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Helping Those Who Help Themselves: The Fourth Circuit's Treatment of Agreements to Arbitrate Statutory Employment Discrimination Claims in *Brown v. ABF Freight Systems, Inc.* and *EEOC v. Waffle House, Inc.*

Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights . . . to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.¹

INTRODUCTION

A trial is a public event, a display of state power, which both reflects and shapes community standards of conduct. Arbitration, on the other hand, is a private system of dispute resolution in which individuals grant third parties the power to resolve their differences.² On a practical level, the fact that arbitration is faster and less expensive than litigation has made it popular with employers and increasingly accepted by courts.³ Despite the advantages of

1. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

2. For a more developed contrast between the distinguishing features of public and private dispute resolution, see Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 401-04 (1999). See also *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (emphasizing the private, contractual character of arbitration); Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42, 57 (1988) (discussing the characteristics of public courts). The two standard treatises on arbitration are IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* (1994) and MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION: THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* (Gabriel M. Wilner ed., 1984 & Supp. 1990).

3. See Mei L. Bickner et al., *Developments in Employment Arbitration*, 52 DISP. RESOL. J., Jan. 1997, at 8, 78-79 (noting a rise in employer use of arbitration procedures because employers fear submitting employment cases to juries and wish to avoid the time and expense of litigation); 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, 1187-88 & nn.1 & 5 (1993) (observing that employers make increasing use of arbitration). Chief Justice Warren Burger argued publicly for increased use of arbitration to settle private disputes partly on the ground that

arbitration, however, courts and commentators have struggled with the question of whether and when to enforce predispute agreements⁴ to arbitrate claims arising under federal employment discrimination statutes.⁵

The reasons for this struggle are not hard to fathom. With the passage of Title VII of the Civil Rights Act of 1964⁶ and other employment discrimination statutes,⁷ Congress authorized federal

arbitration would reduce the volume of cases brought in already over-worked federal courts. See Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276-77 (1982). The Supreme Court's increasingly receptive attitude toward arbitration is chronicled below. See *infra* notes 160-99 and accompanying text.

4. A "predispute" agreement is typically signed by an employee as a condition of accepting employment. In contrast to the controversy surrounding predispute agreements, commentators and courts generally approve of post-dispute arbitration agreements. See, e.g., Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1346 (1997) [hereinafter Estreicher, *Predispute Agreements*] (stating that after disputes have arisen, the parties may knowingly and voluntarily waive their rights to a judicial forum); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1419 n.207 (1991) (stating that courts have routinely enforced post-dispute agreements to arbitrate).

5. See *infra* notes 135-236 and accompanying text (discussing the relevant judicial decisions). For a representative sample of scholarly commentary, see, e.g., Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 472-83 (1996) [hereinafter, Cole, *Incentives and Arbitration*] (arguing that predispute arbitration agreements in individual employment contracts should not be enforced because arbitration procedures systematically favor employers); Estreicher, *Predispute Agreements*, *supra* note 4, at 1349-52 (arguing that arbitration may benefit both employers and employees if the arbitration process has appropriate procedural safeguards); Moohr, *supra* note 2, at 456-60 (arguing that while the increasing prevalence of arbitration threatens to undermine the public goals of employment discrimination law, arbitration may be more effective than litigation in resolving private employment disputes); 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, 191-204 (2000) (arguing that union-negotiated arbitration clauses that mandate arbitration of statutory discrimination claims should not be enforced). Professor Joseph Grodin aptly summarizes many of the criticisms of the increasing judicial acceptance of agreements to arbitrate claims arising under federal civil rights laws. See Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 50 (1996). Grodin is puzzled and troubled by society's willingness to entrust the enforcement of civil rights laws to a private "procedure unilaterally promulgated by the party whose conduct is sought to be regulated." *Id.* Grodin also laments that arbitral decisions are not open to public scrutiny and that they are accorded a "degree of finality we are not willing to accord the decisions of our designated public tribunals." *Id.*

6. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)). Title VII forbids discrimination based on race, color, religion, sex, or national origin. *Id.* § 2000e-2(a)(1).

7. The two most important employment discrimination statutes in addition to Title VII are the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1994 & Supp. IV 1998), and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-

lawsuits through which individual employees could serve as private attorneys general working to further the public policy goal of ending discrimination in the workplace.⁸ In the Civil Rights Act of 1991,⁹ Congress acted to strengthen enforcement of Title VII and the Americans with Disabilities Act (ADA)¹⁰ by explicitly providing for jury trials,¹¹ compensatory damages,¹² and punitive damages.¹³ These actions may suggest that Congress intends for employment discrimination claims to be enforced only in federal court,¹⁴ and the Supreme Court appeared to hold this view until its landmark 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹⁵ By compelling arbitration of a claim arising under the Age Discrimination in Employment Act (ADEA),¹⁶ the *Gilmer* Court sparked a sharp increase in employer use of arbitration agreements.¹⁷ It also raised concerns that employee rights to be free from discrimination might be compromised if employers can unilaterally shift efforts to vindicate those rights from a judicial to an arbitral forum.¹⁸

12213 (1994). The ADEA forbids age-based discrimination against people aged forty or older, 29 U.S.C. § 631(a), while the ADA forbids employment discrimination against the disabled and imposes on employers a duty to reasonably accommodate disabled employees so that those employees may enjoy equal employment opportunities and benefits, 42 U.S.C. § 12112(a), 12112(b)(5).

8. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974); Moohr, *supra* note 2, at 424–26.

9. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, and 42 U.S.C.).

10. 42 U.S.C. §§ 12101–12213 (1994).

11. 42 U.S.C. § 1981a(c) (1994).

12. *Id.* § 1981a(a)(1)–(2).

13. *Id.* On punitive damages under Title VII, see generally Ann M. Anderson, Note, *Whose Malice Counts?: Kolstad and the Limits of Vicarious Liability for Title VII Punitive Damages*, 78 N.C. L. REV. 799 (2000).

14. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (stating that Congress gave the federal courts “plenary powers” to enforce Title VII).

15. 500 U.S. 20 (1991).

16. 29 U.S.C. §§ 621–634 (1994 & Supp. IV 1998).

17. Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591, 591–92 (1997) [hereinafter Cole, *A Funny Thing*]; see also Bickner et al., *supra* note 3, at 15, 78 (stating that in a survey of employers having arbitration plans for nonunionized employees, eighty-five percent of responding employers implemented their plans after the *Gilmer* decision).

18. See, e.g., Grodin, *supra* note 5, at 50–55; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036–50 (1996); cf. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637–39 (1996) (emphasizing the dangers that mandatory arbitration poses for consumers).

Nearly a decade of experience with arbitration in the post-*Gilmer* world has not entirely assuaged those concerns.¹⁹ In some jurisdictions, employers can take away a nonunionized employee's right to litigate employment discrimination claims by presenting her with a form contract or an employee handbook containing a broadly worded arbitration clause.²⁰ Moreover, employers with nonunionized workplaces may have considerable freedom to unilaterally structure the arbitration process in their favor without fear of judicial interference.²¹ Under such circumstances, the statutory guarantee that individuals shall be free from employment discrimination²² rings hollow.

The Supreme Court will soon decide²³ whether to limit the impact of *Gilmer* when it rules in *Circuit City Stores, Inc. v. Adams*,²⁴ a Ninth Circuit decision which holds that federal courts have no authority to enforce arbitration clauses contained in employment contracts.²⁵ Yet, even if the Court declines to retreat from *Gilmer*, the statutory rights of some employees remain quite secure. Unionized employees will rarely be barred from bringing their employment discrimination claims in federal court under current Supreme Court doctrine.²⁶ It seems, then, that workers who organize

19. See, e.g., Mary Williams Walsh, *Court Considers if Employer Can Force Pledge Not to Sue*, N.Y. TIMES, Nov. 3, 2000, at A1 (reporting concerns that a Supreme Court decision approving mandatory arbitration agreements in employment contracts might "diminish the workplace status of millions of Americans"). In 1997, the EEOC issued a policy statement opposing mandatory arbitration of employment discrimination claims if such arbitration is imposed as a condition of employment. EEOC Notice No. 915.002 (July 10, 1997), reprinted in part in *EEO Rejects Mandatory Binding Employment Arbitration*, 52 DISP. RESOL. J., Fall 1997, at 8, 11-14, full text available at <http://www.eeoc.gov/docs/mandarb.html> (last visited Nov. 15, 2000).

20. See, e.g., *McCrea v. Copeland*, 945 F. Supp. 879, 882 (D. Md. 1996) (compelling arbitration of federal discrimination claims on ground that clause providing for arbitration of disputes "relating to this Agreement" should be read broadly to include statutory claims as well as contract claims); *Topf v. Warnaco, Inc.*, 942 F. Supp. 762, 767-69 (D. Conn. 1996) (enforcing an arbitration clause in an employee handbook despite an employee's claims that her employer had represented that all "key" terms of the employment contract were contained in an offer letter signed by the employee).

21. See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 226-27 (1998).

22. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices.").

23. The Court heard argument in the *Adams* case on November 6, 2000. See *infra* notes 105-06, 275-87 and accompanying text for further discussion of *Adams*.

24. 194 F.3d 1070 (9th Cir. 1999) (per curiam), cert. granted, 120 S. Ct. 2004 (2000).

25. *Id.* at 1070.

26. See *infra* notes 240-52 and accompanying text (discussing the practical effect of

stand to gain not only greater contract rights to wages and benefits, but also greater protection under federal employment discrimination statutes. In short, the unspoken theme of current arbitration jurisprudence is that courts will help those who help themselves. The different fates of unionized and nonunionized employees in the post-*Gilmer* world are starkly illustrated by two recent Fourth Circuit decisions: *Brown v. ABF Freight Systems, Inc.*²⁷ and *EEOC v. Waffle House, Inc.*²⁸

Part I of this Note discusses the facts, procedural histories, and opinions in *Brown* and *Waffle House*.²⁹ Part II then explores the twin statutory sources of the federal judiciary's power to enforce arbitration agreements: the Federal Arbitration Act (FAA) and the Labor Relations Management Act (LRMA).³⁰ The history of Supreme Court and Fourth Circuit decisions on the enforceability of agreements to arbitrate statutory claims is reviewed in Part III.³¹ Next, Part IV shows how this history has produced a legal regime under which the statutory rights of unionized workers to freedom from employment discrimination are comparatively secure, while the statutory rights of nonunionized workers are vulnerable.³² Finally, Part V of the Note argues that even though the Supreme Court will likely hold in *Adams* that the federal courts have broad power over the arbitration of employment disputes,³³ courts can still take two steps that would provide more protection for the statutory employment rights of nonunionized workers.³⁴ First, courts should require that any employee waiver of the right to litigate employment discrimination claims be clear and unmistakable.³⁵ Second, courts should not compel arbitration of statutory discrimination claims unless they have rigorously scrutinized the proposed arbitration procedures for compliance with due process norms.³⁶

the Supreme Court's adoption of the "clear and unmistakable" standard for union-negotiated waivers of the right to litigate statutory discrimination claims).

27. 183 F.3d 319 (4th Cir. 1999).

28. 193 F.3d 805 (4th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3726 (U.S. Oct. 2, 2000) (No. 99-1823).

29. *See infra* notes 37-88 and accompanying text.

30. *See infra* notes 89-134 and accompanying text.

31. *See infra* notes 135-236 and accompanying text.

32. *See infra* notes 237-74 and accompanying text.

33. *See infra* notes 275-87 and accompanying text.

34. *See infra* notes 275-420 and accompanying text.

35. *See infra* notes 288-373 and accompanying text.

36. *See infra* notes 374-420 and accompanying text.

I. *BROWN AND WAFFLE HOUSE: WINDOWS ON THE POST-GILMER WORLD*

In *Brown v. ABF Freight Systems, Inc.*, the Fourth Circuit rejected arguments that a broadly worded arbitration clause in a collective bargaining agreement (CBA) required dismissal of the plaintiff's disability discrimination claim.³⁷ The plaintiff, Jerome Brown, had worked as a truck driver for Carolina Freight Carrier (CFC) for twenty years when he was diagnosed with diabetes in 1994.³⁸ After the United States Department of Transportation withdrew Brown's authorization to drive interstate routes on medical grounds, Brown obtained a special waiver from the State of Virginia that enabled him to continue working as a truck driver as long as he drove routes wholly within that state.³⁹ In September 1995, ABF acquired CFC.⁴⁰ Although Brown reached an agreement with ABF that allowed him to continue performing the same intrastate work he had performed for CFC,⁴¹ he was fired less than two months later.⁴² Brown filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that he was fired because of his disability in violation of both the Americans with Disabilities Act (ADA)⁴³ and a Virginia disability discrimination statute.⁴⁴ He also filed a grievance in accordance with the procedures outlined in a CBA negotiated by his union,⁴⁵ but abandoned the grievance process and brought suit in federal district court after receiving a right-to-sue letter from the EEOC.⁴⁶

The district court dismissed Brown's complaint for lack of subject matter jurisdiction, holding that Brown was contractually limited by his union's CBA to binding, final arbitration as the sole

37. *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 323 (4th Cir. 1999).

38. See *Brown v. ABF Freight Sys., Inc.*, 997 F. Supp. 714, 715 (E.D. Va. 1998), *rev'd*, 183 F.3d 319 (4th Cir. 1999).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. 42 U.S.C. §§ 12101-12213 (1994).

44. *Brown*, 997 F. Supp. at 715 (citing the Virginians with Disabilities Act, VA. CODE ANN. §§ 51.5-40 to -46 (Michie 1998)).

45. *Id.*

46. *Id.* Under both Title VII of the Civil Rights Act of 1964 and the ADA, an individual may bring her own lawsuit only if the EEOC decides not to pursue the case on its own. 42 U.S.C. § 2000e-(5) (1994) (describing procedures for enforcement of rights under Title VII); 42 U.S.C. § 12117(a) (1994) (stating that the ADA is enforced through the same mechanisms established in Title VII).

remedy for his statutory discrimination claims.⁴⁷ In so holding, the court relied on *Austin v. Owens-Brockway Glass Container, Inc.*,⁴⁸ an earlier Fourth Circuit decision which held that an individual employee's right to seek relief from employment discrimination in federal court could be waived in an arbitration agreement negotiated between the employee's union and his employer.⁴⁹ The CBA at issue in *Brown* contained a broad nondiscrimination provision⁵⁰ as well as an agreement that "[a]ll grievances or questions of interpretation arising under this . . . Agreement . . . shall be processed' in accordance with the . . . grievance procedure" and submitted to binding arbitration should the grievance procedure fail to produce a solution.⁵¹ Analogizing this language to that of the CBA in *Austin*, the district court read the CBA's nondiscrimination provision as incorporating the entire ADA into the contract.⁵² The court reasoned that in agreeing not to discriminate, the parties had assumed a contractual obligation to follow federal anti-discrimination law. It therefore concluded that disputes about whether the ADA had been violated "arose under" the CBA and thus had to be submitted to binding arbitration.⁵³

On appeal, the Fourth Circuit reversed.⁵⁴ The court based its decision on two cases decided after the district court's disposition of *Brown*: *Wright v. Universal Maritime Service Corp.*⁵⁵ and *Carson v. Giant Food, Inc.*⁵⁶ In *Wright*, the Supreme Court held that courts should enforce only "clear and unmistakable" union-negotiated waivers of employee rights to bring job discrimination lawsuits in

47. *Brown*, 997 F. Supp. at 721.

48. 78 F.3d 875 (4th Cir. 1996).

49. *Id.* at 885. For further discussion of *Austin*, see *infra* notes 215–24 and accompanying text.

50. The nondiscrimination clause read:

The Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, age, or national origin nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of race, color, religion, sex, age, or national origin or engage in any other discriminatory acts prohibited by law. This Article also covers employees with a qualified disability under the Americans with Disabilities Act.

Brown, 997 F. Supp. at 715–16 (quoting Article 37 of the CBA).

51. *Id.* at 716 (quoting Article 8 of the CBA).

52. See *id.* at 720–21.

53. *Id.*

54. *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 323 (4th Cir. 1999).

55. 525 U.S. 70 (1998).

56. 175 F.3d 325 (4th Cir. 1999).

federal court.⁵⁷ In *Carson*, the Fourth Circuit had decided that such a clear and unmistakable waiver could occur in two ways: (1) the arbitration clause of the CBA could explicitly include statutory employment discrimination claims;⁵⁸ or (2) some other part of the CBA (normally, the nondiscrimination clause) could make compliance with federal discrimination statutes part of the agreement between the union and the employer.⁵⁹ In the light of *Wright* and *Carson*, the Fourth Circuit held that a "broad but nonspecific"⁶⁰ arbitration clause encompassing disputes "arising under" the CBA did not constitute a clear and unmistakable waiver of Brown's right to litigate his ADA claims.⁶¹

Despite facts that seem more favorable to the plaintiff than those in *Brown*, the Fourth Circuit enforced a broadly worded arbitration clause in *EEOC v. Waffle House, Inc.*⁶² In June 1994, Eric Baker completed and signed an application to work at a Waffle House restaurant in Columbia, South Carolina.⁶³ At the bottom of the first page of the application was a mandatory arbitration clause printed in seven-point type,⁶⁴ which provided that "any dispute or claim

57. *Wright*, 525 U.S. at 80.

58. The *Carson* court stated that a clause requiring arbitration of "all federal causes of action arising out of their employment" would satisfy the "clear and unmistakable" standard. *Carson*, 175 F.3d at 331. Other authorities have suggested that CBA drafters should identify the specific statutes included within the intended scope of the arbitration clause in order to make the clause enforceable. *Prince v. Coca-Cola Bottling Co.*, 37 F. Supp. 2d 289, 293 (S.D.N.Y. 1999) (holding that the arbitration clause failed the "clear and unmistakable" test partly because "it [did] not identify the statutes by name or citation"); Daniel Roy, Note, *Mandatory Arbitration of Statutory Claims in the Union Workplace After Wright v. Universal Maritime Service Corp.*, 74 IND. L.J. 1347, 1373-74 (1999) (recommending that the "clear and unmistakable" test be interpreted to validate only arbitration clauses that explicitly list the statutory claims meant to be subject to binding arbitration).

59. See *Carson*, 175 F.3d at 332.

60. *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 322 (4th Cir. 1999) (quoting *Carson*, 175 F.3d at 331). The court also held that the CBA's agreement "not to 'engage in any other discriminatory acts prohibited by law'" was not enough to incorporate the ADA by reference. *Id.* (quoting Article 37 of the CBA). Although the second sentence of the nondiscrimination clause in the *Brown* CBA explicitly mentioned the ADA, the court ruled that this sentence merely added disability to the list of reasons for which the parties were not allowed to discriminate under the agreement. *Id.* at 323.

61. *Id.* at 321-22. The court acknowledged that it might have decided the case differently if it were not bound by the Supreme Court's decision in *Wright*. *Id.* at 321.

62. 193 F.3d 805 (4th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3726 (U.S. Oct. 2, 2000) (No. 99-1823).

63. *Id.* at 807.

64. *Id.* at 814 n.1 (King, J., dissenting). Judge King noted that no other part of the application was printed in a typeface so small and that the entire arbitration clause occupied only five-sixteenths of an inch on a page that was eleven inches long. *Id.* (King, J., dissenting).

concerning the Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions, or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration.' ”⁶⁵ Baker declined an offer of employment from the store manager.⁶⁶

Three weeks later, Baker entered another Waffle House restaurant three miles away from the first restaurant and accepted an oral offer of employment from that restaurant's manager.⁶⁷ Baker did not complete an application, and there was no evidence that the manager of the second restaurant knew that Baker had previously completed and signed an application at the first restaurant.⁶⁸ Roughly two weeks after beginning work at the second Waffle House, Baker had a seizure at work—apparently caused by a change in the medications he used to control a seizure disorder.⁶⁹ Shortly thereafter, Waffle House discharged Baker for the “benefit and safety” of both Baker and Waffle House.⁷⁰

Baker filed a charge with the EEOC alleging violations of the ADA, and the EEOC elected to pursue the matter in court.⁷¹ Waffle House moved to compel arbitration, but the district court rejected its argument that Baker and the EEOC were bound by the arbitration clause in the employment application Baker had signed during his visit to the first Waffle House restaurant.⁷² The court held that because Baker was not hired pursuant to the employment application he had completed at the first restaurant, there was simply no arbitration agreement between Baker and Waffle House.⁷³

On appeal, the Fourth Circuit rejected the district court's analysis.⁷⁴ The court reasoned that because the application was for employment with Waffle House, Inc. rather than with a particular franchise, it “followed” Baker to any Waffle House franchise to

65. *Id.* (King, J., dissenting) (quoting the employment application).

66. *Id.* at 807.

67. *Id.* at 814 (King, J., dissenting).

68. *Id.* (King, J., dissenting).

69. *Id.* at 807.

70. *Id.* (quoting the separation notice).

71. *Id.* The EEOC sought a permanent injunction preventing Waffle House from discriminating against the disabled, an order that would require Waffle House to institute programs to combat disability discrimination in its restaurants, and a variety of remedies specific to Baker. *Id.* at 807–08. The remedies sought for Baker included reinstatement with backpay, compensatory damages, and punitive damages. *Id.*

72. *Id.* at 808.

