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# Privatizing Justice—But By How Much?

## Questions *Gilmer* Did Not Answer\*

MARTIN H. MALIN\*\*

### I. INTRODUCTION

A decade has passed since the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>1</sup> that a pre-dispute agreement to arbitrate contained in a securities exchange registration statement will be enforced with respect to claims arising under the Age Discrimination in Employment Act (ADEA).<sup>2</sup> Prior to *Gilmer*, every circuit court of appeals to consider the issue, except for one, had held that pre-dispute agreements to arbitrate statutory employment claims were unenforceable.<sup>3</sup> These courts relied on a series of Supreme Court decisions which consistently held that employees covered by collective bargaining agreements had rights to litigate their statutory claims in court, independent of the collective agreements' grievance and arbitration procedures.<sup>4</sup> The Supreme Court, however, declared such precedents' "mistrust of the arbitral process . . . undermined by our recent arbitration decisions."<sup>5</sup> The

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<sup>1</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *see also* Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 78–83 (1996).

<sup>2</sup> 29 U.S.C. §§ 621–633 (1994).

<sup>3</sup> *See* *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990), *vacated by* 500 U.S. 930 (1991); *Utleigh v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Mgmt. Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Johnson v. Univ. of Wisconsin-Milwaukee*, 783 F.2d 591 (7th Cir. 1986). The sole authority holding a pre-dispute agreement to arbitrate a statutory employment claim enforceable was the Fourth Circuit's opinion in *Gilmer*. *See Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

<sup>4</sup> *McDonald v. City of W. Branch*, 466 U.S. 282 (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

<sup>5</sup> *Gilmer*, 500 U.S. at 34 n.5.

recent decisions to which the Court referred enforced commercial pre-dispute agreements to arbitrate statutory claims.<sup>6</sup> The Court followed its prior commercial arbitration decisions and held that a pre-dispute agreement to arbitrate was enforceable with respect to a claim under the ADEA.

Although *Gilmer*'s holding was narrow, the Court spoke broadly of a strong federal policy in favor of arbitration and made it clear that a party opposed to arbitrating a statutory claim has a heavy burden to demonstrate that Congress intended to preclude arbitration.<sup>7</sup> The strength of the Court's endorsement of arbitration seemed to invite employers to mandate agreements to arbitrate statutory claims as a condition of employment. As employers have taken the Court up on its apparent invitation, the controversy over mandatory arbitration has swirled. Scholarly commentary has divided over whether mandatory arbitration is capable of protecting employee statutory rights.<sup>8</sup> Professor

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<sup>6</sup> See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>7</sup> *Gilmer*, 500 U.S. at 25–27. The full reach of *Gilmer* remains to be seen. The Fourth Circuit read *Gilmer* as impliedly overruling *Gardner-Denver* and its progeny. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996). In *Wright v. Universal Maritime Services Corp.*, 525 U.S. 70, 76 (1998), the Supreme Court acknowledged, “there is obviously some tension” between *Gardner-Denver* and *Gilmer*, but chose not to resolve it. Instead, the Court held that if a collective bargaining agreement can waive an employee's right to litigate a statutory employment claim, such waiver must be “clear and unmistakable.” *Id.* at 80.

Another issue that the Court did not decide in *Gilmer* is how broadly to interpret the Federal Arbitration Act's exclusion of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (1994 & Supp. 2000). All circuits that considered the issue, except the Ninth, construed the exclusion narrowly, applying it only to employees who actually transport goods or people in interstate commerce. See, e.g., *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1997), *cert. denied*, 528 U.S. 811 (1999); *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998); *Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215 (5th Cir. 1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995). The Ninth Circuit interpreted the provision to exclude all employment contracts from the FAA. *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999). The Supreme Court recently resolved the split, siding with the majority view. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001).

<sup>8</sup> See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Robert N. Covington, *Employment Arbitration after Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345 (1998); Samuel Estreicher, *Predispute Agreements to*

Covington has envisioned arbitration evolving into an American system of labor courts.<sup>9</sup> Professor Stone has condemned mandatory arbitration as the “yellow dog contract of the 1990s.”<sup>10</sup>

Many of the institutional players in employment arbitrations have attempted to deal with the fallout. Arbitrator-appointing bodies such as JAMS,<sup>11</sup> the American Arbitration Association (AAA),<sup>12</sup> and the Center for Public Resources (CPR)<sup>13</sup> have developed rules for employment arbitration in an effort to ensure disputants of basic due process. A task force comprised of representatives of the American Bar Association, National Employment Lawyers’ Association (NELA), AAA, National Academy of Arbitrators, Federal Mediation and Conciliation Service, and the Society of Professionals in Dispute Resolution has developed a Due Process Protocol for the arbitration of statutory employment claims.<sup>14</sup> Although such private efforts are commendable, we cannot rely on private bodies exclusively to deal with the fallout from *Gilmer*. For example, in *Great Western Mortgage Corp. v. Peacock*,<sup>15</sup> the agreement required employees to arbitrate all claims in proceedings administered by JAMS. JAMS refused to administer the case because the agreement also shortened the limitations period for filing a claim and restricted the remedies that the arbitrator was authorized to award.<sup>16</sup> Nevertheless, the court enforced the promise to arbitrate.<sup>17</sup>

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*Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMP. POL’Y J. 221 (1997); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Disputes*, 1995 U. ILL. L. REV. 635; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

<sup>9</sup> See Covington, *supra* note 8.

<sup>10</sup> Stone, *supra* note 8.

<sup>11</sup> JAMS, EMPLOYMENT ARBITRATION RULES AND PROCEDURES, at [http://www.jamsadr.com/employment\\_arb.asp](http://www.jamsadr.com/employment_arb.asp) (visited Nov. 1, 2000).

<sup>12</sup> AM. ARBITRATION ASS’N, NATIONAL RULES FOR RESOLUTION OF EMPLOYMENT DISPUTES, at [http://www.adr.org/rules/employment/employment\\_rules.html](http://www.adr.org/rules/employment/employment_rules.html) (visited Oct. 16, 2000) [hereinafter AAA RULES].

<sup>13</sup> CPR PROGRAM TO RESOLVE EMPLOYMENT DISPUTES, at [http://www.cpradr.org/empdispu\\_arbitrat.htm](http://www.cpradr.org/empdispu_arbitrat.htm) (visited Oct. 15, 2000).

<sup>14</sup> TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP, *reprinted in* DISP. RESOL. J., Oct.–Dec. 1995, at 37–39, available at <http://www.adr.org/education/education/protocol.html>.

<sup>15</sup> *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997).

<sup>16</sup> *Id.* at 232 n.10.

<sup>17</sup> *Id.* at 232–33.

Inevitably, lower courts have had to deal with the fallout from *Gilmer*. Courts have had to police the fairness of employer-promulgated arbitration systems.<sup>18</sup> They have had to decide what effect, if any, an employee's agreement to arbitrate statutory claims has on administrative enforcement agencies such as the EEOC.<sup>19</sup> They have had to consider their appropriate roles in reviewing arbitration awards in statutory employment cases.<sup>20</sup>

This article proposes a systematic approach to such *Gilmer* fallout issues. Part II develops the approach. It details the criticisms of mandatory arbitration and finds that these criticisms may also be leveled at arbitration undertaken pursuant to voluntary post-dispute agreements. However, Part II finds a general consensus that mandatory arbitration, which is to be policed carefully or condemned, is qualitatively different from voluntary arbitration, which generally is hailed. Part II suggests that a key difference between mandatory and voluntary arbitration, from the perspective of public policy, is that only the former poses a significant risk of allowing employers to contract out from under the coverage of employment statutes. Part II also suggests that *Gilmer* fallout issues can best be dealt with by asking the question, "Does the position taken in a given matter amount to a contracting out of the obligation to comply with employment statutes?"

Part III uses this systematic approach to analyze the most common due process issues posed by mandatory pre-dispute agreements to arbitrate: neutrality of the arbitral forum, discovery, limitations on remedies, shortened limitations periods, the cost of the proceeding, and mutuality of the obligation to arbitrate. Part IV employs the approach to resolve questions of the effect of mandatory arbitration on enforcement agencies such as the EEOC. Part V employs the approach to define the appropriate role of courts in reviewing arbitration awards. Part VI concludes.

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<sup>18</sup> See generally Martin H. Malin, *Policing Employer Promulgated Arbitration Systems*, 1 EMPLOYEE RTS. Q., Spring 2001, at 20.

<sup>19</sup> Compare EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001), and EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998) (both holding that EEOC may not recover monetary relief for individuals who were subject to pre-dispute agreements to arbitrate their statutory claims), with EEOC v. Northwest Airlines, Inc., 188 F.3d 695 (6th Cir. 1999), and EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999) (both holding that relief available to EEOC is not affected by employees' pre-dispute agreements to arbitrate).

<sup>20</sup> See, e.g., Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000); Dawahare v. Spencer, 210 F.3d 666 (6th Cir. 2000); DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818 (2d Cir. 1997).

## II. A SYSTEMATIC APPROACH TO THE FALLOUT FROM *GILMER*

The fallout from *Gilmer* has focused almost exclusively on arbitration mandated as a condition of employment. Lower courts dealing with the fallout have gone out of their way to note that their decisions are limited to pre-dispute agreements to arbitrate imposed by employers and do not encompass post-dispute voluntary ad hoc agreements to arbitrate.<sup>21</sup> The EEOC opposes mandatory arbitration, but endorses voluntary arbitration.<sup>22</sup> Similarly, the National Academy of Arbitrators' policy regarding arbitration of statutory employment claims distinguishes between mandatory arbitration, which it opposes, and voluntary arbitration, which it endorses.<sup>23</sup> Most tellingly, representatives of the plaintiffs' employment bar, which has steadfastly opposed mandatory arbitration, have distinguished it from voluntary arbitration. For example, the National Employee Rights Institute (NERI) has issued a statement opposing pre-dispute agreements to arbitrate but supporting employers who offer voluntary arbitration as one vehicle for resolving employment disputes.<sup>24</sup> Similarly, Paul Tobias, an icon of the plaintiffs' bar who founded NELA and NERI, stated the following at a meeting of the Association of American Law Schools:

First, I want to discuss voluntary arbitration after a dispute arises. The plaintiffs' bar favors giving employees the option of going to arbitration. We're all for it. After a dispute arises, the parties can get together, decide to go to AAA, and resolve the matter in arbitration. Arbitration is good for many cases. The employer can't get summary judgment in arbitration. It's usually cheaper and faster than court. The employee gets an absolute right to tell the story to a neutral party. Sometimes employees prefer arbitration to court. Voluntary arbitration—Yes! . . . I'm here to talk about mandatory arbitration of statutory claims set forth in the United States Code, passed by the Congress of the United States, and on that subject matter—mandatory arbitration—No! No question, no brainer—No!<sup>25</sup>

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<sup>21</sup> See, e.g., *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1199 (9th Cir. 1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1467 n.1 (D.C. Cir. 1997); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 760 n.7 (9th Cir. 1997).

<sup>22</sup> EEOC: *Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment* (1997), 8 Lab. Rel. Rep. (BNA) 405:7511 (July 7, 1997) [hereinafter *Mandatory Arbitration*].

<sup>23</sup> NAT'L ACADEMY OF ARBITRATORS, STATEMENT OF THE NAA ON INDIVIDUAL CONTRACTS OF EMPLOYMENT (May 21, 1997), at <http://www.naarb.org/guidelines.html>.

<sup>24</sup> See Nat'l Employee Rights Inst., *NERI's Position on Mandatory Arbitration of Employment Disputes*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 263 (1997) [hereinafter NERI].

<sup>25</sup> Paul Tobias, Remarks at the Proceedings of the 1997 Annual Meeting Association of American Law Schools Sections on Employment Discrimination Law and Alternative

Critics of mandatory arbitration have many powerful arguments. They decry the private nature of arbitration. Privately appointed arbitrators, they urge, should not be entrusted with interpreting and applying statutes that embody public justice values.<sup>26</sup> The arbitration proceeding itself and the resulting award are not public, further undermining enforcement of the statutes at issue.<sup>27</sup> The privatizing of dispute resolution, they contend, undermines development of the law through judicially determined precedents.<sup>28</sup>

Critics express concern that the arbitral forum will be biased toward employers.<sup>29</sup> They observe that employees are one-shot players while employers are repeat players. This may produce overt or subtle unconscious bias toward the only party who offers arbitrators the prospect of repeat business.<sup>30</sup> Of particular concern is the diminished likelihood that arbitrators, as opposed to juries, will make large awards of compensatory and punitive damages.<sup>31</sup>

Mandatory arbitration, critics contend, also provides for inadequate discovery. Because employers generally control the information that employees need to press their claims, the lack of adequate discovery is seen as a major advantage to employers and a major impediment to successful prosecution of meritorious claims.<sup>32</sup> Furthermore, because mandatory arbitration provides procedures that are less formal than those in litigation, it may not adequately protect against subtle racial or ethnic bias infecting the decision-making.<sup>33</sup>

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Dispute Resolution (Jan. 7, 1997), in 1 EMPLOYEE RTS. & EMP. POL'Y J. 269, 282–83 (1997).

