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A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining *Alexander v. Gardner-Denver* in the Wake of *Gilmer v. Interstate/Johnson Lane Corp.*

*Sarah Rudolph Cole**

I. INTRODUCTION

In its landmark 1991 decision in *Gilmer v. Interstate/Johnson Lane Corporation*,[1] the Supreme Court held that a predispute agreement to arbitrate statutory claims contained in a securities representative's registration application was enforceable.[2] This decision triggered an exponential increase in the use of arbitration agreements[3] as employers interpreted *Gilmer* to authorize the insertion of such agreements into

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

2. *See id. Gilmer* held that an employee who signed an agreement to arbitrate in a securities registration agreement will be required to arbitrate his Age Discrimination in Employment claims. Subsequent courts have extended that holding to a wide variety of statutory claims, including, among other things, claims for race and sex discrimination. *See* Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (pregnancy discrimination); Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir. 1994) (race discrimination); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (sex discrimination); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (sex discrimination).

3. Many companies have adopted or are considering adopting predispute agreements to arbitrate. Companies such as Burlington Northern Railroad, Brown & Root, ITT (for headquarters employees), and Rockwell International (for management employees) have already taken this step. *See Statement by Professor Samuel Estreicher to the Commission on the Future of Worker-Management Relations Panel on Private Dispute Resolution Alternatives*, [1994] Daily Lab. Rep. (BNA) No. 188, at D-33 (Sept. 29, 1994); *see also* Mary A. Bedikian, *Transforming At-Will Employment Disputes Into Wrongful Discharge Claims: Fertile Ground For ADR*, 1993 J. DISP. RESOL. 113, 141-42 (1993); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 100 n.87 (citing studies and articles emphasizing the growth of individual employment arbitration); Dominic Bencivenga, *Mediation Boutique: Firm Provides 'Neutrals' to Settle Job Disputes*, N.Y. L.J., Dec. 26, 1996, at 5 (noting a dramatic increase in the use of ADR since the *Gilmer* decision in 1991); Margaret A. Jacobs, *Judges Appear to Be Growing Skeptical of Arbitration*, WALL ST. J., Dec. 22, 1994, at B2.

contracts with existing employees and prospective hires.[4] Employers have embraced these agreements, hoping that arbitration will deliver what it promises: inexpensive and speedy decisionmaking, finality, and confidentiality.[5] Moreover, many employers are convinced that together with providing a more expeditious, less expensive system of justice, arbitration will improve their bottom line by lowering potential damage awards.[6] Employers' enthusiasm for the perceived benefits of inserting arbitration clauses into employment agreements, together with the judicial approval of these clauses,[7] ensures the continued use of such agreements in the nonunionized workplace.[8]

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4. *See, e.g.*, Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991).

5. *See* Note, *Mandatory Arbitration of Statutory Employment Disputes*, 109 HARV. L. REV. 1670, 1673 (1996).

6. *See* Garry G. Mathiason, *Evaluating and Using Employer-initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-first Century*, *in* EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS, 793, 795 (ALI-ABA Course of Study, Feb. 22, 1996), *available in* Westlaw, CA35 ALI-ABA 793 ("[E]mployers faced with the potential of costly employment-related lawsuits . . . have been weighing alternative means of resolving such disputes in place of trial by jury."); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 684 (1996); Patricia Sturdevant & Dwight Golann, *Should Binding Arbitration Clauses be Prohibited in Consumer Contracts?*, DISP. RESOL. MAG., Summer 1994, at 4-5 (stating that companies use arbitration clauses to avoid juries, among other things). However, little empirical evidence has been gathered to support the notion that arbitration lowers damage awards.

7. *See Gilmer*, 500 U.S. 20; Patterson v. Tenet Healthcare Inc., 113 F.3d 832 (8th Cir. 1997); Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997).

8. Although employers have used *Gilmer* as a justification for insertion of arbitration agreements in contracts of employment, that decision may be premature. One controversial issue *Gilmer* did not address was whether § 1 of the Federal Arbitration Act (FAA) includes within its coverage agreements to arbitrate statutory claims between employers and employees. The FAA was designed to place arbitration agreements on equal footing with any other contract. *See* 9 U.S.C. § 2 (1994). Yet § 1 of the FAA limits the FAA's coverage, stating 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." *Id.* § 1. The *Gilmer* Court did not reach the issue whether § 1 excludes from its coverage contracts of employment between employers and employees engaged in interstate commerce, because the contract in *Gilmer* was between Gilmer and the New York Stock Exchange, not Gilmer and his employer. If § 1 excludes contracts of employment from its coverage, those contracts will be unenforceable unless state law indicates otherwise. *See* Ware, *supra* note 3, at 94-95. While *Gilmer* did not address the § 1 issue, many other courts have. *See Cole*, 105 F.3d at 1471 (stating that "every circuit to consider this issue squarely has found that section 1 of the FAA exempts only the employment contracts of workers actually engaged in the movement of goods in interstate commerce"). Because the vast majority of courts have held that § 1 of the FAA excludes from its coverage only the contracts of employment of workers actually involved in transporting goods, it seems

A certain inevitability surrounded the emergence of arbitration as a preferred method for resolving employment disputes in the nonunionized sector. After all, arbitration had long been the preferred means for resolving employment disputes in the unionized workplace.[9] Perhaps it was the extraordinary success of arbitration in resolving disputes in the unionized sector that precipitated nonunionized employers' adoption of arbitration to resolve their own ever-increasing number of employment disputes. Whatever the reason for its increased use, arbitration of employment disputes in the nonunionized sector is here to stay.

Although arbitration originated in organized labor and commercial settings, in at least one respect, nonunionized arbitration has developed more rapidly than arbitration in the unionized sector.[10] While *Gilmer* approved the use of predispute agreements to arbitrate discrimination claims in the nonunionized workplace, the use of such agreements is not permitted in the unionized world because of the 1974 Supreme Court decision in *Alexander v. Gardner-Denver*.[11] In *Gardner-Denver*, the issue was whether an unionized employee, who, as required by his union's collective bargaining agreement, had submitted his claim under the agreement's nondiscrimination clause to final arbitration, retained the right to bring a Title VII claim in federal court following the arbitration. The Court determined that an unionized employee's right to a trial de novo on a Title VII claim is not precluded by prior submission of a claim to arbitration under a collective bargaining agreement's nondiscrimination clause.[12]

The continued viability of *Gardner-Denver* following *Gilmer* remains an open question, at least in cases where the parties expressly agree to abide by antidiscrimination laws. *Gilmer* superficially addressed *Gardner-Denver's* continuing validity in response to Gilmer's argument that statutory claims could not be

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unlikely that the Supreme Court would reverse direction and exclude such contracts from the FAA's coverage.

9. *See* Thomas J. Piskorski and David B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment-Related Disputes*, 19 EMPLOYEE REL. L.J. 205, 209 (1993).

10. *See generally* Note, *Compulsory Arbitration in the Unionized Workplace: Reconciling Gilmer, Gardner-Denver and the Americans With Disabilities Act*, 37 B.C. L. REV. 479, 480 (1996).

11. 415 U.S. 36 (1974).

12. *See id.* at 59-60.

the subject of a predispute arbitration agreement.[13] While the Court concluded that Gilmer's reliance on *Gardner-Denver* was misplaced,[14] its willing acceptance of arbitration as a method for resolving statutory claims in the employment context seemed to cry for a re-evaluation of *Gardner-Denver* that the Court failed to provide. Thus, the question remained: what effect does the *Gilmer* decision have, if any, on the enforceability of predispute arbitration agreements between unions and employers?

Some commentators have suggested that *Gilmer* does not provide an opportunity for revisiting *Gardner-Denver*.[15] Yet at least one circuit court and several district courts have used *Gilmer* as the basis for enforcing an agreement to arbitrate statutory claims in a collective bargaining context.[16] Rejecting the continued application of *Gardner-Denver*, the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*,[17] held that a represented employee's statutory claim, based on alleged violations of Title VII and the Americans with Disabilities Act, could be arbitrated.[18] After emphasizing that the parties had agreed that external law should govern the dispute, the *Austin* Court rejected *Gardner-Denver*, holding that the arbitral setting is an adequate forum for the resolution of statutory disputes where the parties have voluntarily agreed to arbitrate their claims.[19]

The *Austin* decision has sparked heated debate among both bench and bar over the continuing viability of *Gardner-Denver*.[20] While the reasoning of *Austin* is not entirely sound, its conclusion is correct—*Gardner-Denver's* absolute prohibition on

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

14. *See id.* at 33.

15. *See* Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 84 (1996).

16. *See* Austin v. Owens-Brockway Glass Container Inc., 78 F.3d 875 (4th Cir.) (enforcing executory arbitration agreement in collective bargaining context), *cert. denied*, 117 S. Ct. 432 (1996); Bright v. Norshipco & Norfolk Shipbuilding & Drydock Corp., 951 F. Supp. 95 (E.D. Va. 1997); Brummett v. Copaz Packing Corp., 954 F. Supp. 160 (S.D. Ohio 1996); Jessie v. Carter Health Care Center, Inc., 930 F. Supp. 1174, 1176-77 (E.D. Ky. 1996) (following *Austin*).

17. 78 F.3d 875 (4th Cir.).

18. *See id.* at 882.

19. *Id.* at 880-82.

20. *See* Kevin P. McGowan, *Labor Law: Size of Award Still Largely Determined by State Law, Say Attorneys on ABA Panel*, [1996] Daily Lab. Rep. (BNA) No. 156, at D-16 (Aug. 13, 1996); Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, 82 A.B.A. J. 58 (1996).

arbitration of statutory claims is inconsistent with the Supreme Court's changed attitude toward the suitability of arbitration announced in *Gilmer* and numerous other judicial decisions.[21] Moreover, the rationale underlying *Gardner-Denver*, while somewhat understandable given *Gardner-Denver's* facts, is no longer compelling in cases where parties have agreed to arbitrate their statutory claims in accordance with federal antidiscrimination provisions. In those cases, *Gilmer* requires a re-evaluation of the foundation for the decision in *Gardner-Denver*.