73. *Id.*

74. *Id.* at 808–09.

which he might apply.⁷⁵ Although the court allowed the EEOC to pursue injunctive relief against Waffle House pursuant to its role as a promoter of the public interest in ending workplace discrimination, the court held that the EEOC could not seek individualized relief for Baker in federal court because Baker had waived his right to a judicial forum by signing the mandatory arbitration clause.⁷⁶ The court reasoned, in other words, that the EEOC could not do for Baker under its own name what Baker could not do for himself. Unlike Jerome Brown, Eric Baker was required to resolve his discrimination claims through arbitration.

When *Brown* and *Waffle House* are placed side by side, the difference in result between the two cases is surprising. The arbitration clause in *Waffle House* contained just the sort of language that the *Brown* court had found too general to waive the right to a judicial forum for statutory discrimination claims.⁷⁷ Further, it did not even contain an anti-discrimination clause that might be construed to incorporate federal employment discrimination law by reference.⁷⁸ Finally, as Judge King pointed out in his dissent in *Waffle House*, Eric Baker would not have expected to be bound by any arbitration agreement, much less an agreement to arbitrate discrimination claims created by federal statute.⁷⁹ If the courtroom door was opened for Brown, surely one would expect it to have been opened for Baker as well.

75. *Id.* Judge King strongly objected to this aspect of the majority's analysis. He claimed that to treat an application for employment at a single restaurant as an application to every restaurant in the chain flies in the face of both common sense and the reasonable expectations of employees. *Id.* at 818 (King, J., dissenting). More fundamentally, he argued that the majority's analysis was inconsistent with basic principles of contract law, which courts must consult in deciding whether an arbitration agreement has been created. *Id.* at 815-16 (King, J., dissenting) (citing *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir. 1998)). Judge King argued that those principles suggest that the terms of the offer of employment at the first Waffle House, including those terms contained in the signed employment application, did not survive Baker's rejection of that offer. *See id.* at 816 (King, J., dissenting) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 36, 38 (1981)).

76. *Id.* at 811-13.

77. *See supra* text accompanying note 65 (quoting the arbitration clause from the Waffle House Employment Application). Judge King noted that even if he had accepted the majority's argument that there was a mandatory arbitration agreement between Baker and Waffle House, he would have held the agreement unenforceable because the arbitration clause did not provide Baker with adequate notice that he was waiving federal statutory rights. *Waffle House*, 193 F.3d at 817 n.8 (King, J., dissenting) (citing *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 20-21 (1st Cir. 1999)).

78. *Compare* text accompanying note 65 (quoting the arbitration clause in *Waffle House*), with note 50 (quoting the nondiscrimination provision in the *Brown* CBA).

79. *See Waffle House*, 193 F.3d at 817-18 (King, J., dissenting).

Nevertheless, the Fourth Circuit's divergent treatment of the arbitration clauses in *Brown* and *Waffle House* is generally consistent with both current Supreme Court doctrine and the practice of other circuits.⁸⁰ The Supreme Court has said that in deciding whether to enforce contractual language requiring the arbitration of a particular dispute, courts must assess that language on two levels.⁸¹ First, they must ask whether the parties have actually agreed to arbitrate the particular dispute.⁸² In other words, they must focus on issues of mutual assent, asking whether a contract to arbitrate has been formed, as well as how that contract should be interpreted. Second, courts finding that the parties have agreed to arbitrate a particular dispute must consider whether any policy considerations external to that private agreement preclude its enforcement.⁸³ At both the level of assent and the level of enforceability, courts currently treat union and nonunion employees differently. At the level of assent, the

80. *Waffle House* is unusual mainly for its willingness to find a contract to arbitrate where basic principles of contract law suggest that no such contract was ever formed. *See id.* at 813–18 (King, J. dissenting). It is not unusual in its untroubled assumption that a broad and unspecific arbitration clause in an individual employment contract should be read to require the arbitration of statutory discrimination claims. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (holding that a New York Stock Exchange rule requiring “arbitration of ‘[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative’” precluded litigation of a claim arising under the ADEA) (quoting New York Stock Exchange Rule 347); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1221–22 (11th Cir. 2000) (holding that an agreement to arbitrate “any dispute between [the parties] or claim by either against the other” encompassed the plaintiff’s racial discrimination claim); *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72, 76 (2nd Cir. 1998) (holding that an agreement to arbitrate “‘[a]ny dispute, controversy or claim arising under or in connection with [the plaintiff’s employment agreement]’” was a “prototypical broad arbitration provision” that encompassed a retaliatory discharge claim (quoting the employment agreement’s arbitration clause); Alison Brooke Overby, Note, *Arbitrability of Disputes under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1144–45 (1986) (stating that courts nearly always find an issue arbitrable when faced with broadly worded clauses mandating arbitration of disputes “arising out of or relating to” a contract). Courts make this assumption because the Supreme Court has directed them to interpret arbitration clauses concerning nonunion employees in light of a presumption of arbitrability. *See infra* notes 163–67, 310–24 and accompanying text (discussing the presumption of arbitrability under the FAA).

81. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

82. *Id.*

83. *Id.* A court might find an agreement to arbitrate statutory claims unenforceable because enforcing the clause would undermine the policies promoted by the statute. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (holding that a prior arbitration proceeding did not preclude a race discrimination lawsuit because Congress had intended federal courts to enforce the anti-discrimination policies of Title VII).

Supreme Court has held that union-negotiated waivers of the right to sue under federal employment discrimination statutes must be clear and unmistakable.⁸⁴ In contrast, arbitration clauses in individual employment agreements are read in light of a presumption of arbitrability, according to which "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."⁸⁵ At the level of enforceability, all circuits save the Fourth hold that union-negotiated waivers of the right to litigate statutory discrimination claims are unenforceable,⁸⁶ though the Supreme Court has yet to rule on this question.⁸⁷ In contrast, agreements to arbitrate statutory discrimination claims in nonunion contexts are widely enforced according to a second presumption of arbitrability, according to which such clauses are presumptively enforceable absent some clear indication of congressional intent to preclude arbitration of the relevant statutory claim.⁸⁸ Although significant differences exist between CBA's and individual employment contracts, such radically disparate judicial treatment is difficult to justify. Reviewing the history of federal law governing the enforceability of arbitration agreements will help to explain the present state of affairs.

84. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998). The Court also stated that the "clear and unmistakable" standard does not apply to an individual's waiver of her own rights. *Id.* at 80-81.

85. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

86. *See infra* notes 204-13 and accompanying text (discussing the refusal of most circuits to compel arbitration of statutory discrimination claims where the arbitration clause is part of a CBA).

87. *Wright*, 525 U.S. at 77 (stating that the Court found it "unnecessary to resolve the question of the validity of a union-negotiated waiver").

88. *Mitsubishi*, 473 U.S. at 628 (stating that once the parties have made a bargain to arbitrate, "they should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"). While courts and commentators have not been explicit about the point, the phrase "presumption of arbitrability" denotes two distinct ideas: (1) that the language of an arbitration clause should be read generously, and (2) that agreements to arbitrate statutory claims are enforceable unless Congress has clearly signaled that those statutory claims are not subject to arbitration. *See infra* notes 167-78 and accompanying text (discussing the two presumptions of arbitrability endorsed in *Mitsubishi*).

II. THE STATUTORY ROOTS OF FEDERAL ARBITRATION JURISPRUDENCE

Arbitration agreements were not enforceable at common law because courts viewed such agreements as an attempt to usurp their jurisdiction.⁸⁹ In light of this common law tradition, judicial authority to enforce arbitration agreements has always been a creature of statute. The authority of federal courts to enforce arbitration clauses in nonunion employment contracts stems from the Federal Arbitration Act (FAA),⁹⁰ while their authority to enforce arbitration agreements in the collective bargaining context is rooted in the Labor Management Relations Act (LMRA).⁹¹

Responding to pressure from both the American Bar Association and business interests that favored arbitration as a fast and relatively low-cost way to settle disputes over commercial contracts, Congress passed the FAA in 1925.⁹² Section 2 of the FAA makes written arbitration agreements enforceable unless they violate some general principle of contract law.⁹³ When the parties to a dispute have signed a valid arbitration agreement, federal district courts must stay any

89. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974); H.R. REP. NO. 68-96, at 1-2 (1924) (Sup. Docs. No. Y 1.1/2:8226) (discussing early judicial hostility to executory arbitration agreements); Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L. REV. 238, 238-43 (1930) (same); Wesley A. Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 581-82 (1952) (same). Some early American cases expressing hostility toward arbitration agreements as efforts to divest the courts of jurisdiction include *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874), and *Wood v. Humphrey*, 114 Mass. 185, 186 (1873). For a listing of English common law cases invalidating executory arbitration agreements, see Sarah E. Rudolph, *Blackstone's Vision of Alternative Dispute Resolution*, 22 MEM. ST. U. L. REV. 279, 291 n.70 (1992).

90. 9 U.S.C. §§ 1-16 (1994).

91. 29 U.S.C. §§ 185-188 (1994 & Supp. IV 1998).

92. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (1994)). The United States Code version of the Act was enacted into positive law in 1947. Act of July 30, 1947, ch. 392, 61 Stat. 669. Although older sources sometimes refer to 9 U.S.C. §§ 1-16 as the United States Arbitration Act, today "FAA" is the more common label. See William F. Kolakowski III, Note, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171, 2172 n.10 (1995). For a discussion of the FAA's legislative history, see Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability*: David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 58 BROOK. L. REV. 279, 280-83 (1992).

93. 9 U.S.C. § 2 (stating that a "written provision . . . to arbitrat[e] . . . shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or equity for the revocation of any contract"). This provision was intended to put agreements to arbitrate on the same footing as other contracts. *Prima Paint Corp. v. Flood & Gonklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967); H.R. REP. NO. 68-96, at 1.

litigation between the parties until the conclusion of the arbitration process.⁹⁴ Furthermore, federal courts have the power to compel arbitration⁹⁵ and may enter orders confirming arbitration awards.⁹⁶ In order to preserve the finality of arbitration awards, judicial review under the FAA is extremely limited.⁹⁷

The FAA applies only to written arbitration clauses in contracts involving maritime transactions and contracts "evidencing a transaction involving [interstate] commerce."⁹⁸ Once a court has established that a contract is within one of these classes, it must ask whether the contract falls within the exclusionary clause in section one of the FAA, which excludes from the scope of the Act "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁹⁹ The primary

94. 9 U.S.C. § 3 (providing that a federal district court must stay any suit or proceeding involving issues covered by a written arbitration agreement "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement").

95. 9 U.S.C. § 4 ("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 which, save for such agreement, would have jurisdiction" over a lawsuit arising out of the underlying controversy between the parties for an order compelling arbitration.).

96. 9 U.S.C. § 9 (providing that "at any time within one year after [an arbitration] award is made any party to the arbitration may apply to [federal district court] for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in [9 U.S.C. §§ 10, 11]").

97. An arbitration award may be vacated only when: (1) the award was secured through "corruption, fraud, or undue means;" (2) the arbitrators were obviously partial or corrupt; (3) the arbitrators engaged in misconduct prejudicial to the rights of a party (for example, by refusing to postpone a hearing despite a showing of sufficient grounds for postponement); or (4) the arbitrators exceeded their powers. 9 U.S.C. § 10(a). Courts do not vacate arbitral decisions merely because the arbitrators misinterpreted the law, see Michael A. Scodro, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1937 (1996), though they have sometimes overturned awards resulting from "manifest disregard" of the law, see, e.g., *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (stating that manifest disregard standard is met when the arbitrators knew the law but deliberately refused to follow it or the arbitrators ignored law that was well established and clearly applicable to the case); see generally Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996) (discussing various common law grounds that courts have used to vacate arbitration awards).

98. 9 U.S.C. § 2. The definition of "commerce" in § 1 indicates that the term includes only interstate commerce. *Id.* § 1. The limitation to maritime transactions and interstate commerce functions to keep the scope of the FAA from exceeding Congress's power under the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3.

99. Federal Arbitration Act § 1, 9 U.S.C. § 1. For brief, general discussions of disputes about the scope of the section 1 exclusion, see RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 32-48 (1997); Grodin, *supra* note 5, at 17-28.

debate about the meaning of the exclusion is whether "any other class of workers engaged in foreign or interstate commerce" should be read broadly to include all workers or read narrowly to include only those workers employed in the transportation industries. Under a broad reading, federal courts would have no authority to enforce arbitration clauses in individual employment contracts.

The circuits are currently split on the scope of the section 1 exclusion. The Ninth Circuit has held that the FAA does not apply to employment contracts,¹⁰⁰ a position that finds considerable support in the legislative history of the Act.¹⁰¹ Most other circuits¹⁰² and some

100. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam) (denying petition for en banc review), *amending* 161 F.3d 1199 (9th Cir. 1998). At least one Supreme Court Justice, a few courts, and several commentators have also stated that the FAA does not apply to employment contracts. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-42 (1991) (Stevens, J., dissenting) (arguing that the section 1 exclusion covers all employees engaged in interstate commerce, including those governed by commercial arbitration agreements); *Pritzker v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 7 F.3d 1110, 1119-20 (3d Cir. 1993) (stating in dicta that the FAA does not apply to employment contracts) (ignoring contrary circuit precedent in *Tenney Eng'g, Inc. v. United Elec., Radio & Mach. Workers*, 207 F.2d 450, 452-53 (3d Cir. 1953)); *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117, 120-23 (N.D. Miss. 1995) (relying on legislative history to support a broad reading of the section 1 exclusion); R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1546 (1994) (suggesting that the section 1 exclusion should be read broadly because no convincing reason exists for varying the rule governing the enforceability of agreements to arbitrate statutory discrimination claims according to the industries in which workers are employed); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 288-304 (1991) (analyzing the section 1 exclusion using various theories of statutory interpretation and concluding that courts should adopt a broad reading). Professor Grodin observes that it is difficult to explain why Congress would have wanted to exempt from the FAA only that particular subset of workers most obviously subject to the Commerce Clause Power. Singling out transportation workers from the class of all workers engaged in interstate commerce seems to bear no rational relation to any legitimate government purpose. Accordingly, Grodin argues that courts should avoid a narrow interpretation of the section 1 exclusion because such an interpretation might raise problems under the equal protection component of the Fifth Amendment's Due Process Clause. See Grodin, *supra* note 5, at 19.

101. The chairman of the American Bar Association committee that drafted the FAA testified before a Senate committee that the bill was "not intended . . . [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." *Hearings on S. 4213 and S. 4214 Before the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 9 (1923) (statement of W.H.H. Piatt, chairman of the ABA committee that drafted the FAA). For a detailed treatment of the historical evidence on the scope of the FAA's section 1 exclusion, see Matthew W. Finkin, "Workers' Contracts" Under *The United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 283-89, 295-97 (1996).

102. *E.g.*, *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470-71 (D.C. Cir. 1997)

commentators, however, have appealed to the principle of *ejusdem generis*¹⁰³ and alternative readings of the legislative history to argue that the exclusion should be read narrowly to apply only to workers in the transportation industries.¹⁰⁴ The Supreme Court has granted certiorari¹⁰⁵ in a Ninth Circuit case, *Circuit City Stores, Inc., v. Adams*,¹⁰⁶ in order to resolve the split. The Court is likely to follow the majority of circuits in adopting a narrow reading.¹⁰⁷

(holding that section 1 of the FAA exempts only the "employment contracts of workers actually engaged in the movement of goods in interstate commerce"); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (holding that the exclusionary language in section 1 should be read narrowly to include only workers involved in the transportation industries); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) (same); *Miller Brewing Co. v. Brewery Workers Local Union*, 739 F.2d 1159, 1162 (7th Cir. 1984) (same); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (same); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971) (same); *Tenney*, 207 F.2d at 452-53 (same).

103. *Ejusdem generis* is a canon of statutory construction which directs that "when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY 535 (7th ed. 1999). Here, the principle would direct that the phrase "any other class of workers engaged in foreign or interstate commerce" be construed to include only those workers of the same type as seamen and railroad employees—those workers who transport goods in interstate commerce.

104. See, e.g., *Tenney*, 207 F.2d at 452-53 (relying on *ejusdem generis* and the legislative history of the FAA in ruling that the section 1 exclusion should be read narrowly); Gerard Morales & Kelly Humphrey, *The Enforceability of Agreements to Arbitrate Employment Disputes*, 43 LAB. L.J. 663, 668-69 (1992) (arguing from legislative history that Congress intended for the section 1 exclusion to apply only to transportation workers); Kolakowski, *supra* note 92, at 2179-80 (arguing that *ejusdem generis* requires a narrow reading of the section 1 exclusion). *Contra* Stempel, *supra* 100, at 292-93 (rejecting the *ejusdem generis* argument for a narrow reading of the section 1 exclusion).

105. 120 S. Ct. 2004 (2000).

106. 194 F.3d 1070 (9th Cir. 1999) (per curiam). *Adams* followed *Craft* in holding that the FAA does not apply to employment contracts. *Id.* at 1070. The Supreme Court heard oral arguments in the case on November 6, 2000.

107. See Estreicher, *Predispute Agreements*, *supra* note 4, at 1371-72 (suggesting that the Supreme Court would be unlikely to adopt a broad reading of the section 1 exclusion); *infra* notes 275-87 and accompanying text (discussing *Adams* and predicting that the Supreme Court will reverse the Ninth Circuit). Professor Estreicher rejects the terms of the primary debate by arguing that the only plausible readings of the section 1 exclusion are (1) that all employees involved in interstate commerce are exempted from the scope of the FAA, or (2) that only unionized workers are exempted. Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 762 n.30 (1990) [hereinafter Estreicher, *Arbitration Without Unions*]. Professor Estreicher dismisses the reading of section 1 to exclude only workers involved in the transportation industries as "artificial." *Id.* His interpretation is based on legislative history indicating that the section 1 exclusion was inserted into the FAA in response to pressure from labor groups that worried that the FAA might be read to interfere with collective bargaining. See *id.* at 761-62. Accordingly, he argues that "contracts of employment" includes CBAs but excludes individual employment contracts. However persuasive one finds Estreicher's appeals to legislative history, his interpretation is not fully convincing because it requires

Federal labor law provides the other statutory source of judicial receptivity to arbitration.¹⁰⁸ The Supreme Court has read section 301 of the LMRA¹⁰⁹ to authorize the federal courts to compel arbitration in the collective bargaining context.¹¹⁰ In the 1960 decisions commonly known as the *Steelworkers Trilogy*,¹¹¹ the Court expressed a strong preference for arbitration as a means of resolving labor disputes¹¹² and preserving industrial peace,¹¹³ and established four fundamental principles that govern the interpretation of collective bargaining agreements.¹¹⁴

First, courts should respect the contractual character of arbitration by refusing to force parties to arbitrate matters that they did not agree to arbitrate.¹¹⁵ Second, disagreements about what the parties have agreed to arbitrate should be resolved by a court rather than by the arbitrator unless the parties “clearly and unmistakably”

an unnatural reading of the statutory text.

108. See Labor Management Relations (Taft-Hartley) Act (LMRA), 29 U.S.C. §§ 185–187 (1994 & Supp. IV 1998); National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (1994). The circuit courts of appeals are currently split over whether the FAA applies to CBAs. Compare *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064, 1067 (4th Cir. 1993) (holding that the FAA does not apply to CBAs), *Posadas de Puerto Rico Assocs. v. Asociacion de Empleados de Casino*, 873 F.2d 479, 482 (1st Cir. 1989) (stating that the FAA “is inapplicable to most labor contracts”), *United Food & Commercial Workers v. Safeway*, 889 F.2d 940, 943–44 (10th Cir. 1989) (holding that the FAA does not apply to CBAs), and *Am. Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 473 (11th Cir. 1987) (same), with *Int’l Assoc. of Machinists & Aerospace Workers v. Gen. Elec. Co.*, 406 F.2d 1046, 1049 (2d Cir. 1969) (holding that the FAA applies to CBAs), *Newark Stereotypers Union v. Newark Morning News*, 397 F.2d 594, 596 (3d Cir. 1968) (same), and *Pietro Scalzitti Co. v. Int’l Union of Operating Eng’rs*, 351 F.2d 576, 579–80 (7th Cir. 1965) (same). The Supreme Court has not definitively answered the question, but has implied that collective bargaining agreements fall outside the scope of the FAA. See *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (observing that the “federal courts have often looked to the [FAA] for guidance in labor arbitration cases” and thereby implying that the FAA does not directly apply in such cases).

109. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185(a) (1994).

110. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450–52 (1957).

111. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

112. See *Enterprise Wheel*, 363 U.S. at 596 (stating that arbitrators are essential to the collective bargaining process); *Warrior & Gulf*, 363 U.S. at 582 (stating that courts should order arbitration “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute”); *American Mfg. Co.*, 363 U.S. at 568 (ordering the enforcement of an arbitration agreement).

113. See *Textile Workers Union*, 353 U.S. at 455 (stating that agreements to arbitrate labor disputes are given in exchange for agreements not to strike, and hence help to preserve industrial peace).

114. See *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 648–51 (1986) (summarizing the principal doctrines established by the *Steelworkers Trilogy*).