<sup>26</sup> See, e.g., *Mandatory Arbitration*, *supra* note 22; Grodin, *supra* note 8, at 53; Stone, *supra* note 8, at 1046–47.

<sup>27</sup> See, e.g., Alleyne, *supra* note 8, at 429–31; Joseph D. Garrison, *Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights*, DISP. RESOL. J., Fall 1997, at 15, 18; Stone, *supra* note 8, at 1043.

<sup>28</sup> See, e.g., NERI, *supra* note 24, at 265; Stone, *supra* note 8, at 1043.

<sup>29</sup> See, e.g., Stone, *supra* note 8, at 1040.

<sup>30</sup> See, e.g., Alleyne, *supra* note 8, at 426; Grodin, *supra* note 8, at 43–44; Stone, *supra* note 8, at 1046 n.196.

<sup>31</sup> See, e.g., Alleyne, *supra* note 8, at 430; Grodin, *supra* note 8, at 50, 52; Stone, *supra* note 8, at 1047 n.197.

<sup>32</sup> See e.g., Joseph D. Garrison, *Discovery in Employment Arbitration*, DISP. RESOL. J., Oct.–Dec. 1995, at 15.

<sup>33</sup> See Alleyne, *supra* note 8, at 428–29. *But see* Dennis O. Lynch, *Conceptualizing Forum Selection as a "Public Good": A Response to Professor Stone*, 73 DENV. U. L. REV. 1071, 1074 (1996) (suggesting that employees may find the formal atmosphere of a courtroom intimidating, whereas "[a] skilled arbitrator can make the setting for the employee's testimony more relaxed and less formal with everyone at a table together and fewer objections interrupting the presentation of testimony.").

The concerns raised with mandatory arbitration are also present in arbitration pursuant to voluntary post-dispute agreements. The proceeding remains private, with a decision that will not be precedential or develop the public law. The proceeding remains informal and discovery remains limited. The employee remains a one-shot user of the arbitrator's services while the employer remains a potential repeat player. The concerns raised by the critics of mandatory arbitration are concerns with arbitration in general. The differences between mandatory arbitration pursuant to pre-dispute agreements and voluntary arbitration pursuant to post-dispute agreements is, at most, a matter of degree.<sup>34</sup> Why then is the controversy limited to mandatory arbitration?

The short answer is that a post-dispute agreement to arbitrate is a method of settling the dispute.<sup>35</sup> Although a few academics have cautioned against the rush to settle,<sup>36</sup> the rest of the world has embraced it. The short answer, however, is not satisfactory. It does not tell us why a post-dispute settlement is different from a pre-dispute agreement to arbitrate. Indeed, the *Gilmer* Court analogized mandatory arbitration to post-dispute settlement,<sup>37</sup> and others have argued that if we allow post-dispute agreements to arbitrate, there is no reason to disallow pre-dispute agreements.<sup>38</sup>

The longer, more satisfactory, answer begins with an analysis of the different nature of pre- and post-dispute agreements to arbitrate. Post-dispute agreements to arbitrate carry with them a very strong presumption that they were arrived at after arms length bargaining and a determination by each party that the agreement is in its best interests. The same can rarely, if ever, be said of pre-dispute agreements to arbitrate. Although courts are developing precedent that distinguishes between mandatory arbitration agreements supported by consideration and those that are unenforceable,<sup>39</sup> the law is focused on the presence of a bargained for exchange in legal form only, rather than in empirical reality.

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<sup>34</sup> For example, Professor Grodin has suggested that the impact of post-dispute agreements to arbitrate on the development of the law is likely to be less substantial than that of mandatory arbitration. Grodin, *supra* note 8, at 29. Similarly, NERI suggests that in negotiating a post-dispute agreement to arbitrate, an employee may use the threat of litigation as leverage to ensure adequate discovery. NERI, *supra* note 24, at 264.

<sup>35</sup> See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 728 (1999).

<sup>36</sup> See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

<sup>37</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991).

<sup>38</sup> See, e.g., Estreicher, *supra* note 8, at 1353–54 (1997).

<sup>39</sup> See *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Smith v. Chrysler Fin. Corp.*, 101 F. Supp. 2d 534 (E.D. Mich. 2000).

The empirical reality is that mandatory arbitration does not result from a bargained for exchange. In some cases, such as *Gilmer*, it is impossible for the parties to bargain. *Gilmer* was required to register with the New York Stock Exchange to be able to perform his job. The New York Stock Exchange required him to agree to arbitrate all claims against his employer as a condition of registration. Thus, even if *Gilmer's* employer had wanted to waive the mandatory arbitration agreement, it lacked the power to do so.

In other cases, where the arbitration requirement is not imposed by an outside party, there is no real bargaining involved. When an employer tells an incumbent employee, particularly a long-term employee, to agree to arbitrate all future disputes or lose her job, the employee has absolutely no choice in the matter. There is nothing for the employee to bargain. Nevertheless, courts have enforced such agreements.<sup>40</sup> Job applicants and new hires may be thought to have more choice than established employees. However, invariably the agreement to arbitrate is presented in a systematic manner as part of the standard boilerplate—a manner designed to preclude questioning, much less bargaining over it.<sup>41</sup> An employee or job applicant who even notices the arbitration agreement is not likely to question it.

First, there is a problem of asymmetric information. The employee or job applicant is unable to assess the likelihood that she may end up in litigation with the employer. Indeed, if the employee believed that there was a significant probability that the employer would violate her statutory rights, she likely would look elsewhere for employment. The employer, on the other hand, can assess the probability that some employees, although not necessarily the employee at issue, will end up alleging that it violated the law. Thus, at the time of hire or

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<sup>40</sup> See, e.g., *Borg-Warner Protective Servs. Corp. v. Gottlieb*, 116 F.3d 1485 (9th Cir. 1997) (unpublished opinion, No. 95-56153, 1997 U.S. App. LEXIS 15516 (9th Cir. June 25, 1997)) (holding that an at-will employee's agreement to mandatory arbitration under threat of discharge was voluntary even though the employee needed the job); *Flynn v. Aerchem, Inc.*, 102 F. Supp. 2d 1055 (S.D. Ind. 2000) (enforcing mandatory arbitration agreement imposed on incumbent employee with threat of discharge); *Kreimer v. Delta Faucet Co.*, No. IP 99-C-1507 T/G, 2000 U.S. Dist. LEXIS 9610 (S.D. Ind. June 2, 2000) (enforcing mandatory arbitration agreement imposed on 20-year employee); *Lang v. Burlington N. R.R. Co.*, 835 F. Supp. 1104 (D. Minn. 1993) (enforcing mandatory arbitration agreement imposed on 16-year employee); cf. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1467 (D.C. Cir. 1997) (observing that successor employer imposed mandatory arbitration agreement on employees of predecessor as a condition of hire). But see *Standard Coffee Serv. Co. v. Babin*, 472 So.2d 124 (La. Ct. App. 1987) (pre-*Gilmer* decision voiding for duress modification to employment contract mandating arbitration where employee's agreement was obtained under threat of discharge).

<sup>41</sup> See, e.g., *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 228 (3d Cir. 1997).

application, the arbitration agreement has much more definite value to the employer than to the employee or applicant.<sup>42</sup>

Second, even if the employee or applicant realizes the potential significance of the agreement to arbitrate, concerns over signaling effects will inhibit bargaining over it. Employees and applicants will fear that voicing a desire to preserve the right to litigate will send a negative signal that may dampen the employer's enthusiasm for the hiring.<sup>43</sup>

Thus, it is clear that, except perhaps in the case of highly paid executives whose contracts are negotiated at arms length by each party's counsel, pre-dispute agreements to arbitrate are imposed unilaterally by employers. Indeed, to the extent that the arbitration system is a collective good, the need for uniformity requires that the system be imposed unilaterally by the employer with no room for negotiation.<sup>44</sup>

Employers who impose mandatory arbitration on their employees must believe that such arrangements work to their advantage. The stock market appears to agree.<sup>45</sup> Merely because mandatory arbitration advantages employers, however, does not mean it necessarily disadvantages employees. A common reason that employers cite for resorting to arbitration is to save money. Businesses view arbitration as less expensive than litigation and they use it outside the employment context as well.<sup>46</sup> Reduced costs do not have to be a zero-sum game, but may produce advantages for employees as well as employers.<sup>47</sup> Arbitration, as a faster, less expensive procedure, may enable employees to bring claims that would not be litigated because of the cost of going to court.<sup>48</sup> Furthermore, as noted by Mr. Tobias, summary judgment

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<sup>42</sup> See Grodin, *supra* note 8, at 28–29.

<sup>43</sup> See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protections in an At-Will World*, 83 CORNELL L. REV. 105, 118–19, 151 (1997).

<sup>44</sup> See Estreicher, *supra* note 8, at 1358–59.

<sup>45</sup> See Steven E. Abraham & Paul B. Voos, *The Ramifications of the Gilmer Decision for Firm Profitability*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 341 (2000).

<sup>46</sup> See David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133 (1998); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 31–32 (1998).

<sup>47</sup> See Maltby, *supra* note 46, at 55.

<sup>48</sup> See Roberto Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1051–52 (1996). Employer advocates routinely make this point. See, e.g., Catherine Hagen, Remarks at the Proceedings of the 1997 Annual Meeting Association of American Law Schools Sections on Employment Discrimination Law and Alternative Dispute Resolution (Jan. 7, 1997), in 1 EMPLOYEE RTS. & EMP. POL'Y J. 269, 278 (1997); Martin J. Oppenheimer & Cameron Johnstone, *Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall

generally is not available in arbitration.<sup>49</sup> Yet, summary judgment is a substantial impediment to employees litigating statutory claims.<sup>50</sup> Moreover, the quicker results that may be available in arbitration can increase the likelihood that reinstatement will be a workable remedy for wrongfully discharged employees.<sup>51</sup>

Nevertheless, because they completely control the arbitration systems, there is substantial reason to fear that employers will structure the systems to their advantage at the expense of disputing employees. The most blatant example of such action in the reported cases involves the arbitration system at issue in *Hooters of America, Inc. v. Phillips*.<sup>52</sup>

Phillips, like all other Hooters employees, agreed, as a condition of employment, to arbitrate all claims pursuant to the company's arbitration rules.<sup>53</sup> The rules required the employee to state the nature of her claim and the specific acts or omissions on which the claim was based and to provide a list of witnesses with a summary of the facts known to each. The rules imposed no similar requirements on the employer.<sup>54</sup> The rules provided for each party to select one arbitrator and for the party-appointed arbitrators to jointly select a third. However, the rules restricted the third arbitrator to those on a list completely controlled by Hooters.<sup>55</sup> Furthermore, the rules allowed Hooters to seek summary judgment, to record the hearing, and to sue to vacate the award if the arbitration panel exceeded its authority, but it gave no similar rights to the employee.<sup>56</sup> Lastly, the rules allowed the employer to amend them at any time without notice to the employee and allowed the company, but not the employee, to cancel the agreement to arbitrate by giving thirty days notice.<sup>57</sup>

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1997 at 19, 22. At least one plaintiff's lawyer has suggested that if many claims are diverted to arbitration, the plaintiff's bar will make up in volume what it may lose because of lower monetary awards in individual cases. Garrison, *supra* note 27, at 18.

<sup>49</sup> See *supra* note 24 and accompanying text.

<sup>50</sup> See Maltby, *supra* note 46, at 46 (noting that in 1994, 60% of federal court employment discrimination cases in which courts made definitive judgments were disposed of by pre-trial motion and employers won 98% of these cases); see also Garrison, *supra* note 27, at 18 ("In arbitration, the plaintiff does not face lengthy and delaying motion practice by the defendant.").

<sup>51</sup> See FitzGibbon, *supra* note 8, at 247-55; see also Garrison, *supra* note 27, at 18 ("[B]ecause arbitration awards generally cannot be reviewed, and are usually issued within six months to one year of the time the claim is filed, if the plaintiff receives an award, payment is virtually certain.").

