Arbitration of Employment Disputes without Unions

Samuel Estreicher
Author's Note: This Article was submitted to the Law Review in November 1990 and thus does not reflect developments after that date. On May 31, 1991, the Supreme Court decided Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991). The holding of Gilmer—that claims arising under the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq., are arbitrable by virtue of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq.—is broadly congruent with the position taken in Part II of the Article. I do, however, fault the rationale employed by Justice White in his opinion for the majority, which essentially sidesteps the question whether arbitration clauses contained in individual employment agreements fall within the exclusion in section 1 of the FAA of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Justice White asserts that since Gilmer, a securities broker, had made the arbitration promise as part of his securities registration application, the case involved "a contract with the securities exchanges," rather than an employment contract as such. In line with its recent FAA jurisprudence, the Court proceeds to give scant recognition to the public policy implications of enforcing predispute arbitration agreements encompassing claims under federal labor and employment law.

This reasoning leaves much to be desired. Consider the facts: (i) Gilmer had no formal employment agreement; (ii) he had to sign the registration statement as a condition of employment; (iii) the arbitration clause purported to deal with disputes arising out of his employment with Interstate/Johnson Lane (Interstate); and (iv) Interstate is a member organization of the exchanges requiring the execution of the registration statement. Moreover, Justice White's citations do not support the proposition proffered that the lower courts "uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration statements;" these decisions acknowledge that employment contracts were involved, but read the exclusionary clause as limited to employees in transportation industries. See, e.g., Dickstein v. DuPont, 443 F.2d 783, 785 (1st
Finally, as urged in the Article, the Gilmer case presented an opportunity to attempt to reconcile the pro-arbitration policy of the FAA with the aims of protective labor legislation. The majority bypasses the opportunity, and, in the process, leaves unresolved not only the reach of the exclusionary clause but also the responsibilities of the arbitral forum and reviewing court to ensure that the substantive policies of the labor laws are being honored.

Our collective task in this special symposium issue is, I suppose, to praise, not to bury, the Steelworkers Trilogy. Yet, the Trilogy’s model of labor arbitration is inseparable from the institution of collective bargaining, which is very much on the decline today. In a society in which labor unions represent 15% of the nonagricultural work force, arbitration of workplace disputes, to the extent it occurs at all, will increasingly take place in settings without unions.

Virtually every collective bargaining agreement contains a formal grievance system culminating in arbitration before an outside neutral. In the nonunion sector, by contrast, formal grievance systems are relatively rare. Even where such systems have been established, disputes are resolved either by an investigator-ombudsman employed by the firm’s human resources department or a “peer review” panel consisting of employees of the same occupational class as the grievant and firm officials.


Only a handful of firms provide for arbitration as the final step of the grievance procedure.\(^6\)

Should the law affirmatively promote arbitration of workplace disputes without unions? How can arbitration in nonunion settings be reconciled with the federal labor law’s prohibition of employer-assisted collective representation schemes? Is it appropriate to transplant to the nonunion setting a virtually all-inclusive presumption of arbitrability and relative immunity from judicial review akin to the Steelworkers Trilogy’s treatment of arbitration under collective bargaining? Should such a presumption extend to claims founded not on an employment contract but derived from external public policy? What role should nonunion arbitration play in the event other states follow Montana’s lead in enacting wrongful termination legislation extending “just cause” protection to employees who are not represented by unions?\(^7\)

These questions acquire a particular saliency because the Supreme Court, in contexts generally not involving workplace disputes,\(^8\) has interpreted the Federal Arbitration Act of 1925 ("FAA")\(^9\) to establish “a federal policy favoring arbitration”\(^10\) that appears to be even more aggressive in channeling disputes into the arbitration process than the Trilogy. The Court in Alexander v. Gardner-Denver Co.\(^11\) and its progeny appeared to draw a line between disputes arising under the labor agreement and disputes arising under external law that confined arbitral

---

6. One survey reported that only 6 of 78 leading members of the National Association of Manufacturers utilize arbitration for some categories of nonunion employees. See D. McCabe, Corporate Nonunion Complaint Procedures and Systems 4, 75 (1988). Ichniowski and Levin report that 10.5% of all business lines provide arbitration for managers, 11.3% for professional and technical employees, 13.4% for clerical employees, and 10.1% for production workers. See Ichniowski & Levin, supra note 3, at 419 (“While grievance arbitration is still much more common for union than for nonunion employees, such arbitration is available for a small but nonnegligible proportion of the nonunion work force.”). For descriptions of arbitration in nonunion settings, see Littrell, Grievance Procedure and Arbitration in a Nonunion Environment: The Northrop Experience, 34 Proc. Ann. Meeting of the Nat’l Acad. Arb. 35 (J. Stern & B. Dennis eds. 1982); D. Ewing, supra note 5, at 281-97 (discussing procedures at the Northrup Corporation), 299-308 (discussing procedures at the Polaroid Corporation), 319-22 (discussing procedures at the Trans World Airlines); Mich. St. Univ., Protecting Unorganized Employees Against Unjust Discharge 8-20 (J. Stieber & J. Blackburn eds. 1983) (discussing procedures at the American Optical Corporation).


8. The one exception is Perry v. Thomas, 482 U.S. 483 (1987); see infra text accompanying notes 94-96.


and the finality of arbitral resolution to the former sphere. However, *Gardner-Denver* and its progeny did not consider the role of the FAA. The Court's FAA decisions, by contrast, would seem to require arbitration of virtually all state-law claims and many federal-law claims, whether sounding in tort or contract or involving statutory policies. The tension between the *Gardner-Denver* and FAA lines of decisions will be resolved this Term in *Gilmer v. Interstate/Johnson Lane Corp.*. Presumably, the Court will decide whether the FAA requires arbitration of claims under the Age Discrimination in Employment Act of 1967 ("ADEA") and, by implication, claims under other protective labor legislation.

This article addresses the question of the appropriate legal response to arbitration of employment disputes in nonunion settings. Part I considers the advisability of importing the aggressive pro-arbitration policies of the Steelworkers Trilogy into the nonunion context. Part II examines the status of nonunion arbitration under the at-will assumptions of existing law. Part III shifts the discussion to a possible future world of wrongful termination legislation and asks whether arbitration should be the principal adjudicative mechanism for resolving disputes under such legislation.

If one is firmly committed to the principle of union representation and its extension to the entire workforce, arbitration without unions is, at the outside, a second-best solution and, at worst, a false cure stymieing true reform. Although the extent to which the policy of our labor laws

---


14. The contrast between the prevalence of arbitration in union-represented firms and its virtual absence in nonunion firms has been seized upon by commentators advocating a strengthening of the labor laws or passage of wrongful-termination legislation for all employees. There are several strands to the claim. First, the widespread acceptance of labor arbitration in the union sector is proof that a system of industrial justice can be successfully reconciled with management goals of
restricts certain arrangements in the nonunion context will be taken up in Part II, this article does not join issue with the larger debate over the degree to which the law should promote collective representation of workers. An assumption of this paper is that the union-representation option is either unavailable to or not desired by the significant sectors of the workforce.

I. MODELS OF WORKPLACE ARBITRATION

In determining the proper legal response to arbitration of employment disputes without unions, it is useful to model the different roles arbitration might be thought to play in different institutional settings.

A. An Instrument of Industrial Self-Governance

The Supreme Court's federal common law of collective bargaining agreements, as typified in the Steelworkers Trilogy, establishes a framework of background or default rules for labor agreements containing arbitration clauses that—in the absence of specific language to the contrary in the agreement—requires resort to the arbitration process for virtually all disputes arising during the agreement's term and sharply restricts access to the courts except where in aid of the process. The justification for this framework of rules is twofold. On one level, it may be argued that these rules reflect the likely assumptions of the parties to a collective bargaining agreement: they spell out the basic exchange of the union's waiver of its right to strike over disputes arising under the agreement in productivity and profitability. Second, the prevalence of arbitration clauses in collective bargaining agreements is evidence of the underlying preferences of employees whether they work for union-represented firms or nonunion shops. Third, employees in nonunion shops cannot effectively secure arbitration systems either because of difficulties in securing collective goods or the unwillingness of management to share power. Finally, this problem of unrealized preferences can be solved only by reforming the labor laws to ensure that employees are able to make truly uncoerced decisions over whether they wish to be represented by unions, or—as a second-best solution—by enacting minimum-terms legislation that extends the just-cause principle of labor agreements and arbitration mechanisms to all employees. For a forceful statement of this position, see P. Weiler, Governing the Workplace: The Future of Labor and Employment Law (1990).

The opposing view holds that the prevalence of arbitration in the union sector can be attributed in part to legal compulsion, such as rules treating an employer's insistence on unilateral determination of grievances as inconsistent with good-faith bargaining. See, e.g., Continental Ins. Co. v. NLRB, 495 F.2d 44 (2d Cir. 1974); Vanderbilt Prod., Inc. v. NLRB, 297 F.2d 833 (2d Cir. 1961); White v. NLRB, 255 F.2d 564 (5th Cir. 1958). Or it may be viewed as an artifact of a legal regime that enables unions to threaten midterm strikes as a means of extracting an arbitration mechanism; only where an employer has agreed to an arbitration clause will it be able to obtain injunctions restraining strikes over arbitrable grievances. See Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970). Professors Freed and Polsby further claim that unions insist on an arbitration clause because they are responsive to their own bureaucratic agenda or the preferences of subgroups of workers they represent. See Freed & Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 Emory L.J. 1097 (1989).
return for a system of bilateral resolution of disputes culminating in arbitration by an outside neutral. The Steelworkers Trilogy thus serves to reduce transaction costs in a manner akin to an important function of contract law.

Not all of the Court's handiwork, however, can be fully explained in these terms. Consider a ruling like Teamsters Local 174 v. Lucas Flour Co.,15 which reads into every labor contract an implied promise on the union's part to refrain from striking over disputes subject to arbitration.16 Another example would be the Court's recent decision in United Paperworkers v. Misco Inc.,17 which requires enforcement of arbitration awards notwithstanding possible conflict with external public policy.18 The justification for such rulings lies in a substantive policy in favor of labor arbitration as such, either because of its presumed contribution to industrial peace or the central role it is thought to play in the institution of collective bargaining that is the raison d'être of the National Labor Relations Act.

It would thus seem that the short answer to the question whether the Steelworkers Trilogy should be imported into the nonunion context is plainly "no." To extend the special status that arbitration enjoys under the Trilogy—the twin features of a virtually all-embracing presumption of arbitrability and a sharply limited role for the courts—to settings where collective bargaining does not take place would be to divorce the Court's doctrine from its underlying justification, its mooring in a particular institution of industrial governance premised on collective representation of workers and joint labor-management determination of basic terms and conditions of employment.

15. 369 U.S. 95 (1962).
16. Lucas Flour requires a labor union that initially had the bargaining power to extract an arbitration clause without giving up its right to strike over arbitrable disputes to obtain express language preserving that strike capability. This change in the burden of obtaining contractual language has distributional consequences for the parties; even a union with considerable bargaining power will have to make some economic concession in exchange for the clause. The ruling also makes it less probable that terms of this type will be negotiated because they are unusual to begin with and insistence on securing such language would suggest an attitude of militancy that the union otherwise might not wish to convey. But see Schwab, Collective Bargaining and the Coase Theorem, 72 CORNELL L. REV. 245 (1987).
18. Misco holds that a court cannot refuse to enforce a labor arbitration award by invoking an elastic conception of public policy that is gleaned from "general considerations of supposed public interests" rather than "ascertained by reference to the laws and legal precedents ...." 484 U.S. at 43. The decision leaves open, however, whether the only occasion for declining to enforce an award on public-policy grounds is when the award itself violates a statute, regulation or other manifestation of positive law or compels one of the parties to violate such a law. See id. at 45 n.12. For a broader view of the public-policy defense, see Meltzer, After the Labor Arbitration Award: The Public Policy Defense, 10 INDUS. REL. L.J. 241 (1988).
Professor Getman, in a much-cited article,\textsuperscript{19} has advanced the view that the labor arbitration experience is not readily transferable to contexts outside of collective bargaining. On the other hand, Judge Edwards, a highly-regarded arbitrator and labor law scholar before he ascended to the bench, believes that arbitration can be useful in many other settings, and particularly so for employment disputes in the nonunion sector.\textsuperscript{20} Both positions are right, I would submit, because each answers different questions.