115. *Id.* at 648 (citing *Warrior & Gulf*, 363 U.S. at 582).

provide that the arbitrator may decide the scope of her own authority.¹¹⁶ Third, courts should not consider the merits of the underlying claims when deciding whether a particular grievance must be submitted to arbitration; even apparently frivolous claims must be judged on the merits by the arbitrator.¹¹⁷ Finally, the *Trilogy* established a "presumption of arbitrability" which provides that "[an] order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."¹¹⁸

Despite the differences between commercial arbitration and collective bargaining, the FAA and the LMRA are similar in that both were designed to allow the federal courts to enforce agreements to arbitrate disputes between "repeat players"¹¹⁹ of roughly equal bargaining power.¹²⁰ The FAA was originally intended to encourage the arbitration of commercial contract disputes,¹²¹ a context for which arbitration is especially well suited. Commercial parties often favor arbitration because the preservation of their on-going business relationship through rapid, private dispute resolution is more important to them than getting the correct result in a particular case.¹²² When the parties are both repeat players, they can sensibly

116. *Id.* at 649 (citing *Warrior & Gulf*, 363 U.S. at 582-83).

117. *Id.* at 649-50.

118. *Id.* at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83).

119. The seminal article for the use of game theory in analyzing dispute resolution is Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Galanter explains that "repeat players" expect to deal with one another on a recurring basis and are motivated by an interest in "continued mutually beneficial interaction." *Id.* at 110.

120. See Cole, *Incentives and Arbitration*, *supra* note 5, at 454-59 (discussing the origins of commercial arbitration as a mechanism for settling contractual disputes between repeat player merchants who wished to maintain an ongoing business relationship); Cole, *A Funny Thing*, *supra* note 17, at 624-28 (explaining that arbitration is appropriate in the collective bargaining context because both the union and the employer are "repeat players").

121. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1089 (9th Cir. 1999) (per curiam) ("[T]he legislative history demonstrates that the [FAA's] purpose was solely to bind merchants who were involved in commercial dealings."), *amending* 161 F.3d 1199 (9th Cir. 1998); H.R. REP. NO. 68-96, at 1 (1924) (Sup. Docs. No. Y 1.1/2:8226) ("The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce . . ."); Cole, *Incentives and Arbitration*, *supra* note 5, at 459-67 (sketching the historical development of commercial arbitration and explaining that the FAA was meant to promote commercial arbitration).

122. Cole, *Incentives and Arbitration*, *supra* note 5, at 457-58. Professor Cole points out, however, that the preference for arbitration dissolves in those cases where the amount at stake in a particular dispute exceeds the value of the ongoing relationship. *Id.* at 457 n.34.

sacrifice procedural protections and the opportunity for judicial review in order to minimize the delay and potential loss of goodwill that formal litigation might bring.¹²³ The value of arbitration to merchants depends, however, on the knowing and voluntary character of the agreement to arbitrate.¹²⁴ Any attempt by one party to force arbitration on an unwilling adversary would likely undermine the very business relationship that commercial arbitration is meant to protect.¹²⁵

Similarly, in labor arbitration under the LMRA, both the union and the employer are repeat players who expect disputes as an inevitable part of their ongoing relationship.¹²⁶ Indeed, the process of resolving disputes through arbitration gives shape to the basic principles of the collective bargaining agreement and creates a “common law of the shop” that governs the workplace.¹²⁷ As in commercial arbitration, both parties are willing to accept some errors in the arbitration process as long as that process displays no systematic bias.¹²⁸ Furthermore, the rough equality of bargaining power between labor and management and the desire of both sides to maintain a smooth working relationship provides protection against overreaching by either party.¹²⁹

When commercial contracts and collective bargaining agreements are at issue, then, the parties have similar reasons for favoring arbitration. In addition, their status as repeat players with comparable bargaining power provides some assurance that the arbitral forum will be neutral and fair.¹³⁰ Another equally significant commonality is that both commercial arbitration and labor arbitration have traditionally dealt with contract rights—rights created and defined by agreements between private parties, and subject to modification by those same private parties.¹³¹ In contrast, statutory

123. *Id.* at 458 & n.37.

124. *Id.* at 467.

125. *Id.* Professor Cole also points out that arbitration will be neither speedy nor cheap if one of the parties wants to explore every avenue to defeat the arbitration agreement. *Id.*

126. Cole, *A Funny Thing*, *supra* note 17, at 618, 626.

127. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); Malin & Ladenson, *supra* note 3, at 1192–94.

128. Cole, *A Funny Thing*, *supra* note 17, at 627.

129. *Id.* at 626.

130. *Cf. id.* at 628 (suggesting that because both union and management are repeat players, courts should presume that labor arbitration adequately protects the rights of employees).

131. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1476 (D.C. Cir. 1997) (characterizing contractual rights).

rights are creatures of public law—created by Congress and subject to definition and modification only by Congress and the courts.¹³² Further, the public has a legitimate interest in how those rights are defined and enforced.¹³³ In light of these differences between contractual and statutory rights, the federal courts were slow to embrace the proposition that arbitration could be an appropriate vehicle for the resolution of federal statutory claims.¹³⁴

III. THE ROAD TO *GILMER* AND BEYOND: JUDICIAL TREATMENT OF AGREEMENTS TO ARBITRATE FEDERAL STATUTORY CLAIMS

The Supreme Court first addressed the question of whether claims arising under federal statutes should be subject to arbitration in *Wilko v. Swan*,¹³⁵ in which the Court considered whether to enforce an agreement to arbitrate a customer's damages claim against a brokerage firm for violation of the Securities Act of 1933.¹³⁶ Although the Court acknowledged that the claim fell within the terms of the arbitration agreement between the customer and the brokerage firm, the Court refused to enforce the agreement because it conflicted with a provision of the Securities Act that prohibited any waiver of compliance with its provisions.¹³⁷ Significantly, the Court was especially skeptical of predispute arbitration agreements because limited judicial review of arbitrated awards meant that investors could not be confident that the proper law would be applied to the facts of their cases in private arbitrations.¹³⁸ In the wake of the *Wilko* decision, some federal courts relied on the rationale behind *Wilko* to conclude that claims arising under federal statutes that promoted important public policy goals should not be heard in private fora.¹³⁹

132. *Id.* (characterizing statutory rights).

133. *Id.* (citing Estreicher, *Arbitration Without Unions*, *supra* note 107, at 777).

134. *See infra* note 379 (explaining that the Supreme Court first approved arbitration of federal statutory claims almost sixty years after passage of the FAA).

135. 346 U.S. 427 (1953), *overruled by* *Rodriguez De Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989).

136. *Id.* at 428–29.

137. *Id.* at 434–35 (discussing Securities Act of 1933 § 14, 15 U.S.C. § 77(n) (1994)).

138. *Id.* at 435–37.

139. *See Am. Safety Equip. Corp. v. Maguire*, 391 F.2d 821, 827 (2d Cir. 1968) (concluding that public policy concerns foreclosed the arbitration of an antitrust claim). The rationale of *American Safety* was followed by many other courts. *See, e.g., Beckman Instruments, Inc. v. Technical Dev. Corp.*, 433 F.2d 55, 63 (7th Cir. 1970) (holding that claims challenging the validity of U.S. patents are not arbitrable); *Bache Halsey Stuart, Inc. v. French*, 425 F. Supp. 1231, 1232–34 (D.D.C. 1977) (holding that claims arising under the Commodity Exchange Act are not arbitrable); Douglas E. Abrams, *Arbitrability in*

In the landmark case of *Alexander v. Gardner-Denver Co.*,¹⁴⁰ the Supreme Court considered for the first time whether a mandatory arbitration clause could bar employees from suing under federal employment discrimination statutes.¹⁴¹ After being fired from his job as a drill operator, the plaintiff, Harrell Alexander, filed a grievance for wrongful discharge under the terms of the CBA governing relations between his union and his employer.¹⁴² The union pursued the grievance to arbitration, but the arbitrator found that Alexander had been justly discharged.¹⁴³ During the grievance process, Alexander, an African American, filed a charge of racial discrimination under Title VII with the Colorado Civil Rights Commission and the EEOC.¹⁴⁴ After the EEOC concluded that there was no reasonable cause to believe that Title VII had been violated, it issued a right-to-sue letter.¹⁴⁵ Alexander then filed a claim in federal district court, but the court granted summary judgment in favor of the employer on the ground that Alexander's claims had already been submitted to binding arbitration.¹⁴⁶ The Tenth Circuit affirmed.¹⁴⁷

On appeal, the Supreme Court unanimously reversed, holding that Alexander had not waived his Title VII claim by pursuing arbitration under the nondiscrimination clause of his CBA.¹⁴⁸ The Court emphasized that contractual rights under a CBA and statutory rights under Title VII are distinct, even if both sets of rights have been violated by the same employer actions.¹⁴⁹ According to the Court, each right should be vindicated in its appropriate forum: the CBA rights in arbitration and the statutory rights in federal court.¹⁵⁰ The Court also suggested that arbitration was an inappropriate forum

Recent Civil Rights Legislation: The Need for Amendment, 26 CONN. L. REV. 521, 529–31 (1994) (discussing the influence of *American Safety*).

140. 415 U.S. 36 (1974).

141. *Id.* at 38.

142. *Id.* at 38–42. Alexander testified during the arbitration proceeding that his discharge had been the result of race discrimination. *Id.* at 42.

143. *Id.* at 42.

144. *Id.*

145. *Id.* at 43.

146. See *Alexander v. Gardner-Denver Co.*, 346 F. Supp. 1012, 1019 (D. Colo. 1971), *aff'd*, 466 F.2d 1209 (10th Cir. 1972) (per curiam), *rev'd*, 415 U.S. 36 (1974).

147. *Alexander v. Gardner-Denver Co.*, 466 F.2d 1209, 1210 (10th Cir. 1972) (per curiam), *rev'd*, 415 U.S. 36 (1974).

148. *Gardner-Denver*, 415 U.S. at 43.

149. *Id.* at 49–50. The distinction between contractual rights and statutory rights was especially clear in this case because the arbitration clause of the CBA governed only differences between the company and the union about the “‘meaning and application of the provisions of this Agreement.’” *Id.* at 40 n.3 (quoting the CBA).

150. *Id.* at 49–50.

for statutory discrimination claims, noting that arbitrators were relatively unfamiliar with the relevant law,¹⁵¹ that the arbitration process was beset with various procedural shortcomings,¹⁵² and that arbitrators were not required to provide written opinions explaining their reasoning.¹⁵³ Finally, the Court noted one problem with the arbitration of statutory claims that was unique to the collective bargaining context: because the union has exclusive control over the grievance process, individual employee rights may be jeopardized when the statutory rights of the employee conflict with the union's interests.¹⁵⁴ Although *Gardner-Denver* held only that arbitration of contractual claims did not preclude subsequent litigation of statutory claims arising out of the same facts,¹⁵⁵ the Court stated in sweeping terms that employee rights under Title VII and similar statutes "may not be waived prospectively."¹⁵⁶ The Court further stated that in enacting Title VII, Congress gave the federal courts "plenary power"¹⁵⁷ to enforce the statutory mandate and that public lawsuits by individual plaintiffs helped to advance the public policy goal of ending employment discrimination in the workplace.¹⁵⁸ For a decade

151. *Id.* at 57.

152. *Id.* at 57-58. More specifically, the Court noted that when compared to federal courts, arbitration proceedings produce an incomplete record, are not governed by evidentiary rules, and may lack the safeguards provided by discovery, compulsory service of process, cross-examination, and testimony under oath. *Id.*

153. *Id.* at 58. Several commentators have echoed the *Gardner-Denver* Court's concerns that an arbitral forum does not allow for the effective vindication of the employee's statutory rights. See, e.g., Cole, *Incentives and Arbitration*, *supra* note 5, at 472-83 (arguing that in the nonunion context, arbitration is structurally biased against individual employees because employers are "repeat players" while individual employees are "one-shot players"); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 286-88 (1994) (arguing that employees may be disadvantaged in arbitration due to the limited discovery available, the lack of diversity in the pool of arbitrators, and the potentially unpredictable rulings of arbitrators with minimal knowledge of employment discrimination law); Stone, *supra* note 18, at 1036-37 (noting that employees may be discouraged from attempting to vindicate their statutory rights when bound by arbitration clauses that require them to pay half of the arbitrator's fees).

154. See *Gardner-Denver*, 415 U.S. at 58 n.19 (citing *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944)); see also *infra* notes 205-13 and accompanying text (discussing potential conflicts of interest between unions and individual employees complaining of employment discrimination).

155. As the Supreme Court later observed, *Gardner-Denver* did not address "the enforceability of an agreement to arbitrate statutory claims;" instead, it asked "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

156. *Gardner-Denver*, 415 U.S. at 52.

157. *Id.* at 45.

158. *Id.* at 44-45.

after the case was decided, *Gardner-Denver* stood for the proposition that no employee (unionized or not) could be forced to arbitrate statutory discrimination claims.¹⁵⁹

During the 1980s, however, the Supreme Court became more receptive to the arbitration of statutory claims.¹⁶⁰ In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,¹⁶¹ the Court first signaled this new receptivity by announcing in dicta that section two of the FAA evinced a "liberal federal policy favoring arbitration agreements"¹⁶² and directed that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."¹⁶³ The seeds planted by *Moses H. Cone* developed into full flower in a series of cases known as the "*Mitsubishi Trilogy*."¹⁶⁴ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,¹⁶⁵ the Court enforced an agreement to arbitrate federal anti-trust claims.¹⁶⁶ Following *Moses H. Cone*, it held that the FAA requires courts to resolve ambiguities in arbitration agreements in favor of arbitrability.¹⁶⁷ The Court also distanced itself from its earlier concerns that arbitration was an inherently unsuitable forum for statutory claims,¹⁶⁸ and rejected arguments that allowing the non-judicial resolution of antitrust claims

159. See Robert L. Duston, *Gilmer v. Interstate/Johnson Lane Corp.: A Major Step Forward for Alternative Dispute Resolution, or a Meaningless Decision?*, 7 LAB. LAW. 823, 830-31 (1991). The Supreme Court followed *Gardner-Denver* in *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (refusing to give estoppel effect to arbitration award involving claims under 42 U.S.C. § 1983), and *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (authorizing a federal suit under the Fair Labor Standards Act despite an employee's prior arbitration proceeding under a CBA).

160. For discussion of the "sea change" in the Court's attitude toward the arbitration of statutory claims during the 1980s, see Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-95: A Sea Change*, 31 WAKE FOREST L. REV. 1, 21-32 (1996); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305-07, 1137-53 (1985).

161. 460 U.S. 1 (1983).

162. *Id.* at 24-25.

163. *Id.*

164. Moohr, *supra* note 2, at 411-12.

165. 473 U.S. 614 (1985).

166. *Id.* at 629. The *Mitsubishi* decision provoked a vigorous dissent by Justice Stevens, which was joined by Justices Brennan and Marshall. See *id.* at 640-66 (Stevens, J., dissenting). Justice Stevens would not have read the arbitration clause to include statutory claims and argued that the FAA should not be construed to authorize the arbitration of federal statutory claims. *Id.* at 641, 646 (Stevens, J., dissenting).

167. *Id.* at 626 (stating that although the intent of the parties should govern the interpretation of arbitration agreements, "those intentions are generously construed as to issues of arbitrability").

168. *Id.* at 632-33. The Court declared that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 628.

would undermine the enforcement of antitrust laws.¹⁶⁹ It reasoned that those goals were satisfied so long as plaintiffs could effectively redress their individual injuries through arbitration.¹⁷⁰ The Court subsequently applied the reasoning of *Mitsubishi* to securities and racketeering claims in *Shearson/American Express, Inc. v. McMahon*¹⁷¹ and *Rodriguez de Quijas v. Shearson/American Express, Inc.*¹⁷² The latter case overruled the *Wilko* decision as a relic of "the old judicial hostility to arbitration."¹⁷³

In addition to adopting *Moses H. Cone's* presumption of arbitrability in the interpretation of arbitration agreements, the *Mitsubishi Trilogy* also articulated a presumption that if the parties have agreed to arbitrate a statutory claim, that agreement should be enforced.¹⁷⁴ The Court reasoned that because Congress had announced a "liberal federal policy favoring arbitration" in the FAA, only a clear expression of congressional intent to preclude arbitration of statutory claims could override that policy.¹⁷⁵ The Court also held that the party arguing against enforcement of an arbitration agreement on public policy grounds bears the burden of proving the requisite congressional intent.¹⁷⁶ The practical effect of these developments has been to blunt the force of arguments that public policies external to an arbitration agreement render that agreement unenforceable.¹⁷⁷ The *Mitsubishi Trilogy*, then, established

169. *Id.* at 634-37. The "chief tool in the antitrust scheme" is the threat of a treble damage award to a private litigant. *Id.* at 635.

170. *Mitsubishi*, 473 U.S. at 637 ("And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

171. 482 U.S. 220, 226 (1987).

172. 490 U.S. 477, 481 (1989).

173. *Rodriguez*, 490 U.S. at 480-81 (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

174. See *Mitsubishi*, 473 U.S. at 626-28.

175. *Id.* at 627-28 ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." (citing *Wilko v. Swan*, 346 U.S. 427, 434-35 (1953))).

176. *Rodriguez*, 490 U.S. at 483; *McMahon*, 482 U.S. at 227.

177. Professor Geraldine Moohr has summarized the effect of the *Mitsubishi Trilogy* by saying that it "limited consideration of the public policy goal of the statutes to remediation and deterrence, changed the focus of analysis to the fairness of the arbitration forum, and realigned the parties' burdens in litigating the enforceability of arbitration agreements." Moohr, *supra* note 2, at 415.

The Court has also effectively foreclosed the argument that enforcing some arbitration agreements would undermine state public policies. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Supreme Court held that section 2 of the FAA fully preempts any state statutes that purport to create rights that can be enforced only in a

presumptions of arbitrability under the FAA both as to the interpretation of arbitration clauses and as to their enforceability.¹⁷⁸

judicial forum. *Id.* at 16. In other words, after *Southland*, no state can create a statutory right that will be enforceable only in court, at least so far as that right purport to govern employment agreements within the scope of the FAA. *Id.* at 19 (Stevens, J., concurring in part and dissenting in part). But see *id.* at 21–36 (O'Connor, J., dissenting) (arguing that the FAA was not intended to have such broad preemptive effects on state law). While *Southland* remains good law, its future is somewhat uncertain because at least four of the Court's current Justices have voiced their disagreement with that decision. Justice O'Connor's dissent in *Southland* was joined by Justice Rehnquist, see *id.* at 21, and Justices Scalia and Thomas expressed their willingness to overturn *Southland* in a 1995 case. See *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284–85 (1995) (Scalia, J., dissenting); *id.* at 285–96 (Thomas, J., dissenting).

178. The changes effected by the *Mitsubishi Trilogy* were apparently motivated by at least two factors: an increasing confidence in the fairness and utility of arbitration as a quick and inexpensive way to resolve disputes, see *Mitsubishi*, 473 U.S. at 626–27 (noting the past “judicial suspicion” of arbitration was no longer appropriate); *id.* at 634 (stating that the Court would not presume that the parties to the arbitration agreement would be unable to find “competent, conscientious, and impartial arbitrators”), and an increasing willingness to encourage arbitration as a way to reduce the burgeoning caseloads of the federal courts.

Many scholars have suggested that the Supreme Court's arbitration decisions over the last twenty years have been driven more by a desire to clear federal dockets than by a desire to enforce private, consensual agreements. See, e.g., IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 172 (1992) (stating that a major motivation behind the Court's arbitration jurisprudence is “docket-clearing pure and simple”); Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 385 (1996) (suggesting that the motive behind the Court's pro-arbitration decisions is a desire to reduce judicial caseloads); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 138 (1996) (stating that the Supreme Court's decisions are “largely consistent with the view that courts favor arbitration as a way to reduce their caseloads whether or not parties have contracted for it”). This suggestion may be based on a belief that docket-clearing must be the Court's motive because its aggressively pro-arbitration FAA jurisprudence is inconsistent with prior case law, public policy, and the text and legislative history of the FAA. See *infra* notes 309–24, 378–82 and accompanying text (criticizing the *Mitsubishi Trilogy* as an unjustified judicial innovation). Scholars may also find support for the docket-clearing theory in evidence that the early 1980s were marked by widespread (and justified) concern about the increasing caseloads of the federal courts, see, e.g., Harry T. Edwards, *The Rising Work Load and Perceived Bureaucracy of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 873 (1983), and in evidence that the Court was well aware of arbitration's potential for helping to manage federal dockets. See, e.g., Burger, *supra* note 3, at 276–77.

The Court's aggressive promotion of arbitration under the FAA may also have been influenced by its hospitable stance toward labor arbitration. MACNEIL, *supra*, at 57–58 (observing that the Court's positive view of labor arbitration has influenced its attitude toward commercial arbitration); Nelson, *supra* note 92, at 303 (stating that in *Moses H. Cone* the Court essentially transported the presumption of arbitrability developed in the *Steelworkers Trilogy* from the collective bargaining context to commercial arbitration under the FAA). Significantly, the *Mitsubishi* Court cited both *Moses H. Cone* and a *Steelworkers Trilogy* case to support the claim that arbitration agreements should be interpreted under a presumption of arbitrability. *Mitsubishi*, 415 U.S. at 626.