Part II of this article conducts just such a re-evaluation, and concludes that the bases for the *Gardner-Denver* decision are unsound. Part III contends that since the reasoning of *Gardner-Denver* is unsound the only remaining question is whether any reason exists for continuing to reject collectively bargained agreements to arbitrate statutory claims. Part III demonstrates that if the "*Gilmer* agreement," which requires an employee, as a condition of employment, to sign a predispute arbitration agreement foregoing all access to jury trials, is enforceable, then the "*Gardner-Denver* agreement," an agreement between the union and employer to arbitrate employees' claims, must be similarly enforceable. This article uses a game theoretic analysis to argue that there is actually greater reason to enforce "*Gardner-Denver* agreements" than "*Gilmer* agreements." Game theory demonstrates that the structural protections inherent in the collective bargaining context cannot be duplicated in cases involving agreements to arbitrate individual statutory claims. Thus, this article contends that even if *Gilmer* is ultimately overturned,[22] "*Gardner-Denver* agreements" should remain enforceable.

II. *ALEXANDER V. GARDNER-DENVER* NEED NOT APPLY

In *Gilmer*, the Court compelled arbitration of Gilmer's age discrimination claim because he had signed a predispute

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21. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Mitsubishi Corp. v. Soler Chrysler-Plymouth, 473 U.S. 477 (1989); Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477 (1989); Austin v. Owens-Brockway Glass Container Inc., 78 F.3d 875 (4th Cir. 1996).

22. *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements between Employers and Employees*, 64 UMKC L. REV. 449 (1996) (arguing that *Gilmer* should be overturned).

agreement to arbitrate claims arising out of his employment. In an attempt to avoid arbitration, Gilmer raised a number of issues, including his theory that statutory claims could not be the subject of a predispute agreement. The Court rejected this argument, as well as Gilmer's argument that arbitration provided an inadequate forum in which to vindicate statutory rights because of its lack of procedural safeguards.[23] Emphasizing how the judicial attitude toward arbitration had changed since the days of *Wilko v. Swan*[24] and *Gardner-Denver*, the Court enforced the arbitration agreement. In addition, the Court rejected Gilmer's claims that the agreement should not be enforced because it was the result of unequal bargaining power.[25]

Gilmer has prompted commentators and courts alike to reconsider the *Gardner-Denver* ruling.[26] In the aftermath of *Gilmer*, some courts have taken the decision at face value, concluding that *Gardner-Denver* is still good law.[27] Other courts

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23. Gilmer also argued, among other things, that arbitral procedures were insufficient to protect his rights. Gilmer claimed that the arbitrators were biased in favor of the employer, and that the limited discovery available was insufficient as was the lack of written opinions. *See Gilmer*, 500 U.S. at 30-31.

24. 346 U.S. 427 (1953), *rev'd*, *Rodriguez*, 490 U.S. at 481. In *Wilko*, the Court held that a predispute agreement to arbitrate a claim arising under § 12(2) of the Securities Act was unenforceable because a judicial forum was necessary to protect the substantive rights created by the Securities Act on behalf of investors. The *Wilko* court's decision rested primarily on its belief that arbitration was inadequate to enforce statutory rights. Thus, where the arbitral forum provides insufficient protection to statutory rights, *Wilko* commands that the statute's beneficiaries be permitted to access a judicial forum. Since the 1980s, however, the Court has never found the arbitral forum an inadequate venue for vindication of statutory rights.

25. *See Gilmer*, 500 U.S. at 33. It is surprising that the Court did not use *Gilmer* to reconsider *Gardner-Denver*. It seems counterintuitive that *Gilmer* should endorse enforcement of arbitration agreements between parties with disparate negotiating incentives—employers and employees—while it continues, following *Gardner-Denver*, to reject wholesale the agreements reached by parties with similar negotiating incentives—unions and employers. Without significant consideration, the *Gilmer* Court, and the majority of courts addressing this question since *Gilmer*, rest the decision not to enforce the collective preference of a unionized workforce on *Gardner-Denver's* holding that statutory employment claims are independent from a collective bargaining agreement's arbitration procedure. This issue will be considered in greater depth in Part III of this article.

26. *See* Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519 (11th Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 363-64 (7th Cir. 1997); *see also* Michele Hoyman and Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, 39 ARB. J. 49 (1984) (calling for *Gardner-Denver's* reversal long before *Gilmer* was decided); Malin, *supra* note 15.

27. *See, e.g.*, *Brisentine*, 117 F.3d at 522-23; *Harrison*, 112 F.3d at 1437; *Pryner*, 109 F.3d 354; Tran v. Tran, 54 F.3d 115, 117-18 (2d Cir. 1995); Humphrey v. Council

have concluded that *Gardner-Denver* is inconsistent with the principles *Gilmer* advocated and have, therefore, used *Gilmer* to reject *Gardner-Denver*.[28] Analyzing *Gardner-Denver* in light of *Gilmer* demonstrates that many of the reasons offered in support of *Gardner-Denver* were wrong when proffered; other reasons, such as the unsuitability of the arbitral forum to resolve statutory claims, no longer correctly state the law. Given the changed perception of arbitration and the lack of remaining justifications for the *Gardner-Denver* decision, where the parties have agreed to resolve their statutory claims using external antidiscrimination law, *Gardner-Denver* should be reversed.

The *Gardner-Denver* Court confronted and resolved four separate issues in reaching its conclusion. The Court's first concern was whether an unionized employee's right to a trial de novo on his Title VII claim should be precluded because of his prior submission of the dispute to an arbitrator.[29] Second, the Court expressed reservations about the adequacy of the arbitral forum as a substitute for litigation.[30] Third, in a footnote, the Court raised the concern that the interests of the individual might be subordinated to those of the group if the union were permitted to waive an employee's right to select a forum.[31] Finally, the Court suggested that an employee's right to be free from racial discrimination is an individual statutory right that the union is not authorized to waive.[32]

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of Jewish Fed'n, 901 F. Supp. 703, 709-10 (S.D.N.Y. 1995); Jackson v. Quanex Corp., 889 F. Supp. 1007, 1010-11 (E.D. Mich. 1995); Randolph v. Cooper Indus., 879 F. Supp. 518, 520-22 (W.D. Pa. 1994); Block v. Art Iron, Inc., 866 F. Supp. 380, 384-87 (N.D. Ind. 1994).

28. *See* cases cited *supra* notes 16-17, 21.

29. *See* Alexander v. Gardner-Denver, 415 U.S. 36, 52-53 (1974). Unlike *Gilmer* which involved a nonunionized employee's contractual agreement with his employer to arbitrate statutory claims, *Gardner-Denver* involved a collective bargaining agreement, negotiated by Gardner-Denver's union and his employer. This agreement required that any disputes between employees and the employer regarding the application of the agreement go through a grievance arbitration process. The grievance arbitration would then resolve the dispute by determining what the agreement means. *See* Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977) ("Put most simply, the arbitrator is the parties' officially designated 'reader' of the contract. He (or she) is their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the unanticipated omissions of the intial agreement.").

30. *See Gardner-Denver*, 415 U.S. at 56-58.

31. *See id.* at 58 n.19.

32. *See id.* at 51-52.

The *Gilmer* Court rejected *Gardner-Denver* to the extent that it rested on the ground that arbitration was inferior to litigation for the resolution of statutory claims. According to the Court,

> [I]n our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[33]

The Court also stated, "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 its remedial and deterrent function."[34]

Yet the decision in *Gilmer* agreed with *Gardner-Denver's* theory that a potential disparity in interests between the union and an employee means that subsequent litigation of a statutory claim is permissible.[35] Moreover, the *Gilmer* Court reiterated its belief that collective bargaining arbitration involved contractual, not statutory rights.[36] The Court also espoused the *Gardner-Denver* theory that the union has the power to waive collective rights, but not individual rights.[37] Thus, the *Gilmer* Court concluded that: *Gardner-Denver* remains good law because *Gilmer* involved an express agreement to arbitrate statutory

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33. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) (quoting Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477, 481 (1989)).

34. *Id.* at 28 (quoting Mitsubishi Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985)).

35. *See id.* at 34. The *Gilmer* court notes both the existence of a potential disparity in interests as well as "tension between collective representation and individual statutory rights." *Id.* at 35. One assumes that the "tension" results from the fear that the union will make collective choices that deviate from the interests of certain individuals within the group. In other words, the "tension" is based on the potential disparity in interests between the union and its members. *Id.* Because these two concepts are based on the same concern, the union acting detrimentally to individual interests, they will be discussed as one concern rather than two.

36. *See id.* at 34. In the unionized environment, the grievance arbitrator interprets the collective bargaining agreement to resolve union-management disputes. Historically, the arbitrator was not empowered to resolve noncontractual disputes and did not utilize external law, i.e., case law or statutes, to assist her in resolving the dispute.

37. *See id.* Collective rights are those rights which are created by the existence of a union, such as the right to strike or the right to arbitrate grievances. Individual rights are those rights an employee has in the absence of union representation.

claims while *Gardner-Denver's* agreement extended only to contract-based claims.[38]

Following *Gilmer*, then, the remaining justifications for denying enforcement of collectively bargained predispute agreements to arbitrate statutory claims are that (1) the potential disparity in interests between a union and an employee prohibits the enforcement of the agreement; (2) the union's ability to waive the collective rights of its constituents does not include the ability to waive an employee's statutory right to select a forum for the adjudication of his or her statutory discrimination claim; (3) the labor arbitrator has no authority to resolve statutory disputes; and (4) labor arbitrators are experts in resolving contractual disputes, not statutory ones. Careful examination of each of these concerns establishes that they are inadequate as justifications for rejecting collectively bargained agreements to arbitrate statutory claims, especially in light of the Court's strong preference for enforcement of arbitration agreements.

A. The Disparity Between the Interests of the Union and the Represented Employee is Insignificant

The Court, both in *Gardner-Denver* and later in *Gilmer*, raised the important concern that the union, as labor's exclusive representative, might use its power to bargain to the detriment of the interests of a certain employee or group of employees.[39] The theory is that unions might sacrifice individual or protected groups' preferences in order to obtain benefits for the majority.

