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## CLAIMING PRIVATE LAW FOR THE LEFT: EXPLORING *GILMER*'S IMPACT AND LEGACY

ROBERTO L. CORRADA\*

I agree with most of the comments and arguments posited by Katherine Stone in her essay in this Symposium issue.<sup>1</sup> I agree, for example, that the trend in labor law to foreclose union members' common law suits under an expansive view of section 301 preemption has the effect of forcing their claims to be judged in a private, not public, hearing. The trend in employment law to shift civil rights claims from public courts to private arbitrations is certainly a similar phenomenon. I also agree that these trends are somewhat insidious in that they mean there is, by virtue of fewer procedural safeguards, a lesser chance on the whole that workers will prevail in their claims. As a result, I also conclude that the trend toward privatization in labor and employment law tends to greatly benefit management, and hence, not surprisingly, is a trend embraced by the conservative right in this country.

Perhaps if there is any strong point of disagreement between Katherine Stone and me it relates to the approach each of us recommends given the current state of affairs. Katherine Stone urges the enactment of a law that would both nullify the current expansive view of section 301 preemption and reaffirm or broaden the Federal Arbitration Act's exclusion of employment contracts.<sup>2</sup> Her decidedly public/legislative approach would purportedly allow all workers to vindicate their civil rights and common law claims in a court of law.

Stone's proposed reform would possibly allow more court access to some unionized and white collar workers than would be the case in the present system, but is it true that most workers will be better off as a result? I do not believe so, and thus advocate a different approach that embraces the privatization of worker rights and legal claims. The fact that I advocate privatization does not place me in the conservative camp, however. I believe that the left can lay

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\* Associate Professor, University of Denver College of Law. B.A., George Washington University, 1982; J.D., Catholic University School of Law, 1985. I would like to thank all of the participants in the New Private Law Symposium. In particular, I would like to thank Katherine Stone for her continuing outstanding contributions to a better understanding of dispute resolution in the labor and employment arena, and Dennis Lynch for the depth of his insights regarding the impact of process on the quality of justice. In addition, I would like to thank Alan Chen, Ed Dauer, Nancy Ehrenreich, and Martha Ertman for taking the extra time to read drafts of this particular essay. Thanks also to the Hughes Research Fund for its continuing support of these symposia and to Sue Chrisman, Tracy Craige, and Tarek Younes, without whose tireless efforts on behalf of the *Law Review* this Symposium would not have been possible.

1. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

2. *Id.* at 1049-50.

claim to the private sphere with a progressive agenda and transform that sphere for the betterment of workers. To demonstrate my point, let us reconsider Katherine Stone's hypothetical case. The hypothetical highlights the unsavory prospect of private arbitration for a retail store salesperson who is injured on the job and is compelled to take her Americans with Disabilities Act (ADA) claim to a presumably biased panel composed of retired industry executives. Stone concludes that if the employee proceeds to court, her claim will be dismissed.<sup>3</sup>

An unstated but implied assumption made by Professor Stone is that the retail salesperson could proceed to court on her ADA claim. This may not, in fact, be the case. Whether the salesperson will actually be able to bring a lawsuit will depend on a variety of other facts not mentioned in the hypothetical. The salesperson may have difficulty finding a lawyer to represent her unless she lives in an area with an active plaintiff's employment bar. Law has become increasingly specialized, and in many areas of the country there is still a decided lack of skilled plaintiff's side employment law practitioners. Next, a lawyer may not take her case unless the remedy she stands to receive is at least somewhat substantial. This would be true even if the attorney would be entitled to attorneys' fees, because the opportunity cost of foregoing another case with larger backpay potential may simply be too great. Since the hypothetical plaintiff is a retail salesperson who has been out of her job for only a short time, it is probably true that her backpay damages are not significant. Representation would thus probably rest on her ability to claim compensatory and punitive damages. There are not enough facts in the hypothetical case to determine whether there are any compensatory damages (emotional distress, physical injury, etc.). Punitive damages are rarely assessed, and, of course, they are capped. Moreover, given the vagaries of the jury trial system, plaintiff's attorneys rarely decide to take cases based solely on the potential availability of punitive damages.

Even if the salesperson succeeds in finding legal representation, she will probably be asked to come up with a retainer of some \$5,000.00 or upwards to be used against costs incurred in litigation, for which she is ultimately responsible. If her case is exceptional, she may be able to convince her attorney to advance the costs of litigation, but she will bear the risk with respect to a loss of those monies in case she does not prevail. Even then, the attorney may not advance the costs unless she enters into a much less attractive contingent fee arrangement. All of this, of course, assumes that the salesperson acts relatively quickly in speaking with an attorney within 300 days of the adverse action by her employer. If she waits too long, her case will be barred by the relevant statute of limitations. The truth is that the mere availability of a legal

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3. *Id.* at 1018. It should be noted here that although federal courts seem to be reading *Gilmer* expansively, it is not at all clear that the Supreme Court would apply the case's holding to Professor Stone's hypothetical salesperson since it has been suggested that what the Court was willing to hold with respect to a relatively sophisticated worker, like the broker before the Court in *Gilmer*, it may not be willing to extend to someone like a retail store salesperson. See generally Robert L. Duston, *Gilmer v. Interstate/Johnson Lane Corp.: A Major Step Forward for Alternative Dispute Resolution, or a Meaningless Decision?*, 7 LAB. L.J. 823 (1991).

cause of action does not necessarily result in an ultimate vindication of the claim in court.

The hypothetical salesperson may ultimately be better off in a private system that provides specific notice to her about any possible claim and time limitations along with affording her the choice of bringing her case with or without an attorney as a representative. Moreover, many of the due process problems highlighted by Stone and characterized by current employer arbitral processes are not inherent features of those systems. And even though I also admit that the employer has considerable leverage over employees with respect to employment contracts, making them contracts of adhesion, I believe there are other institutional actors (such as the American Bar Association) who can affect that relationship and temper employer inclinations toward one-sided accords. This essay will argue, then, that more justice might be achieved for more people if the left decides to work with privatization in a progressive way rather than fight it in favor of public processes that may be less efficient vehicles for the delivery of legal services.

*The Supreme Court's Decision in Gilmer v. Interstate/Johnson Lane Corp.*<sup>4</sup>

The *Gilmer* case holding and its facts have been rehashed countless times, so let me recount here only the essentials. In *Gilmer*, a stockbroker was required by his employer to register as a securities representative with the New York Stock Exchange.<sup>5</sup> His registration application included an agreement to arbitrate any dispute arising out of his employment or termination of employment.<sup>6</sup> When *Gilmer's* employment was terminated, he sued under the Age Discrimination in Employment Act (ADEA).<sup>7</sup> The district court denied the employer's motion to compel arbitration, but was reversed by the court of appeals whose decision was affirmed by the United States Supreme Court.

