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Statutory Rights and Predispute Agreements to Arbitrate in Contracts of Employment

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Enacted in 1925, the Federal Arbitration Act ("FAA")\textsuperscript{1} created substantive federal law\textsuperscript{2} governing arbitration agreements.\textsuperscript{3}
Embodying what was later described as a “liberal federal policy favoring arbitration,” the FAA guarantees that agreements to arbitrate are as enforceable as any other contract clause and regulates the interpretation and enforcement of such agreements. The FAA is designed to place arbitration agreements “upon the same footing as other contracts.”

The FAA establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability. Judicial proceedings are stayed where the parties may shield specific claims from the arbitration in their agreement to arbitrate binding as a matter of federal law although parties may contract to have arbitration governed by state rules.

The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability.

Cone Memorial Hosp., 460 U.S. at 24-25; see Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (requiring agreements to arbitrate be “rigorously enforce[d]”). Nevertheless, parties may shield specific claims from the arbitration in their contract. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 628 (1985) (noting party may exclude statutory claim from agreement to arbitrate); Goldberg, 912 F.2d at 1420 (federal securities claim excluded from arbitration agreement).
FAA applies to contracts within the admiralty and commerce powers of Congress, but contains a specific exclusion for contracts of employment. Whether this exclusion applies to all contracts of employment, or is limited to a class of employees transporting goods in interstate commerce, is the subject of disagreement among the federal courts.

Finally, a court may vacate an award:

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

9 U.S.C. § 10 (Supp. II 1990). For a discussion of the preclusive effect of arbitral awards in subsequent litigation, see Hiroshi Motomura, Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices, 63 Tul. L. Rev. 29, 80–81 (1988) (summarizing current case by case approach to arbitral collateral estoppel and proposing rule that "arbitral findings never have collateral estoppel effect, unless the arbitration agreement clearly and expressly provides for it"); Shell, supra note 3, at 539 (1990) (reviewing res judicata and collateral estoppel effects of arbitration and arguing that contractual intent should guide preclusion analysis); Speidel, supra note 3, at 198–204 (reviewing claim and issue preclusion of arbitration awards).

See Prima Paint Corp., 388 U.S. at 405. At the time the FAA was passed, the underlying congressional authority was not firmly established, as Congress believed it was possessed of the power to create rules of decision in state and federal court. See Hirshman, supra note 6, at 1314. Commentators advanced the view that "[t]he primary purpose of the statute is to make enforceable in the Federal courts . . . agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts." Cohen & Dayton, supra note 1, at 277-78. The Supreme Court declined to view the FAA as procedural and established that the FAA is founded on Congress' power to regulate interstate commerce and admiralty. See Prima Paint Corp., 388 U.S. at 405; see also Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (Act rests on authority to "enact substantive rules under the Commerce Clause"). The proposition that "[f]ederal law in the terms of the Arbitration Act governs [arbitrability] in either state or federal court" is now firmly established. See Cone Memorial Hosp., 460 U.S. at 24; see generally Hirshman, supra note 6 (reviewing Supreme Court cases establishing FAA as governing law in state courts).

9 U.S.C. § 1 (1988); see supra notes 63 to 90 and accompanying text (discussing FAA exclusion for employment contracts).

See supra notes 63-90 and accompanying text.
In addition to this statutory exclusion, in *Alexander v. Gardner-Denver Co.* the Supreme Court created a public policy exception to the enforcement of agreements to arbitrate certain claims arising under federal statutes. In *Gardner-Denver*, the Court held that an employee does not waive the right to judicial resolution of a claim under Title VII of the Civil Rights Act of 1964 by submitting the claim to the grievance arbitration procedures established by a collective bargaining agreement. Subsequently, lower courts expanded this exception and refused to enforce predispute agreements to arbitrate federal statutory claims.

Recently, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court clarified the holding in *Gardner-Denver* by explaining that *Gardner-Denver* only applied to collective bargaining situations.

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12 Id. at 59-60.
15 Id. at 1656-57. "Arbitration is roughly divided into commercial and labor arbitration." Stempel, *Pitfalls*, supra note 3, at 266; see Shell, *supra* note 3, at 512 (noting that fundamental differences between labor and commercial arbitration have led to two models of arbitration). Established by a contract between the parties, commercial arbitration is viewed as an inexpensive, cheaper, more efficient alternative to judicial resolution of a dispute between the parties. See Domke, *supra* note 3, § 1:01, at 1; see generally Thomas Oehmke, *Commercial Arbitration* (1987) (discussing practice and procedure in commercial arbitration); *Commercial Arbitration for the 1990's* (Richard J. Medalie ed., 1990) (surveying current federal arbitration law). Commercial arbitration is not limited to commercial transactions, but is also used to resolve controversies arising out of individual employment contracts, license agreements, partnerships, leases, and many other situations. See Domke, *supra* note 3, § 1:01 at 3, see also Shell, *supra* note 3, at 531 (commercial arbitration used in securities industry to resolve employee and customer claims); Oehmke, *supra*, § 2:3, at 20 (identifying 24 subject matter areas where arbitration is prevalent).

Labor arbitration, on the other hand, arises within the grievance resolution machinery erected under collective bargaining agreements where the arbitration procedure "is a form of 'continuous bargaining' between unions and employers that permits the resolution of disputes to proceed without interrupting the ongoing relationship between these two interdependent parties." Shell, *supra* note 3, at 517; see generally Thomas Oehmke, *Employment Labor and Pension Arbitration* (1989) (discussing practice and procedure in labor arbitration); F. Elkouri & E. Elkouri, How Arbitration Works (4th ed. 1985) (same); Henry H. Perritt, Jr., *Employment Dismissal Law and Practice* (2d ed. 1987) (discussing employment law and arbitration).

Comparatively, commercial arbitration exists as a substitute for litigation, while labor arbitration is a "substitute for industrial strife." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). The Supreme Court consistently has maintained this basic distinction. See Stempel, *Pitfalls*, supra note 3, at 266 n.16; see also Shell, *supra* note 3, at 512; see generally Shell, *supra*.
In addition, the Court in *Gilmer* confirmed the adequacy of arbitration procedures for resolving statutory claims and held that an employee may waive the right to judicial resolution of a federal age discrimination claim by signing a third party arbitration agreement. Nevertheless, the Court did not decide to what extent the FAA was applicable to employment contracts. Thus, since employees may prospectively waive the right to judicial resolution of federal statutory claims after *Gilmer*, the lower courts are faced with the unresolved question of what substantive law governs the interpretation and enforcement of agreements to arbitrate such claims contained in individual contracts of employment.

This Note analyzes the extent to which the FAA governs individual contracts of employment. Part One will discuss the *Gilmer* Court's limitation of *Gardner-Denver* to collective bargaining agreements and present the unresolved issue of what law applies to arbitration provisions in individual contracts of employment. Part Two will analyze the statutory exception in the FAA and conclude that Congress intended to exclude all employment contracts from the FAA. Finally, Part Three will propose that absent federal guidelines for interpreting arbitration clauses in individual employment contracts, state substantive law should apply.

I. LIMITATION IMPOSED ON GARDNER-DENVER BY GILMER

In *Gardner-Denver*, a discharged union member filed a grievance under the collective bargaining agreement between the union and the employer claiming "unjust discharge." During the final step in the arbitration process the employee added, for the first time, a claim of racial discrimination relating to his discharge. The nondiscrimination clause of the collective bargaining agreement prohibited racial discrimination in language similar to that in Title VII. *Gardner-Denver*, 415 U.S. at 39. Under the collective bargaining agreement, the employer retained the right to fire employees "for proper cause." Under the collective bargaining agreement, the employer retained the right to fire employees "for proper cause." Under the collective bargaining agreement, the employer retained the right to fire employees "for proper cause." *Id.* at 42.