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38. The *Gilmer* court also stated that while *Gilmer* arose under the FAA, *Gardner-Denver* did not. While it is true that courts believe the FAA reflects the "'liberal federal policy favoring arbitration agreements,'" *id.* at 35 (quoting *Mitsubishi*, 473 U.S. at 625), this liberal policy is hardly limited to those agreements that the FAA governs. Since the Steelworkers trilogy, courts have been quite willing to enforce collectively bargained agreements to arbitrate disputes that arise between labor and management. Moreover, the Court has suggested that while the FAA does not govern collective bargaining arbitration, courts may look to it for guidance. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987).

39. *See Gilmer*, 500 U.S. at 34; Alexander v. Gardner-Denver, 415 U.S. 36, 58 n.19 (1974); Pryner v. Tractor Supply Co., 109 F.3d 354, 362-63 (7th Cir. 1997). Commentators also recognize this possibility. *See* Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality and Labor Speech*, 82 GEO. L.J. 1903, 1907 (1994); Mayer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 466 (1983) (stating that once a union becomes the exclusive representative, it "has the power to conclude bargains detrimental to the interests of a particular employee or group of employees").

By definition, exclusive representation involves individual employee sacrifice.[40] It is theoretically possible that, as a large entity, the union might have prejudices or, at the least, be more interested in responding to, and satisfying, the needs of the majority. Moreover, as an elected entity, the union may recognize that if it is able to increase the number and type of claims it handles, it will become more powerful.[41] The union's desire to increase its importance to the employees and thereby become indispensable may contribute to its motivation to give away the rights of individuals too easily. The question then is whether the union's ability to disregard or bargain away protected groups' interests should invalidate a collectively bargained agreement to arbitrate statutory discrimination claims.

1. Public choice theory suggests that protected group interests are not compromised

It is entirely possible that protected groups—those whose rights are protected by antidiscrimination statutes—actually receive greater attention and representation from the union than does the majority. Unions may be more responsive to the needs of the protected classes because they articulate those concerns to the union while the majority remains silent.

This is an application of the theory of public choice. Public choice theory involves the application of microeconomics and game theory to legislative decisionmaking.[42] While public choice theory has typically focused on the production of law by legislators, regulatory agencies and courts, the theory applies equally well to any large, elected group that must respond to its constituency. Public choice theorists explain that the compromises reached by legislators, as codified in statutes, depend, in great part, upon the influence of special interest groups. Theoretically, the groups with greatest influence are

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40. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (recognizing that the union is the exclusive bargaining representative for all the employees within the appropriate bargaining unit); *Pryner*, 109 F.3d at 362 ("An agreement negotiated by the union elected by a majority of workers in the bargaining unit binds all members of the unit . . . .").

41. In a grievance procedure, the union represents the aggrieved employee. *See* MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 384 (1988).

42. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250 (1992).

those who can organize easily to promote their ends. To develop an effective political coalition an organizing group must be able to reduce informational and organizational costs. Otherwise, the costs of creating the organization will be prohibitive. As Professor Frickey emphasizes, the groups most likely to organize and influence the legislature are those who can minimize organization costs by identifying similarly situated individuals.[43] Protected groups are more likely to succeed in organizing due to an ease of identification and because they are more "likely to receive discrete benefits or suffer disproportionate burdens . . . than the diffuse public."[44] As a result, Frickey predicts that "lots" of statutes provide "concentrated, unjustified benefits to small groups at the expense of the general public."[45]

The theory of public choice arose to explain legislative results that seemed to prefer the interests of the political minority to those of the political majority. Public choice explained such results using the theory of "interest group capture" articulated above. To apply public choice theory in the union setting requires proof that unions act like legislatures when making decisions. In the context of public choice analysis, this requires a showing that the union's decisions reflect a preference for the political minority at the expense of the political majority. This proof, if it exists, can be obtained by examination of the analogue to the "legislation" produced by the union—the "collective bargaining agreement"—as well as other quantifiable union activities, such as lobbying.

The universal inclusion of nondiscrimination clauses in collective bargaining agreements would seem to suggest protected group capture. So too would the continuing union efforts to eliminate sexual discrimination,[46] and fetal protection policies.[47] More recently, union efforts on behalf of the disabled culminated in the passage of the Americans with Disabilities Act, demonstrating the powerful influence of protected groups.[48]

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43. *See id.*

44. *Id.* at 250-51. Title VII was passed to eliminate disproportionate burdens suffered by minorities and to provide them with discrete benefits.

45. *Id.* at 251.

46. *See* American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985); AFSCME v. County of Nassau, 609 F. Supp. 695 (E.D.N.Y. 1985).

47. *See* International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991).

48. *See* Mary K. O'Melveny, *The Americans With Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?*, 82 KY.

Judicial decisions also reflect union efforts on behalf of protected groups. In one famous case, *United Steelworkers v. Weber*,[49] the Supreme Court considered the validity of an affirmative action plan which created a training program and reserved fifty percent of the program's positions for black employees. The program was intended to eliminate the racial imbalances in the employer's skilled craft positions. The Court upheld the plan against a challenge by a white employee. For purposes of this article, it is important to note only that the program was developed at the behest of the union. The union's behavior demonstrates some evidence of a protected group's ability to influence union decisionmaking.

Similarly, in another well known case, *Wygant v. Jackson Board of Education*,[50] the Court considered a provision of a collective bargaining agreement that retained probationary minority employees during layoffs over nonminority employees with greater seniority. While this provision was ultimately stricken, this case highlights unions' efforts on behalf of protected groups.

Risks of marginalization and erasure of protected classes by unions exist—historically, unions were hardly thought of as protectors of minority rights. Yet even commentators who believe that unions tend to favor majority interests, concede that many unions have "attempted to foster gender consciousness as well as class consciousness through their organizing and pressure strategies," and that "the labor movement has done more than any other social institution to improve women's economic status."[51] Thus unions, who at first blush would seem more likely to marginalize protected groups, may in fact do much to advance minority interests.

Applying public choice theory to the operation of unions, one would expect to see groups who may suffer disproportionately if predispute agreements to arbitrate statutory claims are included in collective bargaining agreements organizing and using their influence to ensure that the union does not concede their right to

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L.J. 219, 220 (1993).

49. 443 U.S. 193 (1979).

50. 476 U.S. 267 (1986).

51. Crain, *supra* note 39, at 1960. *But see* Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 796 (1992) (stating that while all employees benefit from unions, unions historically discriminated frequently on the basis of race).

bring statutory claims in federal court. After all, organization is not difficult because protected groups can identify potential members and define interests easily. The protected groups share the well-defined interest of wishing to avoid the detrimental effects discrimination potentially causes. Moreover, the protected groups tend to be small. This helps such groups overcome potential free-rider problems[52] and concentrates the benefits of the union's actions to create strong incentives for the group to lobby for beneficial results.

A concern that may arise when public choice theory is applied to nonlegislative decisionmaking is whether the protected classes will be able to convince their elected representatives that they should act in the protected group's interest. In the legislative process, this goal is accomplished with pledges of money for reelection campaigns and public support, among other promises. In the union setting, contributions of money are not likely to occur. Yet members of unions wield significant power. Under the National Labor Relations Act (NLRA), a petition for a National Labor Relations Board (NLRB) representation can be filed by unions, employers, or the employees themselves.[53] In order to file a representation petition, a union must first demonstrate that a substantial number of employees support the union.[54] If the NLRB believes that at least thirty percent of the employees in an appropriate bargaining unit support the union, it will call for an election.[55] In that election process, a rival union can obtain a position on the ballot upon the showing of the support of just a single

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52. In large group decisionmaking, any single person's actions will have an infintesimal effect on the outcome. As a result, a rational person will try to "free-ride" i.e., expend no effort, in the hope of benefitting from other people's actions. *See* DANIEL A. FARBER & PHILIP FRICKEY, LAW AND PUBLIC CHOICE 23 (1991). In smaller groups, such as protected groups, the incentive to act increases, thus reducing the "free-rider" problem because there is a greater likelihood that any one individual's actions will change the outcome. *See id.*

53. In the absence of any bars to election, a petition for an NLRB representation election can be filed regardless of whether the employees are currently represented or have never been represented. *See* Comtel Sys. Tech., Inc., 305 N.L.R.B. 287 (1991); John Deklewa, 282 N.L.R.B. 1375 (1987).

54. *See* 29 C.F.R. § 101.18 (1996). NLRB procedures for representation proceedings are set forth at 29 C.F.R. §§ 102.60-72 (1996). Signed, dated authorization cards satisfy the requirement of support. *See* Custom Bent Glass Co., 304 N.L.R.B. 373 (1991).

55. *See* 29 U.S.C. § 159(c)(1) (1994).

employee.[56] If the rival union wants full intervention in the representation hearing, it need only show that ten percent of the employees support it.[57]

Because the NLRA's requirements for appearing on a ballot in an election are minimal, the protected class that is able to organize has a great deal of power to influence the kinds of provisions adopted in the negotiation process. The influence of a protected class is enhanced by its ability to threaten the incumbent union every twelve months to three years.[58] With such frequent challenges possible, a union that wishes to remain in power must pay attention to organized groups. Failure to attend to their needs might very well result in a change of leadership to a rival union more interested in satisfying the needs of the protected group. This result is made more likely because, as in the legislative process, the majority is likely to remain unorganized and, thus, without a voice.

In another way, the case for application of public choice theory to union decisionmaking is even more compelling than it is in the legislative process. Commentators have repeatedly expressed concern with the ability of the public choice theory to explain legislative outcomes. The possibility always exists that a statute will be intentionally, or unintentionally, misconstrued during the judicial review process or, before that, substantially changed through the Congressional committee system.[59] The legislation might also receive a Presidential veto or may be delegated to an administrative agency for further consideration.[60] The possibility that proposed legislation will be substantially altered or misinterpreted decreases the incentive of the interest group to influence the legislation. Yet public choice theory remains a popular method for explaining legislation.