Fundamentally at odds in the *Gilmer* case were an earlier Supreme Court decision securing the right of plaintiffs in statutory civil rights suits to go to court regardless of a contractual agreement to arbitrate<sup>8</sup> and a string of other Supreme Court decisions upholding contractual agreements to arbitrate under the mantle of public policy surrounding the Federal Arbitration Act.<sup>9</sup> Both parties had good arguments, and it seems that *Gilmer* is one of those cases that could have been decided either way. *Gilmer* himself should have felt secure in his argument that the Supreme Court's earlier decision in *Gardner-Denver* was well on point. In that case, the Supreme Court had held that an employee could proceed to court on a statutory civil rights claim (Title VII) despite an agreement between an employer and his union requiring arbitration

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4. 500 U.S. 20 (1991).

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

6. *Id.*

7. *Id.*

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

9. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

of such claims. If anything, Gilmer's case was more compelling since the employee in *Gardner-Denver* had his rights waived by his union, an institutional actor not easily cowed by an employer. Moreover, the Federal Arbitration Act contains an express statutory exemption for contracts of employment.<sup>10</sup>

On the other side, the employer, Interstate/Johnson Lane Corp., may well have found the Supreme Court's trend in favor of arbitration quite compelling. After all, the Supreme Court had favored arbitration in cases involving statutory rights under laws as imbued with public policy concerns as the Sherman Act, the Securities Acts, and even the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>11</sup> The employer may also have felt that its case, involving the securities industry and a relatively sophisticated employee, presented the ideal facts for Supreme Court extension of its arbitration precedents into the employment law arena.

The Supreme Court agreed that arbitration should have been compelled in Gilmer's case, and it did so on the basis of the Federal Arbitration Act's liberal policy in favor of arbitration. In doing so, the Court distinguished the *Gardner-Denver* case primarily by maintaining that it had not presented the issue regarding arbitration of statutory rights. Rather, the Court held that *Gardner-Denver* involved whether the consideration of contract rights paralleling statutory rights (since the plaintiff's claim of discrimination was primarily based on anti-discrimination language in the collective bargaining agreement) can serve as a basis for precluding judicial vindication of statutory rights.<sup>12</sup> With respect to the Federal Arbitration Act's exclusion for employment contracts, the Supreme Court expressly avoided the issue by refusing to find that Gilmer's agreement with the New York Stock Exchange was an employment agreement, leaving the issue "for another day."<sup>13</sup>

The *Gilmer* decision poses two interesting questions regarding what we might call the New Private Law. First, can we say that the decision represents some sort of shift to private law that stands as a bellwether for the private law movement? Second, if it does, is this shift a conservative one that stands to have a strong impact on public law and the political left generally? With respect to the first question, I believe it does signal a substantial shift to the private sphere which may be indicative of a new movement. With respect to the second question, I do not believe that the shift necessarily means that the right has scored a victory. The New Private Law, in my mind, does not inherently

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10. Section 1 of the Federal Arbitration Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). For a discussion of the legislative history of the employment contract exemption, see Matthew W. Finkin, "Workers' Contracts" *Under the United States Arbitration Act: An Essay in Historical Classification*, 17 BERKELEY J. EMPLOYMENT & LAB. L. 282 (1996).

11. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

12. *Gilmer*, 500 U.S. at 33-35. The Court also distinguished *Gardner-Denver* on the grounds that it involved a collective bargaining agreement, raising the tension between individual and collective rights, and that the case had not been decided under the Federal Arbitration Act (suggesting *Gardner-Denver* might be decided differently today). *Id.* at 35.

13. *Id.* at 25 n.2.

carry with it some sort of political valence—either right or left. I will suggest, in fact, that the time is ripe for this shift to be captured and occupied by the progressive left.

*Gilmer's Impact: Signalling a Shift to Private Law in the Employment Arena*

It is my contention that there is evidence of a New Private Law shift in the employment and labor law arena. I believe that the Supreme Court's decision in *Gilmer* and its later opinion in *Lechmere* signal such a shift, not merely by their substantive pronouncements in favor of that which is private, but also by the analytical mode within which the substantive decisionmaking unfolds. A useful framework for determining whether in fact there is something that could be characterized as New Private Law is suggested by the comments made some years ago by Peter Shane in a Symposium on the New Public Law.<sup>14</sup> Shane posited an approach that requires a parsing of the phrase "New Private Law." We should ask first whether we can say that it is, in fact, "new," then whether it is "private," and finally whether it is "law."

To decide whether New Private Law is "new," "we must identify some past moment in time as an appropriate baseline for comparison, and somehow construct a portrait of [private] law as it then existed."<sup>15</sup> Our "private" law, however, would only be new if its features reveal a "theory of the state different from the theory of the state most plausibly attributed to the [private] law of our baseline time."<sup>16</sup> "Theory of the state" is taken to mean "a widespread understanding of the relationship of the state to its citizens, of official institutions to one another, or of the core purposes of government activity."<sup>17</sup> Finally, newness must be understood on a relatively broad level, incorporating different perspectives. If what is purportedly new is only new through a very particularized or contextualized perspective, then it should not necessarily be proclaimed as new on a grander scale.<sup>18</sup>

Let me dispense with the final requirement quickly. I do not, in this essay, purport to be saying that there is an entire legal shift to a private regime (although some of my arguments do indeed support this). Rather, I am merely making the claim in the context of employment and labor law. With respect to a baseline, to the extent that it is generally agreed that the rise of the regulatory state has ushered in a regime of public law,<sup>19</sup> then such a regime could be the baseline that we would use in noting any shift to private law. If indeed there is a shift to private law, which would contain features substantially different from what we know as public law, then we can conclude that this is

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14. See generally Symposium, *The New Public Law*, 89 MICH. L. REV. 707 (1991); see also Peter M. Shane, *Structure, Relationship, Ideology, or, How Would We Know a "New Public Law" If We Saw It?*, 89 MICH. L. REV. 837, 838-42 (1991).

15. See Shane, *supra* note 14, at 838.

16. *Id.* at 840.

17. *Id.*

18. *Id.* at 840-41.

19. See generally Symposium, *The New Public Law*, *supra* note 14; see also Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 596-604 (1990).

“new.” Hence, because I am arguing that what is new is “private” and the current regime is public, I have less work to do than the authors in the “New Public Law” who were attempting to show (at least according to Shane’s characterization) that there was something new about “public” law, the then-existing regime. If all this is correct then I will have revealed a “new” private law if I only show that there is a private shift from public law.