In 1991, the Court applied the analytical framework developed in the *Mitsubishi Trilogy* to an arbitration agreement that covered statutory claims arising under the Age Discrimination in Employment Act (ADEA).¹⁷⁹ In *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁸⁰ the employer required the plaintiff to register with the New York Stock Exchange (NYSE) as a condition of his employment.¹⁸¹ The NYSE registration application contained a clause requiring the arbitration of “‘any dispute, claim or controversy’” between Gilmer and his employer that was required to be arbitrated under the rules of the NYSE or any other organization with which Gilmer registered as part of his securities work.¹⁸² Because NYSE Rule 347 provided for arbitration of “[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative,” Gilmer had effectively agreed to arbitrate any dispute that might arise between himself and Interstate/Johnson Lane.¹⁸³ Gilmer was fired at age sixty-two after six years of employment and alleged age discrimination in a complaint to the EEOC.¹⁸⁴

Interstate/Johnson Lane moved to compel arbitration, but the district court denied the motion by analogizing the case to *Gardner-Denver*,¹⁸⁵ in which the Supreme Court had stated that an employee could not prospectively waive his rights under Title VII.¹⁸⁶ On appeal, the Fourth Circuit claimed that the *Mitsubishi Trilogy* established that agreements to arbitrate statutory claims should be enforced unless the statute contains evidence of congressional intent to preclude the waiver of a judicial forum.¹⁸⁷ Finding no such evidence in the text, legislative history, or stated purposes of the ADEA, the Fourth Circuit reversed and granted the motion to compel arbitration.¹⁸⁸

179. 29 U.S.C. §§ 621–634 (1994).

180. 500 U.S. 20 (1991).

181. *Id.* at 23.

182. *Id.* (quoting the NYSE registration application).

183. *Id.* (quoting NYSE Rule 347).

184. *Id.*

185. *Id.* at 24.

186. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

187. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196–97 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

188. *Id.* at 203.

On appeal, the Supreme Court affirmed.¹⁸⁹ Placing the case in the context of its recent decisions favoring the arbitration of statutory claims,¹⁹⁰ the Court reiterated that the FAA evinces a “‘liberal policy favoring arbitration agreements,’ ”¹⁹¹ and that *Gilmer* bore the burden of demonstrating that Congress had intended all ADEA claims to be enforced in judicial fora.¹⁹² Like the Fourth Circuit, the Supreme Court found no evidence of such congressional intent.¹⁹³ The Court also dismissed *Gilmer*’s challenges to the procedural adequacy of arbitration procedures, stating that whatever shortcuts such procedures contain when compared with their judicial analogs are justified by the greater “‘simplicity, informality, and expedition of arbitration.’ ”¹⁹⁴ While acknowledging that inequality of bargaining power might invalidate an arbitration agreement, the Court preferred to evaluate such arguments on a case-by-case basis instead of treating agreements to arbitrate statutory claims as *per se* invalid.¹⁹⁵

The Court’s reasoning in *Gilmer* raised obvious questions about the continuing validity of *Gardner-Denver*. The *Gardner-Denver* Court based its decision primarily on arguments that arbitration was inconsistent with the public policies embodied in Title VII and that arbitration was procedurally inadequate¹⁹⁶—arguments that the *Gilmer* Court expressly rejected with respect to the plaintiff’s ADEA claim. Nevertheless, the Court distinguished *Gardner-Denver* on three grounds. First, *Gardner-Denver* did not involve an agreement

189. *Gilmer*, 500 U.S. at 35. Justice Stevens dissented on the ground that section one of the FAA excludes all employment contracts from the scope of the FAA. *Id.* at 38–42 (Stevens, J., dissenting) (“When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship.”). The majority refused to address the scope of the section 1 exclusion because the arbitration clause was not part of the employment contract between *Gilmer* and Interstate/Johnson Lane. *Id.* at 25 n.2. Instead, the clause was contained in *Gilmer*’s securities registration application. *Id.*

190. *Id.* at 26 (“It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”).

191. *Id.* at 25 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

192. *Id.* at 26.

193. *Id.* at 28.

194. *Id.* at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also id.* at 34 n.5 (observing that the *Gardner-Denver* Court’s dim view of the arbitration process had been discredited by recent decisions).

195. *Id.* at 33 (“Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”). In any event, the Court saw little reason for concern about unequal bargaining power in *Gilmer*. *Id.*

196. *See supra* notes 149–59 (discussing the Court’s reasoning in *Gardner-Denver*).

to arbitrate statutory claims—it merely held that arbitration of contract claims does not preclude subsequent litigation of statutory claims.¹⁹⁷ Second, *Gardner-Denver* considered an arbitration clause in a collective bargaining agreement, and hence had involved concerns about the “tension between collective representation and individual statutory rights” not present in *Gilmer*.¹⁹⁸ Third, *Gilmer* was decided under the FAA’s liberal policy favoring arbitration, while *Gardner-Denver* was not.¹⁹⁹

In the wake of *Gilmer*, courts have routinely enforced predispute agreements to arbitrate statutory discrimination claims in individual employment contracts.²⁰⁰ Indeed, many courts have held that section 118 of the Civil Rights Act of 1991²⁰¹ contains a congressional endorsement of the trend toward arbitration of employment discrimination claims.²⁰² Where such agreements have not been enforced, courts have tended to focus more on defects in contract

197. *Id.* at 35. The *Gardner-Denver* Court stressed that although Alexander’s charge that his employer had violated a contractual promise not to discriminate was based on the same facts as his statutory discrimination claim, the two causes of action were distinct. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49–50, 52 (1974). While the *Gilmer* Court’s narrow reading of the *Gardner-Denver* holding is correct, it ignores language in the earlier case suggesting that an agreement to arbitrate Title VII rights should never be enforced. *See, e.g., id.* at 60 n.21 (“Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.”).

198. *Id.*

199. *Id.* Oddly, the *Gilmer* Court failed to acknowledge that there is also a strong federal policy favoring arbitration agreements in CBAs. *See supra* notes 111–18 and accompanying text (discussing the *Steelworkers Trilogy*). Indeed, the *Gardner-Denver* Court explicitly acknowledged that policy while holding that it did not bar the plaintiff’s statutory discrimination claim. *See Gardner-Denver*, 415 U.S. at 47. The Court’s implicit distinction between the pro-arbitration policies of the FAA and the *Steelworkers Trilogy* may indicate that courts should be more willing to entertain public policy arguments against the enforcement of arbitration clauses in the collective bargaining context than in the context of individual employment contracts.

200. *Gilmer* involved an ADEA claim, but courts have extended its reasoning to other employment discrimination claims as well. *See, e.g., Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998) (extending *Gilmer* to Title VII claims); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 149–50 (1st Cir. 1998) (extending *Gilmer* to ADA claims).

201. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (codified as 42 U.S.C. § 1981 note (1994)) (“Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes . . .”).

202. *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 11 (1st Cir. 1999) (holding that the Civil Rights Act of 1991 does not bar predispute agreements to arbitrate statutory employment discrimination claims); *Seus*, 146 F.3d at 183 (same). *But see Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1199 (9th Cir. 1998) (concluding that the Civil Rights Act of 1991 reflects congressional hostility to predispute agreements to arbitrate statutory discrimination claims).

formation than on inconsistencies with statutory policy.²⁰³ Yet, despite the *Gilmer* Court's apparent repudiation of the public policy reasoning in *Gardner-Denver*, all circuits except the Fourth to consider the question have held that *Gardner-Denver* and its progeny still govern in the collective bargaining context and have refused to enforce union-negotiated waivers of the right to litigate statutory discrimination claims.²⁰⁴ Often, courts have reconstructed the rationale behind *Gardner-Denver* by emphasizing potential conflicts of interest between the union and the individual employee.²⁰⁵

203. See *infra* notes 289–92 and accompanying text (discussing decisions where courts refused to compel arbitration because the employee had not received sufficient notice of the agreement to arbitrate).

204. See *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 484–85 (D.C. Cir. 1999) (following *Gardner-Denver* to hold that a union could not lawfully waive employee's right to litigate claims under the FLSA), *vacated and reh'g granted*, No. 98-7196, No. 98-7196, 2000 U.S. App. LEXIS 3756 (D.C. Cir. Mar. 9, 2000), *reinstated en banc*, 211 F.3d 1312 (D.C. Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3157 (U.S. Aug. 16, 2000) (No. 00-260); *Albertson's, Inc. v. United Food and Commercial Workers Union*, 157 F.3d 758, 761–62 (9th Cir. 1998) (following the *Gardner-Denver/Barrentine* line of cases in holding that employees could litigate claims under the FLSA without resorting to the grievance and arbitration procedures in their CBA); *Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997) (holding that “an employee whose only obligation to arbitrate is contained in a [CBA] retains the right to obtain a judicial determination of his rights under a statute such as the ADA”); *Brisentine v. Stone & Weber Eng'g Corp.*, 117 F.3d 519, 525–27 (11th Cir. 1997) (holding that the arbitration clause in a CBA did not bar the plaintiff's ADA claim); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1452–54 (10th Cir. 1997) (following *Gardner-Denver* in holding that the plaintiff was not required to exhaust the arbitration procedures required by a CBA before litigating a Title VII claim); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1996) (emphasizing that “the union cannot consent for the employee by signing a [CBA]”); *Varner v. Nat'l Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996) (following *Gardner-Denver* in holding that the plaintiff could bring Title VII claims despite a failure to exhaust arbitration procedures under a CBA); *Tran v. Tran*, 54 F.3d 115, 118 (2d Cir. 1995) (following *Barrentine* in holding that a CBA did not bind plaintiff to arbitrate her claim under the FLSA before seeking relief in federal court). For overviews of how the circuits have treated agreements to arbitrate statutory claims in the collective bargaining context, see Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 123, 130–40 (1998). See generally Marjorie A. Shields, Annotation, *Enforceability of Arbitration Clauses in Collective Bargaining Agreements As Regards Claims Under Federal Civil Rights Statutes*, 152 A.L.R. FED. 75 (1999) (collecting and discussing cases involving CBA arbitration clauses barring employees from litigating federal statutory civil rights claims in federal court).

The question of whether union-negotiated waivers of the right to a judicial forum for federal employment discrimination claims should be enforced is beyond the scope of this Note. For discussion, see, e.g., Cole, *A Funny Thing*, *supra* note 17, at 628–29 (concluding that union-negotiated waivers should be enforced); Hodges, *supra*, at 140–74 (arguing that courts should not enforce union-negotiated waivers); Turner, *supra* note 5, at 191–203 (same).

205. See, e.g., *Pryner*, 109 F.3d at 362–63. In *Pryner*, the Seventh Circuit emphasized

These conflicts are a function of the character of unions as majoritarian institutions. Once a majority of workers in a given bargaining unit have voted to unionize, the union becomes the exclusive bargaining representative of all the employees in that unit²⁰⁶—both those who voted for the union and those who did not.²⁰⁷ Correlative to the union's role as exclusive bargaining agent for all the members of the bargaining unit is the duty of fair representation, which requires the union to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."²⁰⁸ The duty of fair representation does not, however, mean that the union must pursue every employee grievance all the way to arbitration.²⁰⁹ Instead, the union has considerable discretion about which claims to pursue, and may legitimately trade off the interests of some members against others in order to promote the greater good of the whole bargaining unit.²¹⁰ If an employee disagrees with the union's decision not to arbitrate her grievance, she may sue the union for a breach of its duty of fair representation; but such claims rarely succeed because the union has satisfied that duty as long as it can show that it did not act arbitrarily, discriminatorily, or in

the union's exclusive control over the arbitration process, and observed that the public policies underlying employment discrimination statutes are thwarted when union majorities can effectively waive the rights of union minorities. *See id.* In *Brisentine*, the Eleventh Circuit announced a test designed to resolve the potential conflict between collective rights and individual representation. The court stated that mandatory arbitration clauses do not bar lawsuits arising under federal statutes unless: (1) the employee has agreed individually to the contract and its arbitration clause, (2) the agreement explicitly authorizes the arbitrator to resolve federal statutory claims, and (3) the employee retains the right to insist that her claim be arbitrated even if her union does not wish to pursue arbitration. *See Brisentine*, 117 F.3d at 526–27.

206. *See* 29 U.S.C. § 159(a) (1994).

207. *See Pryner*, 109 F.3d at 362.

208. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). The duty of fair representation applies to both the negotiation and administration of CBAs. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991).

209. *See Vaca*, 386 U.S. at 191.

210. *See Pryner*, 109 F.3d at 362 (stating that the union "may take into account tactical and strategic factors such as its limited resources and consequent need to establish priorities, just as other 'prosecutors' must do, as well as its desire to maintain harmonious relations among the workers and between them and the employer"); Michael C. Harper & Ira C. Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1212, 1269 (1985) (stating that employers sometimes settle several grievances favorably if the union is willing to drop a small number of meritorious grievances, thereby sacrificing the interests of the few to the greater good); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 311 (1990) (stating that a union may sacrifice individual claims to the collective interest so long as its decision to do so can be seen as an exercise of reasoned judgment).

bad faith.²¹¹ As a result of these doctrines, when the union's exclusive control over the grievance procedure is combined with a mandatory agreement to arbitrate statutory discrimination claims, some aggrieved employees may be left without any forum in which they can vindicate their statutory rights.²¹² Most circuits have found this result unacceptable, and have reaffirmed the validity of *Gardner-Denver* on the ground that the right of the individual to be free of employment discrimination should not be compromised by the majoritarian processes of collective bargaining.²¹³ In most of the country, then, the rule today is that an individual can waive her own right to litigate statutory discrimination claims, but her union cannot waive that right for her.

The Fourth Circuit stands alone in holding that a CBA arbitration clause can waive an individual employee's right to a judicial forum for her federal employment discrimination claims.²¹⁴ In *Austin v. Owens-Brockway Glass Container, Inc.*,²¹⁵ the plaintiff sought to litigate Title VII and ADA claims in federal district court, but the Fourth Circuit held that she was bound to arbitration²¹⁶ by

211. See *Vaca*, 386 U.S. at 193.

212. See *Pryner*, 109 F.3d at 362 (stating that "a worker who asks the union to grieve a statutory violation cannot have great confidence either that it will do so or that if it does not the courts will intervene and force it to do so"); Hodges, *supra* note 204, at 149 (observing that if a union-negotiated waiver of the right to a judicial forum for statutory discrimination claims is enforceable, employee complaints of discrimination will not be heard in any forum if the union declines to press those complaints all the way to arbitration).

213. See, e.g., *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999) (stating that under *Gardner-Denver* statutory rights against discrimination must "remain exclusively within the individual's control"), *vacated and reh'g granted*, No. 98-7196, 2000 U.S. App. LEXIS 3756 (D.C. Cir. Mar. 9, 2000), *reinstated en banc*, 211 F.3d 1312 (D.C. Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3157 (U.S. Aug. 16, 2000) (No. 00-260).

214. Two district courts in the Second Circuit have also read *Gilmer* to imply that *Gardner-Denver* no longer stands as an absolute bar to the enforcement of union-negotiated waivers of the right to litigate statutory discrimination claims. *Clarke v. UFI, Inc.*, 98 F. Supp. 2d 320, 333 (E.D.N.Y. 2000) (holding that the arbitrator's decision pursuant to a CBA grievance procedure precluded the plaintiff from subsequent litigation of a sexual harassment claim in federal court); *Almonte v. Coca-Cola Bottling Co. of N.Y., Inc.*, 959 F. Supp. 569, 574 (D. Conn. 1997) (enforcing union-negotiated agreement to arbitrate claims under 42 U.S.C. § 1981 and rejecting a "per se rule barring enforcement of CBA mandated arbitration of individual statutory claims"). These cases stand in considerable tension, however, with the Second Circuit's decision in *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995). In *Tran*, the Second Circuit affirmed the continuing validity of *Barrentine* and *Gardner-Denver* in holding that a CBA arbitration clause did not require the plaintiff to submit claims under the FLSA to arbitration. *Id.* at 117-18.

215. 78 F.3d 875 (4th Cir. 1996).

216. *Id.* at 877.

virtue of a clause in her union's CBA that called for final, binding arbitration of " 'all disputes' " under the CBA.²¹⁷ Significantly, the CBA's nondiscrimination clause pledged that both the union and the employer would " 'comply with all laws preventing discrimination against any employee,' " including the ADA.²¹⁸ Invoking the strong federal policies favoring labor arbitration,²¹⁹ the Fourth Circuit rejected the argument that *Gilmer* did not apply to collective bargaining agreements. The court reasoned that just as a union can waive rights protected by the National Labor Relations Act,²²⁰ it can also waive the right to pursue statutory claims in a judicial forum.²²¹ The court also rejected arguments that the legislative history behind the ADA and the Civil Rights Act of 1991²²² signaled Congress's intent to preclude predispute agreements to arbitrate statutory discrimination claims.²²³ Summing up its position, the court stated

217. *Id.* at 879-80 (quoting the CBA).

218. *Id.* at 879 (quoting the CBA).

219. *Id.* at 879. The court appealed to the pro-arbitration policies established in the *Steelworkers Trilogy*, but did not rely on the FAA policy favoring arbitration because prior circuit precedent indicated that the FAA does not apply to CBAs. *Id.* (citing *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993)).

220. 29 U.S.C. §§ 151-169 (1994).

221. *Austin*, 78 F.3d at 885. This aspect of the court's reasoning has prompted criticism. See, e.g., Hodges, *supra* note 204, at 142-43 (criticizing the Fourth Circuit for ignoring *Gardner-Denver's* distinction between contractual rights conferred on the union collectively and statutory rights conferred on individual employees); Andrew J. Ciancia, Note and Comment, *Mandatory Arbitration Clauses in the Collective Bargaining Context: The Fourth Circuit's Misapplication of Gilmer in Austin v. Owens-Brockway Glass Container, Inc.*, 18 J.L. & COM. 115, 129 (1998) (stating that *Austin* failed to recognize that "a collective bargaining agreement can become 'involuntary' when a minority of employees are forced to waive certain rights because they are outnumbered"). But see Cole, *A Funny Thing*, *supra* note 17, at 594-95 (arguing that the *Austin* court reached the correct result and that *Gardner-Denver* should be overruled).

222. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified as § 1981 note (1994)) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes . . ."); see *supra* notes 201-02 and accompanying text (noting that many courts have read the Civil Rights Act of 1991 as an endorsement of predispute employment arbitration).

223. *Austin*, 78 F.3d at 881-82. The House Committee Report on the Civil Rights Act, written before the *Gilmer* decision, stated that:

the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of *Alexander v. Gardner-Denver Co.*

H.R. REP. NO. 102-40, pt.1, at 97 (1991) reprinted in 1991 U.S.C.C.A.N. 549, 635 (Sup.

whether an arbitration agreement forms part of an individual employment contract or a CBA does not matter: "So long as the agreement is voluntary, it is valid, and we are of the opinion that it should be enforced."²²⁴

The Supreme Court granted certiorari²²⁵ on a Fourth Circuit case, *Wright v. Universal Maritime Service Corp.*,²²⁶ in order to resolve the circuit split over the continuing validity of *Gardner-Denver*. In *Wright*, the CBA's arbitration clause encompassed "'all matters affecting wages, hours, and other terms and conditions of employment.'"²²⁷ The Fourth Circuit had followed *Austin* in holding that this clause "easily" encompassed the plaintiff's ADA claim, noting that the arbitration clause in *Gilmer* was equally broad and that any other interpretation would contradict the federal policy favoring alternative means of dispute resolution.²²⁸ Ultimately, the Supreme Court did not reach the issue of whether a union-negotiated waiver of the right to raise statutory discrimination claims in a judicial forum is enforceable because the Court held that no such waiver had occurred.²²⁹

The Court acknowledged that arbitration clauses in CBAs should be read in the light of a "presumption of arbitrability,"²³⁰ but did not apply that presumption to the arbitration clause in *Wright* because the

Docs. No. Y 1.1/8:102-40/pt.1). The House Committee Report on the ADA contains nearly identical language. See H.R. REP. NO. 101-485, pt.3, at 76-77 (1990) reprinted in 1990 U.S.C.C.A.N. 445, 499 (Sup. Docs. No. Y 1.1/8:101-48/pt.3). The Fourth Circuit found this legislative history unconvincing compared to the apparent endorsement of arbitration in the statutory text. See *Austin*, 78 F.3d at 882 (citing Justice Scalia's opinion in *Thompson v. Thompson*, 484 U.S. 174, 188, 191-92 (1988): "Committee reports, floor speeches, and even colloquies between Congressman . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."). For reviews and assessments of the relevant legislative history of the ADA and the Civil Rights Act of 1991, see Abrams, *supra* note 139, at 551-84; Grodin, *supra* note 5, at 30-35; see also *supra* note 202 (listing cases interpreting the pro-arbitration language in the ADA and the Civil Rights Act of 1991).

224. *Austin*, 78 F.3d at 885. Judge Hall dissented on the ground that the difference between the individual employment contract in *Gilmer* and the CBA in *Austin* made "all the difference." *Id.* at 886-87 (Hall, J., dissenting). In his view, *Gardner-Denver*, not *Gilmer*, was the proper rule of decision for cases involving CBAs. *Id.* (Hall, J., dissenting).

