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## **I. IDENTITY AND INTEREST OF AMICI**

Washington Employment Lawyers Association is an association of lawyers dedicated to the advancement of employee rights. The Washington State Labor Council is a prominent advocate for the interests of working people in the state of Washington, representing approximately 550 local and statewide unions associated with the AFL-CIO, which in turn represent approximately 450,000 members. The Service Employees International Union locals advocate for approximately almost 100,000 members in the fields of health care, long-term care, childcare, public services, education, and property services in Washington State. *See* Declaration of Kathleen Phair Barnard.

## **II. STATEMENT OF THE CASE**

Petitioner employees (“Employees”) appeal from the Court of Appeals decision ordering them to individually arbitrate their claims that Respondent Garda CL Northwest (“Garda”) denied them regular meal and rest breaks in violation of the Washington Industrial Welfare and Minimum Wage Acts. The Court of Appeals held that (1) Garda had not waived its right to arbitration (Slip Op. at 5-9); (2) that the collective bargaining agreement (“CBA”) waived the Employees’ right to a judicial forum and that therefore the exclusive forum for Employees’ claims was arbitration under the CBA (Slip Op. at 9-12); and that (3) the Employees

could not pursue their grievances as a class (Slip Op. at 12-14). Citing RAP 2.3(b)(4), the Court of Appeals declined to address the Employees' contention that the arbitration provision of the CBA was unconscionable (Slip Op. at 4). This memorandum is submitted pursuant to RAP 13.4(h) in support of Employees' request for review under RAP 13.4.

### III. AGRUMENT

#### **A. The Erroneous Decision Below Concerns An Issue of Substantial Public Interest: The Intersection Of Individual Statutory And Common Law Claims With Contractual Rights Under Collective Bargaining Agreements.**

Recent years have seen dramatic development of federal law concerning the intersection of litigation of individual employment rights under state and federal statutes and arbitration under labor agreements.<sup>1</sup> This case presents several core questions rising from this ferment which, because they have been answered erroneously by the Court of Appeals, will seriously negatively affect the lives of working people of Washington.

#### **B. The CBA Does Not Clearly And Mistakenly Waive the Employees' Access To A Judicial Forum Because It Does Not Specifically Name the Statutory Causes Of Action Subject To Arbitration and Because It Does Not Subject Them To Arbitration As The Exclusive Forum.**

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<sup>1</sup> See e.g., Griffin Toronjo Pivateau, *Private Resolution Of Public Disputes: Employment, Arbitration, And The Statutory Cause Of Action*, 32 Pace L. Rev. 114 (2012); Kenneth M. Casebeer, *Supreme Court Without A Clue: 14 Penn Plaza LLC v. Pyett And The System Of Collective Action And Collective Bargaining Established By The National Labor Relations Act*, 65 U. Miami L. Rev. 1063 (2011); Clyde Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 Employee Rts. & Employment Pol'y J. 453 (2001). These articles are appended to this Memorandum.

An employee's statutory and contractual rights remain independent even if "the contours of the CBA's antidiscrimination protections [are] defined by reference to federal law." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 263 (2009) (a collective bargaining agreement giving the arbitrator "authority to resolve only questions of contractual rights," does not preclude bringing statutory claims in court "regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII").<sup>2</sup> However, it is possible for unions to effectively bargain arbitration CBA provisions that waive their bargaining unit members' non-substantive statutory right of access to judicial forums for vindication of statutory rights. However, that can be done only by expressly incorporating the statutory requirements into the CBA which an arbitrator is expressly empowered to adjudicate through the sole and exclusive forum of arbitration. *Pyett*, 556 U.S. at 265-66 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628

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<sup>2</sup> See also, *Martinez v. J. Fletcher Creamer & Son, Inc.*, 2010 WL 3359372 (C.D. Cal. 2010) (CBA making compliance with California state wage order subject to arbitration as the exclusive remedy, but which did not specifically express the wage statutes at issue in the court litigation, did not constitute forum waiver because "mere parallelism with the statutes, when no statutes are specifically mentioned, does not constitute an express waiver of Plaintiff's statutory judicial forum rights"); *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1206 (2011) (citing *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 49-50 (1974) ("In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress."))

(1985)). Because the “NLRA governs federal labor-relations law” the standard for determining whether a union has negotiated a waiver of access to judicial forums requires that the collective bargaining agreement provision waiving access to a judicial be “explicitly stated” and “clearly and unmistakably” waive that right. *Pyett*, 556 U.S. at 255, 258-259, 274. *See also Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998).<sup>3</sup>

In *Wright*, the Court held that the CBA provision was not sufficiently expressed to constitute a waiver of a judicial forum because it failed to “incorporate specific antidiscrimination requirements” as within the power of the arbitrator. *Id.* In *Pyett*, 556 U.S. at 258-59, the Court held that the CBA, which contained an express listing of statutory requirements that were expressly incorporated into the CBA, as well as an explicit waiver of bargaining unit employees’ right to seek redress in a judicial forum under review there “meets that obligation.”<sup>4</sup>

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<sup>3</sup> This requirement that the waiver of access to a judicial forum be explicit derives from the fact there is no presumption of arbitrability for statutory claims under the NLRA. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The presumption of arbitrability “does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA.” *Wright*, 525 U.S. at 78 (emphasis in original). *See also, Bratten v. SSI Services, Inc.*, 185 F.3d 625, 630-31 (6<sup>th</sup> Cir. 1999) (same). Thus, the Court of Appeals’ reliance on *Minter v. Pierce Transit*, 68 Wn. App. 528, 531-32 (1993), and *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965), for the proposition that the statutory claims are subject to the sole and exclusive arbitration forum is misplaced.

<sup>4</sup> The CBA in *Pyett*, 556 U.S. 251-252, provided:  
There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims

Since the Supreme Court's decision in *Pyett*, several courts have considered what constitutes an "explicitly stated" "clear and unmistakable" waiver of access to judicial forums. Unlike the now abandoned Fourth Circuit standard applied in *Brundridge v. Fluor Fed. Services Inc.*, 109 Wn. App. 347, 355-56, (2001), the consensus has been that, to effect a waiver, the CBA provisions must incorporate "specific [statutory] requirements" by specifically naming the statutes for which judicial access is waived in favor of sole and exclusive arbitration.<sup>5</sup>

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made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, **the Age Discrimination in Employment Act**, the New York State Human Rights Law, **the New York City Human Rights Code**, ... or any other similar laws, rules, or regulations. **All such claims shall be subject to the grievance and arbitration procedures ... as the sole and exclusive remedy for violations.**

(internal quotation marks omitted) (emphasis added). Thus, the *Pyett* plaintiffs' access to court for their claims made pursuant to the ADEA and the New York State Human Rights Law was explicitly waived, as the plaintiffs there conceded.

<sup>5</sup> In distinguishing prior cases holding, as in *Gardner-Denver Company*, that the statutory rights were distinct from the contract rights, the *Pyett* Court noted that those cases "did not expressly reference the statutory claim at issue," unlike the CBA at issue in *Pyett*. *Id.* at 263-264. Although the *Brundridge* court found no waiver in the CBA under review there, it applied a much less onerous waiver standard enunciated in *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4<sup>th</sup> Cir.) *cert. denied*, 534 U.S. 995 (2001), which is no longer viewed as sufficient. See e.g., *Ibarra v. United Parcel Serv.*, 11-50714, 2012 WL 4017348 at \*4 (5<sup>th</sup> Cir. 2012) (comparing *Safrit* with *Mathews* and discussing post-*Wright* and *Pyett* cases and holding that a CBA must, "at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims..." because "[p]ost-*Wright* courts appear to be in agreement that a statute must specifically be mentioned in a CBA for it to even approach *Wright*'s 'clear and unmistakable' standard.") (internal quotations and citations omitted); *Cavallaro v. UMass Mem. Healthcare, Inc.*, 678 F.3d 1, 7 & n. 7 (1<sup>st</sup> Cir. 2012) ("a broadly-worded arbitration clause ... will not suffice; rather something closer to specific enumeration of statutory claims to be arbitrated is required") (citations omitted)); *Powell v. Anheuser-Busch Inc.*, 457 F. App'x 679, 680 (9<sup>th</sup> Cir. 2011) (no waiver of access to court under a CBA that did not explicitly incorporate the plaintiff's disability discrimination claim under the California Fair Employment and Housing Act because the court "will not interpret a CBA to waive an individual employee's right to litigate

The CBA here does not explicitly name the statutes for which access to a judicial forum is purportedly waived. The CBA does define a grievance to include “any claim under federal, state or local law, statute or regulation, or under any common law theory ....” CP 142-143.<sup>6</sup> The presumption of arbitrability does not extend to statutory claims, without a specific reference to those statutes and express language stating that arbitration is intended to be the sole and exclusive forum for those statutory claims.<sup>7</sup> In this case, the CBA nowhere “explicitly incorporate[s] statutory requirements” so as to constitute a “clear and unmistakable”

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statutory discrimination claims unless the CBA waiver ‘explicit[ly] incorporat[es] ... statutory antidiscrimination requirements’) (quoting *Wright*, 525 U.S. at 80); *Harrell v. Kellogg Co.*, 2012 WL 3962674, \*7 (E.D. 2012) (CBA which explicitly referenced ADA but not 42 U.S.C. § 1981 did not waive access to judicial forum for Section 1981 action because “a statute must specifically be mentioned in a CBA for it to even approach *Wright’s* ‘clear and unmistakable’ standard.”); *Martinez*, 2010 WL 3359372 (CBA making compliance with California state wage order subject to arbitration exclusive remedy, but which did not specifically express the wage statutes at issue in the court litigation, did not constitute forum waiver); *Peterson v. New Castle Corp.*, 2011 WL 5117884, \*2 (D. Nev. 2011) (no waiver of a judicial forum because the CBA “nowhere explicitly indicates that the employee waives the right to sue under Title VII or other anti-discrimination statutes” because it “does not mention these statutes by name, and it does not even state generally that the right to litigate under discrimination statutes is waived or must be arbitrated... .”) In *Petersen*, the court noted that “*Pyett* did not abrogate *Wright’s* requirement of a clear waiver of the right to a judicial forum for statutorily created claims, and it did not change Ninth Circuit law, as the case is consistent with *Renteria*.” *v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1108 (9th Cir.1997) (“[e]ven an individual waiver, as opposed to waivers in collective bargaining agreements ... does not occur where neither the arbitration clauses nor any other written employment agreement expressly put the plaintiffs on notice that they were bound to arbitrate [employment discrimination] claims”). *Id.* at \*3 (internal quotations omitted).

<sup>6</sup> This generic reference to public law may be interpreted by an arbitrator to create contractual obligations duplicative of public law protections, but that does not constitute a waiver of the right to bring the public law claims in court. See e.g., *Ibarra*, 2012 WL 4017348, at \*4, *Mathews*, 649 F.3d at 1202.

<sup>7</sup> For these reasons, the Court of Appeals erred in extending the presumptions of arbitrability and the exclusivity of the arbitration forum to the statutory claims here. (Slip Op. at 11)

waiver of the Employees' access to the Washington courts to vindicate their rights under the Industrial Welfare and Minimum Wage Acts.

**C. Even If The CBA Arbitration Provision Waived The Employees' Access To Washington Courts, It is Not Enforceable Here, Where It Would Work An Unlawful Waiver Of the Substantive Statutory Protections.**

Here, the union does not file grievances, let alone arbitrate them. Therefore, a reading of the CBA to preclude access to court for the statutory claims here works a waiver of the substantive protections of the state statutes, contrary to federal law. In *Pyett*, the plaintiffs argued that their substantive rights under the ADA and New York Human Rights Law could not be vindicated because the union declined to take them to arbitration. While acknowledging that "a substantive waiver of federally protected civil rights will not be upheld," the Court declined to resolve whether the CBA operated "as a substantive waiver" of their statutory rights because it was not clear from the record whether the plaintiffs could proceed to arbitration without the union. 559 U.S. at 273-274 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 637, and n. 19).<sup>8</sup> Subsequent cases have made clear that, if the only forum for vindication of statutory rights is controlled by the union and not available to plaintiffs, the forum waiver

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<sup>8</sup> See also, *14 Penn Plaza*, 129 S.Ct. at 1481 (Souter, J., dissenting) ("the majority opinion ... explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, which is usually the case." (citations omitted)).

may not be given effect. *See e.g. Brown v. Servs. for the underserved*, 2012 WL 3111903 (E.D.N.Y. 2012); *de Souza Silva v. Pioneer Janitorial Servs., Inc.*, 777 F. Supp. 2d 198 (D. Mass. 2011); *Morris v. Temco Serv. Indus., Inc.*, 2010 WL 3291810 (S.D.N.Y. Aug. 12, 2010); *Kravar v. Triangle Servs., Inc.*, 2009 WL 1392595 (S.D.N.Y. May 19, 2009).<sup>9</sup>

The Employees did not ask the union to file a grievance alleging violations of statutes; however, that request would have been a futility because the union does not have the resources to arbitrate and has never done so. CP 606-607, 571-72.<sup>10</sup> Moreover, the CBA does not allow the Employees to take their grievances to arbitration without the union and

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<sup>9</sup> If indeed the Employees' claims are solely under contract, as incorporated claims, then their claims are governed by federal law insofar as they are being arbitrated under a CBA regulated by Section 301 of the Taft-Hartley Act, 29 USC 158, and governed by the federal common law developed under that statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957). Thus, Garda's contention that under *AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), the federal law under the FAA would preempt any argument under state law that the Employees would not be able to vindicate their substantive state statutory rights is inapposite. *See e.g. In re Am. Exp. Merchants' Litig.*, 667 F.3d 204, 212-17 (2d Cir. 2012) (majority opinion) and 681 F.3d 139 (2d Cir. 2012) (Pooler, J., concurring in denial or rehearing en banc) (the teachings of *Concepcion* do not apply to determine the arbitrability of federal causes of action because the FAA does not preempt other federal statutes, but rather must be accommodated to them). Accord: *Chen-Oster v. Goldman, Sachs & Co.*, 2011 WL 2671813 at \*3-5 (S.D.N.Y. 2011).

<sup>10</sup> Even if that were grounds for dismissal, it should have been without prejudice in order to allow the Employees to test their ability to arbitrate. *See e.g., Veliz v. Collins Bldg. Services, Inc.*, 2011 WL 4444498 (S.D.N.Y. Sept. 26, 2011) (dismissing suit because, unlike here, plaintiff did not allege that the person who informed him the union would likely not arbitrate had authority to make that representation, but dismissing without prejudice because if the union prevented plaintiff from resolving his "statutory claims through the procedures set forth therein, the CBA will be unenforceable and Veliz will have the right to refile his claim in federal court.") (citing *Borrero v. Ruppert Hous. Co., Inc.*, 2009 WL 1748060 (S.D.N.Y. 2009) and *Kravar*, 2009 WL 1392595, at \*3 (both dismissing without prejudice for that reason)).

Garda's willingness to arbitrate with each employee individually does not cure this deficiency. *Kravar*, 2009 WL 1392595 at \*4 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (rejecting argument that the lawsuit should be dismissed because the employer had notified employee of its willingness to arbitrate her ADA claim under the CBA but she had refused as "confus[ing] the issue. The arbitration provision that the Court must enforce is the one the union and the [employer] entered into, not a hypothetical agreement in which the employer's rather than the union's consent is critical.")).<sup>11</sup>

**D. Should The Court Hold That The Employees Claims Are Actionable Only Under The CBA, The Employees' Claims May Be Pursued In A Class Grievance Because They Arise Under Federal Law, Section 301 Of The Taft-Hartley Act.**

*Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010), which does not arise in a Section 301 context, does not apply to preclude class arbitration, should the Court find that the Employees' claims must be arbitrated. The FAA is simply an overlay on Section 301 jurisprudence in labor arbitrations, *International Union of Painter and Allied Trades v. J & R Flooring, Inc.*, 616 F.3d 953, 962 (9<sup>th</sup> Cir. 2010). The acknowledgement in *Stolt-Nielsen* that arbitration agreements may implicitly allow class arbitrations and that "custom and

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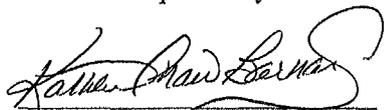
<sup>11</sup> *Cf.*, *Powell*, 457 F. App'x at 680 (no waiver of access to judicial forum because there was no explicit incorporation of statutory requirements and arbitration without the union was not contemplated under the CBA which required the union's participation)

usage” is relevant in determining the parties’ intent, as well as applicable state or federal law, requires interpreting the FAA in light of the NLRA as amended. *Id.* at 1769 n. 6, 1770, 1775. This leads to but one conclusion-- that the right of employees to pursue common grievances as a class grievance is both common in labor arbitration practice, and protected by the NLRA.<sup>12</sup> Therefore, if the Court should hold that the CBA did waive a judicial forum, the Employees may arbitrate as a class.<sup>13</sup>

#### IV. CONCLUSION

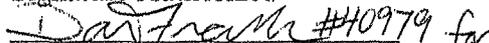
Amici respectfully submit that this Court should grant review.

Respectfully submitted this 29<sup>th</sup> day of October, 2012.



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<sup>12</sup> See e.g., *Elkouri & Elkouri*, *How ARBITRATION WORKS*, 212 (Alan Miles Rubin, 6th ed. 2003). See e.g., *Eastex Inc. v. NLRB*, 437 U.S. 556, 566 (1978); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *D.R. Horton, Inc. v. Michael Cuda*, Case no. 12-CA-25764 (N.L.R.B., 2012); *Owen v. Bristol Care, Inc.*, 2012 U.S. Dist. Lexis 33671, \*10-13 (W.D. Mo. 2012)

<sup>13</sup> Of course, if, as Employees and Amici here contend, there has been no waiver of the right to litigate, there also has been no waiver of the right under Section 7 of the NLRA, 29 U.S.C. § 157, to litigate as the class the trial court originally certified.

## CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of October, 2012, I caused the Motion of WELA, Washington State Labor Council and SEIU Local Unions, the Declaration of Kathleen Phair Barnard in Support of the Motion, and the Amici Curiae Memorandum in Support of Petition for Review, to be served via email and First Class U.S. Mail to:

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# APPENDIX

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**Pace Law Review**  
Winter 2012

Labor and Employment in the Modern Market  
Articles

PRIVATE RESOLUTION OF PUBLIC DISPUTES: EMPLOYMENT, ARBITRATION, AND THE STATUTORY  
CAUSE OF ACTION

Griffin Toronjo Pivateau<sup>al</sup>

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**I. Introduction**

The Supreme Court recently reaffirmed its commitment to honoring arbitration clauses in employment agreements. In *Rent-A-Center, West, Inc., v. Jackson*,<sup>1</sup> the Court found that courts should treat arbitration agreements in the employment context in the same manner as arbitration agreements found in any commercial contract. The *Rent-A-Center* result was not surprising. In recent years, the Supreme Court has faced the issue of mandatory arbitration agreements numerous times and, in virtually every case, favored arbitration.<sup>2</sup> The Court has proved willing to cast aside or ignore precedent in its pursuit of a pro-arbitration policy.<sup>3</sup>

The *Rent-A-Center* case, like almost all employment claims, did not arise out of the employment agreement that contained the arbitration clause. Instead, the plaintiff, Antonio Jackson, alleged racial discrimination and retaliation. Jackson's employer moved to dismiss the action and compel arbitration, citing the arbitration clause in Jackson's employment agreement. This agreement provided for arbitration of all disputes arising out of Jackson's employment with *Rent-A-Center*, including claims for discrimination.<sup>4</sup> The agreement also stated that "[t]he Arbitrator, and not any federal, state, or local court or agency, \*115 shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."<sup>5</sup>

Jackson argued that the arbitration agreement was unconscionable, rendering it unenforceable. *Rent-A-Center* responded that Jackson had agreed that the arbitrator would have exclusive authority to resolve any dispute about the enforceability of the agreement. Therefore, the Court lacked authority to hear Jackson's unconscionability claim. In the end, the Supreme Court sided with *Rent-A-Center*. The Court found that, for a court to hear a claim of unconscionability where the parties have agreed to have an arbitrator decide all issues, a plaintiff must establish that the provision delegating questions of arbitrability to the arbitrator is itself unconscionable.<sup>6</sup>

Following *Rent-A-Center*, it seems certain that all challenges to the fairness of mandatory arbitration clause terms will be decided not by courts, but by arbitrators. Arbitrators themselves will decide whether the arbitration process is flawed.<sup>7</sup> After *Rent-A-Center*, employers may design their own arbitration scheme, confident that questions regarding the fairness of the scheme will not be heard by the courts but by the arbitrators. The law will now provide little oversight on employers in their use of mandatory arbitration clauses in employment agreements.

These arbitration clauses will encompass not just disputes arising from the employment agreement, but statutory claims as well. Because employees have a right to the protection of public statutes, consigning important statutory claims to private arbitration carries huge risks. Society should question the wisdom of relegating almost all employment claims to private processes. Are public interests satisfied "when public laws are enforced in the private fora"?<sup>8</sup>

In favoring arbitration clauses in employment agreements, the Supreme Court has relied on general contract principles.<sup>9</sup> Essentially, the Court has found that, if an employee has agreed to have his statutory discrimination heard in a private forum, then that employee should stick \*116 with the deal.<sup>10</sup>

But relying on general contract principles to decide a matter involving the employment relationship is disingenuous. In fact, the standard employment agreement bears little relationship to the traditional contract. It is not the employment agreement, but statutes that furnish the majority of the duties and obligations of an employment relationship. Numerous areas of the employment relationship are constrained by public law and therefore not subject to contract. The typical employment agreement governs relatively minor areas-- things like salary and benefits. The most important aspects of the employment relationship--occupational safety and health, minimum wage, overtime pay, discrimination--exist independently and cannot be waived in contract.

In essence, the employment relationship exists on a continuum. At one end of the spectrum lie those areas that are solely governed by contract. At the other end of the spectrum lie those rights that are granted by statute. How should society construe the ability of employer and employee to choose an alternative forum? Is it a matter of contract? Or is a judicial forum a right that is neither waivable nor modifiable?

We know that the current judicial consensus favors the contractual approach, treating arbitration agreements as if they were governed solely by contract principles. In contrast, many people argue that mandatory arbitration agreements should be placed outside the scope of contract and banned outright.<sup>11</sup> Therefore, society faces a difficult choice. It must ask itself whether the benefit of permitting parties to choose an alternative dispute resolution mechanism outweighs the burden placed on society by the possibility that the choice may render public law meaningless.

In this Article, I argue that one option doesn't have to exist to the exclusion of the other. I believe that arbitration agreements fall somewhere along the middle of the rights/contract continuum. My understanding of the nature of arbitration agreements relies on a previously existing area of employment law.

There is a particular aspect of the employment relationship that, while open to contract, remains subject to constraints imposed by the \*117 law. A noncompete agreement permits an employee to contract with his employer to not work for a competitor following the termination of the employment relationship. This right to contract away the right to compete is, however, narrowly construed by the court system. A court may not enforce a noncompete agreement unless the agreement meets a standard of reasonableness. I propose that this same analysis be applied to arbitration agreements. It is my position that a predispute, mandatory arbitration agreement should not be enforced unless it meets certain requirements that together make the agreement reasonable. This standard of reasonableness will protect the interests of all parties: the employer, the employee, and society as a whole.

In Part II of this Article, I discuss the problems created by the use of mandatory arbitration clauses in employment agreements. Part III examines the fallacy behind applying general contract principles to arbitration agreements in the employment context. In Part IV, I outline a proposal to constrain the use of mandatory arbitration as a means of resolving employment disputes. My proposed legislative solution is designed to address the concerns raised by the continued use of mandatory arbitration clauses in employment agreements.

## **II. There Is a Problem with Arbitration Clauses in Employment Agreements**

### **A. The Employment Relationship and Mandatory Arbitration Agreements Are in Conflict**

A tension exists between mandatory arbitration agreements and employment relationships. This tension results from the nature of the disputes heard in arbitration. In an ordinary commercial arbitration proceeding, the issues addressed stem from the contract itself. The terms of the contract give rise to the claims and defenses to be heard by the arbitrator. In the arbitration of employment disputes, it is more likely that the dispute stems from an alleged violation of a statutory right. In an employment arbitration, the claims and defenses derive from rights granted by either statute or the common law.

