or state) statute that prompted the arbitration.

225 10 Cal. Rptr. 2d 427 (Ct. App.), *modified*, 8 Cal. App. 4th 452 (1992), *review denied*, 1992 Cal. LEXIS 5123 (Oct. 16, 1992).

226 *Id.* at 433.

227 *Id.*

228 *Id.* at 433-34. The *Spellman* court cited two cases to support this position: Perry v. Thomas, 482 U.S. 483, 490 (1987), and Sacks v. Richardson Greenshield Securities, Inc., 781 F. Supp. 1475, 1480 (E.D. Cal. 1991). *Perry* does not clearly support the test—there, the U.S. Supreme Court simply indicated that there are to be no state-law limitations in addition to the FAA § 2 provisos that arbitration is required unless "the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract,' " *Perry*, 482 U.S. at 489-90, and that the FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause," *id.* at 490 (quoting 9 U.S.C. § 2 (1994)).

229 Specifically, the *Spellman* court cited Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991), which required arbitration of a Title VII claim after the U.S.

tion that important social policies and public rights embodied in statutes prohibiting discrimination in employment can be appropriately resolved by arbitration."[230]

Courts applying the parallel federal claim test have tended to conflate the relevant federal and state claims and to ignore any differences in the legal source of the plaintiff's cause of action when performing the *Gilmer* analysis. In *Sacks v. Richardson Greenshield Securities, Inc.*,[231] for example, a federal court in a diversity action decided the arbitrability of several state statutory and common-law claims, including a California Fair Employment and Housing Act gender discrimination claim.[232] The court held that *Gilmer* required arbitration of the state statutory claim, on the ground that "Title VII sex discrimination claims are to be treated the same as age discrimination claims."[233] Thus, the court in *Sacks* equated Title VII claims with discrimination claims in general, including those based on state law.[234] Other courts have similarly applied the parallel federal claim test without explanation.[235]

When a plaintiff asserts federal and state claims on the same set of facts, some courts have decided the arbitrability of the case as a whole without analyzing the state claims separately. This approach has been most common among federal courts in the wake of *Gilmer*, despite the fact that *Gilmer* dealt only with a federal ADEA claim.[236] For example, the Sixth Circuit Court of Appeals in *Willis v. Dean Witter Reynolds, Inc.*[237] overruled a federal district court's denial of a motion to compel arbitration of sex discrimination claims "under Title VII and Kentucky civil rights provisions."[238] Addressing the applicability of *Gilmer* to federal gender discrimination claims, the court found "*Gilmer* to be dispositive of every argument presented . . . in th[e] appeal" without separately considering the arbitrability of the related state claim.[239]

Similarly, in *Saari v. Smith Barney, Harris Upham & Co.*,[240] a stockbroker sued his former employer alleging violations of the federal Em-

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Supreme Court remanded for consideration in light of the *Gilmer* decision. *Spellman*, 10 Cal. Rptr. 2d at 434.

230 *Spellman*, 10 Cal. Rptr. 2d at 434.

231 781 F. Supp. 1475 (E.D. Cal. 1991).

232 *Id.* at 1476.

233 *Id.* at 1483.

234 *Id.*

235 *See, e.g.*, Hull v. NCR Corp., 826 F. Supp. 303, 306 (E.D. Mo. 1993) ("The Court also finds that Plaintiff's claims under the [Missouri Human Rights Act], a parallel state statutory right to Title VII, are subject to arbitration under the FAA.").

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

237 948 F.2d 305 (6th Cir. 1991).

238 *Id.* at 306.

239 *Id.* at 307.

240 968 F.2d 877 (9th Cir. 1992).

ployee Polygraph Protection Act[241] (EPPA) and related state statutory and tort claims. The court reasoned that *Gilmer* controlled because Congress's intent regarding the arbitration of EPPA claims was no different from its intent regarding the ADEA claims addressed in *Gilmer*.[242] Thus, the court required arbitration of the entire case on the sole basis that the federal claim was arbitrable.

b. *Preemption Analysis*

The second standard applied by courts in determining the arbitrability of state employment claims relies on the Supremacy Clause: the FAA preempts conflicting state law governing arbitrability. This standard presumes that Congress did not intend to exempt *any* state claims from mandatory arbitration. Courts applying this standard have invoked *Southland Corp. v. Keating*[243] as standing for the proposition that the FAA forecloses any state-law rationale for denying arbitration.

For example, in *Skewes v. Shearson Lehman Bros.*,[244] a securities broker had executed a securities registration application requiring him to arbitrate disputes according to the rules of the securities exchanges.[245] After being discharged, he sued his former employer in a Kansas state court for retaliatory discharge.[246] The plaintiff argued on appeal that the lower court properly denied the employer's motion to compel arbitration because section 5-401 of the Kansas Statutes precluded arbitration of disputes between an employer and his or her employees.[247] The Kansas Supreme Court, citing *Southland Corp. v.*

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241 Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (1988).

242 *Saari*, 968 F.2d at 883-84.

243 465 U.S. 1 (1984). For discussion of *Southland*, see *supra* notes 88-95 and accompanying text.

244 829 P.2d 874 (Kan. 1992).

245 *Id.* at 875-76. Skewes, like other securities brokers, was required to execute a "U-4" (Uniform Application for Securities Industry Registration Form), which provided: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register." *Id.* at 875. Skewes had registered with the NASD; the NASD Code provides an arbitration procedure applicable to "any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company: (1) between or among members; [and] (2) between or among members and public customers, or others." *Id.* at 876.

246 *Id.*

247 That section provides:

> (a) A written agreement to submit any existing controversy to arbitration is valid . . . .
>
> (b) Except as provided in subsection (c), a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.

Keating[248] and *Perry v. Thomas*,[249] held that the FAA preempted the state statute and required arbitration of the dispute.[250] Accordingly, the *Skewes* court held that "[t]he FAA requires state courts to enforce an arbitration clause despite contrary state policy."[251]

In *Boogher v. Stifel, Nicolaus & Co.*,[252] a Missouri court applied the preemption standard to facts similar to the *Fletcher* case.[253] Like Alphonse Fletcher, stockbroker Leland Boogher's application to the NYSE contained a promise to arbitrate.[254] Following his discharge, Boogher filed an age discrimination suit, alleging that his employer had violated the Missouri Human Rights Act (MHRA).[255] The trial court dismissed his complaint on the basis of the agreement to arbitrate.[256] On appeal, Boogher contended that the state discrimination claim was not arbitrable because the ADEA, which provides a federal remedy for age discrimination, does not allow for arbitration.[257] Although it noted in passing that *Gilmer*, decided after Boogher filed his brief, rejected such an analysis of the ADEA, the Missouri Court of Appeals disposed of Boogher's lawsuit on Supremacy Clause

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> (c) The provisions of subsection (b) shall not apply to: (1) Contracts of insurance; (2) contracts between an employer and employees, or their respective representatives; or (3) any provision of a contract providing for arbitration of a claim in tort.

Id.

248 465 U.S. 1 (1984).

