

1996

Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s

Katherine V.W. Stone
Cornell Law School

Follow this and additional works at: <https://scholarship.law.cornell.edu/facpub>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Stone, Katherine V.W., "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s" (1996).
Cornell Law Faculty Publications. 1601.
<https://scholarship.law.cornell.edu/facpub/1601>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

MANDATORY ARBITRATION OF INDIVIDUAL EMPLOYMENT RIGHTS: THE YELLOW DOG CONTRACT OF THE 1990S

KATHERINE VAN WEZEL STONE*

I. INTRODUCTION

Imagine that you are a salesperson who lost her job six months ago. You apply for an opening at a large retail chain store. While waiting for an interview, you are given a booklet labeled "Employee Handbook." Too distracted to read, you fill out an application form, provide references, and take a simple test. After a pro forma interview, you are offered the job. You accept, still without opening the Handbook. Later at home, you read the Handbook. It sets out various company rules and policies regarding tardiness, absenteeism, parking spaces, holidays, overtime, dress code, obscene behavior, and so forth. On page nine, at the end of the booklet, it says, "All disputes which arise during the course of your employment shall be submitted to arbitration pursuant to arbitration rules maintained by the employer at its corporate headquarters."

Imagine further that after working eight months, you suffer an on-the-job accident and have a back injury. You are out for two weeks. Before returning, you ask for a transfer to a light work assignment. The company refuses your request and then informs you that your old position has been eliminated and that you are therefore dismissed.

You believe you have suffered discrimination on the basis of your handicap, and so you bring a lawsuit alleging a violation of the Americans with Disabilities Act (ADA). The employer moves to dismiss your claim on the ground that you failed to arbitrate your ADA claim as required by the Handbook. You have not seen the arbitration procedures until now, but you get them upon request. They say that all disputes between employees and the employer shall be decided at arbitration before an arbitrator selected from a panel of retired industry executives. You do not believe that the industry panel, made up of individuals who are beholden to the industry and too old to have much sympathy with the ADA, will render a fair decision in your case.

* © 1996 by Katherine Van Wezel Stone, Professor of Law, Cornell Law School and Cornell School of Industrial and Labor Relations. B.A., Harvard University, 1970; J.D., Harvard University Law School, 1979. The author would like to thank participants at the Symposium on The New Private Law at the University of Denver Law School, the Law and Economics Roundtable at the University of Pennsylvania Law School, and the Cornell-NLRB Conference on the Sixtieth Anniversary of the NLRA in Washington, D.C., for their helpful comments and suggestions. She would also like to thank Philip Hostak and Alex Colvin for their exceptional research assistance.

And you learn from your lawyer that whatever the arbitrator decides, you have effectively no right to appeal to a court. A court will only set aside an arbitral award for "manifest disregard of the law."

Do you have to submit your case to the panel? That is, does your employer succeed in getting your case dismissed? The answer is almost certainly yes. The court will treat the Employee Handbook as a waiver of your rights to sue in court under most federal and state employment laws. Thus the employer, by giving you the booklet and unilaterally establishing an arbitration procedure, has relieved herself of numerous burdensome employment regulations. This hypothetical describes the state of labor and employment "law" today. Note that what we think of as "law" has become "nonlaw" at least insofar as your legal rights have been rendered unenforceable in a judicial tribunal. Your rights are only enforceable in a system of private justice, in a forum crafted by your employer and foisted upon you without any real bargaining or choice. The question is, how did we get there, and does this change from "law" to "nonlaw" make any difference? These questions will be addressed below.

In 1935, Congress passed the National Labor Relations Act (NLRA or Wagner Act),¹ the most extensive worker rights statute ever enacted in this country. Prior to its passage, American workers enjoyed very few statutory rights of any type. In the late nineteenth and early twentieth centuries, the Supreme Court struck down most state and federal laws that had been passed for the protection of workers as violative of substantive due process.² Even in the 1930s, many judges, legal scholars, and congressmen continued to express serious doubts about the constitutional power of the federal government to enact legislation about private-sector labor relations.³ Of course, prior to the 1930s, some workers had contractual rights that were contained in the collective agreements negotiated by their unions, but even those rights were of dubious value given the ambiguous legal status of collective bargaining agreements in the state courts.⁴ Thus in 1935, when the Wagner Act was passed,

1. National Labor Relations Act (NLRA or Wagner Act), §§ 1-16, 29 U.S.C. §§ 151-169 (1994).

2. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (holding unconstitutional law establishing board to set minimum wage); *Coppage v. Kansas*, 236 U.S. 1 (1915) (holding unconstitutional state law that made yellow dog contracts unlawful); *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional law limiting hours of work in bakeries). But see *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum-hour law for women workers on ground that women need special protection); *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding maximum-hour law for coal miners on ground that the hazardous nature of the work merited special protection for such workers).

3. See, e.g., PETER IRONS, *THE NEW DEAL LABOR LAWYERS* 3-4 (1982); see also *West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1930) (Van Deventer, J., dissenting, joined by McReynolds & Butler, JJ.). There was an exception for labor relations in the railroad industry, where Congress had exercised regulatory power since the 1880s. See generally Leifur Magnusson & Marguerite A. Gadsby, *Federal Intervention in Railroad Disputes*, 11 MONTHLY LAB. REV. 26 (1920) (discussing history of federal railroad labor legislation).

4. In most states in the early decades of this century, employees could only enforce a right they had under a collective agreement if they could show that they either incorporated the term into their individual contract of hire or that the union had acted expressly as their agent in negotiating the term. See William G. Rice, Jr., *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572, 581-93 (1931). Thus, collective bargaining agreements were enforced, if at all, as part of individual employment contracts; unions were not permitted to enforce them at all. In the

American workers obtained for the first time the right to organize, the right to engage in collective action, and the right to bargain collectively.⁵ These were contained in section 7 of the statute.⁶

The state of workers' rights today is entirely different. There are a myriad of federal and state laws that give employees substantive rights and protections—protections for whistle-blowers, protection against racial and gender discrimination, rights to be free of lie-detector tests, rights to be free of sexual harassment, rights to a safe and healthy workplace, and protection against unjust dismissal through various modifications of the at-will rule, and so forth.⁷ In addition, the rights guaranteed by section 7 of the NLRA have been given meaning over the course of sixty years as the National Labor Relations Board has interpreted and applied the sparse, broad words of the NLRA. So one might conclude that today's workers reap the benefits of labor's struggles in the nineteenth and early twentieth century—they have government protection for unions, a statutory framework to ensure them rights to bargain collectively and to strike, and legislative guarantees of job security, safe working conditions, pension protection, and dignity on the job.

In recent years, however, a new trend has emerged that threatens to turn back the clock on workers' rights. This trend is found in legal doctrines and judicial opinions that require workers to assert their statutory rights in the forum of private arbitration. These developments prevent workers from vindicating their statutory rights in a public tribunal. At the same time, employers are using arbitration clauses as a new-found weapon to escape burdensome employment regulations.

The trend toward mandatory arbitration of statutory rights is evident in two areas of law, affecting unionized and nonunion employees respectively. First, by means of an expansive interpretation of section 301 preemption, courts generally dismiss suits brought by unionized workers under state employment laws on the grounds that they must take such claims to arbitration. Second, in the wake of the 1991 Supreme Court decision *Gilmer v.*

1920s, this began to change. In *Schlesinger v. Quinto*, 194 N.Y.S. 401 (Sup. Ct. 1922), the New York Appellate Division held that a union was entitled to an injunction against an employers' association to prevent a breach of its collective agreement. Over the next ten years, some states followed the New York rule. See, e.g., *Weber v. Nasser*, 292 P. 637 (Cal. 1930); *Mississippi Theaters Corp. v. Hattiesburg Local Union*, 164 So. 887 (Miss. 1936); *Harper v. Local Union No. 520*, 48 S.W.2d 1033 (Tex. Civ. App. 1932); Katherine Van Wezel Stone, *The Postwar Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1518-21 (1981).

5. Three years earlier, Congress enacted the Norris-LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1995)), which declared it to be the public policy of the United States to support collective bargaining. However, the Norris-LaGuardia Act only gave rhetorical support to worker organizing and collective action; it did not create a general right to organize. The Act's substantive provisions prevented courts from issuing injunctions in labor disputes and rendered yellow dog contracts unenforceable.

6. 29 U.S.C. § 157 (1995), as initially enacted in 1935, states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining and other mutual aid or protection."

7. See generally Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 591-93 (1992) (citing examples).

Interstate/Johnson Lane Corp.,⁸ courts are requiring nonunion workers to submit claims based on federal and state employment laws to private arbitration rather than to a court. Further, some courts are beginning to merge these two doctrinal areas, thereby requiring unionized and nonunion workers to arbitrate state and federal statutory rights under the FAA.

In this article, I describe and analyze the trend toward mandatory arbitration of statutory employment rights. I demonstrate that the trend threatens to deprive workers of their statutory rights altogether. Further, in the nonunion setting, I show that mandatory arbitration is often imposed as a condition of employment, without any consent or bargaining. Thus, mandatory arbitration agreements operate as the new yellow dog contracts of the 1990s. I argue that courts should not permit workers to waive their rights under state or federal employment statutes. That is, courts should not force parties to arbitrate statutory claims, should not presume that promises to arbitrate include promises to arbitrate statutory claims, and should not give arbitral rulings on statutory issues preclusive effect. To do otherwise threatens to nullify the past sixty years' development of workers' rights and will make it difficult to legislate effective worker protection in the future.

II. A SHORT HISTORY OF THE ROLE OF ARBITRATION UNDER THE COLLECTIVE BARGAINING SYSTEM

Today, arbitration and collective bargaining are usually assumed to be coterminous, if not synonymous, institutions. It is usually assumed that all collective agreements contain arbitration procedures and that all disputes arising under the agreements are amenable to arbitration. However, arbitration has not always been such a prominent feature of our collective bargaining system. From the 1900s until the 1930s, enforcement of collective bargaining agreements was generally left to the vicissitudes of moral suasion and economic power.⁹ Beginning in the 1920s, a few state courts permitted workers or unions to enforce collective bargaining agreements as ordinary contracts.¹⁰ At that time, it was not common for collective agreements to contain provisions for arbitration. Where such arbitration provisions existed, parties could easily avoid them, given the historical disinclination of common law courts to enforce executory agreements to arbitrate.¹¹

During World War II, the attitude of courts and unions toward arbitration began to change. The War Labor Board (WLB) regarded arbitration as a substitute for industrial warfare and thus they found it to be a helpful system for securing wartime no-strike pledges. To this end, the WLB made arbitration the preferred method for resolving workplace disputes. It encouraged parties to

8. 500 U.S. 20 (1991).

9. See Katherine Van Wezel Stone, *Rethinking Labor Voluntarism: Legal Personality, the Enforcement of Trade Agreements, and the AFL's Attitude Toward the State in the Progressive Era* 26-29 (Oct. 1996) (unpublished manuscript, on file with author).

10. See Stone, *supra* note 4, at 1519-21.

11. See *Kulukundis Shipping v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942); Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926).

engage in collective bargaining and to include arbitration clauses in their agreements, and it accorded arbitration promises substantial deference.¹²

After the War, Congress enacted section 301 of the Labor Management Relations Act (LMRA), which said that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."¹³ On its face, this provision appeared to give federal courts jurisdiction to hear and decide labor disputes. In the next ten years, some scholars and practitioners in the labor field urged the courts to interpret section 301 in a manner that respected the special role of arbitration in resolving contractual disputes.¹⁴ Justice Douglas adopted this position in 1957 in *Textile Workers Union v. Lincoln Mills*,¹⁵ where he called upon federal courts to develop a "federal common law of collective bargaining," the centerpiece of which was support for and deference to private arbitration.