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56. *See* JAMES B. ATLESON ET AL., LABOR RELATIONS AND SOCIAL PROBLEMS 146-47 (1978).

57. *See id.*

58. Once a new union is elected, rival unions are barred from challenging the incumbent union for at least twelve months. *See* 29 U.S.C. § 159(c)(3) (1994). If the incumbent union negotiates a collective bargaining agreement that lasts three or more years, rival unions are barred from challenging the incumbent union for three years. *See* LABOR LAW CASES AND MATERIALS 273 (Archibald Cox et al. eds., 1990).

59. *See* Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 56 (1988).

60. *See id.* at 59.

Although similar problems exist in the union setting, the opportunities for misinterpretation are greatly reduced. A protected group interested in particular "legislation" in the collective bargaining agreement need only concern itself with the possibilities that management will change the proposed provision or that an arbitrator might subsequently misinterpret it. The reviewing court might also commit error, but this possibility is not significant because only limited judicial review is available. While these are real possibilities, the universe of potential effects in the union setting is smaller than the possibility of alteration of legislation in the legislative process. Thus, the protected groups' incentives to influence union "legislation" is at least as strong as an interest group's incentive to influence legislation.

While empirical evidence supporting application of public choice theory to unions has not been gathered, in at least one well-known NLRB decision, the Board recognized the analogies. In *Jubilee Manufacturing Co.*,[61] the Board stated that the effect of employer discrimination might "cause minorities to coalesce, and it is possible that this could lead to collective action with nonminority group union members."[62] The Board emphasized that given their organizational ability, the minority groups, acting alone, should have the strength to eliminate discriminatory practices by the employer.[63]

Applying public choice theory in the union setting, one would predict that agreements to arbitrate statutory claims would not be included in collective bargaining agreements if the well-organized protected groups believed that such agreements were not in their best interest. Because these agreements are becoming more frequent rather than less, the protected groups may well believe that such agreements are not disadvantageous.

2. *Title VII of the Civil Rights Act of 1964 prohibits discrimination against protected groups*

In the absence of empirical evidence supporting the application of public choice theory to union action, concerns that the union will prefer majority interests at the expense of

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61. 202 N.L.R.B. 272 (1973).
62. *Id.*
63. *See id.* at 272-73.

protected groups may still be overcome by two alternative legislative protections against union abuse of the power. Both the duty of fair representation and Title VII of the Civil Rights Act of 1964 ensure that the union's increased power will not be accompanied by an increase in discrimination against protected groups.

a. The duty of fair representation. The duty of fair representation (DFR) obligates the union to represent fairly all members of the bargaining unit and process grievances in good faith, without hostility or discriminatory intent.[64] While courts give unions fairly wide latitude in negotiating agreements and resolving grievances, in order to avoid liability for breaching the DFR, the union must provide a legitimate and rational explanation for its conduct.[65] In determining whether the union's decisions are reasonable, courts consider the basis for the union's decision. If the union's decision is based on "impermissible" or "invidious" factors, the union is held to be in breach of its duty. "Impermissible factors" include the members' race, sex, national origin, political positions or status as union members. To the extent that most nondiscrimination clauses in collective bargaining agreements have been expanded to include other protected statuses, union decisionmaking that relied upon such information is likely to be considered a breach as well.[66]

Courts hold that the fair representation duty imposes on labor unions both the duty not to discriminate and an "affirmative duty to take corrective steps to ensure compliance with Title VII."[67] Thus, the fair representation duty, at least in the context of members' discrimination claims in contract negotiation and administration, imposes a significant burden on the union to avoid even the appearance of discriminatory decisionmaking.

Some commentators criticize judicial analysis of the fair representation duty, suggesting that the courts' limited judicial

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64. *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

65. *See* Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 72 (1991); Ryan v. Printing Pressman Local No. 2, 590 F.2d 451 (2d Cir. 1979); Figueroa De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970).

66. *See* Connye Y. Harper, *Origin and Nature of the Duty of Fair Representation*, 12 LAB. L.J. 183, 184-85 (1996).

67. *Id.* at 187 (citing Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978)).

review of DFR challenges renders the DFR ineffective.[68] According to the critics, the "DFR" is meaningless because it is based on a principle of "fairness" that is extremely difficult to judge.[69] Thus, in their view, the DFR rarely results in the second-guessing of union decisions.[70]

While judicial review of DFR violations is a potential problem, this criticism is less compelling when the union's actions result in discrimination against a discrete group. Where a union relies on "invidious factors" such as those articulated in Title VII, courts are quick to find a DFR violation.[71] Moreover, judicial understanding of the nature and scope of the "invidious" categories makes it easy for courts to find a DFR breach.[72] Thus, concerns that union decisions are rarely struck down on the principle of distributive fairness should not affect the vitality of the DFR claim as a means to limit discrimination against protected classes, at least when the union's decision is based on an invidious factor. Instead, the good faith duty stands as a bar to the union's ability to prefer majority interests.

b. Title VII protection. If the duty of fair representation were insufficient to ensure that the union did not discriminate against any of its members, Title VII provides overlapping protection to employees against union discrimination on the basis of race, color, religion, sex, or national origin.[73] While the union is still occasionally a defendant in a Title VII action

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68. *See* Freed et al., *supra* note 39, at 466.

69. *See id.*

70. In that sense, critics' complaints about the DFR sound very similar to critics' complaints about the business judgment rule in corporate law. The business judgment rule is a specific application of a directorial standard of conduct to the situation where a business decision is made by disinterested and independent directors on an informed basis with a good faith belief that the decision will benefit the corporation. Should the shareholders sue the directors on the basis that their decision was illegitimate, the court examines the decision only to the extent necessary to verify the presence of a business decision, disinterestedness and independence, due care, good faith and the absence of an abuse of discretion. If these elements are present—and they are presumed to be—the court will not second guess the merits of the decision. *See generally* DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS (4th ed. 1993).

71. *See, e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (holding that a union could not deprive blacks of membership without breaching its duty of fair representation); Miranda Fuel Co., 140 N.L.R.B. 181 (1962) (holding that discrimination against blacks is a breach of the duty of fair representation).

72. Discrimination on the basis of an individual's race, sex, color, religion, or national origin is considered "invidious" discrimination. *See, e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

73. *See* 42 U.S.C. § 2000-e(2)(c) (1994).

instituted by an employee,[74] more often the union's role has been as an active player in the effort to eliminate unlawful employment discrimination in the workplace. Many labor unions have advocated vociferously for the elimination of sexual discrimination,[75] disability discrimination and fetal protection policies.[76]

When the union has discriminated, courts do not hesitate to impose liability under Title VII.[77] Courts also emphasize that Title VII not only imposes a duty on unions to avoid active discrimination, but also to eliminate existing discriminatory practices.[78]

This is not to suggest that unions have resolved the dilemma of responding to majority needs while still protecting minorities or that unions are never guilty of racial discrimination. Yet it would seem that in light of the severe penalties that can be imposed for discriminatory behavior, unions would have little incentive to negotiate an agreement to arbitrate statutory claims if such an agreement could be considered discriminatory. As Samuel Estreicher noted, under current law, an employee claiming inadequate union representation may disregard the collective bargaining agreement's finality provisions and go directly to court.[79] Consequently, the union will be forced to defend its decision to negotiate a clause or process a grievance in

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74. *See* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Daniels v. Pipefitters Ass'n Local Union, 945 F.2d 906 (7th Cir. 1991); Alexander v. Local 496, Laborers Int'l Union, 778 F. Supp. 1401 (N.D. Ohio 1991).

75. *See* American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985); AFSCME v. County of Nassau, 609 F. Supp. 695 (E.D.N.Y. 1985).

76. *See* International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991).

77. For example, in *Goodman v. Lukens Steel Company*, 482 U.S. 656 (1987), the Court held a union liable under Title VII for its knowing refusal to pursue grievances of black members who complained of racial discrimination and harassment by the employer. Similarly, in *Daniels v. Pipefitters' Ass'n. Local Union No. 597*, 945 F.2d 906 (7th Cir. 1991), the Court found a union liable for its back door hiring hall policies which disproportionately excluded blacks from job referrals.

78. The Fifth Circuit held that both the union's DFR and Title VII were violated when it failed to take "every reasonable step" to eliminate a discriminatory seniority system. *See* Terrell v. U.S. Pipe & Foundry Co., 644 F.2d 1112, 1121 (5th Cir. 1981). Both the Seventh and Eleventh Circuits have imposed an affirmative duty on unions to eliminate discriminatory contractual provisions during negotiations. *See* Freeman v. Motor Convoy, 700 F.2d 1339 (11th Cir. 1983); Wattleton v. Int'l Bhd. of Boilermakers, 686 F.2d 586 (7th Cir. 1982); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992 (11th Cir. 1982).

79. *See* Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 844 (1996).

front of a jury at its own expense. If a breach is ultimately found, the union will have to pay damages. Because unions are organizations with limited resources, it would not be surprising for them to avoid the risk of trial on a DFR or Title VII claim even if the consequence is overprotecting protected classes.[80]

B. The Union May Waive the Right of Its Members to Select a Forum for the Airing of Discrimination Claims

Another objection to the enforcement of a union's agreement to arbitrate its members' statutory claims is that the union only has the power to waive collective rights, such as the right to strike, and not the power to waive individual rights, such as the right to select a forum for the airing of a Title VII discrimination claim. In *Austin*, the Fourth Circuit stated that the union's power to waive the right to strike and other rights protected by the NLRA,[81] included the power to exchange the right to a forum for statutory claims for some other benefit.[82] The Fourth Circuit believed that the employees' designation of the union as their representative empowered the union to bargain all terms and conditions of employment, including agreements to arbitrate employee's statutory claims. Since the employees voluntarily elect the union, the court reasoned, the agreement to arbitrate statutory claims is also voluntary and, therefore, enforceable.

