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## **Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements through Collective Employee Actions**

Michael Z. Green

Texas A&M University School of Law, [mzgreen@law.tamu.edu](mailto:mzgreen@law.tamu.edu)

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# OPPOSING EXCESSIVE USE OF EMPLOYER BARGAINING POWER IN MANDATORY ARBITRATION AGREEMENTS THROUGH COLLECTIVE EMPLOYEE ACTIONS

*Michael Z. Green*<sup>†</sup>

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## I. INTRODUCTION

When you review the modern employment relationship and the role of contract, you have to start with the default position of employment-at-will, which allows an employer, in general, to terminate an employee for good reason, bad reason, or no reason at all.<sup>1</sup> A number of

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<sup>†</sup> Associate Professor of Law, Texas Wesleyan University School of Law; B.S. University of Southern California; M.B.A., California Lutheran; J.D., *cum laude*, & M.S.I.R., Loyola University of Chicago; LL.M., University of Wisconsin. This Article resulted from my presentation at a symposium on "The Role of Contract in the Modern Employment Relationship," held on March 7, 2003, at Texas Wesleyan University School of Law, in Fort Worth, Texas. I would like to thank Professor Rachel Arnov-Richman for inviting me to speak at the symposium. At the time of the symposium, I was a member of the faculty at Florida Coastal School of Law. So I would like to thank the Florida Coastal Research Assistant program for its financial support, and the research efforts of Jessica Dungan, a Fall 2003 graduate of Florida Coastal School of Law. Special thanks go out to Earl Martin and Cynthia Fountaine for commenting on an earlier draft of this paper.

1. This at-will employment rule has a long and unusual history as it is a rule peculiar to the United States. It now has numerous exceptions believed to be neces-

exceptions to the employment-at-will rule exist, including tort and statutory employment discrimination claims that allow employees to seek legal remedies and punitive damage awards from juries. As these exceptions have developed outside of contract law, employers have responded by a major contractual effort to shift these disputes away from the courts and into arbitration. The primary employer methodology for accomplishing this shift has been to require that employees agree, at the time of being hired, to arbitrate any disputes arising out of the employment relationship.

In 1991, the Supreme Court held that an employer could compel arbitration of a statutory employment discrimination claim based upon an agreement to arbitrate that occurred as a condition of employment.<sup>2</sup> These one-sided, adhesion<sup>3</sup> agreements to arbitrate future disputes, sometimes referred to as agreements for mandatory arbitration,<sup>4</sup> represent a private contractual response by employers to limit

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sary to balance the harsh effects of literal application of the rule. See Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 551 (1990); Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443, 445 & n.1, 457-80 (1995); see also Michael Z. Green, *A 2001 Employment Law Odyssey: The Invasion of Privacy Tort Takes Flight in the Florida Workplace*, 3 FLA. COASTAL L.J. 1, 7-11 (2001). But see Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000) (asserting that the at-will rule has so many exceptions to it that its continued existence as a rule is approaching its end); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHICAGO L. REV. 947, 951-69 (1984) (describing the at-will rule as a reasonable economic development with a positive asymmetric result and not a harsh consequence as employees are just as free to leave employment with any employer at their will without having to pay the employer).

2. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991). This case involved an age discrimination claim brought pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000). Another primary statutory prohibition against workplace discrimination is found in Title VII of the Civil Rights Act of 1964 (Title VII), as amended, which covers race, color, sex, religion, and national origin discrimination. See Civil Rights Act of 1964 §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (2003). In the *Gilmer* decision, the authority for enforcing the agreement to arbitrate the statutory employment discrimination claim was the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-15 (2000).

3. Herein I assume the generally understood meaning of an adhesion agreement in that one side drafts the terms of the agreement into a standard form and then tells those with whom it intends to transact that they must adhere to these terms or go elsewhere because the terms are not negotiable. See J.W. Looney & Anita K. Poole, *Adhesion Contracts, Bad Faith, and Economically Faulty Contracts*, 4 DRAKE J. AGRIC. L. 177, 179-82 (1999) (describing the development and history of adhesion contracts); Todd D. Rakoff, *Contracts of Adhesion: An Article in Reconstruction*, 96 HARV. L. REV. 1174, 1177 (1983) (describing the "take it or leave it" aspect of adhesion agreements).

4. See Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 831 n.1 (2002) [hereinafter Sternlight, *Out on a Limb*] (commenting about whether these agreements should be called mandatory by stating as follows: "I put the term 'mandatory' in quotes as a nod to those who insist

an individual employee's publicly-developed rights and remedies.<sup>5</sup> Sadly, the average individual who recoils at the proposal of such an agreement to arbitrate future disputes with an employer has little bargaining power to actually refuse when the arbitration agreement is offered as a condition of employment.<sup>6</sup> As a result, this individual will not likely have a chance to pursue any publicly-developed rights provided by a statute.

In this Article, I focus on how employees can respond and address excessive bargaining power issues when employers require individual employees to agree to arbitrate employment disputes as a condition of employment. My thesis is that individual employees can and should seek self-help through collective action to level the playing field for bargaining about arbitration. Furthermore, I contend that the best collective action would be for unions to play a major role in how individual employee disputes, including the various statutory and tort-based exceptions to the employment-at-will doctrine, are negotiated and resolved in arbitration.

Section II of this Article reviews the Supreme Court's analysis of mandatory arbitration agreements involving statutory employment discrimination claims and its lack of concern for bargaining power in enforcing these agreements. Section III addresses the underlying concerns that led employers to excess when seeking mandatory arbitration agreements, and why that response now appears so insidious to many employee advocates. Section IV offers a solution to the dilemma of bargaining power excess engaged in by employers through mandatory arbitration—the use of collective employee activity with the assistance of unions. Finally, this Article concludes that creative uses of unions as assistants to groups of employees can chill employer excess and ultimately level the bargaining playing field with respect to decisions to arbitrate employment disputes.

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that arbitration imposed through contracts of adhesion should be categorized as voluntary. Personally, however, I cannot understand how a person can be said to have 'voluntarily' accepted arbitration when it is part of a small print contract of adhesion."); see also Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 400 n.1 (2000) [hereinafter Green, *Debunking*].

5. See Joseph R. Grodin, *On the Interface Between Labor and Employment Law*, 19 BERKELEY J. EMP. & LAB. L. 307, 310–11 (1998) (noting that it is unusual that the parties regulated by employment discrimination law, employers, may opt out of that regime by requiring their employees go to arbitration as a condition of employment); see also Green, *Debunking*, *supra* note 4, at 409 (arguing same); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 397 (1999) (asserting that mandatory arbitration agreements should not be enforced because a strong public policy in eradicating workplace discrimination requires a public forum to handle these disputes).

6. Even if an employee does try to refuse to sign such an agreement, he will have no legal recourse. See, e.g., *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 753–54 (9th Cir. 2003).

## II. AN UNFETTERED POLICY PREFERENCE FOR ARBITRATION OF EMPLOYMENT CLAIMS DESPITE THE LACK OF BARGAINING POWER FOR INDIVIDUAL EMPLOYEES

During the last decade, agreements to arbitrate have expanded to virtually every possible contractual setting, including the employment relationship.<sup>7</sup> In response to that expansion, a multitude of criticism<sup>8</sup>

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7. See Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 873–74 & n.4 (2002) (noting that “employers, sellers of consumer goods, banks, HMOs, and other institutional players in the economy are using adhesive arbitration clauses, and courts are enforcing them, despite the criticisms of many commentators.”); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 105 & n.2, 162 (1997) (noting that the American Arbitration Association (AAA) “has reported rapid growth in the areas of securities, real estate, franchising, computers, employment, banking, patent, trademark, and copyright disputes”); Sternlight, *Out on a Limb*, *supra* note 4, at 834 (noting that “many credit card providers, banks, insurers, health care providers, service providers, product sellers, and employers are using small print clauses to require individuals to trade their right to a day in court for a right to arbitrate future claims”); Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 696 n.9 [hereinafter Drahozal, *Unfair*]; see also Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1239 n.7 (2001) (focusing on consumer contracts but noting the development of mandatory arbitration in the employment area while also recognizing that employment issues may involve different analyses than consumer issues). In a recent survey of 627 litigators conducted by the American Bar Association’s Litigation Section about attorneys’ use of arbitration, 41.8% of those who responded were most often involved in Commercial law arbitration. See ABA Section of Litigation Task Force on ADR Effectiveness, *Survey on Arbitration at 10* (Aug. 2003), available at <http://www.abanet.org/litigation/taskforces/adr/surveyreport.pdf> (on file with the Texas Wesleyan Law Review). The remaining percentages were as follows: 23.0% Construction; 13.2% Labor and Employment Law; 9.6% Personal injury/tort law; 7.7% securities law; 2.2% Intellectual property law; 2.1% insurance law and 0.5% International law. *Id.*

8. There are probably hundreds of articles that critique the issue of mandatory arbitration. I have found the following articles to be particularly valuable in understanding the parameters of mandatory arbitration: Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB L.J. 381 (1996); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RIGHTS & EMP. POL. J. 189 (1997); Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2002); Sara Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996); Christine Godsil Cooper, *Where are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) [hereinafter Sternlight, *Panacea*]; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996) [hereinafter Stone, *Yel-*

has arisen, including my own more than ten years ago.<sup>9</sup> A number of critics have focused on the coercive aspects and lack of employee bargaining power when being forced to agree to arbitrate statutory employment discrimination disputes before a dispute arises.<sup>10</sup> Many of those critics have primarily sought public and legal resolution (either by the judiciary or Congress) to prevent employers from forcing these agreements on employees.<sup>11</sup>

After more than a decade of cases, much rhetoric about amendments in Congress,<sup>12</sup> years of looking at the criticisms, and even seeing

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*low Dog*] Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231 (1996).

9. See Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER. L. REV. 112 (1993) [hereinafter Green, *Preempting Justice*].

10. See, e.g., Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857, 866–67 (noting the need for protection from the stronger drafting party in arbitration when that drafter has used the arbitration clause as an abuse of bargaining power); Sternlight, *Panacea*, *supra* note 8, at 641 (arguing that the enforcement of agreements to arbitrate was only intended for parties with equal bargaining power); Stone, *Yellow Dog*, *supra* note 8, at 1036–38 (arguing that individual employees have little chance of negotiating with an employer about an arbitration clause).