249 482 U.S. 483 (1987). *Perry*, in which a broker sued his employer for commissions under a state statute allowing such an action notwithstanding an arbitration agreement, held that the FAA preempted the state statute. 482 U.S. at 491. *Perry* relied heavily on *Southland* and *Moses H. Cone* and described the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *id.* at 489 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)), and as "intend[ing] to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," *id.* (quoting Southland Corp. v. Keating, 465 U.S. 1, 16 (1984)).

250 Skewes v. Shearson Lehman Bros., 829 P.2d 874, 879 (Kan. 1992).

251 *Id.* at 879.

252 825 S.W.2d 27 (Mo. Ct. App. 1992).

253 *See supra* notes 215-22 and accompanying text.

254 *Boogher*, 825 S.W.2d at 28.

255 *Id.* Missouri law provides that

> [i]t shall be an unlawful employment practice:
> (1) For an employer, because of race, color, religion, national origin, sex, ancestry, age or handicap of any individual:
> (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap.

MO. REV. STAT. § 213.055 (Supp. 1994). The statute requires complainants to file first with the State Commission on Human Rights; orders can be appealed to the state courts. *Id.* § 213.120.

256 *Boogher*, 825 S.W.2d at 29.

257 *Id.*

grounds.[258] The Missouri court admonished that "[p]laintiff's argument is flawed because the Missouri Legislature could not enact a provision of the MHRA which precludes arbitration without violating the [S]upremacy [C]lause. Under the FAA, plaintiff's age discrimination suit brought under the MHRA is subject to compulsory arbitration pursuant to his agreement."[259]

Although *Gilmer* posits an exception to compulsory arbitration of federal claims based on congressional intent to preclude arbitration of particular claims,[260] the *Skewes* and *Boogher* preemption test allows for no such exception when the employee asserts a claim under state law. The approach embodies a simple syllogism, which one New York court has explained as follows:

> Congress adopted the FAA to insure that courts would rigorously enforce private agreements to arbitrate and it establishes an emphatic national policy favoring arbitration which is binding on all courts, state and federal. Thus, if a civil complaint presenting ouly state statutory violations comes within the scope of a broad arbitration agreement, the court must enforce the agreement pursuant to the FAA.[261]

Thus, as a result of a general policy of enforcing arbitration clauses, state statutes effectuating all types of state policies are subordinated.

c. *State Legislative Intent*

The third standard for analyzing the arbitrability of state employment claims looks to whether the *state* legislature intended to preclude arbitration as a dispute resolution mechanism. In *Bakri v. Continental Airlines, Inc.*,[262] the District Court for the Central District of California upheld an arbitration award resulting from a procedure outlined in Continental's employee handbook. In accordance with Continental's grievance procedure, Mohammed Bakri, a Continental employee, submitted a complaint regarding his discharge to the company's grievance committee. After losing at the grievance hearing, he sued for retaliatory discharge—a state tort claim.[263] Continental removed the action to the federal district court, which held that the plaintiff bears the burden of showing an intention on the part of the *state* legislature to preclude arbitration.[264] Since "the text of the statute . . . [did] not preclude arbitration, and [the plaintiff] offered ab-

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258 *Id.*

259 *Id.*

260 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

261 Harrison v. Salomon Bros., Inc., 593 N.Y.S.2d 439, 440 (Sup. Ct. 1992).

262 No. CV92-3476 SVW(K), 1992 WL 464125 (C.D. Cal. Sept. 24, 1992).

263 *Id.* at *1-*2.

264 *Id.* at *4 ("[T]he burden is on Bakri to show that arbitration was not intended to apply to the statute at issue.").

solutely no evidence that the California state legislature intended to preclude arbitration of his claims,"[265] the court concluded that arbitration was required.

d. *Interest Analysis*

At least one court has employed a more flexible "interest analysis" standard in determining the arbitrability of state employment law claims. In *Singer v. Salomon Bros.*,[266] a securities broker brought several state claims against his employer, alleging that "his dismissal was discriminatory and based upon his disability."[267] The New York Supreme Court stated that "[a]rbitration . . . fulfills the strong public policy favoring a decrease in the courts' burdensome caseload. While there is also a public interest in the adjudication of delicate claims such as discrimination cases, the court must balance the competing interests."[268] Although *Singer* granted the employer's motion to compel arbitration, the court's "balancing" analysis and its discussion of the plaintiff's objections to the arbitration procedure[269] suggest an alternative to the more mechanical approaches used by other courts.

2. *An Assessment of the Viability of the New Standards*

Gilmer requires arbitration of federal statutory claims absent a contrary congressional intent.[270] It does not specify, however, how a court deciding the arbitrability of a state employment claim should go about determining the "intent" of Congress. Because *Gilmer* and prior case law interpreting the FAA are driven by policy considerations, courts interpreting the FAA in the context of state employment claims should not ignore the policies supporting and opposing mandatory arbitration of these claims. This section contends that the prevalent arbitrability standards do not give sufficient consideration to the implications of applying the FAA to state employment claims. However, because the standards most often yield mandatory arbitration, they may accurately anticipate future Supreme Court decisions further expanding arbitrability under the FAA.

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265 *Id.* Although the court actually held that res judicata precludes additional litigation of Bakri's claims, the opinion's implicit rationale is similar to a determination of whether to compel arbitration.

266 593 N.Y.S.2d 927 (Sup. Ct. 1992).

267 *Id.* at 928.

268 *Id.* at 929.

269 *Id.* at 930.

270 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

a. *Parallel Federal Claim*

The parallel federal claim test of *Fletcher v. Kidder, Peabody & Co.*[271] appears at first glance to follow directly from *Gilmer.* A court ruling on a motion to compel arbitration under the FAA interprets federal law; it will therefore need to determine Congress's intent regarding mandatory arbitration of the particular claim at issue.[272] Since the *Fletcher* court treats state claims and their federal "analogs" as "classes of claims," the rationale appears to be that Congress must have intended similar results under the FAA.[273] Courts applying the parallel claim test, however, have not sufficiently justified it.[274]

First, treating the "parallel" state cause of action as identical to its federal analog assumes that Congress's intent concerning the arbitrability of state claims was the same as that for federal claims. The *Gilmer* court does not suggest that its analysis of congressional intent should extend to state causes of action.[275] Indeed, *Gilmer* explicitly leaves open the possibility that certain classes of statutory claims may not be subject to mandatory arbitration.[276] However, as in *Fletcher,* courts enforcing agreements to arbitrate state employment claims often cite *Gilmer* as determinative without further explanation.[277]

The parallel federal claim test is especially problematic when there is no federal analog upon which to base the "congressional intent" inquiry, such as when employees assert state common-law causes of action against their employers. For example, the parallel federal claim test does not address the question of the arbitrability of state

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271 619 N.E.2d 998 (N.Y. 1993).

272 The *Fletcher* court began its analysis by stating the general proposition that the FAA is preemptive: "[I]n situations where the FAA is applicable, it preempts State law on the subject of the enforceability of arbitration clauses. Indeed, the provisions of the FAA are controlling even though the dispute itself may arise under State law." *Id.* at 1001 (citations omitted).