<sup>52</sup> *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

<sup>53</sup> *Id.* at 936.

<sup>54</sup> *Id.* at 938.

<sup>55</sup> *Id.* at 938-39.

<sup>56</sup> *Id.* at 939.

<sup>57</sup> *Id.*

The court held that the agreement imposed on the company a duty to establish a fair and impartial arbitration system. The court characterized the system that Hooters established as “a sham system unworthy even of the name of arbitration.”<sup>58</sup> It concluded that Hooters had breached its duty and ordered the agreement to arbitrate rescinded.<sup>59</sup>

Arbitration systems need not be as one-sided as the Hooters system to provide systematic advantages to employers at the expense of employees. Reported cases involve employer-promulgated arbitration plans that set the time period for filing for arbitration shorter than the limitations period for filing suit under most employment statutes,<sup>60</sup> and that limit the remedies the arbitrator can order, excluding remedies available in court.<sup>61</sup> Employer drafted documents have provided that an arbitration agreement contained in an employee handbook is enforceable while the remainder of the handbook is not,<sup>62</sup> and provided that the employer gets the ultimate choice as to whether the employee’s claim will be heard in court or before an arbitrator.<sup>63</sup> Other employer plans have placed severe limitations on discovery or the length of the hearing and prohibit representation by counsel.<sup>64</sup>

Of course many of these same limitations might be agreed to in a post-dispute arbitration agreement. However, in such circumstances, they will have truly been bargained for and will apply only to that one case. For example, it may be a rational bargain for the parties to a particular dispute to agree to arbitrate and to exclude certain remedies, such as reinstatement or punitive damages, from the arbitrator’s authority. Such an agreement, like any other settlement, does not implicate the employer’s conduct vis-à-vis the rest of its workforce. The employer still faces the threat of litigation and exposure to the full remedial force of the employment statutes if it acts illegally toward its other employees. In contrast, an employer that unilaterally imposes on all of its employees an arbitration system that restricts the arbitrator’s remedial authority has contracted its way out of a significant portion of the statutory regulatory scheme. Employment statutes provide for punitive damages and attorney fees to deter

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<sup>58</sup> *Id.* at 940.

<sup>59</sup> *Id.*

<sup>60</sup> *See, e.g.,* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997); Miller v. Public Storage Mgmt., Inc., 121 F.3d 215 (5th Cir. 1997); Circuit City Stores, Inc., v. Shelton, No. 1:99-cv-561, 2000 U.S. Dist. LEXIS 7059 (W.D. Mich. May 16, 2000).

<sup>61</sup> *See, e.g.,* Brennan v. King, 139 F.3d 258 (1st Cir. 1998); *Peacock*, 110 F.3d at 222.

<sup>62</sup> *See* Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 832 (8th Cir. 1997).

<sup>63</sup> *See* Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997).

<sup>64</sup> *See* George Nicolau, Gilmer v. Interstate/Johnson Lane Corp.: *Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177, 183–84 (1998).

violations and to provide incentives for victims of employer violations to enforce their rights. An employer that, through a mandatory arbitration system, has contracted out of such remedies has removed itself from liability exposure that plays a crucial role in the statutory remedial scheme. Similarly, the remedy of reinstatement is provided not only to right a wrong to the individual plaintiff, but also to effectuate that statutory scheme by proclaiming to the workforce as a whole that illegal employer conduct will not succeed.<sup>65</sup> An employer who contracts out of such a remedy through its mandatory arbitration system contracts out of a significant component of statutory compliance.

The dangers that employer promulgated mandatory arbitration systems pose to statutory compliance are clearly demonstrated by the *Hooters* case. If Hooters had been able to enforce its employees' promises to use the Hooters system, employees would have brought their claims before biased arbitrators selected by and accountable to Hooters and they would have been forced to give Hooters a significant amount of information about their claims and litigation strategies while being left totally in the dark concerning Hooters' defenses. The decision to record and transcribe the hearing would have been left entirely up to Hooters. These rules were designed to ensure that Hooters won every case, regardless of the merits of the claim. However, just in case a successful claimant might find a hole in the system, Hooters retained the right to close the hole by amending the rules without notice. If Hooters' mandatory arbitration system had been enforced, Hooters effectively would never have had to worry about complying with any employment statutes at all.<sup>66</sup>

Thus, from an employment policy perspective, the principal difference between voluntary post-dispute agreements to arbitrate and mandatory pre-dispute agreements to arbitrate is that only the latter pose a risk of allowing an employer to contract out of the need to comply with the underlying employment statutes. Recognizing this difference provides a principled, systematic method for dealing with the fallout from *Gilmer*. Courts must police employer promulgated mandatory arbitration systems to ensure that they do not serve as vehicles for contracting out of compliance with employment statutes. The remainder of this article applies this approach to some common *Gilmer* fallout issues.

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<sup>65</sup> See FitzGibbon, *supra* note 8, at 251–52; Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REFORM 277, 316–17 (1983).

<sup>66</sup> The only compliance threat Hooters would have faced would have been the possibility of suit by a government enforcement agency such as the EEOC or the Department of Labor, depending on the statute at issue. These agencies, however, are able to litigate only a tiny fraction of the cases brought to their attention. Indeed, a major reason for creating private causes of action under most employment statutes is the inability of the enforcement agencies to compel compliance alone.

### III. DUE PROCESS AND MANDATORY ARBITRATION

The D.C. Circuit's decision in *Cole v. Burns International Security Services*<sup>67</sup> contains one of the most extensive and scholarly discussions of the minimum characteristics of an arbitration system necessary to provide an employee with a forum in which to vindicate effectively a statutory claim. The decision has received considerable attention not only for its thoroughness but also because its author, Chief Judge Harry Edwards, is a leading scholar in alternative dispute resolution and the law governing the workplace.<sup>68</sup> The court held that the arbitration system must provide for neutral arbitrators, "more than minimal discovery," a written award, and "all types of relief that would otherwise be available in court."<sup>69</sup> Moreover, the system must "not require employees to pay either unreasonable costs or any arbitrator's fees and expenses as a condition of access to the arbitration forum."<sup>70</sup> Courts have had to consider each of these elements that Judge Edwards itemized as critical to a fair procedure. Courts also have grappled with the degree of mutuality they will require of the arbitration process. The systematic approach developed in Part II provides an effective guide for resolving issues concerning each of these matters.<sup>71</sup>

#### A. *Neutrality of the Arbitral Forum*

An employer who imposes on its employees an agreement to arbitrate statutory claims in a forum that is biased toward the employer effectively has contracted out of the need to comply with the regulatory statutes. If the employer violates the statutes, it can count on the biased decision-maker to bail it out. Thus, there is uniform agreement that the arbitration forum must be neutral for employees to be able to vindicate their statutory claims.

The *Gilmer* Court, in compelling arbitration, observed that the New York Stock Exchange's arbitration rules provided for disclosure of background information on arbitrators, peremptory challenges and recusal for cause, and concluded that *Gilmer* had failed to show that these procedures were "inadequate to guard against potential bias."<sup>72</sup> In *Hooters*, the court placed primary reliance

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<sup>67</sup> *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

<sup>68</sup> Prior to assuming the bench, Judge Edwards was a highly respected labor and employment law professor at the University of Michigan and labor arbitrator.

<sup>69</sup> *Cole*, 105 F.3d at 1482.

<sup>70</sup> *Id.*

<sup>71</sup> *See supra* pp. 593–600.

<sup>72</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30–31 (1991).

on the employer's control of the identity of the non-party appointed arbitrator in denying enforcement to the employee's promise to arbitrate.<sup>73</sup>

Courts have been quick to condemn the use of non-neutral forums to resolve workplace disputes. For example, in *Chicago Teachers Union v. Hudson*,<sup>74</sup> employees, who were not union members but were in the bargaining unit that the union represented, were required to pay the union a fee covering their proportionate share of the costs of their representation. The union adopted a procedure whereby fee-payers could challenge the calculation of their fees before an arbitrator selected by the union.<sup>75</sup> The Supreme Court approved arbitration as an effective method of safeguarding the fee-payers' constitutional rights not to be charged for expenditures on political and ideological activities unrelated to collective bargaining, but held the union's procedure defective because the union controlled selection of the arbitrator.<sup>76</sup>

In *Graham v. Scissor-Tail, Inc.*,<sup>77</sup> the California Supreme Court denied enforcement to an arbitration provision in an agreement between a promoter and a musician who was a member of the American Federation of Musicians (AFM). The agreement, a form contract provided by the AFM, provided for arbitration of future disputes before the AFM.<sup>78</sup> The court held that the AFM could not be a neutral arbitrator in a dispute in which one of its members was a party.<sup>79</sup> As a remedy, the court remanded with instructions for the trial court to allow the parties an opportunity to agree on a different arbitrator or, in the absence of such an agreement, to appoint a neutral arbitrator.<sup>80</sup> Although *Graham* did not appear to involve an employment relationship, did not involve statutory claims and was decided prior to *Gilmer*, the California Supreme Court has since indicated that *Graham* will apply to post-*Gilmer* employment arbitrations.<sup>81</sup>

Single party control over the appointment of the arbitrator is not controversial. It is uniformly condemned.<sup>82</sup> Far more problematic are concerns raised by allegations of covert systematic bias.

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<sup>73</sup> *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999).

<sup>74</sup> *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

<sup>75</sup> *Id.* at 296.

<sup>76</sup> *Id.* at 310.

<sup>77</sup> *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981).

<sup>78</sup> *Id.* at 168.

<sup>79</sup> *Id.* at 173-77.

<sup>80</sup> *Id.* at 177.

<sup>81</sup> See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 682 (Cal. 2000). The court in *Graham* relied on *In re Cross and Brown Co.*, 167 N.Y.S.2d 573 (App. Div. 1957), an employment case in which the court refused to compel an employee to arbitrate his case before the employer. *Id.*

<sup>82</sup> Nevertheless, one survey found that 15% of responding employers who had

Most controversy concerning covert or systematic arbitral bias focuses on the repeat player effect. These concerns derive from differences between labor arbitration conducted pursuant to collective bargaining agreements and employment arbitration conducted pursuant to employer-imposed arbitration agreements. In labor arbitration, the union and employer jointly select the arbitrator. Both the union and the employer are likely repeat players in the arbitration system. Consequently, each balances the other, ensuring that the arbitrator selected is not likely to be biased toward either party. If either party perceives an arbitrator as favoring the other party, it will strike that arbitrator from consideration for future appointments. Labor arbitrators realize that any attempt to curry favor with one party will short circuit their careers. Experienced arbitrators recognize that the only route to long-term success, known in the practice as “acceptability,” is to decide cases on their merits, fairly, impartially and professionally. For example, Arnold Zack, a highly respected arbitrator, has advised the following:

[A]n arbitrator should decide every case as if it is his last one. . . . If an arbitrator is concerned with the parties’ reactions to his rulings, he will not survive. An arbitrator must adhere to his own reasoning and judgment and establish his reputation on that.<sup>83</sup>

More than a decade before *Gilmer*, Professor Julius Getman questioned whether the self-regulating aspects of labor arbitration could successfully be imported to employment arbitration where the employer is the only party likely to be a repeat player.<sup>84</sup> This imbalance is one of the most commonly cited criticisms of employment arbitration.

The degree, if any, to which the imbalance in repeat players may bias employment arbitration systems is an empirical as well as theoretical issue. Professor Lisa Bingham’s work is the most thorough empirical research into the repeat player effect in employment arbitration. Professor Bingham’s first study examined a sample of employment arbitrations conducted in 1992 under AAA’s

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employment arbitration systems unilaterally selected the arbitrator. Mei L. Bickner et al., *Developments in Employment Arbitration*, DISP. RESOL. J., Jan. 1997 at 8, 80.

<sup>83</sup> Arnold Zack, *Decision-Making*, in LABOR ARBITRATOR DEVELOPMENT: A HANDBOOK 111, 113 (Christopher A. Barreca et al., eds. 1983). Indeed, in labor arbitration, it is the mutual expectations of employer and union, rather than the individual desires of one particular party, that provide the primary constraint on arbitral decision-making. See 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, 1198–99 (1993).

<sup>84</sup> Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 916 (1979).