Some might maintain, however, that if a regime of “private” law was ever prevalent in some past era, I have not shown newness unless I distinguish this current private law from that which existed before. To these, I would say that even a mere return to private law is necessarily new because it must be understood in the context of its public law predecessor. However, I believe that the New Private Law has a facet that makes it different from the old private law, and will therefore argue newness on the merits.

If there was an “old” private law regime in the United States, it would be the one safeguarded by common law formalists who regarded the private sphere as primary and who distinctly favored private property rights.<sup>20</sup> This regime was characterized by a suspicion toward government regulation, but at the same time relied upon a decidedly public institution—the court of law—to ensure the protection of property rights and the enforcement of “private” agreements.<sup>21</sup> It is with respect to this characteristic that the “new” private law differs. The New Private Law, as evidenced by the decision in *Gilmer*, expressly mistrusts public fora and seeks to enforce private law in private venues. Although it retains an inherent characteristic of the old private law—a fondness for private property rights and for enforcement of private consensual arrangements—it also seeks to have those rights and contracts enforced by private means. Indeed, vis à vis this new movement, the old private law might be considered only a milder form of public law.<sup>22</sup> This same analysis reveals

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20. See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 711-12 (1991).

21. *Id.* at 712.

22. Cf. Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 884-88 (1991). Of course, one could find a baseline for “private” law that might argue against the newness of the latest private law shift. For example, there was a time, before English common law courts became interested in enforcing private contracts, when contracts were created and enforced by parties other than the state. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* 12-20 (2d ed. 1990) (describing the rise of contract through the ecclesiastical and merchant courts and the ultimate wresting away of contract law jurisdiction by the King’s common law courts). As one writer has noted, in language eerily similar to some of the language contained in *Gilmer*, “It is not the custom of the court of the lord king to protect private agreements, nor does it even concern itself with such contracts as can be considered to be like private agreements.” *Id.* at 13 (citing R. de Glanville, *Treatise on the Laws and Customs of the Realm of England*, bk. 10, ch. 18 (G. Hall ed., 1965)).

The current shift to private law, however, would be new vis à vis this baseline as well. The law being applied in private fora today is decidedly public law enacted by the legislature. *Gilmer* expressly allows private decisionmakers to decide issues involving public rights, but only if the private parties have consensually agreed to such an arrangement in advance. By contrast, private law enforced in ecclesiastical or commercial courts was developed in those courts by church officials and merchants. In addition, there is certainly something new in the state’s giving up jurisdiction (as is the case in a *Gilmer* regime) versus its acquisition of jurisdiction (as was the case when the King’s common law courts encroached on the jurisdiction of the ecclesiastical and commercial courts).

a "theory of the state" that is different from prior baseline theories of the state. Certainly any emphasis on private rights, and especially on private dispute resolution mechanisms, necessarily suggests a less republican view of the state versus the individual. Whereas a regime of public law emphasizes public discourse (whether it be in the courts or in the legislature) and public policy, private law seeks to leave matters to be decided by private parties and within private institutions, preferably with no public discussion and devoid of public influence. This new private theory of the state differs also from common law formalism ("the old private law") in that it sees no role for the state in enforcing private agreements: it is not that these are matters for common law courts rather than legislatures, it is simply that the state shall not be involved in these matters at all. Therefore, the shift indeed seems to be "new."

Next, consider whether this shift can be called "private." Many have written about the public/private distinction in law.<sup>23</sup> Most of these have found the problem of what is public and what is private to be quite intractable. Consider, for example, in labor law literature, Karl Klare's article, *The Public/Private Distinction in Labor Law*.<sup>24</sup> Klare demonstrates the incoherence of the public/private distinction in labor law by showing the inconsistency of the use of public and private designations to describe similar phenomena, how policymakers use public and private labels to arrive at sharply contrasting or even contradictory legal conclusions, and how the borderline between public and private is constantly being altered and redefined despite the absence of significant changes in the underlying phenomena or social forces that are described by public and private labels.<sup>25</sup> As a result, Klare concludes that the public/private distinction poses as an analytical tool, but "functions more as a form of political rhetoric used to justify particular results."<sup>26</sup> In this Symposium, Alan Chen also strongly maintains that there is virtually no real distinction between the public and the private given that the private realm's jurisdiction depends exclusively on the whim of the public sphere.<sup>27</sup> Moreover, according to Chen, even a descriptive shift that we might label "private" has no jurisprudential significance since it is likely to be subsumed, defined, and explained by jurisprudential movements that already exist and carry their own truly independent weight.<sup>28</sup>

Indeed, much of what has been written regarding the incoherence of the public/private distinction has questioned the notion that "private law" is truly private. For example, Karl Klare questions the labeling of an employment contract as a private agreement given the growing number of states forbidding

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23. Legal Realists, Critical Legal Scholars, and Neo-Republicans have successfully attacked the prior line of distinction between private law and public law. See Farber & Frickey, *supra* note 22, at 886 (collecting authority).

24. Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982).

25. *Id.* at 1360.

26. *Id.* at 1361.

27. See Alan K. Chen, "Meet the New Boss . . .", 73 DENV. U. L. REV. 1253, 1257-65 (1996).

28. *Id.* at 1253-55, 1259-67.



the discharge of an employee for a reason that contravenes public policy.<sup>29</sup> He points out that “[p]ublic law norms are implied into the relationship as restrictions upon the employer’s power to discharge.”<sup>30</sup> The same might be said of the “private” collective bargaining agreement. The original Wagner Act embodied the notion that labor law problems would be resolved by a private process of negotiation.<sup>31</sup> Although this private process was created and maintained by the enactment of public law, “the mission of public law was narrowly limited to the task of establishing and maintaining an effective private bargaining system.”<sup>32</sup> Despite this, however, postwar interpretation of labor law provisions governing collective bargaining agreements has been characterized by a “pronounced drift toward public expansionism.”<sup>33</sup> This public drift is seen in increased legal regulation of collective bargaining negotiations, the expanded judicial role in administering the labor contract, and increased statutory regulation of the employment relationship.<sup>34</sup> The collective bargaining agreement today is indeed controlled as much (if not more) by the state as it is by the private parties who breathe life into it in the first instance. It is fair to conclude that the so-called “private” labor contract is part of an integral web of state control over the bargaining relationship.