Professor Getman's essential point is that the success of labor arbitration is due to the role it plays in the collective bargaining process. Labor arbitration is an adjudicative institution established by the parties themselves as a means of closing agreements without spelling out all of the details of their ongoing relationship. Broad general norms governing compensation, seniority and the like are established in the labor agreement, with the understanding that a great many subsidiary terms will need to be hammered out in the grievance-adjustment process and, failing that, will be resolved in arbitration. The acceptability of this special adjudicative mechanism is not simply a function of the parties' ability jointly to select the arbiter—a feature that is common to consensual arbitration. Rather, the explanation lies in the fact that arbitration allows for a continuation of collective bargaining process during the life of the contract. The parties yield authority to an outside neutral in only a limited sense. The entire grievance-adjustment process provides an occasion for midterm adjustment of the agreement. For those relatively few grievances requiring arbitration, bargaining can continue while the hearings are going on, and a great many disputes are settled before an award issues. The norms governing the arbitrator's award are shaped by the bargaining history of the parties and the web of informal practices that serve to give flesh to the bare bones of the labor contract—what Justice Douglas referred to as "the common law of the shop."\textsuperscript{21} The award itself is subject to continued modification by the parties either during the term of the particular agreement or at contract renewal talks. Moreover, the arbiter herself, whether she sits in an ad hoc capacity or as a permanent umpire, understands the importance of resolving the dispute in a manner


\textsuperscript{21} Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 582 (1960).
that will be considered acceptable by the parties—both of which are repeat players—if she is to keep busy in this field.

While I accept Professor Getman's thesis as a statement about the purpose of the Trilogy, it does not follow that arbitration can play no useful role in resolving employment disputes outside of the collective-bargaining context. However, a similarly aggressive pro-arbitration policy must be justified, if at all, on other grounds.

B. A Private Substitute for Court or Administrative Agency Adjudication

Arbitration can also be viewed simply as a private substitute for a formal adjudicative mechanism administered by an organ of government, whether the civil courts or administrative agencies. The FAA and cognate state laws reflect a widely-held view, in derogation of the common law, that arbitration in commercial settings can serve as an efficient dispute-resolution mechanism, and hence predispute arbitration clauses in agreements between merchants should be enforceable on the same terms as any other contract. The question here is whether such clauses in employment agreements warrant a different legal treatment.

1. The Section 1 Issue

A curious feature of the lower-court decisions considering the relationship between the FAA and protective labor laws is a failure to grapple with an express exclusion in section 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The legislative history be-

22. Professor Getman in fact does not go this far. The thrust of his essay is directed to the use of arbitration as the adjudicative mechanism for a wrongful dismissal statute—a topic I address in Part III of this article.

23. 9 U.S.C. § 1 (1988). Many of the state arbitration statutes, though generally modelled on the FAA, either (i) limit the exclusion to collective-bargaining agreements, see, e.g., MASS. GEN. LAWS ANN. ch. 251, § 1 (West 1988) ("shall not apply to collective bargaining agreements to arbitrate"); MICH. COMP. LAWS ANN. § 27A.5001(3)(Callaghan West 1988) ("shall not apply to collective contracts"); (ii) expressly cover all employment agreements, see, e.g., CAL. CIV. PROC. ANN. CODE. § 1280(a) (West 1982) ("includes ... agreements between employers and employees or between their respective representatives"); MINN. STAT. ANN. § 572.08 (West 1988) ("appl[ies] to arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in the agreement"); 42 PA. CONS. STAT. ANN. § 7302(b) (Purdon 1987) ("shall apply to a collective bargaining agreement to arbitrate controversies between employers and employees or their respective representatives only where the arbitration pursuant to this subchapter is consistent with any statute regulating labor and management relations"); or (iii) are silent on the question entirely, see, e.g., N.Y. CIV. PRAC. L. & R. § 7501-7514 (McKinney 1980). Silence on the question is also true of statutes following the Uniform Arbitration Act, 7 U.L.A. 5 (1985). See, e.g., ILL. REV. STAT. ch. 10, para. 101 (Smith-Hurd Supp. 1989). For state statutes appearing to contain a somewhat more broadly worded exclusion that arguably might include individual employment
hind the exclusionary clause sheds sparse light as to its intended reach.24 The principal objective of Congress was to render commercial arbitration agreements enforceable in the face of a common-law tradition that treated unexecuted promises to arbitrate as revocable. The section 1 exclusion was inserted into the statute apparently in response to objections from organized labor that the FAA might be construed to displace collective bargaining in favor of compulsory interest arbitration.25

agreements, see, e.g., Wis. Stat. Ann. § 788.01 (West 1981) ("shall not apply to contracts between employers and employees [sic], or between employers and associations of employees [sic], except as provided in s. 111.10," the latter section dealing with "parties to a labor dispute").


25. The original bill, introduced in 1922, did not contain the exclusion. See S. 4214, H.R. 13522, 67th Cong., 4th Sess. (1922). Andrew Furseth, president of the International Seamen's Union, charged that the bill was a "compulsory labor" bill; the American Federation of Labor (AFL) joined in this protest, and later reported to its members that its efforts had led to an exclusion that "exempts labor from the provisions of the law." Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America 203 (1923); Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925), quoted in Burstein, supra note 24, at 130. Since there was very little arbitration of "rights" disputes under collective bargaining agreements at the time—something organized labor, in any event, generally favored—labor's opposition was aimed at what it feared might be government-imposed arbitration of "interests" disputes in derogation of its right to strike. This was consistent with the AFL's general opposition during this period to "compulsory arbitration, compulsory investigation of industrial disputes, industrial courts, and similar devices which involve limitations upon the right to strike and regulation of relations between employers and employees by law." L. Lorwin, The American Federation of Labor 401-02 (1933).

In the congressional hearings, representatives of the American Bar Association (ABA), which had been actively involved in the drafting process, urged that labor's concern was misplaced:

It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that . . . if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate commerce and foreign commerce." It is not intended that this shall be an act referring to labor disputes at all. It is purely an act to give merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.

Sales and Contracts to Sell in Interstate Commerce, and Federal Commercial Arbitration: Hearings Before A Subcomm. of the Comm. on the Judiciary on S.4213 and S.4214, 67th Cong., 4th Sess. 9 (Jan. 31, 1923) (statement of Mr. W.H.H. Piatt, chairman of the Committee on Commerce, Trade and Commercial Arbitration of the ABA). The report of these same hearings also reproduces a letter from Secretary of Commerce Herbert Hoover to Senator Thomas Sterling, the chairman of the subcommittee considering the bill, which states: "If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" Id. at 14.

When the bill was reintroduced in December 1923, it contained the exclusionary clause. Arbitration of Interstate Commercial Disputes: Joint Hearings before the Subcomms. of the Comms. on the Judiciary on S.1005 and H.R. 646, 68th Cong., 1st Sess. 2 (Jan. 9, 1924). Apparently, organized labor was satisfied because it played no role in the subsequent hearings. See Burstein, supra note 24, at 130.
The early decisions considering the FAA's applicability to collective bargaining agreements further complicate matters. Fearful that the anti-arbitration premises of state common law would undermine labor arbitration, the courts in these cases strove mightily to preserve some role for the FAA in enforcing arbitration promises in collective bargaining agreements. They did so by reading section 1 either as inapplicable to collective bargaining agreements or as limited to employees in particular transportation industries.\textsuperscript{26} The Supreme Court's \textit{tour de force} in \textit{Textile Workers Union v. Lincoln Mills of Alabama},\textsuperscript{27} which recognized a federal common law of collective bargaining contracts, removed the necessity for such creative readings. Later decisions held that section 1 did indeed exclude collective bargaining agreements from the FAA—a view the Court itself appears to have embraced in its 1987 ruling in \textit{Misco}.

It remains to be seen whether section 1 should be read as a flat exclusion of all individual employment contracts. The "plain meaning" of the clause suggests one answer. However, the collective-bargaining focus of its legislative history and the ambiguity of its post-enactment treatment in the courts counsel some hesitation in treating the question entirely as a linguistic matter; so does the fact that the Supreme Court, in its 1987 decision in \textit{Perry v. Thomas},\textsuperscript{29} held that the FAA required a former employee of a securities firm to arbitrate his statutory wage claim against his one-time employer. Whatever reading is adopted of the exclusionary clause, I submit, it should be informed by an assessment of the underlying policies.\textsuperscript{30}

\textsuperscript{26} The authorities are collected in Ray, \textit{supra} note 24.

\textsuperscript{27} 353 U.S. 448 (1957).

\textsuperscript{28} \textit{See United Paperworkers Int'l Union v. Misco, Inc.}, 484 U.S. 29, 40 n.9 (1987). After quoting the section 1 exclusion, the Court observed: "but the federal courts have often looked to the [FAA] for guidance in labor arbitration cases . . . ." The clear implication is that section 1 excludes collective bargaining agreements. \textit{Misco} contains no discussion of whether the provision excludes all employment contracts of workers "engaged in foreign or interstate commerce."

\textsuperscript{29} 482 U.S. 483 (1987). (The section 1 issue was neither briefed nor considered in this litigation.)

\textsuperscript{30} There are, however, only two plausible readings. One is to give the exclusionary clause its most natural reading, as a linguistic matter, and exempt all employment contracts involving employees in interstate commerce. The other is to read the clause in light of the opposition that led to its inclusion in the FAA and exempt only collective-bargaining agreements. I agree with Professor Cox that a limitation of the exclusion to employees in particular transportation industries which can be said to be directly "engaged in foreign or interstate commerce" is artificial. \textit{See Cox, Grievance Arbitration in the Federal Courts}, 67 \textit{Harv. L. Rev.} 591, 597-98 & n.27 (1954). \textit{But see, e.g.}, Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) (FAA inapplicable to professional basketball player's contract because player "clearly is not involved in the transportation industry"); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971) (securities broker not "engaged in foreign or interstate commerce" within the meaning of Section 1).
2. Employment Arbitration Between Relatively Sophisticated Parties

As a first cut at the question of the proper construction of the section 1 exclusion, consider an employment agreement negotiated between a firm and a mid-level executive of reasonable sophistication that provides for arbitration of all disputes arising under that agreement.31 Plainly, there are considerable benefits in allowing parties to such an employment relationship to provide prospectively that disputes arising out of that relationship will be resolved in arbitration rather than in the courts or administrative agencies. First, the parties themselves are presumably in the best position to determine which dispute resolution mechanism will maximize their joint interests. Second, arbitration—despite creeping formalism—continues to be a less formal adjudicative forum than the courts. The absence of an extensive pre-hearing discovery practice, flexibility with respect to the reception of evidence, and the active role of the arbitrator in developing the facts point to a procedure that does not invariably require the assistance of lawyers. The transaction costs involved in resolving disputes are sharply reduced to the extent legal representation is not required. But even if lawyers are involved, the relative informality of the proceeding tends to drive down the costs of representation. Third, arbitration is likely to lead to a quicker resolution of the dispute than would be possible in a government-supplied forum. This, too, suggests lower transaction costs. There are additional advantages in the possibility of securing a resolution of the dispute before an employment relationship is severed; empirical studies suggest that the efficacy of a reinstatement award is inversely related to the length of time it takes to resolve the employment dispute.32 Fourth, arbitration provides a means of resolving disputes in a relatively private manner that minimizes reputational harms whether to the claimant or the firm. Fifth, acceptability of the outcome is promoted by a process in which the parties themselves have a role in selecting the decisionmaker. Finally, there are advantages to the third-party public from the reduction in queues for the scarce decisional resources of courts and administrative agencies.