273 Although the parties in *Fletcher* did not litigate the specific question of the methodology for determining arbitrability, the court apparently based its decision on the close resemblance between federal statutory claims and their state "analogs." *Id.* at 1003 ("Since there is no evidence that Congress intended to limit the enforceability of FAA-governed arbitration agreements in the context of this class of disputes, the courts below were correct in concluding that plaintiffs' State Human Rights Law claims should be submitted to arbitration . . . .").

274 Courts tend to assume that the test applies, without explaining why. *See, e.g.,* Hull v. NCR Corp., 826 F. Supp. 303, 306 (E.D. Mo. 1993) ("The Court . . . finds that Plaintiff's claims under the [Missouri Human Rights Act], a parallel state statutory right to Title VII, are subject to arbitration under the FAA.").

275 *See Gilmer,* 500 U.S. at 27 (discussing congressional intent underlying the Age Discrimination in Employment Act).

276 *Id.* at 26 ("Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'").

277 619 N.E.2d 998, 1000 (N.Y. 1993). For a discussion of the application of the "parallel claim" methodology in *Fletcher,* see *supra* notes 215-22 and accompanying text.

tort theories because Congress does not ordinarily enact analogs to causes of action defined by the state courts.[278] A simplistic application of the standard might yield mandatory arbitration because *Gilmer* requires an affirmative intention to *preclude* arbitration. However, the lack of an analogous federal cause of action may indicate any number of things about congressional intent, the least of which is that Congress wished to require arbitration of state tort claims. Thus, the parallel federal claim approach is mechanical; it tends to yield mandatory arbitration without analyzing the reasons for and against arbitration of the particular claims.

In addition, if the FAA case law is interpreted broadly, basing the arbitrability determination on Congress's intent with respect to the analogous federal claim may violate the Supremacy Clause. Courts applying the preemption approach to require arbitration of all state claims have focused on commercial arbitration cases, especially *Southland Corp. v. Keating*, that have held that the FAA preempts state law.[279] This reading of the preemptive effect of the FAA suggests that state law is not relevant to the arbitrability inquiry. For example, the Missouri Court of Appeals in *Boogher v. Stifel, Nicolaus & Co.* focused on *Southland*'s literal reading of the FAA: "We see nothing in the [FAA] indicating the broad principle of enforceability is subject to any additional limitations under state law."[280] If so, then the *Gilmer* exception triggered when "Congress itself has evinced an intention to preclude [arbitration]"[281] should have no effect when the employee's cause of action is premised on state law, whether there is a parallel federal claim or not.

This account of FAA preemption is concededly too simplistic. The Supreme Court has not yet endorsed an absolute rule requiring courts to enforce all arbitration clauses; instead, *Gilmer* and earlier cases provide some support for a policy-oriented approach.[282] As the Supreme Court recognized in *Lingle v. Norge Division of Magic Chef, Inc.*,[283] there is an important state interest in regulating the employment relationship. *Lingle* emphasized this state interest in its analysis of the preemptive scope of the Taft-Hartley Act, in holding that section 301 does not preempt a state tort claim of retaliatory discharge

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278 *Cf.* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992) (describing many of the tort theories available under state law).

279 465 U.S. 1 (1984) (holding that a California statute invalidating waivers of the right to litigate claims relating to franchises violated the supremacy clause). For discussion of *Southland*, see *supra* notes 88-95 and accompanying text.

280 825 S.W.2d 27, 29 (Mo. Ct. App. 1992) (quoting *Southland*, 465 U.S. at 11).

281 *Gilmer*, 500 U.S. at 26.

282 *See, e.g., id.* at 26-35 (addressing several policy considerations in the context of the arbitrability of an ADEA claim); *see also* discussion *supra* part II.B.

283 486 U.S. 399 (1988).

for filing a workers' compensation action.[284] The parallel federal claim standard of arbitrability, in the context of interpreting the FAA, ignores this state interest because it groups state and federal causes of action into the same "class of claims."[285]

b. *Preemption*

The *Skewes v. Shearson Lehman Bros.*[286] preemption standard suffers from the same policy myopia as the parallel federal claim standard. Although the literal terms of FAA preemption doctrine seem to preclude consideration of state interests,[287] the Supreme Court acknowledged in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* that the FAA does not require arbitration under all circumstances.[288] The crux of the *Southland* decision was that the California legislature could not obliterate the substantive requirements of the FAA by enacting conflicting provisions in its franchise statute.[289] This does not mean that state interests cannot contribute to the analysis of congressional intent.

More importantly, the preemption cases do not intimate that the federal policy of promoting arbitration is the *only* relevant interest when courts interpret the FAA in close cases.[290] The substantive law of the FAA, rather, results from the Court's understanding of congressional intent, which is driven at least in part by relevant policy considerations. *Moses H. Cone* and *Southland* both involved contracts between commercial entities. These contracts are at the heart of the original purpose of the FAA, which was "to give an opportunity to

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284 *Id.*

285 *See* Sacks v. Richardson Greenshield Sec., Inc., 781 F. Supp. 1475 (E.D. Cal. 1991) (holding that state discrimination claims are not exempt from arbitration under the FAA).

286 829 P.2d 874 (Kan. 1992).

287 Chief Justice Burger wrote in Southland Corp. v. Keating, 465 U.S. 1 (1984), that "[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10.

288 460 U.S. 1, 25 (1983) (positing that "exceptional circumstances" would warrant deferring to state law in cases otherwise arbitrable under the FAA).

289 465 U.S. at 10 ("The California Supreme Court interpreted this [state] statute to require judicial consideration of claims brought under the state statute and accordingly refused to enforce the parties' contract to arbitrate such claims. So interpreted, the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.").

290 *Moses H. Cone*, 460 U.S. at 24, describes the policy as "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." However, this statement should not be interpreted as precluding *any* consideration of state or other interests. In the same opinion, the Court used more equivocal language suggesting that the pro-arbitration policy is not absolute: "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25.

enforce an agreement [to arbitrate] in commercial contracts and in admiralty contracts, when voluntarily placed in the contract by the parties."[291] Employment contracts, regardless of the outcome (if any) of the controversy over the scope of the exclusion clause,[292] are much farther from this core purpose. Even *Southland* does not contemplate a universal rule enforcing all arbitration agreements under the FAA.[293] Indeed, the plain language of the FAA sets limits on enforceability.[294] The FAA does not mandate court-compelled arbitration whenever a contract contains an arbitration clause.

In other contexts, the arbitrability determination hinges on interests that are not strictly "federal." In cases involving international commercial arbitration, for example, the Supreme Court has considered other pertinent policy interests, including the importance of a nonfederal forum. In *Mitsubishi Motors v. Soler Chrysler-Plymouth*, for example, the Court considered "international comity, respect for the capacities of foreigu and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes."[295] A similar concern—respect for state tribunals—is implicated when employees assert state claims against their employers.

c. *State Legislative Intent*

Courts that have applied other standards to determine the arbitrability of state claims have strained to justify those standards. The state legislative intent approach has a tenuous basis. *Bakri v. Continental Airlines, Inc.*, which required arbitration of a state claim because the state legislature showed no intention to preclude arbitration,[296] may have simply misread *Gilmer*. The *Gilmer* court analyzed congressional intent because it was deciding whether Congress overrode the normal FAA requirements when it authorized a cause of action under the

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291 65 CONG. REC. 11,080 (1924) (statement of FAA author Rep. Mills of New York). For a more extensive treatment of the history of the FAA, see *supra* parts I.B-II.A.