The longstanding critique of the public/private distinction has been successful because what has occurred with respect to the distinction in labor and employment law development has been replicated in the development of other areas of law. And that critique has shown that to date, the “private law” label has been misapplied to common law. As a result, the “public law” sphere is dominant and in fact encompasses all governmental institutions—the legislature, the courts, and the executive. Those scholars writing about the “New Public Law” in 1991 by and large sought to describe the trend away from the exclusive study of courts and court decisions in law to the study also of the legislature and the executive and their role in making law through the enactment and enforcement of statutes.<sup>35</sup> Even Peller and Eskridge in their article about New Public Law concede that the New Public Law occupies much broader ground than initially suggested by the Legal Realists or even Legal Process Theorists. In describing the New Public Law as: (1) normative, (2) formative, destructive, and transformative, and (3) dialogical practical reasoning,<sup>36</sup> Peller and Eskridge define a dynamic system of interaction that we might call “law” today. Describing “law” so broadly allows Peller and Eskridge to sweep all legal movements in this century into their “New Public Law” schema, but at the expense, perhaps, of defining any “private” sphere entirely out of existence.

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29. Klare, *supra* note 24, at 1362.

30. *Id.* at 1363.

31. *Id.* at 1390; see Archibald Cox, *The Right to Engage in Concerted Activities*, 26 *IND. L.J.* 319, 322 (1951).

32. Klare, *supra* note 24, at 1391.

33. *Id.* at 1395.

34. *Id.*

35. See, e.g., Farber & Frickey, *supra* note 22, at 888-905.

36. See Eskridge & Peller, *supra* note 20, at 746.

However, an analysis of the "New Public Law" scholarship does reveal that despite the apparent breadth of public law today, there may exist a fundamental limiting principle that gives credence to the view that the *Gilmer* decision represents a true "private" law shift. It would appear that public law, and even the "New Public Law," is somehow situated within what we would call the public sphere. "Public sphere," however, should be viewed very broadly today based on the critique of the public/private distinction: it includes not just the judiciary, but also the legislature and the executive. Beyond the formal branches of government, the public sphere might also include institutions that have an impact on these branches—i.e., lobbyists, the media, and even private institutions somehow involved with the public trust. Today, the Internet, because of its easy public accessibility, might be a mechanism that we would include in an expanded and fluid definition of the public sphere.

The argument can be made that the New Private Law seeks to exist outside of the public sphere. If so, the *Gilmer* decision, extended in all the horrible ways suggested by Katherine Stone, could establish an entirely different paradigm of employment law: a paradigm we would be hard-pressed to call "public." This may be true even if New Private Law fails to exist entirely outside the public sphere. If, in fact, private companies take it upon themselves to enter into contracts with employees requiring private arbitration of public law claims and with no hope for judicial review, then the *Gilmer* decision will have welcomed an extraction from the public sphere. Especially if one feature of these private arbitrations is the lack of written opinions, law will be created and re-created without, in any tangible way, affecting the public discourse. Although the public sphere may act upon the private decisionmaking process, there will be no popular mechanism to ensure that the private process acts endogenously upon the public.

It seems to me that a vision of law which seeks to divest itself from the state in particular and the public sphere in general is something new and also something uniquely "private." Moreover, the fact that the state could recapture this jurisdiction at any time does not necessarily mean that the law created in individual private institutions for individual consumption and influence is a creature of the state. Thus, what *Gilmer* portends—an infinite number and kind of individual justice mechanisms within private institutions—cannot be said to fall within the generalized rubric of the "New Public Law" because it does not intend to be a player in public discourse. Individual systems of private justice, whatever they may be, are not systems that generally contribute to political dialogue or public deliberation.<sup>37</sup> They do not, by virtue of their decisions or results, have "a major impact on the implementation of public policy or collective interests."<sup>38</sup> Nor do they, on a day-to-day basis, require

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37. *Id.* at 732-37, 744-45, 750, 752-55, 758-61. Peller and Eskridge implicitly support this idea as well in that, in seeking to define "New Public Law," they necessarily choose two judicial decisions in order to contextualize their discussion. In this sense, they have chosen the quintessential vehicle of public law (the published judicial decision) to make their point—the very vehicle that is circumvented in the *Gilmer*-led private law regime.

38. See Shane, *supra* note 14, at 842 (defining "public" law).

an understanding of political institutions or the framing of issues relating to the proper role of government.<sup>39</sup>

Perhaps a more interesting question than whether New Private Law is new or private is whether it is law at all. If New Private Law lives in hiding, seeks no public identity, and has no public essence, then, quite possibly, it may not be law. Peter Shane has defined law broadly as "webs of institutions and practices through which a society represents to itself its shared understandings of right or wrong . . . ." <sup>40</sup> In the New Private Law of employment, each individual justice system will ultimately develop its own code of right and wrong through a series of self-contained, institutional arbitral decisions. One might argue that these ultimately will not constitute a "shared understanding" of right and wrong. However, there are certain inherent features of the New Private Law in the employment arena that raise it to the level of "shared understanding" without converting it into "public" law. First, these individual systems of justice will be interpreting public law texts. The *Gilmer* case will, if viewed expansively, allow private arbitral tribunals to decide statutory rights. Although these rights will necessarily be transformed into different sets of understandings by isolated fora, they nevertheless must begin with the same textual language, and, to some extent, will be guided by public law decisions relating to such texts. Moreover, appeals to "public" courts of fringe arbitral decisions reaching absurd results should ensure that some general "shared" boundary will be maintained regarding private interpretation of public law. Next, at least in terms of impact, some private arbitral systems will serve communities much larger than many small towns served currently by public courts. For example, a private justice system implemented by General Motors or Exxon will typically yield a "shared understanding" of employment law that is more widely held than that yielded by a local trial court decision from Basalt, Colorado. We can conclude that New Private Law is indeed law, though it may stretch the definition.

To lend further support to the emergence of New Private Law, *Gilmer's* style of analysis strongly suggests such a trend. Although the *Gilmer* decision opens substantive and procedural doors to the New Private Law, it is not merely these opened doors that make the decision noteworthy. The decision may also close a door. The analytical mode of the opinion (the way in which the Supreme Court actually goes about announcing and rendering its substantive decision on the merits) suggests a possible Supreme Court inclination toward ignoring—maybe even erasing—what was so comforting for the left about past civil rights decisions involving discrimination laws. If this is true,

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39. See Farber & Frickey, *supra* note 22, at 887. Farber and Frickey do, however, consider that the New Public Law might be implicated when "the interpretation of a governmental act is at stake." *Id.* To the extent that private arbitration systems within companies will be seeking to apply public law, the argument may be made that these systems fall within public law and certainly the public sphere. But that is true in only the most formalistic sense of public law. Without judicial review (or some other mechanism of public discourse), the public text of a statute can easily lose its "public" character. By interpretation, the text is easily rendered a creature of the private process. Thus, "interpretation of a governmental act" is to the private arbitration process what "sound" is to the tree that falls in the woods with nobody around to hear it.