31. The assumption here is that the disputes subject to arbitration will not raise questions of public policy. The suitability of arbitration for such questions is considered in Part II B below.

32. The National Labor Relations Board’s experience with reinstatement of discriminatees is that “[t]he amount of time that elapses between the discharge and the offer of reinstatement is one of the most important factors affecting an employee’s willingness to accept the reinstatement remedy.” West, The Case Against Reinstatement in Wrongful Discharge, 1988 U. ILL. L. REV. 1, 30. See also Aspin, Legal Remedies Under the NLRA: Remedies Under 8(a)(3), 23 PROC. ANN. WINTER MEETING INDUS. REL. RES. A. 264, 267 (1970); Stephens & Chaney, A Study of the Reinstatement Remedy under the National Labor Relations Act, 25 LAB. L.J. 31, 40 (1974); Chaney, The Reinstatement Remedy Revisited, 32 LAB. L.J. 357, 364 (1981).
Of course, it may not always be in the best interest of the parties to agree to arbitration. The arbitrator’s fee is paid by the parties rather than borne by the public, as would be true of an action in the civil courts. The very informality of the process—in particular, the lack of pre-hearing discovery—may make it difficult for certain claims to be established or effectively defended against. From an ex ante perspective, it may be difficult for the parties to foresee whether the disputes they are likely to face will require a more formal process. Uncertainty as to evidentiary standards and arbitral reluctance to grant summary judgment may also prolong litigation that otherwise might have been settled. Moreover, asymmetries may arise where one side to the dispute is represented by counsel and the other side is not, or where one side is likely to be a repeat player in need of the future services of the arbiter and the other is not.

The significance of this potential for asymmetry should not be overstated. The question should be whether arbitration leaves the parties worse off in this regard than civil litigation. As a general matter, the legal system does not provide legal representation for civil claimants unwilling (or unable) to pay the costs of such representation. Arbitration does not diminish the claimant’s access to legal representation. Indeed, it may improve access to lawyers to the extent it promises a cheaper, less time-consuming method of resolving disputes. The repeat-player concern is somewhat more troubling. It might be argued that there is a built-in asymmetry favoring the employer, even if we assume the claimant is sophisticated and will decline to select an arbitrator who previously had been engaged by the employer. This is because the relevant repeat player is not so much the employer as the firm’s outside counsel (to the extent arbitration is not handled in-house) who presumably represents a

33. See Block & Stieber, The Impact of Attorneys and Arbitrators on Arbitration Awards, 40 LAB. & INDUS. REL. REV. 543 (1987) (as compared to cases in which neither side is represented by an attorney, each party has more favorable awards when it has attorney representation and the other does not; yet, when both sides have attorney representation, the awards do not differ from those rendered when neither side has such representation).

34. There is one sense in which arbitration may diminish access to legal representation. If the claimant would have had access to a civil jury, but for the arbitration process, and we assume a civil jury is more likely to rule in the claimant’s favor and award a larger verdict than an arbitrator, the claimant may find it more difficult to secure a lawyer on a contingent-fee basis. It should be noted, however, that not all employment disputes are tried before a jury; not all juries will be inclined to side for the claimant (particularly if the firm is a large employer in the locality); and, at least in some cases, the lower costs of handling an arbitration may compensate for the possibly lower probability of a large recovery. As discussed below, where the employment arbitration also includes claims based on external law enabling the prevailing party to recover its attorney’s fees, the arbitrator’s award would include such fee-shifting. See infra text accompanying note 121.
number of employers. It is not self-evident, however, why a claimants' bar would not emerge to counterbalance the influence of the management bar.

This simplified model assumes relatively sophisticated parties and arbitration of disputes that involve only an interpretation of the terms of the agreement and hence present no implications for external public policies. Given these assumptions—which are relaxed in Part II—it seems clear that the legal system should enforce the predispute agreement in the employment contract as it would any other contract.

3. Should There Be a Presumption of Arbitrability?

The conclusion that such promises should be enforced does not, however, imply a presumption of arbitrability. The parties can, of course, negotiate very inclusive promises to arbitrate, which ordinarily should be enforced. It would be, however, inappropriate under the FAA, or cognate state laws, to adopt anything like the presumption of arbitrability advanced in the Steelworkers Trilogy. The purpose of the law should be to enforce the mutual commitments agreed to by the parties rather than to promote a particular dispute-resolution mechanism. Thus, section 3 of the FAA provides that before granting a stay of litigation, the court must be satisfied that "the issue involved in such suit or proceeding is referable to arbitration." Similarly, section 4 directs the court to order arbitration only upon "being satisfied that the making of the agreement for arbitration... is not in issue... ."39

In 1967, the Supreme Court in Prima Paint Corp. v. Flood & Conk-
lin Mfg. 40 adopted the so-called "severability" doctrine in order to limit the court's role in considering claims of fraudulent inducement or misrepresentation either in section 3 actions to stay litigation or section 4 actions to compel arbitration. As Justice Fortas put it:

Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.41

This decision is problematic on a number of grounds. First, it is difficult to square with the congressional judgment in section 2 that the FAA does not override background contract law rules, but requires enforcement of arbitration promises "save up on such upon grounds as exist at law or in equity for the revocation of any contract." Prima Paint thus gives the FAA a broader substantive reach—to the extent of overriding even contrary state law—than Congress apparently intended. Second, the "severability" doctrine artificially isolates the promise to arbitrate from the underlying agreement of which the promise is a part. While it is certainly conceivable that a party may concede the validity of an underlying agreement but claim fraud in the inducement of the arbitration clause itself, it is rather improbable that fraud tainting the contract generally did not also permeate the arbitration promise.42 In essence, Prima Paint remits a party to an arbitral forum to decide whether in fact the agreement authorizing the forum is legally effective. Third, the arbitrators are not likely to be particularly impartial assessors of their own authority to act. This difficulty is aggravated by the Court's seeming assumption that arbitral resolution of the fraudulent-inducement claim will be treated like any other claim—subject only to limited judicial review.

41. Id. at 403-04.
42. As Judge Debevoise has noted:

The result in Prima Paint is not wholly logical. It leaves federal courts with the rather rare and narrow issue of whether fraud was directed specifically to the arbitration clause while passing the more frequent and usually more complex question of whether fraud was directed to the entire contract to the arbitration panel. . . . Republic of the Philippines v. Westinghouse Elec. Corp., 714 F. Supp. 1362, 1367 (D.N.J. 1989). The courts do recognize that "where the allegation is one of fraud in the factum, i.e., ineffective assent to the contract, the issue is not subject to resolution pursuant to an arbitration clause contained in the contract documents." Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998, 1000 (11th Cir. 1986). However, this fraud-in-the-factum exception to Prima Paint requires allegations of "misrepresentation as to the character or essential terms of a proposed contract induc[ing] conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract," such that "his conduct is not effective as a manifestation of assent." Republic of the Philippines, 714 F. Supp. at 1368-69 (emphasis omitted) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 163 (1979)).
Most importantly, Justice Fortas can offer no policy justification for the Court's remarkable reading. He refers to the "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." This, of course, simply begs the question. The Steelworkers Trilogy seeks to compel arbitration of barely colorable claims for arbitration because of a substantive goal, thought imbedded in the National Labor Relations Act, of promoting industrial self-government. Here, the court's role should be confined to effectuating the intentions of the parties rather than promoting a particular dispute-resolution mechanism.

C. A Public Substitute for Court or Administrative Agency Adjudication

Yet a third model of workplace arbitration involves a government-imposed substitute for traditional civil courts or administrative agencies. Under this model, although the arbitrator sits as an agent of the state, arbitration is thought to offer certain advantages over traditional fora, including: (i) a relatively informal, quick and low-visibility resolution of the dispute; (ii) party participation in the selection of the arbiter; (iii) an arbiter with some specialized understanding of employment disputes or of the particular industry; (iv) a tailoring of the procedures and characteristics of the tribunal to suit the needs of the parties; (v) a rule-setting process relatively free of stare decisis constraints; and (vi) a potential integration of adjudication with mediation techniques.

Mandatory arbitration has been proposed as the adjudicative mechanism for wrongful-termination statutes. These proposals, which are addressed in Part III, pose the question whether it is appropriate to utilize a dispute-resolution mechanism that developed in consensual settings as an instrument of coercive state power free of the institutional safeguards and other trappings that attend adjudication by courts and administrative agencies.

The perspective of the Steelworkers Trilogy would seem inapposite in this context. Pro-arbitration policies, whether of the Trilogy variety or the FAA-inspired variety, are justified by an interest in party autonomy or voluntarism. Notwithstanding party involvement in the selection of the arbiter and the design of hearing procedures, mandatory arbitration is fundamentally an alternative state forum for the resolution of disputes subject to the usual rules governing public adjudication. Thus, for exam-

43. 388 U.S. at 104.
ple, a presumption of arbitrability here is no different from a presumption of adjudicative jurisdiction, which we ordinarily would not recognize in the case of courts or administrative agencies. Similarly, the limited judicial review typically accorded to arbitration awards would be inappropriate; such awards should be reviewed at least on the same terms as formal administrative agency adjudications.

II. ARBITRATION IN NONUNION SETTINGS UNDER EXISTING LAW

This part of the article considers the status of private, nonunion arbitration under existing law. With the exception of Montana, absent an agreement to the contrary, an employment relationship is terminable at the will of either party. Nonunion arbitration of employment disputes is likely to occur, if at all, under two different scenarios. In one setting, arbitration is the final step of an internal dispute system established by the employer to govern disputes under unilaterally promulgated policies that need not be generally distributed to employees and are subject to prospective modification or revocation. The FAA and cognate state laws would appear not to apply because of the absence of "an agreement in writing to submit to arbitration an existing controversy . . . ."44 Such arbitrations, I argue below, would be limited to claims arising under the employer's policies, and awards would be enforced only to the extent consistent with state public policy. The principal issues here are whether an arbitration promise contained in a unilateral employer policy should be enforceable, as a matter of state contract law, with respect to claims arising under the policy; and whether the policies of the National Labor Relations Act erect any barrier to the use of employee representatives in the dispute-resolution process.

In the second setting, the arbitration commitment is contained in a written employment agreement. The terms of the agreement may be the same for all employees in a given job category or plant subdivision or they may be subject to modification in negotiations with individual employees. If such agreements are valid under generally applicable principles of state contract law (concerning such matters as duress, fraud, illusory promise and unconscionability), the FAA would apply in the absence of section 1. Because the FAA creates a very strong presumption of arbitrability overriding state-law policy judgments that particular claims should be heard in the courts and channeling even a great many claims arising under federal law into the arbitral forum, the scope of the exclusionary clause thus becomes highly material. After rejecting a gen-

eralized objection to arbitral competence to consider issues of external law, I consider two principal arguments that might be raised for reading section 1 literally to exclude all employment contracts: (i) the objection that employees as a class should not be bound to such agreements because of their lack of bargaining power or economic sophistication (what I call the "unsophisticated claimant" objection); and (ii) the objection that arbitration of employment contracts under the FAA would undermine state and federal protective labor legislation (what I call the "public policy" objection).

A. Arbitration Pursuant to Unilateral Employer Policies

1. Enforceability as a Matter of Contract Law

Increasingly, unilateral employer policies are found to create enforceable contractual entitlements. As a matter of state contract law, courts have dispensed with requirements of mutuality of obligation, independent consideration or detrimental reliance in order to enforce commitments contained in such policies against employers. Moreover, these policies have been found to be binding on employers even where they have not been generally distributed to employees and are expressly subject to prospective modification or revocation. When such policies provide that claims based on their terms are subject to "final and binding" resolution by a designated dispute mechanism, should employees be able to bypass the designated mechanism and repair to the civil courts?