Since *Lincoln Mills*, private arbitration has become the central feature of our collective bargaining system. In 1960, in three cases known as the *Steelworkers' Trilogy*, the Supreme Court adopted a set of legal doctrines that have defined a privileged role for arbitration within our collective bargaining system. First, the Supreme Court held that courts should grant specific enforcement of promises to arbitrate without regard to the merits of the underlying dispute. Thus it held that parties who agree to arbitration provisions can be required to arbitrate meritless, or even frivolous, claims.¹⁶ It further held that agreements to arbitrate were not only judicially enforceable but were enforceable on the basis of a presumption of arbitrability.¹⁷ And finally, the Court held that arbitral awards are enforceable with a minimum amount of judicial review.¹⁸

In 1964, the Court further defined the privileged status of arbitration by holding that in cases involving rights arising both under the National Labor Relations Act and from a collective bargaining agreement, it was appropriate for the Labor Board to give deference to arbitration over judicial or administrative mechanisms for resolving the disputes.¹⁹ And in 1970, the Supreme Court approved the use of labor injunctions against strikes over issues that are subject to arbitration agreements,²⁰ thereby making a wide exception

12. See James Atleson, *Labor and the Wartime State: The Continuing Impact of Labor Relations During World War II* 97-103 (Oct. 1995) (unpublished manuscript on file with author).

13. 29 U.S.C. § 185(a) (1995).

14. See, e.g., Archibald Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247 (1958) [hereinafter Cox, *Problems*]; Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958) [hereinafter Cox, *Legal Nature*]; Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959) [hereinafter Cox, *Reflections*]; Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 72 HARV. L. REV. 999 (1955).

15. 353 U.S. 448 (1957).

16. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

17. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

18. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

19. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).

20. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).

to the venerable Norris-LaGuardia Act.²¹ The cases that proclaimed these labor law rules are well-known fixtures of our collective bargaining system. Together they make private arbitration the central and distinctive feature of our collective bargaining system.

In the past two decades, in two different but parallel developments, courts have expanded the use of labor arbitration even further. While the previous Supreme Court cases supported broad deference to arbitration to resolve unionized workers' contractual disputes—i.e., disputes concerning the interpretation and enforcement of collective agreements—courts are now insisting that arbitration be used to resolve statutory disputes—alleged violations of workers' statutory rights. These developments are found in the section 301 preemption doctrine for unionized workers, and in the post-*Gilmer* deferral doctrine for nonunionized workers.²² Both developments threaten to nullify present and future legislative efforts to protect workers.

III. MANDATORY ARBITRATION OF UNIONIZED WORKERS' STATUTORY CLAIMS

In the past fifteen years, courts have given section 301 of the Labor Management Relations Act a broad application and an expansive, preemptive scope. The section 301 preemption doctrine says that a unionized worker must utilize her grievance procedure to resolve all disputes that involve enforcement of her collective bargaining agreement.²³ Even if the case is brought solely as a state law action, it is converted into a section 301 case if it is found to be a de facto effort to enforce a collective bargaining agreement. Today, section 301 preemption has become so extensive that most unionized workers' lawsuits to enforce state law employment rights are automatically dismissed.

The exceptional breadth of section 301 preemption has its origins in a 1968 case, *Avco Corp. v. Aero Lodge No. 735*.²⁴ There the Supreme Court held that a lawsuit which a plaintiff brought solely on the basis of a state-created entitlement was a section 301 action because the defendant raised a contractual issue in its defense.²⁵ *Avco* established an exception to the well-pleaded complaint rule which "makes the plaintiff the master of the claim" by allowing the plaintiff to avoid federal jurisdiction by relying exclusively on state law.²⁶ The *Avco* Court refused to apply the general rule to labor cases and instead created the "complete preemption corollary to the well-pleaded

21. 29 U.S.C. §§ 101-115 (1995).

22. In addition, the scope of arbitration has been expanded under the Board's own deferral rules. In *Hammontree v. NLRB*, 894 F.2d 438 (D.C. Cir. 1990), the Board applied its pre-arbitral deferral doctrine to an 8(a)(3) case even though the plaintiff only alleged violations of the NLRA, not contractual violations. *Id.* A D.C. Circuit panel ruled that deferral was inappropriate, but on rehearing, the Circuit sided with the Board, holding that the Board's expansion of deferral was a reasonable construction of the NLRA. *Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991) (en banc).

23. Stone, *supra* note 7, at 594-96.

24. 390 U.S. 557 (1968).

25. *Avco Corp.*, 390 U.S. at 557.

26. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

complaint rule.”²⁷ This corollary means that an action that asserts a state law right but which arguably involves enforcement of a collective bargaining agreement, is converted into a section 301 claim and may therefore be removed to a federal court where federal law will apply.²⁸ The jurisdictional transformation attaches even if the plaintiff deliberately fails to rely on any rights she might have under her collective bargaining agreement.²⁹ As the Court explained: “[T]he preemptive force of section 301 is so powerful as to displace entirely any state cause of action ‘for violation of contracts between an employer and a labor organization.’ Any such suit is purely a creature of federal laws”³⁰ Further, even where a plaintiff’s case-in-chief rests on adequate state law grounds and does not rely on a collective bargaining agreement, the court will permit removal to a federal court, apply federal law under section 301, and hold that the claim is preempted if the defendant-employer raises an issue involving the collective bargaining agreement in defense.³¹

In 1985, the Supreme Court began to define when it will find a suit brought under state law to be “federalized,” and thus preempted. In *Allis-Chalmers v. Leuck*,³² the Court held that a state law employment claim whose disposition is “substantially dependent upon” or “inextricably intertwined with” a collective bargaining agreement is preempted.³³ Further, the Court held that section 301 preemption applies to suits in tort as well as those alleging contractual violations.³⁴ By extension, complete preemption under section 301 is also applied in suits arising under state statutory law.³⁵ Thus, as the Supreme Court recently recognized, section 301 has been “accorded unusual preemptive power.”³⁶

When a suit is preempted under section 301, there are two practical consequences. First, once a state employment law claim is converted into a section 301 claim, it must be resolved through private arbitration. This follows from the logic of the *Steelworkers’ Trilogy* cases discussed above, in which the Supreme Court adopted the position that all claims for breach of a collective bargaining agreement should be decided in private arbitration rather than by a court.³⁷ And in arbitration, there is virtually no right of judicial re-

27. *Id.* at 393.

28. *Avco Corp.*, 390 U.S. at 559-60.

29. *Caterpillar*, 482 U.S. at 394-95.

30. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983).

31. *See Stone*, *supra* note 7, at 596-604.

32. 471 U.S. 202 (1985).

33. *Allis-Chalmers*, 471 U.S. at 212, 220.

34. *Id.* at 210.

35. *See, e.g., Atchley v. Heritage Cable Vision Assocs.*, 904 F. Supp. 870 (N.D. Ind. 1995) (claims under state wage payment statute preempted by § 301); *see also Burgos v. Executive Air Inc.*, 914 F. Supp. 792 (D.P.R. 1996) (claims under Puerto Rico’s wage and hour law preempted by the RLA).

36. *Livadas v. Bradshaw*, 512 U.S. 107, 122 n.16 (1994).

37. *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151, 163 (1983); *Clayton v. UAW*, 451 U.S. 679, 681 (1981); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (“As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contractual grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress.”).

view.³⁸ Thus, once a claim is preempted under section 301, the worker's only and final recourse is to private arbitration.³⁹ As a result, unionized workers find that by virtue of the section 301 preemption rules, they do not have access to any court to assert their state law claims.

Second, and perhaps more significantly, when a claim is preempted under section 301, the worker's state law rights are extinguished. In arbitration, the arbitrator must apply the law of the collective bargaining agreement, not the external state law which was the basis of the original lawsuit. Thus the unionized worker whose state law claim is preempted receives neither the benefit of a judicial forum nor the benefit of the substantive provisions of the state law.

Section 301 preemption has become a central feature of employment litigation in recent years. Since the mid-1970s, when state courts and legislatures began to create extensive rights for individual employees, there have been thousands of cases in which unionized workers tried to take advantage of the new employment rights. Their fate in the state courts depends on the federal courts' approach to section 301 preemption.

Under the *Allis-Chalmers* standard, a state law claim is preempted when it is "substantially dependent" upon an interpretation of a collective agreement.⁴⁰ Lower courts have differed as to when they will find a state law claim to be "substantially dependent" on a collective agreement.⁴¹ In 1988, in *Lingle v. Norge Division of Magic Chef, Inc.*,⁴² the Supreme Court reiterated, and slightly revised, the *Allis-Chalmers* contract-dependency standard. It said that a suit is preempted "if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement."⁴³ The *Lingle* Court held that an employee's state law action alleging that she had been fired in retaliation for filing a workers' compensation claim was not preempted, even though the employee could have brought a grievance under the "just cause" clause in her collective agreement.⁴⁴ In so doing, the Court rejected the argument that a

38. The grounds for vacating an arbitral award under § 301 are extremely narrow. An award may only be vacated when it fails to "draw[] its essence" from the collective agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). And because there is no obligation for an arbitrator to give a written opinion, a reviewing court attempting to determine from whence an award "draws its essence" must enforce an award if it could have drawn its essence from the collective agreement. "Mere ambiguity" is not grounds to refuse enforcement. *Id.* at 598.

39. The only exception is if the union fails to bring a case to arbitration, or handles a case ineptly at arbitration, as a result of a breach of its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Vaca v. Sipes*, 386 U.S. 171, 187-88 (1967). This is a narrow exception because a union only breaches its duty if its action or inaction is "arbitrary, discriminatory, or in bad faith." *Id.* at 190. Mere negligence by a union does not constitute a breach of its duty of fair representation. *United Steelworkers v. Rawson*, 495 U.S. 362, 372-73 (1990).

40. *Allis-Chalmers*, 471 U.S. at 220.

41. See generally Laura W. Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17 BERKELEY J. EMPLOYMENT & LAB. L. 1, 11-17 (1996) (discussing several tests lower courts have used to define the scope of § 301 preemption under *Allis-Chalmers*).

42. 486 U.S. 399 (1988).

43. *Lingle*, 486 U.S. at 405-06.

44. *Id.* at 407.

suit is preempted if the state law claim involves the same operative facts as a claim arising under the collective agreement.⁴⁵

After *Lingle*, many federal courts developed a free-wheeling approach to section 301 preemption. In 1991, the Ninth Circuit described the state of section 301 preemption law as a “thicket . . . [a] tangled and confusing interplay between federal and state law,”⁴⁶ and “one of the most confused areas of federal court litigation.”⁴⁷ As of 1992, the result of this “thicket” was that lower courts were finding preemption in the vast majority of employment cases brought by unionized workers.

In 1992, this author surveyed hundreds of section 301 preemption cases and found an astonishingly simple pattern: when unionized workers attempted to exercise state employment rights, they were not able to do so.⁴⁸ Rather, by virtue of the preemption rules, the courthouse door was closed. For example, courts routinely dismissed, on preemption grounds, suits for wrongful dismissal or breach of a promise of job security.⁴⁹ In addition, courts routinely dismissed claims of unlawful drug testing, claims of defamation by an employer’s derogatory remarks, claims that an employer conducted an unlawful search of a person or automobile, claims concerning the mishandling of health insurance, medical leave, or other medical obligations, and claims that an employer breached a promise to an employee who was in a bargaining unit.⁵⁰ Indeed, very few cases brought by unionized workers survived dismissal for preemption, and those that did fell into a small number of narrowly-honed exceptions.⁵¹

An example of a typical section 301 preemption case is *Jackson v. Liquid Carbonic Corp.*⁵² The plaintiff, a union member, was dismissed for failure to pass an employer-administered drug test. He sued on the basis of a state statutory and constitutional right to privacy.⁵³ The employer removed the case to federal court and won a dismissal on preemption grounds.⁵⁴ Affirming this ruling, the First Circuit reasoned that in order to decide if the employee’s privacy had been violated, it had to determine whether the employer’s drug testing program was “reasonable.”⁵⁵ Further, it said, reasonableness had to be assessed in light of the right management had, under the collective agreement, to post reasonable rules and regulations.⁵⁶ Thus the court concluded that the suit involved interpretation of the collective agreement, and was therefore preempted.⁵⁷

45. See Stone, *supra* note 7, at 603.

46. Galvez v. Kuhn, 933 F.2d 773, 774 (9th Cir. 1991).

47. *Id.* at 776.

