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## Pitfalls of Public Policy: The Case of Arbitration Agreements.

Jeffrey W. Stempel

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## **PITFALLS OF PUBLIC POLICY: THE CASE OF ARBITRATION AGREEMENTS**

**JEFFREY W. STEMPEL\***

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## EPIGRAPH

If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest . . . arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.

*Richardson v. Mellish*, 2 Bing. 229, 252; 130 Eng. Rep. 294, 303 (1824)(Burrough, J., concurring in the result).

The true grounds of decision are consideration of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes.

*Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896)(Holmes, J., dissenting).

## I. INTRODUCTION

As the juxtaposition of these quotations suggests, judges have long held disparate views on the legitimacy and value of “public policy” considerations as a basis for legal decision making. The popular notion posits that Justice Holmes and legal realists carried the day, making public policy analysis an ordinary part of the adjudication process. The story, of course, is more complex than this legal version of *Don Quixote*.<sup>1</sup> Many judges and lawyers, including Justice Holmes in other writings,<sup>2</sup> continued to speak of adjudication in more formalist and positivist<sup>3</sup> terms, with most laypersons in apparent agreement.<sup>4</sup>

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1. The traditional folklore, which tells of the initially embattled legal realists eventually overcoming their stodgy formalist critics to remake American law has a ring of melodrama to it in a manner reminiscent of Prof. Arthur Leff’s memorable characterization of Richard Posner’s *ECONOMIC ANALYSIS OF LAW* (1973) as a member of the same literary genre as *Don Quixote*, with Posner’s “Economic Analysis” substituting as the man from La Mancha in serving as the protagonist. See Leff, *Economic Analysis of Law: Some Realism About Nominalism* (Book Review), 60 VA. L. REV. 451, 457 (1974). In much the same way, fans of public policy jurisprudence occasionally are too romantic in describing public policy as a completely positive judicial tool, ignoring its potential for error, misuse, favoritism and aggrandizement of judicial power.

2. In discussing his judicial approach to interpreting even unwise statutes, Justice Holmes wrote in 1920, “if my fellow citizens want to go to Hell I will help them. It’s my job.” 1 HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953).

3. By positivism, I mean the view that law results from the commands of the sovereign rather than through notions of natural law. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 90-92, 99-100, 225-227 (2d ed. 1861). In the prevailing American paradigm, the supreme positive law, absent unconstitutionality, is congressional legislation with courts required to faithfully implement these “commands” of the “sovereign” where the intent



Judge Burroughs' view of public policy as a wild horse ridden by a result-oriented judiciary desperate for decision remains a familiar vision for many today, perhaps because of its essential core of truth. When courts move from the realm of legislative statements to notions of public policy, they have entered a less bounded playing field in which judges have more discretion and hence more power to make law.

In the traditional American view, however, courts are to have a circumscribed sphere of influence bounded by legislative and executive authority.<sup>5</sup> Most people believe that although courts may occasionally need to resort to public policy in order to decide cases, the judiciary should make only constrained use of public policy so long as the standard, tripartite, majoritarian-centered approach remains the fulcrum of American government. By this, I mean the constitutional structure of American government in which the bulk of new substantive law is made by legislative action, with the metaphorical "edges" of the law defined by executive implementation and judicial interpretation in contested cases.<sup>6</sup>

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of Congress is sufficiently discernable. *See generally* Hart, *A New Conception of Law*, in *PHILOSOPHY OF LAW* (3d ed. 1986).

4. Virtually every presidential election features both candidates pledging to appoint to the Supreme Court Justices who will "interpret the law, not engage in judicial legislation," suggesting that the public prefers a highly circumscribed role for public policy analysis. In the most recent presidential election, George Bush, the eventual winner, sounded a similar theme. *See* Bradley, *Where the Candidates Stand on Crime and Ethics*, *The Christian Science Monitor*, Oct. 24, 1988, at A3, col. 1.

5. *See* G. STONE, M. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 1-247, 339-434 (1986) (hereinafter "STONE, et al."); G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 91-101 (1982) (hereinafter "CALABRESI"); J. ELY, *DEMOCRACY AND DISTRUST* 4-12 (1980) (hereinafter "ELY").

6. The executive branch enforces laws by prosecution and, increasingly in the 20th Century, regulation by administrative agencies. *See* Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 549-99 (1985). The growth of administrative law has not altered the prevailing United States view that courts and agencies both must follow reasonably clear congressional instructions in either statutory text or legislative history. *See* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). Prof. Sunstein further argues that ambiguous congressional instructions require judges to resort to various background norms; *see also* Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) (hereinafter "Eskridge, *Public Values*"). Certainly, this is what many courts appear to be doing when speaking of public policy reasons for a decision. In this article I do not advocate a total ban on resorting to such public policy. Rather, I advocate a more consistently principled use of public policy, with the arbitration agreement enforcement cases providing an example of the problems that arise from a more expansive, loose conception of public policy.

Federal courts have often utilized public policy exceptions to refuse enforcement of arbitration agreements. Judicial use of the public policy exception to arbitration runs counter to the prevailing view; only the most expansive view of the judicial role can approve these exceptions. Although the traditional, majoritarian-centered view of government with legislative supremacy in substantive lawmaking can be attacked as a flawed model, it is nonetheless the dominant model. Consequently, I accept it for purposes of analyzing judicial treatment of arbitration agreements. Part I of this article briefly outlines the differences between arbitration and litigation and then reviews the history and structure of the United States Arbitration Act (the "Act"), passed to require courts to enforce arbitration agreements. Part II describes the major public policy exceptions federal courts have used to refuse to enforce arbitration agreements. Part III argues that unless we are prepared to abandon the conventional view regarding the judicial function in statutory interpretation, a principled approach to the Act requires substantial contraction of any public policy exception to arbitration, perhaps even its eradication.

Past judicial use of public policy to determine whether to enforce an arbitration agreement has, in my view, resulted in too much inconsistency and too much judicial disregard of legislative preferences. To be sure, courts not only find facts and resolve disputes but have an important role in protecting minority rights, avoiding unwise but available constructions of statutes and contracts, and striking down unconstitutional actions by the legislature or the executive. When the public policy exception is used selectively to strike down some arbitration agreements but not others, depending solely upon the nature of the underlying dispute, two undesirable consequences are likely to result: (1) either the valuable "counter-majoritarian" judicial function will not be fulfilled at all; or (2) it will be fulfilled at substantial cost, often while less costly, equally effective judicial alternatives remain overlooked.

## II. ARBITRATION, ITS HISTORY, AND THE FEDERAL ACT

### A. *Arbitration and Judicial Hostility to It*

#### 1. Arbitration Compared with Adjudication

As most readers of legal periodicals know, adjudication is the pro-

cess of dispute resolution performed by courts.<sup>7</sup> In federal courts and most state courts, where the dispute is a civil action, "adjudication" means framing the basic issues through pleadings, conducting discovery of the facts (including obtaining documents and examining potential witnesses via deposition), making appropriate motions to regulate the proceeding or resolve it prior to trial,<sup>8</sup> and moving to trial presided over by a judge, often with a jury sitting as finder of fact. The trial process is adversarial, with each side taking turns presenting its basic case.<sup>9</sup> After each witness presents direct testimony, the other parties are permitted to cross-examine, with possible re-direct examination and so on. A comprehensive code and common law precedent govern the admissibility of evidence, but with the parties largely responsible for raising objections to a witness's testimony or opponents' questions and tactics, the judge rules upon objections as they arise.

After presentation of the evidence, attorneys for the parties argue the case before the fact finder, who retires to make a decision. Juries continue to deliberate until finished, rendering either a simple finding and award or answering a verdict form drafted by the judge. In bench trials, judges may take weeks or months to render a decision but it will be in writing and usually explain its rationale. After judgment, the parties may make various post-trial motions attacking, modifying, or completing the result. A dissatisfied party may appeal the decision to an appellate court, which reviews the matter in light of the trial record and the briefs and oral arguments of the parties.<sup>10</sup> In the federal system and most states, a losing appellate litigant may seek discretionary review by a higher court.<sup>11</sup> At either the lower or higher appellate level, the court can reverse or modify a trial court result based on errors of law, clearly erroneous fact findings, abuses of dis-

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7. On the adjudication process, see generally, J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, *CIVIL PROCEDURE* (5th ed. 1989); H. FIELD, B. KAPLAN & K. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* (6th ed. 1990).

8. See generally D. HERR, R. HAYDOCK & J. STEMPER, *MOTION PRACTICE* (1985).

9. Regarding the adversary system and its implications for dispute resolution, see generally S. LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE* (1988); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Stempel, *All Stressed Up But Not Sure Where to Go: Pondering the Teaching of Adversarialism in Law School*, 55 BROOKLYN L. REV. 165 (1989) (Book Review of LANDSMAN).

10. On the appeals process, see generally U. BENTELE & E. CARY, *APPELLATE ADVOCACY* (1990); R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* (2d ed. 1989).

11. Regarding the U.S. Supreme Court process, see generally R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* (6th ed. 1986).

cretion, or conduct that materially affects the rights of a party.<sup>12</sup>

Arbitration is quite similar to civil litigation but involves some differences that certain litigants may find significant.<sup>13</sup> The arbitration pleadings are even more streamlined than those permitted in federal court. Discovery in arbitration proceedings is largely limited to exchange of documents among the parties, usually with a narrower scope of permissible discovery, although arbitrators may order more extensive discovery. Arbitrators typically engage in less pretrial management than judges, usually limiting their involvement to meeting with the parties to resolve issues relating to discovery, scheduling, or format of the arbitration hearing. Pretrial or midst-of-trial disposition of the controversy is virtually unknown. The arbitration hearing itself is much like an adversarial court proceeding, except that evidence rules are relaxed or nonexistent and the style of presentation more informal. After hearing the evidence, the arbitrator usually renders a decision within a matter of days or weeks and announces the result in spare prose. In most cases, arbitrators are not required to give reasons for their decision.<sup>14</sup>

Review is more limited than in court cases. A losing party may petition the appropriate court to vacate or modify an award but arbitrations are only overturned in limited circumstances that usually require fraud, evident bias, corruption, or arbitrators exceeding their authority.<sup>15</sup> Review is sought first in the district courts, with a right of appeal.

Many regard the principal difference between litigation and arbitration as the identity of the decisionmakers. Litigation often entails a right to a jury trial. Jurors are typically drawn from lists of layper-

12. See generally S. CHILDRESS, STANDARDS OF REVIEW (1986); Stempel, *Rehnquist, Recusal, And Reform*, 53 BROOKLYN L. REV. 589, 661-63 (1987).

13. On the differences between arbitration and litigation, see generally C. PETERSON & C. MCCARTHY, ARBITRATION STRATEGY AND TECHNIQUE (1986) (hereinafter "PETERSON & MCCARTHY").

14. One exception is the Society of Maritime Arbitrators, in which awards are accompanied by written opinions. See Soc'y of Maritime Arbitrators, Inc., *Maritime Arbitration in New York* 4 (1988). However, even in protracted or complicated cases, arbitration opinions are usually considerably less detailed than judicial opinions. See, e.g., *In re M. Golodetz & Co. Inc. and El Libertad Corp.* (S.M.A. April 24, 1979) (on file with St. Mary's Law Journal).

15. See *infra* text accompanying notes 273-75 (describing the standards and procedures for confirming, vacating, and modifying arbitration awards set forth in the United States Arbitration Act). Labor arbitration awards are reviewed under a slightly different standard that seeks to determine whether the arbitrator acted within the scope of authority conveyed by the collective bargaining agreement. See *infra* text accompanying note 270.

sons, with jury size ranging from six to twelve, depending on the jurisdiction. Judges are almost always lawyers of substantial experience and accomplishment. In federal courts, the trial judge holds a full-time job providing substantial pay and benefits and has life tenure, subject to dismissal only for significant malfeasance. The arbitrator may be a businessperson, scientist, engineer, attorney, labor specialist, or other person familiar with the area in which the dispute arose. Although arbitrators are selected because of their accomplishments or expertise, they are not subject to the more detailed scrutiny that ordinarily accompanies judicial confirmation hearings. She is paid for her efforts, usually jointly by each party on a per diem basis regardless of the outcome of the dispute.

Arbitration is roughly divided into commercial and labor arbitration.<sup>16</sup> In commercial arbitration, the arbitrators generally devote only a small portion of their waking hours to arbitration, serving as arbitrators one to four times a year.<sup>17</sup> Commercial arbitrators are generally drawn from a list in which each disputant is permitted to strike potential arbitrators it does not want. Labor arbitrators typically spend a larger amount of time serving as arbitrators. For many it is their primary or only job, with most labor arbitrators performing many arbitrations each year.<sup>18</sup> Construction dispute arbitration is most properly considered a subset of commercial arbitration.<sup>19</sup>

Arbitration can also be divided into neutral and advocacy arbitration. In the former, the parties select one disinterested arbitrator or a panel of disinterested arbitrators. In the latter, each side selects a partisan arbitrator or "umpire" who will advocate its position and a disinterested arbitrator who will cast the swing vote or attempt to effect a

16. The Supreme Court's jurisprudence has maintained this distinction. The Court has viewed the Arbitration Act, 9 U.S.C. §§ 1-14 (1988), as statutory law applicable to the enforceability of commercial arbitration agreements but in deciding labor arbitrability cases has exercised its common law powers derived from Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1988). *Compare* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-03 (1967) (applying Arbitration Act to determine arbitrability of commercial dispute) *with* *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-85 (1960) (making common law determination of arbitrability question in labor dispute under authority of Section 301).

17. R. RODMAN, *COMMERCIAL ARBITRATION* § 9.1 (1984).

18. Interview with labor arbitrator Rosemary Townley (April 17, 1990).

19. *Compare* American Arbitration Ass'n (AAA), *COMMERCIAL ARBITRATION RULES* (1990) *with* American Arbitration Ass'n (AAA), *CONSTRUCTION INDUSTRY ARBITRATION RULES* (1990) (AAA rules of procedure and format for selection of arbitrators and conduct of hearing essentially same).

compromise. Neutral arbitration is most common in commercial and construction disputes. Advocacy arbitration is more common in labor matters.<sup>20</sup> In terms of the issues involved and procedures used, insurance arbitration most resembles commercial arbitration; but it often uses advocacy arbitration, with each side selecting an arbitrator and the two arbitrators selecting a third arbitrator.<sup>21</sup>

A significant difference between arbitration and litigation centers on the decision-making process. As noted, judges must give reasons for their decisions.<sup>22</sup> Even in a jury trial, judges are often compelled to provide written decisions on pretrial motions and usually write opinions when ruling on post-trial motions that challenge a jury's verdict.<sup>23</sup> In making these decisions, judges are expected to adhere to a set of specific principles and procedures, what one might term "legal logic," in rendering decisions. Where precedent emanates from a higher court in the controlling jurisdiction, it is said to be mandatory rather than merely influential.<sup>24</sup> Arbitrators are less fettered. They are allowed, and often expected, to decide controversies according to their knowledge of industry custom, rough justice, overall equity, and their gut reaction to the dispute. An additional difference is the amount of publicity accorded decisions. Published judicial opinions are usually widely available in bound case reports or through computerized databases. Arbitration decisions are less available and may even be treated as confidential by agreement of the parties. As a result, arbitration precedent is largely a function of the arbitrator's own experiences or an industry grapevine rather than a published body of influential or controlling law.<sup>25</sup> Some states mandate arbitration in certain circumstances. For example, first-party automobile insurance disputes between policyholder and insurer must be arbitrated in most

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20. See R. GORMAN, *LABOR LAW* 450-455 (1982).

21. See, e.g., *Transit Casualty, Co. v. Trenwick Reinsurance Co.*, 659 F. Supp. 1346, 1350 (S.D.N.Y. 1987).

22. See FED. R. CIV. P. 52(a) (trial court rendering decision must make findings of fact and conclusions of law in writing or on record before court reporter).

23. See D. HERR, R. HAYDOCK & J. STEMPEL, *MOTION PRACTICE* § 22.1 at 491-93 (1985).

24. See H. JONES, J. KERNOCHAN & A. MURPHY, *LEGAL METHOD* 255-318 (1980). Even the classic B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1928), which openly acknowledged that judges do not function in a formalist vacuum, started from the premise that legal decision making at least begins with basic axioms, logic, and precedent.

25. See Interview with former Hostra Law School Dean and noted labor arbitrator Eric Schmertz (July 7, 1984), at 58 in C. Friedman, *Oral History: Labor Arbitrators* (unpub. collection on file with St. Mary's Law Journal).

states.<sup>26</sup> In typical commercial and labor situations, however, arbitration results because the parties have agreed to it.

Postdispute arbitration agreements, arising after the parties are in conflict, usually present few enforcement problems. In the bright light and heat of the dispute, the parties generally have counsel, are aware of the distinctions between arbitration and litigation, know the potential impact of the facts and law upon the controversy in the respective forums, and will be held to the terms of any written arbitration agreement. Predispute arbitration agreements, entered into as part of a contract or collective bargaining agreement made when the parties were not disputing, have presented more difficult enforcement questions. Prior to a controversy, at least one party is likely not to appreciate the differences between arbitration and litigation or to have failed to anticipate the types of disputes which might arise from the contract and whether those issues are more likely to be favorably resolved in a particular forum. Most workers subject to a collective bargaining agreement are not involved in the negotiation of the agreement at all. Thus, enforcement of a predispute agreement is more likely to seem unfair, making courts flinch from their usual propensity to require conformity to explicit contract language.

This brief description does not answer what appears to be a fundamental underlying judicial concern in cases involving enforcement of predispute arbitration agreements: is the likely quality of the arbitration proceeding and disposition sufficiently comparable to litigation? If the courts faced with an enforcement decision are sufficiently skeptical of the relative quality of the arbitration disposition, they are less likely to enforce the arbitration agreement. Although the courts' concern is understandable, it is not particularly logical. If the parties have in fact validly agreed to arbitrate, one might regard this as a situation in which a judge will be, to paraphrase Justice Holmes, happy to help them reach Hell, or at least compelled to help them because of the force of contract law precedent, which generally does not relieve persons from bad bargains.

In addition, this article takes the view that the available literature has yet to demonstrate the superiority of either arbitration or litigation for particular types of disputes. To be sure, plaintiffs' and defense attorneys, labor and management attorneys, broker and

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26. See, e.g., MINN. STAT. ANN. § 65B.525 (West Supp. 1990).

shareholder attorneys all have their preferences but this does not begin to answer the question of which forum more often achieves a just result. My answer is: "it depends." It depends on the individual arbitrators, judges, and jurors. Although the quality control mechanism of appellate review upon a richer record derived from greater discovery and the required explanation of judicial decisions probably results in more finely tuned and accurate decisions by courts, courts tend to take longer, cost more money, and lack the expert fact finders found in arbitration. In sum, current data do not establish a clear advantage to either mode, which suggests courts might do well to allow the contractual commitments of the parties to determine the forum for dispute resolution.

## 2. A Brief History of Arbitration

Just as government is a monopoly of the legitimate means of coercion, courts in civilized societies might be defined as a government-created monopoly on the legitimate and enforceable means of dispute resolution.<sup>27</sup> However, courts have at best held only an imperfect monopoly on dispute resolution. The courts themselves have disavowed monopolist status or tacitly acknowledged their inability to obtain it by setting reasonably broad parameters on self-help,<sup>28</sup> and almost always condoning if not overtly approving informal, non-judicial settlement.<sup>29</sup> Occasionally, other means of resolving disputes arise and gain popularity as an alternative to the courts.<sup>30</sup>

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27. See C. BEARD, *AMERICAN GOVERNMENT AND POLITICS* 153-55 (1918); E. GRIF-FITH, *THE AMERICAN SYSTEM OF GOVERNMENT* 166-168 (1965); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) ("Society must enforce" its legal rules; "a minimum of state intervention is always necessary").

28. See Fletcher, *Learning to Live With the Federal Arbitration Act—Securities Litigation in a Post-McMahon World*, 37 EMORY L.J. 99, 133-37 (1988) (describing judicial tolerance of and assimilation of alternative remedies, forums, or rules of resolution).

29. See D. HERR, R. HAYDOCK & J. STEMPEL, *MOTION PRACTICE* § 20.6, at 456-65 (1985) (courts encourage settlement and enforce litigation settlements, having practical effect of precluding trial).