Initially, the question is whether an at-will employee's act of continuing to work after promulgation of such a policy containing a written arbitration term constitutes "an agreement in writing to submit [such claims] to arbitration," within the meaning of the FAA and state arbitration laws. Although there appears to be no authority directly on point, the case for finding the requisite "agreement in writing" is problematic. Admittedly, outside of the employment context, unilateral contracts containing arbitration terms have been held to come within the FAA's reach. It is not at all clear, however, that the enforceability of unilateral employer policy pronouncements that need not be disseminated to employees and are subject to revocation can be grounded on unilateral

contract theory as conventionally formulated. Such decisions are better understood, I submit, not as a species of traditional contract law but as an instance of estoppel akin to the administrative law doctrine that administrative agencies are bound to self-imposed restrictions on their discretionary authority until they have formally rescinded those restrictions.  

If we assume that the FAA and state arbitration statutes do not apply, is there a legal basis for either enabling the employee to bypass the internal dispute mechanism and assert a claim under the unilateral policy in the civil courts or conditioning exclusive resort to that mechanism on satisfying some set of minimum procedural safeguards? This issue, too, has been rarely litigated to date. There are a few decisions permitting a civil action where the dispute mechanism is lacking in certain procedural safeguards, such as the right to conduct cross-examination and receive a written statement of the reasons for the decision. The theoretical underpinning of these decisions, though not clearly stated, appears to be a judgment that giving adjudicative finality to the internal-dispute mechanism would render the underlying contractual commitment an illusory promise. But if the employer can unilaterally revoke or modify the commitments contained in its policy manual, it seems difficult to under-
stand why the employer cannot also insist that disputes under the policy be committed to a designated procedure for final, binding resolution. In any event, this illusory-promise difficulty should evaporate where the final step of the internal procedure is an arbitration before an outside neutral.\footnote{As Judge Edwards observes: "arbitration can achieve substantial benefits even when it is limited primarily to the interpretation of rules developed solely by the employer and subject to the employer's unilateral control." Edwards, The Rising Work Load, supra note 20, at 932.}

Arbitration in this context would be confined to disputes involving claims based on the terms of the employer's policies; there should be no impact on external public policies. It is one thing to enforce an employer's unilateral policy according to the terms of that policy, whether under a theory of unilateral contract or what appears to be an employment-law analogue to the doctrine of administrative estoppel. It is quite another matter for an employer by a unilateral promulgation to require an employee to submit to arbitration claims that the employee may have deriving from an independent source in external law. It is thus highly doubtful that a state court would deem an employee's continuing to work under these terms a legally effective "acceptance" as a matter of contract law.

It might still be contended, however, that unsophisticated employees would face a systematic disadvantage in such proceedings because of the asymmetries in representation and ability to monitor arbitrator performance previously alluded to. Moreover, the arbitrator's fees in such cases are typically paid by the employer.\footnote{See, e.g., D. Ewing, supra note 5, at 291 (quoting Northrop Corporation's defense of this practice: "[W]e bear the cost of the arbitration for the very practical reason that most of the employees who seek arbitration of their grievances simply couldn't afford it if we did not. We really find that when we deserve to win, we usually do, and when we don't, we lose.").}

Without denying the potential for unfair outcomes in some situations, I question whether courts as a matter of their common law authority may legitimately rewrite the employer's policy to render enforceable the substantive contractual commitment contained in the policy while declaring ineffective the accompanying dispute-mechanism term.\footnote{If the employer's unilateral policy establishes a legally binding commitment, it is a commitment to subject its personnel decisions to particular norms under a designated dispute-mechanism. Unlike the public-employment context, where constitutional norms of procedural due process jurisprudence require a bifurcation of "substance" and "process," see Cleveland Board of Educ. v. Loudermill, 470 U.S. 532 (1985), here the "bitter" has to be taken with the "sweet." But see supra note 50.} Again, my assumptions here are that the dispute mechanism does not give rise to difficulties on illusory promise or unconscionability grounds; and that no federal or state law requires disregarding the designated dispute mechanism as a matter of public pol-
Even aside from the question of authority, courts have to assess, as a policy matter, whether paternalistic solicitude for the contractual capacity of unsophisticated employees will leave them less well off—should the employer dilute the substantive provisions of the policy or revoke it altogether—than enforcing the unilateral policy according to its terms.

The "unsophisticated claimant" objection loses some of its force where the dispute procedure contained in the employer's unilateral policy makes provision for competent representation of the employee's interests. A number of firms have sought to improve the representational balance by appointing members of the human resources department as "counsellors" whose function is to serve as the employee's independent advocate, or by creating a system of independent peer representatives. Where these features are present, the case for enforcement of the arbitration provision is considerably strengthened.

2. The "Company Union" Objection

To the extent we are dealing with nonsupervisory and nonmanagerial employees who have a federal right to form unions under the National Labor Relations Act, an employer's provision of peer representation may run afoul of section 8(a)(2) of the Act. That provision makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." The term "labor organization" is not limited to formal organizations and extends broadly, as set forth in

54. If the FAA were applicable, a state statute precluding arbitration would be held violative of section 2's insistence that written arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988). See infra text accompanying notes 90-99.


56. Such arbitrations would still present repeat-player concerns, coupled with a potential for bias where the employer pays the arbitrator's fees. The question is whether claimants are better off with a rule requiring resort to the courts—at the risk of inducing the employer to dilute the substantive restrictions of the policy or revoke the policy altogether—rather than a rule allowing employers to condition claims under unilateral policies on resort to arbitration.

57. 29 U.S.C. § 158(a)(2) (1988). This ground of objection applies only where the employer utilizes some form of employee representation. Even so, both an individual employee's attempt to resolve a grievance with the firm as well as group presentation of grievances are expressly protected by the proviso to section 9(a) of the Act:

Provided. That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted . . . .

Id. at § 159(a) (emphasis original). This provision should apply both to the presentation of the grievance and its resolution either by consensual disposition or arbitration. However, the proviso "does not say that an employer may form or maintain an employee committee for the purpose of 'dealing with' the employer, on behalf of employees, concerning grievances." NLRB v. Cabot Carbon Co., 360 U.S. 203, 217 (1959).

section 2(5), \textsuperscript{59} to:

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Moreover, the Supreme Court announced in its sole encounter with these provisions in \textit{NLRB v. Cabot Carbon Co.}, \textsuperscript{60} that the operative term "dealing with" is not limited to formal bargaining structures and reaches committees comprised of employee representatives who meet with management to resolve grievances and propose changes in any of the subjects listed in section 2(5).

There is presently a debate of sorts between the National Labor Relations Board and some of the courts of appeals over the extent to which section 8(a)(2) embodies an "institutional autonomy" perspective that condemns all employee-representation arrangements—on the view that only one form of collective representation of employee interests is permissible (independent unions) and that tolerance of other forms will stymie the development of independent unions.\textsuperscript{61} The Sixth Circuit,\textsuperscript{62} in particular, has urged a contrary "employee free choice" perspective that leads to somewhat greater tolerance of employee committees as a means of promoting communication and cooperation between the firm and its employees: "It is only when management's activities actually undermine the integrity of the employees' freedom of choice and independence in dealing with their employer that such activities fall within the proscriptions of the Act."\textsuperscript{63}

It is not necessary to resolve this debate here to conclude that a nonunion employer does not violate section 8(a)(2) by maintaining an internal dispute resolution system that provides for employee representatives to serve either as advocates for employee-claimants (who opt for such representation) or as members of an internal adjudicative body. Even on the institutional-autonomy model, the employer is not precluded from using employees to help implement managerial functions, whether they are engaged in the performance of work as part of "work teams" or in the investigation and resolution of disciplinary matters as peer mem-

\textsuperscript{59} Id. at § 152(5).
\textsuperscript{60} 360 U.S. 203 (1959).
\textsuperscript{61} For a good general treatment, see Kohler, \textit{Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)}, 27 B.C.L. REV. 499 (1986).
\textsuperscript{62} See Airstream, Inc. v. NLRB, 877 F.2d 1291 (6th Cir. 1989); NLRB v. Streamway Div. of the Scott and Fetzer Co., 691 F.2d 288 (6th Cir. 1982); Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967).
\textsuperscript{63} Federal-Mogul Corp. v. NLRB, 394 F.2d 915, 918 (6th Cir. 1968).
bers on an in-house adjudicative body. Such use of employees does not involve a form of collective organization of employees in which representatives of employees speak on behalf of the group. Conceivably, any form of employee participation in management decisions promotes employee satisfaction and, to that extent, may dampen interest in forming an independent union. However, the statute does not require an employer to refrain from conduct that, by promoting employee satisfaction, discourages interest in union representation. It is only the element of collective representation of employee interests that triggers the concern, from the institutional-autonomy perspective, that the employer is attempting to undermine the conditions for forming a truly autonomous institution for the purpose of collective representation.

The leading Labor Board decision on this question, *Sparks Nugget, Inc.*, draws a distinction between an employee committee that "performs a purely adjudicatory function and does not interact with management for any purpose or in any manner other than to render a final decision on the grievance," and one that acts "in any manner as an advocate of employee interests." This language could be read to proscribe use of a coworker as an advocate of the employee-claimant in adjudicative proceedings before a peer-review panel or outside arbitrator. Such a reading, in my view, is not required by the institutional-autonomy perspective. There would certainly be a problem, from that perspective, if the employee-advocate had the authority to "initiate grievances or recommend for management's consideration changes in terms and conditions of employment . . . ." It is difficult to understand, however, why the mere use of an employee-advocate to function as an in-house lawyer for the employee-claimant who requests such assistance poses any real threat to the conditions for forming independent unions. It should not matter, moreover, whether the employee-advocate is enlisted from the same job class as the claimant or from the firm's human-resources department, or whether the employee advocate is chosen randomly or designated by the claimant.

From the standpoint of the institutional-autonomy perspective, there would be a stronger basis for concern if the employee-advocate is elected by the rank-and-file and serves for a fixed term. The problem with that view of the section 8(a)(2) prohibition is that it appears to disallow certain features—here, political accountability and accumulated ex-

64. 230 N.L.R.B. 275 (1977).
65. Id. at 276.
66. Id.
67. Id. at 276.
perience—that might serve to enhance the integrity of nonunion arbitration. Yet, the purported benefits provided to employees depend on a set of speculative premises—that (i) the employees might otherwise choose to be represented by independent unions, and (ii) tolerance of this limited form of employee representation would prevent employees from making an uncoerced decision about whether to opt for union representation.

B. Arbitration Pursuant to Written Employment Agreements

We turn now to the much more difficult question of the status of nonunion arbitration pursuant to written bilateral employment agreements. If the promise to arbitrate is contained in a written agreement “evidencing a transaction involving commerce,”68 then the FAA and cognate state laws would apply, but for the exclusionary clause in section 1. If all that were at stake here was whether parties to an employment agreement had to arbitrate claims arising under the agreement, and if the enforceability of this private forum-selection clause would depend on the absence of a contrary state or federal public policy, then the analysis here would follow the same lines as for arbitration clauses in unilateral em-

68. 9 U.S.C. § 2. The Court's first encounter with the requirement in section 2 of the FAA—that the written arbitration provision be found “in any maritime transaction or a contract evidencing a transaction involving commerce”—suggested a substantial limitation on the reach of the statute. Id. In Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956), the Court considered the arbitrability of an employment contract entered in New York contemplating performance in Vermont. Although the contract contained a predispute arbitration clause providing for arbitration under New York law pursuant to the procedures of the American Arbitration Association, the employee had brought suit for breach of contract in Vermont, which adhered to the common-law doctrine of revocability of executory promises to arbitrate. Justice Douglas, writing for the majority, held that the contract did not “evidence[e] a transaction involving commerce”: “There is no showing that [the plaintiff] while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.” Id. at 200-01 (footnote omitted). Moreover, since the federal arbitrability standard applied only to contracts falling within section 2; and, since this was a diversity case, the enforceability of the arbitration clause was governed by forum state law rather than the FAA.