Through the years, courts have acknowledged the different nature of employment arbitration and often struggled with the

issue. When first faced with the question of arbitration of statutory employment rights, the \*118 Supreme Court found that an employee's agreement to arbitrate contract claims did not waive any rights to pursue statutory claims in court.<sup>12</sup> Later, the Court would reverse direction and permit employees to agree to arbitrate statutory claims.<sup>13</sup>

Arbitration, even commercial arbitration, had a long road to legitimacy. Prior to passage of the Federal Arbitration Act (FAA or the "Act") in 1925, the judicial system was hostile to arbitration.<sup>14</sup> The idea of a privatized court system seemed wrong--how could a judicial system work if the parties were able to contract their way out of it?<sup>15</sup> In an effort to combat judges' hostility to arbitration agreements and the resulting privatization of disputes, Congress created a statutory scheme designed to overcome judicial resistance to arbitration.<sup>16</sup> The FAA required courts to enforce arbitration agreements--to compel parties to arbitration when an arbitration agreement existed, and to enforce arbitral awards. The FAA was the first step to a national policy favoring arbitration.<sup>17</sup> The FAA's success is evident as mandatory arbitration has gone from pariah to favored status.

The drafters of the FAA intended the legislation to put arbitration agreements on the same footing as other contracts.<sup>18</sup> To that end, section 2 of the FAA, the "primary substantive provision of the Act,"<sup>19</sup> states that arbitration agreements in contracts involving commerce are "valid, \*119 irrevocable, and enforceable."<sup>20</sup> Section 2 further requires courts to enforce arbitration agreements according to their terms,<sup>21</sup> "save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>22</sup> The FAA provides that petitions to compel arbitration may be brought before "any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties."<sup>23</sup>

The FAA also made suitable provisions for judicial enforcement of arbitral awards. The FAA permits a party to seek enforcement of arbitration agreements in federal court.<sup>24</sup> The Act provided a method for prevailing parties to file a motion for confirmation of the award by a federal court, and an opportunity for judicial review to confirm, vacate, or modify arbitration awards.<sup>25</sup> The FAA forms, for the most part, a single federal law of arbitration and preempts state arbitration laws to the extent those laws conflict with the FAA.<sup>26</sup>

## **B. Judicial Treatment of Arbitration in Employment Has Changed**

Arbitration in the employment context has a confused history. The FAA did not mention employment arbitration or employment \*120 agreements. The Supreme Court first addressed the question of employment arbitration in a case involving collective bargaining. In *Textile Workers Union of America v. Lincoln Mills of Alabama*, the Supreme Court decided that federal courts could enforce arbitration clauses contained in collective bargaining agreements.<sup>27</sup> The *Lincoln Mills* Court, however, did not rely on the FAA. Instead, the Court permitted arbitration of employment disputes, at least in the collective bargaining sense, based on language found in the Labor-Management Relations Act of 1947.<sup>28</sup> The Court found that arbitration of legal disputes was an integral component of the negotiation process, and that a court should have little to say in the context of a negotiated agreement between union and management. The *Lincoln Mills* decision left open the question as to what courts would say about the use of mandatory arbitration agreements in non-union employment relationships.

In 1964, Congress enacted Title VII, which prohibited employment discrimination on the basis of race, color, religion, sex, and national origin.<sup>29</sup> Later federal statutes extended legal protection to age,<sup>30</sup> pregnancy,<sup>31</sup> and disability.<sup>32</sup> These employment rights were gained not through the collective bargaining process, but instead through statute. The statutes also granted to employees, as well as prospective employees, statutory causes of action. Title VII freed employees, at least in some small part, from some of the constrictions of the employment-at-will doctrine, which provides that employers may lawfully "dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong."<sup>33</sup> Passage of antidiscrimination legislation gave employees a weapon--providing them with the ability to sue their employers and have their complaints heard in federal court.

Around this time, state courts also began to test the limits of the employment-at-will doctrine. This recognition of employee rights, whether gained through statute or judicial decision, resulted in an increase in employment litigation.<sup>34</sup> Employers, feeling threatened by the \*121 court system's willingness to side with employees, attempted to minimize their exposure to adverse verdicts. Many employers, seeking to evade the judicial system, began to include mandatory arbitration clauses in their employment agreements. These clauses typically required arbitration of all workplace disputes, including those arising out of statutory claims.

The insertion of mandatory arbitration clauses in employment agreements was controversial. Courts expressed their skepticism of the arbitration process and the attempts by employers to avoid jurisdiction. In the first test of the arbitration clause in a non-union employment agreement, the Supreme Court found that agreement to a mandatory arbitration process could not prevent a plaintiff from asserting statutory rights.

In *Alexander v. Gardner-Denver Co.*,<sup>35</sup> an employee brought a statutory discrimination claim in federal court, following arbitration of a contract claim. The same facts underlay both the statutory and contract claims. The Court held that an arbitration of the contract claim did not prevent subsequent litigation of the employee's statutory discrimination claim. The Court refused to accept the employer's argument that the petitioner waived his cause of action under Title VII, making it clear that "there can be no prospective waiver of an employee's rights under Title VII."<sup>36</sup> The Court went on to note, "waiver of these rights would defeat the paramount congressional purpose behind Title VII."<sup>37</sup>

More importantly, by agreeing to arbitration of contract rights, a party does not waive right to a judicial forum to hear statutory claims. "[M]ere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."<sup>38</sup> The *Alexander* Court expressed its belief that an arbitration proceeding did not provide a substitute forum for the resolution of statutory employment claims. The Court distrusted the arbitration process to handle such weighty issues, citing "the informality of arbitral procedures, the lack of labor arbitrators' expertise on issues of substantive law, and the absence of written opinions."<sup>39</sup>

The *Alexander* Court recognized that an employee making a claim \*122 under Title VII asserted a statutory right separate from the contract. An arbitrator lacked the power to hear statutory claims. As the Court stated:

If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. . . . [T]he arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.<sup>40</sup>

The Court would, however, lose its distrust of arbitration schemes to deal with statutory disputes, as the Supreme Court changed its initial negative view. In three cases, the Court "reversed a longstanding presumption that employment claims were exempt from the FAA."<sup>41</sup> In these cases, referred to now as the *Mitsubishi Trilogy*,<sup>42</sup> the Court enforced arbitration agreements that extended to the following statutory claims: antitrust, securities, and racketeering laws. The Court stated, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."<sup>43</sup> The *Mitsubishi Trilogy* signaled the Court's altered view of the arbitration process.

Even after *Mitsubishi*, however, an important question remained--whether the rights granted under Title VII and similar anti-discrimination statutes could be consigned to arbitration. The Court seemed to answer that question in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>44</sup> There the Court found that a mandatory arbitration agreement, executed at the commencement of employment, bound a nonunion financial services \*123 worker. The Court held that the plaintiff could not litigate in court his allegation that he was terminated for unlawful age discrimination in violation of the federal Age Discrimination in Employment Act of 1967.<sup>45</sup>

In *Gilmer*, the Supreme Court found that the FAA permitted an employer to require a non-union employee to arbitrate, rather than litigate, a federal age discrimination claim.<sup>46</sup> In doing so, the employee was not waiving any substantive rights. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>47</sup> According to the Court, objections of unconscionability and procedural unfairness could be addressed on a case-by-case basis. The Court decided that employment arbitration agreements would be enforced absent "the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract."<sup>48</sup>

Despite the *Gilmer* decision, at least some doubt remained regarding the applicability of the FAA to employment agreements. The arbitration agreement in *Gilmer* was not part of an employment agreement.<sup>49</sup> The FAA specifically excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or

interstate commerce.”<sup>50</sup> Therefore, the argument existed that the text of the FAA itself precluded the application of the statute to arbitration clauses found in employment agreements. Given the traditional broad interpretation of “interstate commerce,”<sup>51</sup> \*124 most employees would presumably be excluded from the Act’s coverage.

The Supreme Court confronted this issue in *Circuit City Stores, Inc. v. Adams*<sup>52</sup> and found that the FAA’s proscription of the Act’s application should be read narrowly. In *Circuit City*, the plaintiff signed an employment agreement containing a mandatory arbitration clause.<sup>53</sup> When an employment dispute arose, the trial court compelled arbitration.<sup>54</sup> The United States Court of Appeals for the Ninth Circuit overturned, finding that the text of the FAA excluded most employment disputes.<sup>55</sup> The Supreme Court disagreed.

In *Circuit City*, the Supreme Court held that the exemption in the FAA concerned only employment contracts of seamen, railroad employees, and those “actually engaged in the movement of goods in interstate commerce.”<sup>56</sup> This interpretation indicated that the limiting text of the FAA was directed only to transportation workers.<sup>57</sup> For all other employees, claims arising out of statutory violations could be consigned to arbitration.<sup>58</sup> The Court reasoned that any other interpretation would make the exemption superfluous.<sup>59</sup> Following *Circuit City*, employers could routinely include arbitration clauses in employment agreements, subject only to general contract defenses.

### **\*125 C. The Potential for Abuse Requires Oversight of Arbitration in Employment**

Given the Supreme Court’s continued support of the concept, and the perceived advantages of arbitration, one may question why mandatory arbitration in the employment context is problematic. After all, employees can always refuse to agree to the mandatory arbitration clauses. Moreover, in a perfect world, employees could negotiate the scope and applicability of the clause. Employees retain their right to general contract defenses--most importantly the defense of unconscionability. Why then should we as a society exhibit concern about employment arbitration?

In fact, a number of policy reasons justify the limited use of mandatory arbitration clauses in the employment agreements. First, the decision to arbitrate employment disputes is often made on a unilateral basis. No opportunity exists for employees to provide input regarding the functioning of the arbitration process. Instead, employers create arbitration systems “with no employee input, often in secret, and then spring the procedure on employees.”<sup>60</sup> Often, employees are not provided with guidance on arbitration-- either the concept or the actual procedure.<sup>61</sup> Employees are likely unfamiliar with the judicial process and are therefore uncertain as to the meaning of selecting arbitration as the final means of dispute resolution.<sup>62</sup> Because of this lack of knowledge, the employee “is in no position to bargain or shop for a better term . . . .”<sup>63</sup>

Agreement to any arbitration proceeding should be knowing and voluntary.<sup>64</sup> Voluntariness, however, likely means something different in the employment context than in a commercial setting. Some courts have noted that agreements to employment arbitration may often be considered involuntary, because arbitration clauses are included in \*126 standard form employment agreements.<sup>65</sup> Employees are presented with the agreement on “a take it or leave it, and be fired/not hired, basis.”<sup>66</sup> “Employees ‘must either “agree” to waive their right to litigate and use the . . . arbitration procedure or lose their jobs.’”<sup>67</sup>

Compulsory arbitration may not be compatible with the public policies at stake in employment. Anti-discrimination laws safeguard the rights of employees to be free from discrimination on the basis of race, sex, age, and disability. These rights are not negotiable. Although employees may decide to ignore violations of the law or they may settle their differences privately, they may not contractually waive such rights.<sup>68</sup> The law provides public schemes, both through administrative procedures and litigation, for enforcement.<sup>69</sup> Legislation provides an entire schedule of remedies.<sup>70</sup>

Finally, there is a question as to whether private arbitration schemes are equipped to deal with statutory discrimination claims. Employment discrimination remains a problem; laws aimed at eliminating employment discrimination have not solved America’s discrimination problems. White women and minorities of both sexes remain not only behind white males, “but have regressed recently in wages, representation in management, and representation in jobs in line for promotion to management.”<sup>71</sup> While equal opportunity in employment \*127 may have improved since passage of Title VII, underlying problems remain and the statistics are clear. These statistics cannot be explained simply by facially neutral factors.<sup>72</sup>

Whatever the cause of the continued lag in employment statistics, whether the problem lies with the statute or its enforcement

model,<sup>73</sup> mandatory private arbitration, as it is currently practiced, is not the answer. The process of shunting employment discrimination claims off to private arbitration panels--with non-standardized procedures, questions of fairness, questions of due process, and a lack of transparency--seems certain to perpetuate the problem of employment discrimination.

### III. The Supreme Court Erred in Relying on Contract Principles

#### A. The Employment Relationship Is Complex

The employment relationship represents "one of the most complex and important relationships in modern society."<sup>74</sup> The employment relationship, like the employment agreement that memorializes it, is almost inherently asymmetrical. The agreement is not the result of a bargain struck between equals.<sup>75</sup> The majority of employees are not able to change any terms of the employment agreement, including the arbitration clause.<sup>76</sup> The employer need not pay any additional consideration for the arbitration agreement; courts routinely construe \*128 continued employment as adequate consideration.<sup>77</sup> Employers have sole control of all documents, agreements, policies and other terms of the employment relationship.<sup>78</sup>

In a commercial contract, the parties agree to arbitrate disputes arising out of the subject matter of the contract. The contract will contain the rights and obligations of the parties, and the arbitration agreement provides the forum that will adjudicate disputes related to those rights and obligations.<sup>79</sup> The employment agreement is different. In the employment agreement, the arbitration clause is "immaterial to the core of the transaction."<sup>80</sup> While the employment agreement may contain provisions regarding salary and benefits, the employer has likely not insisted on a mandatory arbitration agreement to resolve disputes about salary and benefits. Instead, the employer intends to obtain the employee's consent to submit future statutory claims to an arbitration proceeding.

At one time, courts viewed the employment relationship as a matter of contract--a "private economic relationship."<sup>81</sup> The modern employment agreement is, however, a contract only in the broadest sense of the word. The employment agreement may contain terms and conditions of employment, but those terms and conditions are subject to, and constrained by, external law. The rights and duties of the parties to the employment agreement are much more likely to be defined by statute, or by the common law, than by the employment agreement.<sup>82</sup>

For instance, Title VII and similar antidiscrimination statutes impose severe limitations on employers, not only in the making of employment agreements, but in all aspects of employment and \*129 employment decisions.<sup>83</sup> But discrimination laws are only one aspect of the extensive regulation of employment by legislation; there are numerous other examples of state control over the employment relationship. Hours and wages, two of the key elements of any employment relationship, are restricted by statute. An employee may not contract to work for less than the minimum wage, or agree to work overtime without the statutorily mandated pay addendum.<sup>84</sup> The workers' compensation scheme prohibits negligence suits against one's employer.<sup>85</sup> Occupational health and safety is a matter of government regulation, not of individual contractual choice.<sup>86</sup> Social security and federal income tax withholding are matters governed by statute, not by contract.<sup>87</sup> The time and manner of wage payments is subject to state law, not contract.<sup>88</sup>

#### B. The Public Nature of Employment Law Creates Tension with Private Arbitration

To a large extent, "employment law consists of the competing paradigms of rights and contract."<sup>89</sup> In any employment dispute, conflicts are likely to arise between the aspects of employment that are governed by contract and those governed by public law. The employment relationship is, in one sense, based in contract: an individual agrees to work for an employer, and certain terms of that work, e.g., salary or benefits, will be dictated by the agreement, whether implicit or express.<sup>90</sup> But the contract relationship occurs within boundaries. Numerous external laws limit the contract relationship. These external laws acknowledge rights and grant entitlements. These laws limiting contract \*130 rights within the employment relationship are present for public policy purposes, designed to serve the public interest and values.<sup>91</sup>

In *Gilmer*, the Court noted that the purpose of the FAA "was to place arbitration agreements on the same footing as other contracts."<sup>92</sup> In favoring arbitration agreements, the Supreme Court relied on general contract principles, i.e., because the parties made an agreement to arbitrate, they "should be held to it."<sup>93</sup> According to this reasoning, parties must arbitrate their

employment-related claims because they agreed to arbitrate their claims.

But citing traditional contract principles to support arbitration is disingenuous. As we have seen, the modern employment agreement is only tangentially related to traditional notions of contract. Numerous state and federal statutes, as well as the common law, constrain the employment agreement. While courts may still view employment as a contractual relationship, the ability of the parties to contract is severely constricted.

Employment disputes are, to a large part, public conflicts.<sup>94</sup> The interests involved in the typical employment arbitration claim are the interests of society. The law decrees that employees belonging to certain protected classes may be free of discrimination in conjunction with their employment. The law provides remedies for those who have been discriminated against. It is the public who created and defined the rights of the parties to the employment. Society dictated which activities give rise to the claim, and society dictated the appropriate remedy given to the injured.

In contrast, the disputes arising out of commercial contracts concern only the interests of the parties involved in the contract. A public court may eventually hear the dispute, but the important issues at stake are those issues set forth in the contract. The scope of the conflict, the basis for the claim, and perhaps even the remedies themselves are provided by the contract. The parties to a contract create their rights. Such rights are subject to waiver or modification by the parties themselves. The claims between the parties are private, not public.<sup>95</sup>

\*131 At seen herein, the employment-at-will doctrine has boundaries. The employment relationship is a hybrid entity. Current employment law is dictated as much by statute as it is by the terms of the employment agreement. Overlaying the employment-at-will doctrine with statutorily mandated rights created a system that is based in both contract and rights.

#### IV. The Employment Arbitration Agreement Should Be Limited

##### A. The Law Already Limits the Terms of an Arbitration Agreement

I propose that the ability of the parties to enter into an arbitration agreement be limited. This is not a revolutionary position. Limiting the ability of the parties to contract to arbitration terms has already occurred. Arbitration terms are currently constrained in three ways: by the language of the FAA, state contract law, and the statute underlying the dispute.

First, the FAA itself limits the effect of the arbitration agreement. While the FAA expressly states that arbitration agreements “shall be valid, irrevocable, and enforceable,” the Act permits courts to modify or vacate arbitration awards. Sections 10 and 11 provide the grounds for vacatur and modification.

Section 10 of the Act permits a court to vacate an arbitration award under certain conditions:

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption by the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of another misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.<sup>96</sup>

\*132 Under section 11, the grounds for modifying or correcting an award include “evident material miscalculation,” “evident material mistake,” and “imperfect[ions] in [a] matter of form not affecting the merits . . . .”<sup>97</sup> Together these provisions protect the parties and provide base line requirements of fairness.<sup>98</sup>

The FAA also permits arbitration agreements to be challenged upon any basis that would permit a contract to be challenged. The Act preserves the right of the parties to challenge the arbitration agreement “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>99</sup> Thus, parties may still bring claims based on any ground that would allow a party to challenge a contract.<sup>100</sup>

Finally, the underlying statute may (at least indirectly) limit the rights of parties to agree to arbitration terms. The Supreme

Court has indicated that arbitration terms must meet a certain standard of fairness. In *Gilmer*, the Court held that a valid arbitration agreement must permit the plaintiff to “effectively . . . vindicate” his substantive statutory rights.<sup>101</sup> While precise definition is not possible, “effective vindication” would seem to mean that the arbitration process must maintain the same rights and remedies that substantive law would provide to the plaintiff.<sup>102</sup> The parties may waive the forum in which to hear the dispute; they may not waive the substantive law applying to the dispute.<sup>103</sup>

In these three important ways, the law already constrains arbitration agreements. Therefore, the limitations that I propose herein are consistent with pre-existing laws. My proposal is not about altering fundamental notions of freedom of contract. As shown, employers are already constrained in their right to contract regarding arbitration. All I suggest is altering the extent to which the law will restrain the parties.

### **\*133 B. A Place Exists for Mandatory Arbitration**

While I argue for constraint, I do not suggest that arbitration agreements be banned outright. Others would disagree. Many have proposed the absolute elimination of predispute, mandatory arbitration in the employment context.<sup>104</sup> [Banning arbitration] rescues public law that has been put at risk by the unchecked growth of mandatory arbitration. It regulates the “wild west” processes creative counsel are designing to manage risk on behalf of their clients. It brings us back from almost two decades of a *laissez faire*, failed approach to balancing the great value of binding arbitration with the potential for its abuse in the hands of the economically powerful.<sup>105</sup>

Nor is the movement to prohibit arbitration agreements in the employment relationship merely academic. The proposed federal Arbitration Fairness Act, which first surfaced in 2007, was defeated, and revisited again in 2009, prohibited most predispute arbitration agreements between companies and individuals.<sup>106</sup> The proposed statute was sweeping, prohibiting the use of arbitration agreements in “employment, consumer or franchise disputes as well as disputes arising under statutes intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.”<sup>107</sup> In such matters, the parties would be limited to postdispute arbitration agreements.

Broad proposals that would eliminate all mandatory arbitration agreements are not the solution.<sup>108</sup> There is no need to ignore the \*134 potential benefits of arbitration. Arbitration has its advantages. Arbitration is meant to remedy a system weighed down with cost and delay, and it may lead to the resolution of claims at lower cost and with greater speed. Some estimate that litigating a typical employment case can range from five thousand dollars to more than two hundred thousand dollars, while the average cost of arbitrating an employment dispute is twenty thousand dollars, including attorneys’ fees. Others have suggested that litigation is an unlikely choice for employees making less than sixty thousand dollars per year.<sup>109</sup> “It will cost a lawyer far less time and effort to take a case to arbitration; at worst, claimants can represent themselves or be represented by laypersons in a less formal and intimidating forum.”<sup>110</sup>

Perhaps a more compelling case is the matter of time. Employees who bring a claim must also anticipate delays in having a case heard. The employee must often first pursue an administrative remedy before filing suit.<sup>111</sup> Administrative agencies and the court system both struggle to \*135 hear claims. A case that goes to trial will take a minimum of several months to resolve, and is likely to go on for years if appealed. An arbitration proceeding is likely to take much less time.<sup>112</sup> Arbitration also guarantees that employees will have their complaint heard. An employee who brings his claim in court may be surprised to find that his complaint did not survive the procedural minefield that exists before a claim may reach trial.

The private nature of the arbitration forum might appeal to employees as well as employers. Potential plaintiffs may see some comfort in the privacy protections of the arbitration process. An employee reluctant to air his grievances in public may prefer a forum that provides protection from public embarrassment.<sup>113</sup>

In short, arbitration of employment disputes should continue as a supplemental scheme for the resolution of employment disputes, including those that arise under statutory law. “It is an alternative that offers the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy.”<sup>114</sup> As will be discussed in greater detail below, it is possible to create an arbitration process that preserves the benefits of arbitration, while proving mindful of the public policies underlying statutory employment law.

### C. Contract Rights in Employment Can Be Restricted

We must develop the means to constrain arbitration agreements in a way that permits the continued use of such agreements, while at the same time addressing potential problems. Rather than eliminating predispute arbitration agreements, I propose that the ability of the parties to enter into arbitration agreements be constrained. The law would continue to permit employers to insist on arbitration agreements, but only subject to certain limitations.

These reforms must take place on the federal level. It is clear from recent precedent that the Supreme Court is “enamored with arbitration”<sup>115</sup> and is unlikely to tolerate any judicial or state restriction \*136 on the use of arbitration agreements. The Supreme Court has consistently ruled that the FAA preempts state laws that are aimed at arbitration agreements.<sup>116</sup> State legislatures may not act in a way that limits or otherwise restrain agreements to arbitrate. Federal courts have routinely construed the FAA so as to prevent encroachment by state law.<sup>117</sup> Putting any sort of constraints on arbitration agreements will therefore require Congress to act. Without Congressional action, there is simply no way to change the law of arbitration.

Fortunately, precedent exists for how the law could restrain contractual rights to enter into an arbitration agreement. Arbitration agreements could be viewed in a similar manner to another type of clause often found in employment agreements. The covenant not to compete, known more familiarly as the noncompete agreement, inhabits a shadow area in the employment relationship—a middle ground between areas governed by contract terms and those areas subject to rights granted by the law.<sup>118</sup>

A noncompete agreement is “an agreement, generally part of a contract of employment or a contract to sell a business, in which the covenantor agrees for a specific period of time and within a particular area to refrain from competition with the covenantee.”<sup>119</sup> The noncompete agreement is known by other names, most notably as a “covenant not-to-compete,” a “restrictive covenant,” or a “non-compete clause.”<sup>120</sup> These terms are interchangeable and all refer to an employment contract or provision purporting to limit an employee’s power upon leaving his or her employment, to compete in the market in which the former employer does business.<sup>121</sup>

Like arbitration agreements, noncompete agreements are not meant to punish the employee.<sup>122</sup> Instead, they are meant to protect the \*137 employer from unfair competition.<sup>123</sup> Noncompete agreements arguably protect an employer’s customer base, trade secrets, and other information vital to its success. From this perspective, noncompete agreements encourage employers to invest in their employees. An employer does not wish to invest in an employee only to see the employee take the skills acquired, or the company’s customers, to another employer. Logically, the employer will invest more in the employee if measures are in place to guard against the employee’s movement to a competitor.