48. These results, with supporting authority, are discussed more fully in *The Legacy of Industrial Pluralism*, Stone, *supra* note 7, at 605-20.

49. *Id.* at 607.

50. *Id.* at 607-08.

51. *Id.* at 608-10.

52. 863 F.2d 111 (1st Cir. 1988).

53. *Jackson*, 863 F.2d at 113.

54. *Id.*

55. *Id.* at 118.

56. *Id.* at 119.

57. *Id.* at 113.

In a similar fashion, the great majority of union members' cases alleging violations of state law brought in the 1980s and early 1990s were found to be preempted by section 301. In that period, federal courts applied section 301 preemption with extraordinary reach, finding all kinds of lawsuits to be de facto efforts to enforce collective bargaining agreements. Indeed, some courts in the 1980s and early 1990s developed a de facto presumption to preempt all cases in which a unionized worker attempted to assert a state employment right. For example, in a 1991 decision, the Ninth Circuit stated that in a unionized workplace, claims about any working conditions that were within the scope of collective bargaining would be preempted.⁵⁸ Similarly, the Sixth Circuit found an employee's claim preempted because, while not entailing interpretation of a collective agreement, it "address[ed] relationships that have been created through the collective bargaining process."⁵⁹

In 1994, in two cases decided one week apart, the Supreme Court revisited the issue of the scope of section 301 preemption. In doing so, it reined in some of the more expansive approaches that the courts of appeals had been taking. The first case was *Livadas v. Bradshaw*,⁶⁰ which concerned a California law that requires employers to pay all wages due a discharged employee immediately upon discharge.⁶¹ The California Commissioner of Labor had a policy of pursuing late wage payment claims of nonunion workers while refusing to pursue such claims of unionized workers. Livadas, a discharged worker who was not promptly paid her wage claim, challenged the Commissioner's policy under 42 U.S.C. § 1983 as a violation of her federal right to engage in collective bargaining. She alleged that the policy "placed a penalty on the exercise of her statutory right to bargain collectively with her employer."⁶² The Commissioner defended the policy on the grounds that it was compelled by section 301 preemption because disposition of the plaintiff's wage penalty claim would require determining the amount she was owed, and this in turn would involve interpreting her collective bargaining agreement.⁶³ The district court agreed with the plaintiff and enjoined the Commissioner's policy of refusing to enforce wage-and-hour regulations for unionized workers.⁶⁴ A divided Court of Appeals for the Ninth Circuit reversed, stating that whether or not the plaintiff's claims were actually preempted, state officials should err on the side of avoiding interference with contractual grievance and arbitration procedures.⁶⁵

The Supreme Court reversed the Ninth Circuit, rejected the Commissioner's defense, and found him in violation of the plaintiff's federal rights. In doing so, it stated that there was not even a "colorable argument"

58. Schlacter-Jones v. General Tel., 936 F.2d 435, 441 (9th Cir. 1991).

59. Jones v. General Motors Corp., 939 F.2d 380, 382 (6th Cir. 1991).

60. 512 U.S. 107 (1994).

61. *Livadas*, 512 U.S. at 110. The law imposes financial penalties, enforceable by the Commissioner, on employers who fail to comply. *Id.*

62. *Id.* at 113-14.

63. *Id.* at 118-20.

64. *Id.* at 114-15.

65. *Livadas v. Aubry*, 987 F.2d 552, 570 (9th Cir. 1991), *rev'd sub nom. Livadas v. Bradshaw*, 512 U.S. 107 (1994).

that Livadas's claim for late wages was preempted under section 301. The Court reasoned:

[T]he primary text for deciding whether Livadas was entitled to a [late payment] penalty was not the Food Store contract, but a calendar. The only issue raised by Livadas's claim, whether Safeway "willfully failed to pay" her wages promptly upon severance . . . was a question of state law, entirely independent of any understanding embodied in the collective-bargaining agreement between the union and the employer.⁶⁶

While the *Livadas* Court found the plaintiff's claim not preempted, it declined the opportunity to articulate a test for defining the scope of section 301 preemption. Instead, in a footnote, the Court noted that there was a conflict between the circuit courts as to the proper breadth of section 301 preemption. But, the Court said, because the non-preempted status of the plaintiff's claim was "clear beyond peradventure," this case was "not a fit occasion for us to resolve disagreements that have arisen over the proper scope of our earlier [section 301 preemption] decisions."⁶⁷

Exactly a week later, the Supreme Court did revisit its preemption decisions, but in the context of the Railway Labor Act (RLA) rather than section 301 of the Labor Management Relations Act. In *Hawaiian Airlines, Inc. v. Norris*,⁶⁸ an airline mechanic was fired for refusing to certify a repair as satisfactorily completed on an airplane maintenance record.⁶⁹ The employee brought suit in the Hawaii state court on state common law and statutory wrongful discharge theories.⁷⁰ The airline claimed that the suit was in reality a grievance under the "just cause" provision of the collective agreement, and it was therefore preempted by the RLA's arbitral machinery for resolving grievances.⁷¹

The Court rejected the airlines' preemption argument. It stated that the standard for preemption under the RLA was "virtually identical" to the standard under section 301.⁷² It then noted that the facts of the case were "remarkably similar" to those in *Lingle*, where the plaintiff alleged she was fired in retaliation for filing a workers' compensation claim.⁷³ Here the employee alleged he was fired for refusing to sign off on the maintenance record that violated airline safety and health regulations. The Court said that in both cases, the state law retaliatory discharge claim turned on a "purely factual question: whether the employee was discharged . . . , and, if so, whether the employer's motive in discharging him was to deter or interfere with his exercise of [state law] rights."⁷⁴ The Court said that this question could be re-

66. *Livadas*, 512 U.S. at 124-25.

67. *Id.* at 124 & n.18.

68. 512 U.S. 246 (1994).

69. *Hawaiian Airlines*, 512 U.S. at 247.

70. *Id.* at 248.

71. *Id.* at 265.

72. *Id.* at 260.

73. *Id.*

74. *Id.* at 262.

solved without reference to the collective agreement.⁷⁵ Reiterating the *Lingle* standard, the *Hawaiian Airlines* Court held that preemption was required when the employee's state-law claim "is dependent on the interpretation of a CBA [collective-bargaining agreement]" and that here the plaintiff's claims were not preempted.⁷⁶

The 1994 Supreme Court decisions restricted some of the more free-wheeling approaches to preemption taken by the courts of appeals. No longer do courts preempt simply on the grounds that an employee is covered by a collective bargaining agreement.⁷⁷ However, since *Livadas* and *Hawaiian Airlines*, the lower federal courts continue to preempt most unionized workers' claims of unjust dismissal,⁷⁸ promissory estoppel,⁷⁹ and breach of contract concerning employment issues.⁸⁰ But certain claims are less likely to be preempted since the 1994 decisions. In particular, claims of defamation,⁸¹ intentional infliction of emotional distress,⁸² fraud,⁸³ and battery⁸⁴ are no longer routinely preempted. And, as before the 1994 cases, employees' claims of discrimination or workers' compensation retaliation are generally not preempted.⁸⁵

Despite some constriction of the lower courts' use of preemption since the *Livadas* and *Hawaiian Airlines* decisions, courts nonetheless stretch to find unionized workers' state law claims preempted. This is especially true for cases in which a worker challenges her dismissal. For example, in *Thomas v. LTV Corp.*,⁸⁶ a case decided after *Livadas* and *Hawaiian Airlines*, a unionized employee negotiated an individual attendance agreement with his employer.⁸⁷ When he was fired for absenteeism that resulted from an on-the-job injury, he sued for breach of contract, intentional infliction of emotional distress, wrong-

75. *Id.*

76. *Id.*

77. *Cf. Jones v. General Motors Corp.*, 939 F.2d 380, 382 (6th Cir. 1991); *Schlacter-Jones v. General Tel.*, 936 F.2d 435, 441 (9th Cir. 1991).

78. *See, e.g., Thomas v. LTV Corp.*, 39 F.3d 611, 621 (5th Cir. 1994); *Cullen v. E.H. Friedrich Co.*, 910 F. Supp. 815, 823 (D. Mass. 1995); *Sirois v. Business Express, Inc.*, 906 F. Supp. 722, 728-29 (D.N.H. 1995) (RLA preemption).

79. *See, e.g., Thomas*, 39 F.3d at 619; *Cullen*, 910 F. Supp. at 824.

80. *See, e.g., Thomas*, 39 F.3d at 619; *Sirois*, 906 F. Supp. at 729; *Atchley v. Heritage Cable Vision Assocs.*, 904 F. Supp. 870, 876 (N.D. Ind. 1995); *Knox v. Wheeling-Pittsburgh Steel*, 899 F. Supp. 1529, 1534 (N.D. W. Va. 1995); *Gregory v. Southern New England Tel. Co.*, 896 F. Supp. 78, 83 (D. Conn. 1994).

81. *See, e.g., Luecke v. Schnucks Mkts. Inc.*, 85 F.3d 356 (8th Cir. 1996) (holding defamation claims not preempted under § 301); *Gay v. Carlson*, 60 F.3d 83, 88 (2d Cir. 1995) (holding libel, slander, and prima facie tort claims not preempted under RLA).

82. *See, e.g., Trans-Penn Wax v. McCandless*, 50 F.3d 217, 232 (3d Cir. 1995); *Gregory*, 896 F. Supp. at 84.

83. *See Trans-Penn Wax*, 50 F.3d at 232.

84. *See, e.g., Gregory*, 896 F. Supp. at 83; *Mack v. Metro-North Commuter R.R.*, 878 F. Supp. 673, 677 (S.D.N.Y. 1995).

85. *See, e.g., Martin Marietta Corp. v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1402 (4th Cir. 1994) (state handicap discrimination claims not preempted under § 301); *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316, 318 (7th Cir. 1994) (workers' compensation retaliation claim not preempted under RLA).

86. 39 F.3d 611 (5th Cir. 1994).