Commercial Arbitration Rules. Employees in this sample tended to be highly compensated managers and executives. Professor Bingham found that employees had a higher win rate and recovered a larger percentage of the amounts they demanded in cases they initiated than employers experienced in cases they initiated.<sup>85</sup> The study found no pro-employer bias.<sup>86</sup>

A second study that Professor Bingham conducted focused on a sample of cases conducted in 1993 and 1994 under AAA's Commercial Rules and its new Employment Disputes Rules.<sup>87</sup> The study compared outcomes of employee claims against employers who used arbitration once versus outcomes of claims against employers who used arbitration more than once (Bingham's definition of repeat players). She found that employees won with significantly less frequency when they arbitrated against repeat player employers than when they arbitrated against non-repeat players, and employees recovered a significantly smaller percentage of the amounts they demanded against repeat players than non-repeat players.<sup>88</sup>

The 1993–1994 AAA Bingham study documented the existence of a repeat player effect. However, it raised many questions concerning the causes of that effect and its implications for employment arbitration policy. Professor Bingham found that white collar plaintiffs won significantly more often and recovered a significantly greater percentage of the amount demanded than blue collar or pink collar plaintiffs.<sup>89</sup> White collar plaintiffs were also more likely to be arbitrating under the Commercial Rules and under specific contracts and more likely to be represented by counsel, whereas blue and pink collar plaintiffs were more likely to arbitrate under the Employment Rules and under employee handbooks or manuals and to be unrepresented.<sup>90</sup> Repeat player employers were found more frequently to be arbitrating under employee handbooks and under the Employment Rules.<sup>91</sup> Thus, it was not clear whether the repeat player effect reflected arbitral bias or differences in resources of the employee plaintiffs.<sup>92</sup>

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<sup>85</sup> Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369, 376–78 (1995).

<sup>86</sup> *Id.*

<sup>87</sup> Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997).

<sup>88</sup> *Id.* at 208–12.

<sup>89</sup> *Id.* at 213.

<sup>90</sup> *Id.* at 212–14.

<sup>91</sup> *Id.*

<sup>92</sup> See *id.* at 212. Professor Bingham herself raised these and other possible explanations for the results. *Id.* at 213.

Additionally, the study covered arbitration awards rendered prior to the adoption of the Due Process Protocol. The effects, if any, of the Protocol must be evaluated in future research.<sup>93</sup>

A subsequent study by Professor Bingham examined a sample of awards decided under AAA Employment Rules from 1993 through 1995.<sup>94</sup> She again found that employees lost with significantly greater frequency when arbitrating against a repeat-player employer.<sup>95</sup> She also found that employees lost with significantly greater frequency when arbitrating against an employer who was a repeat player with the same arbitrator than when arbitrating against an employer who had not previously used the arbitrator handling the claim.<sup>96</sup> However, she also found that these results correlated with the basis for the arbitration.<sup>97</sup> Repeat player employers were more likely to be arbitrating under personnel manuals than under individual employment contracts and white collar employees were more likely to be arbitrating under individual contracts.<sup>98</sup> Indeed, Professor Bingham also found that among arbitrations occurring pursuant to personnel manuals, there was no repeat player effect.<sup>99</sup> The case frequency, however, was too low to enable her to apply standard statistical tests. Finally, it must be noted that this study also was confined to cases decided before the Protocol was adopted.<sup>100</sup>

Professor Bingham's studies are cause for concern about the possibility of covert systematic bias due to the repeat player effect. However, they are not cause for uniform condemnation of employment arbitration as enabling employers to contract out of the employment statutory regulatory schemes. The repeat player effects that she found may reflect the greater resources available to employees who arbitrated under individual contracts and were unlikely to arbitrate against repeat player employers, compared to employees who arbitrated under personnel manuals and were more likely to arbitrate against repeat players. Professor Bingham's work also focused on cases decided before the Due Process Protocol. The Protocol and other factors may provide self-regulatory measures that will police against covert bias due to the presence of repeat player employers.

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<sup>93</sup> See *id.* at 214–15.

<sup>94</sup> Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Awards*, 29 MCGEORGE L. REV. 223, 232–37 (1998).

<sup>95</sup> *Id.* at 238–39.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 239.

<sup>100</sup> *Id.* at 223.

Judge Edwards, among others, has suggested several sources of constraints that will protect against systematic covert bias among employment arbitrators: adherence to professional ethical standards, policing by the plaintiffs' bar, and policing by arbitration-appointing agencies.<sup>101</sup> Courts should police employer promulgated arbitration systems in ways that support each of these constraints as protection against covert systematic bias.

Thus, courts should inquire whether the arbitration system requires that arbitrators adhere to a recognized professional code of ethics that mandates neutrality. Courts also should facilitate the development of the plaintiffs' bar as an institutional repeat player balancing employer repeat players. The importance of the plaintiffs' bar cannot be overstated.<sup>102</sup> In labor arbitration, small employers are repeat players to a much lesser extent than the unions against whom they arbitrate. Nevertheless, the lawyers for small employers are major repeat players and balance the repeat player influence of the unions. Similarly, in employment arbitration, although the individual employees will not be repeat players, their lawyers will be and may balance the repeat player influence of employers.

The impact of the plaintiffs' bar already has been felt in policing the fairness of employer promulgated arbitration systems. As Professor Corrada has pointed out, AAA and JAMS adopted policies to ensure that arbitrations they administer meet minimal due process standards at a time that they were facing a NELA threatened boycott of their services.<sup>103</sup>

A major service that NELA and other employee advocacy organizations can provide is to collect information, including prior awards, on employment arbitrators. These organizations can provide such information as a benefit to members and, for a fee, provide it to nonmembers. To facilitate the establishment of such institutional memory on the plaintiff side, courts should strike down any provision in an employer's arbitration system that purports to prohibit employees and their lawyers from disclosing information about the arbitration, including copies of the award. Of course, courts should strike down any arbitration system that denies employees their right to counsel.

To further facilitate the ability of counsel to offset any repeat player bias, courts should require arbitrators to disclose all prior business with the parties and their lawyers.<sup>104</sup> Upon request, arbitrators should be required to furnish copies

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<sup>101</sup> *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997).

<sup>102</sup> See *Lynch*, *supra* note 33, at 1073 ("It is clear that a specialized bar that regularly represents employees in the protection of statutory rights is critical to the fairness of a New Private Law in the labor law field.").

<sup>103</sup> Corrada, *supra* note 48, at 1068.

<sup>104</sup> AAA Rules already require disclosure of prior business with a party or the party's representative. AAA RULES, *supra* note 12, at R. 11(b).

of awards rendered in such prior cases.<sup>105</sup> A major limitation of such disclosures derives from when they are made, *i.e.*, after the arbitrator has been selected. Therefore, courts should scrutinize closely any arbitrator's decision following such disclosures to deny a request for recusal.

Courts, however, cannot be relied on to do the lion's share of policing against covert bias. They can provide standards governing arbitral selection procedures and arbitral recusal. However, courts typically will get involved only after an arbitrator has issued an award. Excessive reliance on judicial policing would undermine the finality of arbitration awards and, thereby, undermine the savings in time and expense that are the major advantages of arbitration. Therefore, most policing in the early stages of an arbitration must be performed by the arbitrator-appointing agencies. These agencies have an incentive to police carefully because if they fail to do so they could see an excessive number of awards they administer judicially vacated.<sup>106</sup> The role of arbitration-appointing agencies is extremely important and often overlooked as an area for judicial policing. It is discussed later in this section.

It is quite likely that a combination of external constraints (policing by courts, appointing agencies, and the plaintiffs' bar) and internal constraints (adherence to codes of ethics and professional standards) will neutralize any covert bias on liability issues that might otherwise be induced by the presence of the employer as sole repeat player in employment arbitration. Employment arbitrators who slant their liability findings toward one side or the other are likely in properly policed systems to meet the same fate as labor arbitrators who do the same. In one area, however, the repeat player effect is likely to affect the outcomes in employment arbitrations.

Outlier jury awards in employment litigation make the headlines. Employers notice them and react accordingly.<sup>107</sup> Unlike arbitrators, juries need not worry about repeat business. Outlier arbitration awards also will gain notoriety. Employers will notice and will ensure that the authors of those awards are not

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<sup>105</sup> When the AAA provides parties with a panel of arbitrators, it also provides, to the extent possible, names of parties or their representatives in recent cases decided by the arbitrators listed on that panel. *Id.*

<sup>106</sup> See Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 490 (1997) (suggesting that where an early challenge is made to the arbitrator-appointing agency, the agency will recognize that the preferred and more economical course of conduct is to have the arbitrator step aside).

<sup>107</sup> See JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR MARKET RESPONSES TO EMPLOYER LIABILITY (1992); JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION (1988).

selected for future cases.<sup>108</sup> Employer lawyers see the need to maintain future acceptability as a significant brake on outlier arbitration damage awards.<sup>109</sup>

In labor arbitration, where the repeat players are balanced, monetary awards are quite modest.<sup>110</sup> Consequential damages, punitive damages, and interest are rarely awarded.<sup>111</sup> Similarly, the limited empirical evidence available suggests that monetary remedies in employment arbitration are likely to be considerably lower than those awarded in litigation.<sup>112</sup>

If employment arbitration leads to the death of outlier monetary awards, should we mourn their passing? At first blush we might be tempted to conclude that employers by contracting out of exposure to outlier monetary awards are contracting out of a significant incentive for statutory compliance. Further scrutiny, however, suggests that this is not necessarily the case.

Obsessions with outlier monetary awards distort the picture of typical actual recoveries. Professor Clyde Summers, after analyzing data from studies of wrongful discharge litigation in California, found that there was a large disparity in recovery among litigants.<sup>113</sup> Even for litigants who received high jury verdicts, post-trial appeals and settlements substantially reduced final payments, and attorney contingency fees and reimbursement of litigation costs reduced the employee's net recovery even further.<sup>114</sup> Professor Summers found that most wrongfully discharged employees received modest or inadequate awards, often less than half their economic losses, and they had to wait three to five years after their discharges for any recovery.<sup>115</sup> He further found that the wide disparity in

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<sup>108</sup> See Maura Dolan, *Courts Question Rules Baring Suits by Workers*, L.A. TIMES, Aug. 23, 2000, at A-1 (reporting that Los Angeles employment arbitrator Stefan Mason never saw another case after awarding an age discrimination plaintiff \$1.7 million, including \$700,000 in punitive damages).

<sup>109</sup> See Paul Salvatore, *Alternative Dispute Resolution in Employment Law: The Pros, the Cons, and the How*, in ALTERNATIVE DISPUTE RESOLUTION [ADR]: HOW TO USE IT TO YOUR ADVANTAGE, at 537, 543 (ALI-ABA Course of Study Materials, Dec. 15, 1994) ("[A]rbitrators are much more hesitant to impose punitive or emotional distress damages; arbitrators who routinely grant such damages risk becoming unacceptable as 'neutral' third parties.").

<sup>110</sup> Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 527 (1992) (observing that labor arbitration remedies usually are limited to orders of future compliance and compensation for lost wages and benefits).

<sup>111</sup> See, MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 436-38, 450-60 (2d ed. 1991).

<sup>112</sup> See Maltby, *supra* note 46, at 46-48 (collecting studies).

<sup>113</sup> Summers, *supra* note 110, at 465.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 466.

awards bore little resemblance to the plaintiffs' economic losses.<sup>116</sup> He concluded that the litigation system resulted in "a lottery in which many receive nothing, most receive less than their economic loss, while a lucky few win the jackpot."<sup>117</sup>

Nevertheless, the fear of losing such a lottery might induce employers to comply with the law. There is good reason, however, to think that this is not so. Employer responses to the litigation lottery frequently take the form of "suit[ing] up in 'legal armourplate' to defend."<sup>118</sup> Employers "bulletproof their workplaces," creating objective procedures that leave detailed paper trails designed more to reduce liability exposure than ensure statutory compliance.<sup>119</sup> Although such tactics may actually mask discrimination, they feed an increasing judicial appetite to grant summary judgment,<sup>120</sup> an appetite stimulated by increasing judicial distrust of juries brought on, in part, by outlier jury awards.

Arbitration, on the other hand, eliminates the motion for summary judgment. By being faster and less expensive, arbitration may be a more accessible forum for employees of modest means with modest claims.<sup>121</sup> Although awards are lower, the available evidence suggests that aggrieved employees obtain a recovery much more frequently in arbitration systems providing fair procedures than in litigation.<sup>122</sup> More frequent employee recoveries may result in greater employer compliance than occasional sensational jury awards. As Professor Summers has suggested, "Deterrence is better achieved by increasing the percentage of violators held liable than by increasing the penalty on a few unlucky ones."<sup>123</sup>

As discussed above, arbitrator-appointing agencies will play a key role in policing employment arbitration to ensure that it does not become a tool for employers to evade their obligations to comply with regulatory statutes. Although most discussion of the repeat player imbalance has focused on its effect on individual arbitrators, the imbalance can have a potentially greater effect on the arbitrator-appointing agency. An employee's counsel will be involved in

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 469–70.

