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COMMENTS

The Assertion of Statutory Rights Under FLSA and OSHA: Expand or Limit the *Gardner-Denver* Rationale

I. INTRODUCTION

Over two decades ago the United States Supreme Court in the famous *Steelworkers* Trilogy[1] enunciated a federal policy favoring arbitration of labor disputes. Both the Supreme Court[2] and the National Labor Relations Board[3] (NLRB) on different occasions have emphasized the importance of collective bargaining agreements and arbitration clauses by referring labor disputes arising under such agreements back to the parties for arbitration. For a number of years this presumption of arbitrability was thought to govern labor disputes of almost any kind that were covered under a valid collective bargaining agreement. The Supreme Court, however, altered the traditional notions concerning deferral and arbitration when it held in *Alexander v. Gardner-Denver Co.*[4] that the presumption of arbitrability does not extend to Title VII[5] cases.

In the aftermath of *Gardner-Denver,* differences of opinion have arisen among the lower federal courts as to whether the *Gardner-Denver* rationale should be strictly limited to Title VII cases or expanded to encompass labor disputes arising under other legislation, specifically the Fair Labor Standards Act of 1938[6] (FLSA) and the Occupational Safety and Health Act of 1970[7] (OSHA). Some lower federal courts have relied upon *Gardner-Denver* to permit plaintiffs to exercise FLSA rights

1. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).
2. *See, e.g.,* Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970).
3. *See, e.g.,* Collyer Insulated Wire Co., 192 N.L.R.B. 837 (1971).
4. 415 U.S. 36 (1974).
5. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976).
6. 29 U.S.C. §§ 201-219 (1976).
7. 29 U.S.C. §§ 651-678 (1976).

without first submitting to grievance-arbitration procedures[8] and to exercise OSHA rights following an aribtration award.[9] In contrast, other courts have refused to extend the *Gardner-Denver* rationale to FLSA cases.[10] This Comment focuses on whether the presumption of arbitrability should remain a general rule with a limited Title VII exception or whether the statutorily created rights in FLSA and OSHA should exist independent of grievance-arbitration procedures, thereby warranting *de novo* consideration. The conclusion reached here is that the presumption of arbitrability is displaced where Congress expressly creates independent, statutory rights. Consequently, FLSA and OSHA rights should not be subordinated to the grievance-arbitration machinery of collective bargaining agreements.

II. BACKGROUND

A. *Presumption of Arbitrability*

The federal policy favoring arbitration of labor disputes, according to the Supreme Court, is rooted in "congressional command."[11] The Labor Management Relations Act (LMRA) provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[12] The Supreme Court in *Textile Workers Union v. Lincoln Mills*[13] stated that the purpose behind this policy was to promote industrial peace and concluded that grievance-arbitration provisions in collective bargaining agreements further the achievement of this objective.[14] The Court's most emphatic pronouncement on the

8. Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975).

9. Marshall v. N.L. Indus., Inc., 618 F.2d 1220 (7th Cir. 1980).

10. Barrentine v. Arkansas-Best Freight Sys., Inc., 615 F.2d 1194 (8th Cir.), *cert. granted*, 101 S. Ct. 70 (1980); Satterwhite v. United Parcel Serv., Inc., 496 F.2d 448 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

11. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 377 (1974). The Court identified section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d) (1976), as the anchor for this "congressional command." Section 203, however, relates specifically to the functions of the Federal Mediation and Conciliation Service. Subsection (d) declares that "a method agreed upon by the parties" is the "desirable method for settlement of grievance disputes," and that the Federal Mediation and Conciliation Service is available "only as a last resort."

12. 29 U.S.C. § 173(d) (1976) (this provision relates to the functions of the Federal Mediation and Conciliation Service).

13. 353 U.S. 448 (1957).

14. *Id.* at 455.

subject, which established the well-known presumption of arbitrability, came in the 1960 *Steelworkers* Trilogy:[15] "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[16] Although the Court did explain that this policy favoring grievance-arbitration procedures is essential to our "system of industrial self-government,"[17] it never revealed the specific statutory basis of the policy.[18] Instead the Court emphasized that arbitration provides a body of private law to deal with unforeseeable problems that may arise, and also permits sufficient flexibility to accommodate the different interests and needs of the parties.[19]

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15. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

16. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (footnote omitted).

17. *Id.* at 581.

18. Nowhere in the three decisions comprising the *Steelworkers* Trilogy does the Court cite a legislative enactment expressly declaring a federal policy favoring arbitration of labor disputes. It is true that the Court in *Gateway Coal*, 414 U.S. 368, 377 (1974), relied upon section 203(d) of the LMRA, 29 U.S.C. § 173(d) (1976), as the statutory foundation for this federal policy; however, *Gateway Coal* was decided in 1974 and the *Steelworkers* Trilogy was decided fourteen years earlier. If section 203(d), which was enacted in 1947, in fact served as the statutory basis for the policy, it is difficult to explain why such an important point was not discussed or even cited in the Court's definitive *Steelworkers* Trilogy.

19. The Court elaborated:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

363 U.S. at 581-82.

B. The Deferral Doctrine

For many years the NLRB has adhered to a policy of deferring to the arbitral process. It first announced in *Spielberg Manufacturing Co.*[20] its minimum standards test for deference to arbitration awards. The NLRB stated that it would recognize an arbitrator's award provided "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."[21] In addition to these three requirements, the NLRB in subsequent cases added a fourth criterion that the arbitrator must have considered the question that formed the basis for the unfair labor practice brought before the NLRB.[22] The *Spielberg* deferral policy received favorable comment from the Supreme Court[23] and began finding acceptance in some pre-arbitral situations.[24]

The NLRB added a significant dimension to the deferral doctrine when it held in *Collyer Insulated Wire*[25] that disputes arising out of the meaning or application of a collective bargain-

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20. 112 N.L.R.B. 1080 (1955).

21. *Id.* at 1082.

22. Yourga Trucking, Inc., 197 N.L.R.B. 928 (1972); Airco Indus. Gases—Pacific, 195 N.L.R.B. 676 (1972); Raytheon Co., 140 N.L.R.B. 883 (1963), *enforcement denied on other grounds*, 326 F.2d 471 (1st Cir. 1964); Monsanto Chem. Co., 130 N.L.R.B. 1097 (1961).

23. The Court in Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), referred to the *Spielberg* deferral policy and then approvingly quoted this statement of the NLRB:

> There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.
>
> The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective. *International Harvester Co.*, 138 N.L.R.B. 923, 925-26.

Id. at 271.

24. *See* Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969) (NLRB deferred action on alleged violations of § 8(a)(5) of the National Labor Relations Act before parties had even resorted to the grievance-arbitration procedures of their collective bargaining agreement); Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963) (NLRB deferred action on alleged § 8(a)(3) violations pending completion of arbitration ordered by a district court).

25. 192 N.L.R.B. 837 (1971).

ing agreement that have not been arbitrated may be referred by the NLRB to arbitration under the provisions of the parties' agreement. In *Collyer* a manufacturer and seller of insulated wire cable was charged with violating its duty as an employer to bargain under section 8(a)(5) of the National Labor Relations Act[26] (NLRA) for allegedly having made unilateral changes in working conditions and wages.[27] Although the contract between the parties permitted the employer to adjust the wages of its employees during the contract term and clearly provided that grievance-arbitration processes would be the exclusive forum for resolving contract disputes, the union had not invoked the grievance-arbitration machinery before bringing to the NLRB its unfair labor practice charge against the employer. The NLRB concluded that the circumstances in *Collyer* "weigh[ed] heavily in favor of deferral,"[28] and offered several reasons to support its decision:

> [T]his dispute arises within the confines of a long and productive collective-bargaining relationship. The parties before us have, for 35 years, mutually and voluntarily resolved the conflicts which inhere in collective bargaining. Here, as there, no claim is made of enmity by [the employer] to employees' exercise of protected rights. [The employer] here has credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace this dispute.
>
> Finally, here, as in *Schlitz,* the dispute is one eminently well suited to resolution by arbitration. The contract and its meaning in present circumstances lie at the center of this dispute.[29]

In refutation of a dissenting board member's characterization of deferral as instituting "compulsory arbitration" and allowing parties to be stripped of statutory rights,[30] the NLRB

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26. 29 U.S.C. §§ 151-169 (1976). Section 8 (a)(5) of the NLRA is codified at 29 U.S.C. § 158(a)(5) (1976).

27. The complaint alleged that the employer had unilaterally increased the wage rates for specific skilled maintenance employees, directed that a single maintenance machinist rather than a team of two perform the worm gear removal and cleaning, and provided new wage rates for extruder operators. 192 N.L.R.B. at 837.

28. *Id.* at 840. The NLRB also noted that neither the courts of appeals nor the Supreme Court had ever questioned its authority to exercise discretion and defer to the arbitral process.

29. *Id.* at 842.