According to the dissent, a labor union cannot waive a member's right to a judicial forum for a statutory claim because that right belongs to the individual.[83] According to the dissent, the power to waive collective rights does not include the power to waive individual ones.[84] The supposition underlying the dissent's position in *Austin* and the Court's position in *Gardner-Denver* is that a union's agreement with the employer to arbitrate individual employees' statutory claims is invalid because the individual is not offered the opportunity to waive his right to a forum. In other words, only the individual can waive forum

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80. *See id.*

81. 29 U.S.C. §§ 151-169 (1994).

82. *See* Austin v. Owens-Brockway Glass Container Inc., 78 F.3d 875, 885 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996).

83. *See id.* at 886-87 (Hall, J., dissenting).

84. *See id.* at 887 (Hall, J., dissenting).

selection and the selection of the union as bargaining agent does not constitute such a waiver.[85]

By contrast, the *Gilmer* Court clearly stated that an arbitration agreement signed by an employee as a condition of employment is a legitimate waiver of the employee's right to a forum. In the securities industry, where Gilmer worked, arbitration agreements in individual employees' contracts are presented on a take-it-or-leave-it basis. The only alternative to signing such an agreement is turning down the job.[86] This concern is magnified for securities industry employees because all jobs in that industry require the signing of such an agreement. The decision to reject the arbitration agreement is the decision to work outside the securities industry. Yet in *Gilmer* and subsequent decisions, courts have emphasized that the fact that the agreement is a condition of employment does not render the agreement unenforceable. Such agreements are routinely enforced in the securities industry and have been rejected only once outside the securities industry.[87]

Supporters of *Gardner-Denver* argue that it is the ability of the employee to refuse the agreement that makes his waiver meaningful. Interestingly, the choices presented to the represented employee are remarkably similar to those presented to the "*Gilmer* employee." Once an employee becomes aware that the union and the employer have agreed to arbitrate employees' statutory claims, the employee has the following options: abide by the union's agreement or look for another job. This is the identical dilemma unrepresented employees face. Yet the basis

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85. Martin Malin identifies this issue as the single most important reason why *Gilmer* does not compel reexamination of *Gardner-Denver*. According to Malin, however meaningless a "*Gilmer* employee's" waiver is, the opportunity to reject the waiver provides the "*Gilmer* employee" the ability to "negotiat[e] a separate deal with [his] employer which did not require arbitration." Malin, *supra* note 15. By contrast, a "*Gardner-Denver*" employee has no such "choice". Unionized employees do not have the ability to negotiate separate deals with employers. *See id.*

86. There is always the possibility, however miniscule, that the employee could negotiate with the employer to eliminate the clause. In reality, these clauses are presented on a take-it-or-leave-it basis. Even highly skilled employees are unable to negotiate the elimination of these clauses. This controversial policy is currently being reexamined by the NASD. *See* Patrick McGeehan, *Big Panel is Formed by NASD*, WALL ST. J., May 29, 1997, at C-1. Possible recommendations include leaving the arbitration requirement alone or making it optional. *See id.* at C-3.

87. *See* Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994) (refusing to enforce agreement to arbitrate statutory claims because the employees did not "knowingly" agree to arbitrate).

for the *Gilmer* Court's decision to enforce such agreements as voluntary is the understanding that every employee has the option to reject the arbitration agreement when it is offered. Represented employees are offered the same choices: to continue working under the agreement to arbitrate statutory claims or look for another job. The distinction *Gilmer* attempts to draw between the choices of represented employees and unrepresented employees is empty formalism and should be rejected. If the "*Gilmer* agreement" waiver has legal significance, so too should the union's waiver of a right to a forum for adjudication of its members' statutory claims.

At the time *Gardner-Denver* was decided, the concept of using the grievance arbitration machinery to resolve a statutory discrimination claim was unthinkable. Yet in the twenty years since the *Gardner-Denver* ruling, the acceptance of arbitration as a means of resolving statutory disputes and the recognition of arbitrators as potential experts in employment law issues has increased dramatically. Absent evidence that a union is derogating its minority members' interests in favor of majority desires, there is no justification for ignoring the parties' wish to resolve statutory disputes in arbitration. That the represented employee does not have the option to reject an arbitration provision should not prove troublesome since all employees are offered the same choice: take the agreement or leave the job. Since the bases for *Gardner-Denver* have eroded over time, it should be overruled. As has been shown above, none of the reasons *Gilmer* cited in opposition to the use of predispute agreements to arbitrate statutory rights are valid concerns in the union setting.

C. Arbitrators Are Authorized to Utilize External Law When Interpreting the Collective Bargaining Agreement if the Parties Have Agreed to It

In *Gardner-Denver*, the Court emphasized that when an employee submits his grievance to arbitration, he seeks to vindicate his contractual rights, not his statutory rights.[88] According to the Court, statutory rights are independent of the contract, and must be adjudicated separately even if they arise

88. *See* Alexander v. Gardner-Denver, 415 U.S. 36, 49-50 (1974).

from the same factual occurrence.[89] It is crucial to note that while the *Gardner-Denver* collective bargaining agreement contained a standard nondiscrimination clause,[90] it did not expressly require statutory claims to be arbitrated. As a result, for purposes of *Gardner-Denver*, the Court was right—the parties agreed only to arbitrate contractual disputes. What the *Gilmer* Court subsequently misunderstood when it confronted the identical issue, is that grievance arbitration is not always limited to resolving contractual disputes; parties to collective bargaining agreements can agree to arbitrate noncontractual diputes. While they rarely did so in 1974, it has become increasingly common to see parties agreeing to arbitrate statutory disputes.[91] In these agreements, the parties agree that the arbitrator will apply "external law"—the same law a court would apply were it resolving the dispute. As a result, arbitrators have become more comfortable interpreting and applying Title VII and other antidiscrimination statutes.[92] Thus, it is no longer true that grievance arbitration is a forum solely for the resolution of contractual claims.

It is essential for parties who wish to resolve their disputes using external law to make that intention clear in the language of the collective bargaining agreement. Where the parties choose to incorporate external law into their agreement, the arbitrator is required to interpret and apply that law.[93] This was true even in the days of *Gardner-Denver*. In the absence of a stated intention, an arbitrator should reject external law because his principal task is to interpret and apply the terms of the contract. If it is not clear that the parties wish to use external law to

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89. *See id.* at 50.

90. Article 5, section 2 of the collective bargaining agreement governing Alexander provided that, "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin or ancestry." *Gardner-Denver*, 415 U.S. at 39.

91. *See* Austin v. Owens-Brockway Glass Container Inc., 78 U.S. 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996); Bright v. Norshipco & Norfolk Shipbuilding, 951 F. Supp. 95 (E.D. Va. 1997); Brummett v. Copaz Packing Corp., 954 F. Supp. 160 (S.D. Ohio 1996); *see also* Thomas E. Terrill, *The Americans with Disabilities Act and Labor Arbitration: Recent Awards*, 48 LAB. L.J. 3, 4 (1997) (emphasizing that numerous arbitrators resolve statutory claims in addition to contractual ones because the parties request it).

92. *See* Terrill, *supra* note 91, at 16-17.

93. *See* ARNOLD M. ZACK & RICHARD I. BLOCH, LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION 37-39 (2d ed. 1995).

resolve the dispute, the arbitrator will be prohibited from using it.

The debate questioning the propriety of using external law to assist arbitrators in interpretation of an agreement arose because most agreements contained broadly drawn contractual provisions rather than specific commands regarding the use of external law to resolve disputes.[94] In such cases, the courts decided to leave to the arbitrators the decision whether external law should be used to resolve disputes.[95] The Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*,[96] suggested that an arbitrator could look beyond the agreement to the external law for assistance in "determining the sense of the agreement."[97] At the same time, it emphasized that an arbitrator must still look to the collective bargaining agreement and draw the "essence" of any award from the agreement, not external law.[98]

But *Enterprise Wheel* involved a broadly written clause, not a clause that specifically articulated which external laws the arbitrator was to consider. Where the contract states that the parties will comply with external laws prohibiting discrimination and that disputes regarding discrimination claims will be arbitrated, the ambiguity surrounding the arbitrator's interpretive role is reduced.[99] In such a case, the arbitrator is not

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94. A broadly drawn provision does not specify whether an arbitrator should utilize external law in resolving disputes. A more narrowly drawn clause indicates whether the arbitrator should use external law. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 382-83 (4th ed. 1985).

95. Even in cases with broadly drafted arbitration clause, a "significantly greater number of arbitrators" resolving claims of discrimination "have considered Title VII doctrine in deciding" such cases. *See* ELKOURI & ELKOURI, *supra* note 94, at 382. In interpreting an agreement's prohibition against "discrimination as to age, sex, marital status, race, color, creed, national origin or political affiliation," *id.* at 383, Arbitrator Roumell indicated that where the agreement fails to define discrimination

> one must look to the law as it is being developed under applicable statutes by the courts of the land for a definition. When the parties use a phrase such as 'discrimination as to . . . creed,' they presumably are incorporating the applicable law on that subject into their contract. As to the issue of religious discrimination in employment, the law is set forth in Title VII.

Id.

96. 363 U.S. 593, 597-98 (1960).

97. *Id.* at 597.

98. *Id.* at 597-98.

99. This was the case in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996), the only federal appellate court case to hold that an unionized employee will be bound by the union's agreement to arbitrate statutory discrimination claims. In *Austin*, the collective bargaining agreement contained a provision that stated:

simply authorized to utilize external law; the arbitrator must use external law when resolving the dispute.[100]

The parties may go even further. In *Austin v. Owens-Brockway Glass Container, Inc.*,[101] the collective bargaining agreement stated that the arbitrator was to resolve disputes that arise under federal antidiscrimination laws.[102] If the parties authorize it and are satisfied that they can find an arbitrator capable of interpreting those laws, there is no legitimate basis for prohibiting arbitrators from resolving these disputes.[103] Thus, the statement in *Gardner-Denver*, that arbitration is designed to resolve disputes involving contractual rights and not statutory rights, is simply inaccurate.[104] Concerns regarding the arbitrator's power to decide cases using external law provide no basis for disturbing the parties' agreement.[105]

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1. The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap or veteran status.
2. This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act. . . .
3. Any disputes under this Article . . . shall be subject to the grievance procedure.