292 *See supra* notes 137-64 and accompanying text (describing the conflict between the federal circuits over the scope of the exclusion for "contracts of employment" in § 1 of the FAA).

293 *Southland*, 465 U.S. at 12 (recognizing the "exceptional circumstances" exception) (citing *Moses H. Cone*, 460 U.S. at 25).

294 For example, § 2 provides for the enforcement of arbitration agreements to resolve controversies "arising out of . . . contract[s]." 9 U.S.C. § 2 (1994). This indicates that certain types of disputes are not included. Although the question of which types of disputes are subject to § 2 is unresolved, *see, e.g.*, Speidel, *supra* note 4, no court has suggested that the general rule of arbitrability is without exceptions.

295 *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1984). For a brief description of *Mitsubishi*, see *supra* note 196.

296 No. CV 92-3476 SVW(K), 1992 WL 464125 (C.D. Cal. Sept. 24, 1992).

ADEA.[297] Because subsequent *state* statutes cannot override a prior federal statute, the intention of a state legislature should not be dispositive with respect to the FAA analysis.[298] This does not mean, however, that the state legislature's intention, or, more generally, the state's interest, is necessarily irrelevant to the arbitrability inquiry.

d. *Interest Analysis*

The interest analysis performed by the court in *Singer v. Salomon Bros.*[299] is unique because it explicitly accounted for all the interests at stake, including the state's interest. Congress has not directly addressed the question of the arbitrability of state employment claims, except to the extent that the provision in section 1 of the FAA excluding "contracts of employment" is indicative of Congress's intention. Therefore, a standard that evaluates all the interests is arguably superior to more mechanical standards like the parallel federal claim test. Unfortunately, interest analysis is not consistent with the spirit of the FAA arbitrability doctrine as enunciated by the Supreme Court and lower federal courts.[300] However appealing this standard may be, the Supreme Court's recent FAA decisions make the "federal policy favoring arbitration"[301] nearly dispositive. The Court is therefore unlikely to endorse a standard that simply weighs all the interests together.

The more mechanistic parallel federal claim[302] and simple preemption[303] standards, despite their deficiencies, most accurately reflect the Supreme Court's posture on arbitrability questions. The risk is that these standards will lead to wholesale forced arbitration of state employment claims.[304] Such a result would be inconsistent with the

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297 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the parties should be held to it unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' ") (emphasis supplied) (quoting *Mitsubishi*, 473 U.S. at 628).

298 At the very least, the *Bakri* standard clashes with *Southland*'s admonition that the FAA "withdrew the power of the states to require a judicial forum . . . [when] the contracting parties agreed to . . . arbitration." *Southland*, 465 U.S. at 10. The Supreme Court recently reaffirmed this principle of preemption in Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 838-39 (1995).

299 593 N.Y.S.2d 927 (Sup. Ct. 1992). For a more thorough explanation of *Singer*, see *supra* notes 266-69 and accompanying text.

300 *See supra* part I.C (explaining the Supreme Court's broad interpretation of the FAA).

301 *Gilmer*, 500 U.S. at 26 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

302 As exemplified by Fletcher v. Kidder Peabody & Co., 619 N.E.2d 998 (N.Y. 1993).

303 As exemplified by Skewes v. Shearson Lehman Bros., 829 P.2d 874 (Kan. 1992).

304 This eventuality is, unfortunately, not inconsistent with the more general judicial abdication of responsibility in the arbitration area. *See* Carbonneau & Janson, *supra* note 34, at 205-06 (arguing that neither "contractual" nor "substantive" inarbitrability appropriately limits arbitration).

purpose of the FAA, which excludes "contracts of employment," and with the states' interest in regulating the employment relationship.

B. Implications of Mandatory Arbitration of State-Law Claims

In the current legal climate, courts are unlikely to endorse an "interest analysis" approach to determining the arbitrability of state-law claims by employees. Indeed, if either the "parallel federal claim" or the "supremacy" test prevails, arbitrability will likely be determined without reference to the policy prerogatives of the states. Commentators have noted the drawbacks of denying a judicial forum to employees who allege that their rights have been violated.[305] Equally disturbing, however, are the doctrinal implications of this expansion of federal arbitration law.

1. *State-Law Claims by Employees and State Interests*

Whether the source of compulsory arbitration of state-law claims is characterized as statutory interpretation or federal common law making, it intrudes siguificantly into a policy area in which the states ordinarily play a major role. Therefore, it may thwart states' ability to fashion reforms aimed at rationalizing employment law, an effect that Congress obviously did not contemplate when it enacted the FAA. Compulsory arbitration of employees' state-law claims also conflicts with other areas of law, such as preemption under the Labor-Management Relations Act (LMRA), in which state prerogatives are taken into consideration. Finally, to the extent that federal arbitrability law is driven by institutional pressures on federal courts,[306] it should not prevent adjudication of employment disputes involving state-law claims.

Despite increasing federal regulation of the employment relationship, the states retain a significant role. Through judicial and legislative reforms, states have helped redefine many of the ground rules. They have gradually reduced the severity of the termination-at-will

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305 *See* sources cited *supra* note 4; Holmes, *supra* note 1; Jacobs, *supra* note 3 (citing examples of employee outrage prompted by employers' unilateral imposition of arbitration).

306 *See, e.g.*, Carbonneau & Janson, *supra* note 34, at 207. They contend that pressures on judicial resources, especially from the volume and complexity of federal criminal litigation, have led federal courts to use alternative dispute resolution as "a means of channelling non-criminal litigation to private adjudicatory processes." *Id.* at 207. They continue:

> Some interests had to be abridged or eliminated to afford safe passage to other more important interests. The only means of salvaging the justice system was to have arbitrators function as de facto federal judges in a private setting and at the cost of the parties instead of the taxpayers. The United States no longer could afford the brand of justice required by the federal constitution.

Id.

rule by recognizing exceptions that acknowledge that employment law is not a purely private matter. States have also fashioned comprehensive solutions in particularly vexing areas of employment law. For example, workers' compensation schemes attempt to strike a balance between injured workers' desire for a high probability of being compensated and employers' desire to contain liability costs.[307]

Some states have considered similar solutions in the area of employer liability for employee terminations. The theory behind unjust dismissal statutes, like that of workers' compensation, is "more sure recovery of smaller damages."[308] Thus, the traditional termination-at-will rule is replaced by a "just cause" requirement, in exchange for limits on employer liability and mechanisms aimed at reducing litigation expenses.[309] Some form of arbitration is often part of the proposed compromise.[310]

If federal arbitration law allows employers to impose arbitration unilaterally—and thereby to reduce their fears concerning litigation costs[311]—employers may be less inclined to seek or agree to such compromise solutions. If so, the federal judiciary will have short-circuited the political process that might otherwise operate at the state level to generate solutions that benefit both employers and employees.