30. See Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64, 65 (1983) (federal judge describes success of compulsory court-annexed arbitration program); Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 274-77 (1982) (former Chief Justice urges courts and litigants to explore alternatives to litigation, especially arbitration); Fletcher, *Learning to Live with the Federal Arbitration Act—Securities Litigation in a Post-McMahon World*, 37 EMORY L.J. 99, 133-37 (1988) (describing rise of law merchant and arbitration); Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 43-45 (1980) (federal judge urges



Arbitration proved to be one of the more popular and enduring alternatives, with roots at least as deep as the British Law Merchant, a specialized set of rules governing commercial disputes in England during the Eleventh Century. The Law Merchant was an outgrowth of manufacturers' and traders' attempts to arrange for expedited resolution of their disputes in accordance with the customs of the trade.<sup>31</sup> Admiralty matters were often determined by the Law Merchant.<sup>32</sup> For many decades, the Law Merchant was administered—and decided—by non-lawyers.<sup>33</sup> Eventually, the Law Merchant ceased to exist as a separate entity and cases formerly decided by it were adjudicated in the English courts of common pleas.<sup>34</sup> The doctrines and principles of the Law Merchant in effect became precedent applied by the official English courts.<sup>35</sup>

Although the historical record is not clear, it seems likely that the absorption of the Law Merchant into the official British Courts during the late Eighteenth Century begot the rise and popularity of commercial arbitration as the more formal courts eroded much of the Law Merchant's speed, inexpensiveness and informality, thus creating a market in the business community for an alternative forum. In any event, merchants began to provide for arbitration of their contractual

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modified, often non-binding mini-trial as means of encouraging settlement or replacing full trial with binding mini-trial).

31. Holdsworth, *The Development of the Law Merchant and Its Courts* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 289, 313-31 (1907); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 662-64 (5th ed. 1956). However, arbitration of commercial disputes predates the British Law Merchant. Arbitration clauses appear to have been common in Mediterranean shipping and other commercial contracts at least as early as the Middle Ages. COHEN, COMMERCIAL ARBITRATION AND THE LAW 78 (1918). See also McLaughlin, *Introduction to Symposium*, 15 BROOKLYN J. INT'L. L. 3 (1989) (describing Law Merchant as "transnational body of flexible, business-oriented rules and customs used by merchants in the Middle Ages"). I focus on the Law Merchant because of the obvious connection between British and American judicial attitudes toward arbitration.

32. Holdsworth, *The Development of the Law Merchant and Its Courts* in 1 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY 302-303 (1907); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 662 (5th ed. 1956).

33. Holdsworth, *The Development of the Law Merchant and Its Courts* in 1 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY 302-303 (1907).

34. *Id.* at 328; Fletcher, *Learning to Live With the Federal Arbitration Act—Securities Litigation in a Post Mc-Mahon World*, 37 EMORY L.J. 99, 134-35 (1988).

35. Burdick, *The Development of the Law Merchant and Its Courts* in 1 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY 302-303 (1907); Fletcher, *Learning to Live With the Federal Arbitration Act—Securities Litigation in a Post Mc-Mahon World*, 37 EMORY L.J. 99, 134-35 (1988); Holdsworth, *Contributions of the Law Merchant to the Common Law* in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 34, 50 (1909).

disputes in significant numbers during the Nineteenth Century.<sup>36</sup>

Even in more important matters evidenced by written agreements there was often no formal agreement to arbitrate but rather an implied understanding that questions involving delayed delivery, quality of merchandise, or terms of payment would be decided by a third party with knowledge of the trade.<sup>37</sup> It appears that arbitration initially meant presenting the dispute to a selected third party merchant or group of merchants and asking the third party for an oral ruling.<sup>38</sup> If one of the disputants failed to abide by the decision, the other side's chief remedy was adverse publicity and ostracism, undoubtedly a weak reed where the difficult adversary was a "one-shot" player<sup>39</sup> whose principal operations lay within another merchant community.

### 3. Judicial Hostility to Arbitration Agreements

#### a. The English Roots

Even though commercial arbitration in England and on the continent was developing an infrastructure and a degree of custom, predictability, and popularity, it appears to have always lacked one important component—effective coercive enforceability. The disputant who wished not to arbitrate or to disregard the arbitration result was constrained only by social and market forces. Legal and governmental forces refused to become involved to vindicate the explicit ar-

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36. A. H. MANCHESTER, *SOURCES OF ENGLISH LEGAL HISTORY 1750-1950*, at 145 (1984) (discussing 1881 court of arbitration established by merchants to settle commercial disputes).

37. Jones, *An Inquiry Into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 446 (1958) (hereinafter "Jones").

38. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 134 (1934) (hereinafter "Wolaver").

39. See ARBITRATION OF INTERSTATE COMMERCIAL DISPUTES: JOINT HEARINGS ON S. 1005 AND H.R. 646 BEFORE THE SUBCOMMITTEES OF THE COMMITTEES OF THE JUDICIARY, 68th Cong., 1st Sess. 14 (1924) (hereinafter "*Joint Hearings*") (testimony of Julius Cohen) ("the difficulty is that men do enter into such agreements and then afterwards repudiate the agreement"). A "one-shot" player is essentially a stranger who has little or no connection to others in the transaction and therefore has little incentive to care about how she is perceived after the transaction in order to facilitate future deals. This contrasts to a "repeat player," one who has had and expects to have regular commercial dealings with the others involved in a particular transaction. I have borrowed this terminology from its earlier use in describing litigation parties. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95 (1974); see also R. FISHER & W. URY, *GETTING TO YES* 20-21 (1981) (with repeat players, preservation of good relationship often matters more than outcome of individual dispute).

bitration agreement or the implicit arbitration understanding. Several merchants faced with adversaries who refused to arbitrate sought specific enforcement, reasoning that damages were an inadequate remedy because the advantages of swift, informal, predictable, inexpensive arbitration were lost forever without specific enforcement.<sup>40</sup>

But merchants who sought to enforce arbitration agreements in the English courts met resistance.<sup>41</sup> The English courts uniformly refused to enter injunctions requiring the recalcitrant commercial actor to arbitrate. In some cases, the courts held the arbitration agreement to be void as against public policy.<sup>42</sup> The rationale of these cases is not clearly stated but appears to hold that courts have a dispute resolution authority that cannot be taken away by individual consent as this would weaken the overall authority and effectiveness of the courts. Although this concern has some root validity and continues today among those who fear wholesale privatization of certain classes of controversies, such as securities broker or discharged brokerage employee disputes,<sup>43</sup> it fails to adequately distinguish why courts have always permitted settlement, have never required that all disputes be brought to court, and have never even required satisfaction of a judgment. For the most part, parties have been and remain free to settle a dispute on their own terms even after the state has exercised its full, undiluted judicial authority.

In some English cases, the courts found predispute arbitration agreements voidable at the option of either party.<sup>44</sup> In other cases, probably the majority, the courts viewed the arbitration agreement, particularly if it was evidenced by a signed writing, as a legitimate contract but one that was not specifically enforceable.<sup>45</sup> The theory of

40. See, e.g., *Agar v. Macklew*, 2 Sim. & St. 418, 420-23, 57 Eng. Rep. 405, 406-07 (V.C. 1825); *Wilks v. Davis*, 3 Mer. 507, 36 Eng. Rep. 195 (Ch. 1817) (both Petitioners arguing that the arbitration clause did not benefit them if not specifically enforced).

41. See, e.g., *Kill v. Hollister*, 1 Wils. 129, 129, 95 Eng. Rep. 532, 532 (K.B. 1746) (enforcement of a referral would oust the jurisdiction of the courts); *Waters v. Taylor*, 15 Ves. 10, 27, 33 Eng. Rep. 658, 665 (Ch. 1708) (court of equity will not decree specific performance of agreement to refer).

42. See e.g., *Mitchell v. Harris*, 4 Bro. C.C. 311, 2 Ves. Jun. 129, 136, 30 Eng. Rep. 557, 560 (Ch. 1793); *Agar v. Macklew*, 2 Sim. & Stu. 418, 57 Eng. Rep. 405 (V.C. 1825).

43. See *infra* text accompanying notes 111-78.

44. See, e.g., *Horton v. Sayer*, 4 H. & N. 643, 157 Eng. Rep. 993 (Ex. 1859).

45. See, e.g., *Scott v. Avery*, 5 H. L. C. 811, 10 Eng. Rep. 1121 (H.L. 1856) (agreement of parties to submit to arbitration is permissible but will not oust the jurisdiction of the courts over the matter in controversy).

this line of cases holds that specific enforcement of contracts was available only in extraordinary cases and that breach of an arbitration contract was not such a case.<sup>46</sup> The movant seeking arbitration was then left with no real alternative but suit in the law courts. While pleading breach of the arbitration agreement, it could perhaps append a claim for damages. Where attempted, damages were usually deemed *de minimus*<sup>47</sup> or too difficult to calculate with reasonable certainty and thus not recoverable.<sup>48</sup>

Despite its chilly reception in the British courts, arbitration agreements continued to be popular among merchants.<sup>49</sup> A significant portion of the business community abided by arbitration agreements because it was honorable, or because they were afraid of informal business sanctions or found arbitration comparatively advantageous. It appears that no significant arbitration of personal injury actions, employer-employee disputes, or landlord-tenant disputes occurred during this time.<sup>50</sup> Thus, commercial arbitration—bloody, slightly bowed, but not broken—made its way to the American colonies.

#### b. American Judicial Reluctance to Enforce Arbitration Agreements

Transplanted to American soil, arbitration found no friendlier judicial climate. The colonial and ensuing state and federal courts adopted the English approach to the enforcement of arbitration agreements.<sup>51</sup> In particular, courts tended to adopt the majority British

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46. This is the off-stated venerable rule of contract remedies. See E. YORIO, *CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS* § 1.2.2, at 7-8 (1989). It continues to be the stated "rule" but one perhaps today honored more in the breach than the observance. See Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

47. See, e.g., *Thompson v. Charnock*, 8 T.R. 139, 101 Eng. Rep. 1310, 1310 (K.B. 1799) (bond submitted to arbitrator could be awarded as damages but no additional funds could be compelled by the Court).

48. See, e.g., *Street v. Rigby*, 6 Ves. 815, 817, 31 Eng. Rep. 1323, 1324 (Ch. 1802).

49. See Jones, *An Inquiry Into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 462-64 (1958).

50. See S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 189 (1985). The English cases and early cases reported in the United States deal almost solely with commercial disputes, particularly sales of goods. The absence of labor arbitration agreements is hardly surprising, since employees had no job rights but were essentially treated as if they were property of the employer. *Id.*

51. See, e.g., *Hamilton v. Home Ins. Co.*, 137 U.S. 370, 385 (1890); *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320 (C.C. Mass. 1845) (No. 14,065); *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915); *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 232 F. 403 (S.D.N.Y. 1916), *aff'd*,

rule of refusing to specifically enforce arbitration clauses but stopped short of declaring such agreements illegal or voidable.<sup>52</sup> Some jurisdictions were harsher, construing the arbitration clauses as illegal attempts to oust authoritative courts of their jurisdiction over commercial disputes.<sup>53</sup> Some decisions describe arbitration agreements as little better than pacts with the devil.<sup>54</sup> As in England, arbitration nonetheless remained alive among merchants, where the clauses were voluntarily honored or enforced through informal means. There appears to have been no discernible practice of arbitrating personal injury, labor, or housing disputes.<sup>55</sup>

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250 F. 935 (2d Cir. 1918), *aff'd*, 252 U.S. 313 (1920); *Meacham v. Jamestown F. & C.R. Co.*, 105 N.E. 653, 655 (N.Y. 1914).

52. *See, e.g.*, *Baker Salvage v. The Excelsior*, 123 U.S. 40, 51 (1887); *American-Pacific Constr. Co. v. Modern Steel Structural Co.*, 211 F. 849, 855 (9th Cir. 1914); *Munson v. Straits of Dover S.S. Co.*, 99 F. 787, 788 (S.D.N.Y.), *aff'd*, 100 F. 1005 (2d Cir. 1900); *Holmes v. Richet*, 56 Cal. 307, 312 (1880) (“[a]n agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such an agreement”). Like the English courts, American courts permitted the usually ineffective remedy of damages for breach of an arbitration agreement. *See, e.g.*, *Hamilton v. Home Ins. Co.*, 137 U.S. 370, 385 (1890); *Union Ins. Co. v. Central Trust Co.* 52 N.E. 671, 674 (N.Y. 1899); *Miller v. Junction Canal Co.*, 41 N.Y. 98, 100 (1869); *Hazzard v. Morgan*, 5 N.Y. 422, 426 (1851).

53. *See, e.g.*, *Trott v. City Ins. Co.*, 24 F. Cas. 215, 217 (C.C. Me. 1860) (No. 14,189); *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1322 (C.C. Mass. 1845) (No. 14,065).

54. *See, e.g.*, *Mitchell v. Dougherty*, 90 F. 639, 642 (3d Cir. 1898) (They “seek to accomplish what the law forbids, - the complete abrogation of the authority which it has conferred upon the Courts”).

A court's hostility to arbitration was usually more subtly and indirectly expressed. For example, in *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 252 U.S. 313 (1920) (mercifully hereinafter referred to as “*Korn-Og*”), district judge Learned Hand engaged in a hallucinogenic bit of contract interpretation that was amazingly backed by the appellate court and Justice Oliver Wendell Holmes writing for the Supreme Court. Even great minds have bad days, as the history of *Korn-Og* demonstrates. The case involved a contract for the lease (“charter party”) of a ship to transport goods from Florida to Denmark. *Id.* at 314. The contract contained a broad arbitration provision requiring all disputes relating to the agreement to be arbitrated. After the contract was signed, World War I erupted and the ship lessor refused to perform the contract, claiming force majeure impossibility. The lessee, left searching for a ship in the midst of war, understandably viewed the contract as breached and sought arbitration. *Id.* at 315. The ship owner refused. When the lessee went to court, Judge Hand and Justice Holmes took the view that since the contract was completely unperformed or repudiated by the shipper, the instant dispute did not involve the performance of the contract and hence was outside the scope of the arbitration agreement and thus not arbitrable. *Korn-og* demonstrates that shortly before passage of the Arbitration Act, federal courts still were reluctant to give effect to arbitration agreements. *Id.* at 316.

55. *See Mann, The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 470 (1984). The discussion attending Congressional con-

#### 4. Pre-Act Arbitration in America

Despite an essentially unchanging judicial hostility toward arbitration, it grew in popularity as the commercial affairs of the United States became increasingly far flung and complex. During the period prior to the Arbitration Act, shippers appear to have utilized arbitration more often than other merchants,<sup>56</sup> probably because of custom and greater concern over the forum for dispute resolution by the inherently mobile shippers. Where parties had ongoing relations, the informally swift finality of arbitration perhaps had greater appeal than the still heavily formalistic judicial process.<sup>57</sup>

By the late Nineteenth Century, many of the same forces spurred arbitration on land. Predicting what court might obtain jurisdiction of a dispute, what law applied, the competence and integrity of the bench, and the sentiments of the jury venire became increasingly difficult. In addition, lawyers became an increasing part of the commercial scene<sup>58</sup> and presumably saw the advantages of advising arbitration to their merchant clients. Various trade groups began to establish arbitration mechanisms.<sup>59</sup>

The American Arbitration Association (AAA) was formed in 1926 and established an organized system of arbitrating commercial dis-

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sideration of the Act focused entirely on commercial situations. *See generally Joint Hearings, supra* note 39.

56. *See Jones, An Inquiry Into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 460 (1958). Arbitration was popular in some colonies but dispute resolution tended to become more dominated by courts during the course of the 18th Century. *See Mann, The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 469 (1984).

57. Civil procedure in early America was similar in formality to England. Although this relaxed over time, pleading and procedure was still highly stylized, even after efforts at reform such as the 1848 Field Code in New York. *See F. JAMES & G. HAZARD, CIVIL PROCEDURE* § 67 (3d ed. 1985); L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 144-147 (2d ed. 1985). The separate federal equity rules of procedure were somewhat more flexible, but it was not until the 1938 Federal Rules of Civil Procedure that relative informality, flexibility, consolidation, and efficiency gained a major toehold in civil procedure. *See JAMES & HAZARD* at 18-20.

58. *See L. FRIEDMAN, A HISTORY OF AMERICAN LAW* 633-52 (2d ed. 1985); M. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1800-1860*, at 140-159 (1977).

59. Although trade group arbitration did not become widespread until the late 1920's, there were a few organizations such as the building trades, printing, and clothing industries that had used arbitration as early as the late 1800's. *See F. KELLOR, AMERICAN ARBITRATION* 6-8 (1948). The New York Chamber of Commerce began a formal arbitration committee and began conducting arbitrations during the early 20th century. By 1921, it had a significant volume of international commercial arbitration cases (150). *See Joint Hearings, supra* note 39, at 7-9 (statement of Charles I. Bernheimer).

putes.<sup>60</sup> Despite the extra-legal forces fueling its growth, arbitration had only limited utility so long as arbitration agreements could not be enforced. A substantial number of merchant parties to arbitration agreements found it efficient to breach for a variety of reasons, e.g. when they: had a better legal position than commercial position;<sup>61</sup> wanted a jury trial;<sup>62</sup> distrusted the arbitrator or organization and wanted appellate review;<sup>63</sup> sought consequential and exemplary damages, which were commonly thought to be more freely and generously awarded by courts;<sup>64</sup> or when both their legal and commercial positions were untenable and they desired to delay the inevitable loss.

60. The American Arbitration Association was formed through the merger of the Arbitration Society of America and the Arbitration Foundation. See F. KELLOR, *AMERICAN ARBITRATION* 15-17 (1948). Prior to AAA, the Arbitration Society of America was formed from a number of trade organizations in 1920 when New York passed a state law upon which the federal Act was patterned. See *Joint Hearings*, *supra* note 39, at 24 (statement of Alexander Rose).

61. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987). Because arbitrators are not held to strict compliance with substantive legal rules, they need not strictly impose a legal rule in cases where it would lead to an unsatisfactory result or where the commercial custom of the trade diverges from the law. Thus, a party might have a position of contract interpretation or damages amount to commercial but not legal acceptance.

62. In many contract disputes, a jury is available in either federal or state court. Although the law does not formally recognize the presence of a jury or a judge as decision maker as outcome determinative, see *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525, 531 (1958), practitioners believe that juries and judges differ in their reactions to various parties, claims, and situations. See, e.g., P. DiPERNA, *JURIES ON TRIAL* 57-60 (1984). Consequently, litigants in the *ex post* context of a dispute will often differ in their preferences for a given fact finder.

63. Review of arbitration awards is limited. See 9 U.S.C. § 10 (1988); *supra* text accompanying note 15.

64. Many states still forbid arbitrators from awarding punitive damages, although the trend seems to be in favor of permitting punitive damage awards in arbitration. Compare *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 794 (N.Y. 1976) with *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 598 F. Supp. 353, 361 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985); Bedell, *Punitive Damages in Arbitration*, 21 J. MARSHALL L. REV. 21, 39-41 (1987); Carper, *Punitive Damages in Commercial Arbitration*, 41 *ARB. J.* 27, 30-31 (Sept. 1986). Nonetheless, the conventional wisdom holds that arbitrators exercise this power less frequently and in lower magnitude than do civil juries or judges. But see Buck, *New York Stock Exchange Response to Securities Exchange Commission Request for Review of Pre-dispute Arbitration Agreements Exhibit A* (Oct. 14, 1988) (punitive damages awarded more often in securities arbitration than in litigation for sample studied) (on file with St. Mary's Law Journal).

Similarly, arbitrators appear to be more receptive to awarding enhanced damages, such as treble damages or counsel fees. See Cohen & Geyelin, *Arbitrators, in Apparent Precedent, Use RICO*, *Wall St. J.*, April 5, 1990 at B6, col. 1 (commercial arbitrators award treble damages in claim under Racketeer Influenced and Corrupt Organizations Act (RICO)).

Only if the informal costs of market punishment were high would merchants in these situations keep the arbitration bargain.