30. *Id.* at 849 (Fanning, Member, dissenting).

majority stated that it was not compelling arbitration but "merely giving full effect to [the parties'] own voluntary agreements to submit all such disputes to arbitration, rather than permitting such agreements to be side-stepped and permitting the substitution of our processes, a forum not contemplated by their own agreement."[31] Terming its decision a "developmental step" in the treatment of pre-arbitral deferral cases, the NLRB dismissed the complaint but stated that it would retain jurisdiction for the sole purpose of insuring that the contractual grievance-arbitration procedure resolved the dispute in harmony with the *Spielberg* standards.[32]

The year following the NLRB's decision in *Collyer*, the Fifth Circuit Court of Appeals in *Rios v. Reynolds Metals Co.*[33] formulated a more rigorous version of the *Spielberg* deferral policy for arbitration awards resolving Title VII disputes:

> First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt

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31. 192 N.L.R.B. at 842. The NLRB majority answered the "stripping parties of statutory rights" argument by stating:

> When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function. The long and successful functioning of grievance and arbitration procedures suggests to us that in the overwhelming majority of cases, the utilization of such means will resolve the underlying dispute and make it unnecessary for either party to follow the more formal, and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute. At the same time, by our reservation of jurisdiction, *infra*, we guarantee that there will be no sacrifice of statutory rights if the parties' own processes fail to function in a manner consistent with the dictates of our law. This approach, we believe, effectuates the salutary policy announced in *Spielberg*. . . .

Id. at 842-43.

32. The NLRB retained its right to exercise jurisdiction upon a timely motion for reconsideration of the complaint based on a showing that the dispute was not amicably settled or not promptly submitted to arbitration, or that the grievance-arbitration procedure had not been fair or regular or had arrived at a result repugnant to the NLRA. *Id.* at 843.

33. 467 F.2d 54 (5th Cir. 1972).

adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities.[34]

The Supreme Court subsequently held in *Alexander v. Gardner-Denver Co.*[35] that a policy of deferral by federal courts to prior arbitral decisions in employment discrimination cases would not comport with Title VII congressional objectives,[36] and accordingly rejected the *Rios* deferral standards.

Concluding that *Gardner-Denver* only applied to cases involving claims of race or sex discrimination, the NLRB made clear in *Electronic Reproduction Service Corp.*[37] that it would continue to defer to arbitration under *Collyer* and *Spielberg.*[38] Although the *Collyer* deferral doctrine had been extended to NLRA section 8(a)(3) discrimination cases prior to *Gardner-Denver,*[39] *Collyer* was subsequently trimmed back to its original NLRA section 8(a)(5) dimensions in *General American Transportation Corp.*[40] In contrast to the retrenchment of *Collyer*

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34. *Id.* at 58. The court also ruled that the burden of proof for establishing that these conditions were met would be upon the respondent, not the claimant. *Id.*

35. 415 U.S. 36 (1974).

36. *Id.* at 55-60.

37. 213 N.L.R.B. 758 (1974).

38. The NLRB majority concluded that its position was consistent with recent Supreme Court pronouncements in *Gardner-Denver* and William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12 (1974). In *Arnold* the Court approvingly quoted the NLRB's following language from *Collyer:*

> [A]n industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function. . . . We believe it to be consistent with the fundamental objectives of Federal law to require the parties . . . to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed-upon procedures.

417 U.S. at 16-17 (quoting Collyer Insulated Wire, 192 N.L.R.B. 837, 842-43 (1971)).

39. National Radio Co., 198 N.L.R.B. 527 (1972).

40. 228 N.L.R.B. 808 (1977). In a three-to-two decision, then Chairperson Murphy cast the crucial vote and wrote in part:

> In cases alleging violations of Section 8(a)(5) and 8(b)(3), based on conduct assertedly in derogation of the contract, the principal issue is whether the complained-of conduct is permitted by the parties' contract. Such issues are eminently suited to the arbitral process, and resolution of the contract issue by an arbitrator will, as a rule, dispose of the unfair labor practice issue. On the other hand, in cases alleging violations of Section 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2), although arguably also involving a contract violation, the determi-

pre-arbitral deference, the *Spielberg* doctrine was recently expanded by the Third Circuit in *NLRB v. Pincus Bros., Inc.—Maxwell.*[41] In *Pincus Bros.* the court denied enforcement of an NLRB reinstatement order and held that the NLRB's refusal to defer to an arbitration award, which had ruled that the employee had been terminated for cause, was an abuse of discretion.[42] The court further held that "it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy"[43] and that "where there are two arguable interpretations of an arbitration award, one permissible and one impermissible, the Board must defer to the decision rendered by the arbitrator."[44] The Third Circuit's decision

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native issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act. In these situations, an arbitrator's resolution of the contract issue will not dispose of the unfair labor practice allegation. Nor is the arbitration process suited for resolving employee complaints of discrimination under Section 7.

Id. at 810-11 (footnotes omitted). Murphy did indicate in *General American,* however, that she would follow *Spielberg* and uphold arbitration awards where the employee had voluntarily submitted to the arbitration or where an NLRB regional office had deferred to the award pursuant to the prevailing *Collyer* doctrine. Murphy then joined the two dissenting Board members of *General American* in Roy Robinson Chevrolet, 228 N.L.R.B. No. 103 (1977), to reaffirm the NLRB's deferral to arbitration policy in NLRA § 8(a)(5) cases.

41. 620 F.2d 367 (3d Cir. 1980).

42. *Id.* at 370. The discharged employee in *Pincus Bros.,* according to the arbitrator's decision, was terminated for cause because she had abused working time and had written and distributed a leaflet that was unfairly critical of employment conditions, the employer, and the employer's product. While the employee's grievance was pending, she filed a charge with the NLRB, alleging that she had been discharged for having engaged in concerted activity. The General Counsel issued a complaint and submitted to the NLRB the question whether the NLRB should defer to the arbitrator's award. An NLRB panel decided not to defer since it concluded that the employee had been discharged for having engaged in protected activity. After sending the matter to an administrative law judge for a hearing, the NLRB adopted the administrative law judge's findings and conclusions that the employer had committed an unfair labor practice and ordered the employee's reinstatement. The NLRB then sought enforcement of its reinstatement order by the Third Circuit. *Id.* at 370-71.

43. *Id.* at 374. The court reasoned that NLRB deference to the arbitral process, "especially when the award has already been rendered and it is arguably consistent with Board policy, will effectuate the intent of the parties in the collective bargaining agreement and avoid the time, expense, and inconvenience of duplicative proceedings." *Id.* In addition, the court pointed out that when the parties agreed to establish and follow arbitration procedures, they voluntarily accepted the risk that the results of arbitration might differ from the NLRB's resolution of disputes. *Id.*

44. *Id.* at 377. The court went to some length to articulate four reasons why the

in *Pincus Bros.* establishes a new high-water mark for the doctrine of deferral. It should be remembered, however, that this recent hospitable accommodation by one court of appeals is at present limited to section 8(a)(1) cases under the NLRA.

In any event, the contours of the deferral doctrine remain in flux. Spirited debate continues among commentators about the appropriate role and scope of the deferral doctrine.[45]

III. Title VII Exception to the Deferral Doctrine: *Gardner-Denver*

The Supreme Court placed an important limit on the expanding doctrine of deferral when it decided *Alexander v. Gardner-Denver Co.*[46] The Court held that an employee's Title VII right to a trial *de novo* is not foreclosed because his claim was earlier submitted to arbitration pursuant to the grievance-arbitration provisions of a collective bargaining agreement. In *Gardner-Denver,* the petitioner, a black who was training as a drill operator, was discharged for allegedly producing too many defective parts. Petitioner invoked the grievance-arbitration machinery of the collective bargaining agreement, which arguably covered the dispute, to challenge his discharge. Although petitioner first contended in the final pre-arbitration step that his discharge was racially motivated, the arbitrator nevertheless ruled—without reference to the racial discrimination claim—"that petitioner had been 'discharged for just cause.' "[47] The Equal Employment Opportunity Commission (EEOC),

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arbitrator's decision that the employee's conduct constituted unprotected activity was arguably correct: (1) Employees lose the protection of the NLRA when they make deliberate or malicious false statements, (2) the employee's actions may have constituted unprotected disloyalty, (3) activity is unprotected if it is inconsistent with fundamental NLRA policy to promote collective bargaining and industrial stability, and (4) the employee was not engaged in protected, concerted activity because she was acting alone. *Id.* at 375-77.

45. *See, e.g.,* Christensen, *Private Judges, Public Rights: The Role of Arbitration in the Enforcement of the National Labor Relations Act,* in The Future of Labor Arbitration in America 49 (J. Correge, V. Hughes & M. Stone eds. 1976); Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty,* 49 Ind. L.J. 57 (1973); Zimmer, *Wired for Collyer: Rationalizing NLRB and Arbitration Jurisdiction,* 48 Ind. L.J. 141 (1973).

46. 415 U.S. 36 (1974).

47. *Id.* at 42. At the arbitration hearing, petitioner's union introduced a letter from him stating that he was "knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I . . . have been the target of preferential discriminatory treatment." *Id.* A union representative also gave testimony that the company's customary procedure in the case of unsatisfactory trainee drill operators was to return them to their former positions. *Id.*

which had received petitioner's charge of racial discrimination prior to the arbitration hearing, subsequently informed petitioner that it had no reasonable cause to believe that a violation of Title VII had occurred.[48] Petitioner's private suit was dismissed by the district court following the granting of the employer's motion for summary judgment.[49] On appeal the Tenth Circuit affirmed *per curiam*. The Supreme Court in a unanimous opinion, however, reversed the two lower courts.