40. See Shane, *supra* note 14, at 841.

then those like Professor Stone who would argue for a legislative reversal of *Gilmer* should be more careful about what they ask.

As I will show below, the analytical mode of the *Gilmer* opinion strikingly deviates from prior Court analysis of civil rights decisions that invoke public law principles. In general, the decision favors a formalistic, superficial analysis that typifies the manner in which a court might interpret a contract between two parties rather than the more in-depth, less formal analysis the Court has employed when invoking public law concerns surrounding civil rights laws.<sup>41</sup> Although this may at first seem appropriate given that a contract, after all, was at the heart of *Gilmer*, the Court has in the past rejected the easy contract-type analysis when a matter of public law was also involved. The best example of this contrast is seen in a comparison of *Gilmer* and the Court's 1974 decision in *Alexander v. Gardner-Denver Co.*<sup>42</sup> The fundamental issue in *Gardner-Denver*, as in *Gilmer*, was whether a "private" contract providing for arbitration of a civil rights dispute could be used to prevent a plaintiff from having the dispute heard by a court.<sup>43</sup>

Relying heavily upon legislative history, the *Gardner-Denver* decision begins by focusing on the procedures of Title VII and the public policy behind the statutory enactment. The Court cites to Congress's statement that the policy against discrimination is the "highest priority" in discussing the importance of alternative fora for bringing discrimination claims<sup>44</sup> and emphasizes legislative history manifesting an intent to allow individuals to independently pursue claims under Title VII and other applicable federal and state laws.<sup>45</sup> Finally, in justifying its decision that individuals may go to court despite arbitration over the same issue, the Court relies on the difference between arbitration and the judicial forum, critically highlighting public policy and meaningful differences between the two processes. For example, the Court states, "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."<sup>46</sup>

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41. Martha Ertman argues that courts' general and superficial approach to contracts (as opposed to statutory cases) has benefitted marginalized minorities in our society, and thus she views any trend toward contract-type analysis as positive. See generally Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996). I would simply note that whether the trend is normatively good or bad depends upon whether one is in a statutorily protected class. Those whose civil rights are protected by public law would probably prefer continuation of that protection in the public arena. Ertman shockingly points out that a trend toward contract and away from legislative protection may lead ultimately to outright prohibition—and perhaps the affirmative action debate is an early indicator that anti-discrimination protections are indeed headed in a direction toward prohibition and away from legislative protection.

42. 415 U.S. 36 (1974).

43. Certainly there are notable differences between the two cases: *Gardner-Denver* involved a labor contract which did not require the arbitrator to apply public law (the contract had language mirroring Title VII), while *Gilmer* involved a commercial agreement requiring an arbitrator to actually interpret ADEA statutory language. These differences, however, do not negate the similarity of the fundamental issue in both disputes—to what extent can private arbitration of a civil rights dispute substitute for a judicial hearing and determination of the same issue?

44. *Gardner-Denver*, 415 U.S. at 47.

45. *Id.* at 48 & n.9.

46. *Id.* at 56.

The Court expressly recognizes the marked differences between private and public processes. According to the Court, the role of the arbitrator, to effectuate the intent of the parties, may be inconsistent with the goals of the statute. Moreover, while arbitrators are expected to know the particular parties and make decisions with that in mind, "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts."<sup>47</sup> The Court goes on to explain other incongruities, including differences in the way proceedings are recorded, the rules of evidence, and differences in procedural rights like discovery, compulsory process, cross examination, and testimony under oath.<sup>48</sup> The Court states that "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts."<sup>49</sup>

The Court finally suggests that courts may nonetheless give weight to arbitral decisions in deciding Title VII claims, and the Court acknowledges that the weight accorded might even be substantial if the arbitral process reflects procedures used in court.<sup>50</sup> The Court concludes, however, that "courts should be ever mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of the courts to assure the full availability of this forum."<sup>51</sup>

By contrast, the *Gilmer* Court not only reaches a different result, but does so by perfunctorily comparing and dismissing any differences between arbitral and judicial fora.<sup>52</sup> In *Gilmer*, the Court begins with an exposition lasting several pages on case law involving the Federal Arbitration Act.<sup>53</sup> After introducing the Age Discrimination in Employment Act (ADEA) in only one general paragraph, the Court, with no analysis, concludes that broader social policies can be pursued through both arbitral and judicial resolution mechanisms.<sup>54</sup> The Court sloughs off a concern that encouraging arbitration will undermine the Equal Employment Opportunity Commission's (EEOC) role in enforcing the ADEA by maintaining merely that nothing in the ADEA precludes arbitration.<sup>55</sup> Rather than compare arbitral and judicial structures vis à vis the ADEA, the Court states simply that because the EEOC may receive

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

48. *Id.* at 57-58.

49. *Id.* at 58.

50. *Id.* at 60 n.21.

51. *Id.*

52. I am not the first to point out the superficial nature of the Court's comparisons in *Gilmer*. See Christine G. Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77 (1996).

53. *Gilmer*, 500 U.S. at 24-27.

54. *Id.* at 27-28.

55. *Id.* at 28-29.

information from "any source" and because the agency is itself directed to pursue "informal methods of conciliation," arbitration is consistent with the ADEA's statutory scheme.<sup>56</sup>

Regarding the adequacy of arbitral procedures compared to judicial safeguards, the Court states that general attacks on arbitration are "far out of step with our current strong endorsement" of arbitration.<sup>57</sup> As a result, the Court, almost apologetically, reveals that it intends to "address these arguments only briefly."<sup>58</sup> And, indeed, the Court's dismissal of the procedural arguments is brief. Noting the possibility of biased arbitration panels, the Court quickly states that the New York Stock Exchange (NYSE) rules allow the parties to receive information on the arbitrators and that courts may overturn decisions in which there was "evident partiality or corruption."<sup>59</sup> While the Court concedes that there are more ample discovery rules in a judicial forum, it states that limited discovery in arbitration is the tradeoff for the "simplicity, informality, and expedition of arbitration."<sup>60</sup> The Court makes this point as if ADEA plaintiffs would somehow desire these as much as the employers who institute the procedures. More disturbing, however, is the Court's cite to a decision involving an arbitration agreement between two commercial entities. The Court implicitly suggests that it sees no difference between individuals filing civil rights suits and commercial entities pursuing contract or antitrust claims. With respect to the fact that arbitrators need not file written opinions, the Court refuses to recognize a distinction between judicial opinions and arbitrators' pronouncements by stating that the NYSE rules require an arbitral writing that includes the name of the parties, a summary of issues, and a description of the award.<sup>61</sup>

Finally, with respect to the most important argument in *Gilmer*, that there is often unequal bargaining power between employers and employees, the Court stated that mere inequality is not sufficient to hold that arbitration agreements are per se unenforceable in the employment context. Here, the Court suggests a limiting rule for its decision that harkens back to the days of the *Gardner-Denver* case, but it then undermines this by comparing the employee/employer relationship to that of securities dealer/investor. The Court reveals its unwillingness to entertain inequality arguments when it concludes that there was no indication in the case that *Gilmer* was "coerced or defrauded" into agreeing to arbitration.<sup>62</sup>

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56. *Id.*

57. *Id.* at 30.