As with arbitration agreements, courts traditionally viewed noncompete agreements with disfavor, believing that the agreements contravened public policy.<sup>124</sup> In time, just as with arbitration agreements, courts grew more accepting of the agreement.<sup>125</sup> Nevertheless, the court system did not embrace the noncompete agreement with the same fervor as it has attached to the mandatory arbitration agreement. Instead, the law continues to restrict the use of noncompete agreements for any purpose other than for legitimate business purposes.<sup>126</sup> To ensure the purpose is legitimate, the law requires that a valid noncompete agreement meet a reasonableness requirement.<sup>127</sup>

The noncompete agreement is an example of an agreement that falls \*138 somewhere between right and contract. The noncompete agreement resembles a contract—terms dictated by agreement, supported by consideration. But, in fact, the language of the noncompete agreement does not necessarily bind parties. Unless the agreement meets a standard of reasonableness, and is constrained in several important areas, courts will refuse to enforce this “contractual” agreement.<sup>128</sup> The law restricts the scope of the noncompete agreement because society has decided that fundamental issues of fairness are at stake.<sup>129</sup> Presumably, the limitations on the noncompete agreement are so important that they may only be waived under certain conditions.

I believe that the reasonableness requirement for noncompete agreements is designed to balance the interests of all entities affected by the employer, the employee, and society as a whole. Each entity has an interest to be protected. The employee wishes to preserve his mobility; the employer wishes to protect itself from unfair competition; and society wishes to balance its interest in employed workers with a system that provides incentives for the development and training of employees. With such varied interests at hand, a noncompete agreement must be drafted in such a way as to satisfy all interested parties.

To satisfy the reasonableness requirement, the law requires that the employer establish a reason for the noncompete agreement other than preventing the employee from competing with his former employer.<sup>130</sup> Moreover, establishing the existence of a legitimate business interest to be protected is merely the threshold step that an employer must meet to create an enforceable agreement.<sup>131</sup> The scope of the noncompete agreement must not be greater than the business interest at stake.<sup>132</sup> Almost all courts apply a similar standard of reasonableness in deciding whether to enforce a noncompete agreement.<sup>133</sup>

A noncompete agreement will be enforceable only “if the restraint imposed is not unreasonable, is founded on a valuable consideration, and \*139 is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.”<sup>134</sup> Many states follow the test set forth in the Restatement (Second) of Contracts, which takes into consideration the following factors: (1) whether the restriction is greater than necessary to protect the business and goodwill of the employer; (2) whether the employer’s need for protection outweighs the economic hardship which the covenant imposes on the departing party; and (3) whether the restriction adversely affects the interests of the public.<sup>135</sup>

Once a court determines that the noncompete agreement protects a legitimate business interest, it will then examine the agreement to ensure that it does not exceed the minimum restraint necessary to protect that interest.<sup>136</sup> Courts will enforce agreements only where they are “strictly limited in time and territorial effect and. . . [are] otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee.”<sup>137</sup> To be enforceable, agreements must be reasonable in three ways: scope (referring to the subject matter of the agreement), duration, and geography.<sup>138</sup>

#### **D. Arbitration Agreements Should Be Based on a Standard of Reasonableness**

The law restricts contractual freedom for noncompete agreements. Why does society tolerate this contractual restriction? It is likely because society recognizes the competing interests involved in a noncompete agreement and attempts to balance them using the reasonableness standard. In a similar vein, the law should recognize the competing interests in the use of mandatory arbitration clauses in the employment relationship. Because of the special nature of the employment \*140 relationship, society should not permit unlimited contractual freedom in regard to mandatory arbitration.

Currently, the law supports the use of mandatory arbitration agreements in the employment context. These agreements may encompass the resolution of disputes involving rights provided by external law. Following *Rent-A-Center*, the court system is unlikely to examine any allegations of unfairness regarding the arbitration process, in that the arbitration agreement assigns those allegations to the arbitrator. As a result, there is a risk that an employer could design an arbitration process so unfair that it amounts to denial of rights provided by statute. After *Rent-A-Center*, a federal court may, in most cases, no longer examine the arbitration process. Instead, it must only look to whether the arbitration agreement unfairly reserved allegations of unconscionability to the arbitrator.

The judicial system has effectively removed itself from oversight of the arbitration process. This creates a risk of abuse of the arbitration process. The arbitration agreement must be constrained. It must, however, be constrained in a way that permits continued use of arbitration agreements, while at the same time limiting the possibility of abuse. Ideally, the measure of constraint would not involve lengthy, expensive, or confused oversight by the court system.

The solution is the use of a bright line rule to constrain the arbitration agreement. Restraint could be accomplished by the use of a reasonableness standard. Under my proposal, courts should enforce mandatory arbitration clauses to the extent that the arbitration agreement is reasonable. Of course, “reasonableness” will require debate and forethought, but I would propose that the reasonableness standard should include the following aspects.

##### **1. The Arbitration Agreement Should Provide for Voluntariness**

Mandatory arbitration of statutory claims without voluntary consent is problematic. Courts have described voluntariness as the “bedrock justification” for the enforcement of mandatory arbitration agreements.<sup>139</sup> If future employment agreements contain clauses mandating arbitration of statutory actions, then there must be some means to ensure that the \*141 employee knew the nature of the arbitration provision when he signed it. Therefore, the proposed reasonableness standard should provide some guarantee that the employee entered into the agreement voluntarily.

Nevertheless, any rule that is not clear will invite litigation. Lack of a bright line test for determining voluntariness will create uncertainty. The voluntariness test could also create problems with uniform enforcement of arbitration agreements. Employees who sign the same agreement may not be subject to the same enforcement. "Piecemeal application of a dispute resolution program could threaten to unravel the program for all other similarly situated employees."<sup>140</sup>

I propose that the arbitration agreement be contained in a separate agreement, or at a minimum, require a separate signature line. This idea of separateness would establish that the arbitration clause facing the employee differs from the normal terms and conditions found in an employment agreement. By separating the arbitration clause from the rest of the agreement, employees would receive notice that the arbitration agreement should be considered separately from the rest of the document. Agreement to the arbitration clause could potentially have far greater consequences than any other term contained in the agreement, and therefore it is reasonable to insist on separate treatment. A separate document or signature line would provide some objective indications that the arbitration agreement was entered into knowingly and on a voluntary basis.

Alternatively, Congress could enact requirements of voluntariness using standards similar to those in the Older Workers Benefit Protection Act (OWBPA).<sup>141</sup> Congress enacted the OWBPA to protect the rights and benefits of older workers.<sup>142</sup> The OWBPA imposes strict requirements for waivers of ADEA rights and claims.<sup>143</sup> Under the OWBPA, "[a]n employee 'may not waive' an ADEA claim unless the employer complies with the statute."<sup>144</sup> To this end, the OWBPA creates a series of prerequisites for 'knowing and voluntary' waivers. The OWBPA sets forth eight mandatory elements for a knowing and \*142 voluntary waiver of ADEA claims.<sup>145</sup>

Creating an arbitration voluntariness standard similar to that in the OWBPA has several advantages. Signing such a waiver would focus an employee's attention on the potential pitfalls involved in mandatory arbitration. An OWBPA-style waiver provides another benefit. Employers would appreciate the bright line requirements of voluntariness. Inclusion of the required elements would provide a safe harbor regarding the voluntariness of an employee's agreement. An employer required to draft a waiver similar to that mandated by the OWBPA would ensure that its employees only entered into the agreement on a knowing and voluntary basis.

## 2. The Arbitration Agreement Should Provide Guarantees of Due Process and Fairness

It is well-established that the law does not require due process in private arbitration.<sup>146</sup> Courts have routinely found that arbitration is a \*143 private process, based on agreement of the parties, and thus lacks the requisite state action to raise due process constitutional concerns.<sup>147</sup> Despite the state's review and enforcement of arbitral awards, courts have proved unwilling to find that this role would rise to the level of state action.<sup>148</sup> Without the involvement of a state actor, the parties to an arbitration agreement may not demand constitutional protections.<sup>149</sup>

Nevertheless, any proposed standard for reasonableness should include provisions for due process and fairness. When a state actor is involved, the Constitution guarantees due process.<sup>150</sup> Where the law grants a right, included within that right is a remedy. A right without a remedy would render the underlying right meaningless. The law should provide the opportunity to be heard by an impartial decision maker. This process providing for notice and an opportunity to be heard should be as nonwaivable as the underlying right itself. Otherwise, it renders the underlying right meaningless. Forcing an employee into an unfair arbitration process for a statutory claim arguably deprives that employee of property without due process of law.<sup>151</sup>

If we are to continue to consign employment disputes to mandatory arbitration, public policy demands that certain standards of fairness be met. If in fact we cannot rely on the Constitution to provide employees with sufficient protection, then it is the responsibility of Congress to act. It should be possible to provide standards sufficient to safeguard public policy, without converting the arbitration system into a court system.

Fortunately, in determining what due process protections should be put in place, we can draw on previous attempts to create due process protocols for employment arbitration. Reliance on these pre-existing protocols will simplify the creation of due process standards. \*144 Employment arbitration due process protocols resulted from private attempts to establish fairness in the employment arbitration context.<sup>152</sup> Responding to fears that the arbitration was unfair, and that the judicial system had abandoned its role in ensuring open access to justice, a group of dispute resolution organizations crafted due process protocols to govern the arbitration of employment disputes.

The Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship ("Employment Protocol") stresses "standards of exemplary due process."<sup>153</sup> The Employment Protocol lacks the force of law; nevertheless, many arbitration providers have voluntarily agreed to follow it.<sup>154</sup> The Employment Protocol states that parties to an employment dispute utilizing arbitration "should have the right to be represented by a spokesperson of their own choosing,"<sup>155</sup> should have "[a]dequate but limited pre-trial discovery,"<sup>156</sup> and should have experienced, diverse, independent, neutral, and knowledgeable arbitrators.<sup>157</sup>

Arbitration providers may thus ensure due process through adoption \*145 and enforcement of the Employment Protocol, as well as by rejecting the arbitration of claims that do not meet the due process standards set forth in the Employment Protocol.<sup>158</sup> Although the Employment Protocol may constitute a "bare minimum" of due process,<sup>159</sup> it has "helped restore the public's perception of arbitration, leading some to believe that all disputants are given a level playing field in the arbitral process."<sup>160</sup>

There have been judicial efforts as well to define the requirements of equitability in employment arbitration. In construing proper procedural protections, the United States Court of Appeals for the District of Columbia Circuit held that an arbitration agreement must: (1) provide for neutral arbitrators; (2) provide for more than minimal discovery; (3) require a written award; (4) provide for all of the types of relief that would otherwise be available in court; and (5) not "require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum."<sup>161</sup>

To be reasonable under my proposal, an arbitration process must ensure due process. At a minimum, to be reasonable, due process should permit the employee to choose a representative. Due process guidelines should also provide for a proportionate sharing of costs, to ensure that employees are not effectively prohibited from having their dispute heard. Due process guidelines should provide some form of information sharing, thus requiring a cost effective discovery procedure.

Arbitration qualification and selection is another potential topic area for the due process requirement. With quite complicated statutes involved, it will be important that the arbitration process provide for arbitrators who are skilled and knowledgeable. The means for selection of an arbitrator or panel will be an issue that should be included within \*146 the due process guidelines.

Finally, the due process requirement should govern the arbitrator's scope of authority. If the employment agreement provides for arbitration of statutory claims, the arbitrator must have the power to award statutory remedies. If we are to ensure that parties contracting to arbitration are not waiving substantive rights, then it is important to ensure that those parties retain the right to the same remedies as they would have in the statutory forum.

### 3. The Arbitration Agreement Should Provide for Openness

The private resolution of public disputes raises many concerns. In its protocol describing the essence of a fair and enforceable arbitration agreement, the United States Court of Appeals for the District of Columbia Circuit proposed written decisions.<sup>162</sup> My legislative proposal would do the same-- require a written decision for any arbitral award. Without some standard of openness, citizens are unable to ensure that the public concerns are being met. Without some sort of public "scrutiny" the public has no knowledge of whether the private resolution systems are doing the same work as the courts. Was the procedure fair? Was the public interest "satisfied"?<sup>163</sup> Those are important questions that cannot be answered without some sort of transparency built into the dispute resolution system.

The public has an interest in seeing that its laws are enforced consistently and equitably. An arbitrator acts as both judge and jury, interpreting the law and deciding the facts. But an arbitrator has no public face; he is "neither publicly chosen nor publicly accountable."<sup>164</sup>

The common law system works in large part because it is designed to grow, to be flexible, and to adapt to a changing society. The gains made in addressing racial inequalities in the United States would likely be much less had the Title VII claims of the 1960s and 1970s been consigned to private resolution systems. And the common law can accomplish this weighty task in large part because published decisions filter throughout society. These decisions, even when not compelled by \*147 the power of precedent, have influence on other courts that face similar fact patterns.

But a privatized legal system cannot provide the same atmosphere for growth and change. Virtually every decision rendered by an arbitrator is a walled garden, cut off from all but those parties involved in the decision. The American court system was not designed to function in this manner. Surely a system built on closed, opaque models cannot serve society as a whole. Diverting disputes from civil courts to arbitral forums could disrupt the development of legal doctrine.<sup>165</sup>

One can understand objections to the requirement of openness. Mandatory publication of awards will certainly lead to an increase in costs, and it is the fear of costs that has largely driven the arbitration agenda. Mandatory publication would also diminish the privacy protections afforded by arbitration. Employees leery of public involvement could possibly fail to bring substantive claims for fear of having their identity published. Additionally, an argument exists that there will continue to be enough litigation to generate sufficient civil court opinions.<sup>166</sup>

Nevertheless, I believe that the advantages of publication will outweigh the disadvantages. Although the court system may continue to produce sufficient legal doctrine, the evidence seems to indicate that we will see much less litigation than before. Moreover, if every arbitration panel issues a short opinion conveying its findings and publishing the award, costs should be minimal. Finally, drafters could engineer sufficient privacy protections into the system, similar to the means that courts currently address privacy concerns.

### V. Conclusion

The growth of mandatory arbitration clauses in employment agreements threatens the protections provided by public law. The complexity of the employment relationship has led to much statutory control and oversight. Employment-related statutes, both federal and state, often provide a private right of action. Lawmakers knew that the \*148 ability of an employee to sue his employer in court was vital to making the legislation work. Litigation of employment disputes, within the judicial system, not only resolved matters for the litigants, but provided guidance to thousands of other employers and employees.

Employees have a right to the protection of public statutes. Mandatory arbitration puts those rights in jeopardy. Consigning important statutory claims to private arbitration carries huge risks. Title VII created an opportunity for millions to achieve economic integration to American society. It took a century for the promise of the Fourteenth Amendment--that all Americans are to be treated equally under the law--to become a reality. But in fact it was more than Title VII at work--the body of law generated by court cases brought pursuant to the statute played a key role in changing the world. It is a safe assumption that the United States would look much different today if all Title VII cases had been directed into private dispute resolution processes.

Nevertheless, we also know that arbitration carries important advantages. It could provide a simpler and less expensive forum for the resolution of employment disputes. The challenge that society faces lies in balancing the protections of the law and the policies underlying those protections against the advantages of arbitration. To create that balance, I believe that a standard of reasonableness should be imposed on arbitration agreements. This standard of reasonableness will protect the interests of all parties: the employer, the employee, and society as a whole.

#### Footnotes

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<sup>1</sup> 130 S. Ct. 2772 (2010).

<sup>2</sup> See e.g., *14 Penn Plaza, L.L.C. v. Pyett*, 129 S.Ct. 1456 (2009) (endorsing mandatory labor arbitration, instead of litigation, to resolve statutory claims of unlawful age-based employment discrimination brought by labor union-represented employees).

<sup>3</sup> See *id.* at 1474 (Stevens, J., dissenting) (prefacing his dissent with the comment that his "concern regarding the Court's subversion of precedent to the policy favoring arbitration prompt[ed] ... additional remarks.").

4 Rent-A-Center, 130 S.Ct. at 2775.

5 Id.

6 Id. at 2780.

7 Id. at 2778.

8 Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. U. L. Rev. 293, 295 (1999).

9 Rent-A-Center, 130 S. Ct. at 2776.

10 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (explaining that parties should be held to their agreements to arbitrate).

11 See Lisa Blomgren Bingham & David Henning Good, *A Better Solution to Moral Hazard in Employment Arbitration: It Is Time to Ban Predispute Binding Arbitration Clauses*, 93 Minn. L. Rev. Headnotes 1 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1905680](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1905680).

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

13 See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). For the purposes of this Article, these three cases, as a unit, are referred to as the Mitsubishi Trilogy. For a discussion of the Mitsubishi Trilogy, see *infra* Part II.B.

14 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974). See also Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 *Cardozo J. Conflict Resol.* 509, 516 (2009).

15 Many regarded the mandatory arbitration agreement as an attempt to avoid the jurisdiction of the court. See John E. Taylor, Note, *Helping Those Who Help Themselves: The Fourth Circuit's Treatment of Agreements to Arbitrate Statutory Employment Discrimination Claims in Brown v. ABF Freight Systems, Inc. and EEOC v. Waffle House, Inc.*, 79 *N.C. L. Rev.* 239 (2000). See also Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates And The Waning Public Policy Exception*, 14 *Fordham J. Corp. & Fin. L.* 597, 600 (2009).

16 *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

17 See *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

18 Marcantel, *supra* note 15, at 602.

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

20 9 U.S.C. § 2 (2006).

21 Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

22 § 2.

23 § 4.

24 Id. Specifically, the statute holds:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

Id.

25 §§ 9-11.

26 See Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 281 (1995) (holding that while states may “regulate contracts, including arbitration clauses, under general contract law principles,” section 2 of the FAA preempts state law from placing the arbitration clauses on “unequal footing” with other terms in the agreement).

27 353 U.S. 448, 458 (1957).

28 Id.

29 See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

30 See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2006).

31 See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006).

32 See Americans with Disability Act of 1990, 42 U.S.C. §§ 12101-12213 (2006).

33 Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884).

34 Richard A. Bales, Contract Formation Issues in Employment Arbitration, 44 Brandeis L.J. 415, 419 (2006) [hereinafter Bales, Employment Arbitration].

35 415 U.S. 36 (1974).

36 Id. at 51.

37 Id.

38 Id. at 52.

- 39 See *id.* at 56-58.
- 40 *Id.* at 53-54 (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).
- 41 Kenneth F. Dunham, *Great Gilmer's Ghost: The Haunting Tale of the Role of Employment Arbitration in the Disappearance of Statutory Rights in Discrimination Cases*, 29 *Am. J. Trial Advoc.* 303, 307 (2005).
- 42 See cases cited *supra* note 13.
- 43 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).
- 44 500 U.S. 20 (1991).
- 45 *Id.*
- 46 *Id.* at 26.
- 47 *Mitsubishi*, 473 U.S. at 628.
- 48 *Gilmer*, 500 U.S. at 33 (quoting *Mitsubishi*, 473 U.S. at 627) (internal quotation marks omitted).
- 49 *Id.* at 23.
- 50 9 U.S.C. § 1 (2006). See also Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 *N.Y.U. L. Rev.* 1344, 1345 (1997) (noting that since the arbitration agreement in *Gilmer* “was part of a registration process with the New York Stock Exchange, rather than a contract of employment directly between *Gilmer* and his former employer, the Court was able to avoid construing the reach of the exclusion in § 1 of the FAA.”).
- 51 See, e.g., *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act). In that case, the Court elaborated: The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. *Id.* at 118 (emphasis added) (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819); *United States v. Ferger*, 250 U.S. 199 (1919)).
- 52 532 U.S. 105 (2001).
- 53 *Id.* at 110.
- 54 *Id.*
- 55 *Id.*
- 56 *Id.* at 112 (quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)) (internal quotation marks omitted).

- 57 Id. at 109 (the Court clearly stated that they “decide[d] that the better interpretation is to construe the statute, as most of the Courts of Appeals have done, to confine the exemption to transportation workers.”).
- 58 See id. at 109, 113.
- 59 Id. at 113.
- 60 Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. Mo. B. 174, 174 (2008).
- 61 Id.
- 62 David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 57 (1997).
- 63 Id.
- 64 See e.g., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832-33 (4th Cir. 1986); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985); *Nat’l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).
- 65 See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1, 57-58 (1997).
- 66 Christina Semmer, *The “Knowing and Voluntary” Standard: Is the Sixth Circuit’s Test Enough to Level the Playing Field in Mandatory Employment Arbitration?*, 2 J. Disp. Resol. 607, 613 (2008).
- 67 See Halvordson, *supra* note 60, at 174.
- 68 *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (stating that the Court believes that “it is clear that there can be no prospective waiver of an employee’s rights under Title VII.”). See also *Enforcement Guidance on Non-Waivable Employee Rights under Equal Employment Opportunity Commission (EEOC) Enforced Statutes*, EEOC Notice No. 915.002 (1997), available at <http://www.eeoc.gov/policy/docs/waiver.html>.
- 69 See generally 42 U.S.C. §§ 2000e to 2000e-17 (2006).
- 70 See generally id.
- 71 Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 Berkeley J. Emp. & Lab. L. 193, 194 (2009). Interestingly, McCormick goes on to note the following facts from the statistics: Black women ... earn sixty-three percent of what white men earn, and Latina women earn only fifty-two percent of what white men earn.... Additionally, the number of women of all colors in corporate officer posts and in the pipeline for those posts at Fortune 500 companies has fallen in the past two years. Women of color make up just two percent of those corporate officer posts.  
Id.
- 72 See id. 194-95.
- 73 See id. at 194-96. The continuing problem may actually be a result of ineffectual enforcement by the Equal Employment

Opportunity Commission (EEOC). Perhaps, as some claim, the problem lies squarely with the ability of the EEOC to create accountability on the part of those making employment decisions. McCormick sums up this frustration, stating, "The current model, with the EEOC writing compliance guidelines, encouraging mediation and occasionally acting as prosecutor, is not working." *Id.* at 195.

74 Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 *Berkeley J. Emp. & Lab. L.* 345, 351 (2008).

75 *Id.* at 379.

76 *Id.* at 379-80.

77 See, e.g., *Ex parte McNaughton*, 728 So.2d 592, 596 (Ala. 1998) (explaining that "an employer's providing continued at-will employment is sufficient consideration to make an employee's promise to his employer binding."). See also *Mattison v. Johnston*, 730 P.2d 286, 289 (Ariz. Ct. App. 1986) (noting that nationally, courts have found that "the continuation of employment for a substantial period of time ... establishes consideration for a restrictive covenant.").

78 See Fineman, *supra* note 74, at 380.

79 See e.g., *Judicial Arbitration & Mediation Servs. Inc., JAMS Clause Workbook: A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts* (2011), available at <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>.

80 Schwartz, *supra* note 62, at 56.

81 McCormick, *supra* note 71, at 197.

82 *Id.*

83 *Id.*

84 See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206-207 (2006).

85 See e.g., *Ward v. Bechtel Corp.*, 102 F.3d 199, 203 (5th Cir. 1997) (holding that the Texas Worker's Compensation Act "provides the exclusive remedy for injuries sustained by an employee in the course of his employment as a result of his employer's negligence").

86 See Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. §§ 651-700 (2006).

87 See, e.g., *RAM v. Blum*, 533 F. Supp. 933 (S.D.N.Y. 1982).

88 See, e.g., Cal. Lab. Code § 207 (Deering 2011).

89 Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 *U. Pa. L. Rev.* 379, 380 (2006).

90 Id.

91 Id.

92 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

93 Id. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (internal quotation marks omitted).

94 See generally Edwards, *supra* note 8, at 294.

95 Id.

96 9 U.S.C. § 10(a) (2006).

97 § 11(a), (c).

98 See § 10(a) (containing the grounds for vacatur of arbitration awards).

99 § 2.

100 Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783, 801 (2008) (explaining that “unconscionability” is a difficult concept for the purposes of the statute, however, as it provides little guidance for courts). Antoine notes that while courts have often addressed unconscionability, their decisions have been “widely diverse.” Id.

101 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)) (internal quotation marks omitted).

102 Id. at 26.

103 Id.

104 See, e.g., Bingham & David, *supra* note 11.

105 Id. at 2-3.

106 For the original text of the document, see *Arbitration Fairness Act of 2007*, S. 1782, 110th Cong. (2007).

107 Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 *Cardozo J. Conflict Resol.* 267, 268-69 (2008).

108 See *id.* As discussed by Rutledge, the proposed legislation would invalidate arbitration in many contexts, including presumably disputes in the securities industry. The new law would apply not only prospectively, to end the use of such agreements following its enactment, but also to “any dispute or claim that arises on or after” the enactment date. Id. at 269. Presumably arbitration

agreements that have been in place for years, and may have been fairly negotiated, would be rendered unenforceable by the bill.

109 St. Antoine, *supra* note 100, at 791.

110 *Id.* at 792.