There were several conclusions that the Supreme Court could have reached in *Gardner-Denver*. It could have affirmed the Tenth Circuit's opinion, which adopted a preclusion rule[50]—*i.e.*, an employee's prior submission of a claim to final arbitration precludes *de novo* consideration of the claim in the federal courts. At the other extreme, the Court could have adopted a rule ensuring unconditional *de novo* consideration of an employee's Title VII claim. Finally, the Court could have selected a compromise position incorporating the deferral doctrine in either a lax (*Spielberg*) or a more rigid (*Rios*) form. Instead, the Court fashioned a novel approach. Until the last paragraph of the opinion, every indicator suggested that the Court had totally rejected the deferral doctrine and adopted a pure *de novo* consideration rule. Without explanation, however, the Court simply directed that "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[51] The accompanying footnote, number twenty-one, merely adds:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of dis-

48. *Id.* at 43. The EEOC later informed petitioner of his right to bring suit in federal district court within 30 days. *Id.*

49. *Id.* at 43. The district court, relying upon petitioner's affidavit, which stated that he had raised the racial discrimination claim in the arbitration hearing, found that the claim had been presented to the arbitrator and resolved adversely to petitioner. The court then held under an election of remedies notion that petitioner was bound by the arbitration award and precluded from bringing suit under Title VII because he had voluntarily elected to pursue his grievance by arbitration. *Id.*

50. *Id.* at 54-55.

51. *Id.* at 60.

> crimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.[52]

Professor Harry T. Edwards has noted that "[d]espite the emphasis in *Gardner-Denver* on maintaining full federal adjudication of Title VII rights, footnote twenty-one seems to offer lower courts a route to de facto deferral to arbitral awards."[53] However, it is still too early to detect a trend in the federal judiciary on the weight being accorded arbitral decisions under footnote twenty-one.[54]

An understanding of the Court's analysis and rationale in *Gardner-Denver* is essential for the purposes of this Comment since the central inquiry here is whether the Court's *de novo* consideration approach, which allows the arbitration decision to be admissible as evidence, should also govern statutory rights arising under FLSA and OSHA. The Court began from the premise that Title VII does not directly address "the relationship between federal courts and the grievance-arbitration machinery of collective bargaining agreements."[55] In the absence of express congressional guidance, the Court relied on four main considerations in reaching its decision: (1) Congress vested the federal courts with plenary power for enforcement of Title VII rights, (2) Congress intended to accord parallel or overlapping remedies against discrimination, (3) arbitrators have authority to resolve

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52. *Id.* at 60 n.21. For a detailed analysis of the Court's admissible as evidence doctrine, see Richards, Alexander v. Gardner-Denver: *A Threat to Title VII Rights*, 29 ARK. L. REV. & BAR ASSOC. J. 129 (1975).

53. Edwards, *Labor Arbitration At The Crossroads: The "Common Law of the Shop" v. External Law*, 32 ARB. J. 65, 77 (1977) [hereinafter cited as *At the Crossroads*].

54. In Strittmatter v. Goodyear Tire & Rubber Co., 496 F.2d 1244 (6th Cir. 1974), the Sixth Circuit remanded under *Gardner-Denver* without referring to footnote 21: "*Alexander* requires us to reverse the judgment of the District Court and to remand for a trial *de novo*, in which the arbitral award may be admitted in evidence and accorded such weight as the Court deems appropriate." *Id.* at 1245. The Fifth Circuit in Jones v. Supreme Sugar Refinery, 493 F.2d 1354 (5th Cir. 1974), simply remanded by citing *Gardner-Denver* and not commenting on the weight to be accorded.

55. 415 U.S. at 47.

only contractual rights, not Title VII substantive rights, even if such rights are duplicative, and (4) arbitral processes are comparatively inferior to judicial processes in protecting Title VII rights.

With respect to the first consideration the Court stressed several times in its opinion that Congress had assigned plenary powers to the federal courts to secure compliance with Title VII. Broad remedial powers were entrusted to the federal courts in part because the EEOC does not possess direct powers of enforcement.[56]

Secondly, the Court concluded that because Congress' policy against discrimination was of the "highest priority," its legislation demonstrated a general intent to provide parallel or overlapping remedies.[57] Accordingly, the Court rejected the lower courts' reliance on the doctrines of election of remedies and waiver[58]—doctrines that necessarily limit the scope of relief available to a claimant.

As a third consideration the Court determined that an arbitrator's authority extends to only the resolution of contractual rights, not statutory rights, even if these rights are similar to those protected under Title VII.[59] In other words, contractual and statutory rights have "legally independent origins," and the "distinctly separate nature" of these rights is not removed just because the same factual setting is involved. The arbitrator's grant of authority to resolve disputes is rooted solely in the collective bargaining agreement itself and his decision must be based on a fair interpretation of the terms and application of that agreement.[60]

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56. *Id.* at 44. It is beyond the power of the EEOC to adjudicate claims or impose administrative sanctions. Plenary enforcement powers for Title VII are vested in the federal courts. 42 U.S.C. §§ 2000e-5(f), & (g) (1976) authorize federal courts to provide injunctive relief or other such affirmative action as may be required to remedy the effects of discriminatory employment practices.

57. *Id.* at 47. For examples of other statutory relief available, see 42 U.S.C. § 1981 (1976) (Civil Rights Act of 1866); 42 U.S.C. § 1983 (1976) (Civil Rights Act of 1871).

58. The Court noted that most courts recognize that the election of remedies doctrine does not apply to suits under Title VII. 415 U.S. at 49 n.11. Furthermore, the Court ruled, "there can be no prospective waiver of an employee's rights under Title VII." *Id.* at 51.

59. 415 U.S. at 53-54.

60. The Court found support for this conclusion in the writings of Dean Schulman:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-govern-

These first three factors primarily explain why the Court elected not to follow the Tenth Circuit's strict preclusion rule in Title VII cases. Strict preclusion would prevent claimants from seeking supplemental relief apart from that obtained through the grievance-arbitration machinery. In addition, the foreclosure of these parallel avenues of statutory relief would frustrate Congress' purpose in conferring plenary powers upon the federal courts for the enforcement of Title VII rights.

In the final section of its opinion, the Court developed its fourth proposition that arbitral processes are comparatively inferior to judicial processes in protecting rights secured by Title VII. In this last section the Court specifically explained its rejection of a deferral policy. "Arbitral procedures," stated the Court, "while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[61] An arbitrator's role is to effectuate the parties' intent, not enforce statutory requirements. The weakness of this conclusion, however, is that "the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII."[62] Having undercut its own argument with this acknowledgment, the Court declared that "*other facts* . . . render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights."[63] In short, these "other facts" include the arbitrator's special competence relating "to the law of the shop, not the law of the land."[64] Although arbitrators may be especially knowledgeable with respect to "industrial relations," courts are better qualified to deal with "statutory and constitutional issues" as well as "public law concepts." Moreover, the procedural informality of arbitration, concluded the Court, makes it a "less appropriate forum for final resolution of Title VII issues than the federal courts."[65]

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ment created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. Schulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955).

Id. at 53 n.16.

61. *Id.* at 56.

62. *Id.* at 57.

63. *Id.* (emphasis added).

64. *Id.* at 57.

65. *Id.* at 58.

In scrutinizing the *Gardner-Denver* opinion to determine whether the Court's holding should be extended to FLSA and OSHA rights, several points should be kept in mind. First, the Court acknowledged, but in no way disparaged, the federal policy favoring arbitration of labor disputes. Most importantly, apart from all its previous reasoning earlier in the opinion, the Court stated at the end that it was "accommodating" federal policies—specifically "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices."[66] In the Court's judgment, the best accommodation of these two important federal policies was to allow employees to pursue remedies under both grievance-arbitration processes and Title VII.

IV. Presumption of Arbitrability Extends to Safety Disputes—*Gateway Coal*

Gateway Coal Co. v. United Mine Workers[67] was decided by the Supreme Court in an eight-to-one decision the same year *Gardner-Denver* was decided. As in *Gardner-Denver,* Justice Powell wrote for the majority in *Gateway Coal.* The dispute in *Gateway Coal* arose when the coal company reinstated certain foremen who were suspended for falsifying records indicating airflow levels in the mine.[68] The miners struck to protest the safety hazard created by the presence of the reinstated foremen. Following the union's refusal to arbitrate, the company sought and obtained from the district court an injunction against the striking miners. On appeal a divided panel of the Third Circuit reversed and vacated the injunction. The court of appeals found that public policy disfavored compulsory arbitration of safety disputes[69] and that in the absence of an express agreement to submit such disputes to arbitration, "the union had no contractual duty to submit this controversy to arbitration and hence no

66. *Id.* at 59.

67. 414 U.S. 368 (1974).