87. *Thomas*, 39 F.3d at 614.

ful dismissal, and retaliation for filing a workers' compensation claim.⁸⁸ The Fifth Circuit said that even assuming the individual agreement was independent of the collective bargaining agreement, all the claims were nonetheless preempted. It noted that the employee's individual agreement sought to limit or condition his terms of employment, terms which were also addressed by the collective agreement. On this basis, it found that the individual agreement was subject to preemption.⁸⁹

So long as courts continue to find most unionized workers' state unlawful dismissal claims preempted, organized workers will have, in some respects, less employment rights than their unionized counterparts. One might ask, however, what's wrong with a broad section 301 preemption doctrine that leaves unionized workers with their right to private arbitration? The answer is that when a case is preempted under section 301, the law converts the unionized worker's statutory claim into a claim arising under her collective bargaining agreement. The arbitrator's task is to apply the collective agreement, *not* the relevant statute. Thus, in section 301 arbitration, unionized workers lose their statutory rights. This would not be a problem if unions were able to secure strong contractual protections for their members. However, after years of concession bargaining, judicial restrictions on the scope of mandatory bargaining, and employer use of striker replacements, unions have seen their bargaining strength erode.⁹⁰ As a result, their collective bargaining agreements have become weaker and weaker. In fact, it is precisely because employment law statutes seem to provide workers with stronger protections and better remedies than those contained in their collective bargaining agreements that unionized workers frequently bring legal actions on the basis of their statutory rights rather than rely on grievances to assert their contractual rights. Yet the law of section 301 preemption says that in such cases, the unionized worker is out of luck.⁹¹

In addition to using an expansive section 301 preemption doctrine to deprive unionized workers of their state law employment rights, some courts have developed another approach that similarly prevents workers from challenging dismissals on state law grounds. The First Circuit has concluded that state common law modifications of the at-will rule do not apply to unionized workers. As it was explained by Federal District Court Judge Ponsor of Massachusetts:

88. *Id.* at 615.

89. *Id.* at 618. In dicta, the court stated that it believed that the individual agreement "technically qualifies as a CBA" because the union played a role in helping the employee negotiate it and because it resulted from disciplinary action. *Id.*

90. Katherine Van Wezel Stone, *Labor and the Corporate Structure*, 55 U. CHI. L. REV. 73, 74-76, 86-96 (1988).

91. Judge Alex Kosinski, in his dissent in the Ninth Circuit's opinion in the *Livadas* case, decried the court's expansive interpretation of § 301 preemption, calling it the "novel doctrine of quasi-preemption." *Livadas*, 987 F.2d at 561 (Kosinski, J., dissenting). He pointed out that the doctrine has the effect of depriving unionized workers of the benefits of state law employment rights and placing them at a disadvantage vis-à-vis nonunion workers. *Id.* at 563. He even hypothesized that the courts' expansion of § 301 preemption and the consequent application of labor arbitration to unionized workers' statutory claims has contributed to union decline. *Id.* at 563 n.2; see also Stone, *supra* note 7, at 578-84.

The Massachusetts cause of action for wrongful discharge in violation of public policy is a judicially created exception to the "employment at will doctrine." This doctrine holds that an employee, who works without the benefit of an employment contract, may be discharged for almost any reason with or without cause. The cause of action, however, is only available to "at-will" employees. Allowing employees governed by a CBA [collective bargaining agreement] to assert an independent, common law claim of wrongful discharge would not be "a commendable practice. It would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances."⁹²

Several courts in Rhode Island and New Hampshire have utilized this same reasoning.⁹³ By limiting application of judicially created exceptions to the at-will rule to nonunion workers, these courts preclude claims of unjust dismissal brought by unionized workers, notwithstanding which the standard of section 301 preemption would otherwise be applied. Thus courts are developing a variety of techniques to keep unjust dismissal claims out of court and restrict unionized workers to their contractual grievance procedures.

IV. THE GROWTH OF MANDATORY ARBITRATION IN THE NONUNION SECTOR

A. *The Gilmer Decision*

The second legal development that has expanded arbitration into the realm of statutory employment rights addresses the use of arbitration by nonunion employers. In 1991, the Supreme Court decided the case of *Gilmer v. Interstate/Johnson Lane Corp.*,⁹⁴ which held that an employee of a stock brokerage firm, who alleged he was fired in violation of the Age Discrimination in Employment Act (ADEA), had to arbitrate his claim. At the time of hire, the employee had signed an arbitration clause in a standard stock exchange registration form, which he was required to file in order to begin work.⁹⁵ The *Gilmer* Court held that the arbitration agreement was enforceable under the Federal Arbitration Act (FAA),⁹⁶ an Act which makes arbitration promises in contracts involving commerce "valid, irrevocable, and enforceable."⁹⁷

The *Gilmer* Court's reasoning was based on a series of recent Supreme Court cases about commercial arbitration under the FAA. For example, it quoted its decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,⁹⁸ in which it had stated that the FAA evidences a "liberal

92. *Cullen*, 910 F. Supp. at 821 (citations omitted).

93. *See Sirois*, 906 F. Supp. at 728; *see also* *Bertrand v. Quincy Mkt. Cold Storage & Warehouse Co.*, 728 F.2d 568, 571 (1st Cir. 1984) (holding that under Massachusetts law, implied covenant of good faith and fair dealing does not apply to unionized employees).

94. 500 U.S. 20 (1991).

95. *Gilmer*, 500 U.S. at 23.

96. 9 U.S.C. § 2 (1994).

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

98. 460 U.S. 1 (1983).

federal policy favoring arbitration.”⁹⁹ In addition, the *Gilmer* Court referred to its holdings in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁰⁰ and *Shearson/American Express, Inc. v. McMahon*,¹⁰¹ noting that “statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”¹⁰² It rejected the plaintiff’s arguments that requiring plaintiffs to arbitrate ADEA claims was inconsistent with the statutory framework. In response to the plaintiff’s argument that the ADEA embodies important social policies which should not be determined in private tribunals, the Court recounted recent cases where it had found that claims arising under the anti-trust act, the securities act, and the Racketeer Influenced and Corrupt Organizations Act (RICO) are amenable to arbitration under the FAA.¹⁰³ The Court then quoted *Mitsubishi* to the effect that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”¹⁰⁴

The *Gilmer* Court also rejected, without much discussion, the plaintiff’s arguments that arbitration procedures were inherently inadequate to protect statutory rights.¹⁰⁵ Rather, it discussed with approval the particular arbitration rules of the New York Stock Exchange (NYSE). For example, the Court noted that the NYSE Rules required arbitration panel members to disclose their employment histories and permitted parties to make further inquiries into the backgrounds of potential arbitrators to discern bias. The NYSE Rules also give parties one peremptory challenge and unlimited challenges for cause.¹⁰⁶ The Court also noted that the NYSE Rules permit limited discovery, including document production and depositions.¹⁰⁷ And the Rules require that arbitral awards be in writing, specifying the names of the parties, a summary of the issues, and a description of the award.¹⁰⁸ These features of the NYSE arbitration led the Court to conclude that the arbitration procedures adequately safeguarded *Gilmer*’s substantive rights.

Justice Stevens, in dissent, raised what is perhaps the most troublesome aspect of the *Gilmer* opinion. Section 1 of the FAA has an exclusion for contracts of employment.¹⁰⁹ The FAA states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹¹⁰ Stevens argued that the brokerage agreement the plaintiff signed in *Gilmer* was part of

99. *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24).

100. 473 U.S. 614 (1985).

101. 482 U.S. 220 (1987).

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

103. *Id.* at 27-28.

104. *Id.* at 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637).

105. *Id.* at 30-32.

106. *Id.* at 30.

107. *Id.*

108. *Id.* at 31-32.

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

110. 9 U.S.C. § 1 (emphasis added).

a contract of employment.¹¹¹ Because the employer in *Gilmer* sought to compel arbitration under the FAA, Stevens maintained that the exclusion for contracts of employment governed and the Act could not be applied.¹¹²

The majority gave short-shrift to Stevens's argument about the contract-of-employment exclusion. It stated that because the arbitration clause originated in a contract between the plaintiff and the stock exchange and not in a contract between the plaintiff and his immediate employer, it was not a "contract of employment" for purposes of the FAA exclusion.¹¹³ In addition, the Court said that because the issue of the section 1 exclusion had not been raised by the litigants below, nor developed in the record, it was not obliged to address it in detail. Instead, the Court said, it would leave that issue "for another day."¹¹⁴

The *Gilmer* dissent also took issue with the majority's interpretation of the FAA exclusion for employment contracts. Stevens argued that Congress had excluded employment contracts from the FAA out of its concern that arbitration promises contained in employment contracts were not truly voluntary but might arise out of excessive inequality of bargaining power.¹¹⁵ These concerns, he argued, should be implemented by giving an expansive interpretation to the "contract of employment" exclusion and by refusing to apply the FAA to arbitration of ADEA or other employment-related statutory claims.¹¹⁶

Stevens also argued that the Court's decision in *Alexander v. Gardner-Denver*¹¹⁷ precluded arbitration of employment discrimination claims. In *Gardner-Denver*, the Supreme Court held that an employee who had arbitrated his discrimination claim under his collective bargaining agreement may, nonetheless, obtain a *de novo* judicial determination of his Title VII claim. The *Gardner-Denver* Court reasoned that a union's collective bargaining agreement may not waive an employee's individual rights:

Title VII . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.¹¹⁸

Stevens, in his *Gilmer* dissent, maintained that *Alexander v. Gardner-Denver Co.* established the principle that compulsory arbitration conflicts with the congressional purpose behind anti-discrimination legislation. He quoted Chief Justice Burger on the issue:

111. *Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting).

112. *Id.*

113. *Id.* at 51-52 & n.2.

114. *Id.*

115. *Id.* at 39.

116. *Id.* at 39-43.

117. 415 U.S. 36 (1974).

118. *Gardner-Denver*, 415 U.S. at 59-60.

Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.¹¹⁹

The *Gilmer* majority distinguished *Gardner-Denver* on the ground that the latter involved a unionized worker's claim and an arbitration promise contained in a collective bargaining agreement, thus posing issues about the relationship between a collective representative and an individual employee's rights which were not present in *Gilmer*.

B. Application of *Gilmer* to Non-Union Workers

Since 1991, most lower federal courts have interpreted *Gilmer* expansively. Several federal courts have applied *Gilmer* to find employees' discrimination claims arbitrable in cases in which an arbitration promise arose directly from an employment contract between an employer and an employee, rather than the third-party arbitration promise involved in *Gilmer*.¹²⁰ These cases read the "contracts of employment" exclusion in section 1 of the FAA narrowly to apply only to employees involved in the physical movement of goods across state lines.¹²¹ Some go even further and maintain that the exclusion only applies to transportation workers.¹²² They justify these narrow readings of the statutory language by saying that the contract-of-employment exclusion refers explicitly to contracts of employment involving "seamen and railroad employees," and hence these enumerated categories should limit the type of employees included in the phrase "any other class of workers."¹²³

119. *Gilmer*, 500 U.S. at 42 (Stevens, J., dissenting) (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting)).

120. See, e.g., *Metz v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (applying *Gilmer* in employee's Title VII suit alleging pregnancy discrimination); *Albert v. NCR*, 874 F. Supp. 1328 (S.D. Fla. 1994) (applying *Gilmer* in an employee's Title VII suit alleging religious and national origin discrimination); *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76 (D. Mass. 1993) (applying *Gilmer* to an employee's suit for sex discrimination under Title VII); *DiCrisci v. Lyndon Guaranty Bank*, 807 F. Supp. 947 (W.D.N.Y. 1992) (applying *Gilmer* to an employee's Title VII suit alleging sexual harassment); see also *Crawford v. West Jersey Health Sys.*, 64 Fair Empl. Prac. Cas. (BNA) 853 (D.N.J. 1994) (applying *Gilmer* to suit by medical director against employer for violations of ADEA, Title VII, antidiscrimination statutes, and trade libel); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995) (applying *Gilmer* to deny injunction against arbitration of contract dispute between employee and employer).

121. The leading case which interpreted the "contracts of employment" exclusion narrowly to apply only to movement of goods across state lines was *Tenney Engineering, Inc. v. United Elec. Radio & Machine Workers*, 207 F.2d 450 (3d Cir. 1953). While *Tenney* pre-dated *Gilmer*, it remains good law in many circuits. See, e.g., *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76 (D. Mass. 1993); *Dancu v. Coopers & Lybrand*, 778 F. Supp. 832 (E.D. Pa. 1991) (following *Tenney*).