Id. at 879-80.

100. As Zack & Bloch emphasize, "[i]f . . . the parties have chosen to incorporate external law into their agreement, the arbitrator must interpret and apply that law." ZACK & BLOCH, *supra* note 93, at 28-29.

101. 78 F.3d at 875.

102. *See id.* at 880-81.

103. In *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), the D.C. Circuit suggested that when parties explicitly authorize an arbitrator to resolve a dispute using a statute, public law is only "relevant to determining what contractual rights the parties enjoy." *Id.* at 1475. According to *Cole*, adjudication of a statutory dispute is an implementation of the contract, not a resolution of the statutory claim. This view is extremely formalistic. If a labor arbitrator is requested to resolve an employee's Title VII claim, his interpretation necessarily resolves both the contractual issue and the statutory one. No purpose is served by permitting relitigation of the statutory claim in a subsequent federal court proceeding. In the absence of any evidence that arbitrators did not understand the law they were to interpret, it is senseless to provide the employee with an opportunity to relitigate the same issues.

104. *See* Alexander v. Gardner-Denver, 415 U.S. 36, 50 (1974).

105. In *Gilmer*, the plaintiff raised a different objection to an arbitrator using external law to resolve his statutory claim. According to the plaintiff in *Gilmer*, statutory claims cannot be adjudicated in arbitration because Congress intended for such claims to be aired in a judicial forum. The *Gilmer* Court rejected that argument, stating that once parties have contracted to arbitrate a statutory matter, the parties should be held to that agreement unless Congress intended to prohibit arbitration of that matter. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991). According to *Gilmer*, "[i]f such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.* (quoting Shearson/Am. Express Inc. v.

D. Labor Arbitrators are Experts in Statutory Disputes as Well as Contractual Disputes

According to the Supreme Court in *Gardner-Denver*, a major impediment to the enforcement of arbitration agreements between unions and employers is that the arbitrators chosen to resolve these disputes are educated in the "law of the shop" rather than the "law of the land."[106] If arbitrators are not competent to analyze and decide statutory claims, then the propriety of expanding the arbitrator's role as an interpreter of law would be questionable.

Although the *Gilmer* Court did not address arbitrators' ability to interpret statutes in resolving disputes between represented employees and employers, it quite clearly authorized arbitrators to resolve exactly these questions when unrepresented employees and employers are involved. Arbitrators for labor arbitration and private employment disputes are drawn from the same pool, typically the American Arbitration Association. Thus, there is no reason to think that the arbitrator who resolves disputes between the unrepresented employee and his employer is any less qualified to resolve the identical dispute when a represented employee raises it.

That the *Gilmer* Court empowered arbitrators to resolve statutory disputes does not answer the question of whether arbitrators should resolve these disputes. Yet most concerns regarding arbitrators' ability to interpret antidiscrimination statutes are largely misplaced. As Elkouri and Elkouri emphasize, labor arbitrators have long utilized Title VII and other discrimination statutes to resolve discrimination claims.[107] For this reason, "qualified observers in the field of labor law and arbitration" believe that arbitrators do have the requisite ability to interpret and apply external law.[108]

McMahon, 482 U.S. 220, 227 (1987)). *Gilmer* did not find such an intention in the Age Discrimination in Employment Act. An intention to preclude arbitration has not been uncovered in the Civil Rights Act of 1991, amending Title VII, or the Americans with Disabilities Act. *See Austin*, 78 F.3d at 881.

106. *Gardner-Denver*, 415 U.S. at 52-54.

107. *See* ELKOURI & ELKOURI, *supra* note 94, at 376.

108. *Id.* Of course the question whether arbitrators are capable of resolving disputes by interpreting external law and whether they should be resolving such disputes is a matter of great debate. The Supreme Court in *Gilmer* seems to have resolved that debate, concluding that arbitration can be an appropriate forum for these

Where external legal issues are raised, it would be beneficial to both parties if the selected arbitrator was a lawyer or former judge with experience in employment law. In a recent revision of the American Arbitration Association's (AAA) rules, the AAA stated that arbitrators who resolve employment disputes "shall have familiarity with the employment field."[109] Even without these precautions the selected arbitrator will likely have the expertise the parties wish her to have. Because both parties have an incentive to choose an expert in the employment law field when a discrimination claim has been raised, their joint decision to select a particular arbitrator should be respected.

Gilmer's approval of the use of arbitrators to resolve discrimination claims, together with the arbitrators' proven experience in deciding such claims, leaves little basis for invalidating an arbitration agreement on the basis that the arbitrator is unqualified to decide these issues. The argument that arbitrators are qualified to decide statutory disputes is especially compelling in the employment discrimination context, where cases most often turn on factual not legal issues.[110] Thus, in employment cases, the effect on the underlying dispute of an arbitrator's misunderstanding of the statute is minimized. In addition, judicial review of the legal issues is always possible.[111]

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disputes and that arbitrators are capable of resolving them despite the parties' limited access to judicial review following an arbitral decision.

After studying "thousands" of arbitration opinions, the Elkouris conclude that arbitrators are not only capable of understanding and applying external law, but that "this capability probably equals and sometimes exceeds that of many courts, including some federal courts." *Id.*

109. AMERICAN ARBITRATION ASS'N, EMPLOYMENT DISPUTE RESOLUTION RULES § 8(a) (1993), *available in* 1993 WL 592205.

110. *See* Malin, *supra* note 15, at 104 ("Most employment disputes are fact-based and not likely to raise the kind of legal issues that would call for significant judicial review."). A study conducted in the 1980s found that discrimination claims involve factual issues eighty-four percent of the time. *See* Hoyman & Stallworth, *supra* note 26, at 49, 53.

111. The standard for judicial review of grievance arbitration decisions is quite deferential. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960). Yet this deference is not unlimited. According to *Enterprise Wheel*, "[w]hen the arbitrator's words manifest an infidelity to this obligation [to interpret the collective bargaining agreement], courts have no choice but to refuse enforcement of the award." *Id.* at 597. While this standard does not provide much opportunity for review of an arbitrator's decision, in its language and intent it is quite similar to the FAA's deferential standard for judicial review. The FAA permits reversal of the arbitrator's award when the arbitrator has shown manifest disregard of the law or has engaged in some type of egregious misconduct demonstrating fraud, corruption or partiality. *See* 9 U.S.C. § 10(a)(1)-(5) (1994). When the parties have agreed to resolve

III. ARE "*GARDNER-DENVER* AGREEMENTS" INVALID BECAUSE "*GILMER* AGREEMENTS" REMAIN SUSPECT?

In evaluating the *Gilmer* decision, commentators have found disturbing the Court's emphatic rejection of Gilmer's argument that the existence of unequal bargaining power between an employee and an employer should render that agreement invalid.[112] The Court stated that while validity of consent can be examined on a case-by-case basis, only agreements that are the result of fraud or overwhelming economic advantage would be unenforceable.[113] Despite the *Gilmer* Court's forceful statement on the matter, the question of whether unequal bargaining power should invalidate an agreement to arbitrate statutory claims has remained unsettled.

The question is of continuing importance because of unceasing calls for *Gilmer's* reversal on the basis that predispute agreements to arbitrate are unfair to employees. The primary basis for arguing that "*Gilmer* agreements" should be rejected is that they are not entered into voluntarily. Voluntariness in this context seems to be a euphemism for unequal bargaining power. Legislators argue that the agreements are not voluntary because the employee confronted with the agreement has no ability to reject it or negotiate its terms.[114] The employee's inability to make a legitimate choice stems from the fact that the agreement

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their disputes using external law in the collective bargaining context, the standard of review of the arbitrator's award would look remarkably similar. The main inquiry would be whether the arbitrator manifestly disregarded the applicable external law. *Gilmer* declared that the FAA's system of judicial review was sufficiently protective of employee's statutory rights. Thus, it would seem logical to hold that the *Enterprise Wheel's* system of judicial review is equally appropriate for review of statutory disputes resolved in grievance arbitration.

112. *See, e.g.*, Christine G. Cooper, *Where Are We Going With Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 220-21 (1992); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131, 153 (1996).

113. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).

114. *See* 140 CONG. REC. S4266-03 (1994) (statement of Sen. Feingold) (attacking predispute arbitration agreements because they are mandatory, as opposed to voluntary); *see also* Prudential Ins. Co. of America v. Lai, 42 F.3d 1299, 1299 (9th Cir. 1994) (requiring "knowing and voluntary" consent before enforcement of executory arbitration agreement); Sternlight, *supra* note 6, at 637. Some commentators reject the theory that predispute arbitration agreements are not voluntary. According to Professor Stephen Ware, for instance, such agreements are voluntary because the employee can always choose not to accept the position. *See* Ware, *supra* note 3.

is presented on a take-it-or-leave-it basis and the employee has no bargaining power to challenge the employer's provision. As a result, the argument goes, the agreement is mandatory and should not be enforceable.[115]

Thus, a question arises: if *Gilmer* is ultimately reversed by legislation, should that reversal have any effect on a proposed overruling of *Gardner-Denver*? Regardless of *Gilmer's* fate, *Gardner-Denver* should still be overruled. "*Gilmer* agreements" are objectionable primarily because the parties who agree to them have disparate negotiating incentives. Because the parties to a collective bargaining agreement have similar negotiating incentives, there is no basis for invalidating their agreement on the basis of unequal bargaining power.

In fact, it is this difference that actually provides greater reason to enforce "*Gardner-Denver* agreements" than "*Gilmer* agreements." Application of game theory to both the *Gilmer* and *Gardner-Denver* agreements highlights the important differences between a "*Gilmer* agreement" and a "*Gardner-Denver* agreement" and serves to explain why the perceived unfairness of the "*Gilmer* agreement" is not present in cases involving "*Gardner-Denver* agreements."