225. 522 U.S. 1146 (1998).

226. No. 96-2850, 1997 WL 422869 (per curiam) (unpublished decision).

227. *Id.* at *2 (quoting the CBA).

228. *Id.* (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

229. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 77 (1998).

230. *Id.* at 78 (quoting *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986)). The Court noted that there is also a presumption of arbitrability under the FAA, but because the Fourth Circuit had not relied on the FAA in its decision, the Court declined to address the question whether the FAA applies to CBAs. *Id.* at 77-78 n.1.

presumption extends only as far as its principal rationale, which is that arbitrators are better than judges at interpreting the terms of CBAs.²³¹ The Court, however, did not stop at removing the presumption of arbitrability.²³² Instead, it held that any union-negotiated waiver of an employee's right to a judicial forum for federal employment discrimination claims must be clear and unmistakable.²³³ The Court stated that *Gardner-Denver* at a minimum implies that the right to a federal judicial forum is important enough to be protected against union waivers that are "less-than-explicit."²³⁴ Applying the new "clear and unmistakable" standard to the facts in *Wright*, the Court concluded that the CBA's arbitration clause was not explicit enough to waive the plaintiff's right to a judicial forum.²³⁵ While acknowledging that the Fourth Circuit was correct in analogizing the CBA arbitration clause to the equally broad clause considered in *Gilmer*, the Court emphasized that the "clear and unmistakable" standard did not apply to *Gilmer* because that case involved only an individual's waiver of his own statutory rights.²³⁶

231. *Id.* at 78 (citing *AT&T Technologies*, 475 U.S. at 650). The Court found support for its position in the text of the LMRA, which endorses "'a method agreed upon by the parties'" as the preferred route to settling grievances arising from the "'application or interpretation of an existing [CBA].'" *Id.* (quoting 29 U.S.C. § 173(d) (1994)). The Court also observed that even if a CBA made compliance with the ADA a contractual term, the ultimate issue would remain one of federal statutory law; therefore, the presumption of arbitrability would not apply. *Id.* at 79.

232. *See id.* ("Not only is petitioner's statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear.").

233. *Id.* at 79-80. The Court relied on *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), in adopting the "clear and unmistakable" standard. *Wright*, 525 U.S. at 79-80. In *Metropolitan Edison*, the employer had disciplined union officials more severely than rank and file union members for their participation in an unlawful work stoppage. *See Metropolitan Edison*, 460 U.S. at 695. The Court held that this discriminatory treatment violated section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1994). *See id.* at 710. In rejecting the employer's argument that the Union had waived the protections afforded to its officials by section 8(a)(3), the Court acknowledged that a union may waive statutory rights, but held that any such waiver must be clear and unmistakable. *Id.* at 705-08.

234. *Wright*, 525 U.S. at 80.

235. *Id.* The arbitration clause did not clearly encompass federal statutory claims, nor was there a clear incorporation of the ADA's legal standards into the contract. *Id.* The Fourth Circuit has clarified the test in *Wright* to require either (1) an arbitration clause specifically stating that federal statutory claims are subject to binding arbitration, or (2) an explicit incorporation of the statute into the CBA. *See Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 321-22 (4th Cir. 1999) (citing *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331 (4th Cir. 1999)). Incorporation of the statute into the CBA cannot be accomplished simply by inserting clauses declaring an intent not to perform acts that violate the statute. *Id.* at 322.

236. *Wright*, 525 U.S. at 80-81.

IV. *BROWN* AND *WAFFLE HOUSE* REVISITED: SOME WORKERS ARE MORE EQUAL THAN OTHERS

When examined in light of *Wright*, the Fourth Circuit's refusal to enforce the arbitration clause in *Brown* was clearly correct. The arbitration clause covered "all grievances or questions of interpretation arising under" the CBA—a clause too broad and general to satisfy the "clear and unmistakable" standard.²³⁷ Similarly, the nondiscrimination clause included a pledge not to perform discriminatory acts "prohibited by law," including those acts prohibited by the ADA.²³⁸ The court correctly held that this language was insufficient to constitute "explicit incorporation" under *Wright*, finding a "legally dispositive" difference between "an agreement not to commit discriminatory acts that are prohibited by law and an agreement to incorporate, in toto, the anti-discrimination statutes that prohibit those acts."²³⁹

As *Brown* illustrates, the "clear and unmistakable" standard for union-negotiated waivers of the right to sue under federal employment discrimination statutes provides significant protection for union employees. Very few CBA arbitration clauses meet that standard.²⁴⁰ Indeed, some commentators have suggested that unions would be extremely unlikely to agree to an explicit waiver of the litigation rights of the workers they represent.²⁴¹ The reasons for this

237. *Brown*, 183 F.3d at 320 (quoting the CBA).

238. *Id.* (quoting the CBA).

239. *Id.* at 322.

240. Nearly every court applying the *Wright* standard has failed to find a union-negotiated waiver of an employee's right to litigate statutory discrimination claims. In addition to *Brown* and *Carson* in the Fourth Circuit, see, e.g., *Rogers v. N.Y. Univ.*, 220 F.3d 73, 77 (2d Cir. 2000) (holding that the CBA's arbitration clause did not clearly and unmistakably waive an employee's right to a judicial forum for her claims under the ADA and the Family and Medical Leave Act); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631–32 (6th Cir. 1999) (holding that a CBA's arbitration clause did not clearly and unmistakably waive an employee's right to a judicial forum for ADA claims); *Osuala v. Cmty. Coll.*, No. CIV. A. 00-98, 2000 WL 1146623, at *4 (E.D. Pa. 2000) (mem.) (holding that the CBA did not contain a clear and unmistakable waiver of an employee's right to litigate a Title VII claim). *But see Clarke v. UFI, Inc.*, 98 F. Supp. 2d 320, 333 (E.D.N.Y. 2000) (holding that a CBA arbitration clause clearly and unmistakably waived an employee's right to a judicial forum for sexual harassment claims under Title VII).

241. *Hodges*, *supra* note 204, at 151 n.167 (stating that unions have no reason to seek such waivers and many reasons to avoid them, including avoiding exposure to liability claims for breaches of the duty of fair representation); *see also Cole, A Funny Thing*, *supra* note 17, at 608–09 (observing that unions would have "little incentive" to agree to arbitrate statutory discrimination claims because such an agreement might expose them to both Title VII liability and to claims for breach of the duty of fair representation).

are twofold. First, unions have sufficient bargaining power to protect themselves against unwanted waivers—a union will agree to such a waiver only when the waiver advances its interests.²⁴² Second, unions will rarely want to waive employee litigation rights, for they have compelling reasons not to agree to serve as the exclusive agent for statutory discrimination claims.

To make the second point vivid, imagine that a union has clearly and unmistakably waived the employees' right to a judicial forum for their federal employment discrimination claims. An employee brings a complaint of disability discrimination to the union and asks the union to seek arbitration, but the union believes the claim has little merit. Further, imagine that the union is in the process of pursuing several other grievances that it believes are both more meritorious than the disability discrimination claim and more likely to produce long term benefits to all the employees in the bargaining unit. In such a situation, all of the union's options have significant costs.

The union could simply decline to pursue the disability discrimination claim, but that option carries with it the risk that the disgruntled employee will sue the union for a breach of its duty of fair representation (DFR).²⁴³ Although DFR suits are not easy for the employee to win, they can be very expensive to defend²⁴⁴ and still more costly to lose.²⁴⁵ Indeed, at least one commentator has suggested that unions are so cowed by the prospect of DFR suits that they will prosecute even the weakest employee complaints all the way to arbitration.²⁴⁶ Adopting such a policy would free the union from

242. Cf. 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) (explaining that federal labor law is premised on the assumption that unionized workers should have enough bargaining power to engage in meaningful negotiation over the terms and conditions of their employment).

243. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997) (“[I]f the union arbitrarily refuses to prosecute a grievance, let alone refuses on racial or other invidious grounds to do so, the worker can bring a suit against the union for breach of its duty of fair representation”); see also *supra* notes 208–11 and accompanying text (discussing the duty of fair representation). Declining to pursue an employment discrimination complaint might also subject the union to Title VII liability. See Cole, *A Funny Thing*, *supra* note 17, at 607–09.

244. See Stanley J. Schwartz, *Different Views of the Duty of Fair Representation*, 34 LAB. L.J. 415, 425–26 (1983) (stating that the cost of defending one DFR suit exceeds the cost of arbitrating several grievances of dubious merit).

245. See Turner, *supra* note 5, at 183 (quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976)) (stating that a finding that a union breached its duty of fair representation has serious consequences for both the union and the employer because it “undermines the integrity of the arbitral process”).

246. Schwartz, *supra* note 244, at 424.

the specter of DFR suits, but it too has serious drawbacks. Pursuing a statutory discrimination claim can be costly even in an arbitral forum, and may pose significant strains on union resources.²⁴⁷ More fundamentally, a policy of automatic arbitration for discrimination claims is inconsistent with unions' traditional discretionary approach to arbitration.²⁴⁸ The Supreme Court has recognized that a union's discretionary authority to decide which grievances should be arbitrated is crucial to its role as the exclusive bargaining agent for the employees it represents.²⁴⁹ Being able to abandon some claims in order to increase its chance of success on other claims is part of the union's power,²⁵⁰ and giving up that power would limit the union's ability to promote employee interests. In the hypothetical situation being considered here, aggressively prosecuting the disability discrimination grievance would not serve the good of the bargaining unit as a whole.

This example suggests that unions that agree to mandatory arbitration of employment discrimination claims will often find themselves between the proverbial rock and a hard place. Most unions have apparently concluded that such an agreement would cause more trouble than it is worth.²⁵¹ It is possible, then, that as a practical matter the "clear and unmistakable" standard will all but eliminate the mandatory arbitration of statutory employment

247. Hodges, *supra* note 204, at 157–58 (noting the possible expense of obtaining the expert witnesses and sophisticated statistical analysis that are sometimes necessary to prosecute employment discrimination claims); Turner, *supra* note 5, at 197 (observing that unions that take on the responsibility of handling statutory discrimination claims might have to reallocate scarce resources in ways that do not maximize the well-being of the bargaining unit).

248. Turner, *supra* note 5, at 196.

249. See *Vaca v. Sipes*, 386 U.S. 171, 191–92 (1967). The Court stated that a regime of mandatory arbitration would undermine the employer's trust in the union's authority and might so overburden the arbitration process that it would no longer be able to function effectively. *Id.* at 192.

250. See *supra* note 210 and accompanying text (discussing the union's right to sacrifice the interests of some bargaining unit members for the good of the whole).

251. See *supra* note 240 (observing that the case law suggests that unions rarely make clear and unmistakable waivers of the right to a judicial forum for statutory discrimination claims). The case law also indicates that unions sometime encourage employees to pursue their employment discrimination claims in court rather than through the CBA grievance process. See Turner, *supra* note 5, at 196 & n.354 (citing *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 74 (1998) (stating that the union advised the plaintiff employee to file his ADA claim in court) and *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 629 (6th Cir. 1999) (stating that the union decided not to pursue an ADA claim because it believed that such claims were better resolved in federal court)).

discrimination claims for unionized workers even in the Fourth Circuit.²⁵²

Applying the “clear and unmistakable” standard would also lead to a different result in *Waffle House*.²⁵³ But, of course, that standard does not apply to arbitration agreements involving nonunionized employees.²⁵⁴ Broad but nonspecific arbitration clauses in individual employment contracts are routinely enforced under the presumption of arbitrability established in *Mitsubishi*.²⁵⁵ Indeed, *Waffle House* can be interpreted as extending that presumption to the point of finding a valid contract where most other courts would not.²⁵⁶ Current Fourth Circuit practice, then, leaves unionized employees in a far better position to enforce their federal statutory rights against employment discrimination than nonunionized employees.²⁵⁷ Moreover, the disparity between the unionized and nonunionized is even greater in other circuits, where even clear and unmistakable union-negotiated

252. The power of the “clear and unmistakable” standard can be illustrated by observing that *Austin* almost certainly would have been decided differently under that standard. The arbitration clause in *Austin* was extremely broad and nonspecific, requiring simply that “‘any disputes’ ” under the CBA be handled through a grievance procedure culminating in final, binding arbitration. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879–80 (4th Cir. 1996); *supra* text accompanying note 217. Further, the nondiscrimination clause simply pledged compliance with anti-discrimination laws, including the ADA. *Id.*; *supra* text accompanying note 218. Neither clause would suffice to waive the litigation rights of unionized employees under the “clear and unmistakable” standard employed in *Wright* and *Brown*.

253. The arbitration clause purported to cover “‘any dispute or claim concerning Applicant’s employment with Waffle House.’ ” *EEOC v. Waffle House*, 193 F.3d 805, 814 (4th Cir. 1999) (King, J., dissenting) (quoting the Waffle House employment application), *petition for cert. filed*, 68 U.S.L.W. 3726 (U.S. Oct. 2, 2000) (No. 99-1823). This language is too broad to constitute an explicit waiver of the right to litigate statutory claims. Furthermore, nothing in the arbitration clause could be read to incorporate the ADA by reference. *See id.* at 814 n.1 (King, J., dissenting) (reproducing the text of the arbitration clause).

254. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80–81 (1998) (stating that the “clear and unmistakable” standard does not apply to individual employment contracts like the one at issue in *Gilmer*). Courts have uniformly rejected arguments that the “clear and unmistakable” standard should be extended beyond the collective bargaining context. *See, e.g.*, *Williams v. Imhoff*, 203 F.3d 758, 763–64 (10th Cir. 2000); *Walker v. Carnival Cruise Lines*, 63 F. Supp. 2d 1083, 1090 (N.D. Cal. 1999); *Bosinger v. Phillips Plastics Corp.*, 57 F. Supp. 2d 986, 990–91 (S.D. Cal. 1999).

255. *See supra* note 80 (listing cases requiring arbitration under such clauses).

256. *See Waffle House*, 193 F.3d at 817 (King, J., dissenting) (observing that the majority’s holding that Baker and Waffle House had agreed to arbitrate their employment dispute conflicted with the “fundamental principles of contract law”).

257. *But cf. Bales, supra* note 242, at 690 (suggesting that because many state laws granting individual employment rights are preempted by section 301 of the LMRA, unionized employees are effectively deprived of those rights and hence are left with fewer workplace rights than nonunionized employees).

waivers of the right to litigate statutory discrimination claims remain unenforceable under *Gardner-Denver*.²⁵⁸

This disparity appears ironic when one considers that collective bargaining and statutory grants of individual employment rights represent two distinct strategies for protecting the rights of workers.²⁵⁹ The collective bargaining model rests on the premise that if employees organize effectively and gain sufficient bargaining power to hold their own with employers, the terms of the employment relationship may be left entirely to the contractual agreements between the parties.²⁶⁰ Statutory employment rights, on the other hand, are designed to take certain rights off the bargaining table.²⁶¹ Employment discrimination statutes are meant to confer on employees an absolute right to be free of discrimination that cannot be compromised by the superior bargaining power of employers.²⁶² Such statutory rights are most important where employees lack the bargaining power to protect themselves through the give and take of negotiation.²⁶³ Yet, in the wake of *Gilmer*, individual employees routinely waive their statutory right to a judicial forum for their employment discrimination claims via arbitration clauses that are presented on a “take it or leave it” basis.²⁶⁴ Sometimes, as in *Waffle House*, the employee has no meaningful notice that she has relinquished her right to litigate statutory discrimination claims.²⁶⁵

258. See *supra* note 204 and accompanying text.

259. Bales, *supra* note 242, at 688–89 (describing collective bargaining and individual employment rights as contrasting approaches to workplace governance).

260. *Id.* at 745–46 (stating that the NLRA created a model of “industrial pluralism” under which “[e]mployers and employees, roughly coequal, jointly negotiate and enforce an agreement that establishes the terms and conditions of employment”).

261. See *id.* at 689.

262. Cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (“Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices.”).

263. See Estreicher, *Arbitration Without Unions*, *supra* note 107, at 782 (stating that legislation protecting workers reflects “dissatisfaction with the outcomes of private bargaining”); Stone, *supra* note 18, at 1043 (stating that legislatures create statutory employment rights when they believe that workers cannot protect themselves through bargaining with employers).

264. See Stone, *supra* note 18, at 1036 (observing that agreements to arbitrate statutory rights in the nonunion setting are “particularly problematic” because “[m]any pre-hire arbitral agreements are blatant contracts of adhesion”).

265. Several factors point to the insufficiency of the employee’s notice in *Waffle House*: (1) the broad but nonspecific language of the arbitration clause; (2) the fact that the clause was printed in very small type; and (3) the fact that it was not part of the offer and acceptance that created the employment contract between Baker and Waffle House. *EEOC v. Waffle House, Inc.* 193 F.3d 805, 814–18 & n.1 (4th Cir. 1999) (King, J., dissenting), *petition for cert. filed*, 68 U.S.L.W. 3726 (U.S. Oct. 2, 2000) (No. 99-1823).

In contrast, unionized workers at least enjoy the benefits of having the terms of their employment negotiated by representatives who have bargaining power that is roughly equal to—or at least in the same ballpark as—that of their employer.²⁶⁶ Further, those representatives are constrained to serve the interests of bargaining unit members by a duty of fair representation.²⁶⁷ It seems, then, that in the post-*Gilmer* world unionized workers with the bargaining power to protect their interests through *contract* rights are more secure in the benefits of their federal *statutory* employment rights than those nonunionized employees who are most dependent on statutory rights to protect their interests from abuses of economic power.

The explanation for the present situation is apparent from the earlier examination of the Supreme Court's developing jurisprudence under the FAA and the LMRA. As acknowledged by the Supreme Court in *Wright*, both federal labor laws and the FAA express public

These factors suggest that Baker had no notice that he had agreed to arbitrate *anything*, let alone to arbitrate federal statutory claims. Another particularly egregious example of illusory consent to mandatory arbitration agreements is *Lang v. Burlington Northern R.R.*, 835 F. Supp. 1104 (D. Minn. 1993), in which the court enforced a mandatory arbitration agreement which had been unilaterally adopted by the employer and mailed to current employees. The court reasoned that "continued employment, with knowledge of the [new arbitration agreement], constituted acceptance of the offer and provided the necessary consideration to bind the parties." *Id.* at 1106.

266. Justice Goldberg argued that truly voluntary agreements to arbitrate were essential to the integrity of the process. Arthur J. Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. 13, 16 (1965). He observed that arbitration agreements are "genuinely voluntary" when reached between commercial concerns or in the collective bargaining context where unions and employers possess "an equality, more or less, of bargaining power." *Id.* at 16. In contrast, Justice Goldberg cautioned that concerns about voluntariness may be significant when "an arbitration clause appears as 'boiler plate' in an installment sales contract, a lease or other document where bargaining power may be unequal." *Id.*

It may be objected, however, that the individual worker does not meaningfully consent to arbitration in either the union or the nonunion context. Employers unilaterally make the decision to choose arbitration over traditional litigation in the nonunion context, while unions and employers reach that decision bilaterally through the collective bargaining process. In either case, the individual worker is shut out. Yet if this characterization is accurate, one would expect the decisions reached through union-employer negotiation to serve the interests of employees more reliably than the unilateral decisions of employers. Cf. David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 HOFSTRA LAB. & EMP. L.J. 53, 81 (1998) (suggesting that it would be odd for the Supreme Court to hold that "a union and an employer could not agree to a result that an employer could impose unilaterally in the absence of a union").

267. See *supra* notes 208-11 and accompanying text (discussing the duty of fair representation).

policies favoring the arbitration of (at least some) disputes.²⁶⁸ Both policies were initially designed to facilitate the resolution in a private forum of contractual disputes between parties of roughly equal bargaining power.²⁶⁹ However, the judicial glosses on these policies have now diverged. Individual employment contracts falling under the FAA are interpreted in light of a judicial presumption of arbitrability: all doubts about whether a disputed matter falls within the scope of an arbitration clause are resolved in favor of inclusion.²⁷⁰ The result is that relatively vague arbitration clauses in individual employment contracts are often held to compel arbitration of statutory discrimination claims.²⁷¹

In contrast, the presumption of arbitrability stemming from federal labor policy has never been extended beyond its original context.²⁷² As noted in *Wright*, that presumption's application is co-extensive with its rationale—where arbitrators are in no better position than the courts to correctly resolve the claims at issue, the presumption disappears.²⁷³ Moreover, the Supreme Court now

268. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 77–80 (1998).

269. See *supra* notes 119–31 (discussing the parallels between commercial arbitration and labor arbitration).

270. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). Furthermore, most individual employment contracts fall under the FAA because most courts narrowly interpret the FAA's section 1 exclusion. See *supra* notes 99–107 and accompanying text (discussing the controversy concerning how broadly one should read the section 1 exclusion from the scope of the FAA).