11. See, e.g., Hoffman, *supra* note 8, at 149–55; Sternlight, *Out on a Limb*, *supra* note 4, at 832–33. Unfortunately, states cannot directly address the issue of enforcement of these agreements without being preempted by the Federal Arbitration Act. See *Perry v. Thomas*, 482 U.S. 483, 490–91 (1987). I argued a little more than 10 years ago that Congress should step in by amending the FAA to make mandatory arbitration agreements unenforceable or that the courts could interpret the agreements as unenforceable. Green, *Preempting Justice*, *supra* note 9, at 117–19. Because of bargaining power concerns in mandatory arbitration agreements, I have previously argued that the analysis applied in some court decisions rejecting waivers of future claims by older employees should also be applied to employees being asked to waive court action for future claims in a pre-dispute agreement to arbitrate. *Id.* at 117. Also, I previously argued that the same requirements in the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, 630 (2000)), which requires knowing and voluntary consent to enforce a waiver of an age discrimination claim and prohibits prospective waivers by requiring enforcement for only those disputes that have arisen at the time of the agreement, 29 U.S.C. § 626(f)(1)(C) (2000), should apply to agreements to arbitrate prospective employment disputes. Green, *Preempting Justice*, *supra* note 9, at 118. Apparently, many other commentators have made similar proposals about adapting principles employed under the OWBPA either as a form of judicial analysis or statutory amendment in deciding about the enforcement of mandatory arbitration clauses. See Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1206–07, 1207 n.11, 1238 (2002) (stating that “[m]any scholars have argued that a knowing and voluntary standard of consent should be applied” and “scholars have widely supported applying the OWBPA’s consent standard” to mandatory arbitration agreements).

12. Senator Russell Feingold, a Democrat from Wisconsin, obviously believes that Congress should take action to stop mandatory arbitration, but he has not been successful in mounting any major effort at passing legislation. See Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 284, 298 (2002); see also R. Larson Frisby, *Congress Considers Curbs on Mandatory Arbitra-*

some persuasive commentaries about why mandatory arbitration might still benefit employees regardless of the coercion involved,<sup>13</sup> I have concluded that the issue of contractual bargaining power rests at the center of this controversy.<sup>14</sup> Accordingly, if bargaining power can reach at least a happy medium between employees and employers to form a high level of knowing, voluntary, and informed consent,<sup>15</sup> the

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*tion of Consumer and Employment Disputes*, DISP. RESOL. MAG., Fall 2002, at 31 (describing Senate consideration of legislation introduced by Senator Feingold to prevent enforcement of mandatory arbitration agreements).

13. See Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 763–64 (2003); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 76 (1999); Theodore J. St. Antoine, Gilmer in the *Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491 (2001) [hereinafter St. Antoine, Gilmer]; Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1 (1998) [hereinafter St. Antoine, *Mandatory*]. Without asserting any support for or criticism of mandatory arbitration in the employment setting, I have even argued previously that there are clear benefits for employees who can take their statutory discrimination claims to arbitration rather than face the dismal prospects of succeeding in court. See Green, *Debunking*, *supra* note 4, at 453–54.

14. This is not the first time that I have noted the problem with bargaining power in enforcing mandatory arbitration agreements. See Green, *Debunking*, *supra* note 4, at 418. Nor am I the first to reach the conclusion that bargaining power is an issue of concern in these agreements. See Cole, *supra* note 8, at 459; Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB POL'Y 173, 200–01 (1998); Harding, *supra* note 10, at 862–63; Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 512–24 (2001); Sternlight, *Panacea*, *supra* note 8, at 711; see also Robert Rabin, *The Role of Government in Regulating the Workplace*, 13 LAB. LAW. 1, 17–19 (1997). But see Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537, 537–41 (2002) [hereinafter Drahozal, *Nonmutual*] (arguing that agreements to arbitrate do not require that one party has to assent at the same level as the other party and that to force it will make the agreements unfair for consumers or employees).

15. See Jeffrey W. Stempel, *Boostrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1406–07, 1415 (1996) (criticizing the Supreme Court's refusal to consider lack of consent in its rulings preferring arbitration); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996); Reilly, Comment, *supra* note 11, at 1235–36. There are some debates about what “actual consent” may mean. See Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 827 n.40 (2003) (noting differences in interpretations of consent versus “actual consent”); see also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986) (claiming “consent” in contracts is “the moral component that distinguishes valid from invalid transfers of alienable rights”); Blake E. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233, 252 (2003) (explaining the parameters of consent as follows: “The authenticity of consent confirms a contract’s legitimacy. Consideration notwithstanding, consent ultimately becomes the primary determinant of contract enforcement. Consent, synonymous with intent, has been historically regarded as a ‘meeting of the minds’ of the parties.”).

incessant number of articles and critiques about mandatory arbitration and its highlight as a major issue of the past decade can come to an end. Critics can then focus on the broader aspects of whether arbitration of statutory employment disputes warrants the attention it has received the last ten years.<sup>16</sup>

In the 1991 case of *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>17</sup> the Supreme Court opened the door to enforcement of mandatory arbitration of statutory employment discrimination claims.<sup>18</sup> As a condition of his employment as a financial manager for Interstate/Johnson Lane, Gilmer had to sign a registration application with the New York Stock Exchange (NYSE) requiring that he go to arbitration over any controversy with his employer.<sup>19</sup> The application, executed at the time of hire, became the source of the employer's motion to compel arbitration several years later when Gilmer filed a statutory age discrimination claim under the Age Discrimination in Employment Act (ADEA).<sup>20</sup> Pursuant to the Federal Arbitration Act (FAA), the Court compelled the arbitration of the ADEA claim.<sup>21</sup> Because the agreement was not literally between the employer and the employee, but between the NYSE and the employee, the Supreme Court saved for "another day" the question of whether section 1 of the FAA<sup>22</sup> excludes individual employment agreements from FAA coverage.<sup>23</sup> Al-

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16. Quite possibly, the aura of using arbitration has worn off as mediation of employment disputes appears to be the real growth area for employment discrimination dispute resolution. See Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 111 (2002); Theodore O. Rogers, *The Procedural Differences Between Litigation in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 640 (2001); see also Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLIN L. REV. 261 (1998); Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 334-38 (2001); Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135 (1999); Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431 (1996); Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583.

17. 500 U.S. 20 (1991).

18. Before the *Gilmer* decision, "most parties believed that courts would not enforce agreements requiring mandatory arbitration of statutory employment discrimination claims." Green, *Debunking*, *supra* note 4, at 408 & n.26; see also Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345, 346 (1998) (noting that before the 1990s many thought an employer could not insist upon arbitration).

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

20. *Id.* at 23-24. The ADEA can be found at 29 U.S.C. §§ 621-634 (2000).

21. *Gilmer*, 500 U.S. at 24.

22. Federal Arbitration Act, 9 U.S.C. § 1 (2000) ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

23. *Gilmer*, 500 U.S. at 25 n.2.



though there was still some question as to whether a direct agreement between an employer and an employee would be enforceable under the FAA after *Gilmer*, most lower courts ran with the decision and started a pattern of broad enforcement of mandatory arbitration agreements involving statutory employment discrimination claims.<sup>24</sup>

After a decade of uncertainty, “another day” finally arrived in 2001 when the Supreme Court, in *Circuit City Stores, Inc. v. Adams*,<sup>25</sup> answered the question left open in *Gilmer* and made it very clear that agreements to arbitrate future employment disputes can be enforceable when entered into directly between an employer and an employee.<sup>26</sup> In *Circuit City*, the employee, Saint Clair Adams, made allegations of discrimination and unfair treatment under the California Fair Employment and Housing Act and under state tort law.<sup>27</sup> The Court held that the language in Section 1 of the FAA excluding “contracts of employment” only applied to contracts of employees who are transportation workers.<sup>28</sup>

The *Circuit City* decision clearly left the field for mandatory arbitration of statutory employment disputes wide open. Since the *Gilmer* decision in 1991, the Supreme Court has generally supported and endorsed the arbitration of all forms of agreements. After reviewing the majority of decisions regarding arbitration by the Supreme Court since 1991,<sup>29</sup> and specifically mandatory arbitration of statutory employment disputes,<sup>30</sup> I have noticed an interesting thread. In the only two cases where the employer argued that arbitration should be compelled and the employer did not prevail, collective employee interests were also at issue.<sup>31</sup>

In the first case, *Wright v. Universal Maritime Service Corp.*,<sup>32</sup> the Court addressed the issue of whether an agreement for mandatory arbitration would be enforceable in a union setting involving a collec-

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24. See Green, *Debunking*, *supra* note 4, at 411 & n.39, 412 & n.42 (citing cases).

25. 532 U.S. 105 (2001).

26. See *id.* at 119.

27. *Id.* at 110.

28. *Id.* at 119.

29. See generally *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000); *E. Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57 (2000); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Wright v. Universal Marine Serv. Corp.*, 525 U.S. 70 (1998); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

30. See *supra* notes 17–28 and *infra* notes 32–51.

31. See *infra* notes 32–51 and accompanying text.

32. 525 U.S. 70 (1998).

tive bargaining agreement.<sup>33</sup> The Court decided that in order for a union to waive an individual employee's right to pursue a discrimination claim in a judicial forum, a clear and unmistakable relinquishment of the right to pursue the statutory claim in question must exist.<sup>34</sup> It is unlikely that a union would agree to provide a "clear and unmistakable" waiver of any individual employee's right to take his or her employment discrimination dispute into court.<sup>35</sup>

Accordingly, a bargaining power anomaly has developed from *Wright* and *Gilmer*. When a union with bargaining power represents an individual employee with no bargaining power, as in *Wright*, the clear and unmistakable waiver requirement limits an employer from seeking mandatory arbitration. In contrast, when an individual employee with no bargaining power and no collective interests at issue, as in *Gilmer*, is forced to arbitrate as a condition of employment, there is no clear and unmistakable waiver requirement.

There is some debate about how to apply *Wright* in line with a 1974 Court decision. In *Alexander v. Gardner-Denver Co.*,<sup>36</sup> the Court found that an employee could pursue any individual claim he had under Title VII in court even if he had already used the grievance and arbitration process provided by the employer and his union pursuant to a collective bargaining agreement.<sup>37</sup> According to the Court, by processing the employee's grievance through arbitration, the union had not waived the statutory rights of the employee to file a Title VII claim.<sup>38</sup> The Court also found that a union cannot agree to waive an individual employee's future pursuit of statutory rights in court.<sup>39</sup>

Although it is by no means settled, at least one decision issued since *Wright* has raised concerns about *Gardner-Denver's* requirement that a union cannot waive an individual employee's right to go to trial. In *Air Line Pilots Ass'n International v. Northwest Airlines, Inc.*,<sup>40</sup> the District of Columbia Circuit Court of Appeals applied *Gardner-Den-*

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33. *Id.* at 72.

34. *Id.* at 79–80.

35. St. Antoine, *Gilmer*, *supra* note 13, at 502; see also Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1842 (2001) [hereinafter Crain & Matheny, *Identity*] (asserting that "unions will have a powerful disincentive to negotiate for antidiscrimination provisions in labor contracts because they risk waiving unit members' rights to proceed in court with statutory antidiscrimination claims").

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

37. *Id.* at 50 (finding that "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.").

38. See *id.* at 51–52.

39. *Id.* at 51. The Court subsequently banned prospective waivers by a union of an individual employee's rights under other statutes in *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (banning waivers under 42 U.S.C. § 1983 (2000)) and *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (banning waivers under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–19 (2000)).