This interference with state policy conflicts with Congress's intent in enacting the FAA. First, as explained above, the FAA's purpose was merely to ensure the enforceability of arbitration agreements involving disputes between merchants.[312] Second, the legislative history in-

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307 *See generally* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982).

308 WILLBORN ET AL., *supra* note 13, at 255.

309 *See, e.g., id.* at 251-53; MONT. CODE ANN. §§ 39-2-901 to 39-2-915 (1993) (Wrongful Discharge from Employment Act); Model Employment Termination Act §§ 1-14, 7A U.L.A. 75 (West Supp. 1995). *See generally* Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 519-31 (1976) (advocating state legislation requiring "just cause" for dismissal).

310 *See, e.g.*, Model Employment Termination Act §§ 5-8, 7A U.L.A. (West Supp. 1995). Comprehensive approaches to employee termination in other countries also typically involve the use of special tribunals of some sort. Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310, 320 (1985) (analyzing the laws of Canada, Great Britain, Germany, France, Italy, and Japan).

311 For a discussion of employers' reasons for preferring ADR to litigation, see *supra* notes 31-33 and accompanying text.

312 *See Joint Hearings*, *supra* note 131, at 6-7. An exchange between Senator Sterling, who presided over joint committee hearings on the FAA bill, and Charles L. Bernheimer of the New York Chamber of Commerce illustrates the point:

> Mr. Bernheimer. . . . Speaking for those engaged in buying and selling merchandise, what is usually called trading, whether that be the case of the farmer who buys his supplies, plows, and sells his produce, or the man who sells over the counter, or what not, it is all the same. It applies to all of them.
>
> The Chairman. What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce.

dicates that members did not contemplate that the FAA would intrude on state prerogatives. For example, a document submitted by the American Bar Association and made part of the record at joint committee hearings on the bill that would later become the FAA, made it clear that "[a] federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. *It is no infringement upon the right of each State to decide for itself* what contracts shall or shall not exist under its laws."[313] Congress's accession to the exclusion of "contracts of employment" from the FAA's coverage also indicates that it did not intend to limit state policy governing employment termination.

This intrusion by the FAA into state-law employment disputes is also inconsistent with the federal judiciary's tendency to take states' interests seriously in other contexts. The Supreme Court has explicitly taken account of states' interest in regulating the employment relationship in the context of the LMRA.[314] More generally, when deciding whether to apply a federal common-law rule, the Court has considered whether a state law "served legitimate and important state interests the fulfillment of which Congress might have contemplated through application of state law."[315] But in the context of the FAA,

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Mr. Bernheimer. Yes; entirely.

Id. at 7; *see also Senate Hearings*, *supra* note 125, at 9 (statement of W.H.H. Piatt) ("It is purely an act to give the *merchants* the right [to agree to arbitrate].") (emphasis added); *supra* notes 132-33 and accompanying text; *cf.* 9 U.S.C. § 1 (1994) (excluding "contracts of employment" from the scope of the FAA).

313 *Joint Hearings*, *supra* note 131, at 37 (emphasis added). Because they prepared the original draft and led the lobbying campaign, these ABA members spoke with considerable authority. The ABA document continues: "[It cannot] be said that the Congress . . . would infringe upon the provinces or prerogatives of the States." *Id.* at 39. The ABA's three-front lobbying strategy, which was explained to congressional members, also indicates that Congress did not intend that the FAA would give federal courts the power to intrude on state prerogatives: "This is in three segments: The first is to get a State statute, and then to get a Federal law . . ., and, third, to get a treaty with foreign countries." *Id.* at 16 (testimony of Julius Henry Cohen, Committee on Commerce, Trade, and Commercial Law, American Bar Association).

Moreover, the ABA and congressional committee members believed that the FAA was to be enacted under Congress's power to regnlate the procedures followed by the federal courts. The ABA document, which was made available to congressional members, continued:

> It has been suggested that the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress. This is not the fact.
>
> The statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power.

Id. at 37.

314 Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

315 United States v. Little Lake Misere Land Co., 412 U.S. 580, 599 (1973).

the Court has imposed federal law on both state and federal courts. Employees' potential inability to litigate state-law claims against employers is an especially stark example.

2. *Arbitrability Standards and the Tension Between Union and Nonunion Arbitration Law*

The post-*Gilmer* decisions on the arbitrability of state claims implicate two tensions between arbitration in the union and nonunion contexts. First, an employee covered by a collective bargaining agreement may be able to assert a statutory cause of action despite an unfavorable arbitration of an identical claim under a private grievance procedure. Second, the preemption of state employment claims under section 301 of the LMRA, in its barest terms, precludes union employees from suing in state court if their state-law theory would require interpretation of the collective bargaining agreement. If the FAA is interpreted to require arbitration of virtually all state employment claims, the arbitrability rules under the FAA will differ significantly from those covering union employees.

a. *Finality of Arbitral Awards—Union and Nonunion Employees*

In *Alexander v. Gardner-Denver Co.*,[316] a discharged union employee filed a grievance contending that his discharge was racially motivated. The collective bargaining agreement contained a broad arbitration clause as well as a nondiscrimination clause.[317] Following an unfavorable award, the employee sued for racial discrimination under Title VII of the 1964 Civil Rights Act.[318] The Supreme Court held that the arbitrator's decision did not preclude the subsequent federal lawsuit.[319] The Court found that the arbitrator's authority only extended to interpreting the collective bargaining agreement, and that Congress intended for Title VII to "supplement, rather than supplant, existing laws and institutions relating to employment dis-

316 415 U.S. 36 (1973).

317 The grievance procedure, ending in binding arbitration, covered "differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement" and "any trouble aris[ing] in the plant." *Id.* at 40. The arbitration clause provided that "[t]he decision of the arbitrator shall be final and binding upon the Company, the Union, and any employee or employees involved. . . . The arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement." *Id.* at 41 n.3.

318 *Id.* at 42-43.

319 *Id.* at 59-60.

crimination."[320] The Court also stressed that Title VII rights, which include a right to a judicial forum, may not be prospectively waived.[321]

Gilmer did not explicitly overrule *Gardner-Denver*, but distinguished it on the grounds that labor arbitrators have no authority to adjudicate statutory claims,[322] that union representation is in tension with individual discrimination remedies, and that *Gardner-Denver* was "not decided under the FAA."[323] If these distinctions keep *Gardner-Denver* alive, then union members will be able to litigate claims that their unorganized counterparts must arbitrate. Post-*Gilmer* cases making state-law claims arbitrable under the FAA may widen this rift between union and nonunion employees.

b. *Section 301 Preemption*

The FAA cases involving claims arising under state law also create a tension with the section 301 preemption doctrine. Under section 301 of the LMRA, which gives federal courts the authority to decide disputes involving collective bargaining agreements, employees are precluded from asserting certain state-law claims when those claims are related to the rights governed by an applicable collective bargaining agreement. This doctrine is based on the premise that the substantive law of section 301 displaces contrary state law insofar as it conflicts with the policies underlying the federal labor statutes.[324] The most notable pronouncement of that doctrine is *Lingle v. Norge Division of Magic Chef, Inc.*,[325] which framed preemption in terms of whether "the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement."[326] *Lingle* held that section 301 does not preempt a claim of retaliatory discharge when an employer is accused of firing an employee for filing a workers' compensation claim.[327]

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320 *Id.* at 48-49.