111 See 42 U.S.C. § 2000e-5(e)(1) (2006). More precisely, the statute requires that claims made under this law: [S]hall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. *Id.* See also *Rallins v. Ohio State Univ.*, 191 F Supp 2d 920 (S.D. Ohio 2002) (finding that a gender discrimination claim under Title VII of the Civil Rights Act of 1964 failed because the plaintiff did not file the allegations with the EEOC in accordance with the requirements of 42 U.S.C. § 2000e-5(e)(1)).

112 Halvordson, *supra* note 60, at 178.

113 See Rutledge, *supra* note 107, at 267-77.

114 Estreicher, *supra* note 50, at 1349.

115 Richard A. Bales, How Can Congress Make a More Equitable Federal Arbitration Act, 113 Penn St. L. Rev. 1081, 1085 (2009) [hereinafter Bales, Federal Arbitration].

116 *Id.*; see also *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

117 Bales, Federal Arbitration, *supra* note 115, at 1085. See also *Doctor's Assocs. v. Cassorotto*, 517 U.S. 681, 687 (1996) (explaining that "Congress precluded states from singling out arbitration provisions for suspect status.").

118 See generally Estlund, *supra* note 89.

119 Black's Law Dictionary 364 (6th ed. 1990).

120 As no substantive difference exists among the names, this Article refers to such covenants as "noncompete agreements."

121 *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 909 n.1 (W. Va. 1982).

122 See *Superior Gearbox Co. v. Edwards*, 869 S.W.2d 239, 247 (Mo. Ct. App. 1993).

123 See William M. Corrigan & Michael B. Kass, Non-Compete Agreements and Unfair Competition--An Updated Overview, 62 J. Mo. B. 81, 81 (2006).

- 124 Michael Garrison & John Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107, 112-13 (2008).
- 125 *Id.* at 114.
- 126 See, e.g., *Allen, Gibbs, & Houlik, L.C. v. Ristow*, 94 P.3d 724, 726 (Kan. Ct. App. 2004) (citing *Weber v. Tillman*, 913 P.2d 84 (1996)). See also M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 Tex. Wesleyan L. Rev. 137, 143 (2003). McDonald notes that among the recognized protectable interests for employers are: (1) to protect trade secrets and confidential information of the company; (2) to protect customer goodwill developed for the company (customer relationships); (3) to protect overall business goodwill and assets that have been sold (noncompetes used in the sale of a business); (4) to protect unique and specialized training; (5) for situations in which the employer has contracted for the services of an individual of unique value because of who they are (e.g., performers, professional athletes); and (6) for pinnacle employees in charge of an organization. McDonald, *supra* at 143 (internal citations omitted).
- 127 McDonald, *supra* note 126, at 142.
- 128 Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment Is At-Will: Reformulating the Analysis*, 2 Emp. Rts. & Emp. Pol'y J. 95 (1998) (noting that '[m]ost courts will not enforce covenants unless their terms are reasonable.'). See also T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 Am. Bus. L.J. 1 (2005).
- 129 See generally Anenson, *supra* note 128.
- 130 Garrison & Wendt, *supra* note 124, at 115.
- 131 See *id.*
- 132 *Id.* at 118.
- 133 *Id.* at 117-18. See also *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 910-11 n.1 (W. Va. 1982).
- 134 *W.R. Grace & Co. v. Mouyal*, 422 S.E.2d 529, 531 (Ga. 1992) (quoting *Rakestraw v. Lanier*, 30 S.E. 735, 738 (Ga. 1898)) (internal quotation marks omitted).
- 135 Restatement (Second) of Contracts § 188(1) (1981).
- 136 Garrison & Wendt, *supra* note 124, at 117-18.
- 137 *Palmer & Cay, Inc. v. Marsh & McLennan Co.*, 404 F.3d 1297, 1303 (11th Cir. 2005) (quoting *White v. Fletcher/Mayo/Assocs.*, 303 S.E.2d 746, 748 (Ga. 1983)) (internal quotation marks omitted).
- 138 See *UARCO Inc. v. Lam*, 18 F. Supp. 2d 1116, 1121 (D. Haw. 1998) (noting parameters of reasonableness inquiry). See also *Pinnacle Performance, Inc. v. Hessing*, 17 P.3d 308, 311 (Idaho Ct. App. 2001) (explaining the three factors considered by that court in a reasonableness inquiry).
- 139 *Armendariz v. Found. Health Psychcare Servs, Inc.* 6 P.3d 669, 690 (Cal. 2000).

- 140 Estreicher, *supra* note 50, at 1359.
- 141 See, e.g., Older Workers Benefit Protection Act (OWBPA) of 1990, 29 U.S.C. §§ 621, 623, 626, 630 (2006).
- 142 *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998).
- 143 See § 626(f). See also *Oubre*, 522 U.S. at 427 (holding that the “OWBPA implements Congress’ policy via a strict, unqualified statutory stricture on waivers.”).
- 144 *Oubre*, 522 U.S. at 427.
- 145 29 U.S.C. § 626(f)(1) (2006). Pursuant to the law, the requirements for a valid waiver require that: (1) the waiver must be written in plain English so that the employee can understand the agreement; (2) the waiver must specifically mention that the employee is giving up his or her claims under ADEA; (3) the waiver cannot waive rights that arise after the date the release is signed; (4) the employee must receive consideration of value above anything to which employee is already entitled; (5) the employee must be advised to consult with an attorney; (6) the employee must have at least twenty-one (21) days to consider agreement; and that (7) the employee must have seven (7) days to revoke their acceptance of the agreement. If, however, the termination is part of a reduction in workforce or voluntary program that affects two or more employees, employee must also be given at least forty-five days to consider the agreement and a “release attachment” that has a list of those selected for the program (or termination) and those who are not. See *id.*
- 146 See Carole J. Buckner, *Due Process in Class Arbitration*, 58 Fla. L. Rev. 185 (2006); Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 Ga. L. Rev. 1145, 1161 (2004) (noting that “[e]very federal court considering the question has concluded that there is no state action present in contractual arbitration.”). See also *Desiderio v. Nat’l Ass’n of Secs. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)) (private actors must satisfy constitutional due process standards only if there is a “close nexus between the State and the challenged action” so that the “State is responsible for the specific conduct of which the plaintiff complains” or it “has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State” and that “[m]ere approval ... is not sufficient to justify holding the State responsible for those initiatives.”); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 369 (7th Cir. 1999) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)) (concluding “that the arbitral forum adequately protects an employee’s statutory rights, both substantively and procedurally,” as required by the Fifth Amendment’s right to due process); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1200-01 (9th Cir. 1998) (holding that the requisite element of state action was lacking in arbitration because there was no state action when parties signed the arbitration agreement); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191-93 (11th Cir. 1995) (stating that because “arbitration was a private proceeding arranged by a voluntary contractual agreement of the parties .... the arbitration proceeding itself did not constitute state action,” thus the “due process challenge to the arbitration ... must fail.”); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991) (holding that a party’s agreement to arbitration precludes argument that due process was denied).
- 147 Buckner, *supra* note 146, at 214-15.
- 148 *Id.* at 215.
- 149 *Id.* at 216.
- 150 See U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.
- 151 Estlund, *supra* note 89, at 410.
- 152 See *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*,

Alliance for Educ. Disp. Resol., [http://www.ilr.cornell.edu/alliance/resources/Guide/Due\\_process\\_protocol\\_empdispute.html](http://www.ilr.cornell.edu/alliance/resources/Guide/Due_process_protocol_empdispute.html) (last visited Nov. 12, 2011).

153 Id.

154 Richard Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 *Emp. Rts. & Emp. Pol'y J.* 301, 302 (2007). Specifically, Bales states:

The Employment Protocol has been extremely influential. It has been adopted by the major arbitration service providers, members of which will refuse to arbitrate cases under rules inconsistent with the Protocol. It has inspired two additional Protocols, both adopted in 1998: the Due Process Protocol for Consumer Disputes (the Consumer Protocol) and the Health Care Due Process Protocol (the Health Care Protocol). The Employment Protocol has provided scrupulous employers with a model for drafting fair, ethical, and enforceable arbitration agreements. It has also guided courts in their decisions of whether to enforce particular employment arbitration agreements. The Employment Protocol remains the benchmark against which employment arbitration agreements are measured.

Id.

155 Id.

156 Id.

157 Id.

158 See Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 *Ohio St. J. Disp. Resol.* 165, 174 (2005). The Due Process Protocol has been criticized too for its failure to provide guidance in a number of important areas. Areas to be improved include contract formation issues, barriers to access, process issues, remedies issues, FAA issues, and conflicts of interest. See *id.* at 167, 185.

159 Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 *Denv. U. L. Rev.* 1017, 1045 (1996) (asserting that the protocol provides employees with “few, if any, significant process rights.”).

160 Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 *Ohio St. J. Disp. Resol.* 369, 372 (2004).

161 *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (emphasis in original).

162 Id.

163 See, e.g., Owen M. Fiss, *Comment, Against Settlement*, 93 *Yale L.J.* 1073, 1089-90 (1984) (criticizing settlements instead of full adjudications, because they fail to fulfill the public law function).

164 Edwards, *supra* note 8, at 297.

165 Id.

166 See Estreicher, *supra* note 50, at 1356. See also St. Antoine, *supra* note 100, at 789 (opining that “[t]he notion that the use of arbitration will inhibit the development of a body of judicial doctrine on workplace discrimination seems highly suspect in light of the very large caseload of the federal courts in this area.”).

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SUPREME COURT WITHOUT A CLUE: 14 PENN PLAZA LLC V. PYETT AND THE SYSTEM OF COLLECTIVE ACTION AND COLLECTIVE BARGAINING ESTABLISHED BY THE NATIONAL LABOR RELATIONS ACT

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[I]t was the appeal of stepping into some black hole in American culture, with all the American values except one: individualism. And here, in this black hole, paunchy, middle-aged men, slugging down cans of beer, come to hold hands, touch each other, and sing “Solidarity Forever.” O.K., that hardly ever happens, but most people in this business, somewhere, at some point, see it once, and it is the damndest un-American thing you will ever see. . . .

....

. . . Solidarity. Union. It is the love, the only love left in this country, that dare not speak its name.<sup>1</sup>

The Supreme Court will not speak its name. The Supreme Court and various National Labor Relations Boards have been engaged for more than two decades in statutory interpretations of the National Labor Relations Act<sup>2</sup> (as amended, the Labor-Management Relations Act<sup>3</sup>) that substantially undermine and narrow those statutes.<sup>4</sup> Recent decisions of \*1064 the Supreme Court have crossed the line into judicial re-legislation. The most brazen judicial legislation occurred in the recent case of 14 Penn Plaza LLC v. Pyett.<sup>5</sup> Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined Justice Thomas’s majority opinion. The Supreme Court, in enforcing an express contractual duty to arbitrate union members’ federal statutory individual rights, has remade the collective-bargaining system in the United States. First, the Court equated collective-bargaining arbitration with individual employment contract dispute arbitration and antitrust arbitration, thus transforming the role of collective-bargaining arbitration in ways that ignore bedrock case precedent, while claiming to rely upon it. Second, it destroyed the doctrine of mandatory versus permissive subjects of the duty to bargain in good faith. Third, it shifted the purpose of collective bargaining away from protecting collective action by workers and toward achieving the aggregated individual interests of a bare majority of a union’s membership, contrary to the plain language of the statute.<sup>6</sup> This agenda of individualizing the interpretation and enforcement of the collective-bargaining agreement, and the system of employer/employee relations built upon such agreements, ignores both *stare decisis* and longstanding consensus on the purposes of federal labor statutes, to the detriment of both employers and employees.<sup>7</sup>

\*1065 Since the Pyett decision, there has been no reported decision in the Eleventh Circuit applying that decision to a dispute between a member of a union and an employer or the member’s union. This is not surprising since such a case would most often reach an Eleventh Circuit court in an appeal from a decision made by the NLRB on an unfair labor practice. It is too soon for such cases to have reached the appellate stage. In the alternative, a federal district court action to enforce provisions of a collectively bargained contract could be brought under the LMRA, section 301,<sup>8</sup> but very few such actions have been reported anywhere since Pyett. Such decisions will be coming soon. However, as applied in a district court decision in the circuit, *Campbell v. Pilot Catastrophe Services, Inc.*,<sup>9</sup> in enforcing an arbitration clause in an individual employment contract, the disturbing collapse of the same interpretations of Pyett’s reach for arbitration of statutory rights in individual employment and collectively bargained contracts is assumed. Enforceability and procedures should be similarly treated if agreed to by the parties. The Campbell judge claimed that the only distinction in enforceability of arbitration clauses was the requirement from *Wright v. Universal Maritime Service Corp.*<sup>10</sup> that coverage of statutory claims exclusively through arbitration in a collectively bargained contract must be “explicitly stated.”<sup>11</sup> This implies that all other considerations involved in arbitration

should follow the precedents set in cases involving individual employment contracts. For example, in *Campbell*, the obligation to arbitrate Title VII claims is established from a series of employment contracts entered into by the employee.<sup>12</sup> Seemingly, such cumulated duties could not be the case from a series of collective bargains, and certainly should not be the result given the negotiations required for collective bargaining, where agreement to any clause may depend on reaching agreement on other issues decided in the contract. But such an understanding of *Pyett* within a subsequent district court opinion should not be surprising, especially given the vagaries of the Supreme Court's opinion and the usual reticence of a district court judge to broadly elaborate the Supreme Court's language. Whether parallelism is the appropriate outcome, however, is much more contestable.

Most of the criticism of the *Pyett* decision and of the earlier \*1066 mandatory arbitration upheld in individual employment contracts under *Gilmer v. Interstate/Johnson Lane Corp.*<sup>13</sup> focuses on the damage to enforcement of Title VII rights. This article does not. Rather, it focuses on the damage done to the system of collective bargaining itself by requiring mandatory arbitration of statutory rights under a collective-bargaining agreement.<sup>14</sup> Particularly, in refusing to acknowledge the difference in federal law between protecting individual rights and protecting rights to collective actions, the Supreme Court ignored the almost unique quality of federal labor law within American law--that of protecting group rights--thus contributing to making the experience of solidarity almost literally, legally unimaginable.<sup>15</sup>

The suspicion cannot be avoided that this is the Court majority's intent as part of a related and larger strategy of enforcing rights more narrowly in order to prevent rights from being used to dismantle systematic delegations of governing power to private actors, insulating such powers from government responsibility in creating such power. The Court simultaneously insulates the private delegates in utilizing such power when they follow market practices, thus encouraging entrenchment of social subordination of particular groups.<sup>16</sup> Similarly, refusing to acknowledge solidaristic practices as an important part of mobilizing effective union bargaining on behalf of a union of workers facing off against a management representing a union of stockholders undermines a clearly stated statutory purpose of the National Labor Relations Act, untouched by the Taft-Hartley revisions of the Act.<sup>17</sup> Prior to the NLRA, individuals could not effectively bargain for contracts protecting their \*1067 interests when faced with the great inequality of bargaining power possessed by vast corporations.<sup>18</sup> Only if management were credibly persuaded by bargaining demands on behalf of an almost entirely mobilized and solidaristic workforce would voluntary contract redress power imbalances affecting the economic health of the entire country.<sup>19</sup>

In the *Pyett* case, the plaintiffs were members of the Service Employees International Union (SEIU) representing building cleaners, porters, and doormen who had a New York City-wide collective-bargaining agreement (CBA) with a voluntarily organized multiemployer bargaining group called the Realty Advisory Board (RAB).<sup>20</sup> One of RAB's members, 14 Penn Plaza LLC, decided to contract out the workers' jobs to an independent company. This necessitated reassigning bargaining-unit members covered by the collective-bargaining agreement to other jobs. Unit members objected that the new jobs were less well paid and less desirable. SEIU began a grievance proceeding, demanding arbitration of the dispute that called for submitting all contract claims of discrimination and all such statutory claims to arbitration under the contract's arbitration clause. Thereafter, the union withdrew its demand for arbitration. The affected members initiated a claim before the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act (ADEA). 14 Penn Plaza filed a motion to compel arbitration of the issue under sections 3 and 4 of the Federal Arbitration Act.<sup>21</sup> The Supreme Court held the arbitration of Title VII statutory claims enforceable under the CBA, despite the fact that the union could decline to process such arbitration on behalf of its members.<sup>22</sup>

### I. Collective-Bargaining Arbitration vs. Individual Employment Arbitration

Justice Thomas relied on the individual employment contract case, *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>23</sup> for two beginning propositions. \*1068 First, an individual may waive the right to a judicial forum by individual employment contract agreement to submit the right to an independent arbitrator, as long as such forum is adequate to vindicate the statutory right.<sup>24</sup> It is not the substantive right that is waived, but only the right to have it enforced through a court. Second, "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."<sup>25</sup> The only distinction between arbitration clause enforcement in the two types of employment contracts is that, to be enforceable under a collective bargain, the arbitration clause must explicitly state that statutory claims are to be covered. At another point, Justice Thomas asserted that labor arbitrators must be competent to interpret federal statutory law in the Title VII context because commercial arbitrators routinely interpret more complex antitrust law in arbitrations between corporations.<sup>26</sup> One-size arbitration fits all.<sup>27</sup>

That is wrong as a matter of law. The role and prominence of labor arbitration was the logical extension of the legal enforcement of collective-worker action envisioned by the provisions of the Wagner Act, and is still the unquestioned purpose and structure of federal labor law. This is so in order to redress imbalances in bargaining power necessary to actual free and voluntary contracting of employees with employers, which in turn stabilizes production by reducing the catalysts of disputes and transfers a greater share of the increasing wealth produced by employing companies to the purchasing power of employees necessary to sustain national economic health. The Act thus emphasized the public interest in protecting unions pursuing their members' interests through contracts negotiated by collective bargaining. This "contractualism" of labor-management relations in turn would produce industrial peace. Actual peace then required a dispute-resolution mechanism that would mediate disputes between employees and their employer over issues and rights defined by the contract during the course of the contract, usually under contracts of long duration and anticipated renegotiation and renewal. Dispute mechanisms matured as multiple-stage negotiation and discipline by the representatives of labor and management culminated in neutral arbitration of the contract dispute. The arbitrator must therefore \*1069 stay within the letter and intent of the parties so that the aggregate decisions of the arbitrators form the basis of a private or "common law of the shop"<sup>28</sup> as an extension of bargaining itself. The collective bargain was thus a collective action to be understood as a "constitution of the workplace and workplace relations," within dynamic contract interpretation and enforcement. Because of this "constitutive" nature of the collective bargain, the bargain's inevitable complexity and at the same time open-ended provisions covering inevitably unforeseen circumstances required a common law of the shop to fulfill the intent of the parties. Labor arbitration is thus a particular institution keyed to the protection of legitimate collective action necessary to the formation, development, maturity, and legitimacy of the American system of collective bargaining.<sup>29</sup>

Complexity aside, the majority did not understand this important role of labor arbitrators in enforcing collective-bargaining agreements.<sup>30</sup> The collective-bargaining arbitrator serves the purpose of promoting industrial peace<sup>31</sup> under the NLRA by providing an alternative dispute-resolution procedure to referee disputes between labor and management during the course of long contracts (two-, three-, or five-year CBAs are not unusual).<sup>32</sup> By this alternative, neither side needs to resort to economic leverage, strikes, or lockouts to enforce a contract interpretation it believes the other side has breached.<sup>33</sup> This is the rationale for the legal fiction that an arbitration clause in the collective-bargaining agreement \*1070 creates a quid pro quo for a no-strikes agreement to be read into the agreement, although not mentioned.<sup>34</sup> Unless the contract explicitly exempts strikes or limits the issues to be arbitrated, disputes under the contract are presumed to be arbitrable.

Because the arbitrator is limited to a decision that is arguably an interpretation of a contract provision, the labor arbitrator is relied upon not to issue his or her own brand of industrial justice.<sup>35</sup> This is true even though the arbitrator is to use the "common law of the shop" to interpret provisions, on the ground that the collective-bargaining agreement constitutes not an ordinary contract, but a "constitution of the workplace" and therefore of employment relations.<sup>36</sup> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law--the common law of a particular industry or a particular plant.

....

A collective bargaining agreement is an effort to erect a system of industrial self-government.

....

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties.<sup>37</sup>

Ordinarily, arbitrators are not to refer to outside statutes to justify their interpretations of the contract except in helping to enforce the parties' \*1071 intended agreement.<sup>38</sup> "The opinion of the arbitrator in this case . . . is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the

scope of the submission.”<sup>39</sup> Justice Thomas might respond that the parties in *Pyett* incorporated Title VII into their agreement. That would not be an adequate legal answer, for that response would seem internally inconsistent with the need to separate the substance of the right-- statutory and not to be decided by contract approval or contraction--from waiver of the forum to vindicate the right decided by contract.

Such an approach tells the arbitrator to import the role of “public tribunal” into the arbitral domain. The natural tendency will be to increasingly turn to statutes for interpretations of what the parties intended in other contract clauses defining their relations.<sup>40</sup> Such a statutorily based reading of contract terms undermines the assumption of virtually no judicial review of the arbitrator’s substantive interpretation of the contract.<sup>41</sup> Further, arbitration of statutory claims, which would allow the individual worker to arbitrate if the union decided not to proceed to arbitration (an option seemingly open after *Pyett*), could decrease incentives for both employers and employees to bargain or attempt to resolve the issue at the pre-arbitration stage of grievance procedure. \*1072<sup>42</sup> This also interferes with the choice of arbitrator. Some arbitrators formerly chosen for their knowledge of shop and industry may be foregone in favor of legal specialists.<sup>43</sup> Antitrust arbitrators interpret the law; labor arbitrators do not--until now.<sup>44</sup>

Most importantly, labor arbitration has been referred to as an extension of the collective-bargaining process itself.<sup>45</sup> “The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process.”<sup>46</sup> Both employer and employee may bargain on an issue without specifying the exact future circumstances of a provision’s application, secure in the knowledge that an experienced labor arbitrator will make the provision work for both parties, favoring neither side in the finding of factual predicates.<sup>47</sup> Because the collective-bargaining agreement is a private constitution of the workplace, because the collective-bargaining contract is like a trade agreement and not a commercial or individual contract, and because the parties need to rely on arbitrators as extensions of the collective-bargaining process itself, making labor arbitrators substitutes for courts inevitably interferes with longstanding understandings of the NLRA and \*1073 substantive collective bargaining as it has operated for seventy-five years.<sup>48</sup>

## II. Destroying the Mandatory/Permissive Distinction in Collective Bargaining

The NLRA requires the employer and the union to bargain in good faith over issues of “wages, hours, and other terms and conditions of employment . . . .”<sup>49</sup> Justice Thomas began his exclusive representation argument for inclusion of Title VII under disputes governed by the arbitration clause by stating, without elaboration, “[t]his freely negotiated term between the union and the RAB easily qualifies as a ‘conditio[n] of employment’ that is subject to mandatory bargaining under § 159(a).”<sup>50</sup> Thomas then cited without irony *Steelworkers v. Warrior & Gulf Navigation Co.* and *Textile Workers v. Lincoln Mills of Alabama*.<sup>51</sup> For the majority, apparently any decision of management that could be arbitrated if agreed to by the parties is a condition of mandatory bargaining as part of determining the scope of subjects to be arbitrated.<sup>52</sup> Justice Thomas, in fact, later in his opinion, seeking to distinguish *Alexander v. Gardner-Denver Co.*,<sup>53</sup> argued that excluding a statutory Title VII claim “would create a direct conflict with the statutory text, which encourages the use of arbitration for dispute resolution without imposing any constraints on collective bargaining.”<sup>54</sup> Thus, resolution of statutory claims otherwise outside the contract, when the employer insists on arbitration, are clearly permissive subjects of bargaining, until they become part of which decisions of the parties are to be arbitrated; then they become \*1074 mandatory. Something of a smoking gun on mandatory bargaining of arbitration subjects appears in a recent circuit court opinion:

[I]n *Mendez v. Starwood Hotels*, the Court of Appeals for the Second Circuit upheld the lower court’s denial of a motion to compel arbitration based on a letter agreement signed by Starwood and Mendez because the subject matter of the agreement to arbitrate employment related discrimination claims was subject to mandatory bargaining under the NLRA, and the employer had no right to go outside the collective bargaining context to obtain this letter.<sup>55</sup>

The majority in *Pyett* continually rested its decision on the *Steelworkers’ Trilogy*. In *United Steelworkers v. American Manufacturing Co.*,<sup>56</sup> whether seniority rights, just-cause dismissal, management rights, or a comprehensive arbitration clause would decide an issue over a refusal to rehire a partially disabled employee was decided as a duty to arbitrate the dispute. The legal issue on appeal by the union was based solely on the union’s right to have the issue heard by an arbitrator. In *United Steelworkers v. Warrior & Gulf Navigation Co.*,<sup>57</sup> the scope of the management-rights clause had to be arbitrated because the requirement to arbitrate all local disputes under the scope of the arbitration clause modified the management-rights clause and required arbitration under the contract of a decision to contract out bargaining-unit work.<sup>58</sup>

Some commentators on Pyett believe that employers will push for broad arbitration of all potential legal disputes and force unions to agree in order to make progress on other subjects more core to employee interests.<sup>59</sup> But what is good for the employer's goose must also be good for the employee's gander.