<sup>119</sup> See Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1 (1999); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959 (1999).

<sup>120</sup> See Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141 (2000).

<sup>121</sup> See Corrada, *supra* note 48, at 1051–52, 1069.

<sup>122</sup> See Maltby, *supra* note 46, at 45–51.

<sup>123</sup> Summers, *supra* note 110, at 536.

selecting the individual arbitrator and can strike any arbitrator perceived as favoring employers. However, the employer unilaterally selects the arbitrator-appointing agency when it designs the arbitration system. An employer who mandates arbitration under AAA Rules, for example, has unilaterally selected the AAA as its arbitrator-appointing agency.

The enormous importance of the identity and impartiality of the arbitrator-appointing agency is obvious. Therefore, it is surprising that it has received almost no attention from the courts. On rare occasions when courts approach the subject, they tend to defer to the credibility of established arbitration service providers such as AAA<sup>124</sup> or the securities exchanges. For example, in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,<sup>125</sup> the First Circuit reversed a district court holding that the New York Stock Exchange's (NYSE) arbitration system was structurally biased against employees. The district court had based its conclusion on Merrill Lynch's membership in the NYSE and on the NYSE's being governed by its member firms. The First Circuit, however, found that the majority of NYSE board members were not securities industry representatives and that NYSE regulations, including its arbitration procedures, were subject to oversight by the Securities and Exchange Commission. The court observed that "[r]ather than being controlled by the securities industry, the NYSE plays a significant role in monitoring and disciplining exchange members for non-compliance with its rules."<sup>126</sup> Furthermore, the court noted that, in employment disputes, a majority of the arbitration panel could not come from the industry and persons with industry links were prohibited from serving as public arbitrators. The NYSE's rules also provided for disclosure of arbitrator backgrounds, one peremptory challenge and unlimited challenges for cause. The court concluded that the NYSE arbitration procedures contained sufficient safeguards against bias in the arbitration panel.

On the other hand, there has been judicial skepticism with respect to newcomers. For example, in *Floss v. Ryan's Family Steak Houses, Inc.*,<sup>127</sup> the Sixth Circuit, in dicta, questioned the neutrality of an arbitration forum in light of the relationship between the employer and the arbitration services provider, Employment Dispute Services, Inc. The court wrote the following:

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<sup>124</sup> For example, in union security fee cases, courts deferred to AAA's reputation for integrity and approved procedures whereby AAA unilaterally selected the arbitrator. See, e.g., *Damiano v. Matish*, 830 F.2d 1363, 1371-72 (6th Cir. 1987); *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987).

<sup>125</sup> *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999).

<sup>126</sup> *Id.* at 15.

<sup>127</sup> *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000).

charges with the Board as a condition of employment.<sup>61</sup> As such, the General Counsel found that the agreement deterred employees from seeking to file charges and thus constituted “an open attack on an employee’s right to seek access to the Board . . . .”<sup>62</sup> The General Counsel also noted that the NLRA “gives the Board the authority to prevent or remedy unfair labor practices, regardless of any other dispute resolution mechanisms that may be available.”<sup>63</sup> Then, in an apparent attempt to reconcile its arguments with the Board’s frequent deferral to the grievance and arbitration procedures in the union setting, the General Counsel concluded that such use of its discretionary authority would be the “antithesis of the purpose of the Employer’s attempt . . . to preclude the Board from exercising its jurisdiction in any manner.”<sup>64</sup>

Second, the General Counsel essentially argued that it was unclear under *Gilmer* whether these agreements were enforceable in contracts of employment.<sup>65</sup>

Third, the General Counsel found that, because a charge must be filed before the Board can investigate, any arbitration agreement that might bar an employee from filing an unfair labor practice charge necessarily interferes with the Board’s jurisdiction.<sup>66</sup>

Finally, the General Counsel concluded that the fact that the agreement at issue stated that the employment relationship was “at will,” and that no “just cause” was required to terminate the employee, the agreement was “illusory” because the employee did not have a basis upon which to claim the termination was improper.<sup>67</sup> Ultimately, the case was settled before a trial.<sup>68</sup>

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<sup>61</sup> *Bentley’s Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 212-13, available at 1995 N.L.R.B. GCM LEXIS, at \*5.

<sup>62</sup> *Bentley’s Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213, available at 1995 N.L.R.B. GCM LEXIS, at \*9.

<sup>63</sup> *Bentley’s Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 214, available at 1995 N.L.R.B. GCM LEXIS, at \*13.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Bentley’s Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 213, available at 1995 N.L.R.B. GCM LEXIS, at \*13.

<sup>67</sup> *Bentley’s Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 214, available at 1995 N.L.R.B. GCM LEXIS, at \*15.

<sup>68</sup> In its opinion, the Division of Advice noted that the employer offered to settle the matter (1) “by agreeing to send a memorandum to all current employees stating that the arbitration agreement was not meant to prohibit access to the Board”; (2) by including a clause within the agreement that it was not meant to prohibit access to the Board; (3) by reinstating Letwin upon his signing of the amended agreement; (4) by paying back pay to Letwin if Letwin was reinstated and (5) if the settlement included a nonadmission clause. *Bentley’s Luggage Corp.*, [1996-1997 Transfer Binder] 24 N.L.R.B. Advice Memorandum Rep. (CCH) at 212, available at 1995 N.L.R.B. GCM LEXIS, at \*4; *Accord Reached on*

B. Architectural Building Products, Inc.<sup>69</sup>

A couple of years after the *Bentley's Luggage Corp.* case settled, ALJ Steven Charno held a trial and issued a bench decision holding that Architectural Building Products, Inc. "violated [s]ections 8(a)(1), (3), and (4) of the NLRA by implementing and maintaining a grievance and arbitration provision which unlawfully restricts the right of its employees to use the Board's processes and unlawfully conditioning the reinstatement of two employees on their acceptance of the grievance and arbitration procedure."<sup>70</sup> The ALJ reached this conclusion, despite the fact that the language of the arbitration agreement stated that the agreement was not "a waiver of any requirement of the employee to timely file any charge with the NLRB" and the fact that the handbook contained a savings clause that any provision in the policies that were "inconsistent with any statute, regulation, law or precedent would be deemed to be inoperative and severable."<sup>71</sup> The judge based his decision on three aspects of the agreement: (1) that the agreement was the "exclusive method of resolution of all disputes;" (2) that employees must file any grievance within five days or lose their right to assert a claim in any forum; and (3) that an employee who asserted his rights to file a lawsuit or agency proceeding in violation of the agreement would be liable for reasonable costs, expenses, attorneys' fees, and costs of litigation incurred by the employer as a result of the employee's suit or proceeding if the employer secures a stay or dismissal of the action.<sup>72</sup> No exceptions were filed to this decision.

C. Exceptional Professional, Inc.<sup>73</sup>

Less than a month after the *Architectural Building Products, Inc.* decision was issued, ALJ Mary Miller Cracraft struck down a mandatory grievance and arbitration clause contained in an employment application as violative of sections 8(a)(1) and (3), and sections 2(6) and (7) of the NLRA.<sup>74</sup> Although the

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*Unfair Practice Case Involving Mandatory Arbitration Pledge*, Daily Lab. Rep. (BNA) No. 96, at A-11 (May 17, 1996) (discussing the settlement in which the employer was required to rescind its mandatory policy and reinstate the terminated employee with back pay).

<sup>69</sup> Architectural Bldg. Prods., Inc., No. 17-CA-19326, 1998 N.L.R.B. LEXIS 541, at \*1 (July 28, 1998).

<sup>70</sup> *Id.* at \*4.

<sup>71</sup> *Id.* at \*6-7.

<sup>72</sup> *Id.* at \*8.

<sup>73</sup> Exceptional Prof'l, Inc., Nos. 17-CA-19272, 17-CA-19325, 17-CA-19385, 1998 N.L.R.B. LEXIS 563, at \*1 (Aug. 5, 1998).

<sup>74</sup> *Id.* at \*72.

In *Spielberg*, the parties agreed to arbitrate the employer's refusal to reinstate four employees who had gone out on strike and who were accused of picket-line misconduct.<sup>7</sup> The arbitration was heard by a three-member panel, which was selected pursuant to the terms set forth in the collective bargaining agreement.<sup>8</sup> The collective bargaining agreement also provided that the parties would be bound by the decision of the panel majority.<sup>9</sup> After a hearing in which three of the four strikers testified, a majority of the panel concluded that the employer did not have to reinstate the four employees.<sup>10</sup> Following the arbitration, the four individuals filed unfair labor practice charges, and the General Counsel issued a complaint.<sup>11</sup> The administrative law judge (ALJ) rejected the employer's affirmative defense that it could rely on the arbitration decision to justify its refusal to reinstate the strikers. He held that the employer violated the Act and ordered that the employer reinstate the strikers.<sup>12</sup>

On review of the employer's exceptions to the ALJ's Intermediate Report, the Board dismissed the complaint and found that the employer did not violate the NLRA when, consistent with the arbitration award, it refused to reinstate the four strikers.<sup>13</sup> In reaching this conclusion, the Board observed that all the parties had acquiesced in the arbitration proceeding and agreed to be bound by the decision, that the proceedings were fair and regular, and that the decision of the panel was not clearly repugnant to the purposes and policies of the Act.<sup>14</sup> Given the circumstances, the Board found that "the desirable objective of encouraging the voluntary settlement of labor disputes [would] best be served by [its] recognition of the arbitrators' award."<sup>15</sup> These standards became known as "the Spielberg deferral doctrine." The Board later modified the *Spielberg* doctrine in *Raytheon Co.* by adding a requirement that the issues involved in the unfair labor practice case must be presented to and considered by the arbitrator.<sup>16</sup> Unfortunately, the vagrancies of this later modification resulted in an inconsistent application of the doctrine.

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<sup>7</sup> *Id.* at 1084.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1086.

<sup>15</sup> *Id.* at 1082.

<sup>16</sup> *Raytheon Co.*, 140 N.L.R.B. 883, 886 (1963).

Almost twenty years later, in *Olin Corp.*,<sup>17</sup> the Board finally clarified its *Raytheon Co.* modification of the *Spielberg* doctrine. In *Olin Corp.*, the Board held that it would find that an arbitrator had “adequately considered the unfair labor practice [if] the contractual issue is factually parallel to the unfair labor practice issue, and if the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.”<sup>18</sup> The Board further noted that the arbitrator’s award does not need to be totally consistent with Board precedent.<sup>19</sup> Unless the award is “palpably wrong,” which the Board defined as a “decision that is not susceptible to an interpretation consistent with the Act,” the Board will defer to the arbitration award.<sup>20</sup> The Board also placed the burden on the party objecting to deferral to establish that the *Spielberg* standards were not met.<sup>21</sup>

### B. Pre-Arbitration Deferral to Arbitration Procedure

Consistent with its policy of post-arbitration deferral, the Board, in 1971, adopted specific criteria for pre-arbitral deferral to the parties’ grievance/arbitration procedures.

In the seminal case of *Collyer Insulated Wire*,<sup>22</sup> the Board was faced with a claim by the employer that the union’s section 8(a)(5) charge alleging a refusal to bargain and unilateral changes in the conditions of employment should be deferred to the grievance and arbitrations procedures of the collective bargaining agreement. A majority of the Board held that the Board should and would defer to the existing grievance and arbitrations procedures of the collective bargaining agreement.

The Board articulated several reasons to favor deferral to the parties’ grievance/arbitration procedures. These reasons included (1) that the dispute arose within the “confines of a long and productive collective bargaining relationship;” (2) that there was no claim of employer animosity to the employee’s exercise of protected rights; (3) that the parties contract provided for arbitration of a very broad range of disputes; (4) that the arbitration clause clearly

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<sup>17</sup> *Olin Corp.*, 268 N.L.R.B. 573 (1984).