271. See, e.g., *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430, 1432–33 (N.D. Ill. 1993) (invoking the presumption of arbitrability to justify holding that a clause requiring arbitration of “[a]ny controversy or claim arising out of or relating to any provision of this Agreement or any other document or agreement referred to herein” encompassed the plaintiff's Title VII claim); *supra* note 80 (citing other cases). Compare *McCrea v. Copeland*, 945 F. Supp. 879, 882 (D. Md. 1996) (invoking the presumption of arbitrability to hold that a clause in an individual employment contract requiring arbitration of all disputes “relating to this Agreement” encompassed a statutory discrimination claim), with *Martin Marietta v. Md. Comm'n on Human Relations*, 38 F.3d 1392, 1402 (4th Cir. 1994) (holding that a clause in a CBA requiring arbitration of disputes involving the “interpretation or application” of the CBA did not encompass the plaintiff's disability discrimination claim).

272. In *Gardner-Denver*, the Court acknowledged the pro-arbitration policies of federal labor law, but declined to extend them beyond their original context. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 46 n.6 (1974). The Court did not attempt to argue that the nondiscrimination clause in the CBA should be construed generously to incorporate federal employment discrimination statutes, nor did it argue that the federal policy favoring labor arbitration could trump Congress's choice to create a federal cause of action so that private individuals could promote the public policy of ending employment discrimination. See *id.* (acknowledging the pro-arbitration policies announced in the *Steelworkers Trilogy* but finding them insufficient to prevent the plaintiff from litigating his discrimination claims in federal court).

273. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78–79 (1998).

requires that union-negotiated waivers of the right to litigate statutory discrimination claims be clear and unmistakable.²⁷⁴ As a result, courts rarely find such waivers and unionized employees may vindicate their statutory employment rights in federal court.

V. THE LIMITS OF PRIVATE JUSTICE: HOW COURTS CAN BETTER PROTECT THE STATUTORY RIGHTS OF NONUNIONIZED EMPLOYEES

To understand how current doctrine on the arbitrability of statutory discrimination claims arose, however, is a far cry from endorsing that doctrine. As *Waffle House* illustrates, the statutory employment rights of nonunionized employees are too vulnerable to employer abuses under the current legal regime. The Supreme Court currently has a perfect opportunity²⁷⁵ to remedy this situation by affirming the Ninth Circuit's decision in *Circuit City Stores, Inc. v. Adams*.²⁷⁶ The *Adams* decision followed *Craft v. Campbell Soup Co.*²⁷⁷ in holding that the FAA does not apply to arbitration clauses in employment contracts.²⁷⁸ If the Supreme Court were to adopt the reasoning of *Craft* and *Adams*, the federal courts would rarely have the authority to compel arbitration of federal employment discrimination claims. *Gilmer* would survive, but only as a shadow of its former self. It would control only those cases where the arbitration clause binding an employee is not contained in his employment contract.²⁷⁹

The Ninth Circuit's interpretation of the FAA is both well-reasoned and amply supported by scholarly commentary.²⁸⁰ The court reasoned that because the scope of the Commerce Clause

274. *Id.*

275. See *supra* notes 105–06 and accompanying text (explaining that the Supreme Court has granted certiorari and heard oral arguments on a Ninth Circuit case addressing the scope of the FAA's section 1 exclusion).

276. 194 F.3d 1070 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S. Ct. 2004 (2000).

277. 177 F.3d 1083 (9th Cir. 1999) (per curiam) (denying petition for en banc review), *amending* 161 F.3d 1199 (9th Cir. 1998).

278. *Adams*, 194 F.3d at 1070.

279. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (explaining that the arbitration clause that bound *Gilmer* was not part of his employment contract with Interstate/Johnson Lane). If the Supreme Court were to affirm *Adams*, the *Gilmer* decision would survive only because the arbitration clause at issue was part of *Gilmer's* application to be registered as a securities representative rather than part of his employment contract. See *id.*

280. See, e.g., *Craft*, 177 F.3d at 1087 n.7 (citing Cole, *Incentives and Arbitration*, *supra* note 5, at 468; Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 329, 333 (1997); Stempel, *supra* note 100, at 294; and other sources).

power was much narrower in 1925 than it is today, only those employees who actually transported goods or people across state lines could possibly have been considered to be involved in interstate commerce in 1925.²⁸¹ Consequently, the requirement in section 2 of the FAA that federal courts may only enforce arbitration clauses contained in contracts “evidencing a transaction involving”²⁸² interstate commerce meant that transportation workers were the only possible objects of federal authority over arbitration proceedings.²⁸³ Having placed the coverage provisions of section 2 in their proper historical context, the court reasoned that Congress intended for the section 1 exclusion to exempt from the FAA every employee who could conceivably have been reached by section 2.²⁸⁴ The court therefore concluded that the FAA does not apply to labor or employment contracts.²⁸⁵

There is much to recommend this reasoning, but the Supreme Court is unlikely to accept it. As noted above, the weight of circuit court authority strongly supports a narrow reading of the FAA’s section 1 exclusion.²⁸⁶ More importantly, to affirm *Adams* would be to transform the *Gilmer* decision from a manifesto for employment arbitration into an oddball decision that would apply only in cases where the arbitration agreement is not part of an employment contract.²⁸⁷ However welcome it might be, such a drastic retreat from the Court’s aggressively pro-arbitration FAA jurisprudence cannot be expected.

Yet, even if the Supreme Court reverses *Adams*, courts can and should strengthen their protection of the statutory employment rights of nonunionized employees by requiring that *any* waiver of an individual’s statutory right to a judicial forum for her employment discrimination claims be clear and unmistakable. Furthermore, courts should only compel the arbitration of statutory discrimination claims after they have rigorously scrutinized the proposed arbitration procedures to ensure that arbitration will not result in the loss of substantive statutory rights.

281. *Id.* at 1086–87.

282. 9 U.S.C. § 2 (1994).

283. *Craft*, 177 F.3d at 1086–87.

284. *Id.*

285. *Id.* at 1086–87, 1094.

286. *See supra* note 102 and accompanying text.

287. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (explaining that the arbitration clause that bound *Gilmer* was not part of his employment contract with *Interstate/Johnson Lane*).

A. *The "Clear and Unmistakable" Standard Should Be Extended to Arbitration Clauses in Individual Employment Contracts*

In *Wright*, the Supreme Court signaled in dicta that it would oppose extending the "clear and unmistakable" standard to arbitration clauses in individual employment contracts.²⁸⁸ Nevertheless, the gap between that standard and the presumption of arbitrability that courts currently apply to such clauses is troubling. Suppose, for example, that a contract contains a generic, broadly worded clause requiring mandatory arbitration of "all disputes arising under or relating to this agreement" and a pledge that the parties will follow "federal and state law governing the employment relationship." If this hypothetical contract is a CBA, the arbitration clause does not come close to passing the "clear and unmistakable" standard employed in *Brown*. But the very same language in an individual employment contract might well be read to encompass federal employment discrimination claims under the *Mitsubishi* presumption of arbitrability. Understanding why a generic, broadly worded arbitration clause should be read so differently depending on the kind of contract in which it appears is not easy, and the potential for unfairness to nonunionized employees is significant.

Some courts have reacted to this potential unfairness by imposing heightened notice requirements for individual waivers of the right to a judicial forum for employment discrimination claims.²⁸⁹ In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, for example, the First Circuit held that individual waivers will not be enforced unless the employee receives "some minimal level of notice . . . that statutory claims are subject to arbitration."²⁹⁰ The court drew some support for this principle from *Wright*, though it acknowledged that its "notice" test is less demanding than the "clear and unmistakable" standard.²⁹¹ While the *Rosenberg* decision is a step in

288. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80–81 (1998) (noting that the "clear and unmistakable" standard was not applicable in *Gilmer* because that case involved only an individual's waiver of his own rights).

289. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 70 F.3d 1, 21 (1st Cir. 1999) (refusing to compel arbitration of Title VII and ADEA claims because the plaintiff had not received adequate notice that she had agreed to arbitrate those claims); *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (refusing to compel arbitration of a Title VII claim because the plaintiffs had not knowingly agreed to a waiver of their rights to a judicial forum).

290. *Rosenberg*, 70 F.3d at 21.

291. See *id.* at 20–21.

the right direction, it does not go far enough.²⁹² Despite the Supreme Court's efforts to distinguish *Wright* from *Gilmer*, the reasoning of the *Wright* decision strongly supports the extension of the "clear and unmistakable" standard to individual employment contracts.

As the Supreme Court indicated in *Wright*, there are three basic interpretive approaches to the question of whether an arbitration clause encompasses an employee's statutory discrimination claims.²⁹³ One might employ a presumption of arbitrability, thus assuming that the clause includes such claims unless it clearly fails to do so.²⁹⁴ At the opposite end of the spectrum, one might presume that the arbitration clause does not cover statutory discrimination claims unless their inclusion is clear and unmistakable.²⁹⁵ Both these approaches put a "thumb on the scales" in favor of one result or another.²⁹⁶ A third approach would simply read the arbitration clause

292. Some commentators have recommended a "knowing and voluntary" standard for waivers of the right to litigate statutory employment discrimination claims. See, e.g., Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 10 (1994); Monica J. Washington, Note, *Compulsory Arbitration of Statutory Employment Disputes: Judicial Review Without Judicial Reformation*, 74 N.Y.U. L. REV. 844, 880 (1999); see also Grodin, *supra* note 5, at 36–39 (sympathetically discussing the "knowing and voluntary" standard). Such a standard might seem to promise more protection to employees than the notice requirements in *Rosenberg* and *Lai*, as one could imagine courts routinely using that standard to refuse to enforce adhesive arbitration agreements on the ground that such agreements are not fully "voluntary." Such an aggressive use of the "knowing and voluntary" standard, however, would conflict with the FAA's instruction that arbitration agreements within its scope should be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Federal Arbitration Act § 2, 9 U.S.C. § 2 (1994). The language of section 2 indicates that arbitration agreements should be placed on the same footing as any other contract. See Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1011–13 (1996) (explaining that under the Supreme Court's "contractual" approach to arbitration, any state law that allows revocation of an arbitration agreement on grounds that would not apply to any other contract is preempted by the FAA). Thus, an adhesive arbitration agreement should only be refused enforcement as "involuntary" under circumstances in which any other adhesive contract would also be refused enforcement. Courts heeding the message of section 2 could not use the idea of voluntariness to invalidate arbitration agreements *simply* because they are adhesive, as most adhesion contracts are enforceable under ordinary contract law. *Seus v. John Nuveen & Co.*, 146 F.3d 175, 184 (3d Cir. 1998) ("A contract of adhesion is invalid only where its terms unreasonably favor the other party." (citing *Witmer v. Exxon Corp.*, 434 A.2d 1222, 1228 (Pa. 1981)); Ware, *supra*, at 1029 (stating that courts generally enforce contracts of adhesion as long as their terms are substantively fair).

293. See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 77–80 (1998) (discussing presumptions of arbitrability, ordinary textual analysis, and the "clear and unmistakable" standard as rules for interpreting arbitration clauses).

294. See *id.* at 78.

295. See *id.* at 79–81.

296. Cf. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the*

with no thumb on the scales by employing "ordinary textual analysis."²⁹⁷ Because arbitration is a matter of contract and contracts are founded on the mutual assent of the parties, the default mode in interpreting arbitration clauses ought to be ordinary textual analysis.²⁹⁸ Courts should only be allowed to tip the scales of interpretation toward one outcome or the other if they have good reasons for doing so. The Note will now demonstrate that although the Court of the *Steelworkers Trilogy* had good reasons for applying a presumption of arbitrability to contractual disputes in the unionized workplace, those reasons do not support a similar presumption for statutory claims under the FAA. Indeed, the legislative history and text of the FAA suggest that courts should usually employ ordinary textual analysis when interpreting arbitration clauses in commercial contracts and individual employment contracts. The Note will then show that the reasons supporting the Court's adoption of the "clear and unmistakable" standard for union-negotiated waivers of the right to litigate statutory discrimination claims also support the application of that standard to waivers by nonunionized employees.

Three reasons support the presumption of arbitrability articulated in the *Steelworkers Trilogy*. First of all, the Court's labor arbitration cases reflect a judgment that arbitration serves the substantive goals of national labor policy.²⁹⁹ The arbitration provisions in a CBA can be seen as consideration for the union's promise not to strike,³⁰⁰ and so help to secure industrial peace.

United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28-29 (Amy Gutmann ed., 1997) (describing the use of presumptions in statutory interpretation as putting a "thumb on the scales" in favor of one result).

297. *Wright*, 525 U.S. at 79.

298. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (stating that courts should apply common law contract principles when interpreting agreements to arbitrate).

299. See *Estreicher, Arbitration Without Unions*, *supra* note 107, at 758 (stating that the Supreme Court's labor arbitration cases reflect a substantive policy of promoting arbitration that rests either on its role in preserving industrial peace or on its central role in the collective bargaining process); see also *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (observing that the presumption of arbitrability under the LMRA is based on the belief that arbitrators are in a better position to interpret collective bargaining agreements than courts and the belief that arbitration prevents industrial strife); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (observing that commercial arbitration is a "substitute for litigation," whereas labor arbitration is "a substitute for industrial strife"); *Nelson*, *supra* note 92, at 327 (stating that the presumption of arbitrability in labor law is supported by policies of "concern for public order and national security").

300. *Malin & Ladenson*, *supra* note 3, at 1192 (citing *Boys Mkt., Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 249 (1970)).

Federal labor policy has also sought to promote industrial self-governance. Though CBAs are the primary instruments of this self-governance, they are necessarily incomplete because the parties cannot anticipate all the issues that might arise in the course of their working relationship.³⁰¹ Arbitration is an essential supplement to the collective bargaining process because it functions to put flesh on the bare bones of the CBA.³⁰² The Court of the *Steelworkers Trilogy* announced its presumption of arbitrability precisely because it meant to favor one mode of dispute resolution over others on policy grounds.³⁰³ It made the judgment that, in the collective bargaining context, public policy demands that as many disputes be settled by arbitration as possible.

As the Supreme Court indicated in *Wright*,³⁰⁴ the second rationale supporting the presumption of arbitrability in the *Steelworkers Trilogy* is that arbitrators will do a better job interpreting CBAs than judges because they know more about the "law of the shop."³⁰⁵ Labor arbitration employs decision-makers with far more specialized knowledge of the issues than any judge could possess because unions and employers choose arbitrators who are familiar with their particular industry.³⁰⁶

Finally, the presumption that union and employer intended to arbitrate virtually all their disagreements is consistent with the reasonable expectations of the parties.³⁰⁷ Because labor arbitration produces more informed decisions and facilitates industrial harmony, it is reasonable to assume that the parties would want to arbitrate as many of their disagreements as possible.³⁰⁸

None of these reasons calls for extending the presumption of arbitrability in the *Steelworkers Trilogy* to the FAA.³⁰⁹ Whereas the

301. See *Warrior & Gulf*, 363 U.S. at 578.

302. See *id.* at 581.

303. Estreicher, *Arbitration Without Unions*, *supra* note 107, at 765 (suggesting that the presumption of arbitrability in labor law is meant "to promote a particular dispute-resolution mechanism").

304. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78 (1998).

305. *Warrior & Gulf*, 363 U.S. at 582.

306. *Id.*

307. Estreicher, *Arbitration Without Unions*, *supra* note 107, at 757-58.

308. See *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (stating that the presumption of arbitrability "'best accords with the parties' presumed objectives in pursuing collective bargaining'" (quoting *Schneider Moving & Storage Co. v. Rollins*, 466 U.S. 364, 371-72 (1984))).

309. See Estreicher, *Arbitration Without Unions*, *supra* note 107, at 758 (suggesting that to transport the *Steelworkers Trilogy* presumption of arbitrability to the FAA would be to "divorce the Court's doctrine from [its] underlying justification" in national labor policy).

Steelworkers Trilogy presumption reflects a policy judgment meant to encourage one form of dispute resolution over another, the FAA is simply a mechanism for enforcing private agreements when, and only when, the parties have agreed to arbitrate.³¹⁰ If the FAA is ultimately about enforcing private contracts to arbitrate, there is no reason to read those contracts either broadly or narrowly.³¹¹ It is one thing to say, as the FAA does, that private agreements to arbitrate certain disputes will be enforced on the same basis as any other private contract.³¹² It is another thing, however, to resolve doubts about the scope of arbitration agreements by reading them to include as much as possible. That kind of presumption may impose bargains on private parties to which they did not agree.³¹³ Accordingly, commentators have argued that *Mitsubishi* and its progeny divorced the presumption of arbitrability from its policy justification when they imported that presumption from the collective bargaining context into the world of commercial arbitration.³¹⁴

To the extent that the presumption of arbitrability under the LMRA is supported by a belief that arbitrators are in a better position to interpret collective bargaining agreements than judges, that rationale is absent when arbitrators are called upon to decide statutory employment discrimination claims.³¹⁵ As the Supreme Court recognized in *Wright*, there is no reason to use the presumption of arbitrability to favor arbitration under such circumstances because

310. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (stating that the FAA “does not mandate the arbitration of all claims, but merely the enforcement . . . of privately negotiated arbitration agreements”).

311. See Estreicher, *Arbitration Without Unions*, *supra* note 107, at 765–66 (arguing that the presumption of arbitrability is inconsistent with the FAA).

312. See *supra* note 93 (explaining that section 2 of the FAA was meant to place arbitration agreements on the same footing as other contracts).

313. See Nelson, *supra* note 92, at 326–27 & n.243 (stating that the FAA’s presumption of arbitrability leads courts to compel arbitration of some disputes that would have gone to court under a more neutral textual analysis).

314. See Estreicher, *Arbitration Without Unions*, *supra* note 107, at 765–67 (stating that “the purpose of the [FAA] should be to enforce the mutual commitments agreed to by the parties, rather than to promote a particular dispute-resolution mechanism”); Nelson, *supra* note 92, at 328 (suggesting that the public policies supporting the presumption of arbitrability in labor law do not support the extension of that policy to the commercial context); see also *supra* notes 92, 101, 120–21 and accompanying text (discussing the origins of the FAA as a mechanism for enforcing commercial arbitration agreements). Estreicher also observes that importing a presumption of arbitrability from labor arbitration seems to conflict with the text of the FAA, which directs courts to compel arbitration only when they are “satisfied that the making of the agreement for arbitration . . . is not in issue.” Estreicher, *Arbitration Without Unions*, *supra* note 107, at 765 (quoting 9 U.S.C. § 4 (1994)).

315. See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78–79 (1998).

there is no reason to think that arbitrators are better suited to apply public, statutory law than federal judges.³¹⁶ The same reasoning suggests that no presumption of arbitrability is warranted where arbitrators are called upon to interpret federal statutory law in the nonunion context.

Finally, there is no reason to believe that the parties to an arbitration agreement enforceable under the FAA would expect their intentions about the scope of the agreement to be construed broadly.³¹⁷ In labor law, arbitration is the primary means of specifying and refining the terms of the parties' agreement under the CBA.³¹⁸ Thus, it is natural to believe that at least so long as the dispute is about the interpretation of the CBA, the parties would expect it to be arbitrated. In contrast, an arbitration agreement between an employer and an individual employee is not an instrument of workplace governance—it simply provides an alternative means of resolving contract disputes.³¹⁹ The parties have chosen the language of the arbitration clause to exclude some items and include others. They should not be presumed to have committed

316. See *id.* at 78–79; see also *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981) (observing that the expertise of arbitrators pertains to the “law of the shop” more than to the “law of the land” (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974))); *Cole v. Burns Int’l Sec. Serv.*, 105 F.3d 1465, 1477–78 (D.C. Cir. 1997) (discussing concerns that arbitrators are not competent to decide statutory claims); *Feller*, *supra* note 266, at 70 (stating that labor arbitrators are not chosen for their legal expertise and that many labor arbitrators are not lawyers). But see *James A. King, Jr. et al., Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97, 102 (1993) (suggesting that because the parties choose the arbitrator, they should be able to secure one who knows the relevant law).

317. To be more precise, there is no reason *independent of the law* for such an expectation. Of course, if the parties to an arbitration agreement know about the presumption of arbitrability under the FAA, they will expect courts to broadly construe their intentions as to the scope of the arbitration agreement, but that can hardly be a reason for saying that the presumption of arbitrability honors the (previously existing) reasonable expectations of the parties.

318. See *United Steelworkers of Am. v. Warrior & Gulf*, 363 U.S. 574, 580–81 (1960) (stating that the arbitration process develops a private common law system for a particular industry that enables the parties to deal with unanticipated problems). The Court observed that the arbitration of grievances is “a part of the continuing collective bargaining process.” *Id.* at 581.

319. See *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1205 (9th Cir. 1989) (en banc) (stating that labor arbitration differs from commercial arbitration because a CBA is a mere skeleton to be fleshed out by the private common law developed through the arbitration of grievances, whereas a commercial contract is meant to be a “comprehensive distillation of the parties’ bargain”). The *Stead Motors* court observed that labor arbitration is more than an alternative (and possibly more efficient) way to resolve disputes. *Id.*; see also *Malin and Ladenson*, *supra* note 3, at 1192 (observing that labor arbitration is not comparable to ordinary contract litigation).

themselves to arbitrate a greater range of issues than ordinary textual analysis would indicate.