Of course, the majority did not refer to Justice Stewart's concurrence in *Fibreboard Paper Products Corp. v. NLRB*,<sup>60</sup> long since followed as limiting decisions that lie at the "core of entrepreneurial control"<sup>61</sup> to permissive subjects of bargaining about which both sides \*1075 need to agree to negotiate. Such subjects are substantively permissive because unions supposedly should not be able to force agreement about decisions that impact decisions about return on investment but only incidentally affect member job security. Union members nonetheless increasingly have concerns about such management decisions in the global economy. Under Pyett, unions can insist on mandatory bargaining of such decisions to impasse as an issue they want to be submitted to arbitration, not as to any management-prerogatives clause itself, but as part of the subjects covered by the arbitration clause.<sup>62</sup> The subject of arbitration is, after all, "easily a condition of employment." Furthermore, Justice Thomas required that inclusion of statutory claims within the scope of arbitration under a collective-bargaining agreement must be "explicitly stated."<sup>63</sup>

Now the union, rather than management, will race to bring up a broad arbitration clause as a mandatory issue that must be bargained to impasse before other issues can be agreed to. Of course, before Pyett, permissive issues could, in theory, hold hostage other mandatory issues in bargaining, but the practice of actually doing so depended upon a careful calculation of union bargaining leverage and was unlikely to be insisted upon for very long.<sup>64</sup> Bringing Gilmer so blithely to Pyett would seem to bring unions into the ordinary and daily management of the enterprise. That outcome may be a good thing given the disruptions caused by the global economy, although this was likely not contemplated by the draftsmen of the NLRA,<sup>65</sup> nor by a long line of Supreme Courts.<sup>66</sup>

### III. Ignoring NLRA Protection of Collective Actions of Workers

The most general protection of employees under the NLRA is the protection under sections 7 and 8(a)(1) "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or \*1076 protection . . ." <sup>67</sup> Thus, the NLRA does not only protect workers engaged in collective bargaining over a contract, but other collective actions as well.<sup>68</sup> One does not need to be a member of a union to participate in protected activities, which may include activities that support a union action or that involve no union presence at all.

Justice Thomas took a quotation from Justice Marshall in *Emporium Capwell Co. v. Western Addition Community Organization*<sup>69</sup> out of context in his assertion that "[t]his 'principle of majority rule' to which respondents object is in fact the central premise of the NLRA."<sup>70</sup> In fact, the Marshall quotation following this assertion by Thomas includes the preface, "Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power . . ." <sup>71</sup> The central purpose of the NLRA is not now, and has never been, majority rule per se. Majority rule is simply the mechanism of democracy through which union members determine the collective actions that they will commit themselves to as a unit.<sup>72</sup> The central purpose of the NLRA is the protection of collective actions for mutual aid and protection, including union organization and subsequent collective bargaining if so desired:

The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping, and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. . . . It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained . . . , but it seems to us that the [A]ct has put an end to this.<sup>73</sup>

\*1077 Even after the Taft-Hartley revisions in 1947, the right under section 7 to refuse to join a union, or to resign from one, is only a right to opt out of a union. This in no way undermines the right of protected collective action for those who do decide to join or assist a union.<sup>74</sup>

While the exclusive bargaining agent of the appropriate unit may be chosen by majority vote, the bargaining representative must represent all unit members as a unit.<sup>75</sup> The union that served only a current majority would be short-lived before being

decertified. The union needs strong consensus on most issues to convince management to seriously bargain, instead of betting that it is safe and precipitating a strike--and then replacing up to half the bargaining unit permanently.<sup>76</sup> That the union may not be able to satisfy all members simultaneously, and that the final agreement is in force only after majority ratification, does not diminish the fact that the collective-bargaining agreement is on behalf of the collective unit and a result of leverage achieved through collective action.<sup>77</sup> Justice Thomas is thus part of a solely judicial agenda of individualizing federal labor law.<sup>78</sup>

In the name of protecting individual workers' rights to violate their \*1078 contractual agreements, the Court debilitates the right of all workers to take effective collective action. The conclusion that freedom under the NLRA means freedom to break a freely made promise to one's fellow workers after they have relied on that promise to their detriment is not only a notion at odds with the structure and purpose of our labor law, but is an affront to the autonomy of the American worker.<sup>79</sup>

For the Pyett majority, a union gets what it can for members understood as a majority aggregate of the majority's individual interests. This view of labor law is at odds with a number of statutory provisions and makes totally unnecessary any goal of solidarity as an experience of union, particularly, but not solely, a union's last recourse in effective bargaining leverage--a strike.<sup>80</sup> It is certainly contrary to what most Americans in favor of unionization think is more important to them than the highest possible wage rate; that is, dignity and collective voice.<sup>81</sup>

This is the unkindest cut of all. It creates a judicial veto of an act, the NLRA, in an opinion repetitiously invoking the absence of congressional language in the ADEA prohibiting arbitration of Title VII or other statutory claims to justify arbitration. Thus, a collective action is used to protect a collective union decision not to pursue to arbitration an individual's non-waivable statutory right in the name of an individualized membership organization. This is true even where, as in Pyett, the union's decision not to arbitrate ends the members' attempt to get a hearing of any kind for their Title VII right. It is recognized that the Pyett majority refused to reach any conclusion on whether such members not receiving any arbitration could then go to court under Title \*1079 VII<sup>82</sup>; but nothing in the majority's paeans to arbitration suggests that such a "union letter to sue"<sup>83</sup> would not be perverse to the role of arbitration in pursuit of industrial peace or, as now entirely fabricated into the statute, the pursuit of the avoidance of litigation.

Instead of guaranteeing statutory redress, Justice Thomas insisted that if the union fails to pursue a member's statutory claim, the union may have violated its duty of fair representation.<sup>84</sup> The abandoned members could sue the union instead of being able to pursue a statutory claim in court. First, such a claim is notoriously hard to prove, depending on a showing of union conduct that is "arbitrary, discriminatory, or in bad faith."<sup>85</sup> Second, the Supreme Court has explicitly authorized a union to drop an individual's grievance without arbitration if doing so would advance another legitimate objective of the union or a wider number of its members. Ironically, in *Emporium Capwell*, Justice Marshall upheld the unit's protection of exclusive-representation status and control of dispute resolution under the CBA, preventing a minority from bargaining independently with management precisely because Title VII provided potential alternative relief completely independent of the collective-bargaining process for the minority member's discrimination claim.<sup>86</sup>

It is into this judicially re-legislated statute that the Pyett majority's impossible reading, but not overruling, of *Gardner-Denver* must be placed.<sup>87</sup> The CBA must expressly submit not only contract terms preventing discrimination, but also statutory rights to arbitration in whatever form called for in the contract.<sup>88</sup> This article will not rehearse at length Justice Souter's dissent demonstrating the majority's mangling of the case, as accomplished by referencing bits and pieces of it. Allowing a union to choose whether to arbitrate a Title VII claim or sacrifice its pursuit in favor of placing its bargaining or contract-enforcement chips on something else of more widespread member enthusiasm underscores the necessary tension between collective action (NLRA) and individual protection (Title VII). It is disingenuous to say that Congress did not rewrite the NLRA in passing an ADEA with no mention of \*1080 prohibiting arbitration, or that a statutory recognition of alternative dispute resolution in order to promote industrial peace under the NLRA should be read to cover statutory claims entirely to be determined on merits that could not be modified by a collective bargain.<sup>89</sup> Nor should the theoretical possibility of an adequate alternative forum be used to substantially change the role of labor arbitration as an integral part of a continual bargaining process.<sup>90</sup>

#### IV. Conclusion: Supreme Court Without a Clue

A bare Supreme Court majority, in discovering the religion of arbitration in Pyett, has, if it is to be believed, summarily altered the system of labor-management relations in the United States. The role of the labor arbitrator has been redeployed in

contradiction of the reason such arbitration was desirable and could be trusted by both employers and employees.<sup>91</sup> The mandatory/permissive distinction between bargaining subjects has been rendered meaningless, much to the coming and predictable chagrin of employers. Solidarity has been mortally wounded and with it most of the reason for wanting unions as part of the determination of employment relations at all.<sup>92</sup> Nothing will prevent, not just the arbitration of discrimination in the workplace, but the arbitration of \*1081 all federal remedial statutes at issue between employers and employees, and afortiori, all state-law disputes between employers and employees as well.<sup>93</sup> The Pyett majority, under Justice Thomas's opinion, has truly empowered a private constitution, not simply of the workplace, but of substantial federal and state law replacement as well.<sup>94</sup> Such is the price of ignorance--or was that privatization of law the intent all along?<sup>95</sup>

Footnotes

<sup>a1</sup> Professor of Law, University of Miami School of Law. This article extends remarks first offered on Pyett at the Labor Coordinating Committee annual meeting of the AFL-CIO, May 2009.

<sup>1</sup> Thomas Geoghegan, *Which Side Are You On? Trying to Be for Labor When It's Flat on Its Back* 5, 8 (1991).

<sup>2</sup> National Relations Labor Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-69) (2006)).

<sup>3</sup> Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-97 (2006)).

<sup>4</sup> “[D]ecisions like *Darlington Mills* can no longer be considered aberrations from the common wisdom, cases of judicial temporary insanity. Rather, the case is perhaps the more shocking example of the continuation of judicial policy making. As in *First National Maintenance*, the Court has indicated that there exists a body of inherent managerial interests, an assumption that not only was reflected in common-law decision making prior to 1935 but that also underlies NLRA adjudication.” James B. Atleson, *Values and Assumptions in American Labor Law* 142 (1983). On the Board and the Supreme Court, see *Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95 (1985). On the Board, see *Dana Corp.*, 351 N.L.R.B. 434 (2007); Julius G. Getman & F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 *Tex. L. Rev.* 703 (2001). For earlier judicial narrowing of the statute’s protections, see Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *Minn. L. Rev.* 265 (1978); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 *Yale L.J.* 1509 (1981).

<sup>5</sup> 129 S. Ct. 1456 (2009). On judicial legislation, see *id.* at 1475 (Stevens, J., dissenting). On denying employees free choice after Pyett, see Gary Minda & Douglas Klein, *The New Arbitral Paradigm in the Law of Work: How the Proposed Employee Free Choice Act Reinforces Supreme Court Arbitration Decisions in Denying Free Choice in the Workplace*, 2010 *Mich. St. L. Rev.* 51 (2010). For a critical view of Pyett analyzing multiple doctrinal issues yet to be decided, see Alan Hyde, *Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 *Ohio St. J. on Disp. Resol.* 975 (2010). On the difference between judicial and arbitral forums for statutory claims, see Eric B. Sposito, *14 Penn Plaza v. Pyett: Into the Abyss Between Judicial Process and Collectively Bargained Agreements to Arbitrate Individual Statutory Claims*, *Rutgers L. Rec.* (forthcoming 2011), available at <http://ssrn.com/abstract=1578623>. On the unsuitability of arbitration for statutory rights with excellent explanation of the doctrinal development of the support for arbitrating employment rights, see also Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 *Denv. U. L. Rev.* 1017 (1996).

<sup>6</sup> “Anglo-American common law historically has defined legal rights as the proprietary privileges of isolated individuals. The Wagner Act set forth a unique form of right: the collective entitlement of a body of workers ‘to engage in ... concerted activit[y] for ... mutual aid or protection.’” Craig Becker, *Individual Rights and Collective Action: The Legal History of Trade Unions in America*, 100 *Harv. L. Rev.* 672, 688 (1987) (book review) (alterations in original) (quoting 29 U.S.C. § 157 (1982)).

<sup>7</sup> “By its statutes, labor relations have been cut loose from the individualistic traditions which have anchored thinking in the area. It is benignly misguided, but irrevocably wrong, to decide labor relations cases wholly in individualistic terms.” Robert Brousseau, *Toward a Theory of Rights for the Employment Relation*, 56 *Wash. L. Rev.* 1, 24 (1980).

8 Labor Management Relations Act § 301, 29 U.S.C. § 185(a) (2006).

9 No. 10-0095-WS-B, 2010 WL 3306935 (S.D. Ala. Aug. 19, 2010).

10 525 U.S. 70 (1998) (approved of in *Pyett*, 129 S. Ct. at 1465).

11 Campbell, 2010 WL 3306935, at \*4 (internal quotation marks omitted) (quoting *Pyett*, 129 S. Ct. at 1465).

12 *Id.* at \*1-5.

13 500 U.S. 20 (1991).

14 This article should not be taken as a blanket endorsement of the present collective-bargaining system as it has evolved in the United States. Overall, the NLRA represents a weak and archaic protection of labor organization. This status, however, provides no justification to emasculate NLRA protections further, as the Supreme Court did in *Pyett*.

15 See generally James J. Brudney, Reflections on Group Action and the Law of the Workplace, 74 Tex. L. Rev. 1563 (1996).

16 Kenneth M. Casebeer, The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement, 54 U. Miami L. Rev. 247 (2000). See particularly the cramped construction of 42 U.S.C. § 1983 in *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976), equating the specific-causation-in-fact standing doctrine to limits on equitable relief and the substance of rights under § 1983. See also Kenneth M. Casebeer, Memory Lost: *Brown v. Board* and the Constitutional Economy of Liberty and Race, 63 U. Miami L. Rev. 537 (2009); Daria Roithmayr, Barriers to Entry: A Market Lock-in Model of Discrimination, 86 Va. L. Rev. 727 (2000).

17 "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." National Labor Relations Act of 1935 § 1, 29 U.S.C. § 151 (2006).

18 See *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 33 (1937) (emphasis added) ("Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. That is a fundamental right.").

19 "An integral part of any strike is persuading other employees to withhold their services and join in making the strike more effective.... '[R]espect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process in which every union member has a legitimate and protected economic interest.'" *NLRB v. S. Cal. Edison Co.*, 646 F.2d 1352, 1363 (9th Cir. 1981) (quoting *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir.1971)).

20 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct 1456, 1461 (2009).

21 *Id.* at 1462-63.

22 *Id.* at 1464.

23 500 U.S. 20 (1991).

24 *Pyett*, 129 S. Ct. at 1465.

25 *Id.*

26 *Id.* at 1471.

27 Labor arbitration is entirely different from commercial or antitrust arbitration, which usually involves one-shot disputes between parties without an ongoing relationship. “[Labor] [a]rbitration is an informal process, voluntarily embraced by parties whose interaction is on-going and whose relationship is of a relative permanence. The disputes under review are flowing out of a comprehensive contractual relationship.” John E. Dunsford, *The Role and Function of the Labor Arbitrator*, 30 St. Louis U. L.J. 109, 131 (1985).

28 *United Steelworkers of Am. v. Warrior Gulf & Navigation Co.*, 363 U.S. 574, 580 (1960).

29 On the history of the Wagner Act system of collective bargaining, see, for example, David Brody, *In Labor’s Cause: Main Themes on the History of the American Worker* 237 (1993).

30 “Instead, [collective-bargaining agreements] provide a general code governing wages, hours and working conditions. This code is refined into specific contract rights through case-by-case negotiation between the union and employer through the grievance procedure. Deferral of the refinement to case-by-case negotiation facilitates the reaching of a collective bargaining agreement by enabling the parties to provide generalized standards governing situations, such as discipline and discharge, which are likely to be so varied as to make further specificity impractical.” Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 St. Louis U. L. J. 77, 85 (1996); see Dennis O. Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. Miami L. Rev. 237 (1989).

31 Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274 (1947); see also *Textile Worker Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 454 (1957).

32 In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Supreme Court explicitly stated that the “fundamental aim” of collective bargaining is “the establishment and maintenance of industrial peace ... defusing and channeling conflict between labor and management.” *Id.* at 674 (footnote omitted). This limiting assumption about collective rights is itself highly disputed, but for purposes of this section is acknowledged.

33 “Labor arbitration, unlike commercial arbitration, is not a substitute for litigation. It is a substitute for a strike.” Brief for Petitioner at 8, *Lincoln Mills*, 353 U.S. 448 (No. 211).

34 *Local 174, Teamsters v. Lucas Flour Co.* 369 U.S. 95, 104-05 (1962).

35 Katherine Van Wezel Stone has noted the irony that section 301 law provides for routine preemption of state-law claims in enforcing broadly interpreted arbitration clauses in a collective-bargaining agreement precisely because the arbitrator should decide the dispute only under provisions of the contract without any reference to state law. This is said by the courts to be an important exclusion in order to support a uniform federal common law of interpreting collective-bargaining agreements. See Stone, *supra* note 5, at 1029.

36 See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-35 (1944) (“Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual

ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement ....”).

37 United Steelworkers of Am. v. Warrior & Gulf Navigation, 363 U.S. 574, 578-81 (1960) (emphasis added) (citations omitted) (internal quotation marks omitted).

38 Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 737 (1981).

39 United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

40 See generally Minda & Klein, *supra* note 5.

41 In effect, Pyett subjects an arbitrator’s decision interpreting and applying a CBA that expressly incorporates federal antidiscrimination law to highly deferential review on appeal. See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 n.10 (2009) (arbitrator’s decision subject to limited judicial review under 9 U.S.C. § 10(a)). As a result, Pyett directly contradicts the *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539 (6th Cir. 2008), majority’s interpretation of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and its progeny by sanctioning limited federal court review of earlier arbitrated federal antidiscrimination claims. If an arbitrator’s actions can directly limit judicial review of federal antidiscrimination laws, deference to an arbitrator’s interpretation and application of a CBA in a later-filed federal court action is warranted even if that deference precludes an employee’s statutory claims. See *Nance*, 527 F.3d at 561 (Batchelder, J., concurring). Therefore, a court affords an arbitrator’s decision interpreting and applying the terms of a CBA “an extraordinary level of deference” in a later Title VII action in federal court and affirms the decision “so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.” *Crawford Grp., Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (internal quotation marks omitted) (quoting *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004)); *Tewolde v. Owens & Minor Distrib., Inc.*, No. 07-4075 (DSD/SRN), 2009 WL 1653533, at \*9 (D. Minn. June 10, 2009). “The danger is that errors of law made by arbitrators will go unremedied because the lower federal courts will only vacate those arbitral awards that display a ‘manifest disregard for the law’—the relevant standard for labor arbitration awards.” Minda & Klein, *supra* note 5, at 84-85 (footnote omitted); see *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397 (1976); see also *Wholesale Produce Supply Co. v. Teamsters Local Union No. 120*, No. 02-2911 ADM/AJM, 2002 WL 31655844 (D. Minn. Nov. 22, 2002).

42 David L. Gregory & Edward McNamera, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 Cornell J.L. & Pub. Pol’y 429, 455 (2010). While acknowledging that Pyett has a strong likelihood of radically altering grievance and other labor-arbitration practices--and reducing their effectiveness in handling contract disputes--the authors are generally very favorable to the decision. David Gregory is a frequent labor arbitrator.

43 “In principle anyway, most arbitrators appear to adopt Meltzer’s view that their authority extends only to the business of determining the intent of the parties as reflected in their contract .... Among these considerations is the fact that arbitrators are not necessarily skilled in deciding what the law requires in a given case, nor for that matter did the parties choose them for that purpose.” Dunsford, *supra* note 27, at 121.

44 See *Mathews v. Denver Newspaper Agency LLP*, No. 07-CV-02097-WDM-KLM, 2009 WL 1231776, at \*4-6 (D. Colo. May 4, 2009) (applying *res judicata* to an arbitrator’s interpretation of Title VII, thus precluding any access to a federal court following an arbitration under a collective-bargaining agreement after Pyett).

45 See Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 Chi.-Kent L. Rev. 571 (1990).

46 *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960); Dunsford, *supra* note 27, at 127 (“But as part of the continual collective bargaining relationship, the arbitrator is surely expected to fill a role different from that of the judge the parties would get if they went to a court.”).

- 47 “The parties to collective agreements share a degree of mutual interdependence which we seldom associate with simple contracts. Sooner or later an employer and his employees must strike some kind of bargain. The costs of disagreement are heavy. The pressure to reach agreement is so great that the parties are often willing to contract although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator’s ruling if decision is required.” Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1490-91 (1959) (footnote omitted).
- 48 “There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.” *Id.* at 1498-99; see also Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).
- 49 29 U.S.C. §§ 158(a)(5), (d) (2006).
- 50 *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1464 (2009) (second alteration in original) (Justice Thomas assumes that the substantive issues to be included are also subject to mandatory bargaining); *Util. Vault Co.*, 345 N.L.R.B. 79 (2005) (holding that the mechanism of contractually based grievance arbitration is a mandatory subject of bargaining); see also *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991).
- 51 *Pyett*, 129 S. Ct. at 1464.
- 52 “[T]he arbitration duty is a creature of the collective-bargaining agreement,” and the matter of arbitrability must be determined by reference to the agreement, rather than by compulsion of law. *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 250-51 (1977).
- 53 415 U.S. 36 (1974).
- 54 *Pyett*, 129 S. Ct. at 1465 n.6.
- 55 David P. Twomey, *The Supreme Court’s 14 Penn Plaza v. Pyett Decision: Impact and Fairness Considerations for Collective Bargaining*, 61 Lab. L.J. 55, 60-61 (2010) (citation omitted).
- 56 363 U.S. 564 (1960).
- 57 363 U.S. 574 (1960).
- 58 “Douglas adopted the union’s position that a promise to arbitrate contained in a collective bargaining agreement is enforceable without regard to the court’s view of the merits of the underlying grievance.” Katherine Van Wezel Stone, *The Steelworkers’ Trilogy: The Evolution of Labor Arbitration*, in *Labor Law Stories* 149, 181 (Laura J. Cooper & Catherine L. Fisk eds., 2005). The Stone chapter clearly connects the union’s litigation strategy for extending *Lincoln Mills* to the Douglas opinions in the three cases.
- 59 See *Minda & Klein*, *supra* note 5, at 90.
- 60 379 U.S. 203, 217 (1964) (Stewart, J., concurring); see also *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-80 (1981).
- 61 *Fibreboard Paper Prods.*, 379 U.S. at 223 (Stewart, J., concurring).

- 62 “Yet, arbitration, as the Court itself often reminds us, is ‘part and parcel of the collective bargaining process,’ and it is conceptually difficult to separate the obligation to arbitrate from the obligation to bargain.” Atleson, *supra* note 4, at 164.
- 63 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1468 (2009) (quoting *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998)); see also *Campbell v. Pilot Catastrophe Servs., Inc.*, No. 10-0095-WS-B, 2010 WL 3306935, at \*4 (S.D. Ala. Aug. 19, 2010) (citation omitted).
- 64 See John Thomas Delaney, Donna Sockell & Joel Brockner, *Bargaining Effects of the Mandatory-Permissive Distinction*, 27 *Indus. Rel.* 21 (1988).
- 65 “A third possible argument, that all proposed subjects were to be considered mandatory, was generally neither suggested nor discussed.” Atleson, *supra* note 4, at 119.
- 66 See Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination*, 97 *Harv. L. Rev.* 475 (1983).
- 67 National Labor Relations Act of 1936 § 7, 29 U.S.C. § 157 (2006).
- 68 This claim is so commonplace it underlies recent teaching materials on the most important cases in American labor law: “Workers could gain substantive rights under the NLRA only by joining together in labor organizations and using their collective economic power to persuade employers to grant employee rights in collective bargaining agreements.... The entire regime of individual and group rights is premised on assumptions about the social and economic importance of collective action.” Laura J. Cooper & Catherine L. Fisk, *The Enduring Power of Collective Rights*, in *Labor Law Stories*, *supra* note 58, at 1.
- 69 420 U.S. 50, 62 (1975).
- 70 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1472 (2009).
- 71 *Id.* (quoting *Emporium*, 420 U.S. at 62).
- 72 The effectiveness of their collective strategies will then largely depend on the solidarity of the group. See David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 *N.Y.U. L. Rev.* 1268 (1988).
- 73 Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 *Colum. L. Rev.* 789, 856 & n.294 (1989) (alterations in original) (quoting *NLRB v. Peter Cailler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942)).
- 74 “Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment. This concept is of particular force during a strike, where the individual members of the union draw strength from the commitments of fellow members, and where the activities carried on by the union rest fundamentally on the mutual reliance that inheres in the ‘pact.’” *NLRB v. Granite State Joint Bd.*, 409 U.S. 213, 221 (1972) (Blackmun, J., dissenting).
- 75 “The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.” *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944) (emphasis added).
- 76 See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (upholding the replacement of strikers “with others in an effort to carry on the business”); see also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (prohibiting additional seniority credit for

permanent replacements of strikers).