321 *Id.* at 51-52. The Court acknowledged that an employee may retroactively waive a Title VII right of action by settling with the employer. *Id.* at 52.

322 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 (1991) ("The arbitrator's 'task is to effectuate the intent of the parties' and he or she does not have the 'general authority to invoke public laws that conflict with the bargain between the parties.' ") (quoting *Gardner-Denver*, 415 U.S. at 53).

323 *Gilmer*, 500 U.S. at 35.

324 *See, e.g.*, Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962) ("The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.").

325 486 U.S. 399 (1988).

326 *Id.* at 405-06.

327 *Id.* at 413.

Section 301 preemption eliminates many state-law claims that could otherwise be brought by union employees.[328] Because collective bargaining agreements typically provide for grievance arbitration, disputes giving rise to state-law claims that are preempted under section 301 will generally be resolved through arbitration or will not be resolved at all. However, section 301 preemption does not apply to all categories of employment-related state-law claims. The doctrine carves out a set of state-law claims, albeit a small one, that union members may invoke independently of the arbitration process. Claims of retaliatory discharge for filing workers' compensation claims, claims of discrimination, claims of intentional infliction of emotional distress, and "whistleblowing" claims generally are not preempted by section 301.[329]

The standards applied in FAA cases involving state-law employment claims, however, suggest no such limits to the pro-arbitration stance in the nonunion setting. This asymmetrical situation may result, in part, from the tension between *Gilmer*, which made ADEA claims by individual employees arbitrable, and *Gardner-Denver*, which held that a union employee who had submitted a discrimination dispute to arbitration could nonetheless litigate a Title VII claim. The *Lingle* court assumed, for example, that employees are able to vindicate their rights against discrimination independently from grievance procedures in union contracts,[330] a proposition that has no analog in the nonunion context. However, *Lingle* also placed heavy emphasis on the state's interest in regulating the employment relationship: "preemption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State."[331] Thus, the asymmetry between the types of claims that are arbitrable in the union and nonunion setting is also due to the overemphasis of federal pro-arbitration policy at the expense of legitimate state concerns in FAA cases.

Although asymmetry in the rules governing union and nonunion employees is not intrinsically problematic, it should at least be rational and consistent with federal labor policy. By requiring nonunion employees to arbitrate claims that their union counterparts may litigate, however, courts may be giving additional protection to those employees who need it least.[332]

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328 *See generally* Van Wezel Stone, *supra* note 278 (comprehensive analysis of § 301 preemption).

329 *See id.* at 607-13.

330 *See Lingle*, 486 U.S. at 412-13.

331 *Lingle*, 486 U.S. at 412 (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987)).

332 *Gilmer* distinguishes Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), in part by emphasizing the risk that the power of the majority in the union context will undermine

In addition, this asymmetry may undermine the LMRA. The "substantive law" applicable under section 301 was,[333] at least in theory, premised on the notion that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."[334] Arbitration agreements were viewed as an important incentive to producing collective bargaining agreements.[335] Today, the high litigation costs incurred by employers have reversed the incentives—employers, not employees, wish to use arbitration to settle disputes. From the perspective of promoting collective bargaining, the arbitrability rules are undesirable: employers can impose arbitration of a wide variety of claims—including those arising from state law—on nonunion employees, whereas union employees can litigate many claims even though a grievance arbitration has occurred.[336]

C. The Limits of Arbitrability: Containing the "Federal Policy Favoring Arbitration"

Although the Supreme Court is unlikely to give substantial weight to the states' interest in deciding the arbitrability of state employment claims, section 1 of the FAA may provide a second-best solution. The clause exempting "contracts of employment" from the FAA provides a textual basis for excluding some employment claims from the mandate of the FAA. By relying on section 1, courts could recognize reasonable limits on the Supreme Court's ardent pro-arbitration stance in FAA cases.[337]

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the vindication of antidiscrimination rights. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991). However, this observation does not justify asymmetric treatment. First, it assumes that nonunion employees have sufficient power to vindicate their rights in an arbitral forum—a forum that is in fact chosen by the employer. Second, the logic does not apply to disputes that do not implicate majoritarian problems.

333 *See supra* notes 22-23 and accompanying text.

334 Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

335 *Id.* at 455 ("[The LMRA] expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.").

336 This observation suggests that the current structure of the federal arbitrability rules makes it less likely that collective bargaining will occur. Although employer opposition to unions may be a significant cause of union decline, *see, e.g.*, RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 238-39 (1984), employers' attitude toward unions might be different if employers could not extract arbitration agreements from nonunion employees. This proposition, however, lacks independent empirical support. In addition, because § 301 preemption completely precludes union members from litigating many state-law claims, *see* Van Wezel Stone, *supra* note 278, at 607-13; *supra* notes 328-29 and accompanying text, employers already stand to reduce the cost of litigating state-law disputes by entering into collective bargaining agreements. In short, inferences about the effects of such incentives on collective-bargaining behavior are speculative.

337 *See* discussion *supra* part I.B. The Supreme Court could, of course, close the § 1 route by explicitly holding that the exclusion clause has a very narrow scope.

1. *Broad Construction of the "Contracts of Employment" Exclusion*

The first way to limit the FAA's applicability to state-law employment claims is to reject a narrow construction of the section 1 exclusion clause. Under the most narrow reading of this clause, its scope is limited to employees directly involved in interstate transportation.[338] The federal courts of appeals adopted this view of section 1 in the 1950s in cases involving section 301 of the Labor-Management Relations Act.[339] The reasoning supporting this interpretation was in the first instance tenuous and, as explained in Part II.A, its view of the clause is now irrelevant. *Lincoln Mills* held that section 301 itself provided substantive law and the subsequent *Steelworkers* cases held that section 301 requires federal enforcement of agreements to arbitrate disputes over collective bargaining agreements.[340]

Today, courts reading the section 1 proviso narrowly rely on the pre-Trilogy cases like *Tenney Engineering* to make the FAA applicable to most employment contracts.[341] This approach does not take the ex-

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338 *See supra* notes 177-83 and accompanying text.

339 *See supra* notes 155-69 and accompanying text. As that portion of this Note explains, until the Supreme Court held that § 301 of the LMRA provides for a substantive federal law governing the enforcement of collective bargaining agreements (a somewhat surprising proposition), lower federal courts quite predictably sought that authority in the Federal Arbitration Act. Faced with a seemingly clear impediment to applying the FAA—a clause excluding "contracts of employment" from the Act's reach—some of those courts performed the interpretive tap-dance of reading the exclusion clause to include very few workers in "commerce" but reading the rest of the FAA to reach all the arbitration agreements that Congress could reach under its commerce clause power.