<sup>18</sup> *Id.* at 574.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). *Collyer Insulated Wire* involved allegations by the union that the employer had violated section 8(a)(5), 29 U.S.C. § 158(a)(5) (1994), of the NLRA by failing to bargain with the union over changes in conditions of employment. The employer contended that the charge should be deferred to the existing grievance and arbitration procedures in the collective bargaining agreement.

control discovery efficiently likely will frustrate counsel for both parties and not see future work. On the other hand, arbitral control of the discovery process can provide the flexibility to balance litigants' needs for information against maintenance of the efficiency of the arbitral forum in a manner tailored to each specific case.<sup>142</sup>

Most importantly, providing for arbitral control of the discovery process on a case-by-case basis precludes employers from using discovery limitations as a means of contracting out of compliance with employment statutes. As long as the arbitrator selection process assures arbitral neutrality, an employer cannot rely in advance on discovery rulings that consistently will prevent employees from establishing their claims. Thus, arbitral control over the discovery process should preserve the incentives for employers to comply with employment statutes.

### *C. Limitations on Limitations and Limitations on Remedies*

A common way in which employers have used mandatory arbitration as a means of contracting out of statutory compliance has been to shorten the limitations period for filing claims and to restrict the arbitrator's remedial authority, thereby excluding certain statutory remedies.<sup>143</sup> Courts have responded to such actions in four different ways.

One approach is to leave the validity of such limitations to the arbitrator to resolve. In *Great Western Mortgage Corp. v. Peacock*,<sup>144</sup> the Third Circuit enforced an agreement to arbitrate even though the agreement shortened the limitations period for filing a claim and restricted the remedies that the arbitrator was authorized to award. The court opined that the validity of such waivers of rights and remedies was an issue for the arbitrator to decide.<sup>145</sup>

The Third Circuit's decision is an abdication of judicial authority that places the arbitrator in an untenable position. The arbitrator is a creature of contract. If the parties did not agree by contract to arbitrate, the arbitrator would have no authority to act. Thus, the Third Circuit's decision leaves to the arbitrator a ruling that the arbitrator may have no authority to make. The decision produces a result that either undermines the statutory scheme at issue in the case or undermines the contractual basis of the arbitration. It is hard to tell which is the lesser of these two evils. Arbitrators should not be forced to make that choice.

More importantly, leaving the issue to the arbitrator does nothing to prevent the use of mandatory arbitration as a means of avoiding statutory obligations.

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<sup>142</sup> For an example of such balancing, see *Williams v. Katten, Muchin & Zavis*, No. 92 C 5654, 1996 U.S. Dist. LEXIS 18301 (N.D. Ill. Dec. 9, 1996).

<sup>143</sup> See *supra* notes 60–61 and accompanying text.

<sup>144</sup> *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997).

<sup>145</sup> *Id.* at 231.

Rational employers do not expect limitations on claim filing periods and remedies ultimately to be enforced. Rather, they include such provisions to deter claims from being brought in the first place. Employees who are bound to arbitration agreements that on their face preclude compensatory or punitive damages or attorney fees are less likely to pursue their claims. They will have to discount their recoveries by the likelihood that the arbitrator will abide by the remedy limitations. Moreover, such provisions are likely to deter plaintiffs' counsel from taking such cases. Employers can rely on such limitations to reduce their exposure substantially regardless of the merits of the underlying claims. Leaving the issue to the arbitrator does little to reduce the employer's use of mandatory arbitration to contract out of statutory compliance.

A second approach is to interpret the arbitration agreement around the offending limitations. For example, in *McCaskill v. SCI Management, Inc.*,<sup>146</sup> the court faced an arbitration agreement that provided that each party would bear its own costs and attorney fees but that also adopted American Arbitration Association rules. The court held the agreement enforceable because AAA rules allowed the arbitrator to award costs and attorney fees and suggested that if the arbitrator did not comply with the statute calling for fee shifting for prevailing parties, a court could correct the mistake upon review of the award.<sup>147</sup>

A third approach is related to the second. Rather than interpret around the offending provision, the court simply severs it from the agreement, and enforces the promise to arbitrate without the limitations on the arbitrator's authority. These two approaches are preferable to leaving the decision to the arbitrator. They remove any contractual barriers to the arbitrator's authority, thereby freeing the arbitrator from an otherwise untenable position. However, they fail to remedy the deterrent effect of the offending limitations in the first instance. Therefore, they leave the mandatory arbitration agreement as an effective, albeit somewhat weakened, method of employer contracting out of statutory obligations.

The fourth approach is to refuse to enforce the promise to arbitrate, at least with respect to statutory claims. Several leading cases have adopted this approach. In *Brennan v. King*,<sup>148</sup> the First Circuit refused to require a university faculty member, who claimed that his tenure denial was based on his HIV-positive status and his sexual preference, to use the university's arbitration procedure. The court based its decision in part on the procedure's limitation of

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<sup>146</sup> *McCaskill v. SCI Mgmt., Inc.*, No. 00 C 1543, 2000 U.S. Dist. LEXIS 10317 (N.D. Ill. June 19, 2000).

<sup>147</sup> Judge Edwards used a similar process to interpret the arbitration agreement at issue in *Cole* to not require the plaintiff to pay a portion of the arbitrator's fee. 105 F.3d at 1485-86.

<sup>148</sup> *Brennan v. King*, 139 F.3d 258 (1st Cir. 1998).

the arbitrator's authority to direct the provost to transmit an arbitral finding in favor of the faculty member to the university president.

Similarly, in *Armendariz*,<sup>149</sup> the arbitration agreement limited the arbitrator to awarding back pay up to the date of the arbitration award and expressly precluded reinstatement or injunctive relief. The court held that the limitation was contrary to public policy and unenforceable.<sup>150</sup> In *Paladino v. Avnet Computer Technologies, Inc.*,<sup>151</sup> the Eleventh Circuit interpreted an agreement to arbitrate "any controversy or claim arising out of or relating to [the employee's] employment or termination of employment," that limited the arbitrator to awarding "damages for breach of contract."<sup>152</sup> The court observed that a limitation on remedies for a statutory claim would be invalid. Consequently, it interpreted the agreement as one which obligated the employee to arbitrate claims for breach of contract only.<sup>153</sup>

Decisions refusing to enforce mandatory arbitration agreements that contain illegal limitations on arbitrators' authority recognize that such limitations taint the entire arbitration agreement. Such limitations transform the arbitration agreement into a contracting out of the duty to comply with employment statutes. As such, the entire agreement is contrary to the policies embodied in the employment statutes and the entire agreement should be struck down. By denying the employer its forum of choice, courts will ensure that the forum is not abused and will ensure that employees have not agreed to "forgo the substantive rights afforded by the statute," but only agreed to "submit to their resolution in an arbitral, rather than a judicial forum."<sup>154</sup>

#### D. *Allocating the Costs of Arbitration*

In *Cole*, the D.C. Circuit held that an arbitration agreement may not require the employee to pay any part of the arbitrator's fee. The court reasoned as follows:

Arbitration will occur in this case only because it has been mandated by the employer as a condition of employment. Absent this requirement, the employee would be free to pursue his claims in court without having to pay for the services of a judge. In such a circumstance—where arbitration has been

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<sup>149</sup> *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 675, 682–83 (Cal. 2000).

<sup>150</sup> *Id.* at 682–83.

<sup>151</sup> *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998).

<sup>152</sup> *Id.* at 1056.

<sup>153</sup> *Id.* at 1057–58.

<sup>154</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

imposed by the employer and occurs only at the option of the employer—arbitrators' fees should be borne solely by the employer.<sup>155</sup>

The court expressed concern that the prospect of having to pay steep arbitrator fees could deter employees from pressing their claims and thereby render the arbitral forum inadequate for the vindication of statutory claims.

In the aftermath of *Cole* two approaches developed. Several courts agreed with the holding of *Cole* that the employer must pay the entire fee of the arbitrator.<sup>156</sup> Courts refused to sever provisions requiring the employee to pay half of the arbitrator's fee from the remainder of the agreement and instead invalidated arbitration agreements that provided for fee splitting.<sup>157</sup>

Some courts, however, refused to find arbitrator fee splitting agreements per se invalid. Instead, these courts opined that whether requirements that an employee pay part of the arbitrator's fee deprive the employee of an effective forum in which to vindicate the statutory claim should be evaluated on a case-by-case basis and in light of the employee's ability to bear the costs.<sup>158</sup>

The Supreme Court considered arbitrator fees and related costs in *Green Tree Financial Corp. v. Randolph*.<sup>159</sup> Randolph had sued Green Tree for alleged violations of the Truth in Lending Act and the Equal Credit Opportunity Act. Green Tree moved to compel arbitration pursuant to an agreement to arbitrate contained in the parties' retail installment contract. The arbitration provision was silent concerning responsibility for filing fees, arbitrator fees, and related expenses. The Eleventh Circuit Court of Appeals held that the agreement posed an unacceptable risk that Randolph could be subject to steep arbitration costs and, accordingly, undermined her ability to vindicate her statutory rights in the arbitral forum.<sup>160</sup> The Supreme Court, by a vote of five to four, reversed.

The Court observed, "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her

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<sup>155</sup> *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484–85 (D.C. Cir. 1997).

<sup>156</sup> See, e.g., *Shankle v. B-G Maint. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino*, 134 F.3d 1054; *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 669 (Cal. 2000). In *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000), the court expressed "serious reservations" about an arbitration agreement that required the employee generally to pay half of the arbitrator's fee, but ultimately held the agreement unenforceable on other grounds.

<sup>157</sup> *Shankle*, 163 F.3d 1230; *Armendariz*, 6 P.3d 669.

<sup>158</sup> See, e.g., *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999), cert. denied, 120 S. Ct. 1833 (2000); *McCaskill v. SCI Mgmt., Inc.*, No. 00 C 1543, 2000 U.S. Dist. LEXIS 10317 (N.D. Ill. June 19, 2000).

<sup>159</sup> *Green Tree Fin. Corp. v. Randolph*, 121 S. Ct. 513 (2000).

<sup>160</sup> *Green Tree Fin. Corp. v. Randolph*, 178 F.3d 1149 (11th Cir. 1999), rev'd, 121 S.Ct. 513 (2000).

federal statutory rights in the arbitral forum.”<sup>161</sup> However, the Court reasoned that a party resisting arbitration on such grounds bears the burden of showing the probability that she will have to bear expenses that effectively impede her access to the arbitral forum.<sup>162</sup> The Court held that Randolph failed to meet that burden. It characterized the risk that she would be subject to excessive costs and fees as “too speculative to justify the invalidation of an arbitration agreement.”<sup>163</sup>

The Court’s decision in *Green Tree* is unfortunate for two reasons. First, it undermines the efficiency advantages one finds in arbitration. The Court’s decision forces consumers, and by analogy employees, faced with arbitration agreements presented to them on a take-it-or-leave-it basis to litigate the likelihood that they may face excessive arbitration costs. The Court compounded this problem because it refused to provide any guidance concerning the type of showing of excessive costs that would bar enforcement of the agreement to arbitrate.<sup>164</sup> For example, may an employee facing an arbitration agreement that is silent as to responsibility for costs and fees who writes the employer seeking assurances against excessive costs rely on the employer’s failure to respond to satisfy his burden under *Green Tree*? If so, there is no rational reason for not requiring the party who unilaterally drafted the arbitration agreement to place those assurances in the agreement itself. If not, the Court has forced a party to litigate merely to obtain information about the costs of the arbitral forum. The Court has left the parties in a legal limbo which can only lead to their wasting time and resources on otherwise unnecessary litigation.

The Court easily could have avoided this result. It could have placed on the party drafting the arbitration agreement the burden to expressly provide that a claimant will not be burdened by excessive fees and costs. For example, the Court could have established a bright line rule that, to be enforceable, an agreement to arbitrate must provide that claimants will not have to shoulder any filing fees, arbitrator fees or similar costs that would exceed the filing fees and related costs they would face in federal court. Such a ruling would have resulted in the incorporation of such assurances in the boilerplate of arbitration agreements and eliminate the issue entirely, thereby increasing the speed and efficiency of the arbitral forum.

More importantly, the Court in *Green Tree* totally failed to consider the systematic effects of the agreement’s silence concerning the costs of arbitration. The Court focused the issue narrowly on whether Randolph faced a forum in

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<sup>161</sup> *Green Tree*, 121 S. Ct. at 522.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> “How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss . . .” *Id.* at 522–23.

which excessive fees precluded her from vindicating her statutory rights. Such a narrow focus enabled the Court to place on Randolph the burden of demonstrating the forum's unsuitability. It also eliminated from consideration the probability that the agreement's silence concerning costs would deter many other potential claimants from pursuing their claims. Such deterrent effects, however, would substantially reduce the lender's, in *Green Tree*, or an employer's incentive to comply with the underlying statutes. Such deterrent effects convert an agreement to arbitrate into a contracting out of statutory compliance. The Court's failure to consider such systematic concerns potentially reaches beyond the issue of cost allocation and is most distressing.