Ironically, the commercial trends that made arbitration more attractive also reflected the increasing weakness of informal, market-based coercion as a means of enforcing contracts. With a more widely flung commercial community, information about other merchants was less available, more costly, or both. Similarly, the merchant whose name was sullied as an arbitration breacher in one corner of the greater business community could simply look elsewhere for trading partners and probably find them with relative ease despite a poor track record for honoring arbitration.<sup>65</sup> In addition, the faster pace of politics, life, and commerce made it more likely that events occurring between the arbitration agreement and the dispute would change at least one party's view of the worth of arbitration or contract compliance.

## B. *The Federal Arbitration Act's Genesis, Thrust, and Context*

### 1. The Forces Supporting the Act

The whipsaw of increasing utility of arbitration agreements coupled with increasing incentives for breach and increasing costs from breach prompted action by the business community and its political allies. Merchants began criticizing judicial treatment of arbitration agreements and seeking legislative change requiring courts to enforce and defer to arbitration.<sup>66</sup> The legal community was enlisted in this cause as well, with the American Bar Association's commercial arm proposing and drafting an act to change the common law resistance to arbitration.<sup>67</sup> Although not immediately adopted, the proposal had no apparent organized opposition and gained an increasing following. By 1924, a bill virtually identical to the current act had co-sponsors and appeared on the brink of passage.<sup>68</sup> The Act passed in both Houses and was signed into law during 1925, with an effective date of

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65. See *Joint Hearings*, *supra* note 39, at 14 (statement of Julius Cohen).

66. Note, *Effect of the United States Arbitration Act*, 25 GEO. L.J. 443, 445 (1937) (business support aided passage of Act); see also *Joint Hearings*, *supra* note 39, at 21-24. The proponents of the Act, and probably the Congress that passed it, viewed arbitration as a substantial means of docket reduction and saw themselves as living in the midst of a litigation explosion. See *id.* (listing 67 business organizations supporting proposed Act and letters of endorsement from various groups).

67. See *id.* at 10 (statement of W.H.H. Piatt).

68. See *id.*



January 1, 1926;<sup>69</sup> it has been essentially unchanged since its inception more than 60 years ago.

## 2. The Act in Brief

Section 1 of the Act broadly defines two key terms used subsequently in the Act, "maritime transactions" and "commerce." Courts have read the commerce definition as meaning any activity involving interstate negotiation, communication, manufacture, shipment, or other activity.<sup>70</sup> As the definition of interstate commerce has expanded<sup>71</sup> the Act's definition of commerce has for the most part<sup>72</sup> similarly expanded to the boundary of acceptable notions of the reach of federal power. Section 2 of the Act<sup>73</sup> provides that written agreements to arbitrate, whether part of an initial contract in commerce or a maritime transaction or standing as a separate agreement pertaining to such a contract, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract."<sup>74</sup> In other words, arbitration agreements were legislatively removed from the judicial deep freeze to be treated as well or as poorly as any other contract coming before the courts.<sup>75</sup>

Where a dispute as to arbitrability exists, the Act supplies the substantive rules for decision as to whether to uphold an arbitration agreement, stay judicial proceedings, compel arbitration, confirm the

69. United States Arbitration Act, Pub. L. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 14 (1988)). Section 1 of Pub. L. No. 282, 61 Stat. 669 (1947) was codified and enacted into positive law in Title 9 of the U.S. Code. Prior to that, the text of Title 9 containing the Act had been legally viewed as "merely prima facie evidence of the law." S. REP. NO. 664, 80th Cong., 1st Sess. 1 (1947); see also Karmel, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law*, 54 U. CHI. L. REV. 1373, 1373 n.2 (1987); Sturges & Murphy, *Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 580 (1952).

70. See *Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984); *Garfield & Co. v. Wiest*, 308 F. Supp. 1107, 1109 (S.D.N.Y. 1970), *aff'd*, 432 F.2d 849 (2d Cir. 1970), *cert. denied*, 401 U.S. 940 (1971).

71. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

72. An exception is the courts' construction of the exclusion in section 1 of the Act. See 9 U.S.C. § 1 (1988). Workers "engaged in interstate or foreign commerce," has been increasingly read as applying only to workers in the interstate transportation industry. See, e.g., *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971).

73. 9 U.S.C. § 2 (1988).

74. *Id.*

75. See H.R. REP. NO. 96, 68th Cong., 1st Sess. (1924); S. REP. NO. 536, 68th Cong., 1st Sess. (1924). See generally *Joint Hearings*, *supra* note 39.

award, vacate the award, or alter the award.<sup>76</sup> However, there must be an independent basis for federal jurisdiction before federal courts will hear claims made pursuant to the Act.<sup>77</sup> Although recent Supreme Court jurisprudence has perhaps left open some small crack of doubt, the prevailing view is that even strong state statutory policies do not countermand the Act.<sup>78</sup> The Act, where appropriate, is applicable substantive law in either state or federal courts.<sup>79</sup> The Act also imposes a host of procedural requirements upon the parties seeking to promote or attack arbitration.<sup>80</sup>

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76. *Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 4-5 (1983).

77. *Moses H. Cone*, 460 U.S. at 25 n.32.

78. See Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61, 62-64 (1985) (suggesting that some state laws consistent with federal Act or relating to parties rights separate from arbitration are not foreclosed by view of federal preemption expressed in *Moses H. Cone*, and *Keating* but specific future applications uncertain); see also *Perry v. Thomas*, 482 U.S. 483, 493-95 (1987) (Stevens, J., dissenting) (contending that *Cone* and *Keating* were wrongly decided and misread Congressional intent, perhaps suggesting Congressional intervention to narrow or overturn *Cone* and *Keating*); *Securities Industry Ass'n v. Connolly*, 883 F.2d 1114, 1118 (1st Cir. 1989), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2559, 109 L. Ed. 2d 742 (1990). *Connolly* struck down a federal preemption on grounds of Massachusetts law, making it improper for brokers to insist that a customer sign an arbitration agreement as a condition of opening an account. This suggests that any remaining role for state law specific to arbitration is extremely limited. See *Connolly*, 883 F.2d at 1120-22. However, if the parties have stipulated in the contract to apply state substantive law to their dispute, this private choice of law is binding even where the selected state law conflicts with the Act. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Univ.*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1248, 1253, 103 L. Ed. 2d 488, 498-99 (1989); see also, Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305 (1985) (notes lurking undecided questions of state and federal law in construing arbitration agreements).

79. *Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984).

80. The most obvious and picayune of these are the documentation provisions of § 13 of the Act and the service provisions and time limit of § 12 of the Act regarding motions to the court for confirmation of an arbitration award. They tend to be stringently enforced by the courts. See, e.g., *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986); *Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598, 600 (8th Cir. 1981). The statute, 9 U.S.C. § 6 (1988), states that Arbitration Act requests shall be treated as civil motions, with whatever litigation baggage that entails. See generally HERR, HAYDOCK & STEMPEL, *supra* note 8. Section 7 contains provisions regarding witnesses, fees, and compelling attendance that also look procedural but apply as substantive law in both state and federal court. In addition, § 4 concerning orders compelling arbitration, and discussed at length below, requires five days notice to the other party of an application for the order. It also requires any hearing or other proceedings directed toward the application to take place in the district where the application is filed. See *Econo-Car Int'l., Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391, 1394 (3d Cir. 1974). Section 4 also grants the party resisting arbitration the right to a jury trial on the issue of the making of an arbitration agreement.

The Act further promotes arbitration by providing that litigation commenced by a party to an arbitration agreement may be stayed by the court until completion of the arbitration provided the stay applicant "is not in default in proceeding with such arbitration."<sup>81</sup> The court must first be "satisfied that the issue involved . . . is referable to arbitration."<sup>82</sup> Section 4 of the Act establishes that a party may petition the federal courts for an order compelling arbitration if another party has refused to honor an arbitration agreement.<sup>83</sup> If the existence or scope of the arbitration agreement or adherence to it is in dispute, the judge is to "proceed summarily to the trial"<sup>84</sup> of that issue, holding a bench trial in admiralty matters or where the allegedly defaulting party fails to demand a jury trial. The defendant may demand a jury trial.<sup>85</sup>

The Act provides that any contractually specified method of arbitration shall be followed.<sup>86</sup> If the parties have not selected an arbitrator, have failed to follow the selection method, or there has been an unavoidable lapse or vacancy, the court may appoint an arbitrator or arbitrators upon any party's application.<sup>87</sup> Unless the agreement provides for multiple arbitrators, the court will limit its interstitial involvement to selecting a single arbitrator.<sup>88</sup> Section 7 provides

81. 9 U.S.C. § 3 (1988).

82. *Id.*

83. 9 U.S.C. § 4 (1988).

84. *Id.*

85. 9 U.S.C. § 4 (1988). The most important and potentially confusing features of Sections 3 and 4 are probably their allocation of decisionmaking authority between judge and arbitrator. Compare *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-51 (1986) with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967). Despite any confusion, it would seem that the process deriving from the Act works as follows: when faced with an issue of arbitrability, the court must determine if there exists between the parties an agreement to arbitrate disputes of the nature currently pending; if so, the court compels arbitration (or at least stays litigation in its jurisdiction), leaving for the arbitrator(s) any defense to arbitration based on defects going to the very formation of the contract as a whole. See *Furnish, Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CALIF. L. REV. 317, 320-21, 348-49 (1979). Thus, defenses based on any contract law or interpretation of contract language, unless directly focusing on the validity or scope of the arbitration provision, are referred to the arbitrators rather than decided by the courts in first instance. *Id.*

86. 9 U.S.C. § 5 (1988).

87. *Id.*

88. See *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 642 F. Supp. 1155, 1157 (N.D. Ill. 1986), *aff'd*, 831 F.2d 709 (7th Cir. 1987). Where possible, the court will avoid selecting the specific arbitrator by requiring the disputants to participate in a particular process. See *ATSA of California, Inc. v. Continental Ins. Co.*, 702 F.2d 172 (9th Cir. 1983), *amended*, 754 F.2d

judicially backed procedural powers to the arbitrator(s): subpoena of witnesses and documents, and payment of witness fees.<sup>89</sup> Sections 9, 10 and 11 deal with the confirmation, vacation, or modification of arbitration awards.<sup>90</sup> Sections 12 and 13 set forth the procedural and documentary requirements necessary in judicial proceedings supporting and attacking arbitration awards.<sup>91</sup> The court "must grant an order" confirming the award unless the court finds the case to meet one of the following narrow grounds:

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (c) 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.
- (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>92</sup>

The courts have generally accorded these exceptions the narrow and confined scope one might expect from the limited enumerated grounds, the language of the section, and the conceded thrust of the entire Act to encourage arbitration.<sup>93</sup>

When viewed as a whole, the Act certainly seems consistent with

1394, 1395 (9th Cir. 1985) (requiring parties to proceed under International Chamber of Commerce Rules to select neutral arbitrator).

89. 9 U.S.C. § 7 (1988); *see, e.g.*, *Bayside Enterprises, Inc. v. Hanson*, 675 F. Supp. 1375, 1380 (D. Me. 1987) (arbitrator may hold party in contempt for failing to honor subpoena).

90. 9 U.S.C. §§ 9-11 (1988).

91. 9 U.S.C. §§ 12-13 (1988).

92. 9 U.S.C. § 10(a)-(d) (1988).

93. *See, e.g.*, *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680-81 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *Floracynth, Inc. v. Pickholz* 750 F.2d 171 (2d Cir. 1984). The courts have largely refused to apply § 10(b) where the arbitrators are from industries or companies sympathetic to one of the parties. *See Morelite Const. Co. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984). Unless the arbitrator openly declares extra-record allegiance to a party or stands in a highly compromised position such as father-son, § 10(b) does not apply. *Id.* at 81-82.

Subsection 10(c) is seldom applied as well, although this may be the result of a high degree of caution on the part of most arbitrators, who are often criticized for granting innumerable continuances or fragmented hearings in order to accommodate their own or the parties schedules. Where arbitrators have been unbending in setting hearing schedules, they have occasionally run afoul of § 10(c) with the courts and awards have been vacated. *See, e.g.*, *Teamsters*,

the conventional wisdom that Congress in 1925 sought to usher in a new day for contractual arbitration. Congress did this by statutorily requiring that arbitration agreements receive judicial deference and by equipping the federal trial courts with the procedural machinery to enforce the new order. Recent amendments to the Act concerning appealability of arbitration decisions also carry forth this theme.<sup>94</sup> In passing the Act, Congress envisioned arbitration clauses contained in admiralty documents and commercial contracts between merchants.<sup>95</sup> The statute's language and legislative history suggest that Congress did not anticipate the popular use of arbitration clauses in broker-dealer customer agreements, apartment leases, construction contracts between consumer and contractor, collective bargaining agreements, or employment contracts. Indeed, Congress specifically exempted at least a substantial number of employment contracts from the reach of the Act.<sup>96</sup> However, Congress did not exempt from the Act any particular claims, although it appears to have been well aware that arbitration differed from litigation in several respects concerning the traits

*Chauffeurs, Warehousemen and Helpers Local Union No. 506 v. E.D. Clapp Corp.*, 551 F. Supp. 570, 577 (N.D.N.Y. 1982), *aff'd*, 742 F.2d 1411 (2d Cir. 1983).

Section 10(d) has been the place of greatest judicial intervention to upset arbitration awards. Courts have focused with some care both on the "exceeding powers" language and the "imperfectly executed powers" segments and applied them toward awards. *See, e.g.*, *Milwaukee Typographical Union v. Newspapers, Inc.*, 639 F.2d 386, 391 (7th Cir.), *cert. denied*, 454 U.S. 838 (1981); *Raytheon Co. v. Computer Distrib., Inc.*, 632 F. Supp. 553, 558 (D. Mass. 1986). Of particular interest is the judicial articulation of grounds for vacating the award where the arbitration result evidences "manifest disregard of law" as an imperfect execution of powers. *See, e.g.*, *Sheet Metal Workers Int'l. Ass'n. v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985). For this ground to apply, the arbitrators need not only have failed to enter an award roughly approximating a court's legal result on the same facts but must also have either blatantly disregarded the law or perhaps applied it with intolerably egregious error. *Id.* Thus, it is perhaps not completely correct to suggest that "arbitrators need not follow the law." *See, e.g.*, *Shearson/American Express v. McMahon*, 482 U.S. 220, 234 (1987) (Blackmun, J., dissenting).

94. In 1988, Congress amended § 15 of the Act to provide for immediate appealability of orders denying arbitration, but did not grant express interlocutory review of orders enforcing arbitration agreements. *See Fleck v. E.F. Hutton Group, Inc.*, 873 F.2d 649, 650 (2d Cir. 1989); *but see Thomson McKinnon Sec. Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir. 1989) (order compelling arbitration may be final and appealable where only issue before the court was choice of arbitration body).

95. *See Joint Hearings, supra* note 39, at 14-17 (testimony of Julius Cohen). Attorney Cohen testified on behalf of merchants supporting the Act. Several merchants also testified in favor of the Act. The entire discussion assumed that arbitration agreements and disputes would occur in connection with commercial contracting. *Id.*

96. *See* 9 U.S.C. § 1 (1988) (exempting from Act "contracts of employment of seaman, railroad employees or any other class of workers engaged in foreign or interstate commerce").

of the decision maker, and the degree of procedural formality.<sup>97</sup> After enactment of the Federal Rules of Civil Procedure in 1938, which vastly expanded discovery in federal civil litigation, arbitration also differed significantly in that it generally provided substantially less discovery than litigation.<sup>98</sup>

### III. THE PUBLIC POLICY EXCEPTION TO ARBITRABILITY: SOME CLAIMS ARE MORE EQUAL THAN OTHERS

#### A. *The Exception and Its Rationale*

Despite the absence of any exceptions provided in the language of the Act, the Supreme Court and lower courts have invoked occasional exceptions to arbitrability based on notions of public policy. Judicial consideration of material outside statutory or contract text and reported precedent is hardly news to lawyers brought up in this post-Realist era.<sup>99</sup> Judicial resort to extra-legal factors is often tacit, occasionally done in the guise of another mode of analysis<sup>100</sup> or the result of extra-record assumptions about the parties, the world, and the implications of the case.<sup>101</sup> Courts also occasionally grasp the cudgel of

97. See *Joint Hearings*, *supra* note 39, at 5 (testimony of Charles I. Bernheimer).

98. On the differences between arbitration and litigation, see *supra* text accompanying notes 13-25 and C. PETERSON & C. MCCARTHY, *ARBITRATION STRATEGY AND TECHNIQUE* 83-4 (1986); R. GORMAN, *LABOR LAW* 540-45 (1982).

99. Although a general definition of prevailing legal thought is always open to criticism, perhaps because the field is inherently pluralistic, most observers suggest that the Legal Realist movement of the 1920-40 period, although not completely successful, altered American legal thinking sufficiently that major tenants of Realist thought have become the bedrock of current legal philosophy, making this a "Post-Realist" era. See B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 23-45 (1984); J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 27-29 (1985); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 *HARV. L. REV.* 1669 (1982).

Despite the controversy over what actually does and should occur in judicial decisionmaking and whether it is legitimate, there is widespread agreement that courts resort to much more than formalistic syllogism in order to decide cases. See M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 1-17 (1987) (hereinafter "Kelman"); G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31-44 (1982).

100. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 172-78 (1982) (finding use of inapt doctrines or misapplication of doctrines to reach right result that would not be obtained if "official" approach were followed; finding this a type of judicial "subterfuge").

101. See Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 *U. PA. L. REV.* 655, 657, 670-74 (1988) (illustrating empirical inaccuracy in Supreme Court's assessment of impact of statutes requiring parental notification prior to minor's abortion); Davis, *"There is a Book Out. . .": Judicial Absorption of Legislative Facts*, 100 *HARV. L. REV.* 1539 (1987) (illustrating judicial use of extra-record materials as though undeniable fact).

“public policy” to pound seemingly plain statutory language into a shape that limits the reach of a statute.

The Supreme Court has never explicitly defined the public policy exception to arbitration despite having applied it to refuse to enforce some arbitration clauses.<sup>102</sup> Perhaps the leading article on the topic describes the doctrine as founded on “an awareness that arbitration is unsatisfactory for resolving certain classes of disputes” and holding that “matters involving issues of public policy may not be decided by arbitrators”<sup>103</sup> but notes that the scope of the doctrine was indeterminate in 1981.<sup>104</sup> During the intervening years, the Court has backed away from the doctrine, rejecting some of its former applications entirely.<sup>105</sup> Nonetheless, the Court has never expressly rejected the public policy exception. Several justices expressly cling to it.<sup>106</sup>

As previously noted, this article argues that treating the enforcement of arbitration agreements disparately according to the nature of

102. See Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 482-83 (1981) (hereinafter “Sterk”).

103. *Id.* at 482 (citing as examples antitrust, patent, child custody and other areas).

104. *Id.*; see also Morgan, *Contract Theory and the Source of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059 (1987). Both Morgan and Sterk argue for refusing to enforce arbitration agreements, or at least treating them differently than other contracts, when the matter to be arbitrated is also within the ambit of a statute that was designed to achieve public social goals rather than private dispute resolution. Prof. Sterk would also apply the exception in cases touching upon statutes “enacted to protect one class of contracting parties from imposition of contractual terms by another class of contracting parties with greater bargaining power,” although he equivocates slightly on this point. See Sterk, *Enforceability of Agreement to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 542-43 (1981).

105. See, e.g., *Rodriguez De Quijas v. Shearson/American Express*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1917, 1919, 104 L. Ed. 2d 526, 528 (1989) (overruling *Wilko v. Swan* and disapproving its factual and policy assumptions); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228-232 (1987) (disapproving public policy aspects of holding in *Wilko v. Swan*); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 620-24 (1985) (disapproving rationale of public policy exception for antitrust cases in *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968)).

106. See *Rodriguez De Quijas*, \_\_\_ U.S. at \_\_\_, 109 S. Ct. at 1922, 104 L. Ed. 2d at 531 (Justices Stevens, Blackmun, Brennan and Marshall object to majority’s overruling of *Wilko*, finding many *Wilko* concerns remain relevant); *McMahon*, 482 U.S. at 243 (Blackmun, J., dissenting) (Justices Blackmun, Brennan, and Marshall dissented, suggesting *Wilko* rightly decided and same approach should apply to *McMahon*); see also *McMahon*, 482 U.S. at 268 (Stevens, J., dissenting) (on grounds that even if policy based rationale of *Wilko* was in error, decision not so greatly in error that it should not be followed in light of 30 years reliance on its reasoning); *Mitsubishi Motors*, 473 U.S. at 640 (Stevens, J., dissenting) (dissenting from majority’s criticisms of antitrust exception to arbitrability as well as to majority’s construction of arbitration clause and contract at issue in case).

the dispute rather than the quality of the parties' consent to the agreement constitutes judicial misuse of public policy considerations and cheapens legitimate use of public values as an aid to interpretation. The type of public policy analysis used to decide arbitrability questions increases public cynicism that law really is the sum of the bench's digestion. To understand my desire to greatly narrow or abrogate the public policy exception, one need only review the erratic history of its use.