40. 199 F.3d 477 (D.C. Cir. 1999).

ver and ruled that, if a union cannot waive an employee's right to trial, an employer can negotiate directly with individual employees about mandatory arbitration agreements without having to deal with the union.<sup>41</sup> This decision seems to circumvent the union's role and would normally raise concerns under the National Labor Relations Act (NLRA),<sup>42</sup> which prohibits an employer from dealing directly with employees who are represented by a union.<sup>43</sup> It also seems to be contrary to the purpose of the NLRA, which recognized that problems of bargaining power between individual employees and employers, and the consequences from that imbalance, required that employees have the legal authorization to use unions as their representative to bridge that bargaining power gap.<sup>44</sup> Hopefully, the Supreme Court will clarify the boundaries of *Gardner-Denver*, *Gilmer*, and *Wright* as highlighted by the difficulties from the *Air Line Pilots* decision, or perhaps the *Air Line Pilots* decision represents an anomaly.<sup>45</sup>

In the second case rejecting an employer's attempt to enforce a mandatory arbitration agreement, *EEOC v. Waffle House, Inc.*,<sup>46</sup> the Court found that the EEOC could bring an enforcement action for all equitable and legal remedies available under law, including back-pay, reinstatement, and compensatory and punitive damages, even though the individual employee who filed the charge had agreed with the em-

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41. See *id.* at 484–86.

42. 29 U.S.C. §§ 151–169 (2000).

43. See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 52 (1975).

44. See National Labor Relations Act § 1, 29 U.S.C. § 151 (2000); see also Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. Rev. 687, 688 (1997) (stating that “[t]he NLRA was premised on the assumption that the best way to protect American employees was to give sufficient bargaining power to permit meaningful negotiation over the terms and conditions of employment”). Cf. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981) (asserting that the NLRA was “based on a false assumption: the assumption that management and labor have equal power in the workplace”).

45. See Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513, 516–20 (2001); Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J. L. PUB. POL'Y 489, 498 (2000); see also Crain & Matheny, *Identity*, *supra* note 35, at 1841–45. Compare Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1, 9 (1999) (identifying conflicts for unions in pursuing the collective interests of the membership versus individual claims of employees alleging discrimination claims), and Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135, 201–03 (asserting that unions should not be allowed to waive individual employee rights to statutory discrimination claims because of the conflicts posed), with Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 845–47 (1996) (asserting that unions should be able to waive individual employees' Title VII claims in an agreement with an employer because, without that waiver, the prospect of allowing employees essentially another chance to adjudicate their claim discourages employers from entering into agreements to arbitrate).

46. 534 U.S. 279 (2002).

ployer to arbitrate any employment disputes.<sup>47</sup> This decision highlighted the concern about the collective public rights that the EEOC must vindicate through its enforcement policies.<sup>48</sup> Because the EEOC is not a party to the arbitration agreement, it is still able to seek all the same relief in court that the individual employee may not seek because of the arbitration agreement.<sup>49</sup>

Under *Waffle House*, the employer may still end up in court defending itself and trying to prevent a large jury verdict based upon claims of an employee who agreed to arbitrate pursuant to mandatory arbitration. Because the EEOC only takes a small percentage of cases,<sup>50</sup> an employer may be willing to gamble that its arbitration agreement may survive through a sheer numbers test. However, if an individual employee files a charge raising a systemic, class-based issue for a large collective of employees, the EEOC may be more likely to take the case.<sup>51</sup>

A mere individual employee operating with no bargaining power and no collective interests at issue will likely succumb to the harsh rule of *Gilmer* and the generally unfettered preference for arbitration by the Court. However, when the broader, collective interests of employees as a whole are involved, as in *Waffle House*, the policy of favoring arbitration finally gives way to something else: the policy of

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47. *Id.* at 297–98.

48. *See id.* at 290.

49. *Id.* at 292. If the employee has already recovered remedies in arbitration, any amount received by the employee may limit the final award issued to the EEOC. *Id.* at 296. In *Gilmer*, the Court made it clear that an individual subject to an arbitration agreement is still free to file an EEOC charge, and that arbitration agreements “will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

50. *See* Ann C. Hodges, *Can Compulsory Arbitration be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 175 n.5 (2003) [hereinafter Hodges, *Section 7 Rights*]. *But see* Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 LAB. LAW. 33, 35 (2003) (describing an increase in class action filings by the EEOC from 1997 to 2001 up to an overall increase by 2001 to “210 class cases,” which represented “40 percent of the total docket” and asserting that the increase in filings was due to an increase in the staffing of attorneys at the EEOC during this time period). Professor Ann C. Hodges has also asserted that a problem with relying on the EEOC to right the wrongs that may occur through mandatory arbitration is that the EEOC normally starts its enforcement efforts based upon an employee-filed charge and if employees have entered into agreements to arbitrate, they may not realize they can file EEOC charges. Hodges, *Section 7 Rights*, *supra* at 231–32.

51. *See* Hawkins, *supra* note 50, at 36 (noting an increase in the filing of class actions by the EEOC). In the EEOC’s 1997 enforcement plan, it noted that it would focus on systemic and class-based cases. *See* Equal Employment Opportunity Commission, U.S. Equal Employment Opportunity Commission National Enforcement Plan, § II(c), (describing “systemic investigations and litigation” as part of the EEOC’s enforcement focus) at <http://www.eeoc.gov/nep.html> (last visited Oct. 23, 2003) (on file with the Texas Wesleyan Law Review).

having the EEOC independently vindicate statutory rights and enforce its public mandate for the collective interests of all employees.<sup>52</sup>

After *Wright* and *Waffle House*, employers really have no guarantee that an arbitration agreement will preclude an employee's claims from getting into court. When entities with bargaining power like a union or the EEOC are involved, mandatory arbitration may not be enforced. Some have argued that the Supreme Court must have gotten it backwards and should have offered more protections to the individual employee with no bargaining power, as in *Gilmer*, rather than the individual employee in either *Wright* or *Waffle House*, who had the union and the EEOC, respectively, in a position to bargain for a better result.<sup>53</sup> Although the *Circuit City* decision made it clear that mandatory arbitration agreements for statutory employment discrimination claims would be enforceable,<sup>54</sup> *Wright* and *Waffle House* leave the door open to protect broader collective interests of employees by those entities that may represent their interests in the judicial system or in arbitration.

### III. EXPLORING THE REASONS FOR EMPLOYER BARGAINING POWER EXCESS: A BALANCE OF PERCEIVED CORPORATE GREED VERSUS HEIGHTENED FEARS OF LARGE JURY VERDICTS

The privatization of employment dispute resolution through arbitration has become a major reality over the last decade.<sup>55</sup> Certain

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52. See Crain & Matheny, *Identity*, *supra* note 35, at 1815 n.287 (discussing the implications of *Waffle House* and asserting that “[t]he underlying tension in *Waffle House* is between the federal pro-arbitration policy and the rights of individuals to contract freely with regard to the terms of their employment on one hand, and the public interest in eradicating employment discrimination on the other” because “[t]he EEOC functions as more than just an enforcer for individual employee rights against discrimination, it is the watchdog for the public’s interest” and “the EEOC makes resource allocation decisions about which claims it will pursue based on its assessment of the most significant impact for workers as a whole”).

53. See, e.g., St. Antoine, *Gilmer*, *supra* note 13, at 503–04 (suggesting that the holdings in *Gardner-Denver* and *Gilmer* are “backwards” because of the reversals of bargaining power with the union having it in *Gardner-Denver* and the individual employee not having it in *Gilmer*); Scalia, *supra* note 45, at 497–98 (criticizing the results in *Gilmer* versus *Gardner-Denver* by saying, “Thus, we have the circumstance that an agreement achieved by a labor union—which the NLRA and theories of collective action presume to be a far more effective negotiating agent than an individual employee—is not enforceable; but an agreement signed by an individual employee as a condition of employment—which the employee presumably give[s] little attention [to] at the time of hiring—is enforceable.”); Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 192–93 (2001) (asserting that the decisions in both *Gardner-Denver* and *Gilmer* were wrong).

54. *But see infra* notes 61–67 and accompanying text.

55. See Covington, *supra* note 18, at 411; Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1188 (1993); Sid L. Moller, *Birth of Contract: Arbitration in the Non-Union Workplace*, 50 S.C. L. Rev.

norms develop when operating privately to resolve nonunion employment disputes.<sup>56</sup> The development of employment law in the nonunion workplace follows from the employment-at-will principle, which operates as the default rule.<sup>57</sup> Commentators have raised concerns about consent by individuals when large entities get them to contract out of the public system of dispute resolution into a private dispute resolution system.<sup>58</sup> Because of this major privatization of employment disputes, employees should not rely on efforts to have the courts, or even Congress, correct the imbalance of bargaining power over mandatory arbitration agreements. Instead, employees should take matters into their own hands through collective action,<sup>59</sup> especially through union representation or involvement.

Now, some may question whether it is a good thing to have employees collectively respond to employers regarding mandatory arbitration. Employers save money and time by entering into standard form adhesion agreements,<sup>60</sup> and more costly transactions may eventually harm employees of the company, if the company can no longer save those expenses.<sup>61</sup> However, employer expenses related to the lack of informed consent and bargaining power of employees in mandatory

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183, 185–86 (1998); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 705–09 (1999); see also John C. Coffee, Jr., *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 967 (1988) (reviewing the application of arbitration to resolve shareholder derivative class action suits).

56. See Moller, *supra* note 55, at 184 & n.1.

57. Moller, *supra* note 55, at 187; see also Hayford & Evers, *supra* note 1, at 505–06.

58. See, e.g., Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761 (2002); Michele M. Buse, Comment, *Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award*, 22 PEPP. L. REV. 1485, 1523 (1995); see also Alderman, *supra* note 7, at 1246–49 (criticizing mandatory arbitration as not involving real consent of the individual because it involves an adhesion agreement and differences in bargaining power).

59. See Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 8–11 (2002) (arguing for the use of more private justice by individuals on the inside of corporations).

60. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971) (noting how much more costly it is for the drafter of a standard form adhesion agreement to allow someone to negotiate changes to its standard forms and how it is better for the drafter to just refuse to allow negotiation and spread the costs over a large number of transactions).

61. Drahozal, *Nonmutual*, *supra* note 14, at 555–61; Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90–93; see Drahozal, *Unfair*, *supra* note 7, at 741, 762–64. *But see* Sternlight, *Out on a Limb*, *supra* note 4, at n.65 (arguing that cost savings resulting from standard form arbitration clauses do not get passed back to consumers or employees because “absent perfect competition, companies will be able to keep any profits they secure by imposing binding arbitration”).

arbitration agreements still continue from all of the ongoing criticism, backlash, and challenges to these agreements.<sup>62</sup>

The Supreme Court has said that arbitration agreements may be challenged on the basis of normal contract challenges “such as fraud, duress, or unconscionability.”<sup>63</sup> Although “fraud and duress have been difficult to establish,”<sup>64</sup> ongoing challenges to mandatory arbitration include claims that these agreements are: unconscionable by being too one-sided;<sup>65</sup> illusory and lacking in consideration;<sup>66</sup> unfair in making the employee pay for all or part of the costs of arbitration;<sup>67</sup>

62. Despite the Supreme Court’s general endorsement of mandatory arbitration agreements in 2001 with its decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), a number of legal challenges still continue. See *infra* notes 62–68 and accompanying text.

63. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); see also Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1012 (1996) (exploring the ramifications of unconscionability claims under the FAA after the *Doctor’s Associates* decision). Professor Ware has also offered a thorough analysis of the application of unconscionability principles in the enforcement of agreements to arbitrate specifically involving employees. See *id.* at 1028–34.

64. Hodges, *Section 7 Rights*, *supra* note 50, at 180.

65. See, e.g., *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 786 (9th Cir. 2003); *Murray v. United Food & Commercial Workers International Union*, Local 400, 289 F.3d 297, 302 (4th Cir. 2002); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937–39 (4th Cir. 1999); see also *Faber v. Menard, Inc.*, 267 F. Supp. 2d 961, 977–79 (N.D. Iowa 2003).

66. See, e.g., *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002); *Penn v. Ryan’s Family Steak Houses, Inc.*, 269 F.3d 753, 759–60 (7th Cir. 2001); *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 314–16 (6th Cir. 2000); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997); *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985).

67. See, e.g., *Circuit City Stores, Inc.*, 279 F.3d at 895; *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1483 (D.C. Cir. 1997). The underlying issue of what courts should consider in trying to decide whether being compelled to pay for the costs of arbitration should invalidate the agreement to arbitrate was not clearly addressed by the Supreme Court, but the Court did find that the burden is on the person challenging the agreement to establish that the costs of arbitration being levied are so prohibitive that they prevent the challenger from vindicating a legitimate claim under the statute at issue. *Green Tree Fin. Corp-Ala. v. Randolph*, 531 U.S. 79, 90–92 (2000). The number of court decisions since *Green Tree* are not clear about whether the costs of arbitration may prevent enforcement of an arbitration agreement. See Michael H. Leroy & Peter Feuille, *When is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 177 (2002). A debate about the costs of arbitration for individuals began with a consumer group asserting that arbitration is very costly, and critics have responded by challenging those findings and asserting that service providers, like the American Arbitration Association, have made sincere efforts to limit costs for individuals. See Samuel Estreicher & Matthew Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen’s Jeremiaid on the Costs of Arbitration*, 57 DISP. RESOL. J. 8, 10–11 (Jan. 2003), available at <http://www.westlaw.com> (last visited Nov. 2, 2003) (on file with the Texas Wesleyan Law Review); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 792, 794–803 (2003).

inappropriately banning class actions;<sup>68</sup> and violating certain public policies by preventing the recovery of the same remedies that would be available in the courts.<sup>69</sup> Employers continue to face these challenges because of ongoing concerns about lack of informed consent and bargaining power when agreeing to arbitrate as a condition of employment. Other problems with mandatory arbitration are also starting to occur, including dwindling employee morale<sup>70</sup> and overall frustration with the results from and the limits of arbitration.<sup>71</sup> Never-

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68. See, e.g., *Johnson v. W. Suburban Bank*, 225 F.3d 366, 368–69 (3d Cir. 2000); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). But see *Ting v. AT&T*, 319 F.3d 1126, 1149–50 (9th Cir. 2003), cert. denied, 124 S. Ct. 53 (2003) (mem.). Professor Jean R. Sternlight has offered several reasons for criticism about the effect that mandatory arbitration agreements can have on class actions. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 125–26 (2000); Jean R. Sternlight, *Should an Arbitration Provision Trump the Class Action? No: Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise*, DISP. RESOL. MAG., Spring 2002, at 13. Several other commentators are starting to raise issues concerning class actions and mandatory arbitration. See, e.g., Hodges, *Section 7 Rights*, supra note 50, at 204–23; Richard Jeydel, *Consolidation, Joinder and Class Actions: What Arbitrators and Courts May and May Not Do*, 57 DISP. RESOL. J. 24 (Jan. 2003); Andrea Lockridge, Note, *The Silent Treatment: Removing the Class Action from the Plaintiff's Toolbox Without Ever Saying A Word*, 2003 J. DISP. RESOL. 255. In *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), the Supreme Court sidestepped the issue as to whether mandatory arbitration clauses that are silent as to class actions effectively prohibit class actions under Section 4 of the FAA. The pertinent part of Section 4 of the FAA states: “A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4 (2000). The Court in *Green Tree* decided that the determination of the issue about whether a silent mandatory arbitration agreement could ban a class action was for the arbitrator to make in the first instance, not for the courts, and remanded the case. See *Green Tree*, 123 S. Ct. at 2408.

69. In *Pacificare Health Systems, Inc. v. Book*, 123 S. Ct. 1531 (2003), the Court again refused to decide whether a court must compel arbitration and left it for an arbitrator to decide the issue as to if the agreement bans punitive damages and whether it may be enforced if such a ban conflicts with the remedies to be provided by the statutory scheme at issue. Although the agreement banned punitive damages, it was not so clear that it prevented the statutory remedy of treble damages and so it was for the arbitrator to decide this in the first instance. *Id.* at 1535–36; see also *Circuit City Stores, Inc.*, 279 F.3d at 894–95; *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 464–65 (S.D.N.Y. 1997); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 683 (Cal. 2000).

70. See Simon J. Nadel, *Mandatory Arbitration Not for All Employers; Cost, Fairness Still Subject of Debate*, 70 U.S.L.W. 2755, 2756 (June 4, 2002) (noting that mandatory arbitration agreements can provide a source for low employee morale); see also Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 811 (1992) (noting that boosting employee morale substitutes for union organization).

71. See St. Antoine, Gilmer, supra note 13, at 509 (stating that “[e]mployer enthusiasm for mandatory arbitration even for individual employees, is not all that it was in the past” as management has become aware of employees’ greater success rate rather than in court litigation).



theless, if arbitration poses such major benefits as advocates of mandatory arbitration assume, then the mandatory aspects of agreeing to it as a condition of employment should not make a difference.

Employer advocates may believe that arbitration and alternatives to the litigation system provide a welcome respite, if not an outright panacea, when compared to the overworked judicial system. Such views also rest on paranoid concerns about excessive and unprincipled verdicts from runaway juries.<sup>72</sup> One commentator, who obviously supports this view, has said:

What we have, in effect, is a uniquely American employment law lottery. Most employees work on an at-will basis and have no viable legal claim in the event of a job termination. Many of those workers who may have a legitimate claim are unable to pursue it because of the high entry cost of our justice system. Employers, nonetheless, fear employment termination suits and spend considerable sums in deterring and settling lawsuits. The only real winners in this system are the handful of plaintiffs who strike it big before a jury.<sup>73</sup>

Nevertheless, the result of acting on these unfounded fears of jury verdicts<sup>74</sup> and lack of employer autonomy leaves the evolution of workplace disputes few options other than just to hope that employers will do the right thing. This would continue to allow employers to use their overwhelming bargaining power to contract for whatever procedural and substantive mechanisms they want as long as the courts are willing to enforce them under the guise of supporting arbitration.

A key example of this flawed system involves statutory employment discrimination claims. In 1991, Congress granted employees the statutory right to a jury trial and legal damages for employment discrimination claims.<sup>75</sup> On the other hand, the courts, by allowing employers to

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72. See Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107, 119 (2002); Weiler, *supra* note 53, at 193–95. *But see* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 402 (2002) (stating that “defense costs through trial hover at around \$250,000 in a typical employment termination case” but admitting that “employers prevail in most employment suits”); Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 22 (1997) (arguing that an employer can spend “hundreds of thousands of dollars” defending a wrongful discharge suit); St. Antoine, Gilmer, *supra* note 13, at 509–10 (noting that an attorney had informed Professor St. Antoine that “successful defense in a jury trial may cost \$100,000 to \$200,000, and a complex discrimination case may run into the millions”).

73. Befort, *supra* note 72, at 402–03.

74. I have previously tried to explain that the reasons for corporate fears about jury verdicts are unfounded and based upon a certain degree of paranoia due to the publicity involved in the few disputes that do involve major verdicts. Green, *Debunking*, *supra* note 4, at 454–59 & n.206 (citing Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 250).

75. Civil Rights Act of 1991, 42 U.S.C. § 1981a (2000). This landmark legislation also created new remedies by allowing victims of intentional employment discrimination under Title VII to obtain compensatory and punitive damages relief with the only

use their excessive bargaining power to contract out of the jury trial system and into arbitration, have placed concerns about employer autonomy and costs of litigation, along with the concern for clearing their crowded court dockets, above the statutory rights of employees. Despite the jury trial process for resolving employment discrimination claims that Congress created, the courts have essentially entrusted the dispute resolution process to the employers to devise it as they see fit when resolving these claims through arbitration.<sup>76</sup>

Public trust of corporations probably rests at a very low premium right now. Similar to the hyperbole about runaway jury trials,<sup>77</sup> there exists a lot of exaggeration about greedy and unfeeling employers who are allegedly too willing to exercise Machiavellian tendencies and draconian methods in dealing with employees, especially with the role that the Enron Corporation debacle and other highly publicized acts

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proviso being a limit on actual recovery based upon the number of employees that the employer has. *See id.* at § 1981a(b)(3); *see also* Silverstein, *supra* note 14, at 499–500 (discussing the importance and significance of obtaining the right to jury trials and compensatory and punitive damages in employment discrimination suits and why those rights should not be so easily waived).

76. Arbitration service providers also play a role in how these agreements are enforced, and they have made attempts to self-regulate by following the Due Process Protocol, a joint agreement requiring certain fairness in disputes submitted to arbitration pursuant to a mandatory arbitration clause. *See* American Arbitration Association, *Task Force on Alternative Dispute Resolution In Employment, A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, at <http://www.adr.org> (May 9, 1995) (on file with the Texas Wesleyan Law Review). Most recently, concerns about mandatory arbitration, including lack of public decisions and a lack of agreement by employees about costs of arbitration, are being addressed by the American Arbitration Association, one of the biggest providers of arbitration services. *See* Press Release, American Arbitration Association, American Arbitration Association Announces Changes Aimed at Fairness for Employees in Arbitration (Oct. 29, 2002), at <http://www.adr.org> (last visited Oct. 20, 2003) (on file with the Texas Wesleyan Law Review).