Bernhardt was very much influenced by constitutional concerns, emanating from Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), that were thought to be present if the FAA established a uniform federal arbitration procedure applicable in diversity cases, even in the face of contrary state law. The post-Bernhardt decisions avoid the Erie difficulty by reading the FAA to stipulate a federal arbitrability standard for transactions within Congress' power to regulate commerce. In its 1967 Prima Paint ruling, the Court essentially equated section 2's “evidencing a transaction involving commerce” requirement with the reach of federal power over interstate commerce. However, Prima Paint was not explicit on the point, and facts of the case involved an agreement that was “inextricably tied to . . . interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business.” 388 U.S. at 401. Thus, it might still be argued that the “commerce” test for FAA purposes is narrower than the constitutional reach of federal power. FAA decisions in the lower courts have not taken this route. The Supreme Court had an opportunity to so in Perry v. Thomas, 482 U.S. 483 (1987), which involved a wage claim between a securities firm and a former broker-employee; this was entirely a local employment dispute.
ployer policies. The difficulty arises because the Supreme Court has given the FAA a rather broad sweep. The FAA, according to the Court, is not a narrowly-conceived statute simply repudiating the anti-arbitration premises of state common law. The FAA also overrides any contrary state policy in favor of preserving access to the courts for particular claims; and, on the federal level, acts as a kind of meta-statute enforcing arbitration of claims under federal statutes that do not expressly or by implication insulate forum-choice decisions from private bargaining.

Given this construction of the FAA’s reach, the question of arbitrability cannot be viewed exclusively from the contractarian lens employed thus far in this essay. The question addressed below is whether this difficulty should be resolved by (i) reading section 1 to exclude all employment contracts from FAA coverage; (ii) essentially disregarding Section 1 and extending the FAA directive to all protective labor laws (save certain federal measures that would be incompatible with private arbitration); or (iii) by adopting an intermediate approach that seeks to accommodate the FAA directive with the more particularized policy judgments embodied in particular protective labor laws.

1. Arbitration of Statutory Claims

   a. The Mitsubishi Compromise

   It is important to keep distinct two different versions of the case against arbitration of statutory claims. The first, which must be taken seriously even for agreements covered by the FAA, is the proposition that parties to a private arbitration agreement should not be able to oust the state from advancing its conception of public policy, whether that conception takes the form of a generalized distrust of arbitration for a particular category of claims or a determination that a particular enforcement structure for such claims would be incompatible with arbitration. The second, which I consider more problematic, is the proposition that arbitration clauses should never be read to encompass statutory claims either because individuals possessing such claims may not prospectively waive the right to a judicial forum or because arbitration lacks the institutional competence to address such claims.

   The Supreme Court has plainly rejected the second formulation—holding that claims arising under the federal antitrust laws, RICO and securities laws, as well as claims arising under state franchising and wage

69. See infra text accompanying notes 90-110.
payment laws, are subject to arbitration. If we stay for a moment with the paradigm of economically sophisticated parties, the benefits to the parties and to the system still obtain even though the provenance of the claim is statutory in origin rather than based on a contractual undertaking. This explains why courts enforce forum-selection clauses in agreements notwithstanding the presence of statutory claims. Of course, the usual forum-selection clause contemplates litigation in a civil court, whereas an arbitration clause commits the litigation, in the first instance, to a nonjudicial forum. But the legal system should not assume that the parties will be unable to select arbitrators competent to hear statutory claims, or that the public policy reflected in the statute will invariably be disserved. The Enterprise Wheel prong of the Steelworkers Trilogy did state that labor arbitrators ordinarily should not consider external law in rendering their awards. The problem in Enterprise Wheel, however, was not one of institutional competence but, rather, one of authority: Absent an express provision incorporating external law, the labor arbitrator's agency is limited to an interpretation and application of the terms of the collective bargaining agreement.

Yet, a private agreement to arbitrate statutory claims cannot be viewed entirely in terms of a calculus of private gain and loss that presumably is best left to the parties themselves. It is not a private settlement agreement which ordinarily entails a self-implementing resolution of a dispute. Should a dispute arise subject to an arbitration clause, an adjudication will be had and the winner will seek court enforcement of the award. If the award purports to resolve a claim under external law (and hence preclude relitigation of that claim in any other forum), there is a public interest in the manner by which the external-law norms are articulated and applied in the arbitral forum. Thus, I would argue, when arbitrators sit to adjudicate a dispute governed by external law, there is a tension between the tradition of limited judicial review of arbitration awards and the presence of an independent public interest in ensuring that the law is correctly and consistently being applied, and that substantive policies reflected in the law are neither under-enforced nor over-enforced.

71. A labor arbitrator's authority is that of a "contract reader" selected by the parties. Thus, where the parties themselves invite reference to external law, that reference does not alter the essentially contractual nature of the obligation. The arbitrator's award remains as binding and subject to limited judicial review as conventional awards involving contractual obligations derived from the four corners of the labor contract. See St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny, 75 Mich. L. Rev. 1137 (1977).
The Supreme Court grappled with this tension in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which involved, among other things, the arbitrability of American antitrust claims in the context of a dispute between a Japanese-Swiss joint venture and a Puerto Rican distributorship. The *Mitsubishi* Court drew a distinction between an application to enforce an agreement to arbitrate and a later proceeding to determine whether to enforce an award. For purposes of the former, Justice Blackmun explained, the FAA requires the presumption that the arbitrator will decide the dispute in accordance with the applicable law. At the award-enforcement stage, "the national courts of the United States will have the opportunity . . . to ensure that the legitimate interest in the enforcement of the antitrust laws have been addressed." The Court stopped considerably short, however, of insisting that the award would be reviewable for factual or legal error on the same terms as an adjudication rendered by a trial court or administrative agency: "While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them."

This "minimal" review strives at a compromise between a policy of voluntarism—promoting private resolution of disputes by means of arbitration—and the policy of the external law. On certain assumptions—that the parties are sophisticated, the forum selected is competent to adjudicate the dispute according to external law, and the policy of the external law is indifferent as to the nature of the adjudicative forum, the *Mitsubishi* compromise is understandable. In contexts where these assumptions would be inappropriate, however, the balance may have to be struck differently.

---

73. Id. at 638.  
74. Because *Mitsubishi* arose in the context of an action to compel arbitration, it should not be assumed that decision spells out all that would be required for judicial enforcement of an award. At the very least, the award should contain findings of fact and conclusions of law and an accessible record of the proceedings should be available, so as to permit a court to determine whether the arbitrator has acted in "manifest disregard of the law." The "manifest disregard" standard—a judicially created addition to the statutory grounds for vacating an award set forth in the FAA—requires a showing that "the arbitrator 'understood and correctly stated the law but proceeded to ignore it.'" *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1986) (citations omitted). Traditionally, the absence of a written opinion and accessible record has precluded meaningful review. See Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DIS. RES. 157, 198 (1989).
b. The Relevance of the Alexander v. Gardner-Denver Line of Cases

In a line of cases beginning with Alexander v. Gardner-Denver Co., the Supreme Court has held that the labor arbitration provisions of collective bargaining agreements do not require employees having individual claims against their employer under federal law to submit those claims to the labor arbitration process; that the act of submitting such claims does not constitute a waiver of right to pursue them in the civil courts or administrative agencies; and that the arbitral resolution, while perhaps admissible into evidence, does not preclude relitigation of any of the issues resolved in arbitration.

For good reason, the Court in Gardner-Denver and its progeny did not pause to consider the FAA. On the formal level, there are at least two reasons why the FAA did not apply at all. The first is the position, ultimately adopted in Misco, that reads section 1 to exclude collective bargaining agreements from the FAA's purview. The second, and more persuasive, reason is that the claims in question involved rights based on external law rather than on undertakings that derived from the employment relationship as such; and that these rights were entitlements belonging to the individual employee and not subject to modification in collective bargaining. An employee in a bargaining unit represented by a union can be said to authorize the union to negotiate collective terms of employment binding on all employees in the unit. However, the designation of a collective-bargaining representative does not create an agency for all purposes, and does not ordinarily authorize the union to compromise the extra-contractual rights of employees. It therefore follows that the arbitration clause in the collective bargaining agreement does not constitute a written agreement between the employee and his or her employer to submit the statutory claims in question to arbitration.

This approach parallels much of the analysis employed by Justice Powell in Gardner-Denver to explain why unions cannot waive an individual employee's statutory claims, but does not rely on a doctrine of presumed nonwaivability of a judicial forum for statutory claims. The

77. The Court used language suggesting that individual employees could never enter into an agreement providing for a prospective waiver of the judicial forum available under an external law. When viewed in context, however, the language is best understood as a limitation on the power of unions to negotiate such waivers:
Court went on to reject the further argument that by submitting his contractual claim and the substance of his statutory claim\textsuperscript{79} to the labor arbitrator, the employee should be barred by his election of remedies from pursuing the latter claim in the civil courts. Two reasons were given for rejecting the election-of-remedies contention—both by-products of the union's lack of authority to compromise the external-law entitlements of individual employees. The first\textsuperscript{79} was that the employee by submitting his contractual claim made no knowing and voluntary waiver of his statutory claim because the employee had a contractual right to invoke the arbitral forum that was in no way conditioned on a relinquishment of his statutory right. Moreover, Justice Powell added with a citation to \textit{J.I. Case Co. v. NLRB},\textsuperscript{80} an individual employee could not be required to relinquish individual entitlements as the price for exercising benefits secured in the collective bargain. The second reason\textsuperscript{81} was that because the arbitrator's mandate was confined to the labor agreement, he lacked formal authority to adjudicate the statutory claim under \textit{Enterprise Wheel}.

Finally, the Court considered the contention that a deferral rule akin to the common-law doctrine of issue preclusion should be adopted where "(i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited [the conduct that would be charged in the civil action]; and (iii) the arbitrator has authority to rule on the claim and fashion a remedy."\textsuperscript{82} The reasons given for rejecting deferral appear to depend on a view of arbitral competence to apply to external law that is contrary to the thrust of the FAA decisions. Here, too, it is possible to read the Court's language in light of the facts before it: a labor arbitrator who sits primarily to adjudicate claims under the contract and resolve a

\begin{footnotesize}
\begin{enumerate}
\item It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970). These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as the collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on a plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver. \textit{See Wilko v. Swan}, 346 U.S. 427 (1953).
\item 415 U.S. at 51-52.
\item The Title VII claim as such was not submitted to the arbitrator. However, Alexander charged that his discharge was due to racial discrimination in violation of the no-discrimination clause of the labor contract. \textit{See Gardner-Denver}, 415 U.S. at 42.
\item 415 U.S. at 52.
\item 321 U.S. 332, 338-39 (1944).
\item 415 U.S. at 52-53.
\item 415 U.S. at 55-56.
\end{enumerate}
\end{footnotesize}
dispute in which the participants are the employer and the union, with no formal involvement of the individual employee. The Court properly rejected the proposed deferral rule, for, as it would later explain in Barrentine v. Arkansas-Best Freight System,\(^8\) the union controls the presentation of the grievance in the arbitration and functions in the proceeding not so much as the advocate of the grievant, but more as the representative of collective employee interests.\(^8\)

Thus, notwithstanding Gardner-Denver, the question of the proper role of arbitration agreements with respect to claims under protective labor legislation is not resolved by invoking a generalized objection to arbitral competence to consider external law. In my view, the Gardner-Denver line of authority is best understood in terms of the collective bargaining agent's lack of authority to compromise individual employee entitlements flowing from extra-contractual sources.