### *E. Mutuality in Arbitration*

In *Armendariz*,<sup>165</sup> the California Supreme Court held that an agreement binding employees to arbitrate their claims but not requiring their employer to arbitrate its claims was unconscionable and, therefore, unenforceable. The court reasoned as follows:

Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on "business realities." . . . If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose.<sup>166</sup>

The court cautioned, however, that its holding should not be interpreted in an overly broad manner. It stated:

This is not to say that an arbitration clause must mandate the arbitration of all claims between employer and employee in order to avoid invalidation on grounds of unconscionability. Indeed, as the employer points out, the present arbitration agreement does not require arbitration of all conceivable claims that an employee might have against an employer, only wrongful termination claims. But an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the

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<sup>165</sup> *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).

<sup>166</sup> *Id.* at 692.

other, to arbitrate all claims arising out of the same transactions or occurrences . . . . The arbitration in this case lacks mutuality in this sense because it requires the arbitration of employee—but not employer—claims arising out of a wrongful termination. An employee terminated for stealing trade secrets, for example, must arbitrate his or her wrongful termination claim under the agreement while the employer has no corresponding obligation to arbitrate its trade secrets claim against the employee.<sup>167</sup>

Other courts, however, have enforced employee promises to arbitrate their claims despite the absence of a corresponding promise by the employer.<sup>168</sup> These courts analyze the issue as one of consideration, rather than one of unconscionability. They reason that the employer's promise to be bound by the arbitration procedure and the results of that procedure is sufficient consideration for the employee's promise to use that procedure for the employee's claims.

The *Armendariz* court appears to have carried its policing beyond what is necessary to ensure employer statutory compliance. An employer's insistence that employees arbitrate their claims while retaining for itself the right to press its claims in court does not per se indicate that the mandatory arbitration system is being used to contract out of statutory compliance. The different forums can be explained by the different nature of the claims each party is likely to press against the other. Employee claims are likely to turn on the resolution of factual disputes.<sup>169</sup> Factual disputes are well-suited for resolution in arbitration. Employer claims, on the other hand, are most likely to involve covenants not to compete and the ownership of intellectual property. These claims are more likely to raise complex issues of law that are better suited for judicial resolution.

On the other hand, courts must insist that both employer and employee be mandated to arbitrate the employee's claims. If such mutuality is lacking, the agreement effectively becomes a means by which the employer can contract its way out of complying with its statutory duties. The agreement which the D.C. Circuit enforced in *Cole* illustrates how this is so.

The agreement in *Cole* placed the decision of whether the employee's claim would be litigated in court or arbitrated exclusively in the hands of the employer. Under the agreement, if the employee brought suit, the employee waived his right to a jury trial. Furthermore, the employer had the right, within sixty days following service of the complaint, to require all or part of the claim to be

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<sup>167</sup> *Id.* at 694.

<sup>168</sup> See, e.g., *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997).

<sup>169</sup> See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

arbitrated under the rules of the American Arbitration Association.<sup>170</sup> Nevertheless, the court enforced the agreement.

Arbitration furthers statutory compliance by trading off the potential for outlier jury awards for the likelihood of recoveries by a larger number of claimants due to the speed, efficiency and consequent enhanced accessibility of the arbitral forum. The agreement in *Cole* enabled the employer to thwart both parts of the trade-off. An employer facing a claim with particularly egregious facts that raised a realistic possibility of an outlier jury award could force the claim into arbitration where the outlier award would be highly unlikely. On the other hand, when the employer faced claims of much less monetary value, it could insist on litigation, greatly reducing the likelihood that the claims would be brought or that the employees would recover. Agreements like the one in *Cole* allow the employer to manipulate the choice of forum in such a way as to contract out of statutory compliance. They should not be enforced.

#### IV. ARBITRATION AND ADMINISTRATIVE ENFORCEMENT AGENCIES

In *Gilmer*, the Court rejected Gilmer's claim that compelling arbitration would undermine the EEOC's role in ADEA enforcement, observing that arbitration agreements did not preclude parties from filing charges with the EEOC and did not preclude the EEOC from taking action against discrimination.<sup>171</sup> However, lower courts have divided over whether an employee's agreement to arbitrate may have any effect on an enforcement action by the EEOC.

The Second and Fourth Circuits have held that the EEOC may not seek monetary relief on behalf of an employee who has entered a pre-dispute agreement to arbitrate claims under statutes that the EEOC enforces.<sup>172</sup> These courts recognize that the employee's agreement to arbitrate cannot bind the EEOC. Therefore, they hold that the EEOC remains free to pursue injunctive relief.

However, these courts distinguish between the employee's personal interest in obtaining monetary relief and the public interest represented by the EEOC. They reason that the public interest will be protected if the EEOC is allowed to pursue injunctive relief. On the other hand, in these courts' view, the federal interest favoring enforcement of arbitration agreements should be protected by limiting the employee's personal claim for monetary relief to the arbitral forum.

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<sup>170</sup> *Id.* at 1469.

<sup>171</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

<sup>172</sup> *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998).

The Second and Fourth Circuits find support for their approach in decisions that preclude the EEOC from seeking monetary relief for individual employees who have already settled their claims or who have litigated their claims and lost. In such circumstances, the EEOC is allowed to pursue injunctive relief only. These courts regard the balance struck in the settlement and prior litigation cases as comparable to the balance that must be struck in determining what relief the EEOC may pursue in the face of an employee agreement to arbitrate.

The Sixth Circuit has rejected this approach and has held that the EEOC may pursue all relief regardless of whether an employee has promised to arbitrate.<sup>173</sup> The court has reasoned that the EEOC's cause of action is separate from the employee's cause of action. It has regarded the private arbitration agreement as incapable of binding the federal sovereign agency in any manner. It has noted that the EEOC has exclusive jurisdiction over a charge and the exclusive right to file suit during the first 180 days after the charge is filed. It has distinguished cases that preclude the EEOC from seeking monetary relief for individuals who have litigated and lost as cases involving application of the doctrine of claims preclusion. In the view of the Sixth Circuit, such cases have no application to cases where the EEOC seeks to litigate claims involving employees who had agreed to arbitrate because those claims have yet to be decided or otherwise resolved.

Our systematic approach to the *Gilmer* fallout enables us to resolve this conflict among the circuits. In the absence of an agreement for mandatory arbitration, employers are subject to suit by the EEOC for a full range of remedies, including monetary relief for individual employees. An individual employee's settlement of a claim against the employer precludes the EEOC from seeking monetary relief for that employee. The settlement, however, occurs after the fact of the employer's conduct that prompted the claim. At the time the employer acted, it was subject to the possibility of EEOC action seeking full relief.

In contrast, where mandatory arbitration precludes the EEOC from seeking monetary relief for individual employees, it operates *ex ante*. The employer knows from day one that its actions cannot be subject to EEOC claims seeking full relief. The employer has contracted out from under a major feature of the statutory scheme. Although the EEOC is able to litigate a tiny fraction of the claims brought to its attention, it is most likely to litigate on behalf of individual employees in cases that are particularly egregious or cases that are likely to make new law. Employers who contract out from EEOC actions for individual relief are contracting out from a significant part of their statutory obligations. Consequently, mandatory arbitration agreements should not preclude the EEOC

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<sup>173</sup> EEOC v. Northwest Airlines, Inc., 188 F.3d 695 (6th Cir. 1999); EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999).

or other enforcement agencies from litigating on behalf of individual employees or from recovering monetary relief for those employees.

## V. JUDICIAL REVIEW AND EMPLOYMENT ARBITRATION

The Federal Arbitration Act provides the following bases for a court to vacate an arbitration award:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>174</sup>

In *Gilmer*, the Court appeared to acknowledge that the grounds provided for vacating awards in the FAA are not exclusive. The Court wrote, "[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue."<sup>175</sup> On two occasions, the Court has indicated in dicta that arbitration awards are subject to review for manifest disregard for the law.<sup>176</sup>

Most courts that have applied the manifest disregard for the law standard in employment arbitrations have considered it a very narrow standard of review. They have held that for there to be manifest disregard for the law, the governing legal principle must be well defined, explicit, and clearly applicable to the case, and the arbitrator must have known of the principle and consciously refused to apply it.<sup>177</sup>

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<sup>174</sup> 9 U.S.C. § 10(a) (1994).

<sup>175</sup> *Gilmer*, 500 U.S. at 32 n.4 (internal quotations and citation omitted).

<sup>176</sup> *First Options of Chicago, Inc., v. Kaplan*, 514 U.S. 938, 942 (1995); *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

<sup>177</sup> *See, e.g., Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000); *Dawahare v. Spencer*, 210 F.3d 666 (6th Cir. 2000); *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997).

The Fifth Circuit has adopted a standard that is even narrower. In *Williams v. CIGNA Financial Advisors, Inc.*,<sup>178</sup> the court opined that to vacate an arbitration award, there must be a finding that the arbitrator acted contrary to the law and that enforcement of the award “would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between the parties.”<sup>179</sup>

Under the majority narrow view of what constitutes manifest disregard for the law, the party seeking to vacate an arbitration award has an extremely heavy burden. Just how heavy is illustrated by *DiRussa v. Dean Witter Reynolds, Inc.*<sup>180</sup> DiRussa arbitrated a claim against Dean Witter and its regional director in which he contended that his demotion from branch manager to account executive was based on his age in violation of the ADEA and the New Jersey Law Against Discrimination. The arbitration panel awarded him \$200,000 against both defendants and an additional \$20,000 against the regional director, but denied DiRussa, *inter alia*, attorney fees. The Second Circuit refused to vacate the arbitrators’ denial of attorney fees.

The court recognized that the ADEA mandates an award of attorney fees to a prevailing ADEA plaintiff. It characterized the ADEA’s mandate as well defined, explicit, and clearly applicable to the case.<sup>181</sup> Nevertheless, the court refused to overturn the award because it could find “no persuasive evidence that the arbitrators actually knew of—and intentionally disregarded—the mandatory aspect of the ADEA’s fee provision.”<sup>182</sup> The court considered itself unable to say that the arbitrators knew of the ADEA’s attorney fees mandate because DiRussa had failed to point it out clearly in his submissions to them.<sup>183</sup> In essence, the court held that the parties to a statutory employment arbitration are not entitled to assume that their arbitrator knows the basics of the statute under which they are arbitrating.

Judge Edwards has criticized the Second Circuit’s approach severely. He has characterized the court’s refusal to overturn the denial of attorney fees as

hard to fathom. Everyone except the arbitrators understood and agreed that DiRussa was legally entitled to attorney’s fees; to allow the arbitrators’ ignorance or error to deny DiRussa a requested remedy that has been mandated

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<sup>178</sup> *Williams v. CIGNA Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999).

<sup>179</sup> *Id.* at 762.

<sup>180</sup> *DiRussa*, 121 F.3d at 818.

<sup>181</sup> *Id.* at 822.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 823.

by Congress is to allow arbitration to undermine the statutory scheme designed to protect victims of discrimination.<sup>184</sup>

The ability to establish a manifest disregard for the law is complicated further by the frequent arbitral practice of not explaining the rationale for an award. As the Sixth Circuit has stated, "Arbitrators are not required to explain their decisions. If they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law."<sup>185</sup> Similarly, a district court has opined that where the arbitrator has not explained the rationale for the award, a court must enforce it as long as even a colorable justification can be inferred from the underlying facts.<sup>186</sup>

This does not mean that it is impossible to vacate an arbitrator's award under the narrow interpretation of manifest disregard for the law. Successful petitions to vacate, however, are very rare.

One such successful petition to vacate occurred in *Montes v. Shearson Lehman Brothers*.<sup>187</sup> Montes had claimed that Shearson had failed to pay her overtime in violation of the Fair Labor Standards Act. Shearson maintained that Montes was exempt from the FLSA's overtime provisions. The arbitrators issued an award for Shearson. The Eleventh Circuit reviewed the evidence which tended to establish that Montes was not exempt. It also reviewed Shearson's counsel's closing argument to the arbitrators in which he urged them to disregard the law. The court concluded that on the record before it, Montes had established that the arbitrators had manifestly disregarded the law because the evidence in support of the award was marginal at best and because defense counsel had expressly urged the panel not to apply the relevant law.

The Second Circuit similarly found manifest disregard for the law in *Halligan v. Piper Jaffray, Inc.*<sup>188</sup> In that case, the court held that the combination of the absence of a written rationale for the award and the presence of overwhelming evidence of age discrimination supported the conclusion that the arbitrators ignored the law or the facts or both. The court vacated the award.