*Gilmer*, 111 S. Ct. at 1664-56.
*Id.* at 1649.
*Id.* at 1651 n.2.
See infra notes 22-62 and accompanying text.
See infra notes 63-130 and accompanying text.
See infra notes 131-151 and accompanying text.
*Gardner-Denver*, 415 U.S. at 39. Under the collective bargaining agreement, the employer retained the right to fire employees "for proper cause." *Id.*
*Id.* at 39. The collective bargaining agreement provided that "there shall be no dis-
arbitrator found that the employee was "discharged for just
cause."  

Subsequently, the employee filed a Title VII claim against his
employer in district court based on the same factual situation.  
Although the lower courts held that the labor arbitrator's decision
foreclosed the Title VII action, the Supreme Court reversed.  
The Court reasoned that Title VII created statutory rights distinct and
separate from contract rights under a collective bargaining agree-
ment.  In addition, the Court viewed the labor arbitration process
as an inadequate substitute for judicial protection of these statu-
tory rights.  Thus, the Court concluded that the employee may
pursue a remedy under a collective bargaining agreement and also
maintain a claim under Title VII.  

After Gardner-Denver, it was clear that the Supreme Court
considered arbitration procedures to be inferior to judicial proce-


crimination against any employee on account of race, color, religion, sex, national origin, or
ancestry."  Id.  Title VII prohibits discrimination in employment based on "race, color, reli-

25  Gardner-Denver, 415 U.S. at 42.
26  Id. at 43. The employee filed a charge of racial discrimination with the Colorado Civil
Rights Commission prior to the arbitration hearing.  Id. at 42. The complaint was referred to
the Equal Employment Opportunity Commission which "determined that there was not rea-
sonable cause to believe that a violation of Title VII . . . had occurred."  Id. at 42-43. After
receiving notice of his right to sue from the Commission, the employee filed the discrimina-
tion claim in district court.  Id.

27  Id. at 43. The Tenth Circuit affirmed the district court's decision barring the claim
on election of remedies and waiver theories.  Id. at 45.

28  Id. at 47-50. Although the language of the collective bargaining agreement and Title
VII were coextensive, the Court made a distinction between contract rights under the collec-
tive bargaining agreement and statutory rights under Title VII.  Id. at 49-50.  "In submitting
his grievance to arbitration, an employee seeks to vindicate his contractual rights under a
collective-bargaining agreement.  By contrast, in filing a lawsuit under Title VII, an em-
ployee asserts independent statutory rights accorded by Congress."  Id.  Relying on this dis-
tinction, the Court dismissed claims that the present suit was foreclosed based on election of
remedies or waiver rationales.  Id. at 49-52.

29  Id. at 56. Focusing on the adequacy of labor arbitration proceedings to guarantee
rights provided by Congress, the Court stated that the arbitrator's authority derives from
the contract and an arbitrator's task is to "effectuate the intent of the parties rather than
the requirements of enacted legislation."  Id. at 56-57. The arbitrator's competence pertains
to the "law of the shop, not the law of the land."  Id. at 57. In addition, arbitral factfinding
"is not equivalent to judicial factfinding."  Id.  Moreover, arbitration's informality allows the
procedure to function efficiently, inexpensively and expeditiously, but such characteristics
make it less appropriate for the resolution of statutory claims.  Id. at 58. Finally, since the
union controls the "manner and extent to which an individual grievance is presented," a
court cannot assume that the interests of the union and employee are coextensive.  Id. at 58
n.19.

30  Id. at 59-60.
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The Court believed that Congress intended judicial, rather than arbitral, enforcement of these statutes as they encompassed matters of broad public concern. In later cases, the Supreme Court extended


In Wilko, a customer of a brokerage house filed a claim under the Securities Act of 1933 ("1933 Act") seeking damages for alleged misrepresentations by the brokerage house concerning a purchased security. Wilko, 346 U.S. at 428-29. Claiming that the arbitration provision in a margin agreement between the parties controlled the issue, the brokerage house moved to stay the trial pursuant to the FAA until an arbitration could be had. Id. at 429. In deciding the issue, the Court identified the tension between the policies of the 1933 Act and the FAA, and weighed the 1933 Act more heavily. Id. at 438. The Court reasoned that the 1933 Act was designed to protect investors and "created a special right to recover for misrepresentation which differ[ed] substantially from the common-law action." Id. at 431. The Court held that the "right to select the judicial forum" to prosecute these claims could not be waived. Id. at 435. Further, the Court explained that the "effectiveness in application [of the provisions of the 1933 Act was] lessened in arbitration as compared to judicial proceedings," and arbitration lacked the certainty of a judicial proceeding. Id. at 432, 435. In addition, since arbitrators were not required to explain the reasons underlying an award or maintain a complete record of the proceedings, "the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact,' . . . [could not] be examined." Id. at 436. Finally, the Court found the available procedures for reviewing an arbitral award much narrower than judicial review procedures and inadequate to serve the purposes of the 1933 Act. Id. at 436-37.

In deciding the arbitrability of an antitrust claim, the Second Circuit in American Safety explained that antitrust statutes were "designed to promote the national interest in a competitive economy." American Safety, 391 F.2d at 826. The court believed that Congress intended antitrust claims to be resolved solely by the judiciary and held that antitrust claims were inappropriate for arbitration. Id. at 827-28. Although the opinion in American Safety did not clearly establish the rationale for its holding, at least five arguments have been offered to support the opinion:

(1) Complexity (courts are more competent than arbitrators to resolve antitrust claims); (2) Hostility (arbitrators are less likely to enforce antitrust laws vigorously); (3) Deterrence (judicial resolution will provide more deterrence through more widely disseminated legal precedent); (4) Public Concern (antitrust law's purpose is to protect the public and competition rather than the contracting parties); (5) Adhesion (contracts containing applicable arbitration clauses are likely to be contracts of adhesion).

Stempel, Pitfalls, supra note 3, at 297 (footnotes omitted). See generally Speidel, supra note 3, at 179-91 (summarizing rise and fall of public policy exceptions in antitrust and securities litigation).

32 See Speidel, supra note 3, at 182-83 (recognizing American Safety as "'high water mark' of the public policy defense"); Stempel, Pitfalls, supra note 3, at 284 (certain disputes reserved for judicial forum). "[T]he result [in Wilko] was predicated upon the Court's assessment [of congressional purpose in enacting the 1933 Act] . . . and . . . this assessment, in turn, was influenced by considerations of both arbitral effectiveness and appropriateness." Speidel, supra note 3, at 180.
the rationale set forth in Gardner-Denver and allowed trial de
novo of wage claims under the Fair Labor Standard Act and
claims based on the Civil Rights Act of 1871. Lower courts, in
applying Gardner-Denver, allowed employees direct access to the
judicial forum without first requiring them to exhaust the arbitration
remedy. In addition, lower courts extended the holding beyond
collective bargaining to non-union situations in which the
agreement to arbitrate was contained in an individual contract of
employment.

More recently, in Gilmer, the Supreme Court held that an arbi-
tration clause in a securities representative’s application to the
New York Stock Exchange was enforceable by the representative’s
employer to compel arbitration of a federal age discrimination
claim. At the outset, the Court decided that the registration appli-
cation was not part of an employment contract, thus the FAA
governed the motion to compel arbitration. After establishing

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Freight Sys., 450 U.S. 728, 742-46 (1981) (holding federal wage claim not barred by prior
submission to contractual dispute resolution procedure).