## B. *The Exception Applied: Inconsistency and Irrationale*

### 1. Securities Arbitration: The Rise and Fall of Nonarbitrability

The treatment of arbitration clauses in agreements between securities purchasers and brokerage houses provides the best example of shifting judicial attitudes toward the public policy exception. The doctrine burst on the scene in 1953, was threatened from 1975 to 1985, dealt a mortal blow in 1987, and buried in 1989. Less than forty years lifespan in the glacial pace of legal change suggests a doctrine riddled with internal disease and frailty.<sup>107</sup> Simultaneously, however, the federal courts have tended to ruthlessly enforce arbitration clauses contained in the employment contracts of persons working for brokerage houses even though these boilerplate clauses are even less consensual than those found in broker-customer agreements.<sup>108</sup> New York Stock Exchange (NYSE) Rule 347 requires that employees sign arbitration agreements as a condition of working for a NYSE member organization.<sup>109</sup> These cases, although broadly involving the securities industry, are better treated as employment disputes.<sup>110</sup>

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107. See generally Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985) (theorists have asserted natural selection of legal rules and longer, better survival of better doctrine); Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (problematic legal rules are more frequently litigated).

108. See, e.g., *Pearce v. E. F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987). See generally Stempel, *A Better Approach to Arbitrability*, 65 TULANE L. REV. — (1991) (forthcoming).

109. Several state courts and an occasional federal court have refused to bind employees to these agreements, but only when the employee asserts a claim triggering a public policy exception. See, e.g., *Wertheim & Co. v. Halpert*, 397 N.E.2d 386, 387 (N.Y. 1979) (gender discrimination claim not arbitrable). But see *DeSapio v. Josephthal & Co.*, 540 N.Y.S.2d 932, 937 (1989) (claim of discharge due to disease related disability is arbitrable).

110. The employee-brokerage house cases are discussed in the text regarding employment disputes and arbitrability. See *infra* text accompanying notes 213-311.



During the Great Depression, President Franklin Roosevelt proposed and Congress passed a number of statutes designed to correct abuses in America's financial community, particularly the stock market.<sup>111</sup> The Securities Act of 1933 (the "1933 Act")<sup>112</sup> was designed to regulate the public offering of securities. The Securities Exchange Act of 1934 (the "Exchange Act" or "1934 Act")<sup>113</sup> regulates the markets for the trading of securities.<sup>114</sup> Both statutes make it illegal to misrepresent facts or fail to disclose material information in the offering of securities.<sup>115</sup> These acts were passed by Congress less than a decade after the Arbitration Act. Yet, neither securities law makes any mention of arbitration. These laws neither endorse arbitration as a means of resolving disputes arising under them nor do they specifically exempt claims from the reach of the Arbitration Act.

In 1953, the Court construed the 1933 Act as implicitly forbidding predispute arbitration clauses. *Wilko v. Swan*,<sup>116</sup> held that broad arbitration clauses in brokerage account agreements did not require the arbitration of 1933 Act claims.<sup>117</sup> An investor sued his broker for misrepresentation; the broker moved to stay the litigation and compel arbitration pursuant to a clause in its customer agreement with Wilko.<sup>118</sup> The Supreme Court held that the language of Section 14 of the 1933 Act, which provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [Securities Exchange] Commission shall be void,"<sup>119</sup> banned enforcement of the arbitration clause.<sup>120</sup> The Court reasoned that, since the 1933 Act established federal court jurisdiction and certain special venue provisions for lawsuits brought pursuant to the Act, the arbitration agreement was a stipulation waiving compliance with the Act since it abrogated those provisions.<sup>121</sup> The Court was un-

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111. See W. CARY, *CASES AND MATERIALS ON CORPORATIONS* 79-91 (4th ed. 1980).

112. 15 U.S.C. §§ 77a-77aa (1988).

113. 15 U.S.C. §§ 78a-78jj (1988).

114. See W. CARY, *CASES AND MATERIALS ON CORPORATIONS* 1067-74 (4th ed. 1980).

115. See *id.* at 1079-91; Fletcher, *Learning to Live with the Federal Arbitration Act—Securities Litigation in a Post-McMahon World*, 37 EMORY L. J. 99, 128-33 (1988).

116. 346 U.S. 427 (1953).

117. *Id.* at 434-35.

118. *Id.* at 429.

119. 15 U.S.C. § 77n (1988).

120. *Wilko v. Swan*, 346 U.S. 427, 440 (1953).

121. *Id.* at 434-35.

moved that the abrogation occurred by agreement of the parties and involved no liability determination.<sup>122</sup> It found the right to select the judicial forum is the kind of 'provision' that cannot be waived under Sec. 14 of the Securities Act.<sup>123</sup>

The majority also found in the statute legislative motive<sup>124</sup> to protect small investors.<sup>125</sup> The Court went on to compare arbitration with litigation and to conclude that arbitration was inherently inferior at resolving the instant case, suggesting that arbitrators were competent to determine the quantity of a commodity or the amount due on a contract but were far less able to make "subjective findings on the purpose and knowledge" of the defendant broker.<sup>126</sup> The Court further found that arbitrators were impoverished as decision makers because they were "without judicial instruction in the law"<sup>127</sup> and noted that a court's power to vacate or correct an award was limited, especially so in light of the often sketchy hearing record and award in arbitration.<sup>128</sup> Justice Jackson concurred to add that he felt postdispute agreements to arbitrate did not run afoul of the 1933 Act.<sup>129</sup> Justices Frankfurter and Minton dissented, reading Section 14 to prevent only waivers of substantive rights created under the 1933 Act.

Justice Frankfurter's dissent directly addressed the "contractual consent" issue only adverted to by the majority, providing a promis-

122. *Id.*

123. *Id.* at 433-36.

124. *Id.* Although the conventional theory of contract law has posited that the courts merely enforce bargains and are not paternalistic, several authors have suggested that paternalism or other social motives explain much contract jurisprudence. See generally A. FARNSWORTH, *CONTRACTS*, Ch. 1 (1982); Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983); Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 520-21 (1988). This notion is not exactly revolutionary. See generally FARNSWORTH, *CONTRACTS* Ch. 5 (1982) (discussing contracts not enforceable on public policy grounds); Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). The author suggests that people make bad choices out of sheer inability to do what is best for them, as a result of pre-existing rules and entitlements not chosen by them, myopic behavior overvaluing short term factors and undervaluing long term matters, as well as because of inadequate information or framework of choice—all situations that might justify "paternalistic" regulation. *Id.* This occurs with enough frequency, even in the hard-headed context of arbitration, to justify increased scrutiny of the consensual nature of arbitration agreements.

125. *Wilko*, 346 U.S. at 435.

126. *Id.* at 435.

127. *Id.* at 436.

128. *Id.*

129. *Id.* at 438-39.

ing base for applying the Arbitration Act, one that has been largely ignored or misused during the intervening thirty-five years. He read Section 14 as not barring the arbitration clause and would have confined the Court's role to determining if Wilko had freely consented to arbitrate such disputes. If so, the Court was obliged under both the Arbitration Act and prevailing contract law to enforce the Agreement. The dissent found no reason not to treat the arbitration clause as a freely entered contract.<sup>130</sup>

*Wilko* held sway for three decades. During that time, however, one underpinning of the decision—negative views of the efficacy of arbitration as a forum—eroded substantially as subsequent Court decisions praised the competence of arbitration as well as its efficacy in providing time-savings, cost-savings, finality, settlement, and contentment.<sup>131</sup> In addition, growing demands upon federal and state courts fueled interest in and support for alternative dispute resolution (ADR). As the most well-established and most trial-like major form of ADR, arbitration profited substantially from this trend in the marketplace of ideas. Fears engendered by a perceived “litigation explosion,” illusory or real,<sup>132</sup> prompted favorable judicial views toward various means of caseload reduction.<sup>133</sup>

130. *Wilko v. Swan*, 346 U.S. 427, 440 (1953) (Frankfurter, J., dissenting).

131. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626-27 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-23 (1983).

132. See, e.g., Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38; Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231, 233 (1974) (arguing that an over-litigious America is in midst of litigation binge); Burger, *Isn't There a Better Way*, 18 A.B.A. J. 274, 275 (1982) (arguing that courts are overburdened); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631 (1987) (“Responses to the litigation explosion, including the amendment of rule 11, reflect a widely held view that increased use of the courts is a negative development.”). But see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5 (1983) (arguing that the suggestion of a litigation “crisis” is unsupported by historical data).

133. Substantive law, as well as receptivity to ADR, reflects this trend. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500, 514 (1988) (judicial creation of a government contractor defense to product liability claims); *Davidson v. Cannon*, 474 U.S. 344, 346 (1986) (narrow interpretation of intentional conduct under civil rights act); *Schiavone v. Fortune*, 477 U.S. 21, 24 (1986) (narrow reading of Fed. R. Civ. P. 15(c) concerning amendment of complaints); *Mohasco Corp. v. Silver*, 447 U.S. 807, 812 (1980) (strict views of time limits in civil rights cases); Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 107 (1988) (change in summary judgment approach to encourage more frequent disposition without trial).

While this silent tide was eroding *Wilko's* foundation, *Wilko* nonetheless remained a firm bar to the enforcement of arbitration clauses against 1933 Act claimants.<sup>134</sup> Most courts viewed *Wilko's* approach as applicable to 1934 Act claims as well and refused to compel arbitration of 1934 Act claims.<sup>135</sup> In addition, several circuits adopted the "intertwining" doctrine, which held that where a plaintiff raised claims arising under federal securities laws (which were not arbitrable) and claims under state securities laws or common law (which were arbitrable if standing alone) but where the claims arose out of a common nucleus of fact, the claims were sufficiently intertwined that a federal court could in its discretion try the arbitrable state claims and the inarbitrable federal claims together.<sup>136</sup>

The gradual assault on *Wilko* began with cases involving the 1934 Act. In *Scherk v. Alberto-Culver*,<sup>137</sup> the Court required an American company to arbitrate in Paris its 1934 Act claims against European defendants.<sup>138</sup> The Court stopped short of refusing to apply *Wilko* to 1934 Act claims but signaled that it was receptive to interpreting the 1934 Act in a manner different than the *Wilko* interpretation of the 1933 Act.<sup>139</sup> One Court rationale posited that international transactions would be burdened if courts did not enforce arbitration clauses and similar dispute resolution provisions contained in international business contracts.<sup>140</sup> Although this rationale is persuasive, it is at best unclear why the Court had authority to use this analysis to refuse to apply the reasoning of a precedent (*Wilko*) that purported to have

134. See, e.g., *Kiehne v. Purdy*, 309 N.W.2d 60, 61 (Minn. 1981). As a Supreme Court ruling, *Wilko* obviously controlled federal and state court disposition of arbitration clauses involving 1933 Act claims. *Id.* In addition, *Wilko* was influential in state court cases that extended its reasoning to state Blue Sky laws.

135. See, e.g., *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 720 F.2d 1446, 1448 (5th Cir. 1983); *Stockwell v. Reynolds & Co.*, 252 F. Supp. 215, 220 (S.D.N.Y. 1965).

136. See, e.g., *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1026 (11th Cir. 1982); *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 335 (5th Cir. 1981).

137. 417 U.S. 506 (1974).

138. *Id.* at 519-20. *Alberto-Culver* acquired several trademarks from European entities through purchase of their stock but found the trademarks encumbered in violation of the sales contract and sued in federal district court, alleging fraudulent misrepresentations in violation of the 1934 Act. *Id.* at 509. Defendant *Scherk* invoked an arbitration clause providing that any and all disputes arising under or relating to the contract would be resolved by arbitration before the International Chamber of Commerce in Paris. *Id.* at 508.

139. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987); *infra* text accompanying notes 158-66.

140. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-16 (1974).

resulted from a legislative command in a statute that had language nearly identical to that at issue in *Scherk*.<sup>141</sup>

The *Scherk* Court also characterized the arbitration agreement as a forum selection clause rather than a waiver of rights.<sup>142</sup> The distinction was important in that the Court had recently held forum selection clauses to be prima facie valid and enforceable, particularly in international transactions.<sup>143</sup> If instead the *Scherk* Court had focused on the clause as a substantive arbitration contract or a relinquishment of rights, the Court would have faced a greater need to explain the conflict with the 1934 Act's non-waiver provision, which mirrored the 1933 Act's Section 14 language.<sup>144</sup> It was a task of hair-splitting distinction that the Court was only willing to shoulder fourteen years later in *McMahon*.<sup>145</sup>

Nonetheless, the *Scherk* Court was equal to half the task, stating that "a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us."<sup>146</sup> The colorable argument of the *Scherk* dicta went something like this: a suit under the 1933 Act Section 12(2) for rescission of a stock

141. See Part III(A)(B), *infra* (regarding prevailing notions of the legislative-judicial relationship); see also G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 91-115 (1982); J. ELY, DEMOCRACY AND DISTRUST 1-15 (1980); C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 69-98 (1969) (despite latitude to consider issues of structure and public policy, courts are to faithfully implement legislation that is not unconstitutional). Applied to arbitration, the prevailing view requires that courts enforce arbitration agreements unless a different result is required by other, superceding legislative provisions, the Constitution, or basic contract principles. The inconsistency between *Wilko* and *Scherk* on this point is apparent. If the 1933 Act forbids waivers of the right to sue in court, it is hard to understand why this legislative command thought so compelling in *Wilko* was discarded or ignored in *Scherk* merely for the more diffuse policy reasons of promoting international trade and comity.

142. *Scherk*, 417 U.S. at 518-19.

143. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Prior to *The Bremen*, the Court's deference to such clauses was less clear. See, e.g., *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 182-83 (1959).

144. Compare 15 U.S.C. § 14 (1988) with 15 U.S.C. § 77n (1988). Section 14 of the 1933 Act provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (1988). Section 29(a) of the 1934 Act reads: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a) (1988). The provisions are virtually congruent.

145. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

146. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513 (1974).

purchase (the claim made by Wilko) is a “special” right established in the statute that changes the common law while the general antifraud provisions of the 1934 Act Section 10(b) (the basis of Alberto-Culver’s claim) are merely grounds for a suit because the judiciary has “implied” a private right of enforcement;<sup>147</sup> consequently, although both statutes have identical non-waiver provisions, the 1934 Act’s non-waiver provision is less forceful since it was not expressed on the face of the statute.<sup>148</sup>

The handwriting on the wall became clearer in the 1985 cases of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>149</sup> and *Dean Witter Reynolds v. Byrd*.<sup>150</sup> *Mitsubishi* applied the “encouraging international transactions” and “honoring forum selection clauses” rationales of *Scherk* to uphold an arbitration demand against a judicial public policy exception for antitrust claims.<sup>151</sup> In *Byrd*, the plaintiff investor claimed unauthorized trading and misrepresentation by the defendant brokerage house in violation of the 1934 Act and various state statutes and common law.<sup>152</sup> Dean Witter “assumed that the federal securities claim was not subject to the arbitration provision of the contract and could be resolved only in the federal forum”<sup>153</sup> but sought to compel arbitration of only the state law claims.<sup>154</sup> The Supreme Court required arbitration and rejected the intertwining doctrine, recognizing that the *Byrd* holding created some inefficiencies in two track dispute resolution and difficult questions of preclusion.<sup>155</sup> Justice White concurred, focusing on the “colorable argument” men-

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147. *Id.* at 512-514. An express cause of action is one stated explicitly in the statute. An implied right of action is, to virtually state the obvious, one that is implied although the statute does not establish it but instead merely proscribes certain conduct. In determining whether a statute implies a right of action, the Court looks primarily at legislative intent, supplementing its analysis where legislative intent is unclear by examining whether private civil litigation is consistent with the rest of the statute and would advance or impede enforcement of the law. *Id.* See *Cort v. Ash*, 422 U.S. 66, 74-76 (1975); *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981).

148. *Scherk*, 417 U.S. at 513-14.

149. 473 U.S. 614 (1985); see *infra* text accompanying notes 200-07.

150. 470 U.S. 213 (1985).

151. *Mitsubishi Motors*, 473 U.S. at 629-31.

152. *Byrd*, 470 U.S. at 214-15.

153. *Mitsubishi Motors*, 473 U.S. at 616.

154. *Byrd*, 470 U.S. at 215.

155. *Byrd* also argued that the arbitration clause was a “contract of adhesion” that “should not routinely be enforced”, but the Court found that *Byrd* waived this point by failing to present it to the courts below. *Id.* at 216 n.2.

tioned in *Scherk*, reiterating arguments that the 1934 Act's Section 10(b) implied right of action is different from the 1933 Act's Section 12(2) express right.<sup>156</sup>

Not surprisingly, a case testing more directly the "colorable argument" of *Scherk* and *Byrd* was not long in arriving at the Court, fueled in part by a controversy over whether claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) were exempt from arbitrability on public policy grounds.<sup>157</sup> In *Shearson/American Express v. McMahon*,<sup>158</sup> the Court, in a six to three decision, expressly held *Wilko* not to apply to 1934 Act claims.<sup>159</sup> The *McMahon* opin-

156. *Id.* at 225 (White, J., concurring).

157. RICO was passed as part of the Omnibus Crime Control and Safe Streets Act of 1970 and is codified at 18 U.S.C. § 1961-1968 (1988). The statute provides for stringent criminal penalties and also expressly establishes a private civil right of action to anyone "injured in their person or property." See 18 U.S.C. § 1964 (1988) (provides for attorney's fees and treble damages). Because RICO was a significant remedial statute designed to address a perceived national crime problem (much like the antitrust laws were strong medicine for a perceived monopoly problem and because much of RICO is patterned after the Clayton Antitrust Act), RICO claimants had sought to avail themselves of a public policy exception to arbitrability. This effort had met with some success in the lower courts but was rejected completely by the Supreme Court in *McMahon*, as the Court found nothing in RICO or its legislative history to exclude RICO claims from the reach of the Arbitration Act. *Agency Holdings v. Malley-Duff*, 482 U.S. 243 (1987). The RICO statute is silent as to its limitations period but the Court has determined that application of the Clayton Act's four-year statute of limitations is appropriate. See *id.*

158. 482 U.S. 220 (1987).

159. *Id.* Plaintiffs McMahon, husband and wife, were apparently successful funeral home operators in Westchester County, New York. See Glaberson, *When the Investor Has a Gripe*, N.Y. Times Mar. 29, 1987, Sec. 3, p. 1, col. 4. They opened a customer account with Shearson through a Shearson account agent they knew socially, signing the standard form Shearson customer agreement, which provided for arbitration. They executed a separate agreement giving Shearson authority to make transactions for their account without obtaining prior permission. The McMahon account of \$350,000 was opened in 1980 and incurred trading losses and brokerage fees of \$216,000 before the account was closed in 1983. *Id.* at C3.

The facts of the McMahons' loss suggest that critics of securities arbitration have grounds for their misgivings. Indeed, securities arbitration proponents can not even argue that arbitration has given the McMahons an expeditious or inexpensive decision on the dispute. Three years after the Court's decision, the arbitration hearing has yet to take place, largely it appears, due to Shearson's unfair tactics. See *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 24 (2d Cir. 1990) ("it may fairly be said that Shearson's actions — more than [McMahons'] — unreasonably and vexatiously multiplied these proceedings."); Labaton, *Brokerage Case Goes On and On*, N.Y. Times, Feb. 19, 1990, Sec. 4, p. 2, col. 1.

