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CONCEPTUALIZING FORUM SELECTION AS A "PUBLIC GOOD": A RESPONSE TO PROFESSOR STONE

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First, I want to remind everyone about the powerful conceptual imagery that informs the underlying structure of legal norms governing the unionized work setting. Scholarly work and case law have glorified the imagery of a "democratic" work place where unions and employers jointly shape the rules that determine the rights of labor and management through the administration of a grievance and arbitration procedure to resolve their disputes.[1] The collective agreement or "private law of the workplace" is also enhanced by the consensual "contractarian imagery" that supports the presumption of workers bargaining away their statutory right to strike in exchange for final and binding arbitration with very limited judicial review.[2]

In her earlier scholarship, Professor Stone has demonstrated the problematic character of this "imagery" of American labor law.[3] In her article in this Symposium issue,[4] she extended the logic of her argument to an expanding preemption doctrine under section 301.[5] I have made similar arguments in an

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1. Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Archibald Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951); *see also* Note, *Arbitration After* Communications Workers: *A Diminished Role?*, 100 HARV. L. REV. 1307, 1309 (1987).

The Court placed arbitration at the heart of collective agreements in the *Steelworkers Trilogy* of 1960. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (holding that an arbitration award should be enforced when it draws its essence from the collective bargaining agreement); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) ("[T]he grievance machinery under a collective bargaining agreement is at the very heart of a system of industrial self-government."); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (holding that when a dispute falls within an arbitration clause, its merits are irrelevant to enforcement).

2. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83 (when the scope of an agreement to arbitrate is ambiguous, courts should resolve doubts in favor of coverage and order the parties to arbitrate); *see* Dennis O. Lynch, *Defense, Waiver, and Arbitration Under the NRLA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 241 & n.18 (1989).

3. *See, e.g.*, Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992); Katherine Van Wezel Stone, *The Postwar Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

4. *See* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1049-50 (1996).

5. *Id.*

earlier article regarding the deferral to arbitration of the resolution of employees' statutory rights under the National Labor Relations Act.[6]

I will devote my brief comments to a distinct set of questions as a way of forcing us to think about our assumptions regarding the differences between public and private ordering. Are there characteristics that are necessarily inherent in the differences between public and private fora that cause us to oppose trends toward increased reliance on the New Private Law in the labor field or are we primarily reacting to our empirical observations of labor arbitration as a forum for resolving statutory rights? Would we be as concerned if employees had the option of taking their statutory claims to a public or private forum?

Focusing on these questions forces us to consider the importance of the process for resolving claims and the doctrine governing that process as a "public good." The legal doctrine governing a statutory right benefits all parties similarly situated by making the resolution of their respective rights more predictable and easier to resolve without litigation. The value of legal doctrine as a "public good" may, in some circumstances, be in tension with an employee's access to a cost effective and fair procedure for resolving a statutory claim. What we may regard as an appropriate balance between these two interests may turn on how we think about the following: (1) the methods available for the selection of arbitrators and their knowledge of legal doctrines governing statutory rights; (2) the procedures available through arbitration for obtaining information prior to a hearing; (3) employees' perceptions of the opportunities to have a voice and to be heard in a non-intimidating setting; (4) the effectiveness of the remedies available to the parties in arbitration; (5) arbitrators' views of the relative importance in resolving conflicts of the culture and specific context of a particular work setting as balanced against the public policies underlying the statutory right at issue; and (6) the potential to realize a "public good" from the private forum of arbitration. I will touch briefly on each of these considerations and then end with the question of what really bothers us about the New Private Law of statutory rights in the workplace.

The process for selecting arbitrators has a major impact on the perceived legitimacy of the arbitration forum.[7] One can argue that the type of "industry panel" that would hear Gilmer's age discrimination claim would be more sensitive to the culture and needs of stock brokerage firms than to the public policy underlying the Age Discrimination in Employment Act.[8] In addition Gilmer would not be a "repeat player" in arbitration with a long run interest in

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6. Lynch, *supra* note 2.

7. *See* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?* 69 TEX. L. REV. 509, 534-40 (1990); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 ("[A]rbitration clauses are crucial in that they not only bar judicial review but also may allow companies to select the arbitrators . . . .").

8. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30-31 (1991) (finding that plaintiffs had failed to show that existing protections against bias in NYSE arbitration panel selection were insufficient).

making sure there was no inherent bias in the selection of industrial panels to hear disputes arising through a brokers' work and governed by the arbitration clause in the standard stock exchange registration form.[9] In the case of arbitration under collective agreements, the union is a "repeat player" just as is the employer. Both parties to the arbitration agreement are in a position to maintain information on the backgrounds, opinions, open-mindedness, and basic fairness of the arbitrators they jointly select. The union and the employer will have information on the way the arbitrators they select handle discovery requests, conduct hearings, and reason to a final decision. They can also research the way the arbitrator deals with statutory issues when they come up in the context of resolving the rights of parties under the collective agreement. The real problem with the arbitration of a statutory right under the arbitration clause of a collective agreement may be whether the union and the individual employee actually have a shared interest in the way the arbitrator resolves the statutory claim. As has been clear in some Title VII disputes in unionized work settings, the union may have a stronger interest in maintaining a good working relationship in the workplace than protecting individual statutory rights.[10]

In the non-union setting, the individual employee will not have to worry about a partial conflict of interest with the union over the precedent an arbitrator may establish under a collective agreement, but the employee will not be in as strong a position to invest in maintaining information on the biases and approaches of different arbitrators. As a "one-time player" in arbitration, the employee will not have access to the same quality of information. The employee will be forced to rely on the incentives for a specialized bar handling individual employee claims in arbitration to maintain the information they need to protect the interests of their clients in the selection of arbitrators. In addition, the arbitrator will know the individual employee is not likely to be involved in the selection of an arbitrator in the future so there is less incentive for the arbitrator to worry about the employee's reaction to the arbitrator's opinion. Again the employee must rely on the arbitrator's concern over the reaction of the employee's attorney to the arbitrator's opinion. It is clear that a specialized bar that regularly represents employees in the protection of statutory rights is critical to the fairness of a New Private Law in the labor field.

The second major criticism of arbitration involves its procedural characteristics in terms of the lack of discovery, less formal rules of evidence, and no judicial review of the arbitrator's interpretation and application of legal

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9. *Id.* at 23 (noting that Gilmer was a 62-year-old individual ADEA plaintiff).

10. *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1974) ("Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974) (noting that "a further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented"); Vaca v. Sipes, 386 U.S. 171, 182 (1966) (characterizing subordination of individual interests under collective bargaining system as a necessity); Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965) ("If a grievance procedure cannot be made exclusive, it loses much of its desirability as a settlement.").

doctrine.[11] At the same time arbitration is what we could call a very "plastic" forum. It can become what the parties want it to be. They can shape its characteristics by contract and by mutual instructions to the arbitrator they select. The range can be anywhere from replicating the characteristics of a public court to a very relaxed and informal process. A union and employer can bargain over the procedural characteristics they prefer in arbitration with the possible exception of the degree of judicial review they prefer.[12] The individual employee signing an arbitration clause with an employer is not in the same position to bargain over the procedural issues. Once a dispute arises, the employee's attorney may not be able to negotiate over the characteristics of the arbitration forum unless the law gives the employee an election of forum option that the attorney can use as leverage in negotiation with the employer. The election of forum would give the employer an incentive to craft a cost effective and fair forum that would be attractive to the specialized plaintiff's bar as an alternative to adjudication.

An additional procedural concern is the lack of discovery in arbitration.[13] We all know that the burdens and costs of discovery can make it a negative as well as positive procedural device. A threat to drive up the costs of litigation by excessive discovery can make it impractical to litigate many employee claims for lesser amounts. We can not provide a definite answer as to whether a public or private forum will offer an employee better access to a fair disputing process at reasonable cost without knowing a good deal more about the specifics of the employee's statutory claim.

There is also the question of how the employee will relate to the structural characteristics of a court as compared to arbitration. Employees want a legitimate opportunity to tell their story, to voice the problems they have encountered as well as obtain a remedy. From an anthropological perspective, courts are a very formal and intimidating atmosphere with the judge in a robe, the raised dais, jury venire, and evidentiary constraints on the presentation of evidence. A skilled arbitrator can make the setting for the employee's testimony more relaxed and less formal with everyone at a table together and fewer objections interrupting the presentation of testimony. An arbitrator's skill and knowledge of the law will depend on training and experience, but the point is we can not assume an arbitrator selected by the parties after a review of the arbitrator's background will be less skilled and knowledgeable than a judge. As university professors, we may be more effective by focusing on how to

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11. *See, e.g.*, Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591 (1995).

12. I have never seen a collective bargaining agreement that defines the scope of judicial review more broadly than the *Steelworkers Trilogy*. Federal courts, however, have developed a limited public policy exception to judicial deference to arbitration. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987) (limiting a court's ability to refuse to enforce an arbitrator's interpretation of a collective agreement "to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests'") (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983)).

13. *See* Bales, *supra* note 11.

educate better arbitrators regarding the issues surrounding employees' statutory rights than to assume that judges selected through a political process are preferable.

The remedies available in arbitration are an enormous problem.[14] As Professor Stone noted, arbitrators feel very constrained regarding remedies.[15] They lack the contempt power of the courts making provisional remedies and certain other forms of equitable relief difficult to administer. Indeed the confused body of law surrounding the jurisdiction of federal courts to issue an order to maintain the status quo pending arbitration of a dispute aptly illustrates this problem.[16] The real question is whether there is a creative way to address the problem of remedies while maintaining the integrity of arbitration. For example, expedited arbitration with court enforcement of the arbitrator's award if needed could be used in some circumstances.