None of the rationales that support the presumption of arbitrability in labor law, then, support the extension of that presumption to individual employment contracts under the FAA. Indeed, it is very hard to explain why courts should ever put a thumb on the scales of interpretation without some public policy that would justify the risk that a court will hold parties to terms on which they did not agree.³²⁰ The only such policy that might justify the presumption of arbitrability under the FAA is a policy of promoting alternative dispute resolution as a more expeditious way to settle disputes and thereby reduce federal caseloads. In other words, the pro-arbitration jurisprudence of the *Mitsubishi Trilogy* is justified only if the FAA is read to reflect a congressional policy judgment that because of clogged dockets and the expense and delay of litigation, some disputes should be channeled into arbitration even when that result conflicts with the parties' intentions. Whatever merits such a policy might have, it is inconsistent with the origins of the FAA as a means to place private, contractual agreements to arbitrate on the same footing as other contracts.³²¹ Admittedly, neither Congress nor the courts have been blind to arbitration's potential for speeding dispute resolution and reducing federal caseloads.³²² The Supreme Court, however, has held that the primary purpose of the FAA is to enforce private agreements to arbitrate, not to promote a particular mode of dispute resolution in the service of public policy.³²³

320. Language in some Supreme Court decisions illustrates the inherent tensions between the presumption of arbitrability and the proposition that arbitration is a matter of contract. Compare *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (stating that arbitration is "a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration"), with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (stating that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability").

321. See *supra* notes 92, 101, 120–21 and accompanying text (discussing the legislative history of the FAA).

322. The House Report on the FAA noted that making arbitration agreements enforceable would respond to "agitation about the costliness and delays of litigation." H.R. REP. NO. 68-96, at 2 (1924) (Sup. Docs. No. Y 1.1/2:8226). One Second Circuit decision was especially frank in acknowledging the beneficial effects of the FAA on the federal docket. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959) (stating that "any doubts as to construction of the [FAA] ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars").

323. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (stating that the FAA should be interpreted to promote its principal objective of enforcing private agreements and that the "fortuitous impact of the [FAA] on efficient dispute resolution"

Consequently, courts should not use the presumption of arbitrability as a means to reduce federal caseloads at the expense of holding parties to bargains to which they did not agree. At the very least, then, the meaning of arbitration clauses in individual employment contracts should be a matter for "ordinary textual analysis."³²⁴ The remaining question is whether there might be some reason for placing a thumb on the scales *against* reading an arbitration clause to encompass statutory discrimination claims.

In *Wright*, the Supreme Court found such a reason and held that any union-negotiated waiver of the right to litigate statutory discrimination claims must be clear and unmistakable.³²⁵ Nevertheless, the Court also stated that the "clear and unmistakable" standard did not apply to individual employment contracts and suggested that this asymmetry was justified by the difference between CBAs and individual employment contracts.³²⁶

To decide whether the "clear and unmistakable" standard should be extended to the nonunion context, one must first understand the rationale for applying that standard in the union context. One possible rationale might be that the "clear and unmistakable" standard guards against the possibility that union leaders³²⁷ will agree

should not be allowed to obscure that principal objective).

324. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79 (1998).

325. *Id.* at 80.

326. *Id.* at 80–81. At least one lower court has explicitly advanced this explanation for why the "clear and unmistakable" standard does not apply to individual employment contracts. *Interstate Brands Corp. v. Bakery Drivers & Bakery Goods Vending Machs. Local Union No. 550*, 167 F.3d 764, 767 (2d Cir. 1999) (stating that the "clear and unmistakable" standard applies only where a person's rights are waived by some other person or entity). It is noteworthy, however, that *Metropolitan Edison* did not invoke problems with unions waiving individual rights in its justification for adopting the "clear and unmistakable" standard. Instead, the Court merely stated that it would not infer waiver of a statutory right from a general contract provision. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In other words, its rationale for requiring a clear and unmistakable union waiver appealed to the importance of the statutory right more than to any perceived difficulties in a union waiving the individual rights of its members. Further support for this reading can be found in the *Metropolitan Edison* Court's reliance on *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). In *Mastro Plastics*, the Court refused to hold that a general no-strike provision in a CBA waived the right to strike in opposition to the employer's unfair labor practice. *Id.* at 284. Although the right to strike against an unfair labor practice is conferred on union members collectively in order to facilitate the collective bargaining process, the *Mastro Plastics* Court nonetheless stated that such a waiver would require a "more compelling expression" than a general no-strike clause. *Id.* at 283. It appears, then, that the Court's earlier decisions requiring explicit union waivers did not rest on the fact that a union might be waiving the rights of individual employees.

327. Union members have no statutory right to vote on and ratify CBAs, though such a right is part of some union constitutions. Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 805–06 (1984).

to a waiver that harms the interests of a minority of the workers they represent.³²⁸ Yet, if the union leadership set out to oppress a minority by approving a CBA that unfairly sacrifices minority interests, having clear and unmistakable evidence of what is happening would be of little help to the minority. Only the duty of fair representation could protect against such an abuse of power.³²⁹ In other words, the potential for majority oppression might be a reason not to enforce union-negotiated waivers, but it is not a reason to require that such waivers be clear and unmistakable. A better account of the rationale for requiring that union-negotiated waivers of the right to litigate statutory discrimination claims be clear and unmistakable would emphasize the importance of the right at issue, the expectations of union negotiators in agreeing to a broadly worded arbitration clause, and the need to make the terms of the agreement clear to parties who were not privy to its negotiation.

The Court's initial explanation for adopting the "clear and unmistakable" standard in *Wright* pointed to the importance of the right to litigate statutory discrimination claims.³³⁰ The right to a judicial forum is so important because the substantive rights³³¹ guaranteed by employment discrimination statutes are hollow without a neutral, procedurally adequate forum in which those rights can be vindicated.³³² While acknowledging that the loss of a judicial forum need not compromise substantive rights, the Court stated that "*Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA."³³³ Significantly, the Court has required that waivers of statutory rights be clear and unmistakable solely on the basis of this rationale, even in cases where the statutory rights at issue were collective rather than individual.³³⁴

328. See Mayer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 466 (1983) (stating that unions have the power to make bargains with management that harm the interests of particular employees).

329. A union that set out to sacrifice the interests of minority members would be liable to those members for breach of the duty of fair representation. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (stating that the duty of fair representation extends to the union's negotiation of collective bargaining agreements).

330. *Wright*, 525 U.S. at 80.

331. Such substantive rights include, e.g., the right to be free from discrimination, the right to receive reasonable accommodation for disabilities, etc.

332. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("At a minimum, statutory rights include both a substantive protection *and* access to a neutral forum in which to enforce those protections.").

333. *Wright*, 525 U.S. at 80.

334. See *supra* note 326 (discussing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270

A second reason supporting the “clear and unmistakable” standard is the expectations of union negotiators. Unions are authorized to deal primarily with rights that are conferred on union members collectively in order to advance collective interests.³³⁵ In contrast, the right of an individual employee to be free of discrimination is conferred individually and is not intended to be part of the collective bargaining process.³³⁶ Furthermore, existing judicial doctrine would lead union negotiators to believe that they have no authority to bargain away an individual’s statutory right to a judicial forum for her statutory discrimination claims.³³⁷ Finally, because the very purpose of a collective bargaining system is to establish the rights of the union and the employer by private agreement, it would be natural for the union to believe that any agreement to arbitrate “all disputes arising or relating to the agreement” concerned only those employee rights that were *created* by the collective bargaining process.³³⁸ For all these reasons, union negotiators probably would not expect that a “broad but nonspecific”³³⁹ arbitration clause would waive the individual statutory rights of employees to a judicial forum for their employment discrimination claims.

The argument from reasonable expectations is consistent with the Supreme Court’s reasons for applying the “clear and unmistakable” standard to other terms of arbitration agreements. In *First Options of Chicago, Inc. v. Kaplan*,³⁴⁰ the Court held that if the parties wish the arbitrator to be able to decide the scope of his own authority, they must state that intention clearly and unmistakably.³⁴¹

(1956)).

335. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (stating that unions may exercise or relinquish those rights that are conferred on employees collectively in order to foster the collective bargaining process).

336. *Id.*

337. See *Air Line Pilots Ass’n, Int’l v. Northwest Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999) (“Thus, even after *Gilmer*, *Gardner-Denver* stands as a firewall between individual statutory rights the Congress intended can be bargained away by the union . . . and those that remain exclusively within the individual’s control.” (citation omitted)), *vacated and reh’g granted*, No. 98-7196, 2000 U.S. App. LEXIS 3756 (D.C. Cir. Mar. 9, 2000), *reinstated en banc*, 211 F.3d 1312 (D.C. Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3157 (U.S. Aug. 16, 2000) (No. 00-260); see also *supra* note 204 and accompanying text (observing that all circuits save the Fourth have continued to follow *Gardner-Denver* even in the wake of the *Gilmer* decision).

338. See *Malin & Ladenson*, *supra* note 3, at 1190–95 (characterizing labor arbitration as a process of specifying the content of the general contractual commitments embodied in the CBA).

339. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 332 (4th Cir. 1999).

340. 514 U.S. 938 (1995).

341. *Id.* at 944.

The Court observed that the question of who should decide the scope of the arbitrator's power is sufficiently "arcane" that the parties might have failed to attend to it in their negotiations.³⁴² It therefore reasoned that the "clear and unmistakable" standard should apply to that question because of the basic principle that parties should be forced to arbitrate only those matters that they have specifically agreed to arbitrate.³⁴³ In other words, the Supreme Court adopted the "clear and unmistakable" standard as a way to safeguard the legitimate expectations of the parties.³⁴⁴ Because the law establishes that generally the question of arbitrability is for the judge, not the arbitrator,³⁴⁵ the parties would have expected that result when they agreed to a broadly worded clause requiring the arbitration of all contractual disputes.³⁴⁶

A final reason supporting the "clear and unmistakable" standard is that it helps to insure that all union members understand the consequences of approving the CBA for their statutory rights as individuals.³⁴⁷ Such a requirement is appropriate because union members are not privy to the negotiation of the CBA, and are thus less likely than their representatives to grasp its full implications.³⁴⁸ In other words, requiring a clear waiver of litigation rights is a recognition of the fact that most union members will be bound by an agreement they had little chance to influence aside from either accepting or rejecting proposals at the completion of negotiations.

These three reasons are mutually supporting. Taken together, they suggest that if courts read broadly worded arbitration clauses to encompass statutory discrimination claims, important employee rights might be waived without the awareness of either union negotiators or individual employees. To apply the "clear and unmistakable"

342. *See id.* at 945.

343. *Id.*

344. *See id.* (stating that to interpret "silence or ambiguity" as giving arbitrators the power to decide questions of arbitrability "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide").

345. *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986).

346. *See Kaplan*, 514 U.S. at 945.

347. While unions are not required to submit CBAs to their membership for ratification, many unions do so. *See Hyde, supra* note 327, at 805 (stating that roughly sixty percent of unionized employees have no right to ratify their CBA under their unions' constitutions and thereby implying that roughly forty percent of unionized employees do have such a right). Consequently, it is important for rank and file union members to understand the possible impact of voting for a CBA on their statutory employment rights.

348. *See id.* at 793-95 (emphasizing the rank and file union members' lack of influence on the negotiation and ratification of CBAs).

standard to CBA arbitration clauses is simply to recognize that even *if* unions have the authority to bargain away the statutory rights of individuals, they should at least be aware of what they are doing so that they can extract concessions from the management in return.³⁴⁹

The same rationales that support the “clear and unmistakable” standard in the collective bargaining context also support the extension of that standard to individual employment contracts. The right to a judicial forum is just as important to individual employees as to their unionized counterparts, therefore that right should also be protected against inadvertent waiver in nonunion contexts.³⁵⁰ Similarly, the typical employee has no more input into the negotiation of the agreements by which she will be bound than the rank and file union member.³⁵¹ Most individual employment contracts are presented on a “take it or leave it” basis with no opportunity for negotiation over most contractual terms.³⁵² As a result, individual employees are in a poor position to appreciate that their agreement to a broadly worded arbitration clause may include the waiver of important statutory rights.³⁵³

Whether the “clear and unmistakable” standard is necessary to protect the reasonable expectations of individual employees is a closer question. As noted above, union negotiators typically see themselves as exercising a limited agency on behalf of individual employees—they generally do not see the right to a judicial forum for statutory discrimination claim as theirs to give away.³⁵⁴ In contrast, it might be argued that when an individual employee signs an extremely broad clause like the one in *Waffle House* agreeing to arbitrate “‘any dispute or claim concerning Applicant’s employment,’”³⁵⁵ the

349. *Cf. Metro. Edison Co. v. NLRB*, 460 U.S. 693, 707 (1983) (observing that unions have considerable discretion to bargain away the rights of individual employees in order to secure gains that will benefit employees as a whole).

350. *Cf. Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998) (commenting on the importance of the right to a judicial forum for employment discrimination claims).

351. *See Stone, supra* note 18, at 1036–37 (emphasizing that most arbitration agreements signed by individual employees are adhesion contracts).

352. *Id.*

353. *See Alfred W. Blumrosen, Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REFORM 249, 254–55 (1983) (suggesting that in the nonunion context, employers may unilaterally draft arbitration clauses in ways that disadvantage employees).

354. *See supra* notes 335–39 and accompanying text (discussing the expectations of union negotiators); *see also Turner, supra* note 5, at 198–200 (arguing that because of their limited agency, unions simply lack the power to bargain away an individual employee’s right to a judicial forum for her employment discrimination claims).

355. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 807 (4th Cir. 1999) (quoting the employment application), *petition for cert. filed*, 68 U.S.L.W. 3726 (U.S. Oct. 2, 2000) (No.

employee should expect agreement to such a clause to encompass *all* employment related disputes.

While such an argument has some force, differences in the negotiating posture of unions and individual employees suggest that allowing individual employees to waive their statutory rights via a highly general arbitration clause carries a risk of unfair surprise that warrants the protection of the "clear and unmistakable" standard. To use the jargon of game theory, unions are repeat players whereas employees are typically one-shot players in the arbitration game.³⁵⁶ Unions and employers will face each other again and again in the arbitration of disputes under a collective bargaining agreement.³⁵⁷ As a result, both parties have ample incentives to scrutinize closely the proposed method of dispute resolution under their agreement.³⁵⁸ While such scrutiny requires the union to incur substantial information gathering costs, those costs are well justified by the fact that any ill-advised choices will come back to haunt the union again and again.³⁵⁹ In contrast, the typical employee is a one-shot player.³⁶⁰ When signing an employment contract, she may expect that no dispute will ever arise between herself and her employer.³⁶¹ As a result, the typical employee will rationally conclude that it is simply not worth the required information costs to closely scrutinize an employment agreement in order to determine its exact effects on her statutory rights.³⁶² The employee will simply make the assumption that people commonly make when signing form contracts; she will assume that she is bound by all the unread terms that are not unreasonable.³⁶³ In a judicial climate where mandatory arbitration is

99-1823).

356. Cole, *A Funny Thing*, *supra* note 17, at 619-29 (using game theory to contrast the bargaining postures of unions and individual employees).

357. *Id.* at 625.

358. *Id.* at 626.

359. *Id.* (observing that despite the costs involved, rational union negotiators will carefully analyze every provision of a proposed arbitration agreement).

360. *Id.* at 619-24 (discussing the status of individual employees as one-shot players in the arbitration game).

361. *Id.* at 620 (discussing the judgmental bias of employees that leads them to "ignore or de-emphasize" the risk that they will one day engage in litigation with their employer) (citing Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 462 (David Kahneman et al. eds., 1982) (discussing judgmental bias that leads people to underestimate the risk that a low probability event will take place)); cf. Grodin, *supra* note 5, at 29 (criticizing predispute arbitration agreements on the ground that employees cannot properly assess the probable effect of the agreement on their statutory rights before a dispute arises).

362. Cole, *A Funny Thing*, *supra* note 17, at 620-21.

363. See Ware, *supra* note 178, at 118-19. Ware cites the RESTATEMENT (SECOND) OF

not viewed as inherently unreasonable,³⁶⁴ employees who sign standardized employment agreements may waive important statutory rights without any awareness of what they are doing. Because the right to litigate statutory discrimination claims is admittedly important,³⁶⁵ it at least deserves protection against the rational refusal of one-shot players to clarify the terms of arbitration clauses in form contracts.³⁶⁶

To sum up, the same reasons that justify the Supreme Court's embrace of the "clear and unmistakable" standard in the collective bargaining context support the extension of that standard to individual employment contracts. Federal courts should ignore the Supreme Court's dicta in *Wright* and protect both unionized and nonunionized employees from inadvertent waivers by requiring that any waiver of the right to litigate statutory discrimination claims be clear and unmistakable.³⁶⁷

The "clear and unmistakable" standard would have been enough to protect the plaintiff in *Waffle House*. Yet it still does not protect the statutory rights of individual employees as well as it protects the rights of their unionized counterparts. The reason for this disparity is the difference between the relative bargaining power of unionized and nonunionized employees.

As noted above, the "clear and unmistakable" standard does a good job of protecting unionized employees because their representatives have substantial bargaining power.³⁶⁸ Even in those

CONTRACTS, which provides that when signing a standardized agreement, parties are not bound by "unknown terms which are beyond the range of reasonable expectation." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981).

364. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985) (remarking that judicial suspicion of arbitration is no longer appropriate).

365. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998).

366. See Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 486-87 (1981) (arguing that arbitration agreements should not be enforced where "unequal transaction costs . . . make it likely that one party will draft an agreement that the other will sign without first questioning or reviewing the agreement's arbitration clause"); cf. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (holding that an intent to have an arbitrator decide the scope of her own authority must be clearly and unmistakably stated partly on the ground that the parties to a contract would often fail to focus their attention on that question).

367. See Estrieher, *Predispute Agreements*, *supra* note 4, at 1358 (voicing support for a rule requiring that arbitration clauses clearly indicate that they include statutory employment claims); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 652 (1995) (suggesting that the "clear and unmistakable" standard should be applied to individual employee waivers of the right to a judicial forum).

368. See *supra* notes 240-52 and accompanying text.

rare instances when a union clearly and unmistakably waives the right to a judicial forum, union bargaining power should be sufficient to insure that the arbitration procedures are neutral and fair.³⁶⁹ Nonunionized employees usually come to the bargaining table on far less equal terms, and the employer may try to use its superior position to unilaterally shape the arbitration procedures to its advantage.³⁷⁰ Examples of employer overreaching in setting the procedural rules for binding arbitration are common in the case law,³⁷¹ and judicial acquiescence in such overreaching is disturbingly frequent.³⁷² Individual employees may sometimes have little choice but to accept arbitration clauses that are both completely explicit and terribly unfair.³⁷³ Even assuming that the parties have clearly and unmistakably agreed to arbitrate statutory discrimination claims, the question remains whether such agreements should be enforced.

369. See Cole, *A Funny Thing*, *supra* note 17, at 618, 628 (arguing that union-negotiated waivers of the right to a judicial forum should be enforced because the fact that both union and management are "repeat players" with relatively equal bargaining power will insure that the arbitral forum is neutral and fair).

370. See Bingham, *supra* note 21, at 226-27; Blumrosen, *supra* note 353, at 254-55.

371. E.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-40 (4th Cir. 1999). In *Hooters*, the company established arbitration procedures that were "so one-sided that their only possible purpose [was] to undermine the neutrality of the proceeding." *Id.* at 938. Among other offenses, the *Hooters* rules gave the company unrestricted control over the selection of the arbitrator. *Id.* at 938-39. The Fourth Circuit affirmed the district court's denial of *Hooters*'s motion to compel arbitration, holding that the arbitration agreement with the plaintiff should be rescinded because *Hooters* had breached that agreement by creating "a sham system unworthy even of the name of arbitration." *Id.* at 940-41; see also *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 148-52 (Cal. Ct. App. 1997) (holding that an arbitration clause that favored the employer by limiting employee remedies and exempting some employer claims from mandatory arbitration was unconscionable).

372. See, e.g., *DeGaetano v. Smith Barney, Inc.*, No. 95 CIV. 1613 (DLC), 1996 WL 44226, at *6 (S.D.N.Y. 1996) (compelling arbitration of Title VII claims under an agreement that barred arbitrator from granting injunctive relief, attorneys' fees, or punitive damages); *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 822 (Tex. App. 1996) (holding that the trial court abused its discretion in declaring unconscionable an arbitration agreement that severely limited the employee's remedies and gave her no right to discovery).

373. Because an arbitration agreement may be revoked on general contract grounds, see 9 U.S.C. § 2 (1994), the contract doctrine of unconscionability places some limits on how far employers can overreach without rendering their arbitration clauses unenforceable. See generally Ware, *supra* note 292 (discussing the application of the unconscionability doctrine to arbitration cases).

B. Public Policy Requires Courts to Rigorously Scrutinize Arbitration Agreements for Procedural Fairness

The Supreme Court has stated that even if the parties have agreed to arbitrate a dispute, courts must still ask whether some public policy external to the agreement precludes enforcement.³⁷⁴ Before the 1980s, policy considerations were the chief reason why the Court refused to enforce agreements to arbitrate federal statutory claims.³⁷⁵ The *Mitsubishi Trilogy*, however, served to sharply limit the role of public policy considerations in determining the enforceability of agreements to arbitrate statutory claims.³⁷⁶ Finding that the FAA evinced Congress's intention to promote arbitration, the Court reasoned that statutory claims are arbitrable unless Congress has explicitly declared that they are not.³⁷⁷

374. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

375. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48–49 (1974) (holding that a prior arbitral determination of the plaintiff's race discrimination claim did not bar a subsequent lawsuit on the ground that Title VII had given federal courts the primary role in combatting employment discrimination); *Wilko v. Swan*, 346 U.S. 427, 435–37 (1953) (holding that the public policies embodied in securities legislation precluded enforcement of a predispute agreement to arbitrate claims of securities fraud).