340 Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

341 Part II.A *supra* explains that Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers, 207 F.2d 450, 452-53 (3d Cir. 1953), construed the FAA § 1 proviso as inapplicable to a collective bargaining agreement involving employees who were not engaged in the actual movement of interstate commerce.

The Supreme Court's recent decision in Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834 (1995) (holding that the FAA's scope coincides with that of the commerce clause because Congress used the words "involving commerce" in § 2 of the FAA), could provide a basis for a narrow interpretation of the exclusion clause in § 1. The exclusion applies to contracts of "class[es] of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). Because the magic words "involving commerce" were not used in § 1, a narrower interpretation of the exclusion clause is arguably warranted. As suggested *supra* note 120, however, such a conclusion is not compelled.

There is no evidence in the legislative record indicating that Congress intended a narrower scope for the exclusion clause than for the substantive provisions of the Act. Although seamen and railroad workers—the examples of classes of workers referred to in § 1—are closely connected to the flow of interstate commerce, legislators were told by the ABA that the Act did not "refer[ ] to labor disputes *at all*." *Senate Hearings*, *supra* note 125, at 9 (emphasis added); *see supra* note 133. Moreover, the broad definition of "commerce" in § 1 appears in the same sentence as the "contracts of employment" exclusion. The *Allied-Bruce Terminix* majority relied on this very definition—which uses the language of the commerce clause—in holding that the FAA's provisions are as broad as the commerce power permits. *See* 115 S. Ct. at 840. Immediately after setting forth this broad definition, Congress excluded contracts of workers "engaged in commerce." 9 U.S.C. § 1 (1994). Therefore, Congress most likely meant to exclude workers engaged in the same broad set

clusion clause seriously, and it ignores the pre-Trilogy context of cases like *Tenney Engineering*. In addition, this narrow construction of the FAA's exclusion clause conflicts with the strong state interest in regulating the employment relationship, which the Court recognized in *Lingle*.[342] A broad interpretation of the "contracts of employment" proviso is therefore desirable.

2. *A Middle Ground: Protecting "Workers" Under the Exclusion Clause*

Courts might also limit the arbitrability of state-law employment claims by focusing on the word "workers" in section 1. The exclusion clause does not exempt employment contracts generally; it only excludes those in "class[es] of workers engaged in foreigu or interstate commerce."[343] Recent cases have not distinguished between employees who are "workers" and those who are not. However, the Court of Appeals for the Second Circuit, in *Bernhardt v. Polygraphic Co. of America*, faced the issue of whether a contract between a plant superintendent and his employer was governed by the FAA.[344] The court held that the exclusion clause did not reach the contract because a plant superintendent is not a "worker" within the meaning of the FAA.[345]

This interpretation of "worker" is consistent with the language of section 1 as well as the legislative history. The exclusion clause, as the Second Circuit pointed out, refers to classes of workers like seamen

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of activities it had just defined. If Congress had intended a narrower meaning for the exclusion clause, it would probably have included some qualifying language beyond merely using the word "in."

If Congress had policy in mind when it added the exclusion clause, it is unlikely that it meant to limit the clause to a very narrow set of employees. If, on the other hand, the clause (as argued *supra* note 133) was merely intended to state the obvious—the FAA was only meant to apply to contracts between merchants—then construing the exclusion more narrowly than the substantive provisions is wholly unwarranted.

342 *See supra* note 331 and accompanying text. If the Supreme Court were to interpret the § 1 exclusion clause, the *Allied-Bruce Terminix* dissenters would face an interesting test: how faithful are they to the "core principles of federalism"? *See* 115 S. Ct. at 848 (Thomas, J., dissenting); *see also supra* note 92 (brief description of dissent). As Part III.B.1 of this Note observes, compulsory arbitration of employees' state-law claims significantly intrudes on states' policies in the employment realm. In addition, Justice Thomas's more general concerns about the implications of extending the FAA beyond the federal courts apply in *all* employment cases. He and Justice Scalia might, therefore, be expected to endorse a broad reading of the § 1 exclusion.

343 9 U.S.C. § 1 (1994).

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

345 *Id.* at 951-52 (reasoning that Bernhardt "was not hired as a 'worker' but as a plant superintendent . . . with managerial duties fundamentally different from those of 'workers' ").

and railroad workers.[346] The court reasoned that Bernhardt "was not hired as a 'worker' but as a plant superintendent . . . with managerial duties fundamentally different from those of 'workers.' "[347] California courts have interpreted the California arbitration statute in a similar way,[348] as have courts interpreting the word "labor" in other contexts.[349]

Some courts interpreting the word "labor" have emphasized the purported distinction between "physical" and "mental" tasks.[350] This functional approach is questionable. First, it may unnecessarily demean "physical" work and create the false impression that employees who do such work deserve special protection because of their inher-

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346 *Id.* at 951 ("The words 'any other class of workers,' read in connection with the immediately preceding words, show an intention to exclude contracts of employment of a 'class' of 'workers' like 'seamen' or 'railroad employees.' ").

347 *Id.* at 951-52.

348 See Levy v. Superior Court, 104 P.2d 770 (Cal. 1940), where the court stated:

> It may not be doubted that an actor, or an artist, a clergyman, a general manager, sales manager or other executive, secretary, attorney, or judge, labors; but this court . . . [has] determined that it was the obvious intention of the legislature that contracts involving individuals whose principal efforts were directed to the accomplishment of some mental task were not to be classified as contracts "pertaining to labor"; that the word "labor" as used in the section meant "that kind of human energy wherein physical force, or brawn and muscle, however skillfully employed, constitute the principal effort to produce a given result, rather than where the result to be accomplished depends primarily upon the exercise of the mental faculties."

Id. at 773 (citing Universal Pictures Corp. v. Superior Court, 50 P.2d 500, 501 (Cal. 1935)); *see also* Kerr v. Nelson, 59 P.2d 821, 823 (Cal. 1936) (holding that a sales manager does not perform "labor" within the meaning of the California arbitration statute).

349 *See, e.g.*, Church of Holy Trinity v. United States, 143 U.S. 457 (1892) (a minister does not "perform labor" for purposes of a federal statute "to Prohibit the Importation of Foreigners and Aliens under Contract to Perform Labor"); Tatsukichi Kuwabara v. United States, 260 F. 104 (9th Cir. 1919) (a language teacher did not "perform labor" for purposes of exclusion from admission to the United States under immigration law); Latta v. Lonsdale, 107 F. 585, 585 (8th Cir. 1901) ("A lawyer employed by a railroad company on a yearly salary, payable monthly, is not a laborer or employé, within the meaning of [an Arkansas statute governing priority among creditors of insolvent corporations]."); Gay v. Hudson River Electric Power Co., 178 F. 499 (C.C.N.D.N.Y. 1910) (an attorney hired to solicit purchase options was not a "workingman or laborer" under a New York statute regulating creditor priority); *In re* Ho King, 14 F. 724 (D. Or. 1883) (an actor was not a "laborer" for purposes of exclusion from the United States under a treaty with China); Lesuer v. City of Lowell, 116 N.E. 483 (Mass. 1917) (a vocational teacher was not a "laborer," "workman," or "mecbanic" and therefore fell outside workers' compensation statute); Wirth v. Calhoun, 89 N.W. 785 (Neb. 1902) (musical entertainers did not engage in "common labor" and therefore were not covered by the prohibitions of the Sunday law); Weymouth v. Sanborn, 43 N.H. 171 (1861) (analyzing services performed by doctors); School Dist. No. 94 v. Gautier, 73 P. 954 (Okla. 1903) (a teacher was not a "laborer of any kind, clerk, servant, nurse or other person [bringing an action] for compensation claimed due for personal services performed" under a state statute allowing such litigants to recover attorneys' fees).