- 77 “[T]he law of labor relations is designedly and necessarily anti-individualistic. The collective interest is made paramount ....” Brousseau, *supra* note 7, at 12.
- 78 See, e.g., *Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95, 104-05 (1985) (refusing to uphold union fining of a member who resigned during a strike despite the union’s constitutional agreement not to do so); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 207, 233-37 (1977) (limiting agency fees required of non-members to support collective-bargaining activities and allowing opt-out of support for political or other activities supportive of the union or unions generally). Even the duty of the union to fairly represent all members of the unit can be seen in its enforcement to “fractur[e] the collective entitlement of a body of labor into the aggregated rights of individual employees to be fairly represented. What had been the union’s obligation to an entire unit became a duty to each member within it.” *Becker*, *supra* note 6, at 680. Nor is such judicial revisionism limited to the post-Rehnquist Court. The Burger Court contributed in the lead-up to *Patternmakers*. See *Granite State Joint Bd.*, 409 U.S. at 215-18 (prohibiting union’s fining of members during strike).
- 79 *Pattern Makers’*, 473 U.S. at 133 (Blackmun, J., dissenting).
- 80 “The strike is ‘the ultimate weapon in labor’s arsenal.’ It works to foster both collective bargaining and union democracy--the former by compelling employers to take their workers’ needs seriously, the latter by providing the experience of identity formation and collective action.” Abraham, *supra* note 72, at 1336 (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967)). Further, “[i]n strike and similar situations, workers, if they are to have any chance of success, must operate on the basis of a collective identity which overcomes the individuality of their resources and interests rather than simply aggregating them.” *Id.* at 1287.
- 81 “Putting aside the particular form of representation that workers favored, the main finding of the survey was that the vast majority of workers-- 85% to 90%, depending on the particular questions--wanted a greater collective say at the workplace than they had. Moreover, most workers thought that greater representation and voice to employees at their workplace would be good for their firm as well as for them.” Richard B. Freeman, *Econ. Policy Inst., Do Workers Still Want Unions? More Than Ever 1* (2007), available at [http:// www.sharedprosperity.org/bp182/bp182.pdf](http://www.sharedprosperity.org/bp182/bp182.pdf). “[A]n August 2005 Hart survey gave the following list of top concerns: health care costs (35%), jobs going overseas (31%), rising gas prices (29%), raises that don’t keep up with the cost of living (23%), lack of retirement security (14%), and work schedules interfering with family responsibilities (10%).” *Id.* (citing Peter D. Hart Research Associates, *Study #7704, AFL-CIO* (Aug. 2005), [http:// www.aflcio.org/aboutus/laborday/upload/toplines.pdf](http://www.aflcio.org/aboutus/laborday/upload/toplines.pdf)).
- 82 See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009).
- 83 If the EEOC does not wish to prosecute a complaint on behalf of an individual under Title VII, it issues a “right to sue letter” to the complainant.
- 84 *Pyett*, 129 S. Ct. at 1473. This is ironic and question-begging given that the duty of fair representation already may be said to undermine union collective actions. See *supra* note 78.
- 85 *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).
- 86 See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 60-70 (1975).
- 87 *Pyett*, 129 S. Ct. at 1479 (Souter, J., dissenting).
- 88 Still, Justice Thomas found it necessary in a footnote to threaten the dissenters that if they push their reading of *Gardner-Denver*, the case will be overruled in a future case. See *id.* at 1469 n.8 (majority opinion).

- 89 “There were ‘statutory rights related to collective activity,’ which ‘are conferred on employees collectively to foster the processes of bargaining [, which] properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members.’ But ‘Title VII ... stands on plainly different [categorical] ground; it concerns not majoritarian processes, but an individual’s right to equal employment opportunities.’” *Id.* at 1477 (Souter, J., dissenting) (alterations in original) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974)).
- 90 Mark Berger has suggested that the union, in agreeing to arbitration of statutory claims, must remain in charge of what kind of arbitration is to be used, including what procedures are to be used and the representation provided as part of the collective-bargaining process that was agreed to in the arbitration clause. Mark Berger *A Step Too Far: Pyett and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 *Syracuse L. Rev.* 55, 83 (2009); see *Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 542*, 223 *N.L.R.B.* 533, 533 (1976) (explaining that even if union provides a lawyer for an individual’s grievance arbitration, the individual cannot direct legal strategy or witnesses called). It is also unclear whether labor arbitrators have any power to subpoena witnesses. See Gary Furlong, *Fear and Loathing in Labor Arbitration: How Can There Possibly be a Full and Fair Hearing Unless the Arbitrator Can Subpoena Evidence?*, 20 *Willamette L. Rev.* 535 (1984).
- 91 Mark Berger suggests the union member who does not want her statutory claim to be arbitrated has the option of individual employment contract employees; that is, to quit. See Berger, *supra* note 90, at 81.
- 92 “The willingness of individuals prudently and responsibly to make cause with others, to make some personal sacrifice for the common good even when they may not directly benefit from it, is the sine qua non for the labor movement. Such habits also are central to the survival of any democracy.” Julius G. Getman & Thomas C. Kohler, *The Story of NLRB v. MacKay Radio & Telegraph Co.: The High Cost of Solidarity*, in *Labor Law Stories*, *supra* note 58, at 13, 53.
- 93 On the required arbitration of state-law claims, see, for example, *Johnson v. Tishman Speyer Props., L.P.*, No. 09 Civ. 1959(WHP), 2009 WL 3364038, at \*3 (S.D.N.Y. Oct. 16, 2009). On section 301 preemption, see *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968).
- 94 See Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from Steelworkers Trilogy to Gilmer*, 44 *Hastings L.J.* 1187 (1993).
- 95 “[A]rbitrators who want to interpret the statutes correctly will have no authoritative statutory interpretations to look to for guidance. It also means that the law cannot play an educational role of shaping parties’ norms and sense of right and wrong, and therefore it cannot shape behavior in its shadow.” Stone, *supra* note 5, at 1043 (footnote omitted).

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Article

INDIVIDUALISM, COLLECTIVISM AND AUTONOMY IN AMERICAN LABOR LAW

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**I. Introduction: Freedom of Contract and Autonomy**

In the United States, employment law had its origin in the law of master and servant applied primarily to domestic servants, farm hands and apprentices. Although some terms were bargained, most were imposed by law, based on the status of the employee. With industrialization during the 19th century, employment law moved from one of status to contract with employment governed by terms agreed upon by the employer and employee. In 1842, the Massachusetts court in *Farwell v. Boston & Worcester Railroad*,<sup>1</sup> held that a railroad was not liable to an employee for injury by the negligence of a fellow employee, although it would have been liable to a passenger or a total stranger for the same negligent act.<sup>2</sup> The employee's claim, said the court, 'must be maintained, if maintained at all, on the ground of contract.'<sup>3</sup> All risks arising out of employment are regulated by the \*454 express terms or implied contract between the parties.<sup>4</sup> The contract being silent, the court then read in the implied term.<sup>5</sup> By accepting employment, the court, the employee 'takes upon himself the natural and ordinary risks and perils incident to performance;'<sup>6</sup> he impliedly agrees to assume the risk of the negligence of his fellow employees. 'In legal presumption,' said the court unrealistically, 'the compensation is adjusted accordingly.'<sup>7</sup>

The move from status to contract gave the employer and employee the freedom to determine for themselves the terms and conditions of employment. This freedom was, in legal contemplation, equally enjoyed by both parties. In practice, terms were, as in *Farwell*, read into the contract by the courts according to the judges' predisposition. In *Payne v. Western & Atlantic Railroad Co.*,<sup>8</sup> decided in 1884, the railroad's general agent threatened that any employee who patronized Payne's store would be discharged. The Tennessee court held that in the absence of a term expressed in the contract, employment could be terminated at the option of either party, saying:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even bad cause . . . It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause. . .<sup>9</sup>

This was an expression of the broad *laissez faire* principle of freedom of contract, which permeated American law and became enshrined as a constitutional principle that limited the power of legislatures to prescribe terms of the employment contract. In 1898, Congress passed a statute concerning labor disputes on interstate railroads.<sup>10</sup> Among its provisions was one that prohibited employers from requiring employees to agree, as a condition of their employment, not to become a member of a union - so-called 'yellowdog' contract. \*455 The Supreme Court in *Adair v. United States*,<sup>11</sup> held that this limit on freedom of contract was an unconstitutional invasion of individual liberty.

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the

purchaser of labor to prescribe the conditions upon which he will accept such labor. . . In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.<sup>12</sup>

Freedom of contract was thus conceived as an aspect of individual liberty. In the words of a vigorous proponent, it is 'every bit as much an aspect of individual liberty as freedom of speech, or freedom in selection of marriage partners or in adoption of religious beliefs or affiliations.'<sup>13</sup> It allows each individual to choose his or her own preferences and seek his or her own goals. So conceived, it is both an expression and an instrument of personal autonomy.

The individualism of freedom of contract in employment, however, does not always, in practice, promote personal autonomy for the workers. In Payne, the employees were denied the freedom to buy where they would, and in Adair, the workers were denied the freedom to join in association with their fellow workers. The employer, as a condition of employment, required that employees surrender these aspects of their autonomy. The contract of employment is a product of economic forces in the labor market and those market forces produce results like Payne and Adair.

Some economists argue that, contrary to appearances, the contract of employment in fact expresses the parties' preferences when the contract is a product of bargaining in the free market. If employees prefer certain aspects of autonomy, they can bargain for them by, for example, accepting lower wages, or seeking out employers who will recognize their autonomy. The terms of the contract, therefore, express the relative preferences of the parties; if the \*456 contract of employment does not protect personal autonomy, it is because workers do not value it.<sup>14</sup> This abstraction by economists may be superficially plausible, but reality rejects the theory. It is difficult to believe that in Payne the railroad would have agreed to two wage scales, depending on whether an employee traded at the store. It is impossible to imagine that in Adair any individual employee could make any concession, which would induce the railroad to allow him to join a union. The labor market, collectivized on the employer's side, practically precludes the reality of individualism on the worker's side.

This economic tunnel vision of market forces ignores the documented analyses of market failures in the individual labor market.<sup>15</sup> It also ignores that economic efficiency, supposedly promoted by the market, may sometimes be a subordinate value when recognition of the right in personality and preservation of human dignity are involved. Its reasoning would reject the whole of labor law and logically endorse contracts for sexual services and uphold contracts for indentured servitude.

Freedom of contract is no longer dressed in constitutional garb; the Supreme Court has long since disrobed it.<sup>16</sup> There are no longer constitutional limits to regulation of employment contracts, and there is a multitude of significant regulatory statutes which limit the employer's use of its economic bargaining power. Much of the law of employment contracts, however, is still shaped by the courts, and much of the economic individualism of the late 19th century permeates the judges' thinking. The courts look upon the employment relation largely as a sale of labor as a commodity between two economic entities, largely devoid of any consideration of the employee as a personality with human \*457 worth.

My purpose here is not to develop any large theory, social or economic, of the employment relation, nor to spell out in detail or with precision the rights of the individual employee. Within the limits here, I cannot be definitional but only impressionistic. My purpose, first, is to briefly illustrate how the individual employment contract, rooted in the individualism of freedom of contract, has dealt with the worker's right to personal autonomy; second, to discuss how the collective contract has affected the right to personal autonomy. The hope is to provide some sense of the value which American labor law places on personal autonomy.

## II. Employment at Will and Autonomy

As Payne and Adair demonstrate, defining the contract of employment as one terminable at will empowers the employer to subordinate employees, treating them as mere suppliers of labor with no recognition of them as persons entitled to personal autonomy. In the course of a century, the courts have softened the doctrine only a little around the edges.

Murphy v. American Home Products Co.,<sup>17</sup> decided by the New York court in 1988, is illustrative. Murphy, as assistant treasurer of the company, felt obligated to report to the officers and directors that improper accounting practices allowed high-ranking managers to collect millions of dollars in unearned bonuses. For his personal integrity in fulfilling his obligation, he was summarily dismissed.<sup>18</sup> When he returned to obtain his belongings, he was placed under guard and

publicly escorted from the building. His possessions, which were obtained by breaking the lock on his desk, were dumped on the street beside him.<sup>19</sup> Murphy's employment was at will, said the court, and he had no claim for breach of contract, abusive dismissal, or emotional distress for his public humiliation.<sup>20</sup>

\*458 Employees, while at work, have nearly no legal protection of personality, the right to assert who they are or what they believe, even though the employer's interest is minimal or non-existent. For example, in *Drake v. Cheyenne Newspapers, Inc.*,<sup>21</sup> decided in 1995, the newspaper in opposing unionization ordered supervisors to wear anti-union buttons.<sup>22</sup> Drake said that 'in good conscience' he could not do this, and that to require him to declare what he did not believe was a violation of his freedom of speech.<sup>23</sup> The court upheld his discharge, saying he had no right to free speech on the premises during working hours.<sup>24</sup> He could be required to say what he conscientiously objected to saying.

In *Fagan v. National Cash Register Company*,<sup>25</sup> the employer prescribed haircuts for men, prohibiting the hair from covering the ears or coming below the collar. Fagan wore his hair to his shoulders, as he said, 'in my . . . projection of my image' and 'in the vogue and fashion of . . . my peer group.'<sup>26</sup> Although his appearance was neat, it did not accord with the image which the company wanted to project, and the court upheld his discharge without any inquiry into whether his appearance harmed the employer's business.<sup>27</sup> In *Bigelow v. Bullard*,<sup>28</sup> decided in 1994, the operator of an apartment complex used various subterfuge to refuse to rent to blacks in violation of civil rights laws. When three blacks who sought to rent an apartment were threatened with personal violence by the employer's guards, Bullard remarked to a fellow employee, 'Blacks have rights too.'<sup>29</sup> This was seen by his supervisor as Bullard's having an 'overly sympathetic attitude toward African-Americans;' in the terms of his supervisor, being a 'nigger lover,' and he was discharged.<sup>30</sup> The court's response was that the supervisor had 'the perfect right to dismiss him at her whim, for no \*459 reason, or even for 'wrong' reasons, so long as she did not dismiss him for a refusal to carry out employment tasks . . . contrary to public policy. . . .'<sup>31</sup> In these cases, the employee's interest in asserting his autonomy by stating his views, refusing to misrepresent himself, or by expressing his personality counted for nothing with the court as against the employer's claimed business interests or personal whims.

The contract of employment embodying employment at will may be used by the employer to reach control of the employee's private life, not only at work but also in his activities off the premises outside of working hours. In *Ball v. United Parcel Service*,<sup>32</sup> the employer required all employees to authorize deductions from their pay to the community charity, United Way. The court upheld the right of the employer to discharge those who refused to sign the authorization, in spite of a statute which prohibited mandatory contributions to 'any social, economic or political organization.'<sup>33</sup> In a semantic tour de force, the court parsed the words of the statute to conclude that United Way did not come within any of the terms, 'social, economic, or political organization' and that the legislature did not bar compulsory contributions generally.<sup>34</sup> Employees could, therefore, be compelled to contribute to the employer's favored charity on pain of discharge. In *Brunner v. Al Attar*,<sup>35</sup> an employee was discharged because she did volunteer work at an AIDS center. The employer had an admittedly irrational fear that this would put him, his family, and his employees at risk.<sup>36</sup> The court held that the employer did not need even an irrational fear to bar the employee from doing volunteer work on her own time; her employment was at will and the employer was not requiring her to act illegally.<sup>37</sup> In *Patton v. J. C. Penney, Co.*,<sup>38</sup> the court upheld the discharge of an employee, acknowledged by the employer to be exemplary, \*460 because he had a continuing 'social relationship' with a co-worker in off duty hours. The employer's mere dislike of the employee's 'lifestyle' overrode the employee's claim of what the court conceded was a 'fundamental inalienable human right.'<sup>39</sup>

During the 1970s and 1980s, the courts developed exceptions to the employment at will doctrine, the three most important being the so-called handbook rule, the public policy exception, and recovery for emotional distress. These give very limited protection to the employee and little or no recognition to the employee's interest in autonomy.

The handbook rule, developed in the 1980s, simply applied ordinary contract principles to the contract of employment. If the employer distributed a handbook, policy manual, or guide to employees describing terms and conditions of employment, courts held that the descriptive terms in the handbook became a part of the contract of employment. If the handbook expressly or impliedly provided that employees would not be discharged without cause, or only for stated causes, or if it described the procedures for making employment decisions, the employer's failure to follow the handbook was a breach of contract.<sup>40</sup> Because handbooks sought to reassure employees that they would enjoy certain benefits and be treated fairly, many had provisions which gave employees protection against unjust discharge. This protection, however, was short lived, for no sooner had the courts enunciated the rule than lawyers counteracted the provisions by drafting disclaimer clauses to be included in the handbook, which had statements such as the following: 'This handbook is intended only to state the

company's present policies. The terms and procedures are not contractual and are subject to change and interpretation at the sole discretion of the company without notice or consideration.<sup>4</sup>

Some courts required that the disclaimer clause be worded so as to be understandable by an ordinary worker, be **\*461** prominently placed, and even be in bold print. But the net effect of the handbook exception has been only to catch unwary employers who do not consult a competent lawyer before distributing the handbook.<sup>41</sup>

Potentially more significant is the public policy exception, developed in the 1970s. Regardless of the terms of the employment contract, an employee whose discharge violates public policy may sue in tort, not only for loss of wages but also for pain and suffering and punitive damages. For example, employees who were discharged because they refused to commit perjury<sup>42</sup> or engage in illegal price fixing<sup>43</sup> could recover; an employee who disobeyed the employer's instruction to try to get excused from jury duty was protected from discharge;<sup>44</sup> and an employee could not be discharged for filing a worker's compensation claim for a work injury.<sup>45</sup> These three categories - refusal to commit an unlawful act, performing a public obligation and exercising statutory rights - are generally recognized as coming within the public policy exception. Beyond these three categories, the exception gives uneven protection.

A major category of cases arises out of 'whistle blowing,' that is, informing the employer or public authorities of wrongful conduct. Although employees act out of a sense of personal responsibility, social concern or duty to the employer or others, they can not count on judicial protection against discharge. In *Boyle v. Vista Eyewear, Inc.*,<sup>46</sup> Boyle protested to her supervisor that the eyeglass lenses being produced were not being subjected to tests for resistance to breaking or shattering required by government regulations. She said that if this continued she would feel compelled to report it to the authorities because of the risk to customers' eyes. After months of fruitless urging she reported it to government authorities, which led to her discharge.<sup>47</sup> The **\*462** court held the discharge was 'in violation of a clear mandate of public policy' and defined public policy broadly as 'that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good.'<sup>48</sup>

In contrast, in *Balla v. Gambro, Inc.*,<sup>49</sup> the employer, Gambro, was a distributor of kidney dialysis machines manufactured in Germany. Balla, a lawyer, was director of administration, general counsel and manager of regulatory affairs. He advised the president of Gambro to reject a shipment of dialyzers, because they did not meet government standards. When the president decided to accept the shipment, Balla said he would do whatever was necessary to stop the sale. He was thereupon discharged, and immediately informed the authorities who seized the shipment. The authorities determined the machines in fact did not meet government standards.<sup>50</sup> The court dismissed Balla's suit for retaliatory discharge because, said the court, protecting members of the public from defective dialyzers did not require protecting Balla from discharge.<sup>51</sup> He did not have the choice of remaining silent or losing his job because he was obligated by the lawyers' Rules of Professional Conduct to reveal the information.<sup>52</sup> Further, the court stated, '[W]e refuse to allow in-house counsel to sue their employer/client for damages because they obeyed their ethical obligations.'<sup>53</sup>

The court agreed that Balla's damages were not caused by his obeying his ethical obligation, but by the employer's discharging him for his obeying his ethical and legal obligations. The employer was not liable.<sup>54</sup>

The public policy exception is, in most courts, a narrowly limited exception. First, contrary to common judicial practices and the nature of the common law, the courts generally insist that they cannot make public policy. A discharge must violate some clearly articulated policy, **\*463** expressed in a statute or constitution or perhaps a government regulation. In *Geary v. United States Steel Corp.*,<sup>55</sup> a salesman of steel pipe raised a question with his supervisor whether the pipe could withstand the pressure required for the purposes for which it was being sold. He was told to forget it; his business was to sell the pipe. Not satisfied, he raised the question with the vice-president, who was his friend.<sup>56</sup> When his supervisor learned of this, the salesman was discharged; his concern for safety was characterized as 'a nuisance,' although the pipes were withdrawn from distribution.<sup>57</sup> The court acknowledged that the pipes bursting under pressure could endanger workers, but said there was no clearly articulated statutory policy involved and upheld the discharge.<sup>58</sup>

In *Wright v. Shriners Hospital*,<sup>59</sup> a nurse, questioned by a survey team inquiring into problems in the hospital, stated that there was a problem of communication between nursing and medical staff, and that this affected patient care.<sup>60</sup> The court held that her discharge did not violate public policy, as there was no statute requiring her to report these problems, although there was a regulation of the Board of Nursing requiring reporting.<sup>61</sup> The court explicitly 'rejected the plaintiff's argument that the

public policy exception . . . should extend to protect employees who were performing appropriate, socially desirable duties.<sup>62</sup>

The requirement that the discharge implicate a statutory provision may be applied with tortured narrowness to deny the discharged employee protection. It was not enough that an employee allege that she was discharged because she was about to disclose to top management that her superiors appeared to be engaged in bribery, falsification of corporate records, and misuse of corporate funds for personal benefit. She must point out specific statutes prohibiting the \*464 conduct.<sup>63</sup> Nor was it enough for her to refuse to do what she reasonably and in good faith believed was illegal; she must have proven that it was in fact illegal.<sup>64</sup>

Some courts reject federal law as a source of state public policy. In *Gay v. Travelnol Labs*,<sup>65</sup> the employee was discharged when he refused to falsify records required by the federal food and drug law. The court held that the state had no obligation to use its tort law to enforce federal policies, so the discharge did not violate state public policy.<sup>66</sup> Similarly, an Illinois court held that although it had a general interest in air safety, it had no interest in enforcing federal air safety regulations.<sup>67</sup> In *Pratt v. Caterpillar Tractor Co.*,<sup>68</sup> the court upheld the discharge of an employee who refused to violate the Federal Corrupt Practices Act. No state policy was implicated, said the court, because no harm to the state's citizens was alleged.<sup>69</sup>

A second limitation on the public policy exception is that the discharge must violate a public, as contrasted to a private interest. In *Hayes v. Eateries, Inc.*,<sup>70</sup> an employee was discharged because he reported to the police that his supervisor was engaged in embezzlement. This did not contravene public policy, said the court, because it involved only the private interest of the employer.<sup>71</sup> 'It is not up to an individual employee to report to outside law enforcement agencies embezzlement from his employer by a co-employee, but it is up to the employer who is the direct victim of the crime.'<sup>72</sup> But if the employee reports the embezzlement to his employer, he may be discharged because his report, reasoned the court, serves the private purpose of the employer and embezzlement does not affect public health and safety.<sup>73</sup> With similar logic, the discharge of an employee because she \*465 became engaged to be married was upheld. This did not violate public policy because it was 'based on a private right which is not related to her role as an employee.'<sup>74</sup> An employee discharged because he said he was going to law school was denied protection with the reasoning that attendance at a night school was a private rather than a public concern.<sup>75</sup>

These court decisions applying the public policy exception make plain that the courts are not concerned with protecting the interests of employees, either their interest in their job or their interest in acting on their personal values, their dignity, or their autonomy. As one court candidly stated, 'The public policy exception does not exist to protect the employee.'<sup>76</sup> It exists only to protect the public.

In *Geary*, the court gave no weight to *Geary's* concern for the safety of others or his loyalty to his employer. Similarly *Balla's* insistence on fulfilling his ethical obligations, *Wright's* dedication to her patients, and *Hayes's* sense of civic responsibility to report a crime all counted for nothing with the courts. They could see no public interest in protecting the autonomy of the employees against the whims or vindictiveness of employers engaged in anti-social or even illegal activity.

Only when a statute enacted to protect others is implicated will the court take action. When it does find a violation of public policy, so circumscribed, it will give the \*466 employee full measure of these damages, including economic loss, pain and suffering, and punitive damages. But damages are given, not to vindicate any personal interest of the employee but to vindicate the interests of the public.

A third avenue discharged employees may pursue is a suit in tort for intentional causing of emotional distress. Unlike the public policy exception, this tort focuses on the interests of the employee and the right to personal well being. However, in spite of the psychological traumatic effect of being wrongfully discharged, and the damage to the employee's sense of self-worth, discharged employees seldom recover.