77. *See* Hawkins, *supra* note 50, at 54 (describing several recent “high-profile” discrimination class actions against “Fortune 500 companies, including Coca-Cola Co., Microsoft Corp., Boeing Co., Home Depot, Inc., Texaco, Inc., Mitsubishi Cos., Inc., Lockheed Martin Corp., and Southern Co.” and noting that the “Texaco and Coca-Cola . . . settlements exceeded \$150 million” with the Coca-Cola settlement being “\$192.5 million . . . the largest ever in a race bias discrimination case brought in the United States” (citations omitted)). Nevertheless, there exists little data to “support the incessant corporate fear of jury verdicts and large punitive damage[s]” as a whole. Green, *Debunking*, *supra* note 4, at 459; *see also* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 27 (1986) (finding that “[i]n federal, as in state courts, most cases settle”); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27 (1983) (noting that “most civil cases in American courts are settled” and “terminate in an outcome agreed upon by the parties”). Most information about employment discrimination disputes in federal courts indicates that employers are most likely going to win ninety percent of the time before going to trial. *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997).

of corporate greed have played in judging corporate responsibility over the last two years.<sup>78</sup>

To lift the hyperbolic fog about runaway jury verdicts and the need to punish greedy employers as a pro and con to mandatory arbitration, respectively, and to get at the heart of the matter, requires a focus on bargaining power and its role in the decision to arbitrate. An analysis must focus on the balance of bargaining power between those occasionally greedy employers who involve themselves in ethical breaches of enormous proportions potentially resulting in bankruptcy with thousands of employees losing jobs and pensions<sup>79</sup> versus those rare number of employees who win excessively huge verdicts and ac-

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78. My contention that the focus on corporate greed is a bit of an exaggeration is mostly an anecdotal assertion from having spent most of my life during the last 15 years focused on workplace issues as a manager for a Fortune 500 corporation supervising a large group of employees, an advocate for labor unions, an advocate for employers, and then as a neutral law professor. From that experience, it is my belief that most employers want to do a good job and overall they do. See THOMAS J. PETERS & ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE* (1982) (chronicling many corporate success stories along with their excellent managers who truly value their employees as the key resource for their companies); see also Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 *CAP. U. L. REV.* 241, 243 & n.14, 273 (1997) (describing wonderful developments of businesses and companies through innovative entrepreneurs and the growth of small businesses in this country); Donald Hastings, *The Role of Incentives, Profit Sharing, and Employee Participation in the Development of Human Resources in the United States*, 22 *CAN.-U.S. L.J.* 135, 136 (1996) (criticizing companies in a rush to downsize as having poor managers with no innovation, and for causing disastrous results for those employees instead of valuing them as key human resources and encouraging their productivity). But see Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 *STAN. L. REV.* 857, 876 & n.89 (1993) (describing problems with poor management, bankruptcy, etc., of many public companies, including subsequently poor results for a number of the successful companies, but still identifying some very well-run companies, too). Nevertheless, when managers become obsessed with their greatness or sense that they are all-powerful and can do whatever they want without retribution, they do make major ethical breaches or openly discriminate, and when those events are finally exposed, they are highly publicized. See Patrick Emery Longan, *Lessons From Enron: A Symposium on Corporate Governance—Foreword*, 54 *MERCER L. REV.* 663, 664 (2003) (noting that the name Enron “has become synonymous with corporate greed”); see also Jenny B. Davis, *The Enron Factor: Experts Say the Energy Giant’s Collapse Could Trigger Changes in the Law that Make it Easier to Snare Professionals*, A.B.A. J., Apr. 2002, at 40, 42 (identifying the comments of Washington University Law School Dean, Joel Seligman, an expert on securities law, and questioning “to what extent [the] Enron [debacle] is an extraordinary and isolated event” and suggesting that, regardless, there will be legislation passed to address it); Hawkins, *supra* note 50, at 54 (describing a number of high-profile and widely publicized discrimination cases involving many Fortune 500 companies).

79. See Bucy, *supra* note 59, at 9–10 & nn.18–27; see also Charles B. Craver, *The American Worker: Junior Partner in Success and Senior Partner in Failure*, 37 *U.S.F. L. REV.* 587, 607–25 (2003) (describing the inequities in how rank and file employees and managers are treated in comparison to highest level managers in corporations). See generally Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 *U. PA. L. REV.* 1861 (2003) (criticizing the growth of a managerial elite and the decline of labor in corporate governance as a check on management abuse and immorality).

tually pocket that money while damaging a company's reputation and its bottom line. If the reality is that a few more jury verdicts may occur and potentially prevent some large businesses, and maybe even a middle-sized business, from having to pay its leaders or owners a golden parachute upon retirement<sup>80</sup> with major stock options,<sup>81</sup> why not let the balance come a little more to the employees' side for a while?<sup>82</sup>

Employers, as a whole, have the balance of bargaining power in their favor when dealing with employees. When they choose to use it wisely, it has not caused them problems under the economic underpinnings of our capitalist system that values the general freedom to contract. However, the continued massive use of mandatory arbitration by some employers does constitute an excessive use of bargaining power, especially given the powerful imbalance of the default rule of at-will employment. One commentator has recently used empirical evidence to argue that employers are not likely to agree to arbitrate after a dispute arises,<sup>83</sup> and a few others have raised this point anec-

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80. Retirement packages for executives are being heavily scrutinized and criticized lately. See, e.g., Landon Thomas, Jr., *Outsider Chosen Interim NYSE Chief*, CHI. TRIB., Sept. 22, 2003, § 1, at 10 (describing events that led to the resignation of New York Stock Exchange head, Richard Grasso); Robert W. Hamilton, *The Crisis in Corporate Governance: 2002 Style*, 40 Hous. L. REV. 1, 30-31 (2003) (chronicling the gross and excessive retirement perks that General Electric provided to its outgoing Chairman and CEO Jack Welch).

81. See Weiler, *supra* note 53, at 184-85 (asserting that some may find that "CEO's and their top colleagues have clearly earned these spiraling salaries, because they have been running the companies whose profits and stock prices have been soaring during this era," but exposing that corporate profits over the last quarter century have risen due to downsizing labor costs by "gradually reducing the coverage of benefits such as health care and pension plans," and identifying the personal incentives for top managers to act this way, such as larger shares of executive pay, usually in the form of stock options).

82. I say "for a while" because creative and crafty employers will use whatever bargaining power they have to find additional ways to benefit themselves in their relationship with their employees as any for-profit capitalist business would likely do. See Bucy, *supra* note 59, at 10 (noting that corporate greed will lead businesses to find loopholes to counter any attempts to regulate them).

83. David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 62-65 (2003). In trying to make the case that post-dispute agreements to arbitrate won't work, Professor David Sherwyn relied significantly on a study of results from a dispute resolution program in Chicago, Illinois run by the Center for Employment Dispute Resolution (CEDR) from 1994-1998 and where parties to employment discrimination disputes before the Illinois Human Rights Commission were offered an opportunity to arbitrate or mediate their claims. From his assessment, Professor Sherwyn concludes that the selection rate for these post-dispute offers to arbitrate was dismal and that the CEDR program was "ineffective" and "failed." *Id.* Admittedly, I was an attorney practicing in the Chicago area representing employers during this very time period, and I was also on the Board of Advisors of CEDR. Although it is beyond the scope of this Article to direct any more focus on the points raised by Professor Sherwyn, there are some issues that may have affected the results of his study that require further review, including the significant impact of mediation as an alternative after the disputes arose,

dotally.<sup>84</sup> But, if arbitration represents the panacea that some employers must believe it to be in resolving disputes, then why can they not agree to it after the dispute arises just as easily as they can agree to force employees to do it as a condition of employment before the dispute arises?<sup>85</sup>

This issue is framed in terms of two competing fears of excess: corporate damage via excessive verdicts with outrageous punitive damages assessed by a runaway jury versus employee ruin created by corporate greed resulting from opportunistic behavior and excessive abuse of power. Nevertheless, employees lose employment discrimination claims on average ninety percent of the time, and employers are so fascinated with the prospect of preventing those ten percent from getting to a jury that they are devising mandatory arbitration agreements.<sup>86</sup> Similar to unfounded concerns about runaway jury verdicts, hopefully, the Enron fiasco and other recent acts of corporate greed will represent uniquely tragic situations and will not indicate the norm or warrant overall corporate distrust.<sup>87</sup>

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the lack of involved attorney representatives for the claimant employees, and the number of corporate outside counsel that were involved in the decision rather than in-house counsel or corporate executives who are both much more litigation-averse.

84. Other skeptics have also asserted that few employers will choose to use arbitration after the dispute has arisen. See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563, 567-68 (2001); St. Antoine, *Mandatory*, *supra* note 13, at 8 & n.25; Weiler, *supra* note 53, at 196.

85. Nevertheless, if commentators like Professors Estreicher, Sherwyn, St. Antoine, and Weiler are correct that no employer will want to agree to arbitrate after a dispute arises, then the law should step in and provide some incentives for parties to enter into an agreement to arbitrate after a dispute arises if arbitration is such a good system rather than just accepting employer or lawyer preference as the end of the matter. See Green, *Debunking*, *supra* note 4, at 467-70 (proposing an incentive for post-dispute arbitration through a punitive damage cut-off for agreeing to go to arbitration after a dispute has arisen); Sternlight, *Out on a Limb*, *supra* note 4, at 862-63 (suggesting that if employers believe that arbitration is good enough to force employees into it through mandatory arbitration, it should be good enough to create incentives to force employers into arbitration after a dispute arises). *But see* Estreicher, *supra* note 84, at 567 & n.21 (citing to an empirical study finding that under Montana's wrongful discharge law "few postdispute offers to arbitrate are accepted by the other side to the dispute, even where the statute [MONT. CODE ANN. § 39-2-915 (2003)] imposes attorney's fees on parties rejecting such offers who do not prevail in litigation.").

86. Rogers, *supra* note 16, at 640 (suggesting that because of the uncertainty of litigation, employers may still choose to arbitrate even though there may be better results for them in court because arbitration is more predictable in terms of "knowing in advance how much a case might cost and how long it might last").

87. See Hamilton, *supra* note 80, at 1-40 (providing a thorough, point-by-point analysis and a chronology of all the major corporate scandals in 2002 including Enron, WorldCom, and Imclone, among others). In terms of whether this is the norm, only time will tell, but "[o]n July 8, 2002, the Business Roundtable, a conservative but influential group of CEOs representing many of the largest companies in the United States, issued a statement that they have been 'appalled, angered and, finally, alarmed at the stream of revelations which have emerged in the past six months concerning a number of public companies'" and that "'the list of affected companies is small in

The key difference between the issue of corporate greed and excessive verdicts as it applies to employers and employees remains bargaining power. If some employees decide to make excessive claims, the court system will catch most of them and filter them out. But who catches the employer whose top managers use their overwhelming bargaining power and position to make employees miserable and who possibly even use that power to financially or personally devastate those employees?<sup>88</sup> Again, usually the court system provides that mechanism through the ability to sue the employer for overreaching. It brings to bear tort and statutory-based claims for harm to employees beyond typical contractual remedies. This system also allows employees to have a jury decide those issues.