42 U.S.C. § 1983 (1988); see McDonald v. City of West Branch, 466 U.S. 284, 288
(1984). Adhering to the mistrust of arbitration procedures for guaranteeing statutory rights
established in Gardner-Denver and Barrentine, the Court in McDonald concluded that “ac-
cording preclusive effect to arbitration awards in § 1983 actions would severely undermine
the protection of federal rights that the statute is designed to protect.” Id. at 290-92.

See Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (holding that
Gardner-Denver does not mandate arbitration before judicial resolution of civil rights
claim), cert. denied, 493 U.S. 1045 (1990); see also Swenson v. Management Recruiters Int'l,
858 F.2d 1304, 1306-07 (8th Cir. 1988) (providing judicial forum for Title VII and state law
discrimination claims), cert. denied, 493 U.S. 848 (1989); Jones v. Baskin, Flaherty, Elliot
claim pending arbitration based on Gardner-Denver). Compare Shell, supra note 3, at 566-
69 (criticizing Utley’s unprincipled reliance on Gardner-Denver) and Laura R. Hillock,
Comment, Arbitration of Title VII and Parallel State Discrimination Claims: A Proposal,
27 Cal. W. L. Rev. 179, 193-96 (1990-91) (criticizing Swenson’s reliance on Gardner-Denver
and proposing amendment to Title VII to allow arbitration) with Michael Lieberman, Com-
ment, Overcoming the Presumption of Arbitrability of ADEA Claims: The Triumph of
1817, 1822 (1990) (supporting Swenson’s reliance on Gardner-Denver and proposing pre-
sumption against arbitrability of claims under discrimination statutes).

See, e.g., Utley, 883 F.2d at 187 (ruling that employee cannot prospectively waive
judicial forum in employment agreement); Horne v. New England Patriots Football Club,
arbitration would not dispose of discrimination claim).

Gilmer, 111 S. Ct. at 1657.

Id. at 1651 n.2. The Court established that the arbitration clause was contained in
Gilmer’s registration application with the New York Stock Exchange (“NYSE”). Id. at 1650.
Interstate/Johnson Lane Corporation (“‘Interstate’) sought to enforce this provision because
that the broad arbitration clause in the application encompassed age discrimination claims, the Court examined whether the Age Discrimination in Employment Act of 1967 ("ADEA") precluded arbitration.

Noting that neither the text nor the legislative history of the ADEA precluded arbitration, the Court held that there was no inherent conflict between the underlying purpose of the ADEA and arbitration. The Court reasoned that the goals of the ADEA, encompassing important social policies, were achieved through both private suits and Equal Employment Opportunity Commis-

the rules of the NYSE required the arbitration of all employment claims between registered representatives and "member organizations," which included Interstate. Id. at 1650-51. Even though Interstate required Gilmer to register with the NYSE as a condition of employment, id. at 1650, the Court treated the arbitration provision as one arising from a contract with the NYSE, and not from an employment contract with Interstate, id. at 1651 n.2. Previous cases had intimated that applications to the NYSE, required as a prerequisite to employment, constituted part of an employment contract. See, e.g., Morgan v. Smith Barney, Harris, Upham & Co., 729 F.2d 1163, 1165-67 (8th Cir. 1984) (discussing NYSE application as part of employment contract); Dickstein v. DuPont, 443 F.2d 783, 784-85 (1st Cir. 1971) (same). By holding that an arbitration clause in a securities registration application with a securities exchange was a contract with the exchange and not part of a "contract of employment," the Court impliedly held that cases dealing with such clauses in the securities industry should not be used as authority when examining an arbitration clause in an employment contract. Id. The court noted that lower courts consistently have applied the FAA to arbitration clauses in registration applications for this reason. Id. Subsequently, the Fifth Circuit focused on the fact that, in Gilmer, the arbitration clause was stated in a contract between the employee and a securities exchange, not the employer, and warned that "courts should be mindful of this potential issue in future cases." Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 n.* (5th Cir. 1991).

Gilmer, 111 S. Ct. 1650-51. The arbitration clause in the registration application provided that Gilmer "‘agree[d] to arbitrate any dispute, claim or controversy’ arising between him and Interstate ‘that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which [he] register[ed].’" Id. at 1650. The Court added that NYSE Rule 347 required arbitration of "‘[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.’" Id. at 1651 (citation omitted). The Court assumed that the arbitration clause covered federal age discrimination claims without further discussion.


Gilmer, 111 S. Ct. at 1652.

See id. at 1652.

See 29 U.S.C. § 621(b) (1988). The purpose of the ADEA is "‘to promote employment of older persons based on their ability rather than their age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.’" Id.

See 29 U.S.C. § 621(a) (1988). Congressional findings noted that older workers were disadvantaged in the workplace due to their age and that older workers were increasingly among the unemployed. Id.
sion ("EEOC") actions\textsuperscript{45} and that these goals were nevertheless also effectuated through arbitration.\textsuperscript{46} Furthermore, the Court determined that compulsory arbitration would not undermine the EEOC's role in enforcing the ADEA, since the EEOC is empowered with plenary authority to investigate and prosecute age discrimination claims.\textsuperscript{47} Finally, the Court added that involvement of the EEOC is not required for private settlement of ADEA claims.\textsuperscript{48}

Following a recent pro-arbitration trend,\textsuperscript{49} the Court reaf-

\textsuperscript{45} See Gilmer, 111 S. Ct. at 1652. ADEA allows for private suit sixty days after charge first filed with EEOC. See 29 U.S.C. § 626(c)-(d) (1988).

\textsuperscript{46} See Gilmer, 111 S. Ct. at 1653. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Id. (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637) (alterations in original).

\textsuperscript{47} Id.

\textsuperscript{48} Id.


In Rodriguez de Quijas, the question before the Court was "whether a predispute agreement to arbitrate claims under the Securities Act of 1933 [was] unenforceable, requiring resolution of the claims only in a judicial forum." \textit{Rodriguez de Quijas}, 490 U.S. at 478. The Court reviewed the decision in \textit{Wilko v. Swan} and concluded that the reasoning in \textit{Wilko} was influenced by "judicial hostility" towards arbitration. \textit{Id.} at 480. This view, the Court established, no longer reflected the attitude of the Court towards arbitration. \textit{Id.} at 481. "To the extent that \textit{Wilko} rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." \textit{Id.} at 481. The Court proceeded to explicitly overrule \textit{Wilko} and enforce the predispute agreement to arbitrate. \textit{Id.} at 485; see also Stempel, \textit{Pitfalls}, supra note 3, at 295 (noting that Court in \textit{Rodriguez de Quijas} recognized that \textit{Wilko} relied on public policy and not statutory construction).

In Mitsubishi, the Court was presented with the question "whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction." \textit{Mitsubishi}, 473 U.S. at 624. The Court "[f]ound it unnecessary to assess the legitimacy of the American Safety doctrine as applied to agreements to arbitrate arising from domestic transactions" as the Court would enforce this arbitration clause in an international transaction "even assuming that a contrary result would be forthcoming in a domestic context." \textit{Id.} at 629. Nevertheless, the Court reviewed the individual concerns underlying the American Safety doctrine and rejected each of them as a basis for invalidating an agreement to arbitrate. \textit{Id.} at 632-33.