A broader approach to judicial review has emerged from the D.C. Circuit. In *Cole v. Burns International Security Services*,<sup>189</sup> the court opined that the manifest disregard for the law standard must be interpreted in light of the bases

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<sup>184</sup> Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 305 (1999).

<sup>185</sup> *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000).

<sup>186</sup> *Ahing v. Lehman Bros., Inc.*, No. 94CIV.9027(CSH), 2000 U.S. Dist. LEXIS 5175 at \*28 (S.D.N.Y. Apr. 20, 2000).

<sup>187</sup> *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997).

<sup>188</sup> *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).

<sup>189</sup> *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

for *Gilmer*'s endorsement of arbitration of statutory claims. The court focused on the Supreme Court's statement that a party does not forgo statutory rights by agreeing to arbitrate, but only submits to their resolution in an arbitral forum, and its statement that judicial review is sufficient to ensure that arbitrators comply with the statute at issue. The court concluded that the typical arbitration which turns on factual findings will be affirmed by the courts, but added, "[T]here will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct."<sup>190</sup> Thus, the court appeared to endorse a standard of de novo judicial review of arbitral interpretations of the statute.

If courts do not review employment arbitration awards for errors of law, we risk transforming a system of public law into a system of private justice whereby the same statutes and leading precedents mean one thing to employees of Merrill Lynch and another to employees of Circuit City. At least with large employers, the impact of such private justice systems will be very far reaching. As Professor Corrada has observed, "[A] private justice system implemented by General Motors or Exxon will typically yield a 'shared understanding' of employment law that is more widely held than that yielded by a local trial court decision from Basalt, Colorado."<sup>191</sup> In a prior article, Professor Ladenson and I have demonstrated why such a system of private law is intolerable.<sup>192</sup> Federal employment statutes represent a congressional reaction to perceived market failures by mandating uniform minimum labor standards. They guard against competitive pressures driving labor standards down below levels that public policy would tolerate. For example, in the absence of employment discrimination statutes, employers who disregard customer preferences for members of a particular race, gender, ethnic background, or age group will be at a competitive disadvantage to employers who pander to such base instincts. Private arbitration systems that produce awards whose legal conclusions are not subject to judicial review undermines the uniformity that is a foundation of statutory policy. "Bona fide occupational qualification" may not mean one thing at General Motors and another at Ford.<sup>193</sup>

Furthermore, because arbitrators exist outside the hierarchical public justice system that is characterized by review at successively higher levels of courts with further review of legal interpretations by the legislature, the scope of their legitimate authority is narrower than that enjoyed by judges who operate within

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<sup>190</sup> *Id.* at 1487.

<sup>191</sup> Corrada, *supra* note 48, at 1060.

<sup>192</sup> Malin & Ladenson, *supra* note 83, at 1226–38.

<sup>193</sup> *See id.* at 1226–29.

the public justice system. Arbitrators must confine their interpretations of legal rules to those falling within the core of settled meaning whenever possible. When not possible, arbitrators still must be guided by a philosophy of judicial caution, interpreting established legal rules in “relatively familiar and unsurprising ways.”<sup>194</sup> Judges and other publicly accountable officials, on the other hand, because they operate within the hierarchy of the public justice system, have the legitimate authority to interpret legal rules to develop the legal system to be the best it can be.

Leaving development of statutory employment law to private tribunals evolving private understandings at particular employers amounts to a basic contracting out from the employer’s obligation to comply with its statutory duties. De novo judicial review of arbitral interpretations of law is necessary to bring those interpretations within the hierarchical public justice system and ensure that arbitration does not result in contracting out of statutory compliance.

Professor Covington, however, in a thoughtful commentary on our analysis suggests that we gave insufficient weight to concerns for finality in arbitration.<sup>195</sup> He analogizes to other doctrines that enhance finality, such as *res judicata* and the law of the case.<sup>196</sup> He observes that under the Full Faith and Credit Clause of the Constitution, a court in one jurisdiction may not review the merits of a judgment rendered by another jurisdiction.<sup>197</sup> He cautions that the delay occasioned by the absence of finality usually will benefit the party who has the greater resources, *i.e.*, the employer in most cases. He states that “[e]ach time a new doctrine providing for review is created, a worker whose debatable claim has won out in arbitration is likely to see the day when she gets money put further and further off, as briefs are filed and arguments heard, and appeals taken to the next higher court.”<sup>198</sup>

With all due respect to Professor Covington, I submit that his analogy to doctrines precluding one jurisdiction from inquiring into the merits of judgments of other jurisdictions is flawed. A court in Illinois asked to enforce the judgment of a court in New York is presented a result from a publicly accountable tribunal operating within the hierarchical public justice system. A private arbitrator who operates outside of the hierarchical public justice system enjoys a much narrower scope of legitimate interpretive authority than does a judge. In the prior article, we argued that this distinction is crucial.

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<sup>194</sup> *Id.* at 1233.

<sup>195</sup> Covington, *supra* note 8, at 404.

<sup>196</sup> *Id.* at 406–07.

<sup>197</sup> *Id.* at 406.

<sup>198</sup> *Id.* at 407.

Professor Covington's concerns with finality of the arbitration process are substantial. In the prior article we argued that de novo review of employment arbitrators' interpretations of the law will not undermine finality in the typical case where the dispute is wholly factual.<sup>199</sup> The court agreed in *Cole*.<sup>200</sup> Professor Covington, however, cautions that the distinction between factual findings and legal error will be sufficiently slippery so as to enable parties intent on delay to raise sufficiently plausible legal arguments that will challenge the award.<sup>201</sup>

The Canadian experience provides us some comfort against Professor Covington's concerns. Canadian labor arbitrators are required to consider public law in resolving grievances, and their awards are held to a standard of legal correctness in subsequent judicial review.<sup>202</sup> Nevertheless, there is no evidence that this has undermined the finality of Canadian labor arbitration awards.

Of course, we should never underestimate the ingenuity of American lawyers to turn rulings on factual disputes into alleged errors of law. Accordingly, courts will have to be ready to police against such abuses. Aggressive use of sanctions against parties who, in the guise of a petition to vacate, seek to relitigate essentially factual findings should curb these abuses.<sup>203</sup>

Thus, we can conclude that the D.C. Circuit got it right in *Cole*. The Second Circuit, however, got it wrong in both *DiRussa* and *Halligan*. The Second Circuit's errors threaten to undermine the ability of employment arbitration to provide an accessible forum that furthers the enforcement of employment statutes.

In *DiRussa*, the arbitrators' conclusion that the plaintiff was not entitled to attorney fees was patently wrong.<sup>204</sup> Nevertheless, the court refused to vacate the award because the record did not reveal that the parties educated the arbitrators about the controlling law.<sup>205</sup> The court's decision reduces the efficiency of the

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<sup>199</sup> Malin & Ladenson, *supra* note 83, at 1230.

<sup>200</sup> *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

<sup>201</sup> Covington, *supra* note 8, at 408.

<sup>202</sup> See Randi Hammer Abramsky & Martin H. Malin, *Cross Border Perspectives on the Use of External Law in Labor Arbitration*, in *SEEKING COMMON GROUND: PROCEEDINGS OF THE 21ST ANNUAL INTERNATIONAL CONFERENCE, SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION 199* (James B. Boskey et al. eds., 1994).

<sup>203</sup> See Mark Berger, *Judicial Review of Labor Arbitration Awards: Practices, Policies and Sanctions*, 10 HOFSTRA LAB. L.J. 245 (1992) (making a similar point concerning the use of sanctions to curb abuses of the judicial process that would undermine the finality of labor arbitration awards).

<sup>204</sup> Even the National Labor Relations Board, which employs a policy of broad-based deferral of unfair labor practice charges to labor arbitration would not defer to such an erroneous ruling. See *Olin Corp.*, 268 N.L.R.B. 573 (1984).

<sup>205</sup> *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 822 (2d Cir. 1997).

arbitral forum. No longer may parties simply present their facts and argue their cases to the arbitrators and assume that the arbitrators understand the law. They now must further complicate the proceedings and endure the added expense of educating the arbitrators on the law. The need for detailed briefs becomes manifest and the procedure more cumbersome.

The Second Circuit compounded its error in *Halligan*. Although the court characterized the award as displaying manifest disregard for the law or the facts or both, its decision to vacate the award was prompted by its review of the record and its conclusion that the evidence of discrimination was overwhelming. In other words, the court vacated the award because it disagreed with the arbitrators' factual findings. By so doing, the court undermined the finality it sought to preserve in *DiRussa*. It also undermined the efficiency advantages of arbitration that can protect employees as well as employers. The *Halligan* decision appears to invite employers to challenge awards in cases they lose on the ground that the evidence against the plaintiffs was overwhelming. In labor arbitration, the Supreme Court has recognized the importance of deferral to the arbitrator's factual findings to ensuring finality in the process. The Court has stated that "improvident, even silly fact-finding" by the arbitrator is not a basis for vacating an arbitration award.<sup>206</sup> Instead, the Court has held that courts must defer to the facts as found by the agent appointed by the parties for that purpose.<sup>207</sup>

There is no justification for a different approach in arbitration of statutory employment claims. Improvident or silly fact-finding is most probably the result of a loose cannon arbitrator's ignorance or a partisan arbitrator's bias. Neither is likely to enable an employer to use mandatory arbitration as a vehicle for contracting out of statutory compliance.

The fire from a loose cannon can hit either party without warning. An employer who wins before a loose cannon arbitrator cannot rely on winning before the same arbitrator in the future. A victory before a loose cannon is a matter of luck. It provides the employer with no systematic advantage that will allow it to avoid future compliance with employment statutes. Market forces, moreover, will take care of the loose cannon. Neither party who experiences a loose cannon is likely to return to that arbitrator in the future regardless of whether the party won or lost.

Where a partisan arbitrator is overtly biased, a court can vacate the award for evident partiality.<sup>208</sup> Where partiality is covert, such as where an arbitrator leans toward the employer, if safeguards dealing with the repeat player imbalance are

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<sup>206</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 39 (1987).

<sup>207</sup> *Id.*

<sup>208</sup> *See* 9 U.S.C. § 10(a)(2) (1994).

in place, the employer cannot count on benefitting from that arbitrator's biases in the future. Plaintiffs' lawyers will have learned their lesson with such an arbitrator in the first case and are likely to strike the arbitrator in the future. Certainly an employer who disregards its statutory obligations on the assumption that a partial arbitrator will bail it out again does so at its peril.

Thus, courts should not intervene to correct what they perceive to be even gross errors in arbitral fact finding. Doing so will undermine the finality of arbitration awards which, in turn, will impede the efficiency and accessibility of the arbitral forum. However, courts should police arbitration awards for errors of law. Failure to do so can lead to the use of mandatory arbitration systems as vehicles for contracting out of statutory obligations.

## VI. CONCLUSION

The Supreme Court's broad endorsement in *Gilmer* of the arbitration of statutory employment claims has generated considerable fallout with which lower courts have had to deal. The controversy surrounding *Gilmer* has been limited to mandatory pre-dispute agreements to arbitrate, even though many of the criticisms of *Gilmer* apply to voluntary post-dispute arbitration agreements as well. The crucial distinction between mandatory and voluntary arbitration is that only the former carries a danger that employers will use it to contract out of their statutory obligations. Accordingly, courts should police mandatory employment arbitration systems to ensure that they do not serve as vehicles that relieve employers of the need to comply with employment statutes.

In policing mandatory arbitration systems courts should insist on certain basic due process safeguards. These safeguards include measures that will correct the repeat player imbalance in employment arbitration. Courts may safely leave discovery issues to case-by-case arbitral determination, but they should not leave to arbitral determination the validity of agreement limitations on filing periods or remedies or the allocations of the costs of the proceeding including the arbitrator's fee. Rather, courts should refuse to enforce mandatory arbitration agreements that limit statutory limitations periods or statutory remedies and should refuse to enforce arbitration agreements that impose part of the costs of the proceeding, such as the arbitrator's fee, on the plaintiff employee. Courts need not require that employers who impose arbitration on employee claims also submit their claims to arbitration. However, they should require that employers be equally bound to arbitrate their employees' claims.

To protect mandatory arbitration systems from becoming vehicles by which employers can evade their statutory duties, courts should hold that such systems do not limit the relief that the EEOC and other government enforcement agencies can recover. Courts should review arbitral legal interpretations de novo, but defer completely to arbitral fact finding.