68. The collapse of a ventilation structure, which partially blocked an intake airway, resulted in an airflow of less than half the normal rate. Nonetheless, even with the reduced airflow, ventilation in the mine still exceeded state and federal requirements. *Id.* at 370 & n.1.

69. The court of appeals reasoned that where employees refuse to work because of a "good faith apprehension of physical danger," no sound reason exists for "requiring them to subordinate their judgment to that of an arbitrator." 466 F.2d 1157, 1160 (3d Cir. 1972).

implied obligation not to strike."[70]

In reversing the Third Circuit's decision, the Supreme Court first determined that the arbitration provision of the collective bargaining agreement was sufficiently broad to govern the safety dispute.[71] The Court next concluded that the presumption of arbitrability applies to safety disputes:

> We think these remarks [quoted from the *Steelworkers* Trilogy[72]] are as applicable to labor disputes touching the safety of the employees as to other varieties of disagreement. Certainly industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailed production, and economic instability. Moreover, the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to the one case as to the other, and the need to consider such factors as productivity and worker morale is as readily apparent.[73]

The significance of *Gateway Coal* is that the Court applied the presumption of arbitrability to safety disputes because it determined that arbitrators, by virtue of their "special expertise" and "knowledge of the common law of the shop," are especially well suited for the resolution of safety disputes. However, the facts in *Gateway Coal* are readily distinguishable from those in *Gardner-Denver* in two important respects: *Gateway Coal,* unlike *Gardner-Denver*, involved neither a separate statutory violation nor a prior arbitration award.

V. Cases Extending *Gardner-Denver* Beyond Title VII to FLSA and OSHA: *Leone* and *N.L. Industries*

A. Leone

One of the first cases to extend the *Gardner-Denver de novo* consideration rule beyond Title VII to FLSA and OSHA was the United States Court of Appeals for the District of Columbia Circuit's decision in *Leone v. Mobil Oil Corp.*[74] Unlike *Gardner-Denver, Leone* was a pre-arbitral award case in which the pri-

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70. 414 U.S. at 373.

71. *Id.* at 376. The arbitration provision stated in part that the duty to arbitrate extended to "any local trouble of any kind aris[ing] at the mine." *Id.*

72. 363 U.S. at 581-82.

73. 414 U.S. at 379.

74. 523 F.2d 1153 (D.C. Cir. 1975).

mary issue was whether employees were required to exhaust the grievance-arbitration machinery of their collective bargaining agreement before bringing suit against their employer for alleged violation of their statutory rights. The dispute arose when federal inspectors went to a Mobil refinery in response to a union complaint to investigate conditions at the refinery which allegedly violated OSHA health and safety regulations.[75] The four plaintiff employees accompanied the inspectors during regular working hours on various phases of the inspection, which lasted over the course of several weeks. Midway through the inspection, Mobil ceased compensating plaintiffs for their participation in the inspection.[76] Plaintiffs' union subsequently filed a complaint with the Secretary of Labor in which it alleged that the employer's cessation of payments to the employees because of their participation in the inspection violated OSHA's ban against discriminatory treatment of employees who exercise their OSHA rights.[77] The Assistant Secretary of Labor rejected the union's claim on the ground that refusal to compensate for "walkaround" time is neither discriminatory per se under OSHA nor compensable under FLSA's "hours worked" test.[78]

Plaintiffs next brought suit in the United States District

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75. The inspection was conducted pursuant to 29 U.S.C. § 657 (f)(1) (1976), which states:

> Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary [of Labor] or his authorized representative of such violation or danger. . . . If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable.

As a result of the inspection, Labor Department officials cited Mobil for three "serious" and ninety "non-serious" violations. 523 F.2d at 1154.

76. Mobil management representatives who participated in the inspection, however, continued to receive pay for the entire period. *Id.*

77. 29 U.S.C. § 660(c)(1) (1976) provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

78. 523 F.2d at 1155. The so-called "hours worked" test is derived from the following FLSA provision: "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . [a minimum wage] at the following rates . . . ." 29 U.S.C. § 206(a) (1976).

Court for the District of Columbia,[79] but the court granted Mobil's motion for summary judgment, holding that because the employees' participation was voluntary and primarily for their own benefit, they were not entitled to compensation under the "hours worked" test.[80] On appeal the District of Columbia Circuit resolved for the first time Mobil's claim that employees seeking to vindicate statutory rights must first exhaust the grievance-arbitration procedures specified in the collective bargaining agreement. The court of appeals rejected the exhaustion argument and then affirmed the district court's decision.

In reaching its decision, the District of Columbia Circuit noted that the presumption of arbitrability had been expanded in *Gateway Coal* to encompass safety disputes, but, disturbingly, the court never attempted to distinguish *Gateway Coal*'s arbitration requirements from the safety-related dispute in *Leone*. Perhaps the court ignored the apparent inconsistency because it viewed *Leone* strictly as an FLSA "hours worked" case and discounted the fact that the alleged safety violations had precipitated the wage dispute.

In any event, the court proceeded to limit the exhaustion of remedies doctrine by relying upon two strands of Supreme Court authority. The first line of cases relied upon began with *U.S. Bulk Carriers, Inc. v. Arguelles*,[81] where the Supreme Court reaffirmed the rule favoring use of grievance-arbitration machinery but limited its application with respect to individuals. The Court held there that section 301 of the LMRA neither abrogated nor replaced an individual seaman's statutory claim for wages;[82] rather, section 301 merely provided an optional remedy.[83] The second strand of precedent was naturally *Gardner-*

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79. Plaintiffs brought suit pursuant to the provisions of § 301(a) of the LMRA, 29 U.S.C. § 185(a) (1976). It should be noted that at least one court, the United States Court of Appeals for the Sixth Circuit, has found that no private right of action exists under section 11(c)(1) of OSHA, 29 U.S.C. § 660(c) (1976). Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980).

80. 523 F.2d at 1155.

81. 400 U.S. 351 (1971). *See also* Vaca v. Sipes, 386 U.S. 171 (1967) (employee permitted to sue directly for wrongful discharge without exhausting grievance procedures since union had breached its duty of fair representation).

82. 46 U.S.C. § 596 (1976).

83. The *Leone* court stated:

> What Congress has plainly granted we hesitate to deny. Since the history of § 301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them. We would require much more to hold that § 301 reflects a philosophy of legal com-

Denver. The court of appeals, capitalizing on familiar reasoning, stressed that both the Title VII and FLSA statutory schemes evidence a congressional intent that such rights be judicially enforced. In addition, the court concluded—much as the Supreme Court earlier had concluded—that because FLSA, like Title VII, consists of statutorily created rights, an arbitrator, whose authority stems solely from the agreement between the parties, "cannot be the final arbiter of rights created by statute."[84]

Although the court of appeals in *Leone* drew upon two reputable strands of recent Supreme Court precedent, the court's decision has been criticized for misplaced reliance on both *Arguelles* and *Gardner-Denver.*[85] The essence of the criticism, which merits serious consideration, is that in light of *Gateway Coal,* where the Supreme Court endorsed arbitration of safety disputes and extolled the special expertise of arbitrators who are versed in the common law of the shop, FLSA wage claims are more closely aligned to *Gateway*-type safety concerns than to Title VII discrimination claims. Hence, the argument concludes, "FLSA wage claims should be subject to the exhaustion of grievances requirement."[86] It is unnecessary to deal with this argument at present since it merely sets the stage for the analysis to follow.

B. N.L. Industries

A recent Seventh Circuit case, *Marshall v. N.L. Industries, Inc.,*[87] is in one respect factually closer to *Gardner-Denver* than *Leone. N.L. Industries* and *Gardner-Denver* both involved the assertion of statutory rights following a prior arbitration award. In *N.L. Industries* an employee who refused to work under allegedly unsafe conditions was discharged.[88] The employee filed a

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pulsion that overrides the explicit judicial remedy provided by 46 U.S.C. § 596. 523 F.2d at 1157 (quoting U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 357-58 (1971)).

84. 523 F.2d at 1159.

85. 10 GA. L. REV. 843, 853-55 (1976).

86. *Id.* at 855.

87. 618 F.2d 1220 (7th Cir. 1980).

88. The employee worked as a payloader operator and was assigned to load lead scrap into a melting kettle. As he began to dump the lead scrap, the employee observed that the dross in the kettle had separated from the side of the pot, thereby exposing to view the molten metal beneath. Only the week before similar conditions had resulted in the exploding and spraying of the molten lead toward the employee's enclosed cab. Because he now lacked a windshield and an enclosed cab, the employee feared that an explosion might again occur and cause him injury. Accordingly, he immediately ceased

written grievance under the collective bargaining agreement between his union and his employer[89] and also filed a complaint with the Occupational Safety and Health Administration, alleging that he had been discharged in violation of OSHA's anti-discrimination provision.[90] The employee's grievance progressed through final arbitration where he was awarded reinstatement with "unimpaired seniority" but without back pay.[91] The employee accepted the company's offer to return to work.

The Secretary of Labor subsequently filed suit in district court pursuant to section 11(c)(2) of OSHA[92] and sought a variety of supplemental remedies.[93] The district court granted the defendant company's motion for summary judgment, concluding that despite the controlling precedent of *Gardner-Denver*, an exception existed in this case because the employee voluntarily waived his right to statutory relief by accepting the arbitration award and returning to work without back pay.