I now turn to the question of whether arbitration clauses in individual employment contracts that purport to encompass claims under protective labor laws should be read as a waiver of the right to a judicial forum otherwise available under those laws. Two objections to enforcing such clauses are considered: (i) that protective labor laws represent a global legislative judgment that employees as a class will not be able to vindicate their rights in the arbitral forum (the "unsophisticated claimant" objection); and (ii) that the policies of particular protective laws would be undermined by requiring resort to the arbitral forum (the "public policy" objection).\(^8\) Again, the object of the exercise is to determine how best to read the exclusionary clause of section 1 of the FAA and similar state arbitration statutes.

\(^{83}\) 450 U.S. 728 (1981).

\(^{84}\) Even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration . . . . Since a union's objective is to maximize overall compensation of its members, not to ensure that each employee receive the best compensation available . . . . , a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.

\(^{85}\) Professor Fiss' article raises a more general objection to channeling public-law disputes into the private arena. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984). Presumably, he would favor public resolution of external law even where arbitration provides mutual advantages to the parties and is fully consistent with the public policy embodied in the external law. So put, the objection vastly overstates the benefits of public-dispute resolution. An important point here is that the judicial-review function requires arbitrators adjudicating claims based on external law to issue an opinion containing findings of fact and reasons for the disposition, and an accessible record of the hearings. See infra text accompanying note 121.
2. The "Unsophisticated Claimant" Objection

It is certainly tempting to read section 1 as embodying a categorical judgment that workers as a class should not be bound by predispute arbitration agreements, either because of their limited bargaining power or a relative lack of sophistication hampering their ability to protect their rights in arbitration. The temptation is all the stronger when the rights in question are based on protective labor laws—legislation reflecting dissatisfaction with the outcomes of private bargaining.

There may be reasons, however, for resisting such a reading (aside from the ambiguity of the legislative intention adverted to at the outset of this essay). First, it is somewhat anomalous to say that workers lack contractual capacity to waive a statutory right to a judicial forum when in many other respects concerning considerably more important terms of the employment contract, such as compensation, rights against discharge and duration, workers must strike their own bargains. Although particular circumstances may call for invocation of the contract-law doctrines of unconscionability and duress, we do not ordinarily treat workers as a class of individuals lacking contractual capacity to fill out the terms of the employment relationship. Second, the waiver here would be limited to the identity of the forum and would not extend to the substantive rights recognized in the protective legislation. It is not clear that even unsophisticated workers lacking access to counsel are always better off with a rule requiring resort to the civil courts rather than arbitration to pursue their statutory claims. Third, it should not be assumed that all employees fit the stereotype of the economically strapped, unsophisticated claimant. A broad exclusion of employment contracts from the reach of the FAA and cognate state laws would not be confined to workers seeking to enforce minimum-wage obligations under the Fair Labor Standards Act ("FLSA"). The exclusion would also include highly-placed management officials suing under express contracts and the mid-level management employees who are typical claimants under ADEA.

Nevertheless, the case of the unsophisticated worker with limited

86. Justice Fortas intimated such a view in dicta in Prima Paint: "We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1." 388 U.S. at 403 n.9.


bargaining power presents a legitimate concern that private arbitration will fail to adequately protect workers' rights and will compromise the integrity of the public law scheme. I refer not only to the repeat-player problem (likely to be aggravated where claimants are uncounseled) but also to the prospect of contracts calling for arbitration before tribunals comprised of individuals experienced in the industry who presumably may exhibit a systemic bias in favor of employers.89

On the federal level, concerns of this type can be accommodated (as we shall see) in the course of determining whether the FAA requires arbitration of claims under a particular federal law. On the state level, such concerns cannot be accommodated because of the Supreme Court's aggressive reading of the preemptive force of the FAA even with respect to comprehensive state regulatory schemes embodying a particularized judgment that certain claims should be excepted from the pro-arbitration premises of state law. The wrong turn was taken in a footnote in Southland Corp. v. Keating.90 The case involved a dispute between Southland, the owner and franchisor of 7-Eleven convenience stores, and certain of its California franchisees who were alleging violations of the state's Franchise Investment Law. Even though California has a statute similar to the FAA, the Franchise Investment Law was construed by the state supreme court to invalidate any waiver of the judicial forum with respect to claims under that statute.91 The Supreme Court found FAA preemp-


91. The law provided that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law . . . is void." Franchise Investment Law, CAL. CORP. CODE § 31512 (West 1977). The California Supreme Court had ruled that the FAA prohibited state laws exhibiting an across-the-board hostility to arbitration, but did not "preclude a state from protecting its franchise investors through a system of statutory regulation including nonwaivable judicial remedies." Keating v. Superior Court, 31 Cal. 3d 584,
tion, however, because the state policy against arbitration did not establish a ground for revocation of arbitration agreements generally applicable to all contracts in the state—as required by section 2 of the FAA—but “merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.”92 “If we accepted this analysis,” the Court warned, “states could wholly eviscerate congressional intent to place arbitration agreements ‘upon the same footing as other contracts,’ . . . simply by passing statutes such as the Franchise Investment Law.”93

The Court’s extended the Southland approach to state labor laws in Perry v. Thomas94 (although it did not consider the reach of section 1 of the FAA). In Perry, a former employee of a securities firm sued for commissions owed on a sale of securities under a California wage-payment statute. The Supreme Court held that the FAA required enforcement of the arbitration clause that plaintiff had signed when he initially applied for employment, even though section 229 of the California Labor Code expressly provided that actions for collection of wages may be maintained “without regard to the existence of any private agreement to arbitrate.”95 Unless the state is applying its general contract law, Justice Marshall explained, “[w]e see nothing in the [FAA] indicating that the broad principle of enforceability is subject to any additional limitations under state law.”96

Southland and Perry work a significant interference with the regulatory authority of the states over transactions governed by state law.97 The result of these rulings is to leave a gap in the state’s regulatory scheme. Even though the state believes that a certain enforcement mechanism is essential to the efficacy of its substantive regulation, the FAA is read to displace the enforcement mechanism while keeping in place the

92. 465 U.S. at 16 n.11.
93. Id. at 17 n.11 (citation omitted). Justice Stevens, in a strong dissent, argued that the thrust of the FAA is to bar states from adopting a general common-law rule against enforcement of arbitration agreements rather than interfere with particularized judgments such as were found in the California franchise investment law: “Given the importance to the State of franchise relationships, the relative disparity in the bargaining positions between the franchisor and the franchisee, and the remedial purposes of the California act, I believe this declaration of State policy is entitled to respect.” Id. at 19-20.
95. Id. at 486 (citing CAL. LAB. CODE § 229 (West 1971)).
96. 482 U.S. at 489-90.
These rulings also present serious difficulties for someone wishing to preserve some role for the enforcement of arbitration promises in employment agreements. For claims governed by state substantive law, the section 1 issue presents an all-or-nothing choice: either to enforce arbitration clauses in all employment contracts affecting commerce or (out of solicitude for unsophisticated employee-claimants) to withhold enforcement in all employment contracts.99

3. The "Public Policy" Objection

Concerns over enforcing arbitration agreements between firms and unsophisticated employees with limited bargaining power are, as Southland and Perry illustrate, an aspect of the larger question of the extent to which the pro-arbitration premises of the FAA and cognate state laws can be accommodated with the public policy reflected in the external law. Because the FAA enjoys no automatic preemptive force for claims governed by federal law, however, the rules governing arbitration here can be shaped in a manner that preserves the integrity of the federal regulatory scheme.

a. The Search for an Implied Repeal

In a series of rulings culminating in Shearson/American Express, Inc. v. McMahon,100 and Rodriguez De Quijas v. Shearson/American Express, Inc.,101 the Supreme Court has rejected a general federal public-policy exception to the FAA, and made clear that arbitration of statutory claims is required even where the statute seeks to deter conduct as well as to compensate private losses. The Court's general approach is to recognize in the FAA a strong presumption of arbitrability which is rebuttable only by a showing that the particular federal law either expressly or by implication intends to preclude waiver of the judicial forum. In essence,

98. Congress certainly has the power to shield arbitration agreements from state regulation with respect to transactions over which there is potential legislative authority under Article I. The wisdom of its exercise is a different matter. Moreover, it is doubtful Congress meant to venture this far in displacing state regulatory judgments. For criticism of Southland, see Hirshman, The Second Arbitration Trilogy: The Federalization of Arbitration Law, 71 VA. L. REV. 1305, 1347-50 (1985); Speidel, supra note 74, at 171-74.

99. There may be some state statutes that escape the reach of Southland and Keating because they play a role in a federal statutory scheme that is held not subject to FAA strictures. Compare Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988) (central role played by state civil rights statutes in Title VII scheme indicates that Congress intended to preclude judicial waiver of forum), with Steck v. Smith Barney, Harris Upham & Co., Inc., 661 F. Supp. 543 (D.N.J. 1987) (arbitration required for state law age claim but not ADEA claim).


the FAA applies in the absence of evidence of an express or implied repeal.

With respect to the case pending in the Supreme Court, *Gilmer v. Interstate/Johnson Lane Corp.*, a straightforward application of the approach taken in *McMahon* and *Rodriguez* suggests that—but for section 1—the FAA will be held to require arbitration of claims under the ADEA and, by implication, other federal employment laws. The lower courts in conflict with the Fourth Circuit in *Gilmer* have sought to distinguish the federal labor laws from the federal securities, civil RICO and antitrust laws\(^\text{102}\) which the Supreme Court found arbitrable in prior decisions. Each of these contentions enjoys some force, but none is likely to support a finding of implied repeal consistent with the Court's prior handiwork. First, arguments based on the status characteristics of the statutory claimants go only so far. It is possible to argue that workers asserting minimum-wage claims under the FLSA are particularly in need of paternalistic intervention.\(^\text{103}\) But can it be said categorically that employees as a class are more in need of protection from their waivers of the judicial forum than the customers of brokerage firms in *McMahon* and *Rodriguez*?

Second, an argument might be made that the nature of certain statutory claims supports nonwaivability of a judicial forum. It might be thought that claims of status discrimination, in particular, implicate moral principles that generally should not be subject to compromise. Such a position, however, would also preclude private postdispute settlement agreements (including postdispute arbitration); presumably, the benefits to the parties and the elimination of public costs of the avoided public adjudication support enforcement of such agreements. The objection thus must be directed to the fact that the waiver of the judicial forum occurs prior to the occurrence of the dispute, and that the nature of the right to protection from status discrimination precludes a potential claimant from putting a proper value on the availability of a judicial forum at that time. Considerations of this sort suggest a basis for barring a prospective waiver of substantive protections. It is less clear that they

\(^{102}\) Although the Court in *Mitsubishi* left open the continued viability of the antitrust-law exception to the FAA recognized in *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), for agreements to arbitrate claims arising from domestic transactions, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-29 (1985) its subsequent discussion in *McMahon* undercuts the “private attorney general” underpinnings of *American Safety*. See *McMahon*, 482 U.S. at 238-42.

\(^{103}\) See *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1041-43 (6th Cir. 1986) (en banc) (explaining in these terms why postdispute waivers of FLSA claims are barred by D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)).
support a rule barring forum-choice agreements that do not involve a such a waiver. From the standpoint of the Court's implied-repeal approach, moreover, it would have to be shown that Congress intended to include access to a judicial forum within the set of nonwaivable entitlements.

Third, it might be argued that the role of the federal regulatory agency in statutes like ADEA, Title VII, the Equal Pay Act, and FLSA is more dependent on the filing of private claims for information about possible systemic violations than is the SEC, and hence arbitration poses a greater potential for thwarting the agency's mission. This argument is difficult to square with the rule, recognized in *Gardner-Denver* itself, that Title VII claimants can enter into "knowing and voluntary" postdispute settlements of their claims even without agency oversight; Congress this year essentially reaffirmed this rule with respect to ADEA settlement agreements. Moreover, as suggested below, it is possible to enforce predispute arbitration agreements while ensuring that private claims of alleged violations come to the agency's attention.