122. See, e.g., *Miller Brewing Co. v. Brewery Workers Local 9*, 739 F.2d 1159 (7th Cir. 1984); *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993); *DiCrisci v. Lyndon Guarantee Bank*, 807 F. Supp. 947 (W.D.N.Y. 1992).

123. *Tenney*, 207 F.2d at 453. The *Tenney* court relied on the principle of "*ejusdem generis*"

A few courts, however, have held that the contract-of-employment exclusion applies to all workers engaged in interstate commerce.¹²⁴ These courts argue that the mention of seamen and railroad employees only illustrates the limited reach of the Commerce Clause in 1925, when the FAA was enacted. By including the language "any other class of workers engaged in foreign or interstate commerce," they reason, Congress indicated its intent to except all workers that were within the reach of the commerce power.¹²⁵ While the lower courts are currently split on this issue, most federal circuit courts are adopting the former, narrow reading of the contracts-of-employment exclusion.

In addition to applying *Gilmer* to conventional employment contracts, many courts have utilized *Gilmer's* reasoning to mandate arbitration of non-union employees' claims involving employment-related statutes other than the ADEA statute that was involved in *Gilmer* itself. Thus, courts have required arbitration of claims based on laws prohibiting discrimination on the basis of race,¹²⁶ sex,¹²⁷ religion,¹²⁸ and national origin,¹²⁹ as well as claims arising under ERISA¹³⁰ and the federal Employee Polygraph Protection Act.¹³¹

C. Application of the FAA to Unionized Workers After *Gilmer*

Since *Gilmer*, some courts have questioned whether the holding in *Gardner-Denver*—that unionized workers had a right to judicial determination of discrimination claims despite arbitration provisions in their collective agreements—is still good law.¹³² Indeed, some lower courts' decisions effectively overrule *Gardner-Denver*. For example, in *Austin v. Owens-Brockway Glass Container, Inc.*,¹³³ the Fourth Circuit dismissed a gender and handicap discrimination claim brought by a worker who was covered by a collective bargaining agreement, holding that the employee was required to arbitrate, rather

to conclude that the "any other class" language was limited to the narrow categories that preceded it. Compare Note, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171 (1995) (advocating narrow interpretation of the exclusion) with Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 292-93 (recounting history and reasoning of *Tenney* interpretation of "contracts of employment" exclusion and refuting the "*eiusdem generis*" argument).

124. See *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117 (N.D. Miss. 1995); *Mittendorf v. Stone Lumber Co.*, 874 F. Supp. 292 (D. Or. 1994).

125. See also Matthew Finkin, *'Workers Contracts' Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMPLOYMENT & LAB. L. 282 (1996).

126. *Maye v. Smith, Barney, Inc.*, 897 F. Supp. 100 (S.D.N.Y. 1995).

127. *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76 (D. Mass. 1993) (pregnancy discrimination).

128. *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993) (race, sex, and religious discrimination).

129. *Albert v. NCR Co.*, 874 F. Supp. 1328 (S.D. Fla. 1994) (sex, race, and national origin discrimination).

130. *Pritzker v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993).

131. *Saari v. Smith, Barney, Inc.*, 789 F. Supp. 155 (D.N.J. 1992).

132. See, e.g., *Ngheim v. NEC Elec.*, 25 F.3d 1437, 1441 (9th Cir. 1994); *Willis v. Dean-Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991).

133. 78 F.3d 875 (4th Cir. 1996).

than litigate, her claims.¹³⁴ It based its reasoning on *Gilmer*, concluding that the arbitration clause in the collective bargaining agreement barred judicial determination of the employee's individual discrimination claims. The court stated that it assumed that unionized workers were not subject to the FAA, but it nonetheless held that *Gilmer* mandated its conclusion.¹³⁵ The court also stated that *Gilmer* had effectively overruled *Gardner-Denver*.¹³⁶

Despite Fourth Circuit's dicta in *Austin* to the effect that the FAA does not apply to unionized workers, its holding that the unionized employee must arbitrate her federal statutory claims necessarily rests *sub silentio* on application of the FAA. That is because the FAA would provide the only possible basis for compelling arbitration of a unionized worker's *federal* statutory claims. Section 301 preemption is only available to require arbitration of unionized workers' *state law* claims.

The circuit courts have been long split on the question whether the FAA applies to unionized workers.¹³⁷ Some hold that the FAA does not apply because collective bargaining agreements are "contracts of employment" subject to the section 1 exclusion. As more and more courts reject that view in favor of the narrow interpretation of the section 1 employment exclusion, they will also be inclined to apply *Gilmer* to the unionized sector as the court in *Austin* did. Thus the line between FAA arbitration and section 301 preemption is likely to become blurred.

A recent New Jersey decision similarly blurs the distinction between FAA-compelled arbitration for nonunion workers and section 301 preemption-compelled arbitration for union workers. In *In re Prudential Insurance Co. of America Sales Practices Litigation*,¹³⁸ New Jersey District Judge Wolin considered the application of the FAA to a group of employees of an insurance company who were fired allegedly for refusing to engage in illegal insurance practices.¹³⁹ The employees had been required by their employer to sign the securities industry standard arbitration clause ("U-4 agreement"). The court analyzed the case under *Gilmer* despite the fact that the employees were represented by a union and covered by a collective bargaining agreement. The court ultimately decided that the agents were subject to the U-4 arbitration clause, but rejected the company's motion to compel arbitration on the ground that the U-4 agreement had an exclusion for disputes involving the insurance busi-

134. *Austin*, 78 F.3d at 880.

135. *Id.* at 880-81.

136. *Id.* at 882.

137. The First, Fourth, Tenth, and Eleventh Circuits have held that the FAA does not apply to collective bargaining agreements. *See, e.g.*, *Posadas de Puerto Rico Assocs. v. Asociacion de Empleados de Casino*, 873 F.2d 479 (1st Cir. 1989); *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064 (4th Cir. 1993); *United Food and Commercial Workers v. Safeway*, 889 F.2d 940 (10th Cir. 1989); *American Postal Workers Union v. USPS*, 823 F.2d 466 (11th Cir. 1987). The Second, Third, and Seventh, on the other hand, have held that it does. *See, e.g.*, *I.A.M. v. General Electric*, 406 F.2d 1046 (2d Cir. 1969); *Newark Stereotypers Union v. Newark Morning News*, 397 F.2d 594 (3d Cir. 1968); *Pietro Sclazitti Co. v. International Union of Operating Eng'rs*, 351 F.2d 576 (7th Cir. 1965).

138. 924 F. Supp. 627 (D.N.J. 1996).

139. *In re Prudential*, 924 F. Supp. at 633.

ness.¹⁴⁰ But by entertaining the company's FAA arguments, the court decided *sub silentio* that the FAA applies to employees covered by collective bargaining agreements, at least if the employees are subject to an independent promise to arbitrate disputes other than one contained in their collective agreement.

As more and more courts apply the FAA to unionized workers' federal statutory claims, unionized workers will be required to arbitrate not only their *state law* employment rights, as they are presently under section 301 preemption, but also their *federal* employment claims through such expansive interpretation of *Gilmer*. Such a move would overrule *Alexander v. Gardner-Denver*, a position that some management-side labor lawyers have been advocating for years.¹⁴¹ It would also make unionized workers' legal claims similar to those of nonunion workers who, as discussed above, are required to arbitrate both state and federal employment-related statutory claims. Together these developments would transform the Supreme Court's commitment to labor arbitration beyond recognition.

The original justification for judicial deference to arbitration was that labor arbitrators have a special expertise in applying the "law of the shop," which they can bring to bear in the resolution of disputes.¹⁴² It was never posited that arbitrators have special expertise in interpreting the law of the land. As Justice Brennan, an avid supporter of labor arbitration for deciding contractual disputes, warned in 1980, "[B]ecause the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land, . . . many arbitrators may not be conversant with the public law considerations underlying [statutory claims]."¹⁴³

V. THE YELLOW DOG CONTRACTS OF THE 1990S

A. Due Process Deficiencies

While mandatory arbitration of statutory rights is troublesome in any context, in the nonunion setting it is particularly problematic. Many pre-hire arbitral agreements are blatant contracts of adhesion. In 1994, the *New York Times* reported that more and more employers are requiring their nonunion employees to agree to boilerplate arbitration agreements as a condition of employment.¹⁴⁴ At the moment of hire, employees lack bargaining power and are needful of employment, so they frequently agree to such terms without giving them much thought. In these agreements, employees are typically re-

140. *Id.* at 641-42.

141. See, e.g., Brief Amicus Curiae of Center for Public Resources, Inc., in support of Respondent in *Gilmer v. Interstate/Johnson Lane Corp.*, in the Supreme Court of the United States, filed Dec. 19, 1990, at 14-16 (arguing that *Gardner-Denver* is based on out-moded views of arbitration, and urging the Court to overrule it). The Center for Public Resources is a non-profit corporation made up of 200 major corporations and 100 law firms engaged in employer-side labor and employment law. *Id.* at 1.

142. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

143. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 743 (1981).

144. Steven A. Holmes, *Some Workers Lost Right to File Suit for Bias at Work*, N.Y. TIMES, Mar. 18, 1994, at A1, B-6.

quired to pay their own legal fees and one-half of the arbitrator's fees, a sum that could easily exceed \$1,000.¹⁴⁵ Thus, these *Gilmer* pre-hire arbitration agreements discourage workers from asserting statutory rights. They operate like the early nineteenth century "yellow dog contracts"—contracts in which employees had to promise not to join a union in order to get a job.¹⁴⁶ Today's "yellow dog contracts" require employees to waive their statutory rights in order to obtain employment.¹⁴⁷

Like the yellow dog contracts of the past, the new mandatory arbitration provisions are often imposed on workers without even the illusion of bargaining or consent. They are designed by employers unilaterally, and given to employees at the time of hire or inserted in employee handbooks, without mention of their existence and without discussion as to their terms. A typical case is *Lang v. Burlington Northern Railroad Co.*,¹⁴⁸ in which an employer unilaterally adopted an arbitration policy in 1991, and notified incumbent employees of its existence by mail. When the plaintiff attempted to bring a legal action for wrongful termination, the employer moved to dismiss on the grounds that the dispute must be arbitrated under the company's arbitration policy. The Court agreed with the employer, holding that by sending employees the arbitration policy in the mail, the employer had created a binding unilateral contract. It said, "[The plaintiff's] continued employment, with knowledge of the changed condition, constituted acceptance of the offer and provided the necessary consideration to bind the parties."¹⁴⁹

The *Lang* case is not atypical.¹⁵⁰ As the U.S. Government's Commission on the Future of Worker-Management Relations, reported in its May, 1994 *Fact-Finding Report*:

[T]he type of pre-dispute arbitration arrangement seen in *Gilmer* is devised by employers or their associates and presented to newly-hired employees on a "take it or leave it" basis. While the labor market does permit some negotiation and variation in salaries and benefits, it is hardly likely to let employees insist on litigating, rather than arbitrating, future legal disputes with their prospective employers.¹⁵¹

145. Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMPLOYMENT & LAB. L. 131, 136-37 & n.26 (1995).

146. "Yellow dog contracts" are employment contracts in which workers promise not to join a union in order to obtain employment. They were prevalent in the early decades of the twentieth century and were approved by the Supreme Court in the *Hitchman Coal and Copping* cases. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 299 (1917); *Copping v. Kansas*, 236 U.S. 1 (1915). After decades of agitation by organized labor, in 1932 Congress declared yellow dog contracts unenforceable in § 3 of the Norris-LaGuardia Act, codified at 29 U.S.C. § 103 (1988).