On appeal the Seventh Circuit agreed with the district court that *Gardner-Denver* controlled the question whether a prior ar-

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working. The employee was suspended—and ultimately discharged—for his refusal to finish his work with the unprotected payloader after having been ordered to do so by his supervisor. *Id.* at 1221-22.

89. The pertinent provision of the collective bargaining agreement stated: "No employee shall be required or permitted by the company to work under unusual conditions that are dangerous to life, limb or health, nor to work on a machine or use other equipment which does not meet normal safety standards." *Id.* at 1222 n.4.

90. 29 U.S.C. § 660(c)(1) (1976). Section 11(c)(2), 29 U.S.C. § 660(c)(2) (1976), authorizes the Secretary of Labor to institute actions to enjoin or redress such discrimination.

91. The arbitrator concluded that this was the appropriate relief because he determined that the N.L. Industries supervisor had properly checked the heat of the kettle and decided that the work could proceed safely. 618 F.2d at 1222.

92. The statute provides:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

29 U.S.C. § 660(c)(2) (1976).

93. The relief sought included a permanent injunction against further violations, back pay and vacation pay for the employee, and the posting of a prescribed notice. 618 F.2d at 1222.

bitration award bars *de novo* consideration of the claim in the federal courts. The court likened OSHA to Title VII in that both legislative schemes were enacted by Congress with the aim of mobilizing the federal government's resources to attack specific types of problems that affected workers throughout the country. Emphasizing the recurring motif that Congress intended individuals to be able to find full vindication of their statutory rights in the federal judiciary, the court observed:

> Enacted after the Supreme Court developed its policies encouraging deference to arbitration in a pure collective bargaining context, the OSHA legislation was intended to create a separate and general right of broad social importance existing beyond the parameters of an individual labor agreement and susceptible of full vindication only in a judicial forum.[94]

In addition, the Seventh Circuit added a new variation to the supplemental remedies reasoning by pointing out that an arbitrator cannot always grant the wide range of relief that the courts can. In *N.L. Industries,* for instance, the arbitrator could not order the notice remedies and broad injunctive relief that the Secretary of Labor sought.

In holding *Gardner-Denver* controlling, the court of appeals failed, as in *Leone,* to consider whether the *Gateway* presumption of arbitrability over safety disputes should have any bearing in an OSHA case where an employee's safety is the issue that prompts the suit. Without regard for or perhaps awareness of that important question, the court of appeals proceeded to reverse the district court on the waiver question since it concluded that absent other proof of an intent to waive one's statutory rights, mere acceptance of an arbitration award is insufficient to show such intent.[95]

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94. *Id.*

95. The court observed that the Supreme Court in *Gardner-Denver* had concluded that the mere submission of a grievance to arbitration does not alone constitute waiver. The Seventh Circuit reasoned that "[a]n employee should not have to refuse reinstatement ordered by an arbitrator and thereby risk losing his job permanently in order to exercise his statutory right to seek judicial relief with all the risks that it may entail." *Id.* at 1223.

VI. Cases Limiting the Scope of *Gardner-Denver* to Title VII: *Satterwhite* and *Barrentine*

A. Satterwhite

Only a few courts of appeals have had occasion to address the question whether the *Gardner-Denver* rationale ought to be extended to statutory rights secured by FLSA and OSHA. The Tenth Circuit—the same court of appeals that was reversed by the Supreme Court in *Gardner-Denver*—took the position in *Satterwhite v. United Parcel Service, Inc.*[96] that *Gardner-Denver* should be limited to the Title VII context.

Like the courts in *Gardner-Denver* and *N.L. Industries*, the court in *Satterwhite* considered whether an individual may exercise a statutory right following submission of a claim to final arbitration. The source of controversy in *Satterwhite* was the employer's decision to eliminate two previously paid fifteen minute coffee breaks. The employees filed a grievance under the collective bargaining agreement to recover pay for the extra half hour they were working each day.[97] The company refused the union's demand for arbitration on the ground that coffee breaks were not covered under the labor contract. The union brought suit in district court and obtained an order compelling the company to arbitrate. The arbitrator later ruled that the company's unilateral elimination of the coffee breaks was wrongful and directed that the employees be paid for an additional half hour per day for the period in question. Contrary to the union's wishes, however, the arbitrator set the rate of pay at straight time, not overtime.[98] Following the company's payment of the award, employee Satterwhite, on behalf of himself and fifty-eight others, brought suit under section 16(b) of the FLSA[99] to recover time-

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96. 496 F.2d 448 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

97. *Id.* at 448-49.

98. *Id.* at 449.

99. Section 16(b) provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in

and-a-half pay for work in excess of forty hours per week.[100] Based on the authority of the Tenth Circuit's decision in *Gardner-Denver*, which had not yet been reversed by the Supreme Court, the district court held the arbitration award to be dispositive and dismissed the action.

On appeal the Tenth Circuit prefaced its analysis by stressing that a statutory claim under FLSA for overtime pay is clearly distinct from a statutory right protecting against employment discrimination. Following a brief summary of the Supreme Court's analysis in the recently decided *Gardner-Denver* case, the court set forth its reasons why *Gardner-Denver* should be distinguished from *Satterwhite*.

Because FLSA does not include procedures that accentuate either private enforcement, or overlapping or parallel relief, the court inferred "a greater reliance on contract remedies and a lesser emphasis on individual enforcement" under FLSA.[101] In search of further evidence of congressional intent on the subject, the court turned to the Portal-to-Portal Act of 1947[102] and found that this legislation was enacted because of Congress' dissatisfaction with judicial interpretation of FLSA. The court seemed to find a certain talismanic charm in the declared congressional policy "to protect the right of collective bargaining . . . and limit the jurisdiction of the courts."[103]

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such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under provisions of this subsection.

29 U.S.C. § 216(b) (1976).

100. The governing statutory provision states:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce, or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (1976).

101. 496 F.2d at 450.

102. 29 U.S.C. §§ 251-262 (1976).

103. 29 U.S.C. § 251(b) (1976).

The court's reliance on this language in the Portal-to-Portal Act is imaginative but misleading, if not totally unsound. Congress' intent becomes very clear when the legislation is viewed in its historical context. In a line of important cases decided by the Supreme Court in the mid-1940's,[104] the Court subjected employers and the government to immense liability by ruling that certain preliminary and incidental employment activities—generally regarded at the time to be non-compensable unless otherwise agreed by the parties—constituted compensable "workweek" time. The federal courts were immediately flooded with suits; the claimed and potential liability of private employers and the government was staggering.[105] Congress enacted the Portal-to-Portal Act for the specific purpose of eliminating the unexpected, retroactive liabilities. The legislation removed from both state and federal courts jurisdiction to consider claims seeking to impose such retroactive liability.[106] This historical perspective shows that Congress' declared purpose was to protect employers' interests in the existing collective bargaining agreements and to limit the jurisdiction of the courts with respect to retroactive liability.

The court of appeals proffered one of its strongest arguments, however, when it stated: "Wages and hours are at the heart of the collective-bargaining process. They are more akin to collective rights than to individual rights, and are more suitable to the arbitral process than Title VII rights."[107] The Tenth Cir-

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104. Anderson v. Mount Clemens Pottery Co., 328 U.S. 680 (1946); Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers, 325 U.S. 161 (1945); Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590 (1944).

105. Between July 1, 1946, and Jan. 31, 1947, 1,930 actions based on the *Tennessee Coal, Jewell Ridge* and *Mt. Clemens Pottery* cases were commenced in the federal courts. The combined claims in these actions exceeded five billion dollars. The federal government's potential liability on War Department cost-plus contracts alone was estimated at 1.4 billion dollars. *See* H.R. REP. No. 71, 80th Cong., 1st Sess. 3,4,5 (1947); *see also* S. REP. No. 48, 80th Cong., 1st Sess. (1947).

106. The statute provides:

> No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

29 U.S.C. § 252(d) (1976).

107. 496 F.2d at 451. The court further reasoned: "The ever-present disputes over

cuit also presented a persuasive argument when it shifted the focus to balancing competing federal policies. The court noted that the Supreme Court in *Gardner-Denver* weighed the federal policy favoring arbitration of labor disputes and the federal policy against discrimination which ranked as one of "highest priority." Arbitration gave way to anti-discrimination policy. The *Satterwhite* court did not reach the balancing stage, which would have pitted the policy favoring arbitration of labor disputes against a policy arguably favoring judicial consideration of individual FLSA claims, because it concluded that no FLSA forum preference existed for the resolution of wage disputes:

> We find nothing in any pertinent legislative history or court decision to indicate that Congress, by the grant of a right to private suit under FLSA § 16(b), intended to establish a policy preference for the determination of a wage dispute in judicial rather than arbitral proceedings. Indeed, the only policy expression of which we are aware, that contained in the Portal-to-Portal Act, 29 U.S.C. § 251(b), is to the contrary.[108]

The Tenth Circuit concluded its analysis by reaffirming its apparent preference for a preclusion rule. Although the court in its summary of the Supreme Court's *Gardner-Denver* opinion recognized the separate origin of contractual and statutory rights, it nevertheless was willing to overlook the independent origin of those rights provided they arose from the same factual occurrence.[109] The court apparently favored precluding resort to

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wages and hours are readily adaptable to arbitration. Resort to judicial process after arbitration prolongs the controversy and serves no good purpose when the arbitral and judicial proceedings arise out of, and must be decided on, the same factual background." *Id.* at 451-52.