Investors, scholars, and politicians have voiced complaints about the seemingly stacked deck faced by investors in securities industry arbitration, but to date the industry, through a combination of lobbying and some changes in arbitration procedures, has fought off increased regulation. See Henriques, *When Naivete' Meets Wall Street*, N.Y. Times, Dec. 3, 1989, Sec. 3, p. 1, col. 3; see also Note, *Arbitration of Securities Disputes: Rodriguez and New Arbitration Rules*

ion rings with pro-arbitration rhetoric and general criticism of the public policy exception to arbitrability.<sup>160</sup> The *McMahon* Court also had relatively little patience with the plaintiffs' argument that the arbitration clause was not truly consented to by the McMahons, holding quite rightly that the 1934 Act's non-waivability provision, if it nullified the arbitration clause, made the issue of consent irrelevant.<sup>161</sup> Mysteriously, the majority opinion did not address the converse: if the non-waivability provision is not a bar to arbitration, does a showing of inadequate consent<sup>162</sup> make the arbitration agreement unenforceable? The majority only adverted to this question by stating "the [lack of consent argument] is grounds for revoking the contract under ordinary principles of contract law; the [nonwaiver provision] is grounds for voiding the agreement under § 29(a) [of the 1934 Act]."<sup>163</sup> The Court gave no ground rules for applying contract law exceptions to arbitration.<sup>164</sup>

Lower courts read the Court as ready to overrule *Wilko* when the apt case arises,<sup>165</sup> although the *McMahon* majority expressly declined to do so.<sup>166</sup> The Court's rejection of *Wilko*'s factual assumptions and analysis was clear: "[w]hile *stare decisis* concerns may counsel against upsetting *Wilko*'s contrary conclusion under the [1933 Act], we refuse to extend *Wilko*'s reasoning to the Exchange [1934] Act in light of

*Leave Investors Holding a Mixed Bag*, 65 IND. L.J. 697, 708-720 (1990) (describing new pro-investor procedures and traits of securities arbitration remaining favorable to brokers).

160. *McMahon*, 482 U.S. at 233 (former mistrust of arbitration difficult to square with prevailing assessment).

161. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

162. *Id.* It appears *McMahon* asserted that the arbitration agreement was a nonconsensual contract of adhesion but offered no evidence or persuasive reasoning to support the assertion. *See id.* at 226-27; *McMahon v. Shearson/American Express, Inc.*, 618 F. Supp. 384 (S.D.N.Y. 1985), *aff'd in part rev'd in part*, 788 F.2d 94 (2d Cir. 1986), *cert. granted*, 479 U.S. 812 (1986), *rev'd*, 482 U.S. 220 (1987).

163. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

164. *Id.* at 243 (Blackmun, J., concurring in part, dissenting in part). Justice Blackmun, joined by Justices Brennan and Marshall, made a blistering attack on the majority's distinctions between the 1933 Act and 1934 Act non-waivability provisions and the Court's reading of legislative activity subsequent to *Wilko*. However, it failed to address the contract law questions lurking in the background of the case. *Id.* at 234. Rather than focusing on contract issues, both sides of the *McMahon* Court argued the issue in terms of arbitral competence and public policy. *See*, Note, *Arbitration of Securities Disputes: Rodriguez and New Arbitration Rules Leave Investors Holding a Mixed Bag*, 65 IND. L.J. 697, 702-03 (1990).

165. *See, e.g., Reed v. Bear, Stearns & Co.*, 698 F. Supp. 835, 840-41 (D. Kan. 1988); *Ryan v. Liss, Tenner & Goldberg Sec. Corp.*, 683 F. Supp. 480, 484 (D.N.J. 1988); *Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 673 F. Supp. 1009, 1011 (C.D. Cal. 1987).

166. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230-34 (1987).



these intervening developments [of improved arbitration processes]."<sup>167</sup> A precedent that is still technically valid but whose rationale has been recently rejected by the Court is the judicial equivalent of a wounded animal limping across the savannah, sure to be attacked. Not surprisingly, lawyers for the brokerage houses began successfully demanding arbitration of 1933 Act claims. In *Rodriguez De Quijas v. Shearson/Lehman Brothers Inc.*,<sup>168</sup> the Fifth Circuit declined to follow *Wilko* and ordered arbitration of 1933 Act claims made by an investor against Shearson on the basis of the customer agreement's standard form arbitration clause.<sup>169</sup> The Fifth Circuit panel found 1933 Act claims arbitrable "notwithstanding the earlier precedent of *Wilko v. Swan*."<sup>170</sup>

The Supreme Court, despite some misgivings about the chutzpah of lower courts presuming to "overrule" *Wilko* so shortly after the *McMahon* Court had hesitated,<sup>171</sup> nonetheless rewarded this approach by reviewing *Rodriguez* on certiorari and specifically overruling

167. *Id.* In my discussions with him on this issue, my colleague Norman Poser, a former executive vice-president of the American Stock Exchange, has characterized the Court's faith in the SEC's supposedly effective oversight as a "piece of pure fantasy" revealed by investors' consistent preference for AAA arbitration (which is not supervised by the SEC) rather than NYSE, AMSE, or NASD arbitration (which are regulated by the SEC). Indeed, the *McMahons* have sought AAA arbitration, while Shearson sought NYSE arbitration, occasioning some of the protracted struggle discussed in note 159, *supra*. See *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17 (2d Cir. 1990); Labaton, *supra* note 159.

168. 845 F.2d 1296 (5th Cir. 1988), *aff'd*, — U.S.—, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989).

169. *Id.* at 1299.

170. *Id.* Like many commentators and practitioners who had criticized the inconsistency between *Wilko* and the cases that backed away from it during the 1970s and 1980s, the panel found it "implausible that Congress intended to prohibit arbitration of [1933 Act] claims but intended to allow courts to determine the arbitrability of Exchange Act claims." *Id.* The Circuit further read *McMahon's* rejection of *Wilko* as turning on the adequacy of arbitration to resolve securities disputes and then cited the improvements in arbitration during the years 1954-86 to conclude that *Wilko* itself had become "obsolete" and lacked further precedential authority. *Id.*

171. See *Rodriguez De Quijas v. Shearson/American Express, Inc.*, — U.S.—, —, 109 S. Ct. 1917, 1921, 104 L. Ed. 2d 526, 530 (1989). The majority opinion stated: "[w]e do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko* . . . [The Fifth Circuit] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* The dissent stated: The Fifth Circuit should be "engaged in an indefensible brand of judicial activism." *Id.* at 1923 (Stevens, J., dissenting). Notwithstanding the effrontery of the Fifth Circuit and other lower courts, the *Rodriguez* majority seemed more interested in overruling *Wilko* and striking a blow for arbitration. Despite the admonishment, the net result of *Rodriguez* is validation of a lower court that took more than the usual share of chances in seeking to alter the law.

*Wilko*.<sup>172</sup> The Supreme Court's *Rodriguez* opinion is short and written with certitude, despite the Court's five to four split on the case. The dissent is similarly terse, with an air of resignation.<sup>173</sup> One reads *Rodriguez* with the sense that the cases from *Scherk* to *McMahon* had created solid pro and anti-*Wilko* camps on the Court, requiring only the substitution of Justice Kennedy for Justice Powell to provide a slim but sufficiently solid majority to put the wounded *Wilko* doctrine out of its misery.<sup>174</sup>

What is interesting about *Rodriguez* is its complete conversion of *Wilko* from a result commanded by the language of the 1933 Act to a result reached as a matter of judicial prudence based on the 1953 Court's assessment of the quality of securities arbitration. According to the *Rodriguez* majority, *Wilko* was permeated by "the old judicial hostility to arbitration"<sup>175</sup> and its legislative interpretation of the 1933 Act so poisoned thereby that evolution of more favorable attitudes toward arbitration invalidated *Wilko*'s statutory interpretation.<sup>176</sup> Although *Rodriguez* may engage in unnecessary psychoanalysis of the *Wilko* court, it correctly identifies the *Wilko* result as driven more by public policy reasoning (the view that arbitration is an inferior forum for resolving securities disputes) rather than compelling statutory construction. In any event, the *Rodriguez* Court reached the eminently sensible conclusions that the nonwaiver provision applied only to substantive statutory rights (and not procedural matters such as forum selection clauses) and that interpretations regarding the 1933 and 1934 Acts should be harmonized.<sup>177</sup> The dissent did not quarrel with the former point but argued instead that *Wilko*'s thirty-five year reign created sufficient reliance and *stare decisis* interests that it should not be disturbed.<sup>178</sup>

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172. *Rodriguez De Quijas v. Shearson/American Express Inc.*, \_\_\_U.S. \_\_\_, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

173. *Id.* at 1922-23 (Stevens, J., dissenting).

174. Justice Powell resigned from the Court in mid-1987, shortly after the 1987 *McMahon* decision. Justice Kennedy assumed his seat in early 1988.

175. *Rodriguez De Quijas*, \_\_\_ U.S. at \_\_\_, 109 S. Ct. at 1920, 104 L. Ed. 2d at 534 (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.* 126 F.2d 978, 985 (2d Cir. 1942)).

176. *Rodriguez De Quijas*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 1920, 104 L. Ed. 2d at 534-35.

177. *Id.*

178. *Id.* at 1923 (Stevens, J., dissenting).

## 2. The Rise and Fall of the Antitrust Exception to Arbitrability

The history of the antitrust exception to arbitrability parallels that of the securities law exception, but with some significant differences. Like the *Wilko*-based view, the antitrust exception was short-lived, arising in the 1960s and nearly totally rebuked by the mid-1980s. Like *Wilko*, it had vigorous scholarly and judicial support,<sup>179</sup> some arguing for the exception's continued vitality despite the 1985 *Mitsubishi* holding rejecting the exception for international transactions,<sup>180</sup> a view this article regards as erroneous wishful thinking. Unlike *Wilko*, the antitrust exception was never specifically endorsed by the Court but was created and adhered to by several circuit courts while the Supreme Court allowed the doctrine to flourish for almost twenty years. Unlike *Wilko*, the antitrust exception was not partially linked to any specific statutory provision but was more clearly cut from the whole cloth of the courts' generalized notion of public policy.<sup>181</sup>

The antitrust exception's most obvious birth was the Second Circuit decision *American Safety Equipment Corp. v. J. P. Maguire & Co.*<sup>182</sup> *American Safety* reasoned that the rights conferred through the antitrust laws were of a character inappropriate for arbitration.<sup>183</sup> That

179. See, e.g., Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219 (1986); Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072 (1969).

180. See, e.g., Preston v. Kruezer, 641 F. Supp. 1163, 1170-73 (N.D. Ill. 1986); see also Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219, 235, 237 (1986); Epstein, *Arbitration: The Aftermath of Shearson/American Express, Inc. v. McMahon*, 1988 ANN. SURV. AM. LAW 634, 652-54.

181. Readers unfamiliar with antitrust disputes might wonder how antitrust claims might arise from a contract containing an arbitration clause. The most common dispute involves a manufacturer and its franchisee or other authorized agent. The agency relationship is defined by a contract that provides for arbitration of disputes. Should the parties have a falling out, the agent may allege that an attempted termination or the enforcement of certain restrictions on product use or sales constitute anticompetitive conduct in violation of the antitrust laws. Purchasers with arbitration clauses in a bill of sale may similarly sue over pricing or distribution practices.

182. 391 F.2d 821 (2d Cir. 1968). The antitrust exception was the law in the Second Circuit and other circuits during the late 1960s and 1970s. *Id.* During this period, the Supreme Court rendered no view on the doctrine but implicitly gave it credence by failing to hear and decide any cases in which a party seeking to arbitrate such claims challenged the doctrine. See, e.g., Helfenbein v. Int'l Indus., Inc., 438 F.2d 1068 (8th Cir.), cert. denied, 404 U.S. 872 (1971).

183. *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968).

same year, the New York Court of Appeals took a similar view of the state's antitrust law and arbitration act.<sup>184</sup> The federal circuit courts addressing the issue uniformly followed the *American Safety* approach.<sup>185</sup> *American Safety* itself did not delineate its rationale with painstaking thoroughness but spoke in almost conclusory terms of the public interest in antitrust enforcement and the inappropriate nature of the complex claims for the stripped down proceedings of a commercial arbitration.<sup>186</sup> Reading *American Safety*, other antitrust exception cases, and commentary supporting the doctrine shows as many as five arguments offered to support the doctrine: (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).<sup>187</sup> Of these five arguments, public concern and deterrence are generally given the most credence by commentators.<sup>188</sup>

The complexity rationale is misguided on two counts. Questions of complexity and competence are relative. Compared to the judicial track record on antitrust, it would be hard to imagine that arbitrators could do much worse. Liberals and Chicago-school conservatives alike have criticized both the judiciary's approach to antitrust and its results.<sup>189</sup> For example, one district judge found that a merger in

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184. See *Aimcee Wholesale Corp. v. Tomar Prods., Inc.*, 237 N.E.2d 223 (1968).

185. See, e.g., *Applied Digital Technology, Inc. v. Continental Cas. Co.*, 576 F.2d 116 (7th Cir. 1978); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Buffler v. Electronic Computer Programming Inst., Inc.*, 466 F.2d 694 (6th Cir. 1972); *Helfenbein v. International Indus., Inc.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *A. & E. Plastik Pak Co., v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968); see also Sterk, *supra* note 102, at 503-11.

186. *American Safety*, 391 F.2d at 823-29.

187. See *id.* at 827; Lee, *Antitrust and Commercial Arbitration: An Economic Analysis*, 62 ST. JOHN'S L. REV. 1, 3, 26-27 (1987); Pitofsky, *supra* note 179, at 1079-80; Aksen, *Arbitration and Antitrust—Are They Compatible?*, 44 N.Y.U. L. REV. 1097, 1100 (1969); Sterk, *supra* note 102, at 503-05; Morgan, *supra* note 104.

188. Aksen, *Arbitration and Antitrust—Are They Compatible?*, 44 N.Y.U. L. REV. 1097, 1102-1110 (1969).

189. See, e.g., McChesney, *Law's Honour Lost: The Plight of Antitrust*, 31 ANTITRUST BULL. 359 (1986); Fox, *The Politics of Law and Economics in Judicial Decision Making: Anti-*

which the two combining companies would hold eighty-five percent of the herbal tea market was, as a matter of law, insufficient to state an antitrust claim.<sup>190</sup> Mercifully, the appellate court reversed.<sup>191</sup> Perhaps persons with business experience are more competent if given proper legal guidance by the advocates. An arbitration panel composed of an attorney, a manufacturing executive, and a retailing executive might well provide better antitrust decisions than a judge. A second and more powerful reason for rejecting the complexity rationale of *American Safety* does not depend on the relative competence of the tribunals. When the parties have chosen to arbitrate by executing a contract provision to that effect, the competence of the forums and the wisdom of their choice becomes irrelevant, so long as the contract was the product of knowing and voluntary consent of the parties.

The hostility rationale posits that "commercial arbitrators are likely to harbor hostility toward antitrust law."<sup>192</sup> Although this may be true, courts embracing the antitrust exception again eschewed a comparative perspective. The judiciary, or at least vast elements of it, have demonstrated hostility toward the antitrust laws for ninety years,<sup>193</sup> although some have viewed the Court as taking too expan-

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*trust As a Window*, 61 N.Y.U. L. REV. 554 (1986). Much of the conservative critique has attacked the antitrust laws as well as judicial performance. See, e.g., R. BORK, *THE ANTI-TRUST PARADOX* 72 (1978).

190. See *R.C. Bigelow, Inc. v. Unilever N.V.*, 689 F. Supp. 76 (D. Conn. 1988), *rev'd*, 867 F.2d 102 (2d Cir. 1989), *cert. denied sub nom.*, *Thomas J. Lipton, Inc. v. R.C. Bigelow, Inc.*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 64, 107 L. Ed. 2d 31 (1989).

191. See *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989), *cert. denied sub nom.*, *Thomas J. Lipton, Inc. v. R. C. Bigelow, Inc.*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 64, 107 L. Ed. 2d 31 (1989); see also *Delaware & Hudson Ry. Co. v. Conrail*, 902 F.2d 174 (2d Cir. 1990) (reversing district court finding of 800% increase in user fees imposed by defendant with monopoly power reasonable as matter of law because defendant sought to increase short-term profits through increase).

192. See *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968); Lee, *supra* note 187, at 3.

193. See E. GELLHORN, *ANTITRUST LAW* 40-44 (3d ed. 1986). Since the 1968 *American Safety* decision, scholarly criticism of traditional antitrust law increased substantially. See, e.g., BORK, *THE ANTI-TRUST PARADOX* (1978); Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). This thinking has affected the judicial perspective on antitrust law. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (granting summary judgment against predatory pricing antitrust claims in the absence of direct evidence on grounds that predatory pricing is generally rare and implausible in instant case as a matter of economic theory).

sive a view of antitrust.<sup>194</sup> The supposed greater hostility of arbitrators seems based only on speculation.<sup>195</sup>

The adhesion argument is unproven and not obviously correct. If the reported cases are at all indicative of what occurs in the broad spectrum of commercial reality, the typical antitrust versus arbitration dispute arises in a relatively complex, long-term contract between manufacturer-distributor-retailer, franchisor-franchisee, or supplier-manufacturer. Proponents of the adhesion rationale point to the often superior economic resources of the antitrust claim defendants.<sup>196</sup> However, this factor by itself is irrelevant to the issue of contract consent.<sup>197</sup> A party may have less economic power than another but it does not inevitably follow that the weaker party was required either to enter the contract or was unable to negotiate over the dispute resolution clause.

The deterrence rationale also provides no justification for the exception. Proponents of the exception argue that effectuating the goals of antitrust requires published judicial opinions warning would-be antitrust violators, but it is fallacious to assume that published opinions always deter antitrust violations. On the contrary, many judicial opinions may encourage future violations by laying out in painstaking detail the blueprint by which anticompetitive actors can couch their actions in ways that will establish an apparently legitimate purpose for the alleged anticompetitive conduct, even if the purported purpose

194. See, e.g., BORK, *THE ANTITRUST PARADOX* 7, 25, 30, 198-216 (1978) (criticizing cases).

195. Unfortunately, such naked speculation, hunches, unfounded assumptions, and the personal but unverified notions of judges often affect decisions. See Pine, *Speculation and Reality*, 136 U. PA. L. REV. 1553 (1988); Davis, "There is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1541 (1987) (criticizing courts for enshrining mere opinion or incorrect myth as fact). But see generally Woolhandler, *Rethinking Judicial Use of Legislative Facts*, 41 VAND. L. REV. 111 (1988) (contending that court-generated assumptions are necessary to decide cases and enable courts to modify decisions as necessary).

196. Loevinger, *Antitrust Issues as Subjects of Arbitration*, N.Y.U. L. REV. 1085, 1091 (1969).

197. The language of contract avoidance due to disparities in bargaining and other power is sufficiently lax that it tends to assume the smaller party is always the party with less bargaining power. See E. FARNSWORTH, *CONTRACTS* § 4.24 (1982) (bargaining power and adhesion are distinct concepts). Although the two may be closely correlated in the majority of cases, they are independent. *Id.* For example, a small company that has something the large company desperately needs (say, the last available ton of silicon for microchips) may have much greater bargaining power than the corporate giant (say, IBM) with whom it is negotiating a sales contract. *Id.*

is a sham. By contrast, the generally more opaque and variable arbitration results do not draft such a blueprint.

The public concern rationale derives from a notion that the anti-trust laws are bigger than any particular dispute and must be litigated, notwithstanding the legislative command of the Arbitration Act. This assumption also fails to leap the chasm of empirical reality. Inherent in every law is a twofold purpose: doing individual justice and serving social goals. It is wrong to view some claims as "private" and others as "public."<sup>198</sup> Even a more sophisticated view seeing all causes of action as lying on a continuum from the primarily private to the primarily public does not escape the essential truth that all causes of action have some public purpose and larger social impact beyond the litigants.<sup>199</sup> There seems no principled basis, in the absence of legislative expression, for giving antitrust special treatment but denying it to financial laws, tort claims, property disputes, certain commercial contracts and, yes, even securities law.

In *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*,<sup>200</sup> the Court

198. See generally Klare, *The Public Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982). Some scholars argue that the public-private distinction is completely void of intellectual content. I believe the basic distinction has validity and can occasionally be a useful analytical tool or basis for decision in close cases. However, no serviceable and fair bright line test exists for delineating public and private laws.