147. See Margaret Jacobs, *Woman Claims Arbiters of Bias Are Biased*, WALL ST. J., Sept. 19, 1994, at B1 (reporting that more than 100 major companies have made it a condition of being hired that an applicant agree to a mandatory arbitration provision of his/her statutory employment rights).

148. 835 F. Supp. 1104 (D. Minn. 1993).

149. *Lang*, 835 F. Supp. at 1106.

150. See also *Kinnebrew v. Gulf Ins. Co.*, 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994) (upholding arbitration policy unilaterally adopted by employer and mailed to incumbent employees).

151. U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMMISSION ON THE FUTURE OF THE WORKER-EMPLOYER RELATIONSHIP, FACT-FINDING REPORT 118 (May 1994).

The problem of lack of consent by nonunion employees to employer-initiated arbitration systems has been much noted by commentators but little heeded by courts. In one unusual case, the Ninth Circuit refused to enforce an arbitration agreement in the securities industry because the agents were not given an opportunity to read it and it was not explained to them.¹⁵² However, that decision has been repudiated by most other courts.¹⁵³ Indeed, one district court recently acknowledged that the lack of consent is typical of arbitration agreements in the securities industry and it found that fact no bar to its enforcement. It said:

Even if Smith Barney had explained the scope of the arbitration clause to the plaintiff, the end result would have been the same; the execution of a Form U-4 is not unique to Smith Barney employees and it is not optional. It is an SEC industry-wide requirement, a prerequisite to registration with any securities firm.¹⁵⁴

The Center for Public Resources (CPR), an organization devoted to promoting alternative dispute resolution in employment relations, acknowledges that some courts might find that some arbitration clauses do not give employees adequate notice of the fact that by signing them, they are waiving some or all of their statutory employment rights. To cure this potential problem of lack of knowing waiver and consent, the CPR has proposed language for employers to use in the introductory paragraph to their written ADR procedures. They propose the following:

Statement of Consideration and Joint Agreement

IN CONSIDERATION AND AS A MATERIAL CONDITION OF THE EMPLOYMENT AND CONTINUATION OF EMPLOYMENT OF THE EMPLOYEE AS OF THE DATE OF THIS EMPLOYMENT DISPUTE ARBITRATION PROCEDURE ("*Employment Dispute Arbitration Procedure*") BECOMES EFFECTIVE, THE EMPLOYEE AND THE EMPLOYER (as this term is defined below) (collectively, the "Parties") AGREE TO SUBMIT FOR RESOLUTION PURSUANT TO THIS *Employment Dispute Arbitration Procedure* ANY EMPLOYMENT DISPUTE (as this term is defined below), AND FURTHER AGREE THAT ARBITRATION PURSUANT TO THIS *Employment Dispute Arbitration Procedure* IS THE EXCLUSIVE MEANS FOR RESOLUTION OF SUCH DISPUTE AND THAT BOTH THE EMPLOYER AND EMPLOYEE HEREBY WAIVE THEIR RESPECTIVE RIGHTS, IF ANY, TO RESOLVE ANY DISPUTE THROUGH ANY OTHER MEANS, INCLUDING A JURY TRIAL OR A COURT TRIAL IN A LAWSUIT, EXCEPT AS EXPRESSLY PROVIDED IN THIS *Employment Dispute Arbitration Procedure*.¹⁵⁵

152. Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994).

153. See e.g., *In re Prudential*, 924 F. Supp. 627, 642 (D.N.J. 1996).

154. *Id.* at 642 (quoting *Bender v. Smith Barney Upham & Co., Inc.*, 789 F. Supp. 155, 159 (D.N.J. 1992)).

155. See Jay W. Waks & John Roberti, *Challenges to Employment ADR: Processes, Rather*

The virtue of this language, observes the CPR, is that it explains "in a single sentence that 'All Disputes are subject to this *Employment Dispute Arbitration*.'"¹⁵⁶ The CPR goes on to propose additional language, which:

[D]efines this term broadly with certain limited and clearly stated exceptions: the term "Dispute," whether in the singular or plural, means (a) all claims, disputes or issues of which the Employee (including former Employee) is or should be aware during the employment relationship or after termination thereof, and which relate to or arise out of the employment of the Employee by the Employer (including without limitation any claim of constructive termination, any benefits-related claim or any related claim against an individual employee), and (b) all Employer counterclaims against that Employee. The term "Dispute" includes, without limitation, contractual, statutory and common law claims and excludes statutory claims for workers' compensation or unemployment insurance, other claims that are expressly excluded by statute and claims that are expressly required to be arbitrated under a different procedure pursuant to the terms of an employee benefit plan. In addition, the term "Dispute" expressly excludes any claim which relates to or arises out of confidentiality or noncompetition conditions of employment, trade secrets, intellectual property or unfair competition.¹⁵⁷

The CPR recommendation concludes by saying, "An explication of this nature should ordinarily provide sufficient protection."¹⁵⁸

The CPR language is about as "sufficient" as the back of a parking lot ticket stub for conveying knowledge of a waiver of liability. After trying to imagine a worker without legal training and extraordinary patience reading this language, one is left to wonder who is getting the protection out of this?

In addition to resting on dubious consent, many nonunion arbitration agreements require employees to waive their rights to punitive damages, consequential damages, attorneys' fees, injunctive relief, reinstatement, or other remedies that might be available in court. These are almost always upheld.¹⁵⁹ For example, in *Pony Express Courier Corp. v. Morris*,¹⁶⁰ an applicant for employment was given an arbitration agreement to sign, which provided that all claims relating to her employment shall be arbitrated without discovery and that any award shall be limited to actual lost wages or six months wages,

Than Principles, Are at Issue, N.Y. ST. B. ASS'N, June 1996.

156. *Id.*

157. *Id.*

158. *Id.*

159. See, e.g., *DeGaetano v. Smith Barney*, No. 94-CIV-1613, 1996 WL 44226 (S.D.N.Y. 1996) (compelling arbitration of Title VII even though arbitration agreement did not permit awards of injunctive relief, attorneys' fees, or punitive damages); *Kinnebrew v. Gulf Ins.*, 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994) (enforcing arbitration agreement that limited damages to compensation for "direct injury," excluding punitive damages, attorneys' fees, and equitable relief, and placing severe restrictions on possibility of reinstatement).

160. 921 S.W.2d 817 (Tex. Ct. App. 1996).

whichever is less. The agreement also said that "you will not be offered employment until it [the arbitration agreement] is signed without modification."¹⁶¹ The Texas appeals court upheld this agreement against a challenge that it was unconscionable.

Perhaps the most troublesome aspect of nonunion arbitration agreements stems not from the fact that they are contracts of adhesion or that they limit employees' remedies, but that they often have a systematic pro-employer effect on the outcomes of disputes. While there is no comprehensive survey data on the subject (and indeed there cannot be due to the privatized nature of the tribunals), there is some anecdotal data that suggests that nonunion arbitration schemes tend to generate pro-employer outcomes.¹⁶² For example, a congressional study found that the overwhelming majority of securities industry arbitrators who hear sexual harassment complaints as well as other employment matters are white males in their sixties who do not have significant experience or training in labor and employment law. In this setting, women plaintiffs are not likely to win.¹⁶³

In the wake of *Gilmer*, several organizations have developed model arbitration procedures for nonunion workplaces. One, the "Model Employment Termination Dispute Resolution Procedure" which was promulgated by the Center for Public Resources, demonstrates how particular ADR procedures can have a systematic effect on the outcome of disputes.¹⁶⁴ In the CPR model ADR procedure, an employee promises to arbitrate all disputes related to or arising out of the termination of her employment, and it expressly precludes bringing any such claims in a court. The employee has a short time period, 180 days, to initiate the procedure.¹⁶⁵ All disputes are heard by an Adjudicator. If the parties cannot agree on who the Adjudicator shall be, it is to be chosen from the commercial arbitration panel of the American Arbitration Association (AAA), not the labor arbitration panel. The CPR's Official Commentary does not explain why they call for selecting an arbitrator from the AAA's commercial arbitration panel rather than from the AAA's labor arbitration panel, yet commercial arbitrators tend not to be lawyers and, unlike the labor arbitrators, have no familiarity with employee rights or concerns.

The CPR procedure states that for an employee to prevail, she must "demonstrate that the termination was not based on any legitimate business rea-

161. *Pony Express*, 921 S.W.2d at 819.

162. One survey concludes that employers are more likely to win discrimination cases before an arbitrator than before a jury, and that those employees who do win, generally receive smaller awards in arbitration than in jury trials. Stuart Bompey & Michael Pappas, *Compulsory Arbitration in Employment Discrimination Claims: The Impact of Gilmer v. Interstate/Johnson Lane Corp.*, 1993 A.B.A. SEC. ON EMPLOYMENT & LAB. LAW EEO COMM. PAPERS.

163. Steven A. Holmes, *Arbitrators of Bias in Securities Industry Have Slight Experience in Labor Law*, N.Y. TIMES, Apr. 15, 1994, at B4.

164. CENTER FOR PUBLIC RESOURCES, MODEL EMPLOYMENT TERMINATION DISPUTE RESOLUTION PROCEDURE, in Jay W. Waks & Linda M. Gadsby, *Arbitration and ADR in the Employment Area*, C879 ALI-ABA MEDIATION AND OTHER ADR METHODS 439 app. at 461 (Nov. 18, 1993) [hereinafter CPR PROCEDURES].

165. *Id.* at 470. In contrast, under Title VII of the 1964 Civil Rights Act, in some circumstances employees have 300 days to file suit. 42 U.S.C. § 706 (e)(1).

son."¹⁶⁶ As the CPR's Official Commentary acknowledges, this phrase is an express waiver of other burdens of proof which might otherwise apply.¹⁶⁷ Specifically, this burden of proof makes it more difficult for employees to prevail in CPR arbitrations than they would under the usual burden in labor arbitrations, in which the employer typically has the burden of demonstrating "just cause" for a dismissal. The CPR's burden of proof is also a more onerous burden than the burden of proof under some employment statutes, in which an employee can win in a mixed motive situation.¹⁶⁸ In the CPR procedures, by contrast, if there is any scintilla of legitimate business reason involved in a dismissed decision, the employer will prevail.

Under the CPR procedures, should an employee win her case, she will find she has a very limited range of remedies. The rules provide that the Adjudicator may grant the remedy of lost wages, less interim income from unemployment benefits, other earnings etc., the expenses of bringing the case to arbitration, and reinstatement. If reinstatement is not practical "under the circumstances," the Adjudicator may grant up to two years "front pay" in its stead. Also, the Adjudicator may grant up to one year's wages in lieu of punitive or other special damages that the employee may be entitled to in a judicial proceeding.¹⁶⁹ No recovery for items such as pain and suffering, consequential damages, or punitive damages are permitted. Thus, a worker who might otherwise have received a generous award of damages for unjust dismissal, intentional infliction of emotional distress, invasion of privacy, assault, defamation, or some other tort in a state court, is limited in CPR to reinstatement, interim lost earnings, and one or two year's wages.¹⁷⁰

B. *Agreements to Capitulate*

Some federal agencies and courts are beginning to recognize that by enforcing mandatory arbitration of statutory rights, they are effectively depriving employees of their rights altogether. For example, in *EEOC v. River Oaks Imaging & Diagnostic*,¹⁷¹ an employer insisted its employees agree to arbitration clauses under which they promised to arbitrate all disputes with the employer and to pay one-half of the cost of any ADR proceedings.¹⁷² Two female employees who refused to sign the employer's arbitration agreement were fired. The EEOC sought a preliminary injunction against the company's enforcement of its ADR policy, arguing that the agreement was a violation of the Civil Rights Act because it required employees, as a condition of employ-

166. CPR PROCEDURES, *supra* note 164, at 473.

167. *Id.* at 483.

168. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (on method for determining mixed motive questions in Title VII disparate treatment case).

169. CPR PROCEDURES, *supra* note 164, at 475-76.

170. These arbitral monetary remedies are not nearly as generous as some jury awards in unjust dismissal litigation in state courts, which often reach six figures. *See Stone*, *supra* note 7, at 630 & n.225.

171. No. CIV.A.H-95-755, 1995 WL 264003 (S.D. Tex. 1995).

172. For a detailed discussion of the facts of *River Oaks Imaging*, see Hoffman, *supra* note 145, at 136-40.

ment, to promise to refrain from exercising their rights to bring employment discrimination charges to the EEOC. On April 19, 1995, a district court issued a preliminary injunction against River Oaks prohibiting the employer from requiring its employees to submit to "any ADR policy which would cause an employee to pay the costs of ADR proceedings preclud[ing] or interfer[ing] with any employee's right to file complaints with the EEOC or to promptly file suit in a court of law when the employee has complied with the requirements of Title VII."¹⁷³ The case was ultimately settled with a consent order which voided the River Oaks ADR policy.¹⁷⁴

Another recent case which demonstrates the potential for pre-hire arbitration agreements to operate as mandatory waivers of statutory rights is *Bentley's Luggage Corp.*¹⁷⁵ There, employees were asked to sign a form stating that by remaining a Bentley's Luggage employee, they agreed to submit all employment-related disputes to arbitration before bringing any legal action. One employee who refused to sign the agreement was fired. The NLRB General Counsel's office issued an unfair labor practice complaint on the theory that it is an unfair labor practice for an employer to fire a worker for refusing to waive his right to bring an unfair labor practice charge to the Board.¹⁷⁶

Bentley's Luggage was eventually settled, with the employer reinstating the employee-complainant and posting a notice that it would not require employees to arbitrate issues that involved rights protected by the NLRA.¹⁷⁷ However, a similar case is still pending at the NLRB. In *Great Western Financial Corp.*, an employee who signed a pre-hire arbitration agreement was fired when she filed an unfair labor practice charge with the NLRB.¹⁷⁸ In these cases, the Labor Board, like the EEOC in *River Oaks Imaging*, has begun to recognize that reliance upon, and deferral to, arbitration has gone too far.

We can expect cases like these to proliferate. Indeed, *Gilmer* suggests a modern revival of the old yellow dog contract. In many states, employers can get the benefit of *Gilmer* merely by inserting arbitration clauses into their employment manuals or by sending incumbent employees a postcard. Thus even without signing anything, workers can be forced to waive their statutory rights—rights to be free of employment discrimination, rights to a safe workplace, rights to form a union—just to get a job.

C. Curtailing Legislative Capacity and Reinventing Substantive Due Process

The increased judicial deference to arbitration to resolve the statutory claims of nonunion workers and to preclude the statutory claims of unionized workers makes it exceedingly difficult for legislatures to enact meaningful

173. *River Oaks Imaging*, 1995 WL 264003, at *1.

174. Hoffman, *supra* note 145, at 140 & n.48.

175. NLRB Case No. 12-CA-16658, 1995 DAILY LAB. REP. 95 d4 (BNA) (Sept. 25, 1995).

176. *Arbitration: Accord Reached on Unfair Labor Practice Case Involving Mandatory Arbitration Pledge*, 1996 DAILY LAB. REP. 96 d15 (BNA) (May 17, 1996).

177. *Id.*

178. NLRB Case No. 12-CA-166886, DAILY LAB. REP. 105 d4 (BNA) (Sept. 25, 1995).

statutes that give employees protection. Imagine, for example, that courts were to hold that workers' complaints under the Occupational Safety and Health Act of 1970 (OSHA) are subject to mandatory arbitration provisions. Such a result, which is possible under an expansive interpretation of *Gilmer*, would vitiate Congress's intent in enacting OSHA in the first place. Congress enacted OSHA in order to provide *uniform* standards for employee health and safety. To subject its provisions to mandatory arbitration would subject unionized as well as nonunion workers to the variable, unpredictable, and invisible outcomes of private arbitration.¹⁷⁹ Further, such a requirement would make it difficult, if not impossible, for Congress to monitor the effectiveness of its legislative efforts, or to revise legislation to better address pressing social problems. In a similar fashion, compelled arbitration of statutory claims threatens to nullify all employee protection legislation. It also makes it impossible for Congress to enact effective legislation for worker protection because whatever is stipulated by statute can be compromised away by employer-designated arbitrators. In addition, by removing labor cases to private arbitral tribunals, courts are taking employment concerns out of the public arena, away from public scrutiny and political accountability. Because the arbitral tribunal is invisible, no one knows to what extent arbitration enforces these publicly conferred employment rights, if at all.

A related problem with mandatory arbitration of statutory rights is that statutory disputes are being decided in private tribunals which generate no publicly available norms to guide actors or decisionmakers in the future. Over the next five years, we can expect a gradual diminution of litigation in the discrimination area as employers channel more and more employees' discrimination complaints into arbitration. This will mean that arbitrators who want to interpret the statutes correctly will have no authoritative statutory interpretations to look to for guidance.¹⁸⁰ It also means that the law cannot play an educational role of shaping parties' norms and sense of right and wrong, and therefore it cannot shape behavior in its shadow.

Furthermore, statutory employment rights are enacted when a legislature believes that workers cannot adequately protect themselves simply by bargaining with their employers. That is, they reflect a legislature's view of market failure in the contracting process. Legislatures act to ensure healthy and safe workplaces, protect privacy on the job, or to provide other protections when they believe that there is a public policy concern so compelling that it warrants intervening in the wage bargain. To then relegate enforcement or interpretation of these employment rights to a privatized tribunal—a tribunal whose composition and internal rules reflect and instantiate the very power imbalances that gave rise to the need for legislation in the first place—permits, indeed invites, *de facto* nullification.

179. See also Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 100 (1996) (employment statutes represent Congress's desire to enact uniform labor statutes).

180. Arbitrators frequently have no training in the legal issues they are called upon to decide. See, e.g., Holmes, *supra* note 163, at B4.

VI. DUE PROCESS OR COWBOY ARBITRATIONS?

A. *Efforts to Reconstruct Due Process in the Private Realm*

One could read the *Gilmer* decision as imposing minimal due process norms on employment arbitration and thus precluding the spread of lawless, one-sided "cowboy" arbitration procedures of the sort described above. The majority opinion in the *Gilmer* Court noted with approval the due process protections in effect in the New York Stock Exchange arbitration rules that were involved in *Gilmer's* case. The NYSE rules include procedures for employees to detect and challenge bias in arbitration panels, provisions for limited discovery by employees, requirements that arbitrators issue written opinions, and approval for a broad range of remedies, including equitable relief.¹⁸¹ One commentator has argued that *Gilmer* thus establishes a minimal set of due process standards by which employment arbitration must be measured.¹⁸² Professor Robert Gorman reads *Gilmer* to say that "Arbitral systems without the procedural safeguards found in the New York Stock Exchange would apparently so undermine the enforcement of statutory claims as to be, in the Court's view, intolerable."¹⁸³

Unfortunately, none of the lower courts since *Gilmer* have read the Supreme Court opinion in this way. To date, no post-*Gilmer* lower court has treated the procedural aspects of the NYSE arbitration rules as a precondition to enforcing an employment law arbitration. Rather, courts almost universally uphold mandatory pre-dispute arbitration for statutory claims without any discussion about the procedures to be utilized in the arbitration itself.

Since *Gilmer*, some members of the labor-management bar have attempted to draft their own minimal due process norms for nonunion employment arbitration proceedings. Most notably, a task force composed of representatives of the Labor & Employment Section of the American Bar Association, the American Arbitration Association, the National Academy of Arbitrators, the National Employment Lawyers Association, the American Civil Liberties Union, and the Society of Professionals in Dispute Resolution met over a period of months to develop a set of fair arbitration procedures. Out of this effort came a document called "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship." The Protocol, which was signed in May, 1995, addresses issues such as arbitral bias, representation of parties, costs of arbitration, discovery, and the form of arbitral awards.¹⁸⁴ The organizations that endorsed the Protocol have taken the position that they will not participate in any employment arbitrations that do not satisfy its terms.

181. *Gilmer*, 500 U.S. at 30-32.

182. Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 644-45.

183. *Id.* at 645.

184. Arnold M. Zack, *The Evolution of the Employment Protocol*, 50 J. DISP. RESOL. 36, 37-38 (Oct.-Dec. 1995).

The Due Process Protocol thus appears to represent a consensus within the labor-management community about fair procedures for employment arbitrations. However, its protections are extremely limited. The task force did not achieve consensus on the most important issues concerning nonunion arbitration: whether to permit pre-dispute arbitration at all, and whether to permit employers to make agreement to arbitration a condition of employment.¹⁸⁵ Some task force members believed that employees should never be permitted to waive their right to judicial relief of statutory claims, some believed that employees should be permitted to waive their right to a judicial forum once a dispute arises but not *ex ante*, and some believed that employers should be able to insist on a pre-dispute agreement to utilize an arbitration procedure.¹⁸⁶ Thus the most controversial aspect of *Gilmer* arbitrations is not addressed by the Protocol.¹⁸⁷

To the extent that the Protocol sought to develop “standards of exemplary due process” for such arbitrations as do occur, it presents at best a bare minimum. It contains few, if any, significant process rights for employees. One due process protection it does contain is to state that employees should have the right to be represented by a spokesperson of their own choosing. Another is that it calls for “limited pretrial discovery” to give employees access to “all information reasonably relevant to . . . arbitration of their claims.”¹⁸⁸ However, beyond these two specific safeguards, the Protocol gives employees little. For example, the Protocol calls for the selection of “impartial arbitrators” and insists arbitrators must be “independent of bias.”¹⁸⁹ These are worthy goals—goals that no one would dispute. But the Protocol may just as well say, “arbitration procedures should be fair.” That too would be beyond reproach but equally devoid of any guidance about how fairness could be achieved or what fairness comprises. Without more detail, exhortations for impartiality and freedom from bias are empty aspirations rather than meaningful protections. The Protocol says nothing about how to ensure impartiality and lack of bias.¹⁹⁰ The FAA itself states that “evident partiality” is grounds for a court to vacate an arbitral award,¹⁹¹ so the Protocol’s language endorsing the idea of impartiality for arbitrators gives employees no better protection than they already had.

The Protocol’s main achievement is to delegate the most important issues that arise in arbitration to the arbitrator. For example, it says that the arbitrator should have the authority to determine the scope of discovery, to rule on evi-

185. *Id.* at 37.

186. *Id.*

187. In contrast, the Dunlop Commission took a position on this issue in its Final Report, and concluded that courts or Congress should “Forbid Making Agreement to Arbitrate Public Law Claims a Condition of Employment at This Time.” U.S. DEP’T OF LABOR, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 33 (Dec. 1994) [hereinafter DUNLOP COMMISSION FINAL REPORT].

188. Zack, *supra* note 184, at 38.

189. *Id.* at 38-39.