108. 496 F.2d at 451. The court's reasoning on this point is not persuasive. FLSA provides for a right to private suit; the right is not qualified or conditioned. Yet the Tenth Circuit seems to argue that because Congress did not expressly state, as a matter of policy preference, that it found a judicial forum to be superior to an arbitral forum in this context, that its expression of intent is somehow less valid. The court does not explain why a statutory provision, clear on its face and not constitutionally infirm, should not be enforced as Congress intended. Congress is not obligated to explain why it chooses one course of action over another or over all others. This is especially true in the instant case where the other course of action, *i.e.*, the use of arbitration, first received the strong endorsement of the Supreme Court in the 1960 *Steelworkers* Trilogy—some thirteen years after the FLSA was enacted.

109. The Tenth Circuit stated:

> We hold that when a wage dispute is submitted to arbitration in accordance with a collective-bargaining agreement, the employees may not thereafter maintain an FLSA § 16(b) suit for recovery on the basis of the same factual occurrence as that presented to the arbitrator. We are convinced that the pol-

judicial relief following arbitration because judicial action only "prolongs the controversy and serves no good purpose when the arbitral and judicial proceedings arise out of, and must be decided on, the same factual background."[110]

B. Barrentine

The Tenth Circuit's reasoning in *Satterwhite* was recently adopted by the Eighth Circuit in *Barrentine v. Arkansas-Best Freight System, Inc.*[111] Certiorari has since been granted by the Supreme Court. In *Barrentine,* truck drivers brought suit against their employer and union. Count one of the complaint was brought under section 16(b) of the FLSA. Count two, brought under section 301 of the LMRA, consisted of an allegation that the union had breached its duty to fairly represent the employees in their dispute with the employer.[112] The controversy arose because of the employer trucking company's policy regarding compliance with United States Department of Transportation regulations governing pre-trip safety inspections.[113] No driver received pay for the time spent inspecting his vehicle; furthermore, in the event mechanical defects were discovered, the trucking company refused to pay the driver for the actual driving time incurred after inspection in taking his truck to the company's repair facility.[114]

To challenge this company practice, Barrentine and a fellow employee, Scates, submitted formal grievances which were eventually processed through final arbitration and rejected by the

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> icy of Congress, recognized by the Courts, favors the arbitration of disputes over wages and hours in accordance with a collective-bargaining agreement. The high priority which Congress has given to protection against racial discrimination has no application to a dispute over rate of pay. The reassertion in a judicial forum of the same wage claim determined in an appropriate arbitration hinders rather than promotes industrial peace, and should not be permitted.

Id. at 452.

110. *Id.* at 451-52.

111. 615 F.2d 1194 (8th Cir.), *cert. granted,* 101 S. Ct. 70 (1980).

112. The Eighth Circuit concluded that because count one of the complaint failed, count two automatically failed as well. *Id.* at 1202.

113. The Department of Transportation under the authority of the Interstate Commerce Act, 49 U.S.C. § 304 (1976), promulgated the Federal Motor Carrier Safety Regulations. The regulations require, among other things, that drivers inspect specified parts and accessories before driving their vehicles, 49 C.F.R. § 392.7 (1979), and that drivers refrain from driving if mechanical defects are discovered, 49 C.F.R. § 396.4 (1979).

114. 615 F.2d at 1197.

joint industry-labor grievance committee.[115] Barrentine and Scates were joined by four other drivers, who had not submitted grievances, in filing a complaint in the district court. The court dismissed the suit with respect to all the plaintiffs, holding that the safety-inspection time dispute was properly submitted to arbitration and fairly decided without a breach of fair representation by the union.

On appeal the Eighth Circuit adopted the *Satterwhite* distinction between wage and discrimination issues. Accordingly, the court of appeals concluded that an employee who voluntarily submits a wage dispute to grievance-arbitration procedures under a collective bargaining agreement cannot later bring a private suit under the FLSA. Concerning the four plaintiffs who had not yet submitted grievances, and therefore had not exhausted their remedies before bringing suit, the court merely circumvented the precedent of *Leone v. Mobil Oil Corp.*[116] and *Thompson v. Iowa Beef Packers, Inc.*[117] These two cases held that where an employee's claim was protected under the FLSA and covered under the arbitration clause of a collective bargaining agreement, the employee need not exhaust his contractual remedies before bringing private suit. Because the trial court had elected to treat "the case as though each of the named plaintiffs had actually filed grievances which were considered and denied,"[118] and because the four drivers' trial counsel did not object to that approach, the Eighth Circuit merely concluded that *Leone* and *Thompson* were not controlling.

VII. Expand or Limit the Scope of *Gardner-Denver*?

The discussion to this point has attempted to set forth the case authority, highlight various lines of reasoning, and portray an accurate global view of the controversy over the scope of *Gardner-Denver*—all for the purpose of offering an analysis that

115. The parties disagree whether the FLSA claim was presented to and considered by the grievance committee. The petitioners claim that it was not. "[T]here is no indication that any claim under the FLSA was presented to, much less considered by, the grievance committee." Brief for Petitioners at 5, Barrentine v. Arkansas-Best Freight System, Inc., *cert. granted,* 101 S. Ct. 70 (1980). The respondent in turn, "has not and does not concede that the FLSA claim of the employees was not submitted to or considered by the Grievance Committee." Brief for Respondent at 1.

116. 523 F.2d 1153 (D.C. Cir. 1975).

117. 185 N.W.2d 738 (Iowa 1971), *cert. dismissed as improvidently granted,* 405 U.S. 228 (1972).

118. 615 F.2d at 1201.

might add some clarity and insight to the resolution of this important matter.

The courts that have ruled to expand the scope of *Gardner-Denver* to FLSA and OSHA cases[119] and the courts that have ruled to restrict such expansion[120] appear to have either missed or ignored some of the important issues. The courts in *Leone* and *N.L. Industries,* for whatever reasons, failed to confront the implications raised by the *Gateway Coal* policy favoring arbitration of safety disputes. The *Satterwhite* and *Barrentine* courts, on the other hand, did not satisfactorily justify their authority to eliminate by judicial fiat statutorily created rights. It will be helpful to reconstruct the most compelling positions for each side by synthesizing some of the strongest arguments propounded by the various courts.

A. Position Favoring Limitation of Gardner-Denver *to Title VII Cases*

The desirability of limiting the application of the *Gardner-Denver* rationale to Title VII cases is perhaps best demonstrated by proposing a two-part balancing test for grievance-arbitration cases that involve statutory rights. The test would balance the federal policies underlying arbitration against the federal policies underlying the statutory scheme in question. The first prong of the test would be to identify the specific federal policy (or policies) underlying the statute. The second prong would focus on whether an arbitral or a judicial forum would be better suited for achievement of the stated federal policy. With this information a court could balance the federal policy favoring arbitration of labor disputes with the stated federal policy underlying the statute. In those instances where a court determines that the federal policy underlying the statute would be best promoted and protected in an arbitral forum, the inquiry would cease and either a deferral or preclusion rule would be adopted. Where a court determines, however, that the federal policy underlying a statutory scheme is better promoted and protected in a judicial rather than an arbitral forum, the court would then decide

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119. Marshall v. N.L. Industries, Inc., 618 F.2d 1220 (7th Cir. 1980); Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975).

120. Barrentine v. Arkansas-Best Freight System, Inc., 615 F.2d 1194 (8th Cir.), *cert. granted,* 101 S. Ct. 70 (1980); Satterwhite v. United Parcel Service, Inc., 496 F.2d 448 (10th Cir.), *cert. denied,* 419 U.S. 1079 (1974).

whether Congress deemed either the statutorily based policy or the arbitration policy to be relatively more important than the other so as to warrant controlling stature.

The facts and analysis in *Gardner-Denver* provide a useful example for application of this test. The Supreme Court there identified the two competing federal policies as that favoring arbitration of labor disputes and that against discriminatory employment practices.[121] The Court determined that "arbitration makes a less appropriate forum for final resolution of Title VII issues than the federal courts."[122] Factors such as the presence of constitutional and statutory issues, the need to refer to public law concepts, and the procedural formalities of judicial proceedings all persuaded the Court that a judicial forum is the superior method for resolving Title VII matters. Clearly, these two federal policies were at odds with one another, and the Court in its attempt to "accommodate" the two policies was likely influenced by its earlier determination that Congress considered its "policy against discrimination to be of the 'highest priority.' "[123] Indeed, the Court's sincere desire to accommodate the two policies is evidenced by the "admissible as evidence" rule found in footnote twenty-one of its opinion.