The mindset of arbitrators can also present an issue. An arbitrator who works regularly in a specific type of industry will become schooled in the culture of the workplace in that industry. That can be a plus or a minus depending on the nature of the dispute. Of course, the alternative may be the adjudication of an employee's rights before a judge who has no knowledge of the workplace in question. I mentioned earlier, the possible negative aspects of the mindset of an arbitrator who was selected by the parties and who knows that the parties may not select her again if they are not satisfied with the handling of the case and the arbitrator's opinion. An arbitrator does look at a case through different lenses than a judge who is selected through a process totally independent of the case in question and who may or may not stand for retention through a political process. My point is that the judicial mindset may not always be the preferred one. We ought to at least ask questions about differences in the mindset of the adjudicators in the two fora in a thoughtful manner, informed by more empirical observation.

I started with the value of judicial opinions as a "public good." The visibility of judicial opinions and the public debate surrounding legislative correc-

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14. *See id.*; *see also* Stone, *supra* note 4, at 1039-41.

15. *Stone, supra* note 4, at 1047 n.197.

16. *See, e.g.*, Niagra Hooker Employees Union v. Occidental Chem. Corp., 935 F.2d 1370 (2d Cir. 1991); IBEW Local 733 v. Ingalls Shipbuilding Div., 906 F.2d 149 (5th Cir. 1990) (both holding that an employer's prior agreement to maintain status quo pending arbitration as sufficient but not necessary for a grant of injunctive relief); United Steelworkers v. Fort Pitt Steel Mfg., 598 F.2d 1273, 1278-79 (3d Cir. 1979) (endorsing three elements to consider in determining NLA preclusion of injunction: (1) whether the dispute is subject to arbitration, (2) whether the party is interfering or frustrating arbitral process, and (3) the propriety of an injunction over "ordinary principles of equity"); Lever Bros. Co. v. Chemical Wkrs. Local 217, 554 F.2d 115 (4th Cir. 1976) (stating that the purpose of the anti-injunction exception was to ensure that arbitration would not be merely a "hollow formality"); *see also* International Union, United Automobile, Aerospace and Agricultural Implement Workers of American, UAW v. Textron Lycoming Reciprocating Engine Div., 919 F. Supp. 783 (D. Pa. 1996) (applying "irreparable harm" test). *But cf.* Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Employees, 847 F. Supp. 1294 (E.D. Pa. 1994); Complete Auto Transit, Inc. v. Chauffeurs, Teamsters, and Helpers Local Union No. 414, 839 F. Supp 1339 (N.D. Ind. 1993); Teamsters Assoc. v. Japanese Edu. Inst., 724 F. Supp. 188 (S.D.N.Y. 1989); *see also* Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers Ass'n, 620 F.2d 602 (7th Cir. 1980) (defining Seventh Circuit test as whether arbitral remedies would be "wholly inadequate" to redress a contractual violation).

tions to unpopular judicial opinions is an important element of our democratic process. Whether similar debate can be generated by the repetitive arbitration of similar disputes is an open issue. Since the concept of precedent is deeply embedded in our jurisprudence, we can expect private services to develop and to reduce the cost of obtaining arbitrators' opinions. New technologies should make this even easier. Parties specializing in employment law will read and evaluate the opinions and will pursue ways to change an evolving doctrine in arbitration that they do not like. In collective bargaining, unions and employers regularly bargain around the opinions of arbitrators. They also use public policy arguments to increase the scope of judicial review of arbitrators' opinions.[17] The relationship between arbitrators and courts need not be viewed as fixed in stone. It can be adjusted to make both work together to better serve the ends of justice.

In reality I am much more skeptical of the use of arbitration to resolve statutory claims than these comments suggest. I do believe, however, that we would benefit from a much more serious comparative examination of institutional fora for settling disputes. Each will have their own particular characteristics that yield benefits and detriments. Their positive and negative qualities may vary depending on the nature of the claim underlying the dispute. One way to learn more is to encourage doctrines that leave parties with a choice of fora and to study the conflicts they encounter over the choice of forum.

We are worried because we see employers beginning to force a choice on employees through mandatory arbitration clauses. Before these mandatory clauses, employees could have voluntarily agreed to arbitrate in lieu of going to court, but there was not much incentive for the parties to invest in the development of specialized arbitration panels for statutory disputes. Can we develop an improved arbitration option while maintaining the right of employees to elect their preferred forum? We would certainly learn more about the comparative qualities of different fora for resolving similar conflicts.

17. *Misco*, 484 U.S. at 43.