Although the Court has retreated from public policy exceptions and rejected some previous applications entirely, several Justices still adhere to them. See Stempel, \textit{Pitfalls}, supra note 3, at 284; see also Speidel, \textit{supra} note 3, at 190-01 (summarizing conclusions in favor of arbitration from Court's recent cases).
firmed the adequacy of arbitration procedures for resolving federal statutory claims by reiterating that an individual forgoes no substantive rights by submitting a claim to arbitration.\textsuperscript{50} Traditional criticisms of the arbitration process concerning bias,\textsuperscript{51} limited discovery,\textsuperscript{52} unwritten opinions,\textsuperscript{53} and the inability to obtain equitable relief or maintain class actions\textsuperscript{64} were summarily dismissed. Additionally, the Court noted that claims of procedural inadequacies and those of unequal bargaining power should be decided on a case-by-case basis.\textsuperscript{55}

Although the employee asserted preclusion of arbitration based on \textit{Gardner-Denver} and its progeny,\textsuperscript{58} the Court distinguished those cases on three grounds. First, those cases decided “whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims” and did not consider whether an agreement to arbitrate a federal statutory claim could be enforced.\textsuperscript{67} Second, the tension in the arbitration proceedings under a collective bargaining agreement between the individual’s interests and those of the union did not exist in \textit{Gilmer}.\textsuperscript{68} Third, those cases were not decided pursuant to the FAA.\textsuperscript{59} Significantly, the Court also stated that the “mistrust” of arbitration, noted in \textit{Gardner-Denver}, no longer held sway with the Court.\textsuperscript{60}

\textsuperscript{50} See \textit{Gilmer}, 111 S. Ct. at 1652. The Supreme Court has “recognized that ‘[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’” \textit{Id.} (quoting \textit{Mitsubishi Motors}, 473 U.S. at 628).

\textsuperscript{51} See \textit{id.} at 1654. The Court explained that the NYSE rules, requiring disclosure of an arbitrator’s background, employment history, and potential biases, and the FAA procedures for judicial review adequately protected against potential bias. \textit{Id.} at 1654.

\textsuperscript{52} See \textit{id.} at 1654-55. In dismissing the discovery restrictions, the Court emphasized the minimal discovery usually required in an ADEA suit, the efficiency and informality gained in arbitration, and the fact that arbitrators are not bound by the rules of evidence. \textit{Id.}

\textsuperscript{53} See \textit{id.} at 1655. The NYSE rules required the arbitrator to issue a written opinion that would be open to inspection by the public. \textit{Id.}

\textsuperscript{54} \textit{Id.} The Court explained that the NYSE rules allowed for such actions and that the EEOC was not foreclosed from “bringing actions seeking class-wide and equitable relief.” \textit{Id.}

\textsuperscript{55} See \textit{id.} at 1655-56; see also \textit{Sterk, Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense}, 2 Cardozo L. Rev. 481, 486-87 (1981) (suggesting agreements to arbitrate in adhesion contracts unenforceable).

\textsuperscript{56} \textit{Gilmer}, 111 S. Ct. at 1656.

\textsuperscript{57} \textit{Id.} at 1657.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id. at 1656 n.5. But see Brunet, Questioning the Quality of Alternate Dispute Resolution}, 62 Tul. L. Rev. 1, 54 (1987) (noting substantive law lost in procedural emphasis of
Reasoning from these distinctions, it is submitted that courts may no longer refuse to enforce agreements to arbitrate statutory claims in individual contracts of employment on public policy grounds. The strong statements in favor of arbitration in *Gilmer* and the explicit limitation of *Gardner-Denver* to collective bargaining agreements, coupled with the holding in *Gilmer* that an employee may waive the right to a judicial forum by signing a predispute arbitration agreement, provide for broad enforcement of agreements to arbitrate. Indeed, two circuit courts have compelled arbitration of Title VII claims in the wake of the Court’s holding in *Gilmer*.61

Although the Court in *Gilmer* relied on the FAA to allow waiver of the judicial forum, the Court specifically avoided the question concerning the scope of the FAA exclusion for contracts of employment.62 As a result, this question must be resolved to determine what substantive law governs the interpretation and enforcement of agreements to arbitrate contained in individual contracts of employment.

II. STATUTORY EXCLUSION FOR CONTRACTS OF EMPLOYMENT

Although the FAA applies to any agreement to arbitrate contained in a “maritime transaction” or a “contract evidencing a transaction involving commerce,” section one of the Act provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”64 The Supreme Court has never interpreted this language,65 even though the question concerning the scope of the exclusion has been briefed and presented to the Court on two occasions.66 Lower courts have dis-
agreed over the interpretation of the exclusionary language "any other class of workers engaged in foreign or interstate commerce." 67

A. Judicial Interpretation

The Third Circuit's opinion in Tenney Engineering v. United Electrical Radio and Machine Workers 69 represents the prevailing view for a narrow interpretation of the exclusion. 69 In Tenney Engineering, the plaintiff, a manufacturing corporation, alleged that the defendant, a labor union, violated the collective bargaining agreement through initiation of a strike by the plaintiff's employees. 70 The union moved to compel arbitration pursuant to the FAA because the collective bargaining agreement contained an arbitration provision. 71

Construing the FAA exclusion narrowly, the Third Circuit relied on the maxim ejusdem generis 72 and Congress's narrow under-

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67 See Bacashihua v. United States Postal Serv., 859 F.2d 402, 404 (6th Cir. 1988) (noting interpretation of section 1 subject to debate); American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 470-73 (11th Cir. 1987) (discussing proper interpretation of section one).

Courts initially debated whether collective bargaining agreements were contracts of employment within the meaning of the FAA. See Lincoln Mills v. Textile Workers Union, 230 F.2d 81, 85-86 (5th Cir. 1956) (summarizing interpretations of "contracts of employment"), rev'd, 353 U.S. 448 (1957). While holding specifically that "collective bargaining agreements are 'contracts of employment' within the meaning of the exclusion" in section 1 of the FAA, the court, in American Postal Workers, stated that the opposite position was a "distinctly minority view" that could not be "cited with any confidence as the current view of any of the federal courts of appeals." American Postal Workers, 823 F.2d at 473. Subsequently, the Supreme Court stated that the FAA does not apply to collective bargaining agreements although courts may look to the FAA for guidance when deciding labor arbitration cases under section 301 of the Labor Management Relations Act. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987); see also Occidental Chem. Corp. v. International Chem. Workers Union, 853 F.2d 1310, 1315-16 (6th Cir. 1988) (excluding labor contracts from FAA based on Misco).

The Supreme Court has taken a narrower approach when evaluating what constitutes an individual employee's "contract of employment." See supra note 38.

69 207 F.2d 450 (3d Cir. 1953).

70 See Bacashihua, 859 F.2d at 405; American Postal Workers Union, 823 F.2d at 473. Since courts have relied on the Labor Management Relations Act for resolving labor arbitration disputes post-Lincoln Mills, the scope of section one has not received much attention. See Shell, supra note 3, at 527; Douglas E. Ray, Court Review of Labor Arbitration Awards Under the Federal Arbitration Act, 32 VILL. L. REV. 57, 64 (1987).

71 Id. at 452. But see John M. Kernochan, Statutory Interpretation: An Outline of
standing of its commerce power in 1925. The court reasoned that the general phrase in the exclusion, "any other class of workers," should be limited to the class of workers directly engaged in interstate commerce. Since seamen and railroad workers were so engaged, the court believed that Congress intended to exclude only workers "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it."