Arbitration of public law issues in a nonunion setting is troubling because the structural protections inherent in collective bargaining are not present.[116] Unlike interactions in the collective bargaining context, in which both the employer and the union are regular participants in negotiation and arbitration, only the employer is a "repeat player"[117] in individual employment arbitration. The employee, by contrast, is a one-shot player.[118] An analysis of the interactions between one-shotters and repeat players demonstrates that repeat players have a

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115. *See* 140 CONG. REC 4267 (daily ed. April 13, 1994) (statement of Sen. Feingold) ("It is simply unfair to require an employee to waive, in advance, his or her statutory right to seek redress in a court of law in exchange for employment or a promotion.").

116. *See* Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997).

117. A repeat player is typically an organization that frequently interacts with a particular institution or engages in certain behaviors, for example, commercial transactions or labor-management negotiations. Representative repeat players include unions and employers as well as large organizations like securities firms or insurance companies.

118. A lack of organization and sophistication characterizes the one-shot player. The one-shot player will usually have few opportunities to negotiate agreements and even fewer opportunities to litigate a claim. The one-shot player's limited exposure to negotiating and dispute resolution are defining aspects of his nature.

distinct and systematic advantage in interactions with one-shot players.[119]

By contrast, the possibility of overreaching will rarely play a part in negotiation and other interactions between repeat players. In such interactions, external nonlegal interests, such as each party's interest in maintaining a smooth working relationship, together with equivalent negotiating power, provides the incentive not to overreach.

A. *The Repeat Player Interacting With the One-Shot Player: Employer-Employee Negotiations*

The repeat player's greater experience, expertise and sophistication in contract negotiation will provide it significant advantages in interactions with one-shot players. For instance, in the dispute resolution context, the repeat player is likely to have a much better understanding of the risks and benefits of various dispute resolution mechanisms. Through this understanding, the repeat player may be able to choose the dispute resolution mechanism that best favors both parties, or one that is more favorable to it.[120] A one-shot player, by contrast, will be unable to evaluate intelligently the proposed clause, because of a lack of experience in dispute resolution and inadequate resources to investigate the benefits and drawbacks of the clause.

The repeat player may also enjoy significant benefits during the dispute resolution process. A greater understanding of the process and an ability to influence that process through repeated informal relations with the decisionmaker provides the repeat player notable advantages. Moreover, the repeat player's institutional memory will lead to more informed choices in selecting an arbitrator.[121] The one-shot player will not have a similar ability to influence the arbitrator and cannot afford to keep track of different arbitrators' decisions.

Finally, the repeat player may benefit from the fact that one-shot players, such as employees, tend to value improperly the

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119. *See Cole*, 105 F.3d at 1476.

120. *See* Alfred W. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REFORM 249, 254-55 (1983) (suggesting that in the nonunion setting, employers are relatively free to draft the arbitration clause, potentially unfairly narrowing the legal rights of the employees it will ultimately bind).

121. *See Cole*, 105 F.3d at 1476.

inclusion of an arbitration agreement in an employment contract. Employees suffer from judgmental bias as a result of their personal experiences;[122] that is, they systematically ignore or de-emphasize the likelihood that a low probability event will affect them because the event has not occurred in the past. In the employment context, this judgmental bias may cause an employee to misapprehend the risk that he will engage in litigation with his employer. This informational problem may lead the employee to demand lower wages and fewer benefits than if he was fully cognizant of the risks present in the proposed arbitral agreement.

In the context of a relationship between an employer and an employee, the employer's systematic advantage as a repeat player over the one-shot-player employee manifests as follows: Repeat players maintain their advantage during the negotiation of the arbitration agreement because of their greater experience and superior knowledge, as well as in the selection of the arbitrator and in the arbitration itself.

1. Arbitration agreement negotiation

If repeat players use contracts in their negotiations with one-shot players, they will attempt to maximize profits and benefits from economies of scale by using standardized forms presenting limited opportunity for negotiation of terms. When presented with a standardized agreement, a one-shot player can only attempt to gain concessions on the negotiable terms if he fully appreciates the disadvantages or costs arising from the nonnegotiable portions of the agreement. To appreciate the value of the nonnegotiable terms, the employee would need to read and understand the proposed agreement.[123] Yet the rational employee will not invest substantial resources in reading or analyzing a proposed agreement. Such behavior is rational because the expected benefits from undertaking such an

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122. Judgmental bias causes people to misassess the likelihood that a low probability event will occur. *See* Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 462 (David Kahneman et al. eds., 1982).

123. A repeat player who utilizes standardized forms neither expects nor wishes for the one-shot player it deals with to read the agreements. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1979) ("A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms.").

investigation would be significantly outweighed by the costs associated with such investigation. The expected benefits of reading and understanding the agreement may be reduced even further if the nonnegotiable terms concern the consequences of unlikely occurrences and appear in small print and/or are defined using obscure language.[124]

Empirical evidence supports the theory that the rational employee does not expend his limited resources reading and analyzing terms other than wages or benefits. According to David Charny, employees typically learn about crucial issues such as dispute resolution mechanisms, job safety or compensation a substantial amount of time after beginning employment.[125]

By contrast, a rational repeat player will have included the dispute resolution system of its choice in the employment agreement with a one-shot player because it will have developed an understanding of the different methods of dispute resolution available and identified which method affords the greatest benefit. The employer's greater understanding of the value of such clauses, together with its ability to maximize its surplus by determining which provisions should be included in the agreement, will enable the employer to structure the employment agreement in a way that furnishes it the most advantage.[126] Moreover, the rational employer's position is further enhanced by its ability to present the arbitration

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124. *See* Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 241-43 (1995). Eisenberg explains that rational form readers will remain ignorant of the terms because the cost of evaluating them is a waste of resources and the likelihood of the clause's relevance is low. *See id.* Perhaps more importantly, workers simply have other things on their minds. As one author put it, "'people want to eat first and consider legal and philosophical implications later.'" Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1387 (1991) (quoting 2 Brecht, *Dreigroschenoper* [The Three Penny Opera], *in* GESAMMELTE WERKE: STUCKE [Collected Works] 457 (1967)).

125. *See* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 417 (1990). Charny acknowledges that empirical evidence regarding employees' knowledge about the jobs they accept and the reasons why they accept them is sparse. *Id.* at 417 n.144. Charny suggests that the evidence available indicates that "workers are generally poorly informed and learn most relevant information only after substantial experience at the job." *Id.* (citing W. KIP VISCUSI, RISK BY CHOICE 63-69 (1986)); *see also* W. Kip Viscusi & Charles O'Connor, *Hazard Warnings for Workplace Risks: Effect on Risk Perceptions, Wage Rates, and Turnover*, *in* LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION 98, 101-09 (W. Kip Viscusi & Wesley A. Magat eds., 1987).

126. *See* Charny, *supra* note 125, at 418.

agreement on a take-it-or-leave-it basis. If an employee actually understands the arbitration provision and attempts to negotiate the elimination of the provision, the employer will simply refuse and make a job offer to someone else.

An analysis of arbitration demonstrates that the process of negotiation is not the only area where repeat players have the potential to obtain significant advantage.[127] The employer's repeat player status also creates a systematic bias in its favor in the arbitration proceedings. The bias results from the employer's incentive to foster relations with the arbitrator and create a precedent system for tracking arbitration decisions.

2. Interaction with the arbitrator

An individual using arbitration to resolve disputes has the incentive to compile information about potential arbitrators and their past decisions and develop a relationship with those arbitrators. The former will allow better predictability of arbitral outcomes. The latter will potentially allow the individual to influence the outcome of the arbitration. The employer's position as a repeat player enables it to accomplish both of these goals.

It makes economic sense for the repeat player to monitor arbitrators' decisions and acquire advance intelligence about each arbitrator because it is likely that it will use that information repeatedly in the future. Not surprisingly, it is common for large organizations and law firms that represent those organizations to keep databases containing extensive background information on each potential arbitrator, including how the arbitrator ruled in a number of cases, as well as the quality of his decision.[128]

For the same reason, the repeat player will take the opportunity to develop facilitative informal relations with the

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127. *See* Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1476 (D.C. Cir. 1997); Lewis Maltby, *Paradise Lost: How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 4-5 (1994).

128. One large, management-side, labor law firm in Chicago maintains a database that indicates whether an arbitrator found in favor of management or union, describes the issue in dispute and offers the participating attorney's opinion regarding the quality of the decision. Other resources containing information about arbitrators exist. The Labor Arbitration Information Service (LAIS) provides information regarding an arbitrator's past decisions, including the percentage of times the arbitrator has found in favor of management and the union. The LAIS also indicates the arbitrator's percentages in discipline and nondiscipline cases and then considers the arbitrator's decisions individually, providing a summary of the subjects at issue in the arbitration.

arbitrator, investing resources in attending events or conferences where the arbitrator will be present in order to establish a friendly relationship with the arbitrator that may result in bias in favor of the employer in the future.[129]

A one-shot player who devoted any substantial time and resources to obtaining information about arbitrators or developing relationships with them would, by contrast, be acting irrationally because he would never have use for the information again.[130]

The structure of the current arbitrator selection system does not eliminate the one-shot employee's disadvantages. Quite to the contrary, the current system provides significant benefits to the employer, at the expense of the employee. The arbitrator is likely to feel pressure to find in favor of the permanent party, the employer, in most cases because industry members will more frequently appear before the arbitrator. In addition, in many employment arbitrations the employer pays the arbitrator's entire fee.[131] The sense that the employer "owns" the process as a result may influence the arbitrator's ultimate resolution of the

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129. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Chance*, 9 LAW & SOC'Y REV. 95, 110-12 (1974).

130. Although potential plaintiffs would be acting irrationally if they attempted to obtain similar information, the question is why a business or law firm has failed to develop similar databases for plaintiffs' use. The response is simply that it would be economically inefficient to expend the kind of resources necessary to obtain such information unless there was some assurance that plaintiffs would choose to pay the collector of the information for use of that information. In other words, as long as a business or law firm would have no assurance that they would receive a return on their investment, it would be irrational for them to compile such a resource. Employers and their law firms, on the other hand, do have an incentive to compile such information because a large employer will typically hire one law firm to handle all of its employment lawsuits.