58. *Id.* It is interesting to note how the Court dismisses as general attacks on arbitration, the very same attacks that it not only entertained, but substantially endorsed, in the *Gardner-Denver* decision.

59. *Id.* The Court concludes, as if recognizing that its arguments are specious, that "[t]here has been no showing in this case that [the NYSE] provisions are inadequate to guard against potential bias." *Id.* at 31.

60. *Id.*

61. *Id.* at 32. Again, the Court seems to sheepishly recognize the lack of force behind its argument by adding that despite its decision, ADEA claims will continue to be filed in courts of law. *Id.*

62. *Id.* at 33.

The *Gilmer* Court's unwillingness to entertain arguments about the deficiencies of arbitration compared to judicial resolution of civil rights claims cannot bode well for those who would seek merely to reverse *Gilmer* in the hopes that the Court (and federal courts in general) will decide civil rights cases as it did in the past, in a manner imbued with the public trust and en-crustured with concerns about public policy. The starkest evidence that the Court is unlikely to decide civil rights cases the same way, however, is revealed by two more important indicators: first, the Court's radically different view of the public forum in *Gilmer* as compared to its view in *Gardner-Denver*; and second, and most importantly, the Court's abject refusal to view employees as a class as somehow different from investors or car dealers when it comes to negotiation of contracts. The Court's myopia with respect to a distinction that cuts to the very *raison d'être* of civil rights statutes is a strong indicator that the times they are a changin'.

A slightly weaker trend toward a New Private Law can also be seen in labor relations law (the law of union and management relations). This trend is manifested in two ways, one procedural and one substantive: first, the expansion of the doctrine of preemption in the 1980s and 1990s (procedural), and, second, the Supreme Court's decision in *Lechmere, Inc. v. NLRB*,<sup>63</sup> involving union access rights to employer private property (substantive). Katherine Stone does an excellent job of explaining the expansion of section 301 preemption and its implications for unionized workers' common law employment claims.<sup>64</sup> This expansion, which forces unionized workers to take common law claims to labor arbitrators and by and large prevents judicial resolution of those claims, reflects a Supreme Court preference for private arbitration systems over public fora. It is a weaker private law trend than the one represented by *Gilmer*, however, because the labor contract has become a creature of the state, and there has been a drift toward importing public ideals and controls into the labor arbitration process. Still, the labor arbitration process is much less public than judicial resolution of claims in court. Thus, the Supreme Court's increasing preference for private ordering in the unionized context (measured by the expansion of section 301 preemption) reflects a trend toward private law that is at least equal to the private ordering preferences of old common law formalism with some features of the New Private Law (requiring resolution of "public law" claims in private fora).

The other indicator of a trend toward private law in the labor arena is the Supreme Court's 1992 decision in *Lechmere*, which, incidentally was issued only some eight months after *Gilmer*. In *Lechmere*, the Court was asked to determine whether it was an unfair labor practice for a private employer to bar nonemployee union organizers from its property. In holding that it was not an unfair labor practice, the Court tilted substantially in favor of private property rights over public law guarantees of employee access to information about organizing.<sup>65</sup> In deciding *Lechmere*, the Court expressly rejected the highly

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63. 502 U.S. 527 (1992).

64. See Stone, *supra* note 1, at 1022-30.

65. See, e.g., Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of*

nuanced, decidedly New Public Law approach that the NLRB had taken to the issue of nonemployee union access to private property.<sup>66</sup> The Board's approach had been developed over a course of decades with guidance from the Supreme Court in three union access cases.<sup>67</sup> The approach relied on the weighing of a multiplicity of variables that would help the NLRB to determine a "locus of accommodation" between employers' private property rights and employees' NLRA section 7 rights. The Board's own description of the analysis used reflected its "New Public Law" grounding. According to the Board, "As with other legal questions involving multiple factors, the 'nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.'"<sup>68</sup> In rejecting the Board's complicated approach that attempted to equate private law and public law rights, the Court stated:

To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the locus of that accommodation where nonemployee organizing is at issue. So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is only where such access is *infeasible* that it becomes necessary and proper to take the accommodation inquiry to a second level.<sup>69</sup>

The Court's application of its understanding that private property rights should be ascendant to employee section 7 rights was revealed in its discussion of the actual case. The Court explained that despite insurmountable access problems encountered by the union in *Lechmere*, "[a]ccess to employees, not success in winning them over, is the critical issue," and "the union in this case failed to establish the existence of any 'unique obstacles' . . . that frustrated access to Lechmere's employees."<sup>70</sup>

The Court's decision in *Lechmere* certainly seems to be a throwback to old common law formalism due to its enhanced view of private property interests. To the extent that the decision also rejects the NLRB's "New Public Law" approach to the question of nonemployee access to private property, it also represents a closing door similar to the one in *Gilmer*.

#### *Gilmer's Legacy: The Seeds of Co-Optation by the Left*

Whether or not *Gilmer* signals some sort of New Private Law movement, its legacy—shifting public law civil rights cases into private dispute mechanisms—will have a profound impact on employment law. Certainly what

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Lechmere, Inc. v. NLRB, 9 HOFSTRA LAB. L.J. 1 (1991).

66. *Lechmere*, 502 U.S. at 538; see also *Jean Country*, 291 N.L.R.B. 11 (1988).

67. *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

68. *Jean Country*, 291 N.L.R.B. at 14 (quoting *Electrical Workers v. NLRB*, 366 U.S. 667 (1961)).

69. *Lechmere*, 502 U.S. at 538 (emphasis added).

70. *Id.* at 540-41.



*Gilmer* may allow should be of large concern to the left in general and to the civil rights community in particular. In the past, there has been a marked difference in the quality of justice meted out in public courts and private arbitrations. Katherine Stone does a good job of quantifying these differences.<sup>71</sup> As a result of these differences, Stone maintains that legislators should act to ensure that all public statutory rights claims be decided in courts.<sup>72</sup>

I maintain, however, that, despite these historical differences between private and public processes, civil rights advocates should not opt for the old public law route so quickly. The analysis of *Lechmere* and *Gilmer* in the prior section reveals the Court's growing inclination against interpreting civil rights laws broadly in the public interest as it once did. And this should come as no real surprise given the absence from the Court of noted civil rights champions such as Thurgood Marshall and William Brennan. But this shift in Court analysis and approach is not as important an argument for proceeding with caution as is the fact that *Gilmer*, despite its shortcomings, has served as an impetus of sorts for the transformation of private processes by various private actors to erase some of the meaningful differences that have separated public from private fora for so long. If this transformation continues, the prospects for equal justice in private arbitration processes is improved with a corresponding increase in the possibility of justice.