In addition, the court explained that Congress understood its commerce power in 1925 to be limited to the narrow field of interstate transportation. Moreover, the court hypothesized that Congress incorporated phraseology into the FAA similar to that contained in the Federal Employers' Liability Act of 1908, knowing that the Supreme Court had recently interpreted the Federal Employers' Liability Act "to include only employees engaged in interstate transportation." Finally, the court added that Congress later continued to use the phrase "engaged in commerce" in a narrow sense while employing other, more precise language to exercise broader commerce power and include "activities merely affecting commerce" within a federal statute.

As a result, since the workers in Tenney Engineering only "engaged in the production of goods for subsequent sale in interstate commerce," they were not within the exclusion and the FAA

Method, 3 Dalhousie L.J. 333, 360-63 (1976) (arguing that maxims should be invoked as non-mandatory guides only after investigation of intent and context prove use appropriate).

7 Tenney Eng'g, 207 F.2d at 453.

7 Id.

74 Id. at 452. Since special arbitration legislation existed for seamen and railroad workers, the court reasoned that the draftsmen "rounded out the exclusionary clause by excluding all other similar classes workers." Id. at 452-53.

It is only a partial answer to the allegation of inconsistency to say that Congress enacted the exception . . . because there was already machinery for handling their grievances. The [exclusion clearly applies] to truckers, many maintenance groups, employees engaged in ordering and paying for interstate shipments, warehouse employees where the interstate transit has not ended, etc. This is probably a larger group numerically than the railroad and maritime workers. There was no risk of duplication so far as they were concerned.

Archibald Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591, 599 n.27 (1954) (citation omitted).

76 Tenney Eng'g, 207 F.2d at 453.

77 Id.

78 Id. The court cited, as an example, the Fair Labor Standards Act which Congress made applicable to employees "engaged in the production of goods for commerce" and not merely those "engaged in commerce." Id.
controlled. The majority of courts confronted with this issue have adopted the holding of Tenney Engineering with limited independent analysis.

The court in United Electrical, Radio and Machine Workers v. Miller Metal Products, however, proposed a much broader interpretation of the exclusion. In Miller Metal Products, the Fourth Circuit, confronted with a situation factually similar to that in Tenney Engineering rejected the distinction drawn in that case between workers producing goods for interstate commerce and those transporting goods in interstate commerce. Instead, the Fourth Circuit chose to rely on the structure of the statute and reasoned that the exclusionary clause was meant to be co-extensive with the statute's scope. Therefore, the court concluded that the

79 Id. at 453.
80 See Dickstein v. DuPont, 443 F.2d 783, 785 (1st Cir. 1971) (holding securities industry employee not covered by exclusion); Pietro Scalzetti Co. v. International Union of Operating Eng'rs, Local 150, 351 F.2d 576, 579-80 (7th Cir. 1965) (holding collective bargaining agreement in construction industry not within exclusion); Signal-Stat Corp. v. Local 475, United Elec., Radio and Mach. Workers, 235 F.2d 298, 302 (2d Cir. 1956) (finding workers manufacturing auto parts not within exclusion), cert. denied, 354 U.S. 911 (1957). While most of these cases concerned collective bargaining agreements, this particular issue generally has not been analyzed differently when individual contracts of employment were at issue. See Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) (professional basketball player); Dickstein, 443 F.2d at 785 (securities representative); see also Ray, supra note 69, at 64 (discussing split among circuits in applying FAA to labor arbitration). Explicitly addressing the issue of different treatment for individual contracts of employment and collective bargaining agreements, the Sixth Circuit, in Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991), after reviewing the legislative history of the FAA, refused to conclude "that individual employment contracts involving employers engaged in interstate commerce should be treated any differently" than collective bargaining agreements. Id. at 311-12 (dictum). But see John A. Gray, Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Legal Status of Predispute Mandatory Arbitration as a Condition of Employment, 37 VILL. L. REV. 113, 132-33 (predicting that reasoning in Gilmer will lead to Supreme Court limiting FAA exclusion to collective bargaining agreements).

In addition, certain circuits have not conclusively interpreted the exclusionary language. See Willis, 948 F.2d at 310-11 (exploring exclusionary clause in dictum); Bacashihua v. United States Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988) (avoiding issue because postal workers clearly engaged in interstate commerce); American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (same).

81 215 F.2d 222 (4th Cir. 1954).
82 Id. at 222. As in Tenney Engineering, the employer filed an action seeking damages from the labor union for breach of the no-strike provision in the collective bargaining agreement. Id. The union moved to stay the action and to compel arbitration pursuant to the FAA. Id.
83 Id. at 224.
84 See id.; see also Willis, 948 F.2d at 310-11 (dictum) (expressing view that term "commerce" should be read consistently when deciding jurisdiction of FAA and scope of
exclusion reached to the fullest extent of Congress's commerce power and held that the FAA could not be used to stay the judicial proceedings.\(^5\)

Consistent with the rationale in *Miller Metal Products*, it is submitted that relying on Congress' narrow understanding of its commerce power misstates the central focus of the inquiry into the extent of the exclusion. Based on the structure of the statute, it is proposed that the scope of the statute and the exclusion, in terms of breadth, are linked and should be construed in harmony. Section two extends the coverage of the statute to "written provision[s] in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy."\(^6\) Section one excludes from this definition "other class[es] of workers engaged in foreign or interstate commerce."\(^7\) It seems that Congress was not endeavoring to create subtle distinctions between "involving commerce" and "engaged in commerce."\(^8\) Rather, by listing seamen and railroad workers followed by a general exclusion, Congress intended to remove all contracts of employment possibly falling within its commerce power from the operation of the FAA.\(^9\) Since

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\(^5\) *Id.* The court referred to an earlier Fourth Circuit case which held that Congress exercised the full extent of its commerce power under the FAA. *Id.* (citing Agostini Bros. Bldg. Corp. v. United States, 142 F.2d 854 (4th Cir. 1944)). Therefore, the court found "no reason to think that it was not intended that the exception incorporated in the statute should not reach also the full extent of [Congress'] power." *Id.*


\(^7\) *Id.* § 1 (emphasis added). The statute also governs such provisions in "maritime transactions." *Id.*

\(^8\) See Cox, *supra* note 75, at 597-98 (noting subtle distinctions between "affecting commerce," "engaged in the production of goods for commerce" and engaged "in commerce" not recognized by Congress in 1925). Professor Cox concluded that "[o]ne should not rely on one policy in interpreting the phrases relating to commerce and an opposite conception in reading 'contract of employment.'" *Id.* at 599; see also Herbert Burstein, *The United States Arbitration Act - A Reevaluation*, 3 VILL. L. REV. 125, 133 (1958) (arguing that collective bargaining agreement cannot be construed as "contract evidencing a transaction involving commerce"). But see Thomas K. Plofchan, Jr., *Coming Home to Contract: Loosening the Death-Grip of Statutorily Created Rights On Arbitration in the Non-Union World*, 6 OHIO ST. J. ON DISP. RESOL. 243, 256-58 (1991) (arguing that non-textual interpretation requires broad construction of scope and narrow construction of exception).

\(^9\) See Cox, *supra* note 75, at 598. Although Professor Cox supported a narrow construction of the exception, he stated that "it would seem equally accurate historically and equally permissible textually to read . . . [the exclusion] either as coextensive with the constitutional power of Congress . . . or else as limited to the few types of employment believed subject to federal regulation in 1924." *Id.* at 598. In addition, Professor Cox concluded that a broad scope and narrow exclusion would be permissible only if utilized to give effect to a labor policy "favoring the enforcement of agreements to arbitrate grievances." *Id.* at 599.
the FAA has been applied to reach any contract within the commerce power of Congress, the exception should be given an equally broad sweep.