Quite a different result arguably could be reached, however, when the same test is applied to an OSHA rather than a Title VII case. In identifying the federal policy behind OSHA, Congress stated in part: "The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."[124] The object of providing safe and healthful working conditions is arguably most effectively furthered by resort to arbitration. This conclusion draws its support from the Supreme Court's opinion in *Gateway Coal* where it held that the presumption of arbitrability applies to safety disputes. In so holding, the Court emphasized the suitability of arbitration for the resolution of labor disputes "touching the safety of the employees" because of "the special expertise of the labor arbitrator, with his knowledge of the common law of the shop."[125] When this determination that the arbitral

121. 415 U.S. at 59.
122. *Id.* at 58 (footnote omitted).
123. *Id.* at 47.
124. 29 U.S.C. § 651(b) (1976).
125. 414 U.S. at 379.

forum best advances the federal policy favoring safe and healthful working conditions is coupled with the federal policy favoring arbitration of labor disputes, the consequence is the adoption of a deferral or preclusion rule.

Application of this test to FLSA cases would presumably require a result similar to that reached in OSHA cases. In its statement of findings under the FLSA, Congress said:

> The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of *labor conditions detrimental to the maintenance of the minimum standard of living* necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to *spread and perpetuate such labor conditions among the workers of the several States;* (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.[126]

Congress proceeded to declare its policy of correcting and eliminating as rapidly as practicable the conditions referred to in its findings.[127] Moreover, a later congressional policy expression in the Portal-to-Portal Act of 1947[128] amended the FLSA in part "to protect the right of collective bargaining; and . . . to define and limit the jurisdiction of the courts."[129] The federal policy favoring improvement of substandard labor conditions also appears to be an objective that is within the special competence of labor arbitrators. If labor disputes touching the safety of employees are well-suited to arbitration, then a fortiori, labor disputes touching wages and hours, which are fundamental provisions in all collective bargaining agreements, are all the more appropriate for resolution through arbitration. In this case, as in OSHA cases, there is no conflict between federal policies; on the contrary, the federal policy favoring improvement of substandard labor conditions and the federal policy favoring arbitration of labor disputes combine to mandate the conclusion that arbitration be employed to resolve FLSA disputes.

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126. 29 U.S.C. § 202(a) (1976) (emphasis added).
127. *Id.* at § 202(b).
128. 29 U.S.C. §§ 251-262 (1976).
129. *Id.* at § 251(b).

It may be contended that this balancing of federal policies approach fails to consider the independent statutory basis for FLSA and OSHA rights. Admittedly, a preclusion rule does bar the exercise of individual statutory rights. A strict deferral rule, however, such as the one proposed by the Fifth Circuit in *Rios v. Reynolds Metal Co.*,[130] would merely suspend an individual's statutory rights in pre-arbitral cases until grievance-arbitration processes had been exhausted, or foreclose the exercise of statutory rights only where a prior arbitration award, meeting particularized requirements of fairness, had been awarded. Such a strict deferral rule would preserve scarce judicial resources, protect the policies underlying the grant of the statutory rights, and reserve for labor arbitrators those matters peculiarly within the domain of their specialized competence.

In summary, the position favoring restriction of *Gardner-Denver* to Title VII cases relies upon a two-step balancing test. This test first identifies the federal policy underlying the statutory scheme in question and then determines whether a judicial or an arbitral forum is best suited for fulfillment of that statutory policy. When this test is applied to disputes arising under FLSA or OSHA, arbitration accompanied by a strict deferral rule emerges as the better method for resolving such conflicts.

B. *Position Favoring Expansion of* Gardner-Denver *to FLSA and OSHA Cases*

The primary reason for extending *Gardner-Denver* to FLSA and OSHA cases is the independent origin of these statutorily created rights. The language of the FLSA[131] and OSHA[132] provisions creating procedures for vindication of individual rights in federal district courts clearly evidences a congressional intent to provide such statutory rights. Furthermore, no FLSA or OSHA provision, either express or implied, states that federal courts should refrain from granting jurisdiction either permanently (by preclusion) or temporarily (by deferral) in cases where violations of these statutory rights have allegedly occurred.[133] Even though

130. 467 F.2d 54, 58 (5th Cir. 1972).

131. 29 U.S.C. § 216(b) (1976).

132. 29 U.S.C. § 660(c) (1976).

133. It has been argued by the Tenth Circuit that the language in the Portal-to-Portal Act, 29 U.S.C. §§ 251-262 (1976), provides for the protection of collective bargaining as well as the definition and limitation of federal court jurisdiction. Satterwhite v. United Parcel Service, Inc., 496 F.2d 448 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

it may be claimed—albeit not necessarily accurately—that judicial resources are conserved through arbitration or that arbitrators are better equipped than judges in some areas of expertise, the fact remains that arbitrators possess no authorization to adjudicate statutory rights. As the Supreme Court correctly noted in *Gardner-Denver,* the arbitrator's "source of authority is the collective-bargaining agreement" and his "task is to effectuate the intent of the parties."[134] Under the FLSA and OSHA statutory schemes, by contrast, federal district courts receive their grant of authority from enacted legislation and it is their task to effectuate the intent of Congress.

In addition to the fact that statutory rights are of independent legal origin, *de novo* consideration of such rights is essential because judicial remedies may provide a broader range of relief to secure these important rights. Even where a prior arbitration award has been granted, judicial remedies may be justified to fairly "supplement" the relief awarded. For example, the notice remedies and broad injunctive relief granted in *Marshall v. N.L. Industries, Inc.*[135] could not have been imposed by the arbitrator.

Finally, it should be recognized that the statutory rights created under FLSA and OSHA are *individual,* not collective, rights. These statutory rights were specifically created to protect individuals, not to influence union-employer relations. It may be true that the alleged violation that gives rise to the exercise of statutory rights affects many workers, and therefore group representation could be effective; but the fact remains that Congress granted individual workers the opportunity to seek vindication of their rights regardless of action taken by any union.

Accordingly, it may be claimed that such language at least implies a congressional intent that federal courts refrain from granting jurisdiction in FLSA cases. Viewed in its historical context, however, it is clear that the Portal-to-Portal legislation was enacted specifically to exempt employers and the government from a tremendous, unexpected *retroactive* liability which, if imposed, would have crippled this country's economy. The limitation of federal court jurisdiction was aimed at preventing retroactive, not prospective liability. If Congress had intended to prohibit prospective liability, it assuredly would not have eliminated federal court jurisdiction only with respect to certain FLSA claims arising prior to May 14, 1947. *See* 29 U.S.C. § 252(a) (1976). The amended FLSA retains the right for individual employees to bring private causes of action.

134. 415 U.S. at 53.

135. 618 F.2d 1220, 1223 (7th Cir. 1980).

C. *The Better Position: Extend* Gardner-Denver *to FLSA and OSHA Cases*

The juxtaposition of the two views regarding *de novo* consideration of FLSA and OSHA rights serves to accentuate the complexity of the issues and the sound arguments that support each side. Some of the current commentary in the field has criticized the Supreme Court's decision in *Gardner-Denver*[136] and the District of Columbia Circuit's decision[137] in *Leone v. Mobil Oil Corp.*[138] Despite the persuasiveness of those criticisms, the commentators fail to explain on what grounds the federal judiciary would be justified in abrogating individual statutory rights that were expressly and validly created by Congress. In the absence of such explanation, the better position is that *Gardner-Denver* and *Leone* were correctly decided and, furthermore, that *de novo* considerations of FLSA and OSHA rights is the appropriate and prudent course to follow.

In addition to the central argument that no justification exists for abrogating statutorily created individual rights, other reasons support *de novo* consideration of statutory rights as the better position. Professor Feller has noted several obvious problems with collective bargaining that weigh in favor of individual statutory rights. First, the majority of American workers are not presently union members and thus lack union representation. Secondly, experience demonstrates that individual and minority interests are not always protected by unions. Finally, society and its elected representatives may deem some interests to be too fundamental to be entrusted to private collective bargaining.[139]

Other commentators have advanced the argument that the adjudication of statutory rights by arbitrators will distort or diminish the development of public law rights.[140] Harry T. Ed-

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136. Oppenheim, Gateway & Alexander, *Whither Arbitration?*, 48 TUL. L. REV. 973, 986-88 (1974); Comment, *Federal Courts—Labor Arbitration—Employment Discrimination—Federal Courts as Primary Protectors of Title VII Rights*, 28 RUT. L. REV. 162, 189-90 (1974).

137. 10 GA. L. REV. 843 (1976).

138. 523 F.2d 1153 (D.C. Cir. 1975).

139. Feller, *The Impact of External Law Upon Labor Arbitration*, in THE FUTURE OF ARBITRATION IN AMERICA 83, 87-88 (American Arbitration Association 1976).