At some point, employers have to recognize that corporate greed has consequences. When employees are not able to play a significant role in their governance, it means problems for the corporation.<sup>89</sup> In these times of highlighted corporate greed and highlighted excessive verdicts, it is uncertain as to whether either of these issues really represents a major problem. But, due to bargaining power, the balance should start to fall more toward employee protection from corporate greed and excess than employer protection from excessive jury verdicts. The corporate abuse at Enron and other highly publicized corporate governance issues over the last two years may be rare occurrences that do not warrant a rush to make some judicial or legislative fix. However, the corporate greed and excess involved with implementing mandatory arbitration agreements is a reality. Accordingly, the specter of having employees band together to negotiate agreements for arbitration presents a worthy curb to that greedy and excessive use of bargaining power to force the agreements in the first instance.

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comparison to the more than 11,000 publicly traded U.S. companies.’” *Id.* at 37–38 (quoting Press Release, The Business Roundtable, The Business Roundtable Statement on Restoring Investor Trust (July 8, 2002), at <http://www.brt.org/press.cfm/728> (last visited Oct. 29, 2003) (on file with the Texas Wesleyan Law Review)).

88. See Matthew W. Finkin and Sanford M. Jacoby, *Introduction to Employees and Corporate Governance*, 22 *COMP. LAB. L. & POL’Y J.* 1, 1–2 (2000) (suggesting that a collective employee voice in corporate governance can occur with or without a union, and it can play a role in holding top management accountable to those who have a big stake in the enterprise).

89. See Nadel, *supra* note 70, at 2756 (describing the problems with employee morale due to mandatory arbitration); see also Michele M. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why?: An Empirical Portrait of the Litigious Worker*, 1981 *U. ILL. L. REV.* 115, 118–19 (describing how the lack of employee voice in the workplace is a major contributor to why employees file lawsuits against their employers).

#### IV. USING UNIONS TO PROVIDE EMPLOYEES A BALANCE IN BARGAINING POWER AND TO CREATE A DETERRENT FOR EMPLOYERS' EXCESSIVE ATTEMPTS TO USE MANDATORY ARBITRATION

Many forms of collective employee action may force employers to second-guess their attempts to use mandatory arbitration agreements, including the use of private class actions, EEOC group-based claims, or a more grassroots, politically-based effort. The most effective means of using collective activity to balance bargaining power in negotiating agreements to arbitrate would be applied through union organizing and union representation.<sup>90</sup> Most of the gains, both political and personal, from other grassroots and collective employee activities can also be obtained by union organizing and involvement. But with union involvement, employees and employers can enjoy the added benefit from ongoing relations that do not play a role in other collective employee activities.<sup>91</sup> Accordingly, labor unions present the best option to help individual employees in collectively and fairly bargaining with their employer, and unions offer the best deterrent to employer attempts to continue mandatory arbitration.<sup>92</sup> If a union was able to become the agent for bargaining on behalf of the interests of a group of employees,<sup>93</sup> then that union would have significant bargain-

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90. Of course, employees can join together and take direct political action, including boycotting select companies that are proponents of mandatory arbitration or forming more direct coalitions with civil rights groups. Professor Leroy Clark has suggested that unions and civil rights organizations should form coalitions because both entities have led major movements for justice that are now stagnant to the point of being in a crisis. See Leroy D. Clark, *Movements in Crisis: Employee-Owned Business—A Strategy for Coalition Between Unions and Civil Rights Organizations*, 46 *How. L.J.* 49 (2002). Specifically, Professor Clark proposes a coalition for the two groups around employee-owned businesses. *Id.* at 51–52.

91. See Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 *COMP. LAB. L. & POL'Y J.* 97, 122–23 (2000) (noting political gains derived from labor activism on behalf of employees including favorable media coverage, symbolic values to employees that the company is not out to hurt employees, acknowledgment that workers are competent to help management in making strategic business decisions, and that various coalitions can develop including those with labor and shareholders in the company).

92. Mitu Gulati, *Incorporating Labor*, 22 *COMP. LAB. L. & POL'Y J.* 171, 174 (2000) (noting how labor unions provide a significant deterrent effect to corporate opportunistic behavior); O'Connor, *supra* note 91, at 98–100, 119–20 (arguing the importance of including workers' voice in corporate decision making, especially with the growing dependence on human capital in a global market, and noting how unions can provide a curb to corporate excess including excessive executive compensation which drags down the company's success); see also Scalia, *supra* note 45, at 499 (noting that unions should be in a better position to represent individual employees in discrimination disputes than plaintiffs' lawyers).

93. See generally Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration and Workplace Committees*, 5 *U. PA. J. LAB. & EMPL. L.* 75 (2002) (noting that unions may be able to work for the interests of nonunion employees up to a certain point). A union could bargain on behalf of the employees solely for the purpose of establishing an arbitration agree-

ing power, especially if those employees had chosen the union to be their representative consistent with the protections and requirements of the NLRA.<sup>94</sup> Also, just the threat of union organization could deter employers from seeking mandatory arbitration agreements.

Other forms of collective employee response, including class actions, political boycotts, and EEOC lawsuits, do not create the type of deterrence to the use of mandatory arbitration agreements that union organization would create. Furthermore, most of those other collective actions have so far unsuccessfully sought a long-term resolution to the bargaining power issue through either judicial interpretation or legislative change. Now, employees should take things into their own hands by seeking the assistance of unions.

A. *Union Organizing: Actual Representation of Employees as a Deterrent and Response to Excessive Use of Employer Bargaining Power*

A number of commentators have asserted that mandatory arbitration may be better for employees because of the inability to obtain counsel and the difficulty of prevailing in the court system without counsel.<sup>95</sup> However, nonunion employees in employment arbitration would still have problems with obtaining counsel and paying the costs of arbitration. At a minimum, organizing nonunion employees into unions would level the playing field. Of course, it is easier said than done when it comes to organizing workplaces.<sup>96</sup>

Some may argue that union organizing will not do much to help employees in navigating the bargaining power concerns with mandatory arbitration because the labor movement is essentially a

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ment, or it could become a complete organizing opportunity where the union is the designated bargaining representative of the employees for all matters. *See id.* at 81–89. One major concern is that unions not representing a majority of employees may be subject to claims that they are violating labor law that prohibits employers from recognizing unions that do not, in fact, represent a majority of employees. *Id.*; *see also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1573 n.204, 1594–95 & n.291 (2002).

94. *See* 29 U.S.C. §§ 151–169 (2003).

95. *See* Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1069 (1996) (distinguishing between the need for legal representation in court versus arbitration, especially given the difficulty of finding an attorney); Estreicher, *supra* note 84, at 563 (describing difficulties for most plaintiffs in obtaining counsel in the court system); St. Antoine, Gilmer, *supra* note 13, at 499 (noting that only about five percent of plaintiffs seeking counsel with an employment claim in court are able to obtain counsel).

96. *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776–81 (1983) (describing the difficulties of workers in union organizing campaigns, how they are likely to be fired, and the travails of whistleblowers); *see also* Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 213–14 (1991) (describing same).



thing of the past.<sup>97</sup> There are those who debate whether the union movement is dead and gone or just on life support.<sup>98</sup> Recent indicators may suggest some growth by unions due to an increase in organizing.<sup>99</sup> Regardless of its current growth, union organizing is still a major concern for employers who, in general, want to keep their workplaces nonunion and will go to great efforts to keep it that way.<sup>100</sup>

While it may not be new to suggest that unions and collective agents can play a major role in private dispute resolution for individual employees,<sup>101</sup> the use of union organizing as an effective response to con-

97. See Bales, *supra* note 44, at 693–702 (noting the disappearance of unions in the private sector workplace, the increase in individual employee rights from 1935 to 1994, and predictions of the continuing decline of unions in the private sector through 2000); Barbara J. Fick, *The Changing Face of the American Workplace*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 1 (1998) (stating that the American workplace over the past few decades has evolved into an increasingly part-time or contingent worker base with the “lowest unionization rates for industrialized countries”); David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 4 (1998) (“[S]ince only ten percent of the non-agricultural private sector workforce belongs to unions, these avenues for worker expression are much fewer and farther between.”).

98. See Befort, *supra* note 72, at 361–62 (chronicling the clear decline in American unions over the last 50 years with 31.5% of the non-agricultural labor force being unionized in 1950, 34.7% in 1954, down to 24.7% by 1970, 16.1% by 1990, and 13.5% in 2000 and even more drastic drops in total union membership over this time in the private sector which is essentially a drop from over 30% in 1950 to only 9% in 2000); William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 262 (2002) (noting that unions are no longer “a major player in most workplaces . . . and represent only about thirteen and a half percent of the workforce and about nine percent of the private sector workforce” in 2000); see also Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 651–54 (2001) [hereinafter Stone, *Changing Workplace*] (recognizing diminished labor and making broad proposals that would change the landscape if a citizen union formed to take up employee issues); Weiler, *supra* note 53, at 185–86 (noting a decline in unionism from about 40% of the private sector in 1947 and down to less than 10% in the late 1990s and noting a corresponding reduction of at least 20% in wages).

99. See Maria Ontiveros, *Work in the 21st Century—Creating the Social Architecture*, 37 U.S.F. L. REV. 511, 515 (2003) (noting the agreement of a management attorney, a union attorney, and a president of a local union that “the labor movement is on the rise” as all three have “witnessed a recent increase in union organizing and grassroots activism”). But see Befort, *supra* note 72, at 361–63 (noting a general decline in the union movement from 1950 to 2000).

100. See Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375, 375, 380 (2003) (noting that avoidance of union organizing is a big reason why employers adopt dispute resolution procedures in the nonunion setting and any “threat of unionization can strongly influence the organizational practices of nonunion employers” as proven by historical and contemporary studies).

101. Corrada, *supra* note 95, at 1055 (asserting that the *Gilmer* decision represents a shift to resolving employment disputes in a private rather than a public arena and imploring the left to take advantage of this shift rather than fight it); see also Rabin, *supra* note 96, at 204–18 (asserting that a key role for unions can be to help nonunion

cerns about mandatory arbitration does not appear to be on the radar screen for organized labor.<sup>102</sup> The failure of organized labor to take advantage of this opportunity to organize is interesting given the current desires of a large number of nonunion employees.

In their recent study, Richard Freeman and Joel Rogers found that nonunion employees want more involvement in how decisions are made in the workplace and at least one-third would like to have union representation.<sup>103</sup> Accordingly, it is surprising that unions have not taken on the issue of mandatory arbitration as a source for organizing when its coercion of employees arguably reflects an attempt to prevent worker empowerment, a reason why many nonunion employees are interested in either unions or some form of collective committee to address workplace issues.<sup>104</sup> This would appear to be a major area and a unique opportunity for organizing. What better time is there

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workers address public rights and negotiate with employers about those rights). Professor Corrada also believes that concerns about bargaining power can be ameliorated through institutional entities, like the ABA, and private ADR providers, that can limit employer efforts to make agreements too one-sided. Corrada, *supra* note 95, at 1053, 1067–68.