B. The Legislative History of the FAA

Although the legislative history specifically discussing the exclusionary language has been labeled "ambiguous," the history of the FAA and the circumstances leading to its enactment indicate that the FAA was intended only to cover commercial transactions. The Act was drafted by the American Bar Association and was modeled after the 1920 New York Arbitration Law. The Association sought to overturn the common law rule of judicial hostility towards arbitration and instructed the Committee on Commerce,

Slightly different reasoning was used in Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991), where the Sixth Circuit reviewed a factual situation similar to that in Gilmer. Although the court ultimately followed Gilmer and held that the plaintiff's discrimination claim was not exempt from her agreement to arbitrate because the agreement was contained in a securities registration application and not a contract of employment, in dictum, the court cited Miller Metal Products and Professor Cox for the proposition that "the same meaning for 'commerce' was meant to apply throughout the entire Act," including the exclusion in section one. Id. at 310-11. The court then noted that the jurisdiction provisions in Title VII and the ADEA, both enacted under the commerce power of Congress, provide a Congressional determination that an "employer with 15 or more employees necessarily implicates interstate commerce." Id. at 311. The court reasoned that any claims under Title VII or the ADEA necessarily implicate commerce. Id. As a result, the court concluded that employment contracts with employers subject to Title VII or similar anti-discrimination laws would necessarily fall within the exclusion of the FAA for contracts of employment. Id. Assuming, arguendo, that the reasoning in this dictum is correct, this falls short of a mandate to preclude enforcement of arbitration clauses in employment contracts. See infra note 108 and accompanying text.

See Perry v. Thomas, 482 U.S. 483, 490 (1987) (The FAA "provide[s] for the enforcement of arbitration agreements within the full reach of the Commerce Clause.").

Local 205, United Elec. Radio and Mach. Workers v. General Elec. Co., 233 F.2d 85, 99 (1st Cir. 1956) (remarking that legislative history is of little aid in deciding whether collective bargaining agreement was contract of employment), aff'd on other grounds, 353 U.S. 547 (1957); see Signal-Stat Corp. v. Local 475, United Elec. Radio and Mach. Workers, 235 F.2d 298, 302 (2d Cir. 1956) ("The legislative history of the exclusionary clause in Section 1 is, at best, vague and inconclusive."), cert. denied, 354 U.S. 911 (1957).

See 50 A.B.A. Rept. 356-62 (1925)


See Cohen & Dayton, supra note 1, at 265 (noting FAA reversed common law doctrine). Under common law, agreements to arbitrate future disputes were generally of little value as courts refused to grant specific performance. See Red Cross Line v. Atlantic Fruit Co., 264 U.S. 108, 120-21 (1924) (federal courts denied specific performance); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 976, 984 (2d Cir. 1942) (discussing English
Trade and Commercial Law of the American Bar Association to consider and report upon "the further extension of the principle of commercial arbitration."\textsuperscript{95}

Initially introduced into Congress in 1922, the original draft did not contain the exclusionary language.\textsuperscript{96} Andrew Furuseth, President of the International Seamen's Union of America, vigorously objected to the bill, claiming that it created a "compulsory labor" bill.\textsuperscript{97} The American Federation of Labor also protested the bill, later claiming that its protests led to the inclusion of the exclusionary language.\textsuperscript{98} When the bill was reintroduced in 1923, the revised draft contained the exclusionary language,\textsuperscript{99} and the bill passed with no additional resistance from labor.\textsuperscript{100}

The hearings and floor debate conducted on the amended bill were devoid of labor participation.\textsuperscript{101} The lack of interest by labor organizations, combined with the focus on the commercial nature of the bill in both the Senate and House Reports\textsuperscript{102} and the floor

and American common law doctrine and refusal to grant specific performance for agreements to arbitrate future disputes); see also Wesley A. Sturges, Commercial Arbitration and Awards § 23, at 83 (1930) ("[S]pecific enforcement of future disputes agreements will be denied in the absence of an enabling statute."). While an aggrieved party could sue for breach of contract, the party could only recover a nominal sum for breach of an arbitration clause. See Red Cross Line, 264 U.S. at 121; Domke, supra note 3, § 3:01. Non-enforcement was premised on the view that such clauses served to "oust the courts of their jurisdiction" and were "revocable" based on public policy. Sturges, supra, § 15 at 45. As such, courts would not allow a party to plead the clause in abatement of a court action, but would allow either party to terminate the arbitration agreement upon notice to the opposing party. See id; see also Kulukundis, 126 F.2d at 983 (noting English hostility founded on desire to avoid loss of income from fees); Stempel, Pitfalls, supra note 3, at 271-74 (summarizing English and American judicial hostility).

\textsuperscript{95} See 45 A.B.A. Rep. 75 (1920).
\textsuperscript{96} See Ray, supra note 69, at 69-73 (reviewing history of section one exclusion); Burstein, supra note 88, at 129-34 (same).
\textsuperscript{97} See id. (citing Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203 (1923)).
\textsuperscript{98} See Ray, supra note 69, at 72 (citing Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925)).
\textsuperscript{100} See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 467 (1957) (Frankfurter, J., dissenting) ("Congress heeded the resistance of organized labor . . . .").
\textsuperscript{101} See Burstein, supra note 88, at 130.
\textsuperscript{102} See H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924). The House Report stated that the common law hostility to arbitration agreements was "too strongly fixed to be overturned without legislative enactment." Id. The House Report mentioned that the common law hostility to arbitration agreements was "too strongly fixed to be overturned without legislative enactment." Id. Agreements to arbitrate under common law "were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy." S. Rep. No. 536, 68th Cong., 1st Sess. 2 (1924); see Local 205, United Elec. Radio & Mach. Workers v. General Elec. Co., 233
debate, supports the conclusion that the Act was intended to cover only commercial transactions. Since the legislative history clearly indicates that the statute was intended to change the common law rule for commercial transactions only, a broad interpretation of the exclusion for contracts of employment furthers this intent.

Moreover, Justice Stevens, in his dissenting opinion in *Gilmer*, stated that there was “little dispute” that the FAA was only applicable to commercial situations and that the Supreme Court impliedly has read the exclusion broadly. This statement, combined with the Supreme Court’s holding that the FAA was not directly available in labor arbitration, supports a broader interpretation of the statutory exclusion.

C. Enforceability of Agreements to Arbitrate Statutory Claims Outside the FAA

Assuming that all employment contracts may be excluded from the FAA, it does not automatically follow that Congress intended to preclude the enforcement of arbitration clauses in employment contracts. Indeed, this view was impliedly rejected by

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103 See Burstein, *supra* note 88, at 130; Ray, *supra* note 69, at 73 (recognizing absence of labor representatives at committee meetings supports assumption that labor’s needs were met by exclusion).


105 See Kernochan, *supra* note 72, at 346 (stating that objective of statutory interpretation is to ascertain and effectuate legislative intent).

106 See *Gilmer*, 111 S. Ct. at 1659-60 (Stevens, J., dissenting) (relying in part on Justice Frankfurter’s dissent in *Lincoln Mills*).