199. See generally Hazard & Scott, *The Public Nature of Private Adjudication*, 6 YALE L. AND POL'Y REV. 42 (1988); Kennedy, *Paternalism*, 41 MD. L. REV. 563 (1982); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689 (1976). In addition, the statute/common law-public/private distinction ignores or glosses over criticism of the legislative process that describes much legislation as but the product of rent-seeking by interest groups. See generally Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 875-83 (1987); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 240 (1986); see also Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203, 227-31 (1979) (arguing that many laws are outdated and, even if passed with best intentions, no longer serve true public interest).

200. 473 U.S. 614 (1985). Mitsubishi involved an automobile dealership agreement between Mitsubishi Motors, Soler, a Puerto Rican auto dealer, and a Chrysler subsidiary. The contract required Mitsubishi to provide Soler with a certain number of automobiles each month, with Soler obligated to take and pay for a required number of cars as well. The contract also contained a separate provision providing that all "disputes, controversies, or differences" between the two arising out of or relating to certain articles of the agreement "shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.* at 617. A dispute arose; Mitsubishi sought to compel arbitration; Soler objected and counterclaimed in federal court on antitrust and other grounds. *Id.* at 618-19. Prior to the Supreme Court's decision compelling arbitration, the district court had ordered arbitration with the First Circuit reversing, citing *American Safety*, 723 F.2d 155 (1st Cir. 1983). *Id.* at 621-23. The dissent read the arbitration clause as applying

specifically refused to follow *American Safety* and apply the exception to a dispute between a Japanese auto maker and a Puerto Rican auto retailer.<sup>201</sup> As in the international securities contract case of *Scherk v. Alberto-Culver Co.*,<sup>202</sup> the Court reached this result primarily by treating the arbitration agreement as a forum selection clause.<sup>203</sup> *Mitsubishi* also criticized the theory of the antitrust exception with sufficient vigor to cast doubt upon the entire doctrine,<sup>204</sup> doubt which intensified after *McMahon*.<sup>205</sup>

The *Mitsubishi* Court first rejected any notion that statutory claims in and of themselves should ever be viewed as less amenable to arbitration.<sup>206</sup> The court then rejected the *American Safety* doctrine for international contracts concluding, as it had concerning the securities laws in *Scherk*,

that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that [the Court] enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context.<sup>207</sup>

The Court went on to criticize the rationales of the antitrust exception in general. It first rejected the contract of adhesion rationale, at least in *Mitsubishi*, finding no attempt by Soler to show fraudulent, coercive, unconscionable, or even unfair contracting behavior.<sup>208</sup> Likewise, the Court completely rejected the complexity rationale

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only to certain articles of the franchise agreement and not to all legal claims that might arise out of the parties' relationship. See *Mitsubishi Motors v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985)(Stevens, J., dissenting) (simply as a matter of ordinary contract interpretation the dissent would hold that Soler's antitrust claim is not arbitrable).

201. *Mitsubishi*, 473 U.S. at 632, 640.

202. 417 U.S. 506 (1974).

203. *Mitsubishi*, 473 U.S. at 637-40.

204. *Id.* at 616-19.

205. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

206. *Mitsubishi*, 473 U.S. at 621. Thus, the suggested basis for a public policy exception to arbitrability based upon the distinction between statutes and the common law offered by some authors seems to have been rejected by the court, at least where antitrust is concerned. See, e.g., Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Questions*, 60 S. CAL. L. REV. 1059, 1065-66 (1986); Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 542-43 (1981).

207. *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 621-23 (1985).

208. *Id.* at 621.



without any suggestion that the rationale gained any strength in the domestic context.<sup>209</sup> It also rejected any presumption of arbitrator bias or prejudice regarding the antitrust laws.<sup>210</sup> It further enshrined as legislative fact the view that antitrust claims linked to a contract containing an arbitration clause most frequently arise from vertical restraints, (a view in accord with most commentators) and are less likely to lead to "monstrous" antitrust proceedings that would tax the competence of arbitrators.<sup>211</sup>

### 3. The Public Policy Exception's Strongest Bastion: Employment and Civil Rights Claims

Although recent cases involving securities and antitrust claims suggest a retreat from the policy exception, it appears to have continued vitality in cases involving employment and civil rights claims.<sup>212</sup>

#### a. Employment Matters and Arbitrability

##### i. Arbitration and ERISA

In 1974, Congress passed the Employee Retirement Income Security Act (ERISA),<sup>213</sup> a statute designed to provide greater security for workers in the wake of widely publicized plant closings. ERISA's response to the problem was to create certain minimum requirements for the vesting, withdrawal, rollover, and portability of pension bene-

209. *Id.* at 633-34.

210. *Id.* at 633.

211. *Id.* Apparently, the Court believed that any antitrust matters raised in the manufacturer-dealer context would be less factually complex and time-consuming than questions of horizontal restraint. *Id.* A vertical restraint is one affecting the chain of production and distribution, usually of a single product (e.g., a contract provision governing manufacturer-wholesaler-retailer) while a horizontal restraint involves competing firms (e.g., a price fixing agreement among major automobile manufacturers). See P. AREEDA, *ANTITRUST ANALYSIS* 260-61, 498-99 (4th ed. 1974).

212. In my view, the articulated policy reasons for restricting arbitration of civil rights claims have more persuasive appeal than the policy reasons used to justify other exceptions to arbitrability. Title VII contains language that could be regarded as limiting arbitration in much the same way as *Wilko* read the 1933 Act as limiting arbitration and there is real concern about unauthorized agency in the union-employee context. Also, assumptions regarding institutional competence made by courts in the civil rights arbitration cases are, in my view, more often correct than similar "guesstimates" made without benefit of record in other cases. See Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in *ARBITRATION* 1975, at 59, 76-80 (28th Ann. Proceedings of the Academy of Arbitration 1976) (hereinafter "Edwards") (substantial number of labor arbitrators not currently versed in employment discrimination laws and do not wish to adjudicate such disputes).

213. 29 U.S.C. §§ 1001-1461 (1988).

fits as well as to impose certain fiduciary requirements upon employers and pension plan administrators.<sup>214</sup> Because ERISA, like the Securities Acts, was designed for systemic social regulation as well as codification and vindication of individual rights, it is not surprising that employees who preferred the judicial forum argued that any arbitration clauses in their employment contracts did not apply to ERISA claims against the employer.

The argument was successful in the first reported case to consider the issue, *Lewis v. Merrill Lynch*,<sup>215</sup> which arose when a Merrill Lynch employee joined another brokerage house. His pension benefits were denied for taking a job with a competitor (although he was 100% vested and the pension was ordinarily portable).<sup>216</sup> Lewis sued in federal court, claiming the forfeiture provision violated ERISA. Merrill Lynch moved for a stay of court proceedings pending completion of arbitration proceedings before the New York Stock Exchange.<sup>217</sup>

As required by NYSE Rule 347, Lewis had signed Merrill Lynch's standard form employment agreement for account representatives, which provided that "in consideration of the New York Stock Exchange's approving my application" he agreed to submit to the jurisdiction of the Exchange and arbitrate all disputes pertaining to his employment under Exchange rules.<sup>218</sup> Lewis argued that the arbitration clause was invalid<sup>219</sup> and that even if valid, the clause did not apply to his ERISA claim.<sup>220</sup> The court found ERISA similar to the Securities Acts and applied *Wilko*-like reasoning. The court noted that ERISA provided that any agreement to limit fiduciary duties imposed by the statute was void and that ERISA had liberal jurisdiction and venue provisions like those of the Securities Acts.<sup>221</sup>

In counterpoint to *Lewis* stood *Fox v. Merrill Lynch & Co.*,<sup>222</sup> a

214. *See, e.g.*, 29 U.S.C. § 1104 (1988) (ERISA fiduciary duties).

215. 431 F. Supp. 271 (E.D. Pa. 1977); *see also* discussion in Sterk, *supra* note 102, at 521.

216. *Lewis*, 431 F. Supp. at 273.

217. *Id.* The case report does not specify whether the arbitration of Lewis's claim was in progress or merely planned by Merrill Lynch and the Stock Exchange.

218. *Id.*

219. *Id.* The court did not reach any defenses Lewis may have raised concerning the formation of the contract but instead focused on the issue of whether the clause, if valid, was applicable to ERISA claims.

220. *Id.*

221. *Id.*

222. 453 F. Supp. 561 (S.D.N.Y. 1978).

similar case that specifically rejected *Lewis* and the ERISA exception to arbitrability.<sup>223</sup> Fox, a long-time Merrill Lynch employee, left to become a branch manager for competitors. Merrill Lynch terminated his 100% vested pension benefits pursuant to the company's defection penalty. Fox sued under ERISA to obtain the benefits and the company sought a stay pending arbitration. In addition, Fox contended that the arbitration rule of the Exchange did not bind him because it was enacted after he began his Merrill Lynch employment.<sup>224</sup> The court held that Fox's 1957 employment contract agreeing to be bound by Exchange rules included amendments establishing arbitration and that Fox had tacitly reformed the contract to include the arbitration clause by failing to object to the company when the arbitration rule was enacted.<sup>225</sup>

For ten years after these two decisions defined the issue, most courts followed the *Fox* rationale and either distinguished or rejected *Lewis*,<sup>226</sup> though at least one court found *Lewis* persuasive.<sup>227</sup> During this period, pro-arbitration courts tended, however, to reject the policy-based exception with policy style reasons of their own such as characterizing ERISA as a "private rights" statute.<sup>228</sup> In one case, *Wilson v. Fischer & Porter Co. Pension Plan*,<sup>229</sup> where arbitration proceeded pursuant to a collective bargaining agreement, the court viewed the labor context as strengthening the case for arbitration on

223. Although the *Fox* case is properly seen as rejecting the public policy exception of *Lewis*, see Sterk, *supra* note 102, at 523, the precise holding in *Fox* and its rejection of *Lewis* is narrower, the *Fox* court finding *Lewis* inapposite because Fox had not made a claim against any fiduciaries.

224. Fox also claimed that Merrill Lynch was estopped from arbitrating since it had continued to employ him for some years after the enactment for the Exchange Rule without asking him to sign an arbitration consent form. *Fox*, 453 F. Supp. at 563. However much one dislikes the *Lewis* rationale, a strong case can be made that *Lewis* reached the correct result—allowing the former employee to litigate rather than arbitrate a claim that he was wrongfully denied pension benefits for changing jobs. Modern contract law doctrines of consent, disclosure, adhesion, and unconscionability suggest that *Lewis*'s "consent" to arbitrability was an unwise legal fiction, as was Fox's. Both were required to consent to arbitration and accept the harsh defection penalty of the Merrill Lynch pension plan in order to be hired to make a livelihood.

225. *Id.* at 564-67.

226. See, e.g., *Challenger v. Local Union No. 1 of Int'l Bridge*, 619 F.2d 645 (7th Cir. 1980); *Lindahl v. A T & T Co.*, 609 F. Supp. 267 (N.D. Ill. 1985); *Wilson v. Fischer & Porter Co. Pension Plan*, 551 F. Supp. 593 (E.D. Pa. 1982).

227. See, e.g., *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492 (D.N.J. 1985).

228. See, e.g., *Challenger*, 619 F.2d at 645; *Lindahl*, 609 F. Supp. at 267.

229. 551 F. Supp. 593 (E.D. Pa. 1982).

the theory that the combined policies in favor of arbitration and of giving effect to collective bargaining agreements combined to far outweigh any policy factors in favor of committing ERISA claims to the courts.<sup>230</sup>

After years of relative anonymity, the issue of ERISA arbitration received renewed judicial scrutiny, and mixed results, followed by a cryptic Supreme Court pronouncement that appears to have resolved the issue in favor of arbitration. Two circuit court cases, *Bird v. Shearson Lehman/American Express, Inc.*<sup>231</sup> and *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*<sup>232</sup> split on the issue, paralleling the *Lewis* and *Fox* holdings of a decade earlier. In *Bird*, the trustee of a pension plan sued Shearson, investment advisor to the pension plan, under the 1934 Act and ERISA.<sup>233</sup> Both the district court and the Second Circuit ruled that the 1934 Act claims were subject to arbitration but that the ERISA claims were not.<sup>234</sup> In *Sulit*, the physician plaintiff, who had placed his employee benefit plans assets with Dean Witter, alleged similar claims.<sup>235</sup> The Eighth Circuit held the ERISA claims arbitrable.<sup>236</sup>

Despite the recent Supreme Court precedent of *McMahon*, *Mitsubishi*, and *Byrd*, the Second Circuit in *Bird* reasoned that in enacting ERISA Congress "intended to preclude a waiver of judicial remedies for the statutory rights at issue" and that Congress intended the federal courts to be the only forum in which ERISA claims could be resolved.<sup>237</sup> The Second Circuit reached this result notwithstanding the absence of any language in ERISA specifically addressing arbitration. Rather, the court focused on ERISA's language and legislative history granting exclusive litigation jurisdiction to federal courts.<sup>238</sup> According to the court, ERISA's procedural scheme making the federal forum available precluded parties from agreeing to a nonjudicial resolution of the dispute.<sup>239</sup> Judge Cardamone dissented: "I am un-

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230. *Id.* at 595.

231. 871 F.2d 292 (2d Cir. 1989), cert. granted and judgment vacated, \_\_\_ U.S. \_\_\_, 110 S. Ct. 225, 107 L. Ed. 2d 177 (1989).

232. 847 F.2d 475 (8th Cir. 1988).

233. *Bird*, 871 F.2d at 294.

234. *Id.* at 295, 298.

235. *Sulit*, 847 F.2d at 476.

236. *Id.* at 479.

237. *Bird*, 871 F.2d at 295 (citing *McMahon*).

238. *Id.* at 292, 296-98.

239. *Id.* at 297-98. *Bird* drew support from the Third Circuit. See *Gavalik v. Continen-*

able to agree [that] Congress' preference for federal courts to state courts . . . compels the conclusion that Congress also prefers federal courts over arbitration tribunals, so much so that private parties cannot contract to the contrary."<sup>240</sup>

The Eighth Circuit in *Sulit* read *McMahon* as establishing a heavy burden of proof that the party opposing arbitration must meet in order to demonstrate that Congress intended a statutory right abrogating a contractual commitment to arbitrate.<sup>241</sup> Examining the text of ERISA, the court found the non-waiver clause specifically confined to a part of the statute that dealt with substantive rights rather than the procedural provisions on which the Second Circuit placed such reliance.<sup>242</sup> The ERISA legislative history evidenced a general intent to provide remedies and court access to protect pension rights but did not suggest that parties could not choose an alternative forum.<sup>243</sup> Finally, the court found nothing inherently incompatible about arbitration and ERISA.<sup>244</sup> In partial concurrence, Judge Gibson agreed with the majority's analysis of the statute but criticized it for ignoring the issue of whether "the adhesion contract in this case should be enforced to deprive Sulit of his day in federal court."<sup>245</sup>

Defendant Shearson petitioned for certiorari in *Bird*. The Supreme Court granted the petition but did not take the occasion to discuss the

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tal Can Co., 812 F.2d 834 (3d Cir. 1987); *Zipf v. A T & T Co.*, 799 F.2d 889 (3d Cir. 1986); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985). Support was also drawn from Ninth Circuit precedent. See *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). These cases concerned whether ERISA claims of union members must be arbitrated pursuant to a collective bargaining agreement. Although these courts all said "no", the opinions can be read as interpreting the scope of the collective bargaining agreement to exclude individual ERISA claims rather than determining that agreements to arbitrate an ERISA matter violate "public policy," although the opinions invoke the institutional competence and aptness for arbitration rhetoric of the public policy exception. See, e.g., *Zipf*, 799 F.2d at 892-93; *Amaro*, 724 F.2d at 751-52. By contrast, plaintiff *Bird* had signed a broad arbitration provision acting in his own capacity. The clause could not be narrowly interpreted nor could he claim a defense of defective agency, forcing the Second Circuit to resort to public policy prohibition of arbitration.

240. *Bird*, 871 F.2d at 299 (Cardamone, J., dissenting). Judge Cardamone's analysis of the statutory issue is terse and trenchant but does not address the issue of the quality of *Bird*'s consent to the arbitration clause in the Shearson standard form contract.

241. *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds*, 847 F.2d 475, 477-79 (8th Cir. 1988).

242. *Id.* at 478.

243. *Id.*

244. *Id.* at 478-79.

245. *Id.* at 479 (Gibson, J., concurring).

ERISA exception to arbitrability. Instead, the Court vacated the Second Circuit judgment and recommended the case for reconsideration in light of *Rodriguez*, the 1989 case that overruled the securities exception to arbitration of *Wilko v. Swan*.<sup>246</sup> Justices Brennan, Marshall and Stevens dissented, although it is unclear whether they dissented from the grant of certiorari, its disposition of the case, the lack of explanation, or all three.<sup>247</sup> Although the Court's failure to discuss the issue is unfortunate, the result seems compelled by the Court's views about statutory construction and the public policy exception as reflected in *Rodriguez*, *McMahon*, and *Mitsubishi*.<sup>248</sup>

An ERISA exception to arbitration is less defensible than the securities exception of *Wilko* and may even have less persuasiveness than the short-lived antitrust exception of *American Safety*. The ERISA non-waiver provision is less helpful to arbitration opponents than that of the 1933 Act in that it is less broadly worded<sup>249</sup> and more easily seen as applying to substantive pension rights rather than procedural rights of forum selection. In addition, Congress, which passed ERISA when *Wilko* held sway but was under attack, said nothing to restrict arbitration. In 1974, Congress was constructively aware of *Wilko* and could have addressed arbitrability in the statute but did not, suggesting Congress had no desire to limit arbitration agreements between parties to an employee benefits plan. In addition, the Supreme Court's jurisprudence of the 1980s regarding commercial dealings suggests the Court views commercial and securities arbitration as fundamentally fair and not inconsistent with substantive rights. In particular, the Court's 1989 overruling of *Wilko* in *Rodriguez*,<sup>250</sup> casts suspicion on a *Wilko-like* approach to other statutes. Further, *Bird* and *Lewis*, like *American Safety*, admit of no ready and principled stopping point. Under their rationale, any federal statute with broad remedies and liberal judicial access could be read to pre-

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246. *Bird v. Shearson Lehman/American Express Inc.*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 225, 107 L. Ed. 2d 177-78 (1989); see also *supra* text accompanying notes 107-78 (discussing securities exception to arbitration).

247. *Bird*, \_\_\_ U.S. at \_\_\_, 110 S. Ct. 225, 107 L. Ed. 2d 177-78 (Brennan, J., dissenting) (1989).

248. See *supra* text accompanying notes 158-66 (discussing *McMahon*); *supra* text accompanying notes 172-78 (discussing *Rodriguez*); *supra* text accompanying notes 200-11 (discussing *Mitsubishi*).

249. See 29 U.S.C. § 1110(a) (1982).

250. *Rodriguez deQuijas, et al. v. Shearson/American Express, Inc.*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

clude arbitration whenever the bench views adjudication as superior for resolving the case.

## ii. Arbitration of Fair Labor Standards Acts Claims

In *Barrentine v. Arkansas-Best Freight System, Inc.*<sup>251</sup> the Court held claims under the Fair Labor Standards Act (FLSA) not to be within a broadly worded arbitration clause contained in a collective bargaining agreement.<sup>252</sup> Barrentine objected to company policy that he punch out (and not get paid) while getting his rig inspected before beginning a haul. His claim was heard by a joint committee consisting of three union representatives and three management representatives. The joint committee rejected what seems to this non-labor lawyer a winning argument (that Barrentine should get paid for attending to required work).<sup>253</sup> The decision was apparently based on the provisions of the collective bargaining agreement.<sup>254</sup> Disappointed in the result, Barrentine filed a federal suit alleging that the company policy, now endorsed by the grievance committee, violated the FLSA and that his union had breached its duty of fair representation.<sup>255</sup> The company moved for dismissal of the case on claim preclusion grounds.

The Supreme Court held that the arbitrators had no authority to decide the wage claim, that Barrentine had in effect attacked the policy on the basis of the collective bargaining agreement (rather than the FLSA) during the grievance, and that the arbitration result therefore failed to preclude either the FLSA claim or any issue in the lawsuit.<sup>256</sup> The Court is silent as to whether the arbitration had any evidentiary value in the lawsuit. Although other Court cases suggest an evidentiary role for arbitration awards even where they are not preclusive,<sup>257</sup> the standards for assessing the evidentiary use of such awards suggest that the Barrentine grievance would have had little or

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251. 450 U.S. 728 (1981).