Similarly, there is little incentive for plaintiffs' lawyers to collect and maintain a database containing information about arbitrators. While such information would make a plaintiff's lawyer more marketable and would allow him to increase his fees if the information made her more successful, an investment in that information might not be fruitful because employees are one-shot players in the legal hiring world just as they are in the dispute resolution world.

131. *See* Tia Schneider Denenberg & R.V. Denenberg, *The Future of the Workplace Dispute Resolver*, 49 DISP. RESOL. J. 48, 50 (1994). In a recent case, the D.C. Circuit held that it is preferable to have employers pay for the entire process. *See Cole*, 105 F.3d 1465. The *Cole* court suggested that *Gilmer* might not have approved a program of mandatory arbitration of statutory claims in the "absence of an agreement to pay arbitrators' fees." *Id.* at 1484. Moreover, the *Cole* court rejected the theory that a repeat player has the ability, if it pays for the process, to control it. The *Cole* court stated, "[i]t is doubtful that arbitrators care about who pays them, so long as they are paid for their services." *Id.*

case. An arbitrator who regularly finds in favor of complaining employees may be sure that the employer will be reluctant to rehire her in the future.

Thus, the employer maintains significant advantages over the employee in structuring and executing a dispute resolution clause.[132] On that basis, a persuasive argument can be made that predispute arbitration agreements between employers and employees should not be enforced.[133] Yet the Supreme Court firmly rejected this argument in *Gilmer*, holding that, as a general rule, statutory claims are subject to binding arbitration, at least outside the collective bargaining context. Despite the perceived unfairness such agreements generate, the arbitral agreements of the unrepresented will be enforced.

B. The Repeat Player Interacting With the Repeat Player: Union-Management Relations

As the D.C. Circuit recently acknowledged, arbitration in the collective bargaining context is not as troubling as arbitration between employers and individual employees because the structure of the negotiation and arbitral process does not confer benefits on one party at the expense of the other.[134] In union-management relations, both parties are frequent participants, or "repeat players" in negotiation and arbitration.

1. Drafting the arbitration agreement

The dynamics of the relationship between two repeat players temper many of the defects present in the relationship between

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132. Unrepresented employees suffer from an additional disadvantage: judgmental bias. Judgmental bias causes individuals to misperceive the likelihood that an event that rarely occurs and that they have never experienced will occur again in the future. *See* Slovic et al., *supra* note 122, at 468. This bias, together with most people's belief that they are immune from hazards, results in an inability to perceive accurately the likelihood that a low probability event will occur. *See id.*

Applying the judgmental bias theory to the employment area yields the following result: when the employee reviews his employment agreement and encounters an arbitration clause that requires him to arbitrate all disputes arising out his employment, his judgmental bias, developed from his personal experiences, is likely to render him unable to place the proper value on the clause. In other words, the employee is unable to value the clause properly because he will tend to discount the probability that he will engage in a dispute with his employer. After all, he has never had a dispute with an employer in the past and he knows that, in general, such disputes happen to other people.

133. *See generally* Cole, *supra* note 22.

134. *See Cole*, 105 F.3d at 1476.

a repeat player and a one-shot player. In repeat player relationships, both actors should have similar experience and expertise in negotiation and dispute resolution. Economies of scale do not favor either party; nor does one party have a greater understanding of the dispute resolution process than the other. More importantly, in a transaction involving two repeat players, both parties will have an economic incentive to avoid self-serving behavior. In most instances nonlegal sanctions, such as the desire to maintain a profitable business relationship with the other party, induces the repeat player to keep its commitments. These nonlegal sanctions, together with the awareness that both parties have similar knowledge and access to information about negotiation and dispute resolution, motivate the drafting party to apportion fairly the agreement's surplus.

The drafting party creates the agreement with the knowledge that an experienced negotiator will review it. As a result, the party presenting the first draft is aware that drafting an unfair or oppressive agreement may result in the kind of ill will that might ultimately trigger the relationship's demise. Further, even if the self-serving behavior went undetected initially, the self-serving party would have difficulty dealing with the other party throughout the life of the agreement and would certainly face tough opposition in subsequent negotiations. Thus, in drafting an agreement with another repeat player, the drafter has the proper incentives both to draft an efficient contract, and to distribute equitably the economic benefits.

In game theory terms, the strategy that motivates a repeat player engaged in continued interactions with other repeat players to avoid overreaching is the game of "tit for tat."[135] Using the "tit for tat" strategy, a party's optimal strategy is to begin by cooperating and continue to cooperate as long as one's opponent does. If one's opponent engages in an act of betrayal, the affected party should retaliate. This strategy discourages noncooperative behavior while permitting a pattern of mutual cooperation to develop. Thus, "tit for tat" is the best strategy in a repeat-move game involving repeat players.[136]

Applying this theory to the union-management relationship yields predictable results. First, the union is a repository of

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135. *See generally* ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION (1984).

136. Such strategy is not available to a one-shot player engaged in a transaction with a repeat player because the one-shot player has only one opportunity to negotiate.

information about both the benefits particular contractual terms provide and the history of the negotiating relationship. The employer has no incentive to propose a one-sided provision, because it is quite probable that the union will fully appreciate the disadvantages and costs associated with such a provision and will reject it. Unlike the one-shot player who would be irrational to invest substantial resources in reading and analyzing a proposed agreement, it is perfectly rational for the union to read and analyze each and every one of the provisions of a proposed agreement. The equal bargaining power present on both sides reduces the likelihood that either side will attempt to garner a disproportionate benefit from the agreement. Moreover, if an employer, for example, attempts to capture the surplus, the union, as a repeat player, is capable of retaliating against the breaching employer by playing "tit for tat" either during the life of the agreement or during the next round of negotiations.

Thus, both sides are conscious of the need to avoid overreaching. Yet on those occasions when overreaching does occur, repeat players prefer not to engage in formal litigation with each other. Because formal litigation might jeopardize their ongoing relationship, the parties prefer an informal dispute resolution method that is less disruptive and which elevates the interest in maintaining the relationship over the need for a "correct" resolution of the dispute. In most repeat player relationships the preferred method of dispute resolution is arbitration.

2. Dispute resolution between repeat players

A study of repeat player behavior establishes that arbitration is the dispute resolution mechanism of choice for a repeat player engaged in a dispute with another repeat player.[137] According to Galanter, repeat players dealing with other repeat players have the expectation that they are dealing and will continue to deal with each other frequently.[138] Because both parties are interested in "continued mutually beneficial interaction," they will prefer to use informal controls to govern their relations. The use of informal controls is preferable because the potential loss of their continuing relationship outweighs any official remedy

137. *See* Galanter, *supra* note 129, at 110.
138. *See id.*

available.[139] Thus, as is quite well known in labor-management circles, unions and employers prefer a dispute resolution form "detached from official sanctions."[140]

Arbitration provides just such detachment. Arbitration is typically conducted in private. Moreover, the parties have considerable freedom in designing the procedures governing their arbitration because no formal rules govern the proceedings. Because parties can customize the proceedings to suit their interests, arbitration also has the potential for providing an acceptable result at a low cost. As a result, arbitration limits wealth transfers between parties, enabling the parties to retain resources rather than expending them on lengthy litigation that does not produce income for either side. Moreover, for repeat players, it is irrelevant that errors may occur in determining the outcome of a particular dispute, as long as no systematic bias presents itself. Repeat players are aware that wealth effects should balance out over the long term.

As repeat players, both union and management also have an interest in avoiding the unsettling impact of constant litigation. Because the two players raise their interest in a continuous working relationship above the need for obtaining a correct answer to a dispute, they prefer arbitration to litigation. As Julius Getman noted: "[T]he feeling that awards are likely to be equalized over the long run and that erroneous awards can be dealt with through negotiation, all have contributed to the common labor-relations practice of routinely obeying awards, even those that the losing side considers erroneous."[141] The method for dealing with awards that are perceived to be unfair to the union or the employer is not reprisal or disobedience, both of which might cause negotiation difficulties in the future, but rather simply the decision not to hire the offending arbitrator again in the future.

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139. *See* Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 281 (1990).

140. *See* Galanter, *supra* note 129, at 110.

141. Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 922-23 (1979).

Neither should the issue of judgmental bias present a problem in union-management interactions.[142] Because the union is a professional negotiator, it will have engaged in frequent dispute resolution and will understand fully the needs of its constituents, the employees. Thus, the union is in a much better position, in fact the same position as the employer, to resist the judgmental biases that plague unrepresented employees. Thus, there is no reason to suspect that unions are at a disadvantage if they select arbitration as a means for resolving disputes. Rather, the contrary is true; courts should presume that arbitration protects the represented employee's rights, whether those rights are contractual or statutory.

IV. CONCLUSION

Predispute arbitration agreements between employers and employees are unquestionably enforceable following *Gilmer v. Interstate/Johnson Lane Corporation*. By contrast, the Supreme Court has been reluctant to enforce similar agreements in the unionized workplace, citing *Alexander v. Gardner-Denver*, for the proposition that such agreements are not enforceable.

Over the past twenty years, however, the Supreme Court and lower federal courts have articulated an increasingly favorable attitude toward the use of arbitration to resolve statutory disputes. The Court has also repeatedly announced that the arbitral forum is a perfectly adequate venue for the resolution of statutory rights. This new vision of arbitration, when considered in conjunction with the erosion of *Gardner-Denver's* foundation, mandates a re-evaluation and reversal of *Gardner-Denver*. A number of lower courts have already begun the movement, placing collectively-bargained agreements to resolve statutory disputes using external antidiscrimination laws on equal footing with "*Gilmer* agreements." While some differences between the two types of agreements remain, these are distinctions without a difference that should be acknowledged as such and rejected. Furthermore, even if *Gilmer* were ultimately overruled or reversed by legislation because the employee's agreement to arbitrate is viewed as involuntary and therefore unfair, *Gardner-*

142. *See* Charny, *supra* note 125, at 418 ("As a professional negotiator with an inherently adversarial . . . stance, the union may resist the cognitive distortions that may plague individual workers.").

Denver should still be overturned because "*Gardner-Denver* agreements" are unquestionably voluntary and the result of exactly the kind of vigorous, two-sided negotiation that eliminates questions of compulsion.