376. Moohr, *supra* note 2, at 415.

377. *Mitsubishi*, 473 U.S. at 628 (stating that the FAA's liberal federal policy favoring arbitration can be trumped only if Congress's desire to preclude arbitration can be found in either the text or legislative history of the relevant statute). The Court has also stated that a congressional intent to preclude arbitration might be discerned from "an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987). One might imagine this language forming the basis for powerful public policy arguments that employment discrimination claims should never be submitted to arbitration. After all, the purpose of Title VII and related statutes is not merely to compensate the victims of discrimination; the statutes are also designed to "eliminat[e] . . . discrimination in the workplace." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). Judicial resolution of employment discrimination claims serves such public policy goals as deterring discriminatory conduct, developing the body of discrimination law, and forming public values. Moohr, *supra* note 2, at 427–39. Because settling employment discrimination claims in private arbitration is arguably incompatible with these goals, see *id.*, one could argue that allowing mandatory arbitration of employment discrimination claims is inconsistent with the inherent purposes of Title VII and related statutes. This line of argument, however, has never been taken seriously by the Supreme Court. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–28 (1991) (rejecting the public policy argument against the arbitration of an ADEA claim because the Court had already upheld arbitration of claims under other federal statutes that also advanced important public policies); *Mitsubishi*, 473 U.S. at 637 ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); Moohr, *supra* note 2, at 413 (stating that the *Mitsubishi Trilogy* changed the focus of the Court's FAA arbitration jurisprudence from public policy to the fairness of the arbitral

The *Mitsubishi Trilogy*'s view that a statutory claim is arbitrable unless the statute contains an "implied repeal"³⁷⁸ of the FAA is open to serious criticisms. First, it is wildly ahistorical to read the FAA as expressing a strong preference for the arbitration of statutory disputes that can only be overcome by an implied repeal.³⁷⁹ The drafters of the FAA did not contemplate its application to statutory claims;³⁸⁰ instead, it was intended to facilitate the enforcement of private agreements to arbitrate *contractual* disputes between commercial parties.³⁸¹ Second, the implied repeal theory makes it practically impossible to deny enforcement of an arbitration clause on public policy grounds. Because Title VII and other anti-discrimination statutes were passed at a time when no one thought the FAA authorized the federal courts to compel the arbitration of federal statutory claims, those statutes are unsurprisingly devoid of any evidence that the enacting Congresses intended to implicitly repeal the FAA.³⁸²

Despite the force of these criticisms, however, the *Mitsubishi Trilogy* continues to undermine efforts to argue that public policy

forum).

378. Estreicher, *Arbitration Without Unions*, *supra* note 107, at 785–86 (stating that the Supreme Court's post-*Mitsubishi* position is that the FAA's pro-arbitration policies apply to statutory claims unless the statute effects an express or implied repeal of the FAA).

379. Significantly, it took sixty years for the Supreme Court to discover (in the *Mitsubishi Trilogy*) that Congress intended the FAA's pro-arbitration policies to extend to the arbitration of statutory claims. Certainly, the *Wilko* Court discerned no such intention. *See Wilko*, 346 U.S. at 434–37 (refusing to compel arbitration of a claim for securities fraud). The Court's interpretation in *Mitsubishi*, then, sharply conflicts with the principle that contemporaneous interpretations of statutes should be privileged. EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* 388–89 (1940) (stating that contemporaneous construction of a statute is not controlling but should ordinarily be accorded great weight).

380. *See Mitsubishi*, 473 U.S. at 646 (Stevens, J., dissenting) (arguing that neither the text nor the legislative history of the FAA indicate that Congress contemplated its use to compel the arbitration of statutory claims); *see also Gilmer*, 500 U.S. at 42 (Stevens, J., dissenting) ("I doubt that any legislator who voted for [the FAA in 1925] expected it to apply to statutory claims . . .").

381. *See supra* notes 92, 101, 120–21 and accompanying text (discussing the original purpose of the FAA).

382. Estreicher, *Arbitration Without Unions*, *supra* note 107, at 789. *Mitsubishi*'s presumption that public policy does not preclude the enforcement of agreements to arbitrate statutory claims arguably received some support in the Civil Rights Act of 1991. One might argue that although Congress had an opportunity in enacting that legislation to signal its disapproval of the trend toward arbitration of statutory claims, it instead included an endorsement of arbitration procedures within the Act. *See Civil Rights Act of 1991*, § 118 (codified as 42 U.S.C. § 1981 note (1994)) (encouraging use of alternative dispute resolution methods "[w]here appropriate and to the extent authorized by law"); *see also supra* notes 201–02, 222–23 and accompanying text (discussing the Civil Rights Act of 1991).

categorically precludes the arbitration of federal employment discrimination claims. A different type of public policy argument acknowledges that agreements to arbitrate employment discrimination claims can *sometimes* be consistent with public policy. It suggests, however, that such agreements should be enforced only if the proposed arbitration procedures comply with due process norms.³⁸³ According to this approach, exacting judicial scrutiny of arbitration procedures can prevent the loss of substantive individual rights³⁸⁴ while increasing the level of employee access to a satisfactory means of dispute resolution.³⁸⁵

This public policy argument begins from very general observations about the policies served by federal employment discrimination statutes. As was described earlier, statutory employment rights reflect a congressional judgment that individuals should enjoy certain rights in relative freedom from the vagaries of market power.³⁸⁶ These rights are taken “off the table,” so to speak; they form a baseline from which individual employees can bargain with employers for contractual rights in addition to those guaranteed by statute. When statutory employment rights are seen in this light, the prospect of employers presenting employees with form contracts mandating the arbitration of statutory discrimination claims as a condition of employment is disturbing. It suggests that the very rights Congress had sought to remove from the bargaining table can still be compromised by superior bargaining power. If statutory rights are being compromised when employees waive their right to a judicial

383. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1479–88 (D.C. Cir. 1997) (upholding arbitration agreement after reviewing the agreement for procedural adequacy); Estreicher, *Predispute Agreements*, *supra* note 4, at 1349 (stating that public policy requires adherence to “certain adjudicative quality standards” in the arbitration of federal statutory claims); Gorman, *supra* note 367, at 644–45 (arguing that courts must scrutinize the contemplated arbitration system for procedural adequacy before compelling arbitration or confirming arbitral awards).

384. *Mitsubishi*, 473 U.S. at 628 (stating that parties do not forego substantive rights when they agree to arbitrate statutory claims).

385. See Estreicher, *Predispute Agreements*, *supra* note 4, at 1349–52, 1375 (arguing that the law should encourage arbitrations of statutory employment claims so long as those arbitrations satisfy standards of procedural adequacy); Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 2 (1998) (suggesting that most employees might be better off with mandatory arbitration so long as the arbitral system has due process guarantees). Professor St. Antoine suggests that mandatory arbitration may be the only realistic hope that lower salaried workers have for a forum in which to vindicate their statutory rights because few lawyers would find it worthwhile to press their claims in court. St. Antoine, *supra*, at 7–8.

386. See *supra* note 263 and accompanying text.

forum, judicial enforcement of arbitration agreements undermines the public policies of employment discrimination law at the most fundamental level.³⁸⁷ Consequently, arbitration agreements that compromise statutory rights should not be enforced.³⁸⁸ The public policies animating employment discrimination law require courts to scrutinize the proposed arbitral forum for procedural adequacy before deciding to compel arbitration or confirm arbitration awards.³⁸⁹

This conclusion should not be surprising, as the Supreme Court's pro-arbitration FAA jurisprudence has been premised on the assumption that statutory rights are *not* compromised by the shift to an arbitral forum. Despite the Court's recognition that the forum in which a right will be vindicated affects the scope of that right,³⁹⁰ it stated in *Mitsubishi* that arbitration merely provides an alternative forum for dispute resolution without compromising substantive statutory rights.³⁹¹ Similarly, the *Gilmer* Court's review of the arbitration procedures to be employed under the NYSE's rules³⁹² implies a belief that mandatory arbitration agreements should be enforced only if the contemplated procedures cohere with some private analogue of due process.³⁹³ The Supreme Court's reasoning in *Mitsubishi* and *Gilmer* suggests that the proper question for courts to consider in deciding whether to enforce agreements to arbitrate statutory claims is whether the shift to a private forum compromises substantive rights.³⁹⁴

387. See *Cole*, 105 F.3d at 1482 (stating that to enforce an arbitration agreement "no matter what rights it waives or what burdens it imposes . . . would be fundamentally at odds" with public laws such as Title VII and the ADEA).

388. See *id.* at 1488 (warning that courts "will have no choice but to intercede" if arbitrators do not vigilantly protect statutory employment rights).

389. See Gorman, *supra* note 367, at 645.

390. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974) (citing *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring)).

391. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

392. See *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 31-32 (1991).

393. See *Cole*, 105 F.3d at 1481-83 (upholding an arbitration agreement partly on the ground that the proposed system of arbitration satisfied the criteria of procedural adequacy employed by the *Gilmer* Court); Gorman, *supra* note 367, at 644-45 ("Arbitral systems without the procedural safeguards found in the regulations of the New York Stock Exchange would apparently so undermine the enforcement of statutory claims as to be, in the [*Gilmer*] Court's view, intolerable.").

394. Cf. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 8 n.4 (1st Cir. 1999) (suggesting that most criticism of arbitration is directed at the procedural shortcomings of particular arbitration programs rather than at the inherent faults of

Although the Supreme Court has framed the proper question, it has not indicated how much process is needed to insure that arbitration does not compromise substantive rights. The District of Columbia Circuit has provided a helpful starting point by stating that “[a]t a minimum, statutory rights include both a substantive protection *and* access to a neutral forum in which to enforce those protections.”³⁹⁵ Obviously, a neutral arbitral forum need not offer the full gamut of procedural protections that the parties would enjoy in federal court.³⁹⁶ Sacrificing procedural protections may increase the risk of erroneous decisions, but a modest increase in that risk does not compromise substantive rights so long as the risk is equitably distributed.³⁹⁷ The touchstone of arbitral fairness is whether the procedures used tend to skew results in favor of one party.³⁹⁸ Arbitration procedures that systematically favor the employer over the employee are not neutral and therefore compromise the substantive rights of employees.

Much of the scholarly distrust of mandatory agreements to arbitrate statutory employment disputes no doubt stems from a perception that arbitration procedures typically do favor employers over employees,³⁹⁹ and some empirical research suggests that the perception has a factual basis.⁴⁰⁰ In particular, repeat player

arbitration *per se*).

395. *Cole*, 105 F.3d at 1482 (citing *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1246–48 (9th Cir. 1994)).

396. *See Mitsubishi*, 473 U.S. at 628 (stating that parties agreeing to arbitrate their disputes “trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”).

397. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (explaining that courts should decide how much process the Constitution requires by balancing the government’s interest in efficiency, the private interest threatened by government action, the risk of an “erroneous deprivation” of that private interest, and the probable value of additional procedural safeguards).

398. Bingham explains that the fairness of the arbitral forum may be compromised by the partiality of the arbitrator or by “structural bias” created when procedural rules favor one party over another. *See Bingham, supra* note 21, at 245. An example of structural bias would be severe limits on discovery, which would systematically disadvantage the plaintiffs in employment arbitration. *See Bales, supra* note 242, at 755–56 (noting that generous discovery is crucial to employment discrimination plaintiffs because they need access to the employer’s personnel files in order to prove their cases).

399. *See, e.g., 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, 240 (1992) (suggesting that employers favor arbitration because they want to unilaterally shape the arbitral system whereas employees and their lawyers generally oppose arbitration because they fear that the arbitral forum will be biased); *Stone, supra* note 18, at 1040 (stating that mandatory arbitration agreements have a “systematic pro-employer effect” on outcomes).

400. *See Stone, supra* note 18, at 1040 n.162 (noting a survey finding that employers are

employers have been found to do much better than one-shot player employers in arbitration against one-shot player employees.⁴⁰¹ Though there is room for debate about the sources of this "repeat player effect,"⁴⁰² two common explanations are that the experience of repeat players gives them an information advantage over employees in the selection of arbitrators⁴⁰³ and that arbitrators looking for future business tend to favor the interests of the repeat player employer.⁴⁰⁴ These explanations suggest that any neutral arbitration system must have procedures designed to negate these employer advantages so as to secure a truly impartial arbitrator.

Groups involved in dispute resolution,⁴⁰⁵ government agencies,⁴⁰⁶ and scholars⁴⁰⁷ have all developed procedural guidelines to govern the

more likely to win in arbitration than in jury trials and that employees who manage to win in arbitration tend to receive smaller awards than employees who prevail in jury trials) (citing Stuart Bompey & Michael Pappas, *Compulsory Arbitration in Employment Discrimination Claims: The Impact of Gilmer v. Interstate/Johnson Lane Corp.*, in Sec. on Emp. & Lab. Law, A.B.A., EEO Comm. Papers (1993)). See generally Bingham, *supra* note 21, at 232–39 (reviewing empirical research on arbitration outcomes).

401. Bingham, *supra* note 21, at 234 (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189, 205–13 (1997)). Bingham's study found that employees arbitrating claims against one-shot player employers win over seventy percent of the time, while employees arbitrating claims against repeat player employers win only about sixteen percent of the time. *Id.*

402. See *id.* at 239–44 (surveying various theoretical explanations for the repeat player effect).

403. *Id.* at 240; Gorman, *supra* note 367, at 656.

404. Alleyne, *supra* note 178; Gorman, *supra* note 367, at 656.

405. In 1995, representatives of the American Bar Association, the American Arbitration Association, the American Civil Liberties Union, the National Employment Lawyers Association, and other groups agreed on a Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship, 9A Lab. Rel. Rep. (BNA) No. 142, at 534:401 (May 9, 1995) [hereinafter Due Process Protocol]. See Arnold M. Zack, *The Evolution of the Protocol*, 6 WORLD ARB. & MEDIATION REP. 217, 217–18 (1995) (recounting the history of the Protocol's adoption).

406. The U.S. Departments of Commerce and Labor created a Commission on the Future of Worker-Management Relations, commonly known as the Dunlop Commission, in 1993. Among other recommendations, the Commission formulated a list of "quality standards" to govern the arbitration of statutory employment disputes. COMM. ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'TS OF COMMERCE & LABOR, REPORT AND RECOMMENDATIONS 30–33 (1994) [hereinafter DUNLOP REPORT], available at <http://www.dol.gov/dol/%5Fsec/public/media/reports/dunlop/dunlop.htm>; see also Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 129–30 (1996) (summarizing the Dunlop Report's "quality standards" for employment arbitration).

407. See, e.g., Estreicher, *Predispute Agreements*, *supra* note 4, at 1349–50 (listing procedural guidelines partially based on the Dunlop Report); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 95–99 (1996) (discussing the necessary features of an arbitration system that could be both just and self-regulating).

arbitration of employment disputes, and something of a consensus has emerged.⁴⁰⁸ Under the terms of this (sometimes vague) consensus, a procedurally adequate arbitration procedure must include the following eight provisions: (1) a neutral arbitrator with knowledge of the relevant law,⁴⁰⁹ (2) “[a]dequate but limited” discovery provisions,⁴¹⁰ (3) provisions for sharing the cost of arbitration so that all employees can afford access to the arbitral forum,⁴¹¹ (4) an employee right to be represented by counsel,⁴¹² (5) authority for the arbitrator to award the full range of remedies authorized by the relevant employment discrimination statute(s),⁴¹³ (6) a requirement that the arbitrator issue a written decision explaining the reasons behind his award,⁴¹⁴ (7) an unlimited right of employees to file charges with the EEOC and other appropriate agencies,⁴¹⁵ and (8) a reasonable location for the arbitration.⁴¹⁶

408. See St. Antoine, *supra* note 385, at 6.

409. DUNLOP REPORT, *supra* note 406, at 31. In order to facilitate selection of a neutral arbitrator, the Due Process Protocol imposes a duty on arbitrators to disclose potential conflicts of interests and recommends that all parties to the arbitration be given access to references from the arbitrator’s last six cases. Due Process Protocol, *supra* note 405, at 402–03.

410. Due Process Protocol, *supra* note 405, at 402. Accord DUNLOP REPORT, *supra* note 406, at 31 (calling for “a fair and simple method by which the employee can secure the necessary information to present his or her claim”). The vagueness of these discovery standards would of course lead to difficulties in application. Permitting the same level of discovery the parties would enjoy in federal court would threaten to undermine the cost advantages of arbitration, *see id.*, but severe restrictions on the scope of discovery would unfairly disadvantage plaintiffs. See Bales, *supra* note 242, at 755–56.

411. DUNLOP REPORT, *supra* note 406, at 31–32; Due Process Protocol, *supra* note 405, at 404. While both the Dunlop Report and the Due Process Protocol call for fee sharing between employer and employee, some circuit courts of appeals have held that the employer should bear the full cost of compensating the arbitrator. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1483–85 (D.C. Cir. 1997) (“[I]t would undermine Congress’s intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.”); *see also* *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233 (10th Cir. 1999) (holding that mandatory arbitration agreement requiring employees to pay part of the arbitrator’s fees was unenforceable); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (stating that agreement shifting part of the arbitration fees to employee was unenforceable because it conflicted with the public policies that support Title VII).

412. DUNLOP REPORT, *supra* note 406, at 31; Due Process Protocol, *supra* note 405, at 402.

413. DUNLOP REPORT, *supra* note 406, at 31–32; Due Process Protocol, *supra* note 405, at 403.

414. DUNLOP REPORT, *supra* note 406, at 31–32; *see also* Due Process Protocol, *supra* note 405, at 404 (recommending that arbitrators write opinions summarizing the issues in the dispute and their resolution).

415. Estreicher, *Predispute Agreements*, *supra* note 4, at 1349.

416. *Id.*

These guidelines represent the conventional (and largely consensual) wisdom on arbitral due process, but whether they go far enough to insure arbitral neutrality is ultimately an empirical question. So far, there has been no social scientific research to indicate whether observance of the suggested due process norms eliminates the repeat player effect.⁴¹⁷ For now, the guidelines at least provide a useful starting point for judicial scrutiny of arbitration agreements.⁴¹⁸ Courts should use them to develop specific due process standards⁴¹⁹ for the arbitration of statutory employment discrimination claims, and should enforce those standards by refusing to compel arbitration when the standards are not met.⁴²⁰

CONCLUSION

As *Brown* and *Waffle House* vividly illustrate, federal courts currently treat agreements to arbitrate statutory discrimination claims very differently depending on whether the employees who sign those agreements are unionized or not. While the disparity in treatment between unionized and nonunionized employees can be explained by

417. Bingham, *supra* note 21, at 244 (noting that extant research on the repeat player effect in employment arbitration does not reflect the possible influence of the Due Process Protocol). Bingham calls for further research to study the effects of arbitrator compliance with due process norms on the outcomes of arbitration proceedings. *Id.* If such research tended to show that compliance with due process norms does not reduce the repeat player effect, that result would provide a strong reason for Congress to take corrective action.

418. See Washington, *supra* note 292, at 880 (suggesting that courts use guidelines like the Due Process Protocol as a foundation for meaningful procedural scrutiny of the fairness of the arbitral process).

Some authorities have suggested that more searching judicial review is also essential to ensuring that arbitration proceedings do not compromise substantive rights. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997) (stating that arbitration would compromise substantive rights unless judicial review under the "manifest disregard of the law" standard is "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law"); DUNLOP REPORT, *supra* note 406, at 31–32 (recommending "sufficient judicial review to ensure that the result is consistent with the governing laws"); Malin, *supra* note 407, at 104–05 (arguing that the policies behind federal employment discrimination statutes require that an arbitrator's interpretations of law be subject to de novo judicial review); Washington, *supra* note 292, at 883 (arguing that judges should overturn arbitration awards if they are "clearly erroneous" or "clearly repugnant" to the statute's purposes). Discussion of the proper standard of judicial review for arbitration proceedings involving statutory discrimination claims is beyond the scope of this Note.

419. Washington emphasizes that due process standards governing arbitration must be clear enough to "provide notice and guidance to arbitrators, employers, and employees." Washington, *supra* note 292, at 882.

420. The opinion in *Cole* well illustrates the sort of judicial scrutiny that would help to protect the statutory rights of employees. See *Cole*, 105 F.3d at 1479–88.

and is consistent with the Supreme Court's evolving arbitration jurisprudence, it cannot be justified. Current judicial practice may adequately protect those employees who have effectively organized to protect their interests, but leaves nonunionized employees dangerously exposed to employer abuses of the sort chronicled in *Waffle House*. Courts should move to rectify this situation by extending *Wright's* "clear and unmistakable" standard to individual employment contracts. They should also adopt and enforce due process standards governing the arbitration of statutory employment discrimination claims. These steps are necessary to offer nonunionized employees a greater measure of protection against the possibility that the loss of a public forum will carry with it the loss of substantive rights.

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