Fourth, a variant of the above argument is that private suits are more central to the enforcement of the federal civil rights laws and the FLSA than they are in the securities area, and, therefore, arbitration reduces the role of the claimant to that of a private suitor in a private forum rather than a "private attorney general" enforcing public norms in a public manner. The Court also faced private-enforcement schemes when it held arbitrable the civil RICO claims in *McMahon* and the antitrust claims in *Mitsubishi*. This argument, too, cannot be easily reconciled with the allowance of private postdispute settlement agreements. Moreover, the fact that the statute is enforced largely through private litigation tends to support arbitrability, for there is less risk of conflict with agency objectives.

Fifth, the considerable regulatory powers of the SEC in the securities context, in contrast with the more limited authority of the Equal Employment Opportunity Commission ("EEOC"), might argue for

104. The Older Workers Benefit Protection Act of 1990, see supra note 88, provides that "[a]n individual may not waive any right or claim under [ADEA] unless the waiver is knowing and voluntary" in accordance with the minimum safeguards set forth therein. Pub. L. No. 101-433, § 201, 104 Stat. at 983 (amending 29 U.S.C. § 626(f)(1). Conceivably, this language could be read to reach a predispute waiver of the procedural right to a judicial forum, although there is no indication in the text of the 1990 measure or the committee reports that Congress intended to regulate arbitration agreements or to displace the FAA. In *McMahon*, the Court read the no-waiver provision in § 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a) (1988) (declaring void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]") as limited to waivers of substantive obligations under the Exchange Act. See 482 U.S. at 240-42.

105. See discussion in *McMahon*, 482 U.S. at 240-42.
greater allowance of private arbitration on the view that the SEC can effectively police industry arrangements, whereas the EEOC presumably cannot. This point, too, has force—as evidenced by the SEC’s actions in prodding the industry’s self-regulatory organizations to improve arbitration procedures.  

Again, it is not entirely clear why the EEOC or the Labor Department could not by regulation set forth the conditions under which they would treat an arbitration award as preclusive of an agency’s enforcement effort.

Sixth, another approach is to focus on the broad equitable remedial powers of courts hearing claims under ADEA and the other federal civil rights laws and the central role played by private class actions as evidencing a congressional purpose to authorize litigation capable of transforming values and preferences in the workplace. On the other hand, while arbitrators have traditionally not exercised broad powers, certainly in the labor arbitration context they have issued awards requiring employers to make prospective changes in their operations and to avoid recurring violations. Class actions are uncommon in arbitration, but they do sometimes occur. The transformative dimension of ADEA and Title VII litigation also can be overstated; most claims under these statutes constitute fact-specific allegations of discriminatory motive in termination and promotion decisions.

Finally, an argument available only for claims under ADEA, the Equal Pay Act and FLSA is to infer from the congressional provision of a right to a jury trial a preference to have claims adjudicated in tribunals.

106. See supra note 89.

107. See Shell, ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?, 68 TEX. L. REV. 509, 568 (1990) ("Title VII is not only a remedial statute; it is an attempt to address a systemic social ill—discrimination—that is deeply embedded in the cultural fabric . . . . Commercial arbitration is not well situated to serve this institutional goal because it is essentially transactional in focus.").

108. The prospective-relief issue is not without difficulty in the labor-arbitration context, but such awards have been rendered. See, e.g., Oil, Chemical & Atomic Workers Int’l Union, Local 4-16000 v. Ethyl Corp., 644 F.2d 1044, 1052 (5th Cir. 1981); O. Fairweather, Practice and Procedure in Labor Arbitration 637-40 (2d ed. 1983).

considered particularly receptive to employee-claimants.\textsuperscript{110} But a jury trial would also have been available for the claims in \textit{Mitsubishi, McMahon and Rodriguez}. Moreover, Title VII, under present law, does not expressly provide for a jury trial, which raises the further difficulty that claims under Title VII may be arbitrable while claims under ADEA would not, despite the common substantive purpose and somewhat similar procedures of the two statutes.

\textbf{b. A Process of Accommodation}

Ultimately, the Court's search for an express or implied repeal of the FAA is likely to result in the drawing of arbitrary distinctions among federal statutes: furthering the policy of arbitration in some cases, while promoting the availability of a judicial forum in other cases. The nub of the problem is that all of the federal laws in question were enacted at a time when the FAA was thought not to reach federal statutory claims.\textsuperscript{111} In the absence of an express repeal, only a statute providing for exclusive agency enforcement, such as the National Labor Relations Act, can be said to be fundamentally inconsistent with private arbitration.\textsuperscript{112} The other federal labor laws rely, however, on a mixture of agency enforcement and private litigation. It is this hybrid of public and private enforcement mechanisms that renders intractable the implied-repeal approach of the Court's FAA rulings.

An alternative approach would be to abandon the search for an express or implied repeal and attempt to integrate the directives of the FAA with the policies of the federal labor law in a manner which preserves the vitality of both statutes.\textsuperscript{113} This process of accommodation

\textsuperscript{110} It cannot always be said that statutory provision of a right to a jury trial reflects that sort of preference, because the availability of a jury trial often turns on historic treatment of analogous claims for relief. In the ADEA context, the Court found a right to a jury trial because the statute incorporated sections of the FLSA providing for a jury-tried action for unpaid wages. \textit{See Lorillard v. Pons}, 434 U.S. 575, 580-82 (1978). Congress in 1978 amended § 7(c) of ADEA, 29 U.S.C. § 626(c)(2), to expressly provide for a right to a jury trial in private suits "regardless of whether equitable relief is sought by any party in such action." Paradoxically, because of the FLSA analogy, EEOC suits may be viewed as bench-tried actions to redress a public offense even where unpaid wages are sought in addition to equitable relief. \textit{See Lorillard}, 434 U.S. at 580 n.7.

\textsuperscript{111} The then-prevailing view was set in \textit{Wilko v. Swan}, 346 U.S. 427 (1953) (overruled by \textit{Rodriguez De Quijas v. Shearson/America Express, Inc.}, 490 U.S. 477 (1989)).

\textsuperscript{112} The National Labor Relations Board has chosen, in its discretion, to refer disputes stating claims under the statute and the collective bargaining agreement to the labor-arbitration mechanism established by the parties. \textit{See United Technologies Corp.}, 268 N.L.R.B. 557 (1984); \textit{Collyer Insulated Wire}, 192 N.L.R.B. 837 (1971). The Board's aggressive pro-arbitration deferral policy is criticized in the panel decision in \textit{Hammontree v. NLRB}, 894 F.2d 438 (D.C. Cir. 1990), \textit{vac. on reh'g, 925 F.2d 1486 (1991) (en banc)}.

\textsuperscript{113} The Court's reluctance to integrate the policies of modern civil rights legislation with its revival of the open-ended civil rights legislation of the Reconstruction era, see \textit{Johnson v. Railway Express Agency, Inc.}, 421 U.S. 454 (1975), led to the unfortunate ruling in \textit{Patterson v. McLean
would require that certain steps be taken to ensure that private arbitration is conducted in a manner which preserves the administrative agency's role and the court's review function under the federal statute.

Initially, where the statute requires that a charge be filed with the EEOC as a prerequisite to filing a civil action—as is the case under Title VII and ADEA—arbitration of the statutory claim should be stayed until after the charge has been filed and the administrative process has been completed. For Title VII claims, the process is not completed until the EEOC has issued a notice of right-to-sue letter; for ADEA claims, there is only a 60-day waiting period. Such an administrative-exhaustion requirement provides a means of informing the EEOC of potential violations at a particular firm and enables the agency in appropriate cases to file an enforcement action preempting a private suit. In deciding whether to pursue an active investigation of the charge and, ultimately, whether to bring an enforcement action, the EEOC could consider the nature of the arbitration forum (including the quality of the hearing procedures) provided in the employment contract. The agency could also issue regulations setting forth minimum procedural safeguards for arbitration of Title VII or ADEA claims.

Upon the completion of the administrative process, the case would be ripe for arbitration. Two routes are possible at this point. Where both parties are willing to submit to arbitration, that proceeding would commence without resort to the courts except for a later petition to confirm or review the arbitration award under sections 9 and 10 of the FAA. In addition, the reviewing court should satisfy itself that the arbitrator applied the substantive provisions of the federal statute consistent with the limited-review standard recognized in Mitsubishi and McMahon. Alternatively, where the claimant is unwilling to submit to arbitration—out of


114. Cf. EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987) (postdispute settlement agreements may compromise substantive rights under ADEA but, as a matter of public policy, cannot foreclose right to file charge with the EEOC or otherwise cooperate with EEOC investigation). The holding of Cosmair is codified in the Older Worker Benefits Protection Act: "No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." Pub. L. No. 101-433, § 201, 104 Stat. at 984 (amending 29 U.S.C. § 626(f)(41)).


fear that statutory claims will be held time-barred either under the 90-day period for filing a Title VII action from date of receipt of the EEOC's right-to-sue letter\textsuperscript{118} or the two-year statute of limitations for filing an ADEA action\textsuperscript{119}—the claimant should be permitted to file a civil action.\textsuperscript{120} Where there is a valid arbitration agreement under the FAA, however, the court should stay the action under section 3 and refer the dispute to arbitration, while retaining jurisdiction to confirm or review the award.

The arbitration need not mirror what would transpire in a civil action. The benefits of arbitration would be lost if all of the procedures entailed in a civil action were simply transported to the arbitral arena. However, the premise of the Court's rulings in \textit{McMahon} and \textit{Rodriguez} is that arbitration entails only a waiver of a procedural right to a judicial forum rather than a waiver of any substantive right accorded by the statute. Consistent with that premise, the arbitrator is obligated to decide the dispute in conformity with the substantive standards of the statute and should have the authority to award whatever injunctive or monetary relief is necessary to remedy a proven statutory violation.\textsuperscript{121} The court should review the award for conformity with applicable legal standards and to ensure that findings of fact are not clearly erroneous. Moreover, in order to permit meaningful review by the court, a transcript of the hearings should be kept and the award should be accompanied by an opinion containing findings of fact and reasons for the manner of disposition of the statutory claim.

4. Revisiting the Section 1 Issue

The choice before the Supreme Court in \textit{Gilmer} is whether to apply section 1 literally to exclude all employment contracts evidencing a transaction in commerce from the reach of the FAA, or to take up the challenge of refashioning its pro-arbitration stance so as to better accommodate the policies of state and federal protective labor legislation.\textsuperscript{122}

\textsuperscript{120} In order to avoid such protective filings, the party compelling arbitration—typically, the employer—should be held to have waived any defense of statute of limitations (other than the administrative charge-filing requirements).
\textsuperscript{121} This should include the fee-shifting provisions, if any, of the external law.
\textsuperscript{122} The approach outlined in the text is consistent in spirit with the recommendation in the \textit{Federal Courts Study Committee, Report of the Federal Courts Study Committee} 60-61 (April 2, 1990) that Congress authorize, on a five-year experimental basis, voluntary arbitration of employment discrimination disputes, with enforcement of awards pursuant to the FAA; and
III. ARBITRATION IN NONUNION SETTINGS UNDER FUTURE LAW

What role should nonunion arbitration play in a future world where nonunion employees are protected by law against termination without "just cause"? I will assume that such legislation has been enacted without considering the justifications for such laws. The question considered here is whether such measures should rely on arbitration as the adjudicative mechanism for resolving disputes and developing the substantive law of the employment relationship.

A. Justifications for Reliance on Mandatory Arbitration

Many proposals for wrongful-termination legislation seize upon private arbitrators as the adjudicative mechanism of choice. Montana, the only state thus far to adopt such legislation, imposes a cost-shifting mechanism to encourage resort to private arbitration. The draft proposal of a Uniform Employment-Termination Act, presently pending before the National Conference of Commissioners on Uniform State Laws, urges reliance on arbitration rather than the civil courts or administrative agencies. Because mandatory arbitration of "rights" disputes

with the directive of Congress in § 12212 of the newly-enacted Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 (1990) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under this Chapter."'). It is not clear, however, whether the reference to arbitration here is confined to postdispute agreements.