140. Christensen, *Private Judges—Public Rights: The Role of Arbitration in the Enforcement of the National Labor Relations Act*, in THE FUTURE OF ARBITRATION IN AMERICA 49 (J. Correge, V. Hughes & M. Stone eds. 1976); *At the Crossroads*, note 53 *supra*.

wards has concluded that arbitration is "not a suitable forum for the disposition of Title VII *or any other important public law issues.*"[141] Edwards based his conclusion on the results of a survey taken of two hundred members of the National Academy of Arbitrators:[142]

> The evidence as to whether and how many arbitrators are professionally competent to decide legal issues in cases involving claims of employment discrimination is at best mixed. Furthermore, even assuming, arguendo, that most arbitrators are professionally competent to decide such issues, the nature of the arbitration process often will not allow for full and adequate consideration of an employee's Title VII rights. Finally, the evidence from the survey suggests that even when arbitrators are professionally competent to decide legal issues and when the arbitration process is adequate to allow for full consideration of legal questions arising pursuant to Title VII, still many arbitrators believe that they have no business interpreting or applying a public statute in a contractual grievance dispute.[143]

This notion that "[p]ublic law is for public tribunals to define"[144] was recognized by the Supreme Court in *Gardner-Denver* when it stated that arbitration is a less appropriate forum for resolution of Title VII rights because the primary responsibility for resolution of constitutional and statutory issues lies with the courts.[145] Although OSHA and FLSA rights may not involve the constitutional issues that Title VII rights raise, they nonetheless touch important statutory issues that "frequently can be given meaning only by reference to *public law concepts.*"[146] Edwards correctly points out that two principal dangers arise when arbitrators undertake to decide issues of public law: "The first is that they may be wrong. The second is that their errors, if honored by a public tribunal out of deference to arbitration, may distort the development of precedent."[147]

The concern over arbitrators deciding issues of public law is heightened in light of the emerging doubt as to the advantages

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141. *At the Crossroads, supra* note 53, at 78 (emphasis added).

142. Edwards, *Arbitration of Employment Discrimination Cases*, in PROCEEDINGS OF THE 28TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 55-92 (BNA, Inc. 1975).

143. *Id.* at 82.

144. *At the Crossroads, supra* note 53, at 91.

145. 415 U.S. at 56, 57.

146. *Id.* at 57 (emphasis added).

147. *At the Crossroads, supra* note 53, at 90.

of arbitral versus judicial proceedings. A number of commentators are marshalling convincing evidence to dispel some of the traditional notions concerning the efficacy and desirability of arbitration. One distinguished critic, Paul R. Hays, asserts that neither the writings of Dean Schulman[148] nor those of Archibald Cox,[149] which were relied upon by Justice Douglas in writing the *Steelworkers* Trilogy opinions,[150] actually provide authority for the propositions on arbitration set forth in those cases.[151] Hays states the thesis of his book as follows:

> It is the submission of this book that there is no authority to support the view of arbitration adopted in the Steelworkers cases. There have been no extensive studies of the arbitration process that would establish the validity of the propositions advanced in those cases. While, with overwhelming modesty, the Court attributed to the arbitrators enormously superior expertise in cases arising under collective agreements, the Court impliedly claimed for itself an extensive knowledge and understanding of the arbitration process—a knowledge and understanding which the Court could hardly have in light of the

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148. *See* Schulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

149. *See* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959).

150. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

151. Specifically, Hays contends:

> Dean Schulman's Holmes lecture is cited in the *Steelworkers* cases to support a number of propositions with respect to arbitration. A careful reading of the passages cited will reveal, I believe, that, favorable as Schulman was to the arbitration process, his comments do not support the propositions for which they are cited. Nor can Schulman's lecture be properly cited in connection with the holdings of the *Steelworkers* cases. For the Court's remarks on the nature of the collective agreement and on arbitration are incidental to the holding that agreements to arbitrate and arbitration awards are fully enforceable in the federal courts, while central to Schulman's thesis of the acceptability of arbitration awards was the submission that arbitration agreements and awards should *not* be enforceable in the courts.
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> . . . .
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> If the attitude toward labor arbitration which characterizes the *Steelworkers* cases finds little or no support in Schulman's writing or in his position, the other authority on whom principal reliance is placed, Professor Archibald Cox, affords even less ground for the result. His writings on the subject, if read in their entirety, not only do not support the Court's position, they demonstrate that Cox takes a position contrary to that of the Court in several important respects.

P. HAYS, LABOR ARBITRATION 7-9 (1966).

available material on arbitration.[152]

In persuasive fashion, Hays attacks the widely circulated beliefs that parties select arbitrators on the basis of their special competence,[153] that arbitrators possess particular expertise,[154] and that the cost and time savings of the arbitral process far exceed those of judicial proceedings.[155] The soundness of Hays' conclusions are buttressed by those of Edwards and others.[156]

Finally, to convincingly argue that *de novo* consideration of FLSA and OSHA rights is the better position, satisfactory explanations must be given for two arguments. The first argument is the equitable one articulated by the district court in *Gardner-Denver,* where it reasoned that it would be unfair to allow an employee to submit his claim to both arbitral and judicial forums and then bind only the employer to the arbitral award. The court refused to "accept a philosophy which gives the employee two strings to his bow when the employer has only one," and thought an employee's later resort to a judicial forum would undermine the employer's incentive to arbitrate, thereby sounding "the death knell for arbitration clauses in labor contracts."[157] The Supreme Court disagreed with the lower court's reasoning since it concluded that " 'a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration.' "[158] The Court further observed that the benefits derived by employers from no-strike provisions are so valuable that they offset whatever costs may be encountered by allowing employees an arbitral remedy in addition to relief granted pursuant to their statutory rights.

Only time and closer examination will reveal whether the reasoning of the district court or that of the Supreme Court is correct. It is true that back pay, court costs, and attorneys fees provisions under FLSA and OSHA might induce more employees to exercise their statutory rights,[159] but it is also true that

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152. *Id.* at 9.

153. *Id.* at 37-39.

154. *Id.* at 58-59.

155. *Id.* at 60.

156. *At the Crossroads, supra* note 53, at 92-93.

157. 346 F. Supp. 1019 (D. Colo. 1971).

158. 415 U.S. at 55 (quoting Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235, 248 (1970)).

159. *See* 29 U.S.C. § 216(b) (1976) (FLSA); 29 U.S.C. § 660(c)(2) (1976) (OSHA).

there is little evidence to suggest that employers are moving in the wake of the *Gardner-Denver* decision to delete arbitration clauses from their collective bargaining agreements.

The second argument to be addressed is that the *Gateway Coal* presumption of arbitrability of safety disputes extends to many OSHA and FLSA cases. The simple answer is that *Gateway Coal* is distinguishable on its facts. Since no statutory rights were involved in that case, it should not stand as a bar to *de novo* adjudication of OSHA rights.

For these reasons, *de novo* consideration of statutory rights is the sounder position in terms of both law and policy. Consequently, if the extension of the *Gardner-Denver* rationale to FLSA and OSHA rights is the better position, then the logical conclusion would be to apply the *Gardner-Denver* holding with its accompanying "admissible as evidence" caveat to FLSA and OSHA cases involving arbitration awards. The arguments favoring arbitration of wage, hours, health, or safety disputes may sway judges to in fact accord great weight to arbitral decisions that provide adequate due process protections and evidence full and *accurate* consideration of an employee's statutory rights. On the other hand, in pre-arbitral cases involving statutory rights, *de novo* consideration could be allowed without requiring an employee to exhaust all other remedies. A necessary adjunct would be the elimination of the *Collyer* doctrine to the extent that it requires deferral of cases involving FLSA and OSHA rights.

VIII. Conclusion

The federal policy favoring arbitration of labor disputes has become deeply engrained in the fiber of American labor relations. The NLRB has promoted arbitration by adopting liberal deferral standards in both pre-arbitral and post-arbitral cases. Undoubtedly, arbitration would have continued as the preferred method for resolving most labor-related disputes if the Supreme Court had not trimmed back the contours of the presumption of arbitrability in *Gardner-Denver*. The *Gardner-Denver* holding rests on the following propositions: (1) Congress vested the federal courts with plenary power to enforce the provisions of Title VII, (2) Congress intended to provide individuals with overlapping remedies, (3) arbitrators possess no authority to adjudicate statutory rights, and (4) a judicial forum is superior to an arbitral forum for the protection of such rights.

In the absence of definitive Supreme Court statements re-

garding statutory rights other than Title VII rights, it remains uncertain whether the Court will also permit independent *de novo* consideration of FLSA and OSHA rights. The question whether to extend or limit the *Gardner-Denver* rationale is a very difficult one. Sound legal and policy considerations support each side. Nonetheless, the better position is to expand *Gardner-Denver* and allow *de novo* consideration in federal courts of FLSA and OSHA rights. This is the more prudent course for several reasons. First, Congress expressly created these individual causes of action and has authorized the federal judiciary to protect them, not to abrogate or qualify them. In addition, these statutorily created rights are strictly individual and not collective in nature, which means that they may be vindicated independent of union action. Also, because of the importance of the public law concepts and statutory issues that exist in many FLSA and OSHA cases, a judicial forum is a more suitable forum for the resolution of such matters. Finally, the efficacy of arbitration as a vehicle of dispute resolution is being seriously questioned because of mounting concerns about the expense and duration of the arbitral process as well as the competence of arbitrators. Wisdom dictates that these questions be carefully investigated and resolved before individual statutory rights are impaired.

John A. Adams