Before discussing transformative efforts, a brief recap of the traditional problems with private arbitration in the employment setting is in order. Katherine Stone rightfully points out the primary hazard of allowing employment agreements in the nonunion setting.<sup>73</sup> These agreements are often blatant "contracts of adhesion" which have been required of new employees on a "take it or leave it" basis without affording employees proper notice regarding waiver of a public venue for their claims.<sup>74</sup> Moreover, these arbitration processes have been characterized by systematic deficiencies that tend to favor employers, not the least of which is a biased decisionmaker who generally tends to be a retired industry executive.<sup>75</sup>

Since the *Gilmer* decision, however, a number of private organizations have attempted to draft and implement procedures that address a number of concerns regarding arbitration of employment disputes. Moreover, these groups have by and large attempted to incorporate due process requirements from public dispute resolution mechanisms in an attempt to make private arbitrations fairer. For example, the Center for Public Resources (CPR) has drafted a process that requires an arbitrator selected from an arbitration panel of the American Arbitration Association.<sup>76</sup> In addition, the CPR process provides for

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71. See Stone, *supra* note 1, at 1036-43; see also *Gardner-Denver*, 415 U.S. at 57-60.

72. Stone, *supra* note 1, at 1046-50.

73. See generally *id.* at 1036-41, 1046-49.

74. See *id.*

75. See *id.*

76. *Id.* at 1040-41; see also CENTER FOR PUBLIC RESOURCES, MODEL EMPLOYMENT TERMINATION DISPUTE RESOLUTION PROCEDURE, in Jay W. Waks & Linda M. Gadsby, *Arbitration and ADR in the Employment Area*, C879 ALI-ABA, MEDIATION AND OTHER ADR METHODS, 439 app. at 461 (Nov. 18, 1993) [hereinafter CPR PROCEDURES].

backpay, attorneys' fees and costs, and reinstatement.<sup>77</sup> If reinstatement is not practicable, then an employee may be awarded "front pay."<sup>78</sup> Although punitive and special damages are not allowed, an arbitrator may award up to one year of wages in lieu of such an award.<sup>79</sup>

The American Arbitration Association (AAA) has also released its National Rules for the Resolution of Employment Disputes.<sup>80</sup> The AAA's rules follow the Due Process Protocol developed by a task force comprised of management, union, and arbitration representatives formed in response to an American Bar Association (ABA) resolution to address employment arbitration involving nonunion workers.<sup>81</sup> Along with its rules, the AAA also announced that it has assembled a roster of experienced employment arbitrators and mediators to decide disputes and has instituted a national training program focusing on substantive and procedural issues.<sup>82</sup> The AAA rules provide that arbitrators have the authority to order whatever discovery is necessary for "a full and fair exploration of the disputed issues" and that they may grant any relief that would be available in court, including attorneys' fees.<sup>83</sup> Important systematic safeguards are also required by the rules, including: the right to representation, the same burdens of proof as in court, and various requirements regarding arbitrators to ensure neutrality.<sup>84</sup> The rules took effect on June 1, 1996 and will be applied to "any arbitration agreement that provides for arbitration by AAA or proceedings under its rules."<sup>85</sup> In addition, JAMS/Endispute, another provider of ADR services, adopted similar fairness rules in January of 1995.<sup>86</sup>

Katherine Stone levels a substantial criticism at these processes that despite their attempts to provide disclaimers to employees informing them of their decision to elect a private forum for any disputes, employers' continuing inclination to minimize any disclaimers by hiding them or placing them in fine print will hopelessly serve to undermine the process.<sup>87</sup> Stone emphasizes post-*Gilmer* case law that supports her point.<sup>88</sup> However, Stone also discusses cases in which courts of law or the parties themselves have refused to be bound by mandatory arbitration agreements because of procedural irregularities surrounding the formation of the contract.<sup>89</sup> Moreover, courts have shown a

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77. See Stone, *supra* note 1, at 1041; see also CPR PROCEDURES, *supra* note 76, at 475-76.

78. *Id.*

79. *Id.*

80. See *Arbitration: Revised AAA Arbitration Procedures Reflect Due Process Task Force Scheme*, 1996 DAILY LAB. REP. 102 d6 (BNA) (May 28, 1996).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* Arbitrators must be mutually acceptable to both parties and drawn from a diverse and nondiscriminatorily composed pool. Moreover, arbitrators must be experienced in employment law, have no conflicts of interest, and must disclose all information affecting neutrality. *Id.*

85. *Id.*

86. *Id.*

87. See Stone, *supra* note 1, at 1037-39.

88. *Id.*; see, e.g., *De Gaetano v. Smith Barney Inc.*, No. 95 Civ. 1613 (DLC), 1996 WL 44226 (S.D.N.Y. Feb. 5, 1996); *Kinnebrew v. Gulf Ins. Co.*, 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994); *Lang v. Burlington Northern R.R.*, 835 F. Supp. 1104 (D. Minn. 1993); *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817 (Tex. Ct. App. 1996).

89. Stone, *supra* note 1, at 1041-42; see *EEOC v. River Oaks Imaging & Diagnostic*, 67 Fair

willingness to void arbitration agreements that drastically depart from the substantive requirements of civil rights laws or the procedural rights afforded in courts of law.<sup>90</sup> In fact, the courts' overall willingness to review the fairness of private arbitral systems in the context of statutory civil rights claims has led private ADR service companies to change their procedures. For example, after the *River Oaks Imaging* case discussed by Stone,<sup>91</sup> CPR upgraded its disclaimer to provide better and more meaningful information to employees in a "model memorandum to employees."<sup>92</sup> Moreover, the new policy ensures that arbitration agreements do "not truncate statutes of limitation available under statutory or common law."<sup>93</sup>