102. See Yamada, *supra* note 97, at 14 & n.72 (discussing the overall decline in union membership and providing a skeptical look at organized labor's new efforts to focus on campaigns to increase membership); see also Crain & Matheny, *Identity*, *supra* note 35, at 1809 (noting that various groups wrote amicus briefs in the *Circuit City* case when it was before the Supreme Court, but organized labor did not participate). Professor Bales argued quite forcefully that there were many benefits to organized labor in getting involved with the arbitration of individual employee disputes back in 1997 and believed it could be "a potent selling point" in increasing the opportunities for organizing more employees, including women and minorities. Bales, *supra* note 44, at 753. While I assume that organized labor may not necessarily be focused on the great ideas of academics, it also just may be unwilling to bridge the gap through a focus on individual employee rights because most of those rights have accrued to protect against discrimination in the workplace, rather than focusing on overall better wages for workers, a theme that appears to be the focus of modern labor. See Crain and Matheny, *Identity*, *supra* note 35, at 1787.

103. See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 150–55 (1999) (describing statistical results from a study of workers and their desires). According to their study, those workers may not necessarily be interested in having a union represent their interests and would rather deal directly with employers on a number of items, possibly through an employee committee. *Id.* at 135–36. Nevertheless, the use of a mandatory arbitration agreement, especially on a broad scale, may send a message to those employees that if they want their voices to be heard, it will only be through expanding their bargaining power. By joining together and using a union to bargain for them about their participation, they do not have to depend upon the employer to allow the use of work committees. Excellent analyses of the Freeman and Rogers study can be found in Matthew W. Finkin, *Bridging the "Representation Gap"*, 3 U. PA. J. LAB. & EMP. L. 391 (2001) and Bruce E. Kaufman, *The Employee Participation/Representation Gap: An Assessment and Proposed Solution*, 3 U. PA. J. LAB. & EMP. L. 491 (2001).

104. Although the problem may be that unions have not only historically separated themselves from issues of social justice in the workplace regarding race and gender discrimination, they continue to identify themselves in an orientation that is too focused on general financial justice. See Crain and Matheny, *Identity*, *supra* note 35, at 1781–87.

than now for unions to be creative in their organizing efforts? Because unions currently face growing concerns about their decreasing membership, “only fresh approaches” to organizing “will generate new membership [for unions] in the private sector.”<sup>105</sup>

Some employers are already realizing that they are lowering morale by using mandatory arbitration agreements.<sup>106</sup> That reduced morale may make those employers more susceptible to a union organizing campaign.<sup>107</sup> In fact, at least one human resources expert and senior counsel for employers believes that “mandatory arbitration . . . will end up costing employers in terms of turnover, morale, and worker performance” and that it is “not the way to get productivity out of people.”<sup>108</sup>

With the AFL-CIO union leadership focusing on how to increase its membership, mandatory arbitration could become a rallying cry for organizers. Apparently, there are “now roughly fifteen million non-union employees—nearly one-third of the total in all but the tiny firms in the private sector—who would now like to have union representation (and more than 90% of employees who now have union representation [that] want to keep it).”<sup>109</sup> The unions could target some key companies who have obviously bought into the value of mandatory arbitration agreements, as evidenced by the number of court cases where they have argued to enforce the agreements. One such company might include Circuit City.<sup>110</sup> A union could target this

105. Clark, *supra* note 90, at 60; *see also* Estlund, *supra* note 93, at 1532, 1605 n.326 (citing an AFL-CIO manual describing new tactics for labor organizing campaigns including “coalitions with other groups; legislative initiatives; appeals to regulatory agencies; litigation; consumer actions; pressuring creditors and lenders; withdrawals of, or threats to withdraw, pension fund assets; shareholder actions; and in-plant actions”); Peggy R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 50 n.16 (2000) (discussing new organizing strategies for “low-wage service” workers).

106. *See* Nadel, *supra* note 70, at 2756 (describing comments from Stuart Brody, a senior counsel and member of a Human Resources think tank called the Employment Roundtable, that a mandatory arbitration agreement causes low morale because it “send[s] out the message” . . . that the employer “is in charge” and that such messages are “counterproductive” to establishing a “high-performance workplace and increasing retention rates”).

107. *See* MARTIN JAY LEAVITT & TERRY CONROW, *CONFESSIONS OF A UNION BUSTER* 49–50 (1993) (listing an opinion of a corporate anti-union campaign leader of the “five key corporate failings that drive workers to seek union help: lack of recognition; weak management; poor communication; substandard working conditions; and non-competitive wages and benefits” and noting that union buster jobs are to train management to be better managers so that when their “work is done, the company remains union free because no union is needed” and when “[m]anagement does its job right, [then] the workers are happy”).

108. Nadel, *supra* note 70, at 2756 (quoting Stuart Brody, Senior Counsel at Gibney, Anthony & Flaherty, LLP, New York).

109. Weiler, *supra* note 53, at 187 (emphasis omitted).

110. There are numerous cases in many jurisdictions involving Circuit City, including landmark Supreme Court Cases, where they have sought to enforce mandatory arbitration agreements. *See* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001);

company's employees with a message explaining to them the lack of consent involved in mandatory arbitration agreements, and what consequences may occur once employees actually have disputes and want to take their claims to court. The union could offer to represent the employees to negotiate better agreements regarding working conditions, including a fair hearing in front of an arbitrator with the union representing the interests of the employees at the arbitration. Also, the union would be informing the employees of its negotiating expertise and how it could negotiate directly with the employers for a complete grievance and arbitration process.

Even if the continued existence of the labor movement is hanging by a thread, it would seem that efforts to resurrect it or bring about a resurgence would benefit from a new and potentially powerful organizing tool. That tool would be the opportunity to appeal to workers employed by companies that still continue to push mandatory arbitration agreements with the message that the only fair way for them ever to have their voices heard and interests pursued in the workplace is to have a union represent those interests. The following is an example of a possible message, but actually an imaginary message, with Circuit City used as a potential example target of organizing due to its widespread use of mandatory arbitration agreements.<sup>111</sup>

Dear Fellow Workers of Circuit City,

Your employer does not want your input in the workplace about things of concern to you. Instead, your employer wants you to just shut up and accept it. That is why it requires that you agree as a condition of employment to waive your hard-fought right to a jury trial if it ends up committing egregious acts of discrimination against you. It doesn't want a jury consisting of your peers, even possibly fellow employees, to judge the merits of any dispute you may have with it. Your employer does this despite knowing that you are a nonunion, at-will employee, which means it already has the right to terminate you for good reason, bad reason, or no reason at all. Yet,

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Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 652 (6th Cir. 2003); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002); Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002); Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 680 (8th Cir. 2001); Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 635 (7th Cir. 1999); Johnson v. Circuit City Stores, Inc., 148 F.3d 373, 377 (4th Cir. 1998); Wright v. Circuit City Stores, Inc., 82 F. Supp. 2d 1279, 1286 (N.D. Ala. 2000). For that reason, I have listed it as a company that may potentially be the focus of a union organizer. Professor Ann Hodges has also identified "Circuit City" as a "well-known" employer using mandatory arbitration agreements along with several other employers including "Waffle House, Ryan's Family Steak Houses, Tenet Health Care, Hooter's, and O'Charley's." Hodges, *Section 7, supra* note 50, at 178-79 & n.19.

111. As noted earlier, Circuit City is one of the primary employers which use mandatory arbitration agreements and it has fought in many jurisdictions to protect and enforce its mandatory arbitration program. See *supra* note 110. That makes this company ripe for an example of how union organizing could play a role via the type of campaign propaganda involved in this imaginary message I have drafted.

your employer wants to pile it on you by forcing you to agree to arbitrate.

Is there anything you can do about this? There are possibly a few things you can do on your own. But, if you let us be your representative, we can take care of this issue by using the collective bargaining power of all employees to level the playing field and obtain a fair and honest arbitration agreement. And we would represent you in that arbitration process should it ever be necessary. Just imagine trying to find and being able to afford a lawyer to navigate the court system. If you don't believe what we say, we can show you the dozens of publicly reported legal decisions where your employer has fought long and hard to prevent individual employees from having their day in court. Your employer can't deny its actions. So your employer doesn't want your input and doesn't care about you having more of a say in what goes on at the workplace. Your employer advertises to its customers that "we're with you," and not to worry about exchanges, just bring it back "hassle-free."<sup>112</sup> Unfortunately, the employer is not saying that to you, its employees, by forcing you to give up the right to a jury without making it a fair and honest exchange for you. This is an employer that is not with you, hassle-free. That has been made clear. But we'll be with you if you let us represent your interests and bring our collective bargaining power together on your behalf. We are for fairness in the workplace and we'll be with you even if you do have a complaint about how you are treated.

Signed, Imaginary Union to Employees of Circuit City.<sup>113</sup>

### B. *Union Involvement: Creative Representation of the Employment Interests of Nonunion Employees in Arbitration as an Equalizer and a Deterrent*

Unions could also represent employees in bargaining and arbitration without actually seeking to organize them. If the union ever does attempt to organize the employees, this raises some interesting questions as to whether the union will be considered to have taken the improper action of coercing employees by conferring benefits upon those who will be asked to vote for the union.<sup>114</sup> While there are

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112. The service mark for Circuit City is "We're with you" and they offer a "Hassle-Free Return policy." See <http://www.circuitcity.com> (last visited Oct. 31, 2003) (on file with the Texas Wesleyan Law Review).

113. Although this is imaginary, unions can have wide discretion in developing campaign propaganda. See, e.g. *Contex Div., SPX Corp. v. NLRB*, 164 F.3d 297, 309 (6th Cir. 1998) (rejecting employer's arguments that statements made by the union on campaign paraphernalia were inappropriate, misleading, and affected the voting for the union, and allowing a broad protection for union campaign statements).

114. See generally Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57 (2002) (describing how a necessary role for unions and their lawyers is to help nonunion employees enforce rights established through common law and statutes but a major concern is that unions which have provided services or support to a group of employees may be charged with vote-buying as a

some concerns, Professor Catherine Fisk has made some persuasive arguments that unions and their lawyers should be able to assist non-union employees without any repercussions, and she suggested some ways to get around any organizing issues related to an election by either not seeking an election and just demanding recognition or not seeking to actually represent the employees.<sup>115</sup> In any respect, with the changing workforce and a declining percentage of union workers, many commentators have called for a new form of unionism that does not follow the traditional model under the NLRA.<sup>116</sup> This new model or aspect of labor law reform would allow unions to represent nonunion employees' interests, either at the bargaining table, in an arbitration, or in various roles where the NLRA would not act as a hindrance.<sup>117</sup>

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form of an unfair labor practice under labor law which could set aside an organizing campaign election conducted by the National Labor Relations Board).