252. *Id.* at 745.

253. *Id.* at 731-33.

254. *Id.* at 731.

255. *Id.*

256. *Id.* at 745.

257. See *McDonald v. City of West Branch*, 466 U.S. 284, 294 n.13 (1984); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974); see also Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29 (1988); Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 IND. L.J. 362 (1990).

no impact on the Court.<sup>258</sup>

Because *Barrentine* arose in the post-arbitration context, it did not specifically create an exception to arbitrability as did *Wilko* and *American Safety*. However, a fair reading of *Barrentine* makes this the inevitable conclusion.<sup>259</sup> The *Barrentine* Court, in refusing to find the arbitration result binding in the ensuing litigation, viewed the FLSA claim as a statutory right independent of the arbitration process even though the collective bargaining agreement provided that any controversies between employee and management would be resolved through a mandatory and binding grievance arbitration procedure.<sup>260</sup> Without doubt, Barrentine's claim that he was entitled to get paid for his work attending the truck during inspection was a work-related controversy directly linked to the terms, conditions, and compensation of his employment. The dispute fell within the scope of the arbitration agreement to which Barrentine was constructively a party by virtue of his membership in the union that was a party to the collective bargaining contract.

So why did the Court, with only two Justices dissenting, refuse to let the arbitration decision resolve the controversy so long as Barrentine's representation was fair? Once again, the public policy exception genie escaped the bottle, this time to combine with some historical oddities of labor law to produce the suspect but now well-entrenched *Barrentine* holding. The Court suggested that there was a conflict pitting the Labor Management Relations Act (LMRA), which was designed to foster collective bargaining, quick and informal dispute resolution, and industrial peace, against the FLSA, which sought to guarantee minimally acceptable working conditions and wage policies

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258. See *McDonald*, 466 U.S. at 294 n.13 (reiterating standards from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974)). These standards direct courts to examine: whether provisions of the collective bargaining agreement conform to the statute providing the basis of the claim; the degree of procedural fairness in the arbitration; the adequacy of the record; and the special competence of the arbitrators. Under these criteria, the *Barrentine* arbitration would probably not merit evidentiary force or preclusive effect because of the likely paucity of the record in labor arbitrations.

259. The *Barrentine* rule seems sufficiently entrenched that one does not even see cases annotating Title 9 or Title 29 of the U.S. Code in which employers seek to compel arbitration of FLSA claims or in which the employers seek preclusive effect of evidentiary findings of an arbitration. See *Sheet Metal Workers Local 162 v. Jason Mfg.*, 900 F.2d 1392, 1397-98 (9th Cir. 1990) (expressly declining to decide whether Act applies to labor arbitrators but noting prior courts' reference to Act in deciding labor disputes).

260. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743-45 (1981).



for American workers.<sup>261</sup> The dichotomy suggested by the Court is not inherently obvious and was not based on evidence of record, to wit:

There are two reasons why an employee's right to a minimum wage and overtime pay under the FLSA might be lost if submission of his wage claim to arbitration precluded him from later bringing an FLSA suit in federal court. First, even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration. Wage and hour disputes that are subject to arbitration under a collective-bargaining agreement are invariably processed by unions rather than by individual employees. Since a union's objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available, . . . a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.<sup>262</sup>

The Court did not cite to specific factual support and to some extent allowed this ruling to be dictated by labor law doctrines open to serious question.<sup>263</sup> To be sure, unions are by nature collectives and must seek a bargaining agreement that benefits the membership as a whole. If the union failed in this task, it would lose support and ultimately be decertified. However, the union must seek an agreement that is something other than purely egalitarian or more senior, highly skilled, or marketable workers will not join. The truckers at the Arkansas-Best terminal, for example, presumably had better wages and benefits than the laborers in the warehouse and those who washed the trucks. The union's role is sufficiently complex that it is far from inevitable that it should uniformly sacrifice an individual employee grievant to the collective good. Whether union representatives so act in a given arbitration seems a fact question better suited to case by case determination rather than broad, irrebuttable presumptions used to prevent enforcement of arbitration agreements.

Rather than face this less uniform complexity and charge district courts with the task of determining whether a particular union in a

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261. *Id.* at 734-41.

262. *Id.* at 742.

263. *Id.* at 740-46.

specific grievance arbitration sacrificed an individual wages and hours claim on the altar of the collective good, the Court laid down a bright line rule that arbitrators lack institutional competence to render binding decisions of FLSA claims, since the statute was "designed to provide minimum substantive guarantees to individual workers."<sup>264</sup> Logically, since an arbitration decision involving FLSA issues is non-binding, an employee cannot, under *Barrentine*, be required to first submit his wage claim to arbitration. *Barrentine* thus in effect, creates a *Wilko* rule for the FLSA.

The *Barrentine* Court faced an additional problem in that precedent had established a highly deferential yardstick by which courts were to decide claims of unfair representation by the union. In the leading case, *Vaca v. Sipes*,<sup>265</sup> the Court stated that a union had substantial discretion in framing and conducting a grievance claim so long as the handling of the proceeding was not "arbitrary, discriminatory, or in bad faith."<sup>266</sup> This standard is sufficiently lax that it would presumably permit unions to sacrifice individual claims or types of claims for the greater good so long as its decision was one of reasoned judgment and not based upon impermissible motives such as personal dislike for a grievant or demonstrable invidious prejudice.<sup>267</sup> Unless the Court was prepared to revisit the well-established fair representation standard of *Vaca v. Sipes*, there was an equitable argument that *Barrentine* should not be bound by a result in which his agent had so much discretion to underrepresent him.<sup>268</sup>

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264. *Id.* at 737.

265. 383 U.S. 171 (1967).

266. *Id.* at 190. The *Vaca* standard has been deferentially followed by the courts. *See, e.g.,* *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1060 (9th Cir. 1989) (courts accord great deference to union prosecution); *Caselli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1482 (9th Cir. 1985) (union's presentation need not be error free); *see also* *Emporium Capwell Co. v. Western Addition Comm. Org.*, 420 U.S. 50, 64 (1975) (picketing and other activities by racial minority employees not protected NLRA activity because union is exclusive representative of employees regarding working conditions; minority employees may not bargain separately for nondiscrimination provisions).

267. *See* *Peterson v. Kennedy*, 771 F.2d 1244, 1253-54 (9th Cir. 1985) (union's exercise of judgment does not constitute arbitrary conduct even if erroneous). In addition, Section 301 of the LMRA has been given a broad preemptive sweep, precluding state law claims against a union that requires reference to the collective bargaining agreement. *See, e.g.,* *United Steel Workers of Am. v. Rawson*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990) (barring state law wrongful death claim for alleged negligent safety inspection by union).

268. For example, the union could have originally accepted the employer's practice of requiring truckers to work "off the clock" to perform the required federal inspection in return for higher hourly pay or fringe benefits to truckers or other union members. The employer

The *Barrentine* Court also invoked the holding of *Steelworkers v. Enterprise Wheel & Car Corp.*,<sup>269</sup> to buttress its holding. *Enterprise Wheel* held that a labor arbitrator's decision would be sustained upon judicial review even where the court would have decided the issue differently so long as the arbitrator's decision "drew its essence" from the collective bargaining agreement.<sup>270</sup> *Enterprise Wheel*, decided under Section 301 of LMRA,<sup>271</sup> rather than the federal Arbitration Act,<sup>272</sup> established a slightly different standard for judicial review of arbitration awards resulting from a collective bargaining agreement than for those occurring in other contexts. As discussed in Section I, Section 10 of the Arbitration Act sets forth a narrow series of grounds under which a court can refuse to enter judgment upon or vacate an arbitration award. In essence, an award will be vacated only where it results from fraud, corruption, evident bias or, occasionally, manifest disregard of the controlling law.<sup>273</sup> Section 10(d) provides that an award will be vacated where the arbitrators exceed their powers or so imperfectly execute them as to make the award infirm.<sup>274</sup> Courts have occasionally seized upon this section to vacate or refuse to enforce awards that are clearly erroneous or inconsistent with applicable legal rules and have carved a "manifest disregard of law" exception into the statute.<sup>275</sup>

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may have thought this a fair trade despite the wage increase if it suspected that punched-in truckers dawdled in obtaining the inspection (by letting others ahead in line, etc.) thus increasing total payroll expenses despite a lower wage rate. Under these circumstances, the union's representation of *Barrentine* on the FSLA claim might be quite tepid.

269. 363 U.S. 597 (1960).

270. *Id.* at 597-99.

271. 29 U.S.C. § 185 (1988).

272. 9 U.S.C. § 10 (1988).

273. *Id.*; see also *supra* text accompanying note 15 (discussing judicial review of arbitration awards).

274. 9 U.S.C. § 10(d) (1988). This section permits vacation of an award where "the arbitrators exceeded their power, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id.*

275. See *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986); *Virgin Islands Nursing Association's Bargaining Unit v. Schneider*, 668 F.2d 221 (3d Cir. 1981); *Drayer v. Krasner*, 572 F.2d 348 (2d Cir.), *cert. denied*, 436 U.S. 948 (1978); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211 (2d Cir. 1972) (arbitration award will not be vacated for mistaken interpretation of law, but if arbitrator simply ignores applicable law, literal application of "manifest disregard" standard should presumably compel vacation of award). Many cases, for example, *Drayer*, appear to disagree with the *Sobel* interpretation and will not apply the exception where an arbitrator appears to simply have been unaware of the law rather than knowingly rendering a decision in conflict with the law.

Because review of awards under the Arbitration Act provides these limited escape hatches, Section 10 review would appear to be more searching than Section 301 review under the *Enterprise Wheel* standard. Under *Enterprise Wheel*, the admittedly narrow list of Section 10 reasons to avoid enforcing an award is reduced to one: whether the award was within the scope of the arbitration agreement.<sup>276</sup> So long as it is within the scope, *Enterprise Wheel* admits of no reason to question even the most idiotic of awards. In that sense, *Enterprise Wheel* review is far narrower than Section 10 review.<sup>277</sup> In another sense, *Enterprise Wheel* review is broader than Section 10 review. The court can invalidate even the most reasonable of awards should it find the arbitrator to have stepped over the boundaries of the agreement.<sup>278</sup> Courts taking a narrow view of what constitutes the essence of the agreement might therefore grant more stringent review, even under broadly worded arbitration clauses such as those found in *Barrentine*.<sup>279</sup> The dual standards of review and the Court's historical invocation of Section 301 of the LMRA<sup>280</sup> in labor arbitrations that would seem subject to the Arbitration Act causes some confusion.<sup>281</sup>

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276. See *Public Serv. Co. of Colo. v. International Bhd. Elec. Wkrs.*, 902 F.2d 1920 (10th Cir. 1990) (court has "no authority of review whether the arbitrators were correct or incorrect but only to determine whether the decision draws its essence from the agreement"). *But see* *Strathmore Paper v. United Paperworkers Int'l Union*, 900 F.2d 423, 427-428 (1st Cir. 1990) (*Enterprise Wheel* permits arbitrator to consider matter not strictly incorporated in collective bargaining agreement but related to it).

277. See Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U. L. REV. 471, 483 (1962) (*Enterprise Wheel* provides "no serious judicial review" after labor arbitration award in "discredit to the judicial process"). *But see* Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 270-71 (1980) (despite narrow "cryptic caveat" of *Enterprise Wheel*, "reviewing courts frequently do explore the merits of arbitral interpretation"). Prof. Kaden's assessment is correct, this proves a point: rigid adherence to the *Enterprise Wheel* standard is inadequate review; courts recognize this and on occasion conduct more searching review, however surreptitiously.

278. See, e.g., *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 394 (7th Cir. 1981), *cert. denied*, 454 U.S. 838 (1982); *Local 1466, Int'l Bhd. of Elec. Wkrs., AFL-CIO v. Columbus & S. Ohio Elec. Co.*, 455 F. Supp. 471, 474 (S.D. Ohio), *aff'd*, 627 F.2d 1091 (6th Cir. 1978).

279. See, e.g., *International Union of Elec. Radio and Mach. Wkrs. v. General Elec. Co.*, 407 F.2d 253, 256 (2d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969); *Textile Wkrs. v. American Thread Co.*, 291 F.2d 894, 898 (4th Cir. 1961); see also Wellington, *supra* note 277, at 484 (some language of *Enterprise Wheel* opinion would support narrow view of "essence" standard and greater judicial review).

280. 29 U.S.C. § 185 (1988).

281. Labor arbitration cases are annotated under both the LMRA, 29 U.S.C. § 185 and the Act, 9 U.S.C. § 10, but the standards of review are not congruent, a state of affairs subject to criticism. See, e.g., Wellington, *supra* note 277, at 477-84; Note, *Judicial Review of Labor*

The melding of *Enterprise Wheel* and the public policy exception to arbitrability produced an interesting tautological trap in *Barrentine*. According to the Court, the *Enterprise Wheel* standard of review—in the absence of an FLSA policy exception to arbitration—not only required deferral to labor arbitrations that err but also forbid the arbitrator from making reference to statutory law outside the four corners of the collective bargaining agreement. Said the Court:

[a]lthough a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so. An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement. . . . He "has no general authority to invoke public laws that conflict with the bargain between the parties." . . . His task is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties.<sup>282</sup>

The Court then quoted *Enterprise Wheel*'s view that:

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.<sup>283</sup>

Although there are undoubtedly some sound reasons for wanting labor arbitrators to focus on the collective bargaining agreement rather than acting as roving judges, reasons that support the *Enterprise Wheel* doctrine and go beyond the scope of this paper,<sup>284</sup> the *Barrentine* court went out of its way to set up an *Enterprise Wheel* straw man. What was once a rule requiring arbitrators to resolve disputes in accordance with the collective bargaining contract became a

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*Arbitration Awards: Refining the Standard of Review*, 11 WM. MITCHELL L. REV. 993, 995 (1985).

282. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981) (citations omitted).

283. *Id.* (quoting *Enterprise Wheel*, 363 U.S. at 597). Justice Brennan's characterization of *Enterprise Wheel* seems unduly slanted toward blinding the arbitrator to the legal world outside the shop. *Enterprise Wheel* can easily be read as empowering arbitrators to consider statutory law if necessary. See *Enterprise Wheel*, 363 U.S. at 597-98.

284. One rationale is that this standard gives greater deference to the bargain struck by the parties. See Edwards, *Judicial Review of Labor Awards: The Clash Between the Public Policy Exception and the Duty to Bargain* 64 CHI.-KENT. L. REV. 3, 3-6 (1988) (hereinafter "Edwards, Public Policy"). Another virtue of the *Enterprise Wheel* test is that it limits judicial expenditure of time reviewing arbitration awards even more than Section 10 of the Act does. The different standard of review may also, by focusing on the agreement, foster industrial peace.

ban on arbitrators looking to statutory law for guidance and a bar to vacating labor awards that clearly contravene substantive law.

An extreme example serves to show that the Court could not have literally meant to remove legal considerations from the arbitration. Suppose, for example, the truckers' collective bargaining agreement provided that truckers would also haul small parcels of cocaine to make extra money and split the proceeds with the company. A worker who refused was denied promotion, grieved the issue, and lost. Would the Court seriously affirm the award as within the essence of the agreement? Would it strike down an arbitrator's decision to notify the local United States Attorney, a remedy clearly outside the essence of the agreement? One hopes not. Obviously, there must be some outer limit to the narrow and unquestioning review standard of *Enterprise Wheel*; perhaps a bargaining agreement's provisions or application at odds with federal labor statutes should be one of them.<sup>285</sup>

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285. *But see* *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (upholding labor arbitrator's decision to order reinstatement of employee who appears to have been using illegal drugs in company parking lot). The line drawing process in determining what, if any, public policy policing to apply to private dispute resolution techniques is complex, invoking one of the most basic tensions in our legal system: the conflict between individual freedom and collective good. *See generally* Sunstein, *Private Preferences*, *supra*, note 124; Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

Although most commentators give high marks to the status quo of labor arbitration, there are some notable critics. *Compare* P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* (1966) with Meltzer, *Book Review*, 34 U. CHI. L. REV. 211 (1966). Prof. Bernard Meltzer, a proponent of both arbitration and the public policy exception to it in discrimination cases takes issue with Judge Hays. *See* Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30 (1971). Although Prof. Meltzer raises substantial and fair criticism of Judge Hays' occasionally excessive complaints about the process, Prof. Meltzer perhaps is unduly unwilling to acknowledge legitimate complaints. For example, Hays suggests that labor arbitrators, desiring continuing employment, are under subtle pressure to render a roughly equal number of union and employer awards irrespective of the merits of the individual case. Meltzer dismisses this view in as cavalier and undocumented a fashion as he accused Hays of using in the book. *See* Meltzer, *Book Review*, 34 U. CHI. L. REV. 211, 213-15 (1966). As long as anyone can play the pseudo-empirical game, my entry is closer to Hays. Judging from the anecdotes told by my acquaintances in labor law, arbitrators do trade off, seeking an aggregate "fair split" between the parties will gain the arbitrator continued employment with the union and the employer, repeat players relatively unconcerned with individual errors so long as they are treated fairly in the aggregate. However, there are drawbacks. A very courageous arbitrator who fails to split the baby in a big dollar case may not work in the field for some time. Individual grievants may either profit or lose from this system. *See* Edwards, *Public Policy*, *supra* note 284. Judge Edwards sees the *Misco* opinion as striking the right balance and injecting judicial notions of public policy into the arbitration process only when the public policy concerns are explicit: "well defined and dominant, and ascertained by reference to the laws and legal precedents and not from general considerations

To some extent, the false *Enterprise Wheel* dilemma invoked by the *Barrentine* Court has become more suspect in the 15 years since *Barrentine*. In *W.R. Grace and Co. v. Local 759 Int'l of United Rubberworkers*,<sup>286</sup> the Supreme Court, while continuing to accord substantial deference to labor arbitration,<sup>287</sup> stated that it would "refrain from enforcing" an arbitration award that "violates some explicit public policy."<sup>288</sup> However, to justify abrogation of an award, the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.'"<sup>289</sup> The Court reiterated this test in *United Paperworks Int'l Union v. Misco, Inc.*<sup>290</sup> The Court stated that public policy grounds for vacating a labor award, although narrow, would exist if a specific term of a collective bargaining agreement violated established public policy.<sup>291</sup> Thus, if the labor agreement in *Misco* had guaranteed workers a right to "pot breaks" in lieu of coffee breaks, awards enforcing this provi-

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of supposed public interests." *Id.* at 8 (quoting *Misco*). He, however, notes a dangerous "burgeoning" use of the public policy exception in lower courts. *Id.* at 3, 8. Presumably, Judge Edwards would agree with my hypothetical, despite its superficial resemblance to *Misco* since it is an egregious situation that smacks of a conspiracy to commit crime at least as much as it triggers an arbitration-public policy conflict.

286. 461 U.S. 757 (1983).

287. *Grace* upheld an arbitrator's award finding the employer in violation of its collective bargaining agreement for violating the established seniority system in order to enter into a conciliation agreement with the Equal Employment Opportunity Commission (EEOC). The Court rejected *Grace's* argument that, since it sought to avoid Title VII liability and promote equal opportunity, the arbitration award should be set aside on public policy grounds. *Grace*, 461 U.S. at 761-766. The Court reasoned that employers who deviate from a collective bargaining agreement, no matter how well-motivated, do so at their own risk, and that public policy does not invalidate an award unless the award itself compels a violation of law or other socially unacceptable result. Because the arbitrator's award enforcing the seniority provisions of the labor agreement did not itself violate antidiscrimination laws, it was upheld. *See id.* at 766-768.

288. *Id.* at 766.

289. *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

290. 484 U.S. 29 (1987). In *Misco*, the employer fired a worker found with a marijuana cigarette in the ashtray in his car, which was parked in the factory parking lot at the time. The worker grieved his discharge and was ordered reinstated by the arbitrator. The company sought to have the award set aside on the ground that reinstating the worker violated the nation's public policy against drug use. *Id.* The Court rejected this argument, finding that the arbitrator's exercise of discretion to void the discharge did not run sufficiently counter to anti-drug laws, even assuming that the employee had used marijuana near the time he was working. *Id.* at 35-38.