190. The Protocol does call for the disclosure of conflicts of interest by an arbitrator, but that too has been a feature of the federal arbitration act for a long time. See *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

191. 9 U.S.C. § 10(b) (Supp. 1996).

deniary matters, to determine whether post-hearing submissions should be considered, and decide arbitrability questions.¹⁹² On the issue of expense, the Protocol is ambiguous. It recommends that employers reimburse employees for a portion of the employee's attorneys' fees if the employee is low paid, yet it also calls for employer and employee to share in the costs of the arbitrator, if at all possible. It leaves the actual allocation of fees, including attorneys' fee reimbursement, to the arbitrator.¹⁹³

The Protocol also devotes considerable attention to the issue of ensuring arbitrators are knowledgeable about employment statutes. While the existence of knowledgeable arbitrators would ultimately enure to the benefit of employees, the Protocol's proposal is extremely weak. The Protocol does not take the position that only lawyers should conduct arbitrations about statutory claims—it merely recommends that arbitrators receive training in “substantive, procedural, and remedial issues to be confronted.”¹⁹⁴

Overall, the Protocol proposals will not cure most of the due process defects in the nonunion arbitrations. Even with the right to representation and minimum discovery that the Protocol calls for, nonunion employment arbitrations are still designed by employers, heard by whichever arbitrator the employer selects, and conducted under whatever procedural rules, burdens of proof, presumptions, limitations periods, and the like that the employer writes into the procedure.

B. *Critical Voices from the Bar, the Labor Movement and the Supreme Court*

There is a significant and growing sentiment in the legal community that arbitration is an inadequate enforcement mechanism for employees' statutory rights. Some focus on the procedural deficiencies in the arbitral process, stressing that arbitration is a privately created, do-it-yourself tribunal, which rarely provides rights to discovery, compulsory process, cross examination, or other due process protections common to civil trials.¹⁹⁵ Thus, some claim, arbitration relegates workers to second-class justice.

Other critics focus on the privatization of disputes in arbitration. These critics argue that arbitral decisions are invisible documents—they do not receive media attention or public scrutiny and therefore engender no public debate. Arbitrators are not public officials, not accountable to a larger public, nor required to apply public law.¹⁹⁶ And there is no legislative arena in

192. Zack, *supra* note 184, at 39.

193. *Id.* at 38-39.

194. *Id.*

195. Stone, *supra* note 9; see *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 659 (1965) (Black, J., dissenting).

196. While arbitrators are not accountable to the public, they may be accountable to the repeat players in the arbitral world—those who pick arbitrators on a regular basis. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 1974 LAW & SOC'Y REV. 95 (on the advantages of repeat players). In the nonunion context, the repeat players are inevitably the employers.

which unpopular decisional trends can be challenged. Arbitration is a privatized forum, designed by the parties, and out of the public eye.¹⁹⁷

Some of the voices critical of arbitration of statutory rights come from the labor movement and the labor relations bar.¹⁹⁸ For example, in a joint statement to the Commission on the Future of Worker-Management Relations, several organizations representing working women, including 9 to 5, the National Association of Working Women, the American Nurses Association, and the Coalition of Labor Union Women, decried the “alarming trend toward using mandatory arbitration to reduce employment-related litigation.”¹⁹⁹ These groups feared in particular that Alternative Dispute Resolution (ADR) was being used “as a means of eroding the hard-fought legal protections women have against inequitable treatment in the workplace . . . [especially] in the area of sexual harassment.”²⁰⁰ They argued that “employers should not be able to coerce individual workers, particularly women workers who are not protected by a union, at the onset of an employment relationship or at any time thereafter, to choose between their statutory rights to be free of discrimination and their jobs.”²⁰¹

Marsha Berzon, an attorney who represents the AFL-CIO, pointed out to the Commission that mandatory ADR to resolve statutory disputes would circumvent the deterrent effects of litigation—large verdicts and unfavorable publicity—which are so important in enforcing employment legislation.²⁰² Berzon also argued that ADR systems are inherently biased without a union. Even if ADR systems are designed to provide neutral decisionmakers and a level playing field, they still give the employer an advantage because the employer is a repeat player in the world of ADR professionals.²⁰³ Berzon also opines that by relegating important employment issues to private tribunals, employment law will remain unelaborated, misunderstood, and diminished in its effectiveness.²⁰⁴

On many occasions, members of the Supreme Court have also recognized the shortcomings of arbitration of statutory rights. The Court has repeatedly

197. Stone, *supra* note 4. In addition to its due process failings, arbitration also does not provide remedies as effective or as generous as those in a judicial forum. For example, most arbitrators believe that they do not have the power to award damages for intangible harms, or to award punitive or consequential damages. In addition, arbitrators almost never grant interest on back pay awards, even when it is issued months or years after an unjust dismissal. It is common practice for an arbitrator to award reinstatement but no back pay at all to a worker fired without just cause. In contrast, prevailing parties in unjust dismissal litigation receive jury awards in the mid-to-high six figures. Furthermore, most arbitrators do not believe that they have the power to order provisional relief. Thus many contract violations, such as improper job assignments or safety matters, can neither be prevented nor remedied after the fact. Stone, *supra* note 7.

198. See Committee on Labor and Employment Law, *Final Report on Model Rules for the Arbitration of Employment Disputes*, 50 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 629, 629-30 (1995).

199. *Fact Finding Report, 1994: Hearing Before the Commission on the Future of Worker-Management Relations*, 102d Cong. 24-26 (1994) (statement of 9 to 5).

200. *Id.*

201. *Id.*

202. *Id.* at 5 (statement of Marsha Berzon).

203. *Id.* at 6-7.

204. *Id.* at 9-10.

warned that the second-class procedures of arbitration can lead to second-class outcomes. For example, the Court stated in 1956, in *Bernhardt v. Polygraph Co. of America*.²⁰⁵

The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. 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. . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their 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.²⁰⁶

Bernhardt was a nonlabor case arising under the FAA. Justice Douglas, who wrote these words, spearheaded the Supreme Court's adoption of broad support for arbitration in labor cases. Douglas wrote the *Bernhardt* opinion in 1956, one year before he wrote the path-breaking *Lincoln Mills* opinion calling upon courts to expand the role of labor arbitration.

Justice Douglas repeated these sentiments in 1974 in another nonlabor case, *Scherk v. Alberto-Culver Co.*,²⁰⁷ where he criticized judicial deference to arbitration of statutory claims. He wrote in dissent:

An arbitral award can be made without explication of reasons and without development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable. . . . The loss of the proper judicial forum carries with it the loss of substantial rights.²⁰⁸

Similar arguments about the lack of due process in arbitration and the consequences for the outcomes of disputes have been raised by many Supreme Court Justices over the past four decades. Justice Black, in his dissent in *Republic Steel Corp. v. Maddox*,²⁰⁹ observed:

For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration . . . carries no right to a jury trial . . . ; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.²¹⁰

Justice Reed in his majority opinion in *Wilko v. Swan*,²¹¹ stated that, for securities cases, it is unlikely that arbitrators will be sufficiently versed in the law, or have an adequate understanding of statutory requirements such as "burden of proof," "reasonable care" or "material fact."²¹² Similarly, Justice

205. 350 U.S. 198 (1956).

206. *Bernhardt*, 350 U.S. at 203.

207. 417 U.S. 506 (1974) (Douglas, J., dissenting).

208. *Scherk*, 417 U.S. at 532.

209. 379 U.S. 650 (1965).

210. *Maddox*, 379 U.S. at 669 (Black, J., dissenting).

211. 346 U.S. 427 (1953).

212. *Wilko*, 346 U.S. at 436 (quoting 15 U.S.C. § 771(2) (1995)). Justice Reed also criticized

Brennan wrote for the majority in *McDonald v. City of West Branch*²¹³ that “an arbitrator’s expertise ‘pertains primarily to the law of the shop, not the law of the land.’”²¹⁴ Justice Powell, writing for the Court in *Alexander v. Gardner-Denver Co.*,²¹⁵ said:

[W]e have long recognized that “the choice of forums inevitably affects the scope of the substantive right to be vindicated. . . .” Respondent’s deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.²¹⁶

Similar sentiments have been expressed by Justice Blackmun dissenting in *Shearson/American Express Inc. v. McMahon*,²¹⁷ by Justice Stevens dissenting in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²¹⁸ and by Justice Harlan concurring in *U.S. Bulk Carriers, Inc. v. Arguelles*.²¹⁹ Indeed, even Justice Marshall, writing for the majority in *Dean Witter Reynolds, Inc. v. Byrd*²²⁰—a decision in which the Court approved an expansive interpretation of the FAA—acknowledged that “arbitration cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that section 1983 is designed to safeguard.”²²¹

Thus for over four decades, many Supreme Court Justices have recognized the procedural shortcomings of arbitration and have questioned the wisdom and justice of permitting private arbitration to substitute for judicial or administrative tribunals for resolving statutory disputes. I hope that we could return to this wisdom now, and reverse the trend toward compulsory arbitration of statutory employment rights.

VII. CONCLUSION

The state of labor and employment law today stands as a distorted reflection of that which existed one hundred years ago. In the past, workers had few workplace rights other than those they could secure and enforce through collective muscle and labor market power. Today, workers have many *de jure* rights, but often these rights cannot be enforced due to mandatory pre-dispute arbitration systems. Further, in many respects, workers have less ability to use direct action to enforce rights than they once did. Today, labor’s use of

the FAA for not providing for “judicial determination of legal issues such as is found in the English law.” *Id.* at 437.

213. 466 U.S. 284 (1984).

214. *McDonald*, 466 U.S. at 288-93 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)).

215. 415 U.S. 36 (1974).

216. *Gardner-Denver*, 415 U.S. at 56 (quoting *United States Bulk Carriers v. Arguelles*, 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring)).

217. 482 U.S. 220, 257-60 (1987) (Blackmun, J., concurring and dissenting) (arguing that procedural defects in arbitration render it inadequate to protect investor’s rights).

218. 473 U.S. 614, 647 (1985) (Stevens, J., dissenting).

219. 400 U.S. 351, 365 (1971) (Harlan, J., concurring).

220. 470 U.S. 213 (1985).

221. *Byrd*, 470 U.S. at 222 (discussing *McDonald*, 466 U.S. at 284).

economic weapons is governed by a Byzantine labyrinth of complex and contradictory legal rules, rules which channel disputes into a legalistic maze of public and private tribunals, at the end of which the worker, exhausted, demoralized, and dispirited, finds she has lost whatever rights she once believed were worth seeking. The result is a bitter irony for the worker—she has more rights and less protection than ever.

To avoid this descent into labor-management absurdity, we need to consider legislative proposals that would reverse the trend toward privatizing employment rights. Congress could take action to reverse this trend of excessive use of labor arbitration to resolve disputes over workers' statutory rights. Specifically, Congress could enact legislation that would:

- (1) state clearly that section 301 is not intended to preempt state *or* federal employment law statutes; and
- (2) reaffirm a broad interpretation of the FAA's employment exclusion and/or expressly repudiate the result of the *Gilmer* case.

Further, courts need to reevaluate their knee-jerk pro-arbitration approach to cases involving statutory employment rights. They should narrow their approach to section 301 preemption, interpret worker protection statutes to be non-waivable, and adopt a broad interpretation of the contract-of-employment exclusion in the FAA, so that employment contracts of *all* workers engaged in interstate commerce are excluded from the Act. In addition, the courts and Congress should adopt two recommendations of the Dunlop Commission: they should ensure that binding arbitration agreements are not made a condition of employment, and they should provide for judicial review of statutory issues decided on arbitration.²²²

None of these changes will occur until employees, the labor movement, Congress, and the general public recognize that while labor arbitration may play a valuable role in resolving disputes concerning interpretation of collective bargaining agreements, extending arbitration to disputes over statutory rights—especially for nonunion workers—is inappropriate. Expanding arbitration in this way may seem expedient in terms of reducing court congestion, but it is a trend that will, in the long run, prove very costly. By subjecting employment rights to a regime of private justice and cowboy arbitrations, we are eliminating most employment rights for most American workers.

222. DUNLOP COMMISSION FINAL REPORT, *supra* note 187, at 32.