107 See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957). In dissent, Justice Frankfurter noted the implicit rejection by the majority of the availability of the FAA to enforce arbitration agreements in collective bargaining contracts, and stated that the majority “also found that Congress by implication repealed its own statutory exemption of collective bargaining agreements” in the FAA. *Id.* at 467-68. (Frankfurter, J., dissenting)

108 See Slawsky v. True Form Founds. Corp., Civ. A. No. 91-1822, 1991 WL 98906 (E.D. Pa. June 4, 1991) (denying motion to dismiss and compel arbitration because arbitration clause contained in individual contract of employment exempt from FAA). In Slawsky, the court did not discuss why exclusion from the FAA therefore mandated ignoring the agreement to arbitrate. Similarly, Justice Stevens, in *Gilmer*, apparently felt that a finding that the FAA did not apply to Gilmer’s employment contract led to the conclusion that arbitration of his claim would not be compelled. *Gilmer*, 111 S. Ct. at 1657 (Stevens, J., dissenting).
the Supreme Court's creation of a public policy exception to arbitration in *Gardner-Denver.* If the FAA mandated non-enforce-
ment, a public policy exception would have been completely 
unnecessary.

The more plausible conclusion is that the exclusion simply left 
the common law rule against specific performance of arbitration 
agreements undisturbed. Under this view, a federal court faced 
with the need to determine whether or not an arbitration clause in 
an employment contract is enforceable would not be bound by the 
FAA's liberal policy favoring arbitration. Rather, the issue would 
become the continued validity of the judicial hostility towards 
arbitration.

In *Textile Workers Union v. Lincoln Mills,* the Supreme 
Court held that section 301 of the Labor Management Relations 
Act was "federal law, which the courts must fashion from the pol-
icy of our national labor laws." The Court stated that Congress 
had impliedly rejected "the common-law rule . . . against enforce-
ment of executory agreements to arbitrate." The Court, however, 
specifically reserved the question "whether as a matter of federal 
law executory agreements to arbitrate are enforceable, absent con-
gressional approval." Although recent cases have denounced ju-
dicial hostility towards arbitration, none have directly addressed 
the continuing vitality of the common law rule under federal statu-
tory law. Given that arbitration is in essence a form of forum selec-
tion, it is submitted that in establishing the enforceability of forum 
selection clauses, the Supreme Court has impliedly rejected the 
common law hostility towards arbitration and would enforce an ar-
bitration agreement in the appropriate situation, even without ex-
press federal statutory authority.

In *The Bremen v Zapata Off-Shore Co.,* the Court reviewed 
a forum selection clause in an international towage contract. The 
clause at issue provided that "dispute[s] arising must be treated
before the London Court of Justice.” In deciding whether the clause should be specifically enforced, the Court determined that forum selection clauses were prima facie valid and entitled to enforcement unless unreasonable under the circumstances.

The Court reasoned that judicial hostility towards such clauses, grounded in views that they ousted the jurisdiction of the court or were contrary to public policy, lacked serious support in the law and was “hardly more than a vestigial legal fiction.” Enforcement of such clauses was merely the logical corollary to allowing parties to consent in advance to the jurisdiction of a given court, enabling notice to be served by the other party. Relying further on principles of freedom of contract and contemporaneous scholarly opinion, the Court dismissed judicial hostility as a “provincial attitude regarding the fairness of other tribunals.” Freed from this common law hostility, the Court proceeded to analyze the clause as it would any other clause in a contract.

117 Id.
118 See id. at 7-8. Zapata, a corporation based in Houston, TX, contracted with Unterweser, a German corporation, for the latter to tow Zapata’s drilling rig from Louisiana to Italy. Id. at 2. Using its deep sea tug, The Bremen, Unterweser undertook to complete the contract. Id. at 3. The Bremen met high seas in international waters and the drilling rig was damaged. Id. Zapata commenced suit in United States District Court in Tampa, and Unterweser invoked the forum clause and moved to dismiss. Id. at 4. The district court denied the motion, and adhered to the traditional view that “agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.” Id. at 6 (quoting Carbon Black Exports, Inc. v. The Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958), cert. dismissed, 359 U.S. 180 (1959)).
119 See id. at 10.
120 Id. at 12. The Court essentially adopted the view expressed in Judge Wisdom’s dissenting opinion below. Id. at 10. In proposing a rule of reasonableness and not one of dis-taste in evaluating forum clauses, Judge Wisdom labeled as “weak” the historical antecedents of opposition to forum and arbitration clauses. See In re Unterweser Reederei, GMBH, 428 F.2d 888, 902 (5th Cir. 1970) (Wisdom, J., dissenting). The proper focus for analyzing forum clauses should be on the bargaining conditions of the parties and the remedy available if the forum clause is enforced. Id. at 905 (Wisdom, J., dissenting).
121 See The Bremen, 407 U.S. at 10-11; see also National Equip. Rental, Ltd. v. Szukhert, 375 U.S. 311, 315-16 (1964) (providing that party may consent to service of process via an agent in jurisdiction where party cannot be found).
122 See The Bremen, 407 U.S. at 11; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). The Restatement provides that “[t]he parties’ agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable.” Id.
123 The Bremen, 407 U.S. at 12.
124 See id. The Court framed the issue as “whether . . . [the lower] court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.” Id. The Court found enforcement of the clause not to be unreasonable. Id. at 19.
While the opinion doubtlessly reflected the facts of the case and judicial policy colored by the realities of international trade, the reversal of common law hostility to choice of forum clauses was expanded to arbitration clauses governing statutory claims in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* Characterizing an agreement to arbitrate as "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute," the Court found this policy to be reinforced by federal policy in favor of arbitration and held that antitrust disputes were subject to arbitration under the FAA. Subsequent Supreme Court decisions have invariably followed this line of reasoning, reversing public policy exceptions to arbitration and enforcing arbitration clauses under the FAA even when statutory rights were in issue. It is submitted that a court would reach the same conclusion even without the FAA's liberal policy in favor of arbitration.

III. PROPOSED ANALYSIS FOR CASES NOT GOVERNED BY THE FEDERAL ARBITRATION ACT

Since predispute agreements to arbitrate federal statutory claims contained in employment contracts are excluded from the FAA but enforceable under the authority of *Gilmer*, a court must decide what substantive law to apply when interpreting and enforcing such agreements. In these instances, since federal question jurisdiction exists, federal substantive law governs in the first instance. If the statute conferring the substantive right precludes

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125 *Id.* at 9-10. "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.* at 9.


127 *Id.* at 630 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)). Relying mainly on The Bremen, the Court in *Scherk* enforced, pursuant to the FAA, an agreement to arbitrate a dispute that arose from an international commercial transaction. *See Scherk*, 417 U.S. at 519-20.

128 *See Mitsubishi Motors*, 473 U.S. at 631. The Court explained that "federal policy [in favor of arbitration] applies with special force in the field of international commerce." *Id.*

129 *See id.* at 640.

130 *See, e.g.*, *Gilmer*, 111 S. Ct. at 1657 (ADEA); Perry v. Thomas, 482 U.S. 483, 491-92 (1987) (wage claims under California Labor Code); *supra* note 49 (discussing recent pro-arbitration trend).

131 *See Rules of Decision Act, 28 U.S.C. § 1652 (1988).* The Rules of Decision Act provides that "[t]he laws of the several states, except where the Constitution or treaties of the
arbitration either explicitly or implicitly, an agreement to arbitrate would be unenforceable and the parties would be free to litigate. In Federal civil rights and employment statutes, however, have not mentioned arbitration. In addition, recent cases have found no conflict between arbitration and the underlying remedial purposes of these statutes.

United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” Id. When rights and duties are governed by the Constitution or federal statutes, the rule of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), does not apply. See Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943).