Despite continuing concerns about private resolution of statutory civil rights claims, it appears that a unique combination of the courts and the private marketplace is working to ensure fairer procedures and more just results. The adoption by AAA and JAMS/Endispute of policies that follow the Due Process Protocol endorsed by the ABA indicates that private institutions can work within themselves to ensure fair application of civil rights statutes in private processes. Also, the willingness of CPR to respond to the market for ADR services by making its procedures more fair means that employers will not be able to institute arbitral processes with the help of expert ADR providers without incorporating notions of procedural and substantive fairness into their systems. While these developments may seem precarious in the sense that these private groups might change their approach, the fact that some of these developments occurred roughly simultaneously with a threatened boycott of ADR processes by the National Employment Law Association (plaintiffs' employment lawyers) strongly suggests the developments may well be enduring ones.<sup>94</sup> Ultimately, too, as employers and ADR providers become more knowledgeable about what courts will generally allow with respect to private arbitration in this area, the courts will become much less relevant. If the trend continues, it will become more efficient and direct for those who would seek to change these processes to approach private institutions like the ABA and

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Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. 1995); *Bentley's Luggage Corp.*, NLRB Case No. 12-CA-16658 (Sept. 25, 1995); see also *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

90. See, e.g., *Graham Oil Co. v. ARCO Prod. Co.*, 43 F.3d 1244 (9th Cir. 1994) (holding unenforceable an arbitration agreement limiting the authority of the arbitrator to award exemplary damages or attorneys' fees as allowed by statute); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981); *Ditto v. RE/MAX Preferred Properties, Inc.*, 861 P.2d 1004 (Okla. Ct. App. 1993) (voiding an arbitration agreement allowing the employer alone to appoint the arbitration panel). Cf. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995) (upholding a punitive damages award in arbitration, although partly because of the parties' contractual agreement to provide for them). For a more complete discussion of these cases, see George W. Bohlander et al., *Alternative Dispute Resolution Policies: Current Procedural and Administrative Issues*, 1996 LAB. L.J. 619.

91. See Stone, *supra* note 1, at 1041; see also *supra* note 89.

92. See *Alternative Dispute Resolution: Center for Public Resources to Issue Model ADR Policy for Employment Disputes*, 1995 DAILY LAB. REP. 114 d11 (BNA) (June 14, 1995).

93. *Id.* ("Although the change [regarding statutes of limitation] takes into account such recent case law as *EEOC v. River Oaks Imaging and Diagnostic . . .*, the committee's concern over the model policy's varying substantive rules of law predated that decision . . .").

94. EDWARD A. DAUER, 2 MANUAL OF DISPUTE RESOLUTION § 26.04, at 2S-58 (Supp. 1996); Thom Weidlich, *Storm Brews over ADR*, NAT'L L.J., Nov. 6, 1995, at A6.

private ADR companies like AAA and JAMS/Endispute. In the future, then, the state may well be effectively divorced from this new private system of law.

One might react to the above argument by asking whether it would simply be better to seek to have statutory civil rights disputes remain in the courts since the courts are more adept at instituting and enforcing the due process notions that are so important in this area of law. In other words, if private arbitration systems can at best hope to be pale imitations of the court system, why not simply try to retain judicial handling of civil rights complaints? Of course, the answer must be that transforming private arbitral systems has some additional bonus for the progressive left that the court system cannot provide. I can think of two substantial benefits to working for change in private arbitral systems. The first harkens back to Katherine Stone's hypothetical involving the retail salesperson plaintiff and my reaction to that hypothetical at the beginning of this essay. Under the public law system, a potential plaintiff must find a lawyer to represent him or her, typically for a fee. Plaintiffs who appear to be poor witnesses, who have very little backpay damages because of low paying jobs or mitigation efforts, or who simply cannot afford to pay consultation fees and retainers are effectively denied justice for lack of legal representation. Most private arbitral processes allow the option of proceeding without representation. For those who cannot find representation, this facet of private arbitration offers some hope, especially if these processes are ultimately engineered to be fair to the employee.

The second benefit of taking the private route relates to a point that Katherine Stone makes with respect to section 301 preemption in the labor law setting. She maintains that one of the problems with requiring unionized employees to take their common law wrongful discharge and tort claims to a labor arbitrator is that arbitrators do not typically award the same kind of relief that can be procured in a court of law.<sup>95</sup> It seems to me that all the changes taking place in arbitration processes for nonunion employees must ultimately inure to the benefit of unionized workers. One reason is that the charge to change arbitration to ensure its integrity on the nonunion front is being led by labor arbitrators, among others.<sup>96</sup> In addition, many of the arbitrators who currently preside over disputes regarding union employees and labor contracts will be the very ones who are called to deal with public statutory questions in private nonunion processes. It should be only a matter of time, if the culture indeed changes, before these same arbitrators are comfortable and knowledgeable about awarding punitive and compensatory damages for common law claims of unionized workers brought in labor arbitration.

Finally, one should not underestimate the ability of the progressive left to react to change that at first may seem contrary to its goals or agenda. This has been true, for example, in the case of the *Gilmer* decision where the left has acted, with others, to transform private arbitral processes. It is also true in the case of the *Lechmere* decision, where the progressive left (in this case, labor

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95. See Stone, *supra* note 1, at 1029.

96. See *supra* text accompanying note 81.

unions) also reacted in a uniquely private way. Rather than attempt to reverse *Lechmere*, unions responded to a general ban on access to employer property for organizing purposes by having union organizers apply for jobs in the workplaces they sought to unionize (a process known as "salting" the workplace).<sup>97</sup> The genius of this approach is that it is difficult for employers to react to it by protesting the means by which such unionization is achieved without conceding that the government should be more involved in regulating the hiring process. And although employers did attempt to argue, within the labor laws, that they should be able to reject job applicants who would have divided loyalties, the Supreme Court, relying upon master/servant principles ironically forged during the era of common law formalism, rejected the employers' pleas.<sup>98</sup> As a result, unions have increasingly come to use employee organizers, a more effective tool for organizing workers than mere access.<sup>99</sup>

I have maintained in this essay that the left should not be so quick to condemn private arbitration of statutory rights for two primary reasons. First, although these processes have historically been seized by employers as an efficient, less costly alternative to litigation devoid of due process safeguards, there is nothing inherent in private arbitration to prevent making the process fairer for employees. Second, there is a substantial payoff that justifies the work required by those on the left to transform these processes for the betterment of employees. That payoff is greater access to justice. Private arbitration holds the potential to eliminate institutional barriers that block access to public courts by some employees. In conclusion, although there is much work to be done, the seeds of co-optation of the private realm by the progressive left in labor and employment law already seem to have been planted.

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97. See generally Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341 (1995) (arguing that the *Lechmere* decision creates a powerful incentive for increased use of "salting," compelling union organizers to become statutory employees).

98. See *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995). *Town & Country*, which reflects a Supreme Court tilt in favor of old common law formalist protection of the private master/servant relationship, provides more evidence of the New Private Law in the labor and employment arena.

99. Cf. generally Jeffrey A. Mello, *The Enemy Within: When Paid Union Organizers Become Employees*, 1996 LAB. L.J. 677.