126. The statute apparently contemplates postdispute offers to arbitrate which, if not accepted by the other party and that party does not prevail in the civil action, exposes the non-accepting party to an obligation to pay the offering party's post-offer attorney's fees. A discharged employee who makes an offer to arbitrate that is accepted and who prevails in such arbitration is entitled to have the arbitrator's fees and the costs of the arbitration borne by the employer. See Wrongful Discharge from Employment Act of 1987, MONT. CODE ANN. § 39-2-914. The combined effect of the two provisions is to create powerful—in the case of most discharged employees, irresistible—incentives to agree to submit disputes under the Montana law to arbitration. But even though Montana has enacted what as a practical matter is a mandatory arbitration procedure, the award itself is subject to review in conformity with the limited judicial review accorded awards rendered under consensual arbitration in the Uniform Arbitration Act. See id.

in the employment setting is both an unusual concept\textsuperscript{128} and marks a departure from its roots as a consensual dispute-resolution mechanism, those who urge use of private arbitrators carry a fairly hefty burden of justification.

Proponents of wrongful-termination legislation share a common intuition that such laws will spur a vast surge of litigation that may overwhelm the civil courts.\textsuperscript{129} This is likely to be the case even if statutory protection is limited to terminations and "constructive dismissal" claims rather than including all adverse personnel decisions affecting employees. Even so, this anticipated increase in cases argues only for some adjudicative mechanism outside the civil courts. The Western European countries that have enacted such laws use labor courts or industrial tribunals that function as special tribunals within the civil court system.\textsuperscript{130} Because such courts typically involve a tripartite structure of representatives of industry associations, organized labor and the public, this option is presumably unavailable on an American terrain characterized by decentralized collective bargaining and low union density. This option recommended, the drafting committee also offers alternative procedures for states preferring to utilize the civil courts or administrative agencies.

128. At present, only one jurisdiction employs private arbitrators as the adjudicative mechanism for wrongful-termination legislation. In 1978, the Canadian Labour Code was amended to protect against unjust dismissal employees who have been with the same employer for at least twelve months and are not subject to a collective-bargaining agreement. R.S.C. ch. L-2, §§ 240-46 (1985). \textit{See also} Act of April 23, 1978, ch. 27, 1977-78 Can. Stat. 607. This measure applies only to industries within Canada's federal sector—largely, the transportation, communications and atomic energy fields—comprising a thin layer of about 10% of the nonagricultural workforce (which, in turn, is no more than 1/10th of our own labor force). \textit{See} Estreicher, \textit{Unjust Dismissal Laws: Some Cautionary Notes}, 33 \textit{AM. JUR. COMP. L.} 310, 311-12 (1985); Carter, \textit{Collective-Bargaining Legislation in Canada}, in \textit{UNION-MANAGEMENT RELATIONS IN CANADA} 31 (J. Anderson & M. Gunderson eds. 1982). An empirical study of experience with nonunion arbitration in the Canadian federal sector has been undertaken by Genevieve Eden of the University of Toronto. \textit{See} Eden, \textit{Unjust Dismissal: Just Cause and Remedies Under the Canada Labour Code}, \textit{PROC. ANNUAL CONF. CANADIAN INDUS. REL.} A. (1990) (copy available on request from this author); G. Eden, \textit{Unjust Dismissal in the Canadian Federal Jurisdiction} (1990) (Ph.D. Dissertation, University of Toronto, Centre for Industrial Relations).

129. I am not aware of any systematic attempt to quantify the extent of new litigation that would be generated by such laws. The Federal Courts Study Committee reports that 7500 employment discrimination cases were filed in the federal courts in 1989. \textit{FEDERAL COURTS STUDY COMMITTEE}, \textit{supra} note 122, at 61. This figure does not, of course, include state-court filings, and it cannot be assumed that wrongful-termination filings nationwide will be limited to this order of magnitude. Extrapolating from the experience of employees under collective bargaining agreements, Jack Stieber offers the estimate of approximately 2 million employees discharged each year, of which 150,000 "would have been discharged without just cause and reinstated to their former jobs if they had had the right to appeal to an impartial arbitrator as do almost all unionized workers." \textit{See} Stieber, \textit{Recent Developments in Employment-at-Will}, 36 \textit{LAB. L.J.} 557, 558 (1985); Stieber & Murray, \textit{Protection Against Unjust Discharge: The Need for a Federal Statute}, 16 \textit{U. MICH. J.L. REF.} 319, 324 (1983).

130. For a good recent survey, see Hepple, \textit{Labour Courts: Some Comparative Perspectives}, 40 \textit{CURRENT LEGAL PROBS.} 169 (1988).
would, moreover, be inappropriate for employees in the nonunion sector. Administrative agencies, however, provide an obvious alternative that could be implemented in this country. The argument, then, has to be that private arbitration enjoys a comparative advantage over administrative agencies.

The usual argument advanced in favor of arbitration over the alternatives is grounded in a claim of expertise. This claim has two parts. The first is that arbitrators have available to them the accumulated wisdom of over a half century of grievance arbitration under collective bargaining. As former Dean St. Antoine observes: "Adopting the arbitration format would immediately make available the vast body of arbitral precedent concerning substance and procedure that has been developed in countless decisions over the years." Even if we grant the need for expertise, this part of the claim is particularly problematic. The principles that have developed in labor arbitration were forged, as Professor Getman reminds us, in consensual settings as part of an ongoing process of collective bargaining. Moreover, these principles have been applied in disputes typically not involving employees whose jobs involve considerable unsupervised time and the daily exercise of discretion and judgment. Dismissals for poor performance—as opposed to misconduct—in such unstructured settings are rarely encountered, let alone sustained, by labor arbitrators. An insistence on a formal system of progressive discipline as a precondition to a sustainable discharge, for example, may be inappropriate for managerial and supervisory employees who are likely claimants under a wrongful-termination statute. In a unionized environment, moreover, an arbitration award that significantly hampers managerial discretion can be modified in collective bargaining; a


133. St. Antoine, supra note 125, at 77; accord, Summers, supra note 123, at 519-32. Dean St. Antoine, who is the reporter for the drafting committee proposing a Uniform Employment Termination Act, see supra text accompanying note 127, does not explicitly refer to the desirability of utilizing labor-arbitration precedents in the commentary accompanying the current proposal.

similar escape valve would not be available in a statutory "just cause" regime administered by private arbitrators.

The second part of the claim—the availability of expert decisionmakers—is less assailable. Arbitration, former Dean St. Antoine tells us:

would permit the use of an established nucleus of experienced arbitrators, and a growing number of young, able aspirants who are caught in the vicious cycle of being denied experience because they have no experience. It would facilitate maximum flexibility, at least until more is learned about future caseloads, because there would be no need to engage a large permanent staff at the outset.135

As an occasional arbitrator, I welcome an infusion of new employment opportunities for those in the profession. It remains to be demonstrated, however, how much specialized expertise is needed for employment disputes;136 how well the labor-arbitration experience converts to the somewhat different context of statutory claims; and why administrative agencies could not quickly develop the requisite experience. I doubt, moreover, that engaging a large body of arbiters can be avoided long after the onset of a wrongful-dismissal law—particularly since it is the anticipated caseload that is driving the arbitration proposal in the first place.

B. Comparative Disadvantages

There are also reasons to believe that there are comparative disadvantages to private arbitration over administrative agencies. First, private arbitrators sitting as adjudicators under a wrongful-termination statute act as agents of the state. There are difficulties, both of constitutional and policy dimensions, with having arbitrators paid and selected by the parties functioning as public adjudicators.137

Second, once this is conceded, private arbitrators (who typically receive a per diem fee of upwards of $400) may provide a considerably less

135. St. Antoine, supra note 125, at 77.

136. The American Arbitration Association, it should be noted, uses its commercial panel rather than its labor panel for assigning arbitrators for disputes under individual employment agreements (except perhaps for individual contract disputes that are arbitrated under the umbrella of a collective bargaining agreement, as in the entertainment industry). Dean St. Antoine concedes that "just cause rulings do not call for the minute technical expertise that may be essential in a permanent hearing officer specializing in unemployment compensation or Social Security claims." Id. at 78.

137. The current draft of the Uniform Employment-Termination Act, in recognition of such difficulties, provides for selection and compensation of arbitrators by the state: "As a public right, the right to protection against discharge without just cause should be administered by a public agency . . . . [T]o maintain the public character of the proceedings under the statute, the formal appointment of arbitrators should be the responsibility of the public agency." Draft Uniform Employment-Termination Act of October 22, 1990, supra note 127, at E-4 (comment: § 6(a)).
cost-effective means of dispensing industrial justice than an administrative agency.

Third, unlike administrative agencies, private arbitrators do not screen cases for probable merit and are not well-situated to mete out summary dispositions in appropriate cases. Unless the substantive judgment is made that every termination decision requires a hearing on the merits, some mechanism for weeding out plainly nonmeritorious cases and attempting to mediate solutions will be needed to keep costs down to a manageable level and avoid a situation where the sheer queue of cases prevents a prompt decision—thought to be critical to successful implementation of a reinstatement remedy.\textsuperscript{138} Since neither of the parties is bearing the cost of the proceeding itself, other than attorney’s fees, they are not likely to face the right incentives. A filing-fee requirement is an unpromising means of promoting self-screening, unless set at a more than nominal level that may lead to under-enforcement of statutory norms. A provision shifting attorney’s fees to prevailing parties also would deter potentially meritorious claims and is unlikely to secure political acceptance from representatives of claimants’ interests. In all likelihood, the appointing agency will be called upon to make the “reasonable cause” screening decision.\textsuperscript{139} But this method sacrifices significant efficiencies—and lowers the potential for mediated solutions by separating that screening task from the ultimate decisional responsibility.

Fourth, private arbitrators who sit to dispense public justice will be subject to the due process requirements that govern any form of public adjudication. In the American legal culture, this will, of necessity, result in increasing levels of formality that reduce whatever advantages of speed and informality arbitration traditionally has enjoyed. It is doubtful that a doctrine of stare decisis can be successfully resisted, simply to ensure that statutory norms are being applied—here, as an exercise of direct governmental authority rather than through the filter of a private contract—in a relatively evenhanded and doctrinally coherent manner.

Finally, the tradition of limited judicial review of arbitration awards is not likely to take root in this context. It is difficult to understand how arbitrators functioning \textit{de facto} as an administrative agency under a statute can be immunized from the standards of judicial review applicable to administrative-agency adjudication.\textsuperscript{140} A formal exception can be carved

\textsuperscript{138} See \textit{supra} note 32.
\textsuperscript{139} See \textit{St. Antoine, supra} note 125, at 78. The current Draft of the Uniform Employment Termination Act, \textit{supra} note 127, does not provide a screening mechanism.
\textsuperscript{140} The Draft Uniform Employment-Termination Act sets forth the grounds for vacating award that are available under the FAA, and adds an additional ground: “the arbitrator committed
out of federal and state administrative procedure acts. However, principles of judicial review inspired, if not required, by constitutional due process and delegation-doctrine concerns will quickly rise to the fore.

In short, arbitration here is not likely to present any real advantage over an administrative agency, and seems a circuitous route to establishing what will ultimately look and operate like an administrative-agency structure.

IV. CONCLUSION

Arbitration in nonunion settings does not warrant an aggressive pro-arbitration policy akin to the Steelworkers Trilogy. Nonunion arbitration does have a useful role to play in contexts that permit an essentially contractarian perspective. With respect to the adjudication of claims governed by external law, however, adjustments are necessary to ensure that the interests of a third party, the public, are given effect in the arbitral forum. As a public adjudicative mechanism, mandatory arbitration is a highly problematic alternative to administrative agencies.