See Shell, supra note 69, at 565 (noting courts cannot enforce agreement to arbitrate in contravention of congressional intent).


[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

The House Report discussing this section emphasized that “the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII” and that “any agreement to submit disputed issues to arbitration, whether in a ... collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions.” H.R. REP. No. 102-40(I), 102d Cong., 1st Sess. 97 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635 (citing Gardner-Denver with approval). At least one commentator has suggested that the provision concerning alternative means of dispute resolution rendered questions regarding the application of the FAA exclusion to individual employment contracts moot. See Gray, supra note 80, at 131 n.64, 131-32. Such a view, however, seems to disregard the express language of the statute which only “encourages” alternative means of dispute resolution “where appropriate and to the extent authorized by law.”

See supra notes 37-62 and accompanying text (discussing Gilmer). Although the Court, in Gilmer, repeated the notion from Mitsubishi that “all statutory claims may not be appropriate for arbitration,” the Court nevertheless found the ADEA claim to be arbitrable. Gilmer, 111 S. Ct. at 1652. The Supreme Court has yet to find that arbitration posed an inherent conflict to any statutory scheme. See supra note 49; cf. Bird v. Shearson/American Express, Inc., 926 P.2d 116, 120-22 (2d Cir.) (on remand after Rodriguez, court found no inherent conflict between ERISA and arbitration), cert. denied, 111 S. Ct. 2891 (1991); Steele v. L.F. Rothschild & Co., 701 F. Supp. 407, 408 (S.D.N.Y. 1988) (no inherent conflict between arbitration and Fair Labor Standards Act); supra note 61 (Title VII claims subject to arbitration after Gilmer). But see Shell, supra note 3, at 566-72 (arguing that ERISA claims may be arbitrable but ADEA and Title VII claims are not); Edward M. Morgan, Contract Theory and the Source of Rights: An Approach to the Arbitration Question, 60 S. CAL. L. REV. 1059, 1065-71 (1987) (suggesting a focus on the rights in issue to determine arbitrability; rights flowing from individual interaction are arbitrable while rights created by the government to further collective interests are not); Lieberman, supra note 35, at 1822 (proposing discrimination statutes should be presumed to override the FAA); Nicholas W. Lobenthal, Note, The Arbitrability of ADEA Claims: Towards an Epistemology of Congressional Silence, 23 COLUM. J.L. & SOC. PROBS. 67, 68 (1989) (Congress intended ADEA claims
Absent federal guidelines, it is submitted that a court should apply state law to govern the interpretation and enforcement of such agreements. For supplying decisional rules where a federal scheme is lacking, the presumption rests in favor of adopting state law.138 The majority of states have adopted some form of the Uniform Arbitration Act,137 which provides for broad enforcement of arbitration agreements, including those contained in employment contracts.138 Every other state has enacted some form of commercial arbitration legislation.139 As a result, well developed
to be non-arbitrable); Alison Brooke Overby, Note, Arbitrability of Disputes Under The Federal Arbitration Act, 71 Iowa L. Rev. 1137, 1156-57 (1986) (arbitrability inquiry should focus on parties intent to submit particular issue to arbitration).

138 See DelCostello v. International Bd. of Teamsters, 462 U.S. 151, 159 n.13 (1983) (adopting state statute of limitations matter of discretion and not mandated by Erie or Rules of Decision Act). Where a federal statute is silent concerning a particular issue, federal courts may “fashion federal law where federal rights are concerned . . . [but] the range of judicial inventiveness will be determined by the nature of the problem.” Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957). “Whenever the federal court is free to decide for itself the rule to be applied . . . it is applying, or making, ‘federal common law.’” CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 60, at 389 (4th ed. 1983). Examples of areas where federal common law has developed include:

(1) admiralty and maritime cases; (2) interstate disputes; (3) proceedings raising matters of international relations; (4) actions involving gaps in federal statutory provisions; (5) cases concerning the legal relations and proprietary interests of the United States.


136 See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2778 (1991) (citing as usual rule use of state statute of limitations where Congress failed to provide a statute of limitations for a federal cause of action). The presumption in favor of state law recognizes “the logical utilization of local substantive law to solve local problems, the preservation of important state policies, and the orderliness and certainty of application of well-developed areas of state law.” FRIEDENTHAL, supra note 135, § 4.7 at 223-24; see Theresa C. O’Laughlin, Note, Adopting State Law as the Federal Rule of Decision: A Proposed Test, 43 U. Chi. L. Rev. 823, 834-35 (1976) (establishing three part test for determining whether state law should be adopted); see also Note, Rules of Decision in Nondiversity Suits, 69 YALE L.J. 1429, 1446 (1960) (noting essential focus whether or not Congress intended state law to apply).


state law exists to provide rules of decision in these instances.

If the state arbitration law was found to conflict with the federal statute at issue, however, a federal court would be free to fashion a different rule of decision. A conflict would exist if the use of state law nullified the purpose and the functioning of the federal statutory program under consideration. Since these statutes create a right and provide a framework of judicial enforcement, a state arbitration statute allowing liberal access to a judicial forum could hardly cause a conflict. Nevertheless, as evidenced by Gilmer, a state statute that restricts such access and meticulously enforces agreements to arbitrate will cause no conflict provided Congress has not guaranteed a judicial forum under the statutory scheme.

Along with situations creating a conflict, a strong need for a uniform federal rule may overcome the presumption in favor of state law. Although the use of state law may lead to different and disparate results based on each state’s policies, a sufficiently
compelling need for uniformity to override the presumption in favor of state law is not apparent.\textsuperscript{148} These are not situations in which a uniform rule would aid administration of a federal program.\textsuperscript{147} State law is often used to complement and supplement federal statutory schemes.\textsuperscript{148} Moreover, uniformity for its own sake is not enough to defeat the presumption in favor of state law.\textsuperscript{149} Although the FAA provides an established body of law from which uniform standards could readily be established,\textsuperscript{150} the mere possi-
bility of different and disparate results does not require departure from the principles of federalism and nullify the presumption in favor of state law.\footnote{Union v. Lincoln Mills, 353 U.S. 448, 452 (1957); see Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1504 (7th Cir. 1991) (FAA may be adopted for labor arbitration in determining breach of agreement to arbitrate); Bacashihua v. United States Postal Serv., 859 F.2d 402, 406 (6th Cir. 1988) (adopting FAA statute of limitations for claim to vacate arbitration award under LIRA section 301). \textit{But see} Ray, supra note 69, at 63. Professor Ray reviewed the split in authority over whether the FAA applies to labor arbitration, \textit{id.} at 63-69, and concluded that the FAA's standard for reviewing arbitral awards was inherently incompatible with the purposes and policies of labor arbitration, \textit{id.} at 90. Under the employment and civil rights statutes, however, there has been no similar mandate to create federal common law.}

\textbf{Conclusion}

With the demise of public policy exceptions to arbitration and the departure from dispelled judicial hostilities to arbitration, the appropriateness of arbitration to resolve statutory claims rests on a strong legal foundation. Where the arbitrability of a federal statutory claim is not governed by the FAA, however, state arbitration law should be adopted to govern the interpretation and enforcement of agreements to arbitrate. Although federal courts possess the power to develop a uniform rule under federal common law in this situation, adoption of state law commands maximum deference to principles of federalism, while leaving ample breathing room for judicial review and activism where state law is wholly inappropriate. This position provides fertile ground for growth in the use of arbitration and other forms of dispute resolution by allowing each state to develop its own policy concerning arbitration and by avoiding negative implications from creating a mandatory federal rule favoring arbitration.

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