The Restatement of Torts states that to recover the plaintiff must show that the conduct is 'so outrageous in character and extreme in degree as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.'<sup>77</sup> The emotional distress must be 'severe and of a nature no reasonable man could be expected to endure it.'<sup>78</sup> Discharged employees can seldom satisfy the courts' interpretation of these words.

For example, when a doctor's secretary was beaten up by her estranged husband and raped at gunpoint, the doctor terminated

her and retroactively canceled her health insurance so her medical bills were not paid. The court held that the public policy exception did not apply and that the doctor's conduct did not reach the standard of 'extremely or clearly outrageous.'<sup>79</sup> In another case, an employee was discharged for inadvertently taking a handful of nails. The employer publicized to the community that the employee was being discharged for stealing. The court held that this was not sufficiently outrageous to constitute a tort.<sup>80</sup> In *Murphy v. American Home Products Co.*, discussed earlier,<sup>81</sup> the court held that having a policeman publicly escort Murphy out of the building, breaking into his locked desk to obtain his personal possessions, and dumping them on the public \*467 sidewalk beside him fell 'far short of the strict standard' set forth in the Restatement.<sup>82</sup>

In these cases, not only might the reasons for the discharges be viewed as 'outrageous,' but the brutal way they were done should be 'intolerable in a civilized society.' But the judges were unmoved. The refusal to find liability in these cases underlines the courts' reluctance to recognize and protect employees from egregious employer conduct which destroys their sense of self worth and strips away their human dignity.

Freedom of contract was conceived as an instrument of individualism and personal freedom, with the employment contract supposedly expressing the individual choices of the employer and employee. However, employment at will, theoretically a product of freedom of contract, is the ultimate expression of employer domination over the employee. It empowers an employer to control the employees' lives, not only in their work, their dress, their speech and associations in the workplace, but also their activities and associations off the job. It empowers the employer, out of whim, vindictiveness or corrupt motives, to dismiss employees who act out of a sense of social responsibility, ethical obligation or personal conscience. To be sure, there are limits, and most employers recognize the personal worth of their employees. But courts, reasoning from employment at will, too often give little or no weight to the interests of employees. Employment at will has transformed the individualism and personal freedom into a denial of personal freedom and autonomy.

### III. Workplace Privacy and Autonomy

The right to privacy as a separate tort in American law had its origin in an article in the *Harvard Law Review* in 1890 by Samuel Warren and Louis Brandeis.<sup>83</sup> They wove together threads of the common law to show an evolving protection of the individual's 'inviolable personality' which included the 'right to be let alone,' 'seclusion of thoughts and sentiments,' \*468 the right to be free from 'spying into the privacy of domestic life,' and revealing of 'facts relating to his private life which he has seen fit to keep private.'<sup>84</sup>

The Restatement of Torts has identified four types of violations of the right of privacy: (1) unreasonable intrusion into the seclusion of another or his private affairs which would be highly offensive to a reasonable person; (2) public disclosure of private matters in which the public has no legitimate concern as to bring shame or humiliation to a person of ordinary sensibilities; (3) publicity that puts a person in a false light; and (4) appropriation of another's name or likeness. The first two are most often involved in the employment relation.<sup>85</sup>

The right of privacy has been generally described as the right of 'not having one's private activities minded by another,' and 'protection of the personal boundaries of self.'<sup>86</sup> It is a personal right, protecting individuality and human dignity, the right to be one's self. It is rooted in the right to inviolable personality, the right to personal autonomy.<sup>87</sup>

The employment relation inevitably intrudes on seclusion, but in principle, intrusions are subject to the mercurial test of 'reasonableness' as found by the courts. In *Pulla v. Amoco Oil Co.*,<sup>88</sup> the employer obtained an employee's credit card record to determine if she went shopping on days she claimed to be sick. The employer argued that it had a legitimate interest in the inquiry, but the court declared that the employer's interest must be balanced against the degree of intrusion and upheld a jury verdict for the plaintiff.<sup>89</sup> Similarly, when an employee failed to report for work, his supervisor got a locksmith to open the door of the trailer \*469 where the employee lived.<sup>90</sup> The employer claimed that he broke in because he was concerned for the employee's well being; the employee said that the supervisor wanted to get evidence to discharge him.<sup>91</sup> The court held that if the jury believed the employee, the break-in was not reasonable.<sup>92</sup> If an employer furnishes locks for employees' lockers and retains a key, the lockers can be searched without the employee's consent, but if the employer allows an employee to use her own lock, opening the locker to search for stolen articles is an unreasonable intrusion, violating her privacy.<sup>93</sup> An employer, conducting a fashion show, may place video cameras around the hall and at doorways for security purposes, but the employer may not place one of the cameras to observe the model's dressing in their room.<sup>94</sup>

Most courts, however, in balancing the employer's interest against the degree of intrusion place a heavy hand on the employers' side. In one case, an employer, investigating whether an employee collecting compensation for a work injury, used a telephoto camera to take pictures through an open window of activity inside the employee's home, had an investigator pose as a process server to get inside the home to observe what was going on, and also sent a letter to the employee's doctor in an effort to get medical information.<sup>95</sup> The court, without weighing the degree of intrusion against the employer's need, found no unreasonable intrusion of privacy because 'privacy is subject to the legitimate interests of the employer.'<sup>96</sup>

The court's heavy hand on the employer side of the scale is epitomized in *Baggs v. Eagle-Picher Industries, Inc.*<sup>97</sup> The court acknowledged that the employer's drug testing invaded privacy because it 'can reveal a host of private medical facts about the employee including whether she is epileptic, \*470 pregnant or diabetic.'<sup>98</sup> Also, the method of taking urine itself implicates privacy and is 'an intrusion a reasonable person would find objectionable.'<sup>99</sup> The drug testing, however, was upheld with a blanket license; 'A Michigan employer may use intrusive or even objectionable means to obtain employment related information.'<sup>100</sup>

At the same time, courts dismiss as of little consequence substantial intrusions into employees' privacy. In another work injury case, the investigator masqueraded as a marketing researcher, getting repeated access to the employee's home by asking his wife to test various products.<sup>101</sup> The court minimized the intrusion by saying that the investigator never entered the house without permission and the visits were short, although the 'permission' was obtained by fraud and there were repeated visits.<sup>102</sup> With similar dismissive reasoning, a court held that requiring a male employee to provide a urine sample under the direct observation of a female supervisor did not violate the employee's right of privacy. 'The intrusiveness of the search was slight,' said the court; there was 'nothing more than momentary embarrassment;' and taking the urine was 'nothing significant,' as it was a 'waste product.'<sup>103</sup>

In *Smith v. Pillsbury Co.*,<sup>104</sup> the employer encouraged its employees to communicate with each other by e-mail, repeatedly assuring them that all messages would be confidential, would not be intercepted or used against them for reprimand.<sup>105</sup> When an employee responded to his supervisor by e-mail from his home, concerning problems in the workplace, it was intercepted and he was dismissed for 'inappropriate and unprofessional' comments derogatory of management. The court stated, inexplicably, that the employee had no reasonable expectation of privacy in e-mail, \*471 and even if he did, a reasonable person would not find the interception highly offensive.<sup>106</sup> In another case, the employer ordered its employees not to associate with a fellow employee who had been discharged on unproven charges of sexual harassment and fighting. The court held that this forbidding of association off the job was not highly offensive.<sup>107</sup>

Claims to right of privacy may arise when employees at will are discharged for refusing to answer intimate questions, submit to urinalysis or take a drug test. The question, then, is whether discharge of the employee for insisting on his right of privacy is contrary to public policy. In *Borse v. Piece Goods Shop, Inc.*,<sup>108</sup> a sales clerk in a piece goods shop was discharged for refusing to sign a form consenting to urinalysis screening and search of her personal property on the premises. The court held that the employer was requiring the employee to consent to what might be highly offensive intrusions on her seclusion, which violated her common law right of privacy.<sup>109</sup> The common law of privacy was a clear mandate of public policy, said the court, so the discharge was a violation of public policy and the employer was liable.<sup>110</sup> Most other courts, however, have rejected this reasoning and upheld the discharge of employees who sought to protect their privacy.

In *Johnson v. Carpenter Technology Corp.*,<sup>111</sup> an employee refused to take a drug test until he talked to his lawyer. After talking to his lawyer he decided to take the test, but he was discharged before he had a chance to inform the employer of his willingness to take the test. The court denied the employee any relief, holding that, even if the drug testing violated the employer's privacy, the public policy exception did not apply to a tort 'peculiarly designed to protect personal rights rather than the collective public good.'<sup>112</sup> In *Luck v. Southern Pacific Transportation Co.*,<sup>113</sup> a woman refused to \*472 submit to urinalysis because she did not want it known that she was pregnant. After the court had extolled the importance of the right of privacy for forty pages, pointing out how drug testing intruded on seclusion, the court held that the discharge was not contrary to public policy because, 'The right by its very name is a private right, not a public right.'<sup>114</sup> The court further reasoned that there is 'no duty which inures the benefit of the public at large rather than to a particular employer or employee.'<sup>115</sup> This in the face of a provision in the California constitution affirmatively protecting the right of privacy against intrusion by private parties.<sup>116</sup>

There is yet another trap door through which employees' right of privacy can fall. There must be a 'reasonable expectation'

of privacy and, of course, consent may negate that expectation. The employer may eliminate any expectation of privacy by notifying employees in advance that they may be subject to search, required to answer questions about private matters, and subjected to drug, polygraph and intrusive psychological tests. As one court has held, continued employment constitutes implied consent to such policies and consent negates any claim of privacy.<sup>117</sup>

Employers may seek a more solid shield by requiring employees to sign forms expressly consenting in advance to intrusions on the pain of discharge as the employer did in *Borse*.<sup>118</sup> Other courts, however, have converted such consent forms into a catch 22. In *Jennings v. Minco Technology Labs Inc.*,<sup>119</sup> the court gave lip service to the right of privacy, but said that there was no invasion of privacy because only those consenting to the random rug testing were tested. Those who did not consent were not tested but discharged as employees at will. When an employee argued that if she did not consent she would be dismissed, and she needed the job so the consent was illusory, the court was unmoved. The court \*473 wrote, 'There cannot be one law of contracts for the rich and another for the poor . . . . The law views her economic circumstances as neutral and irrelevant facts insofar as her contracts are concerned.'<sup>120</sup> The court thereby reduced the right of privacy to a contract right subject to unrestrained market forces. The employer was free to use his economic power to require an employee's surrender of her right of privacy. As the court in *Luck* said, requiring consent would be contrary to public policy only if it would be illegal for the employee to agree.<sup>121</sup> The employer's ability to compel consent thus becomes as wide as its freedom to discharge under employment at will. Under this reasoning employees at will have no privacy rights.

Invasion of privacy may take the form of asking the employee intrusive questions such as inquiring into the employee's love life or sexual activity.<sup>122</sup> The most serious problem is raised by the use of 'pen and pencil' tests - questionnaires designed to determine the employees' psychological make up, attitudes and personal values. The courts have given little protection against this form of intrusion. In *Court v. Bristol-Myers Co.*,<sup>123</sup> the employer required all salesmen to answer a questionnaire which included questions as to the employees' home ownership and mortgage, maiden name, age of spouse, age and health of parents, occupation of parents, brothers and sisters; the employees' serious illnesses, operations, or nervous disorders, smoking and drinking habits, off the job problems and principle worries. It also asked the salesmen to state their principal strengths and weaknesses, activities they preferred not to engage in, the income they would need to live the way they would like to live, their plans for the future and memberships in civic, professional and social organizations. Employees who refused to answer any of the questions were discharged, and the \*474 court found no violation of public policy. The court did not examine the specific questions but stated that questions bearing on 'the temperament and dedication of the salesmen' were 'certainly reasonable and to be expected;' questions under the heading of 'aims' were relevant to the employee's job qualifications and although questions about family and home ownership were 'probably of no significance to Bristol-Myers,' they were not improperly intrusive.<sup>124</sup>

The questionnaires used in *Soroka v. Dayton Hudson Corp.*<sup>125</sup> to screen out applicants emotionally unfit for security positions was a psychological Personal Inventory test designed to measure the individual's emotional stability, interpersonal style, addiction potentiality, dependability and reliability, and tendency to follow established rules. It consisted of 704 true/false questions which included questions about the person's religious attitudes such as: 'I feel sure there is only one true religion;' 'I believe in the Devil and Hell in an afterlife;' and 'I go to church nearly every week.'<sup>126</sup> It also included questions about the person's sexual activities and orientation such as: 'My sex life is satisfactory,' 'I am strongly attracted to members of the opposite sex,' and 'I am worried about sex matters.'<sup>127</sup> The California court held that some of these questions violated the constitutional right of privacy and statutory prohibitions against discrimination because of religion or sexual orientation.<sup>128</sup> The questions must be job related, said the court.<sup>129</sup> As Professor Finkin points out, this is but half a loaf of protection, for it permits psychological testing if the specific questions are not intrusive. The very purpose of such tests, however, is to render the person transparent, to discover the employee's personal traits, private attitudes and inner thoughts which he or she would not knowingly reveal. Regardless of the specific questions, it is deliberately designed to invade the individual's inner sanctum and learn its secrets. It is the ultimate of intrusion on the employee's most private area of personal \*475 seclusion.<sup>130</sup>

Privacy in the workplace inescapably requires a balancing of the employee's right of privacy with the employer's right to produce. There is, of course, room for disagreement as to how much weight should be given to each of these interests, but for the courts, the employee's right of privacy is a hollow shell against the lead weight of the employer's claim to run his business as he pleases. The employee's sanctity of his home can be invaded by a telephoto camera or a fraudulent entry to simplify the employer's determining whether an employee is only pretending to be sick.<sup>131</sup> An employer's desire to discover dissatisfied employees justifies intercepting an employee's private e-mail messages even when he has been repeatedly assured of privacy.<sup>132</sup> In the name of a drug free workplace the employer can require an employee in a non-sensitive position,

for whom there is no suspicion of drug use, to provide urine which can reveal many things other than drug use. And he or she may be required to provide it under direct observation of the opposite sex.<sup>133</sup> Where invasion of privacy is under threat of discharge, the doctrine of employment at will gives the employer's interests, desires, or even whims controlling weight.

The harsh insensitiveness of judges to the personal right, human dignity, and autonomy of workers under employment at will and the shriveled right of privacy is softened in spots by legislation. The Employee Polygraph Protection Act<sup>134</sup> broadly prohibits employers from requiring employees to submit to polygraph testing except for very narrow exemptions subject to strict conditions, and the employees 'may not waive their rights by contract or otherwise.'<sup>135</sup> The Federal Electronic Communications Act<sup>136</sup> prohibits interception of 'any wire, oral or electronic communication', a prohibition reaching any form of eavesdropping, bugging or \*476 wiretapping. A number of states prohibit random drug testing and limit testing to safety sensitive jobs or where there is reasonable suspicion, and regulate testing procedures to limit invasions of privacy and protect confidentiality.<sup>137</sup> Title VII of the Civil Rights Act<sup>138</sup> prohibits discrimination because of race, creed, nationality and sex and the National Labor Relations Act<sup>139</sup> prohibits discrimination because of union membership or activities.<sup>140</sup> State statutes may also prohibit discrimination on the basis of sexual orientation or political activities. More specific statutes may prohibit discrimination because of jury service, supporting a political party, running for political office, or for engaging in recreational or social activities outside of work.<sup>141</sup> Beyond these, statutory provisions provide more promise than protection. Many federal statutes such as those regulating employee safety, environmental protection and public health contain 'whistle blower' provisions prohibiting discrimination or retaliatory action against employees protesting or reporting violations of the statute.<sup>142</sup> The enforcement procedures, however, may drain these of substance. For example, under the Occupational Safety and Health Act,<sup>143</sup> a discharged employee may file a complaint with the Secretary of Labor who investigates, but has discretion whether or not to bring an action in the district court. If the Secretary fails or refuses to act, either from lack of funds or lack of commitment, the discharged employee has no recourse.<sup>144</sup> Few employees in \*477 fact find protection.

A number of states have enacted more general whistle blower statutes, but many protect only public employees who are already protected by civil service and constitutional provisions.<sup>145</sup> Statutes which protect private sector employees have gaps which trap trusting employees. Some protect only reports to a 'public body' so an employee who reports misconduct or violations of the law to the employer get no protection. Other statutes require that the report must first be made to the employer to enable it to take corrective action even though a crime has been committed. The New York whistle blower statute illustrates how cynical legislators and insensitive judges may hold the promise to the ear and break it to the heart. The generic clause prohibits an employer from taking any retaliatory action against an employee who discloses 'any activity . . . of the employer that is in violation of the law . . . which violation creates and presents a substantial and specific danger to the public health and safety.'<sup>146</sup> By its terms the statute applies only to illegal activities of the employer, not illegal activities of fellow employees. Therefore, reports to upper management or public authorities of inspectors passing defective products, nurses abusing patients or drug dealing by other employees are not protected. It is not sufficient that the employee believe in good faith that the activities reported are illegal. He must prove that illegal acts were in fact committed.<sup>147</sup> Thus, in addition, the illegal conduct must be a 'substantial and specific danger to public health and safety.' Consequently, an employee who reported fraudulent billing was not protected because there was no danger to public health and safety.<sup>148</sup> Further, an employee in a mental hospital who reported neglect of a patient and a deletion in the record of patient treatment was not protected.<sup>149</sup> 'The defendants' alleged wrongdoing,' said \*478 the court 'may have presented a danger to the health and safety of the individual patient, but did not threaten the health or safety of the public at large.'<sup>150</sup> Not surprising, no employee has won a case under the New York statute in ten years.

Federal and state statutes, at best, give only freckled protection to employees who are unjustly discharged, they give no general recognition to the right of individual autonomy of workers. Only one state, Montana, has repudiated employment at will and prohibits discharge without just cause.<sup>151</sup> Workers are still left largely to the one-sided individualism of employment at will and the untender mercies of courts who place little or no value on individual autonomy.

#### IV. Collectivism and Autonomy

Collective contracts, unlike individual employment contracts, provide substantial protection of individual autonomy of employees. Almost all collective agreements repudiate employment at will with provisions prohibiting discharge or other discipline without just cause. Protection of the individual from arbitrary or retaliatory action by the employer is reinforced by the seniority provisions that impose a mechanically objective standard for reductions in force and, in many cases, promotions. The union through the grievance procedure, and ultimately with binding arbitration, enforces these provisions.

Arbitrators who are not bound by court decisions or by precedents of other arbitrators determine the protection provided by the just cause provision; 'just cause,' therefore, may be said, like equity, to be measured by the size of the arbitrator's foot. However, there are few clubfeet or abominable snowmen among arbitrators, and during the last sixty years they have developed general principles of what constitutes 'just cause' which are broadly accepted.

One of the most widely accepted principles is that 'what an employee does on his own time is none of the employer's \*479 business.'<sup>152</sup> When a union discovered that one of its business agents and his secretary had carried on an adulterous affair for four years, the business agent resigned and the secretary was discharged. The arbitrator reinstated the secretary saying that there was no showing of adverse effect on the union or its members.<sup>153</sup> Similarly, an arbitrator reinstated an unmarried supermarket clerk who had been fired for having a second pregnancy.<sup>154</sup> The arbitrator rejected the employer's claim that there might be unfavorable reactions by customers and other employees, saying that the discharge 'must be based on something more tangible.'<sup>155</sup> There must be some concrete showing of a direct effect on the employer's business.

Even commission of a crime may not be 'cause' for discharge under a collective agreement. For example, an employee pled guilty to assault on his wife, from whom he was separated, and on her boyfriend. The arbitrator ruled that because the employee had no contact with the public and this did not become public knowledge, there was no adverse effect on the employer's business or other employees, and, therefore, there was no cause for discharge.<sup>156</sup> Similarly, a nurse could not be discharged for shoplifting where there was 'no proof of actual detriment' to the hospital;<sup>157</sup> and an employee convicted of possession of narcotics and giving drugs to a minor was reinstated when there was no evidence of an adverse effect on the employer or other employees.<sup>158</sup>

Arbitrators give substantial protection to employee autonomy for conduct on the job. In one case, an employee was discharged for refusing an assignment to raise and lower the flag. He objected on moral and political grounds. The \*480 arbitrator ordered him reinstated and ordered the employer to relieve him of this particular duty.<sup>159</sup> Employers frequently establish dress and grooming rules, limiting the length of hair or wearing of beards. Arbitrators generally require that the employer show that these rules serve some substantial business purpose, such as customer relations or safety, not the tastes or whims of the employer.<sup>160</sup> For example, a bus company with a 'no beards' rule, discharged a ticket clerk for refusing to shave off his well-trimmed goatee. He was an amateur magician giving benefit performances for church and other groups and he considered the goatee to be a part of his magician personality. The arbitrator ordered reinstatement because the employer failed to show that its business was hurt by his wearing a goatee.<sup>161</sup> Similarly, the driver of a truck delivering concrete mix to construction sites was discharged for refusing to shave off his beard. The employer justified its action on fear of adverse reactions of customers. The arbitrator rejected this, saying that it was 'hard to conceive how the business of a redi-mix company could be damaged by drivers who wear beards.'<sup>162</sup>

Most arbitrators have given only limited protection to employees who publicly criticize the employer's practices or policies because of the injury to the employer's reputation, characterizing it as disloyal and damaging to the employer's image or as none of the employee's concern.<sup>163</sup> But some arbitrators give more weight to the employee's interest and less to the employer's. For example, an arbitrator voided the discharge of an employee of a public utility who had written an extraordinarily vitriolic letter criticizing the company and his supervisor to the chairman of the board of directors and to his congressman. The arbitrator relied on the federal policy \*481 of 'robust debate' in labor matters in protecting the employee's criticism.<sup>164</sup>

Whistle blowers, however, get full protection, at least if they first blow the whistle on illegal or improper activities within the enterprise. If they go outside to public authorities without first giving the employer the opportunity to take connective action, they generally find arbitrators unsympathetic, but not always.<sup>165</sup> In *Yellow Cab Co. of California*,<sup>166</sup> the taxicab company was rigging the meters to collect extra fares. A mechanic employed by Yellow Cab told this to a person from a rival taxicab company that was competing for a franchise, and also testified about the meter rigging in the public hearing deciding who would get the franchise. The employee was discharged for disloyalty. The arbitrator held that it was not punishable disloyalty to reveal this to a competitor under the circumstances, saying, 'It would be a strange public policy which would tolerate punishment of an employee for such disclosure.'<sup>167</sup>

The collective agreement gives substantial protection to the employee's right of privacy. Arbitrators, weigh the employer's business interests against the employee's privacy interests but require the employer to show some substantial business

need.<sup>168</sup> As previously discussed, rules against fraternization, even where there is adultery, cannot be enforced unless the employer shows it will have a substantial impact on production or customer relations.<sup>169</sup> Nor can the employer pry into an employee's private affairs if they have no substantial impact on the business. Thus, an arbitrator held that an employee could not be discharged for refusing to fill out a fidelity bond application which asked for other sources of income, real and personal property owned, existing debts, names of parents and prior discharges.<sup>170</sup> An employer \*482 seeking to determine if an employee had falsified his application as to prior physical problems could not require the employee to sign a form authorizing the employer to obtain all of the doctor and hospital records of the employee and all the members of his family. The arbitrator held that the inquiry went beyond the demonstrated needs of the employer.<sup>171</sup> In another case the arbitrator held that an employee was suspended without just cause for refusing to submit to a psychological evaluation.<sup>172</sup> Although employees can be required to record their leaving work to go to the restroom, an arbitrator held that it was invasion of privacy to require women to inform a male supervisor of the reasons.<sup>173</sup>

Collective agreements give employees uneven protection in drug testing. Some unions accept that employers should be able to test all employees whether there are grounds to suspect drug use, or whether the employees are in safety sensitive positions. The collective agreement then gives the employee no protection. However, many unions oppose unlimited drug testing and, in the absence of union management agreement, most arbitrators require that the employer show some 'reasonable cause' or a reasonable suspicion that the employee is under the influence of drugs.<sup>174</sup> The mere fact of an accident on the job is not grounds for reasonable suspicion where it is a minor accident which could not be attributed to drug use,<sup>175</sup> and arbitrators have rejected random mandatory drug testing as an unreasonable intrusion on privacy unless the job involves safety or health risks.<sup>176</sup>

The contrast between the protection of employee autonomy by the courts applying the individualism of freedom of contract and arbitrators applying the collectively established principle of just cause is the contrast of a cloudy day and an evening moon light. In the absence of a collective \*483 agreement, under employment at will, the employer need show no cause; the burden is on the employee to show that the discharge is contrary to the public interest, not the individual's private interest. Under 'just cause' provisions the burden is on the employer to show a substantial business interest, and that the business interest outweighs the employee's private interest. In weighing the competing interests, the emphasis is heavily on the employee's interest in the job, which gains weight with the employee's seniority, rather than the employee's interest in personal autonomy. But the result is that personal autonomy obtains substantial implicit, if not explicit, protection.