115. *Id.* at 78–79 (noting the incentives that unions will have to organize outside of union elections if giving pre-election legal help to employees will set aside an election).

116. See Marion Crain & Ken Matheny, *Making Labor's Rhetoric Reality*, 5 GREENBAG 2D. 17, 22–25 (2001) [hereinafter Crain & Matheny, *Rhetoric*] (describing reforms to include making collective bargaining a civil right; abolishing majority rule/exclusive representation; expanding the definition of labor organization in the NLRA to include advocates for racial, gender, ethnic or other social justice; making gender & racial justice, including anti-discrimination measures, mandatory subjects of bargaining; overruling *Gardner-Denver* and substituting arbitration under collective bargaining agreements for court enforcement of anti-discrimination rights; eliminating the ban on secondary boycotts; and providing for interest arbitration as a mechanism for settling labor disputes); see also Befort, *supra* note 72, at 421–60 (describing the need for creative changes in labor law and providing four proposals including: creating a just cause standard for employment security law; leveling the bargaining playing field between unions and employers; creating an employee work council for effective voice; and enhancing protection for the contingent workforce); Clark, *supra* note 90, at 51–52 (proposing employee-owned coalitions between unions and civil rights groups); Corbett, *supra* note 98, at 299–306 (discussing new ways to build relationships between unions and nonunion employees); Fisk, *supra* note 114, at 75–79 (looking at a role for unions in helping nonunion workers in arbitration); Hodges, *Section 7 Rights*, *supra* note 50, at 215 (promoting class actions to remedy bargaining power concerns); Ontiveros, *supra* note 99, at 515 (discussing a symposium presentation promoting development of community unionism or citizenship unions); Scalia, *supra* note 45, at 496–99 & n. 32 (arguing that instead of focusing on reviving the labor movement to its heyday of collective action, the focus of reform should be on integrating a role for unions as advocates related to existing employment laws, especially in handling arbitration of employment discrimination disputes now being implemented through mandatory arbitration); Stone, *Changing Workplace*, *supra* note 98, at 632–53 (describing developments of two new forms of unionism: craft unionism and citizen unionism); Weiler, *supra* note 53, at 197 (talking about freeing up nonunion employees to have more involvement via committees or employee involvement plans and to have fair, employer-created plans to arbitrate disputes without running afoul of the NLRA).

117. See, e.g., Hodges, *Section 7 Rights*, *supra* note 50, at 217, 228–29 (arguing that attempts of individual nonunion employees to seek court actions would invoke Section 7 rights under the NLRA and be protected concerted activity preventing an employer from seeking a mandatory arbitration agreement). See also Crain & Matheny, *Identity*, *supra* note 35, at 1843–46 (proposing reforms that would allow unions to

Although there are a number of legal concerns about unions being able to represent the interests of nonunion workers,<sup>118</sup> there are many creative approaches available in how to do this.<sup>119</sup> Furthermore, the threat of representation can have a powerful effect on how a company decides to operate. Out of fears about unions taking on issues that are generally within management discretion and responsibility, a lot of employers use methods to prevent unions from organizing their employees.<sup>120</sup> Employers likely fear the threat of a union more than the threat of an employee obtaining a large jury verdict.<sup>121</sup> Accordingly,

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branch out to women and minorities that are not represented by the union and provide services and representation in arbitration or to provide incentives where they will join the union and get the benefits of union representation in negotiations and arbitration); Stone, *Changing Workplace*, *supra* note 98, at 651–53 (proposing reforms to labor law to meet pressing needs of today's workforce).

118. See Fisk, *supra* note 114, at 60–104 (describing, in general, a role for unions and their lawyers, but noting the barriers imposed by the NLRA in that a union's efforts to help nonunion employees may be a problem if the union later seeks to represent those employees because the issue of vote-buying can be raised in an attempt to set aside the union election results, along with various ethical issues). Also, Professor Finkin has raised some legal issues under Section 8(a)(2) of the NLRA, 29 U.S.C. 158(a)(2), which prevents organizations that are either employer dominated or that do not represent a majority of the employees from acting as the union representative for those employees. Finkin, *supra* note 93, at 97–100. Additionally, Professor Finkin has raised an interesting issue about unauthorized practice of law. *Id.* at 88 n.55; see also Birbrower, Montalbano, Condon & Frank, *P.C. v. Superior Court*, 949 P.2d 1, 5–10 (Cal. 1998) (finding that New York attorneys, not licensed in California, who had counseled parties in arbitration held in California had been involved in the unauthorized practice of law under California law and could not collect their attorney's fees for this unlicensed work). Another barrier involves secondary boycotts if the union attempts to effectuate change from employers that do not have employees represented by that union. See Crain & Matheny, *Identity*, *supra* note 35, at 1789–90 (discussing problems with the scope of secondary boycotts); Crain & Matheny, *Rhetoric*, *supra* note 116, at 24–25 (proposing to eliminate the ban on secondary boycotts); Stone, *Changing Workplace*, *supra* note 98, at 626–28 (describing how secondary boycotts put boundaries on what unions can do and limit what pressures they may seek to help with their agenda as the workplace expands).

119. See Finkin, *supra* note 93, at 80–95 (suggesting that when employers create an arbitration system that sweeps in public law, they are expecting unions to become a part of that system and promoting the use of unions to arbitrate nonunion employee disputes by providing legal services and acting as employee safety committee representatives); Crain & Matheny, *Identity*, *supra* note 35, at 1822–24, 1841–46 (asserting a moral imperative and proposing that unions take on the role of focusing on social justice by proposing various reforms to assist with that focus); Stone, *Changing Workplace*, *supra* note 98, at 640–52 (suggesting creative ways to have unions expand into protecting the interests of nonunion workers, including the use of a citizen union format). Professor Hodges has also argued that legal maneuvering could be used in favor of allowing unions to take on these tasks by arguing that efforts of nonunion employees to seek court relief regarding their terms and conditions of employment involve an exercise of rights protected by Section 7 of the NLRA and any attempts to prevent employees from exercising those rights would violate the NLRA. See Hodges, *Section 7 Rights*, *supra* note 50, at 228–30.

120. See LEAVITT & CONROW, *supra* note 107; Colvin, *supra* note 100, at 380.

121. Compare Estlund, *supra* note 93, at 1596 (“Not only do most employers strongly prefer to operate non-union, but they have the economic power to impose that preference on their employees if the law does not effectively intervene” because

just the possibility of having more union involvement with nonunion employees should make employers rethink the value of mandatory arbitration if that becomes the impetus for inciting more union involvement in their workplaces.

A long history of separation exists between unions and civil rights groups, which causes a major degree of skepticism as to whether organized labor is up to or willing to take on the task of making racial, gender, and other forms of social justice in the workplace a major focus of its organizing efforts despite its vast potential for union growth and its appeal to nonunion employees.<sup>122</sup> Hopefully, organized labor will see the benefits of having this agenda and the kind of powerful coalitions with civil rights groups that can develop.

If coalitions with civil rights groups do not occur, unions and employees may still receive positive effects from organizing attempts focused on negotiating and processing disputes through arbitration.<sup>123</sup> The unions may still be able to expand and organize more workplaces just by getting their foot in the door on an issue that could resonate with those nonunion employees who are already seeking more involvement in workplace decisions. Also, as a possible response or just as a further mechanism of control, employers may try to cut the head off of this movement by deciding that mandatory arbitration is just not worth it and rid itself of those agreements.<sup>124</sup> Thus, union organizing provides a powerful deterrent to the use of mandatory arbitration agreements, and this deterrent effect represents the most probable re-

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employers "own the workplace, and they effectively own the employees' jobs under the prevailing American presumption of employment at will."), and Colvin, *supra* note 100, at 380 (noting employers actions and concerns in response to the union threat) with Green, *Debunking, supra* note 4, at 448 & n.175 (finding over ninety percent of cases are resolved in the employer's favor before trial).

122. In-depth discussion of the historic problems and conflicts between unions and civil rights groups is beyond the scope of this Article, but others have addressed it. See, e.g., Crain & Matheny, *Identity, supra* note 35, at 1785-88 (raising the historical problems and conflicts with unions and civil rights groups as a concern, and questioning the resolve of organized labor to have a social justice focus rather than a class focus given a recent effort by organized labor to "put aside race and gender interests").

123. Under this scenario, the unions would merely be using the mandatory arbitration issue as a tool to organize more employees without focusing on a social justice message. See *id.* (criticizing organized labor for taking this focus, but recognizing that this is the approach of their current leadership). Organized labor has started to focus on organizing and it has had some slight success since John Sweeney became the head of the AFL-CIO in 1995. *Id.* at 1784-85 (noting how a renewed commitment to organizing has paid off to some extent).

124. Although the *Gilmer* decision, which got most of this started, involved parties in the securities industry, the securities industry has all but abolished the use of mandatory arbitration based upon collective responses through class action settlements, and political backlash from pressures by civil rights groups, politicians and plaintiffs' lawyers. See Green, *Debunking, supra* note 4, at 427-28 & nn.106-07.



sult given that employers will not likely welcome the presence of unions in their nonunion workplace.<sup>125</sup>

## V. CONCLUSION

Individual employees and applicants for employment should respond to employer efforts to require arbitration as a condition of employment by leveling the playing field and using their collective bargaining power to negotiate satisfactory agreements to arbitrate with employers or to deter employers from continuing to pursue mandatory arbitration agreements. This Article asserts that the use of unions will best help achieve the balance of power between employees and employers in negotiating arbitration agreements. If those collective efforts are implored, they can impress upon employers the need for sensitivity to individual employees' bargaining concerns with respect to arbitration. These collective efforts can provide a counterbalance to employers in a rush to unilaterally contract their workforce into arbitration agreements. In these times of concern about corporate greed and runaway juries, cooler heads need to prevail. The current opportunistic use of bargaining power by employers implementing mandatory arbitration agreements must be balanced by the use of unions to help individual employees negotiate and navigate arbitration procedures. Then, concerns about bargaining power will no longer play a major role in how statutory employment disputes get into arbitration. Hopefully, other pending critical issues, including racial, gender, and class concerns about arbitration, may become the focus.

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125. See LEAVITT & CONROW, *supra* note 107, at 53 (noting how most executives that union buster consultants work with are "in a state of panic about the union drive," and that they are willing to do anything due to "their hatred and fear of the union"). Professor Finkin has creatively suggested many ways in which unions can play a role in representing nonunion employees in arbitration. See Finkin, *supra* note 93, at 76-86 (asserting a role for unions in nonunion employee arbitration). But, most of those roles assume that employers will accept the role of unions in arbitration of nonunion employees, even begrudgingly. *Id.* at 80 (contending that employers have invited unions to become involved by sweeping in public law into their agreements to arbitrate and employers cannot deny unions from getting involved). However, a quite reasonable response from employers will be to fight any involvement of unions in a nonunion workplace, essentially because of the threat of organization. LEAVITT & CONROW, *supra* note 107, at 53.