350 *See supra* note 348.

ent capabilities—or lack thereof.[351] Second, the functional approach falsely assumes that "mental" and "physical" tasks are different and that they can be distinguished. Third, the approach in any event is of little use today because of the emergence of a service-based economy.

A more appropriate inquiry may therefore be a power test: an employee is in a "class of workers" for purposes of being excluded by section 1 of the FAA if the employee would have been unable to bargain effectively with the employer over the inclusion of the arbitration clause in the employment contract.[352] This test is desirable for at least three reasons. First, although the legislative record is far from clear,[353] the evidence suggests that Congress excluded "contracts of employment" from the FAA to prevent employers from forcing arbitration of one type or another on employees who were not powerful enough to stop them. Second, the power test is consistent with the Second Circuit's determination in *Bernhardt*, which was not disturbed by the Supreme Court in that landmark case.[354] Third, the power approach to defining "worker" produces a superior arbitrability rule—employees who cannot effectively bargain over the inclusion of arbitration clauses in their contracts cannot be denied access to the courts on the whim of their employers.[355]

This understanding of the word "workers" allows *Gilmer* to be harmonized with *Gardner-Denver*. Harrell Alexander worked as a drill press operator,[356] whereas Robert Gilmer was a manager of financial services.[357] If Alexander is viewed as a "worker," then the collective bargaining agreement in *Gardner-Denver* falls within the FAA's section 1 exclusion clause. The FAA would therefore not constrain an employee like Alexander from pursuing a Title VII action after a completed grievance arbitration. Robert Gilmer's contract would be

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351 Alternatively, the functional approach might be taken to glorify traditionally male job classifications. In the context of the FAA, it would give more procedural protection to employees in such categories because their employers could not force them to arbitrate rather than litigate.

352 This view is consistent with the emerging understanding that interactions between players within an enterprise—and between an enterprise and external players—do not occur in a power vacuum. The results of such interactions depend upon the relative bargaining strength of the players. *See, e.g.*, Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540 (1995) (arguing that the law should take account of differences in the relative bargaining strength of managers and shareholders within a firm).

353 *See supra* part II.A.

354 *See* Bernhardt v. Polygraphic Co. of Am., 218 F.2d 948, 951-52 (2d Cir. 1955) (holding that a plant supervisor is not a "worker" within the meaning of § 1), *rev'd on other grounds*, 350 U.S. 198 (1956).

355 Because Congress has specifically made the judgment that workers' contracts are not covered by the FAA, this way of defining "workers" is justified despite the general proposition that fraud—not mere lack of bargaining power—is necessary to avoid compulsory arbitration under the FAA.

356 Alexander v. Gardner-Denver Co., 415 U.S. 36, 38 (1973).

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

covered by the FAA, however, because he is not a "worker" within the meaning of the section 1 exclusion clause.

3. *Federal Legislation*

Legislation would be another solution to the courts' expansive interpretation of the FAA. Uproar over employment arbitration practices in the securities industry led to the introduction of remedial legislation in the 103d Congress.[358] This proposed legislation was of two types. One bill would have amended several federal statutes governing employment to prevent denial of the judicial forum by means of contractual provisions.[359] A more general proposal would have prohibited employers from forcing employees to arbitrate, without amending particular federal civil rights statutes.[360]

The analysis in this Note supports the latter approach. Because courts have used the FAA to require arbitration of state-law claims, amending the federal civil rights laws would not solve the problem. If Congress passed a statute affecting only *federal* laws, courts would continue to apply a broad preemption standard to keep state claims out of court. The substantive rights of employees are governed, to a large extent, by state laws. Therefore, more general legislation is warranted. Legislation addressing the arbitrability of employee rights of action under both state and federal law would give states more leeway in resolving problems in the nonunion workplace. Unfortunately, the results and aftermath of the 1994 congressional elections suggest that Congress will not be especially sympathetic to the right of employees to seek redress in court.[361] Courts should therefore jettison their extreme pro-arbitration stance and interpret the FAA with an eye toward treating union and nonunion workers more consistently.

CONCLUSION

Courts apply a variety of standards to determine if Congress "intended" to exclude a state employment claim from mandatory arbitration under the FAA. The common feature of these standards is that they typically yield mandatory arbitration, a result that is consistent with the Supreme Court's broad reading of the FAA. This result may, however, conflict with the letter and purpose of the FAA because the FAA specifically excludes "contracts of employment" from its scope,

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358 *See* Steven A. Holmes, *Some Employees Lose Right to Sue for Bias at Work*, N.Y. TIMES, Mar. 18, 1994, at A1 (describing controversy over mandatory arbitration by employees); Jacobs, *supra* note 3 (citing congressional interest in the wake of controversy).

359 *See* H.R. 4981, 103d Cong., 2d Sess. (1994); S. 2405, 103d Cong., 2d Sess. (1994).

360 *See* S. 2012, 103d Cong., 2d Sess. (1994).

361 *But cf.* Jacobs, *supra* note 3 (indicating that key Republicans have shown interest in bills protecting employees from mandatory arbitration).

and because Congress—and the Supreme Court in other circumstances—has recognized a significant state interest in policing the employment relationship. Mandatory arbitration of employment claims also creates a tension with the law governing union employees, because unionized employees may pursue at least some claims in a judicial forum despite an arbitration clause in a collective bargaining agreement.

To avoid the pervasive reach of the federal law of arbitrability, courts should construe the exclusion clause in section 1 of the FAA more broadly. In addition, courts could interpret the word "workers" in the FAA clause excluding "contracts of employment" as covering employees who lack the power to bargain effectively with their employers over the inclusion of arbitration clauses in their employment contracts. This might allow mandatory arbitration of employment claims by stockbrokers, for example, but not of claims by many service sector or production employees. Such a view of the FAA would also conform to the federal labor laws, which favor collective bargaining and which displace state-law causes of action that require courts to interpret such agreements.

The two-faced evolution of arbitration law under the FAA and section 301 of the LMRA has led courts to apply different rules to union and nonunion workers. Although dissimilar treatment is warranted in some circumstances, the current rules governing the arbitrability of state-law claims, paradoxically, often give *more* protection to employees who are represented by unions than those who are not. By interpreting the FAA so as to immunize at least some state-law employment claims from mandatory arbitration, courts could treat union and nonunion workers in a more consistent way.

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