Protection of autonomy rests almost entirely on the 'just cause' clause; invasions by employer action other than discipline or discharge go largely uncurbed. Intrusion into an employee's home by telephoto camera or gaining entry by breaking in or by false pretense, breaking open the employee's locker, obtaining an employee's credit card record, or intercepting e-mail are seldom prohibited by collective agreements. Furthermore, arbitration would not likely provide an effective remedy, for arbitrators rarely award damages except for monetary losses such as lost earnings. An award declaring that the employer had acted improperly would be scant satisfaction to an employee whose privacy had been violated, and would provide little deterrence to an employer so insensitive to employee privacy.

Although the collective agreement protects individual employees from employer violation of their autonomy, at the same time, it significantly denies their autonomy, submerging their individuality in the collectivity. The fundamental principle in American collective labor law, embedded in the National Labor Relations Act, is that the majority union is the exclusive representative of all employees in the bargaining unit.<sup>177</sup> This legal principle denies individual autonomy in four significant ways.

First, it imposes on individual employees, without their individual agreement, a representative empowered to speak for them on all matters concerning their employment. An \*484 individual is barred from speaking through any representative except the one chosen by the majority, and may not bargain individually with the employer on his own behalf without the consent of the union. His only voice is the union's. In the words of the Supreme Court. 'It is a violation of the essential principle of collective bargaining and an infringement of the Act for an employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or minority.'<sup>178</sup> Once designated by a majority, the union retains its status as exclusive representative normally until the end of the collective agreement, which may be three years, even though it has lost its majority support.

The employee is not wholly voiceless, however, for he speaks through the union and the Landrum-Griffin Act seeks to

guarantee him a voice in the union by guaranteeing basic democratic processes in union decision making.<sup>179</sup> But the union does not lose its status and control if it violates those democratic rights.

Second, the individual is bound by the collective agreement made by the majority union, regardless of whether she voted for the union or approved of the collective agreement. The individual may not bargain for other terms, better or worse, without the consent of the union, which is given only in very rare instances, such as bargaining for salaries in professional sports. The individual may, therefore, be bound by terms that are less favorable than she could have negotiated individually, or by a package of benefits different from what she would have personally preferred. Again in the words of the Supreme Court:

The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. The work-man is free, if he values his own bargaining position more than that of the group, to vote against representation, but the majority rules, and if it collectivizes the employment bargain, individual advantages and favors will generally in practice go in as a contribution to the collective result.<sup>180</sup> \*485 The loss of autonomy under exclusive representation may be more theoretical than substantive. Few individuals would be able to bargain for better terms than the union would obtain, and employers would be reluctant for reasons of administrative convenience and morale of the workforce to provide for different terms for employees similarly situated. There is an inevitable pressure toward standardization, whether imposed by the employer or the union, particularly in large enterprises. However, there is room for variations in some occupations such as nursing, teaching, clerical and semi-professional or professional work, but exclusive representation tends to obscure the possibilities of such individualization.

One typical provision in collective agreements that denies the worth of a worker as a unique individual is the seniority clause which reduces a worker's worth to a calendar date. The job he retains or the promotion she may obtain depends, not on an evaluation as a worker or a person, or on any decision under the worker's control, but on the worker's date of hire. Whether she is laid off or denied a promotion may depend on whether she was hired on May 2 rather than May 1. Though seniority serves the purpose of protecting against possible management favoritism or arbitrary action, it is a protection some workers would willingly forego to be judged for their personal worth.

Third, a union security provision in the collective agreement may encroach on autonomy by requiring the employee to support financially a union, which he did not choose and to which he does not belong.<sup>181</sup> However, an employee may not be compelled to become a member of a union, and if he does not choose to join he may not be compelled to contribute more than his fair share of the union's costs of collective bargaining. He may not be compelled to pay union dues to support the union's political or social causes or other activities not related to negotiation and administration of collective agreements.<sup>182</sup> The logic is that all employees receive the benefits of the collective \*486 agreement and should, therefore, share the costs. The encroachment on autonomy is thus limited. However, some individual employees may be ideologically opposed to the union, do not want the help of the union, and may feel that they are not benefitted by the terms of the collective agreement. But they are denied their freedom to choose not to support the union's collective bargaining activities.

Fourth, and perhaps the most substantial denial of individual autonomy, is that the collective agreement may deny individuals the ability to enforce their individual contract rights. The Supreme Court in *Smith v. Evening News Ass'n*<sup>183</sup> held that the individual employee obtains legally enforceable rights under the collective agreement and may sue the employer in her own name. However, in *Vaca v. Sipes*,<sup>184</sup> the Court held that the union and employer can include provisions in the collective agreement which give the union exclusive control over processing individual grievances and enforcing the contract through arbitration. This empowers the union to decide whether to process a grievance and whether to carry it to arbitration. In short, the union can, by refusing to process a grievance to arbitration, foreclose the individual from enforcing her rights under the collective agreement. The union's control is limited by the 'duty of fair representation,' which requires the union to represent all employees fairly, but proof of unfairness requires showing that the union's refusal to process the grievance is arbitrary, discriminatory or in bad faith. The courts have been extremely reluctant to find such unfairness, leaving the individual largely subservient to the union.<sup>185</sup>

\*487 Exclusive representation, extended as it has been to enforcement of the collective agreement, effectively submerges the individual in the collectivity. He is bound by collective agreement terms he may not want, made by a union he did not choose. The individual may not negotiate with the employer for different terms or even better terms. Even though he is bound by the contract, and has helped pay for its negotiation and administration, he may not enforce it. An individual must look to

the union for his employment rights; as an individual he is only a supplicant with no autonomy. This submergence of the individual is not required by law, but is a product of the collective contract made by the employer and the union. The parties could agree that individuals could bargain for better terms; they could agree that individuals could process their own grievances; they could permit individuals to carry their own grievances to arbitration, and they could make payment of dues voluntary. Instead, they agree that the individual should not be a party to their process, but only an object of their control. Although the Supreme Court declares that the individual has legal rights under the collective agreement, the perspective of the parties is epitomized by the common expression, 'The grievance belongs to the union.'

As pointed out earlier, the 'just cause' provision in collective agreements provides substantial protection of individual autonomy from employer violations, through the grievance procedure and arbitration. Employees obtain that protection, however, not through their individual assertion of autonomy, but as wards of the union, dependent on the union's willingness and ability to assert those rights in the union's name.

### V. Conclusion

Individualism, when expressed in terms of freedom of contract in the employment relation makes labor a commodity of trade. The individual worker becomes vulnerable to economic forces in the market where the collectivized economic power of the employer enables it to treat the worker as an object to be used, not a human being entitled to dignity, respect, individuality and autonomy.

\*488 Employment at will is a product of freedom of contract, but the contract is not one openly and freely bargained. Most ordinary workers are unaware that they can be terminated without notice or cause; and the employer dictates the terms which the worker must accept or not work. The courts have reinforced employment at will by imposing it unless the employment is expressly for a fixed term even when ordinary contract principles would lead to a different result. Courts have been markedly reluctant to cabin the rule to prevent employer abuses. Although the court may invalidate a discharge as contrary to public policy, it does not do so to protect the individual's private interests in personal freedom, privacy or human worth; the court will act only to protect the 'public' interest, and the court is blind to the public interest in protecting private rights, even fundamental rights of freedom of speech and rights of privacy.

What emerges from the cases is that, in evaluating the interests of the employer and the individual worker, courts give great weight to the interests of the employer and weigh lightly, if at all, the interests of the individual employee. Courts tolerate outrageous conduct of employers and trivialize its assault on the dignity and sense of self worth of the employees. The courts give conclusive or overriding weight to the employer's claimed interest to obtain information about an employee and denigrate the employee's interest in privacy. The inescapable conclusion is that courts are insensitive to the worker's right of autonomy but are sensitive to the employer's interest in profits.

Legislatures have not been so insensitive, but have given at least limited recognition to the worth of the workers as persons, rather than as commodities. But except for one state, no legislature has repudiated employment at will. Legislatures give dominant weight to the employer's interests and only fragmentary concern to the individual's autonomy.

When collectivism on the employer's side is balanced with the collectivism on the employee's side, the collective market forces have produced substantial protection of employees' interest in autonomy through the collective agreement, grievance procedure and arbitration. This, however, is of little value to most employees, for collective agreements cover \*489 little more than 10 percent of employed workers in the private sector. And legislatures in the United States have shown little readiness to make generally applicable by statute, principles developed and accepted the parties in collective agreements.

Employment necessarily requires some loss of individual autonomy, for the production process requires cooperation and discipline. But neither the courts nor the legislatures have reflectively sought to balance or accommodate these competing interests. Instead, they give conclusive or dominant weight to the employer's interests. This invites the question why, in the employment relation, the complex of personal interests of autonomy have been given so little weight by the law in a society that prides itself on individual rights. In part, it may be that the individual's interest in autonomy is so intangible, abstract and indefinite that it is too elusive to weigh, while the employer's interest in efficiency and production is tangible and visibly substantial so that its weight is obvious. But the relative weight given to these two interests may be indicative that today in our society we are more concerned with increased production than enhancement of human worth; that what we see in the law

is a reflection of ourselves; that despite our declarations of individualism, we secretly prefer products to personal autonomy.

Footnotes

<sup>a1</sup> Jefferson B. Fordham, Professor Law Emeritus, University of Pennsylvania. This article is based on a paper written for a Liber Amicorum for Professor Spiro Smitis of Johann Wolfgang Goethe Universitat (University of Frankfort), Zur Autonomie des Individuums (2000).

<sup>1</sup> 45 Mass. (4 Met.) 49 (1842).

<sup>2</sup> Id. at 55.

<sup>3</sup> Id. at 56.

<sup>4</sup> Id. at 59.

<sup>5</sup> Id. at 56.

<sup>6</sup> Id. at 57.

<sup>7</sup> Id.

<sup>8</sup> 81 Tenn. 507 (1884).

<sup>9</sup> Id. at 518.

<sup>10</sup> The Erdman Act, ch 370, 30 Stat. 424 (1888).

<sup>11</sup> 208 U.S. 161 (1908).

<sup>12</sup> Id. at 174-75.

<sup>13</sup> Richard Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947, 953 (1984).

<sup>14</sup> See Epstein, *supra* note 13. Mayer Freed & David Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 Emory L.J. 1097 (1989).

<sup>15</sup> See Michael. Gottesman, Wither Goest Labor Law: Law and Economics in the Workplace', 100 Yale L.J. 2767 (1991); W. Kamiat Labor And Lemons: Efficient Norms in the Internal Labor Market and Possible Failures of Individual Contracting, 144 U. Pa. L. Rev. 1953, 1955-57, 1968-70 (1996); Paune Kim, Norms, Learning and Law Influences on Workers' Legal Knowledge, 1999 Univ. Ill L. Rev. 447 (1998); Steven Willborn, Individual Employment Rights and the Standard Economic Objections: Theory and Empiricism, 67 Neb. L. Rev. 101 (1988).

<sup>16</sup> See NLRB v Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

17 58 N.Y. 2nd 293, 448 N.E.2d 86 (1983).

18 Id. at 87.

19 Murphy v. American Home Prods. Corp., 447 N.Y.S.2d 218, 219 (S. Ct. Spec. Term), aff'd, 451 N.Y.S.2d 770 (App. Div. 1982),  
aff'd in relevant part, 748 N.E.2d 86 (N.Y. 1983).

20 448 N.E.2d at 89-90.

21 891 P.2d 80 (Wyo. 1985).

22 Id. at 82.

23 Id. at 81.

24 Id. at 82.

25 481 F.2d 1115 (D.C. Cir. 1973).

26 Id. at 1122.

27 Id. at 1125.

28 901 P.2d 630 (Nev. 1995).

29 Id. at 632.

30 Id. at 633.

31 Id.

32 602 A.2d 1176 (Md.1992).

33 Id. at 1177.

34 Id. at 1179.

35 786 S.W.2d 284 (Tex. 1990).

36 Id. at 785.

37 Id.

38 719 P.2d 854, 856 (Ore. 1986).

39 Id. at 857.

40 See, e. g., Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980); Wooley v. Hoffman LaRoche, 491 A.2d 1257 (N.J. 1985); Richard Harrison Winters, Note, Employee Handbooks and Employment at Will Contracts, 1985 Duke L.J. 196 (1985) .

41 See Steven Befort, Employee Handbooks and The Legal Effects of Disclaimers, 13 Ind. Rel. L. J. 326, 348-68 (1991).

42 Peterman v. International Bhd. of Teamsters, 344 P.2d 25, 26 (Cal. Ct. App. 1959).

43 Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1331 (Cal. 1980).

44 Nees v. Hock, 536 P.2d 512 (Ore. 1975).

45 Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

46 700 S.W.2d 859 (Mo. 1985).

47 Id. at 867.

48 Id. at 871.

49 584 N.E.2d 104 (Ill. 1991).

50 Id at 106.

51 Id.

52 Id at 109.

53 Id. at 110.

54 Id.

55 319 A. 2d 174 (Pa. 1974).

56 Id at 175.

57 Id at 178.

58 Id. at 179-180.

59 589 N.E.2d 1241 (Mass. 1992).

60 Id. at 1243.

61 Id. at 1245.

62 Id.

63 Adler v. American Standard Corp., 432 A.2d 464, 470 (Md. 1981).

64 Clark v. Modern Group Ltd., 9 F.3d 321, 331 (3d Cir. 1993).

65 812 F.2d 911 (4th. Cir. 1984).

66 Id. at 916.

67 Rachford v. Evergreen Int'l Airlines, 596 F. Supp. 384,386 (N.D. Ill. 1984).

68 500 N.E.2d 1001 (Ill. App. 1986).

69 Id. at 1002.

70 905 P.2d 778 (Okla. 1995).

71 Id. at 787.

72 Id.

73 See Foley v. Interactive Data Corp., 765 P.2d 373, 380 (Cal.1988).

74 Karren v. West Federal Sav. Bank, 717 P.2d 1271,1274 (Ore. Ct. App. 1986).

75 Scrogan v. Kraft Corp., 551 S.W.2d 811 (Ky. App. Ct. 1977). In Emerick v. Kuhn, 737 A.2d 456 (Conn. App. Ct. 1999), the employer, a defense contractor, sponsored a forum inviting employees to express their views with guarantees of no retribution. Emerick expressed his concern that layoffs were planned while executives were receiving enormous bonuses, and that they were taking government and state money and for their personal gain to the detriment of the state's economy. He claimed that his discharge was contrary to public policy as a violation of free speech and the code of ethics for major defense contractors requiring them to encourage employees to express their views. Although there was a state statute prohibiting a private employer discharging an employee for exercising his constitutional right of free speech, the court found no violation of public policy. The plaintiffs' claims 'did not rise above the private nature of the employer-employee relationship.' Id at 465. When he spoke, 'he was not exercising a right enjoyed by the general citizenry, but was exercising a privilege granted him by his employer.' Id at 469. It was 'a

matter between him and his employer and, thus, is not protected speech.' *Id.* at 468.

76 *Clark v. Modern Group, Ltd.*, 9 F.3d 321, 331-32 (3d Cir. 1998); *Green v. Bryant*, 887 F.Supp. 798, 800 (E.D. Pa. 1995).

77 Restatement of Torts (Second) § 46 cmt. d (1986).

78 *Id.* cmt. j.

79 *Green v Bryant*, 887 F. Supp. 798, 803 (E.D.Pa. 1995).

80 *Diamond Shamrock Refining Co. v. Mendez*, 809 S.W.2d 514, 522 (Tex. Ct. App. 1991).

81 See *supra* notes 17-20 and accompanying text.

82 *Murphy*, 448 N.E.2d at 90.

83 Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev 10 (1890).

84 *Id.* at 195-96.

85 Restatement (Second) of Torts, § 652B (1976).

86 Louis Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410, 1424-25 (1974); see also Joel Feinberg, *Autonomy, Sovereignty and Privacy*, 58 Notre Dame L. Rev. 445, 463-83 (1983).

87 See generally Matthew W. Finkin, *Privacy in Employment Law* (1995); Matthew W. Finkin, *Employee Privacy: American Values and the Law* 72 Chi-Kent L. Rev. 221 (1996); Pauline Kim, *Privacy Rights, Public Policy and the Employment Relation*, 57 Ohio St. L.J. 671 (1997).

88 882 F. Supp. 836 (S. D. Iowa 1994).

89 *Id.* at 847.

90 *Love v. Southern Bell Tel. & Tel. Co.*, 263 So. 2d 460 (La. App. 1992).

91 *Id.* at 462.

92 *Id.* at 466.

93 See *K-Mart Corp. v. Trotti*, 67 S.W.2d 632, 634-36 (Tex. Ct. App. 1984).

94 See *Doe v. BPS Guard Serv. Inc.*, 945 F.2d, 1422, 1425 (8th Cir. 1991).

- 95 Saldano V. Kelsey Hayes Co., 443 N.W.2d 382, 383-84 (Mich. App. 1989).
- 96 Id. at 383.
- 97 957 F.2d 268 (6th Cir. 1992).
- 98 Id. at 274-75.
- 99 Id.
- 100 Id.
- 101 Turner v. General Adjustment Bureau, 832 P.2d 62, 64 (Utah 1992).
- 102 Id. at 67.
- 103 Fowler v. New York City Dep't of Sanitation, 704 F. Supp. 1264, 1274 (S.D.N.Y. 1989).
- 104 914 F. Supp. 97 (E. D. Pa. 1996).
- 105 Id. at 98-99.
- 106 Id.
- 107 Glasgow v. Sherwin Williams, 901 F. Supp. 1185, 1192-93 (N.D. Miss. 1995).
- 108 963 F. 2d 611 (3rd Cir. 1992); see also Twigg v. Hercules Corp., 406 S.E.2d 52, 55 (W. Va. 1991).
- 109 Borse, 963 F.2d at 622-23.
- 110 Id. at 626.
- 111 723 F. Supp. 180 (D. Conn. 1989).
- 112 Id. at 186.
- 113 267 Cal. Rptr. 618 (Cal. Ct. App. 1990).
- 114 Id. at 635.
- 115 Id.

- 116 .Cal. Const. Art.I, § 1.
- 117 Texas Employment Comm'n v. Hughes Drilling Fluids, 746 S.W.2d 796 (Tex. Ct. App. 1988).
- 118 Borse, 963 F.2d at 622-23.
- 119 765 S.W.2d 497 (Tex. Ct. App. 1989).
- 120 Id. at 502.
- 121 Luck, 267 Cal. Rptr. at 620-21.
- 122 See Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705 (Ala. 1983). A supervisor called in a female employee and asked her how she was getting along with her husband, how often they had sex, what positions they used and whether she ever engaged in oral sex. He then said that he wanted her to have oral sex three times a week. The court held it was an invasion of the employee's psychological solitude, and provided a cause of action for invasion of privacy. Id. at 706.
- 123 431 N.E.2d 908 (Mass. 1982).
- 124 Id. at 910-11.
- 125 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991).
- 126 Id. at 79-80.
- 127 Id.
- 128 Id. at 82.
- 129 Id at 89.
- 130 Finkin, *supra* note 87, at 234.
- 131 See Love v. Southern Bell Tel. & Tel. Co., 263 So. 2d 460 (La. App. 1972); Saldana v. Kelsey-Hayes Co., 443 N.W.2d 382 (Mich. App. 1989).
- 132 See Smith v. Pillsbury Co., 914 F. Supp 97 (E.D. Pa. 1996).
- 133 See Fowler v. New York City Dep't of Sanitation, 704 F. Supp. 1264 (S.D.N.Y. 1989).
- 134 29 U.S.C. §§ 2001-09 (1994).
- 135 Id. at § 2005(d).

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- 137 See Finkin, *supra* note 88, § 48.
- 138 42 U.S.C. §§ 2000e to 2000e - 7 (1994).
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- 140 *Id.* § 158 (a)(3).
- 141 See William Holloway & Michael Leech, *Employment Termination: Rights and Remedies*, App. A (1993).
- 142 See Daniel Westman, *Whistleblowing: The Law of Retaliatory Discharge* App. C (1991).
- 143 29 U.S.C. § 660(c) (1994).
- 144 In 1985, 2433 complaints were filed, 291 were found meritorious, 67 were referred for court action and in only half was suit brought. Eugene R. Fidell, *Federal Protection of Private Health and Safety Whistle Blowers: A Report to the Administrative Conference of the United States*, at A7 (1987). When one employee brought suit on his own behalf, the Secretary of Labor supported the private claim because the Department of Labor did not have the funds or personnel to bring the suit. The court was unmoved and dismissed the suit because the statute gave only the Secretary the right to bring the suit. *Taylor v. Brighton Corp.*, 616 F. 2d 256, 263-65 (6th Cir. 1980).
- 145 See Westman, *supra* note 143, App. B.
- 146 N.Y. Labor Law, §740(2)(a) (McKinney, Supp. 1986).
- 147 See *Kern v. DePaul Mental Health Servs., Inc.*, 529 N.Y.S.2d 265 (N.Y. Sup. Ct. 1988).
- 148 *Remba v. Federation Employment and Guidance Serv.*, 559 N.Y.S.2d 961, 962 (N.Y. App. Div. 1990).
- 149 *Kern v. DePaul Mental Health Servs., Inc.*, 544 N.Y.S. 2d 252 (App. Div. 1989).
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- 152 Marvin F. Hill & Mark L. Kahn, 'Discipline and Discharge for Off-Duty Misconduct: What Are The Arbitral Standards' in *Arbitration 1986: Current and Expanding Roles* 121 (Proceed., 39th Ann. Meet., Nat'l Acad. of Arb. Gladys Gershenfeld ed., 1986); Elkouri & Elkouri, *How Arbitration Works* 896-99 (Marlin M. Volz & Edward P. Goggin eds., 5th ed.1997).
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- 160 See Rolf Valin, Hair And Beards in Arbitration, in Labor Arbitration at the Quarter Century Mark 235 (Proceed. 25th Ann. Meet., Nat'l Acad. Arb. Barbara D. Dennis & Gerald G. Somers eds., 1972); Note, Arbitration of Labor Disputes Involving Hair, 10 Willamette L. Rev. 279 (1974).
- 161 Greyhound Lines, Inc., 56 Lab. Arb. Rep. (BNA) 458 (1971) (Burns, Arb.).
- 162 Arrow Redi-Mix Concrete, Inc., 56 Lab. Arb. Rep. (BNA) 597, 602 (1971) Fleischli, Arb.).
- 163 See Matthew Finkin, Employee Duty of Loyalty: An Arbitral and Judicial Comparison, in Arbitration and The Changing World of Work 200 (Proceed. 46th Ann. Meet. Nat'l Acad. Arb. Gladys Gruenberg ed., 1993) [hereinafter Finkin, Duty of Loyalty].
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- 165 See Elkouri & Elkouri, supra note 153, at 956., Finkin, Duty of Loyalty, supra note 163, at 211.
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- 167 Id. at 3298.
- 168 See Elkouri & Elkouri, supra note 153, at 1076-82.
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- 177 See 29 U.S.C. § 159(a) (1994).
- 178 *Medo Photo Supply Co. v. NLRB*, 321 U. S. 678, 684 (1944).
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- 183 371 U.S. 195 (1962).
- 184 386 U.S. 171 (1967); see also *Airline Pilots Ass'n. Int'l v. O'Neil*, 499 U.S. 65 (1991).
- 185 See Michael J. Goldberg, *The Duty of Fair Representation: What The Courts Do In Fact*, 34 Buff. L. Rev. 89 (1985). In *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir. 1986), the court stated that a union breaches its duty by discriminating against an employee 'for forbidden reasons such as race or politics, including the employee's position on the union and its leaders,' *id.* at 244, but there is no remedy 'for careless or bone-headed conduct.' *Id.* The standard is 'intent or recklessness from which intent may be inferred.' *Id.* However, in *Ooley v. Schwitzer Div., Household Mfg., Inc.*, 916 F.2d 1293, 1302-03 (7th Cir. 1992), the Seventh Circuit recognized that its prior position requiring intentional misconduct was inconsistent with *Airline Pilots Ass'n Int'l v. O'Neil*, 499 U.S. 65 (1991).