291. *Id.* at 38.

sion, in fact the entire agreement, could be struck down.<sup>292</sup> However, an award giving a second chance to a fired employee suspected of using drugs was not sufficiently illegal to overcome the equally strong public policy of enforcing labor agreements, arbitration awards, and contracts generally. In short, despite the *Barrentine* court's vision of arbitrators empowered indeed required, to render decisions contrary to law, *Grace* and *Misco* have established some boundaries to prevent *Barrentine's* worst fear: the illegal award immune from judicial modification. Presumably as well, the post-*Misco* Court would support the arbitrator who struck down the hypothetical employer union cocaine running ring.<sup>293</sup> Similarly, an appeals court vacated an arbitration award that permitted an employer to "gag" employees from reporting safety problems to federal regulators.<sup>294</sup> In light of these developments, it appears that the *Barrentine* Court's perceived inability to review labor arbitration awards was overstated. Committing FLSA claims to arbitration need not eliminate judicial review.

In addition to overstating the limits of arbitrator discretion and judicial review, the *Barrentine* Court held as a matter of law that labor arbitrators were generally not competent to decide FLSA claims (and implicitly, any statutory claims) because the arbitrators' specialized competence "pertains primarily to the law of the shop, not the law of

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292. *Id.*

293. Even after *Misco*, circuit courts have invoked public policy to set aside labor awards. See, e.g., *Iowa Elec. Light & Power Co. v. Local Union 204 of Int'l Bhd. of Elec. Wkrs.*, 834 F.2d 1424 (8th Cir. 1987) (vacating award reinstating injured nuclear power plant worker who briefly deactivated safety system to take short cut to lunch; court found national policy of nuclear safety justified setting aside award); *S.D. Warren Co. v. United Paperworkers Int'l Union*, 815 F.2d 178, 186-87 (1st Cir. 1987) (vacating award reinstating operator of dangerous equipment who possessed drugs); *Amalgamated Meat Cutters, Loc. No. 540 v. Great Western Food Co.*, 712 F.2d 122, 125 (5th Cir. 1983) (vacating reinstatement of truck driver who consumed alcohol on duty). *Iowa Electric* has been criticized as taking too expansive a view of the limited public policy exception of *Misco*. See, e.g., Edwards, *Public Policy*, *supra* note 284, at 3-6; Note, *Public Policy Exception in Judicial Review of Arbitration Awards*, 15 WM. MITCHELL L. REV. 767, 787-89 (1989). Most courts appear to have read *Misco* narrowly and are reluctant to set aside awards reinstating the fired employee who drinks, uses drugs, gambles, or acts dishonestly. See, e.g., *Northwest Airlines v. Air Line Pilots Ass'n*, 808 F.2d 76 (D.C. Cir. 1987); *American Postal Wkrs. Union v. United States Postal Serv.*, 789 F.2d 1 (D.C. Cir. 1982); see also Gould, *Judicial Review of Labor Arbitration Awards — Thirty years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464, 486-492 (1989).

294. *Amalgamated Meat Cutters & Butcher Workmen v. Jones Dairy Farm*, 680 F.2d 1142, 1145 (7th Cir. 1982).



the land.”<sup>295</sup> According to the majority, the FLSA typically presents mixed questions of law and fact.<sup>296</sup> Such momentously complex questions include: “what constitutes the ‘regular rate,’ the ‘workweek,’ or ‘principal’ rather than ‘preliminary or postliminary’ activities.”<sup>297</sup> To the Court, these questions were beyond the ken of labor arbitrators who were presumed capable of discerning “many preliminary factual questions, such as whether the employee ‘punched in’ when he said he did.”<sup>298</sup> To be stranded on a desert island with a labor arbitrator

295. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-83 (1960)).

296. *Barrentine v. Arkansas-Best Freight Sys., Inc.* 450 U.S. 728, 743 (1981).

297. *Id.*

298. *Id.* Related to *Barrentine* but more defensible and correctly decided is *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557 (1987). In *Buell*, a railroad worker sued in federal court under the Federal Employers’ Liability Act (FELA), 45 U.S.C. § 51 (1988), a 1906 statute passed to provide railroad workers advantageous opportunity to prosecute tort claims. Buell alleged vicious harassment by a company foreman. The railroad contended that Buell was obligated to arbitrate his claim as a labor dispute under the Railway Labor Act (RLA), 45 U.S.C. § 151 (1988), a 1926 statute that established a “comprehensive framework for the resolution of labor disputes in the railroad industry.” See *Buell*, 480 U.S. at 562. The Supreme Court found the RLA did not require arbitration but remanded for further consideration on another point of interpreting the FELA. See *id.* at 570-71.

The *Buell* opinion cites the “exception trilogy” of *Barrentine*, 450 U.S. 728 (1980), *McDonald v. West Branch*, 466 U.S. 284 (1984) (discussed *infra* at text accompanying notes 328-35) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (discussed *infra* at text accompanying notes 314-23) with approval and contains dicta referring to policy:

This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, “different considerations apply where the employee’s claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.”

*Buell*, 480 U.S. 557, 564-65 (1987) (quoting *Barrentine*). Perhaps these statements are what led one commentator to suggest that the *Buell* decision was heavily influenced by “public values” and is connected to the public policy arbitration exception that once existed in securities laws. See Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1045-46 (1989).

Despite this dicta, no public policy analysis was necessary to *Buell* and in my view, none was really applied. In *Buell*, the Court faced a statutory tort claim backed by legislative history describing it as a supplementary remedy. The RLA set up an arbitration mechanism for labor (as distinct from personal injury) disputes but said nothing about restricting other rights of the workers. Read fairly, the RLA envisioned referral to arbitration of true “work rules,” disputes such as the quality of work done, the length of rest periods, crew size, general job site safety procedures, and so on.

*Buell*’s claim was of a different nature—he alleged that the foreman had it in for him and attempted to hurt and degrade him at work. *Buell* alleged individualized conduct that did not apply to other workers or suggest an interpretative question as to labor policy. By contrast,

must be a horrible experience should he prove as dull as the Court suggests. Again, the Court forgets that forum quality is a relative thing. Many judges, for example, never dealt with FLSA interpretation prior to ascending to the bench. Somehow, the parties and counsel muddle through and the court normally reaches a correct, or at least, acceptable, decision. Furthermore, labor arbitrators are likely to be attorneys.<sup>299</sup> In addition, whatever differences exist between arbitration and litigation may have been exactly what prompted the parties to agree to an arbitration clause.

As Justices Burger and Rehnquist noted in dissent,<sup>300</sup> the Court's efforts to pigeonhole the FLSA safely out of arbitration's reach seem odd in an era when society, the body politic, and the legal profession are encouraging alternatives to judicial dispute resolution.<sup>301</sup> The Court itself has led a flank of this advance with its more pro-arbitration jurisprudence of the past thirty years and the judiciary's encouragement of compulsory arbitration in many federal district courts.<sup>302</sup> The dissent correctly characterizes *Barrentine's* claim as "a relatively typical and simple wage dispute."<sup>303</sup> Nonetheless, *Barrentine* is the law and FLSA claims are not within the Act.

### iii. Arbitration and Plain Vanilla Employment Contracts

Unlike the fortunate *Barrentine*, who escaped the arbitration agreement contracted for by his authorized agent, the union, most contractual employees<sup>304</sup> disputing with employers are usually less successful.

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*Barrentine's* dispute had general application—he was questioning whether any truckers should have to work off the clock while sheparding the rig through the required federal inspection.

Further, *Buell* is not an Arbitration Act case since the RLA establishes a government mandated program and the *Buell* dispute does not involve either an individual agreement (which Section 1 of the Arbitration Act makes unenforceable, at least for interstate transportation workers) or a voluntary arbitration provision in a collective bargaining agreement, as in *Barrentine*. The RLA's failure to foreclose FELA claims (of which Congress was constructively aware) makes *Buell* resolvable without resort to the more diffuse notions of public policy at work in *Barrentine*, *McDonald* and *Alexander*.

299. See R. GORMAN, *LABOR LAW* 542 (1982). *But see* Edwards, *supra* note 212, at 85 (only 54% of sample of labor arbitrators had legal training).

300. *Barrentine v. Arkansas-Best Freight System Inc.*, 450 U.S. 728, 746 (1981) (Burger, C.J., dissenting).

301. *Id.* at 746-49 (Burger, C.J., dissenting).

302. See, e.g., Broderick, *supra* note 30; Burger, *supra* note 30.

303. *Barrentine*, 450 U.S. at 749 (Burger, C.J., dissenting).

304. Most employees are "at will," *i.e.*, they serve at the pleasure of the employer and may be discharged at any time without cause. However, many states now consider it wrongful

Generally, courts have enforced arbitration agreements in employment contracts so long as one of the parties makes no claim triggering a public policy exception to the act.<sup>305</sup> An employee claiming mistreatment by an employer must usually arbitrate the dispute if her contract contains an arbitration clause. In reaching these holdings, courts typically do not discuss whether the arbitration agreement is defective based on contract doctrine. However, some case holdings suggest that courts have a subconscious discomfort in relentlessly applying arbitration clauses to common law claims arising out of employment. For example, in *Coudert v. Paine Webber Jackson & Curtis*,<sup>306</sup> the court held that an arbitration clause in an employee's contract committing to arbitration "[a]ny controversy . . . arising out of the employment or termination of employment" did not require the employee to arbitrate defamation claims arising out of the discharge on the theory that the defamation action did not relate to plaintiff's employment.<sup>307</sup> As the dissent noted, the majority's reading of the "any controversy" arbitration clause seems strained and violative of the federal policy favoring arbitration.<sup>308</sup> Recently, the Second Circuit rejected the *Coudert* rationale, holding that a broker's defamation claims for post discharge statements by the employer were arbitrable so long as they "involve significant aspects of the employment."<sup>309</sup>

The bulk of the "run-of-the-mill" employment contracts with arbitration clauses and no statutory issues implicating various public policy exceptions have involved stockbrokers who, as part of the standard practice of NYSE under its Rule 347, are required to sign the contracts that provide for arbitration.<sup>310</sup> Until the recent developments in *McMahon* and *Rodriguez*, there existed the curious situation that Exchange company employees, who were truly in a vulnerable position (risking their jobs if they refused to sign) had less ability to avoid a perceived hostile forum than did Exchange company custom-

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discharge if an employee is fired for a reason that violates public policy. Employer policies may also give rise to contractual claims by workers normally regarded as at-will employees.

305. See, e.g., *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310 (7th Cir. 1981); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972).

306. 705 F.2d 78 (2d Cir. 1983).

307. *Id.* at 80, 82 (quoting New York Stock Exchange Rule 347).

308. *Id.* at 82-83.

309. *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1052 (2d Cir. 1989) (quoting *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1167 (8th Cir. 1984)).

310. See, e.g., *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir. 1989) and cases cited therein.

ers (risking putting their money in banks or mutual funds if they refused to sign).<sup>311</sup>

b. Civil Rights Claims and Arbitration: A More Sympathetic Sacred Cow

i. Title VII

When Congress passed the Civil Rights Act of 1964, Title VII of the Act<sup>312</sup> prohibited discrimination in the workplace on the basis of race, gender, and ethnic or religious background. Collective bargaining agreements often provide for arbitration of employment disputes,<sup>313</sup> making a public policy collision of Title VII and the Arbitration Act inevitable. When it occurred in *Alexander v. Gardner-Denver Co.*,<sup>314</sup> the Court unanimously held that Title VII required de novo judicial resolution of employment discrimination claims even when such claims arose out of the subject matter of a dispute previously arbitrated pursuant to a collective bargaining agreement.<sup>315</sup>

Alexander was fired from his position as a drill operator allegedly "for producing too many defective or unusable parts that had to be scrapped."<sup>316</sup> He filed a grievance pursuant to the collective bargaining agreement which was prosecuted by his union, the Steelworkers, and contended he was "unjustly discharged" but did not then claim race discrimination.<sup>317</sup> The arbitration clause of the agreement broadly required arbitration of all differences between union and management and "any trouble arising in the plant."<sup>318</sup> Later in the grievance process,<sup>319</sup> Alexander first raised his claim of race discrimination. The arbitrator rejected all his claims and sustained his firing. Prior to the arbitration hearing, Alexander had filed a

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311. *McMahon and Rodriguez*, by eliminating the Securities Acts exceptions, have brought some consistency but have not quelled concern about the fiction of "consenting" to an arbitration clause in an employment contract. Inconsistency remains in that some employees are held to arbitration clauses while others avoid them when suing over a claim protected by a public policy exception.

312. 42 U.S.C. § 2000e, *et. seq.* (1988).

313. See R. GORMAN, *LABOR LAW* 540-43 (1982).

314. 415 U.S. 36, 59-60 (1974).

315. *Alexander*, 415 U.S. at 59-60.

316. *Id.* at 38.

317. *Id.* at 39.

318. *Id.* at 40.

319. The grievance and arbitration process available to Alexander provided several levels of review. See *Alexander*, 415 U.S. at 40 n.3.

charge of race discrimination with the Equal Employment Opportunity Commission (EEOC), which took no action. He then filed suit in federal court. The company raised the adverse arbitration result as a defense, asserting claim preclusion, a position the Supreme Court rejected.<sup>320</sup>

The *Alexander* Court viewed Title VII as invoking the policy exception because the statute required de novo adjudication by courts of agency decisions that were also required by the statute.<sup>321</sup> In addition, the courts were vested with enforcement responsibility.<sup>322</sup> This basis for disregarding an arbitration agreement is unpersuasive in light of the judicial willingness to tolerate, even to encourage settlements and consent decrees. The presence of an extensive administrative scheme and de novo review is irrelevant to the arbitrability question. Title VII claimants are required to participate in the administrative scheme in order to prosecute a claim. They are not required

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320. *Id.* at 60. In *Alexander*, the Court, despite requiring courts to consider Title VII claims de novo, added that the "arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." *Id.* The Court identified as relevant factors: any provisions in the collective bargaining agreement that conform substantially to Title VII; the procedural fairness of the forum; the adequacy of the record on the discrimination issue, and any "special competence of particular arbitrators." *Id.* at 60 n.21.

Note 21 of *Alexander* seems a sensible compromise if one is to permit courts to engage in any retreat from the Arbitration Act's directives regarding compelling arbitration and confirming its results, despite ambiguity in its application. For example, does its language permit a court to grant summary judgment to the employer if the arbitrator found, on the basis of a fully developed record, no discrimination? Probably, unless the employee has some special evidence to create a genuine issue of fact as to the arbitration outcome. This is a thornier problem today than when the *Alexander* court wrote in 1974 because summary judgment appears to have become more available to defendants. See Stempel, *A Distorted Mirror*, *supra* note 133; Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOKLYN L. REV. 35, 41-42 (1988).

In practice, however, such interesting questions are unlikely to occur. Labor arbitrations, like almost all arbitrations, generally proceed on an abbreviated record, with streamlined discovery, and result in tersely worded decisions. Consequently, few arbitrations will ever meet the standards of *Alexander*. See *Alexander*, 415 U.S. at 60 n.21. This has the practical effect of treating Title VII claims differently from other claims. The resolution of the other claims in arbitration and deferral by the courts occurs on the basis of only slim records and terse decisions but it is accepted by reviewing courts. *But see* Edwards, *supra* note 212, at 69 (suggests some significant potential for arbitration proceedings to effectively determine discrimination issue).

321. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974). The Court seemed to recognize that this rationale was not overwhelmingly persuasive and immediately attempted to buttress it with discussions of court and arbitrator competence.

322. *Id.* at 44-45.

to agree to arbitrate. If they do, the presence of the forsaken agency investigation and judicial review do not counsel judicial interference with the arbitration.

The *Alexander* Court went on to distinguish Title VII from other laws by suggesting that a “private [Title VII] litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.”<sup>323</sup> As with the antitrust exception, the public/private dichotomy of law ultimately becomes too arbitrary to be particularly fair or helpful since all laws and lawsuits have both private and public aspects. The opinion perpetuates the ambiguous favoritism of other public policy-style cases.

ii. Federal Civil Rights Act of 1871 (42 U.S.C. § 1983)

Section 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983) provides a right of action for any person deprived of their civil rights by state action.<sup>324</sup> Although the statute contains several complexities such as the requisite degree of state involvement and intent required,<sup>325</sup> it essentially makes illegal invidious discrimination or denials of due process by state officials (*e.g.*, police, elected officials) against someone because of minority status (*e.g.* race, ethnicity, religion, gender).<sup>326</sup> Unlike Title VII, section 1983 was passed during the 19th Century and does not establish a regime of agency proceedings designed to foster informal resolution of disputes and does not contain any language commanding *de novo* review of claims. Section 1983 can be distinguished from Title VII by language, historical context, and thrust.<sup>327</sup> In *McDonald v. City of West Branch*,<sup>328</sup> however, the Court took the *Alexander* approach to Section 1983.

Police officer McDonald was fired in 1976 and challenged his dis-

323. *Id.* at 45 (citing cases).

324. 42 U.S.C. § 1983 (1988).

325. *Id.* To make out a claim under Section 1983, there must be “state action,” which requires more than mere receipt of government funds by the entity alleged to have acted under color of state law. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 839-40 (1982). The wrong alleged may insufficiently implicate the statute even if the state is the tortfeasor. *See Paul v. Davis*, 424 U.S. 693, 701-710 (1976).

326. *See Graham v. Connor*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1865, 1870-73, 104 L. Ed. 2d 443 (1989) (holding § 1983 action violates 4th amendment if excessive use of force by police).

327. *See Will v. Michigan Dept. of State Police*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 2304, 2310-12, 105 L. Ed. 2d 45, 56-58 (1989); *Patterson v. McLean Credit Union*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (construing 42 U.S.C. § 1981).

328. 466 U.S. 284 (1984).

missal through the grievance proceedings established between the city and his union, the Teamsters. The arbitrator found just cause for discharge. McDonald did not appeal but filed a Section 1983 federal court action against the city and several officials, particularly the Chief of Police,<sup>329</sup> alleging the discharge was in retaliation for exercising his first amendment rights. A jury returned a verdict against the police chief alone, who appealed, asserting preclusion by the arbitration. The Supreme Court disagreed, finding no preclusive effect under the Full Faith and Credit Statute.<sup>330</sup> The grievance arbitration was treated as evidentiary but not conclusive on the issue of why McDonald was fired.<sup>331</sup> The Court reasoned that, like the FLSA in *Barrentine* and Title VII in *Alexander*, Section 1983 was a statute that Congress intended "to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes."<sup>332</sup>

The Court based its decision primarily on its view of the efficacy of arbitration versus litigation in resolving civil rights disputes.<sup>333</sup> For example, the Court noted: "arbitral factfinding is generally not equivalent to judicial factfinding;" the arbitration record is less complete; legal rules of evidence do not apply; and trial procedures of examination and cross-examination under oath are usually truncated.<sup>334</sup> Although largely correct, this analysis begs the question of whether McDonald should be bound by his union's agreement to resolve all of his employment related claims against the city through arbitration. Presumably the union's lawyers and the city's lawyers knew something about the differences between arbitration and litigation.<sup>335</sup>

Lurking in the background of *McDonald*, as in *Alexander*, is the question of whether a rank and file employee should be bound to the

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329. *Id.* at 286.

330. *Id.* at 291-93. See 28 U.S.C. § 1738 (1988). The *McDonald* Court quickly and correctly decided that an arbitration award was not a "judicial proceeding" within the meaning of § 1738. *Id.* at 284, 287-88 (1984).

331. *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984).

332. *Id.* at 289.

333. *Id.* at 292.

334. *Id.* at 291. This generalization appears to be more correct regarding labor arbitration than when applied to commercial arbitration or securities arbitration. See *supra* text accompanying notes 7-21.

335. Nonetheless, McDonald probably should not have been bound by the agreement because of the limited agency constructively accorded his union.

arbitration clause entered into by an agent (the union) over which he has relatively little control. I sympathize with the positions of McDonald and Alexander as well as the Court's result in these cases. However, I am more than a little puzzled that the Court used the public policy exception approach in these cases. To say that arbitration is inconsistent with the subject matter of Title VII or Section 1983 seems more than a little overbroad. To argue that McDonald and Alexander should not be bound to arbitrate disputes that go beyond the union's typical agency over terms and conditions of employment is more modest and would have furnished a less draconian means of assisting them. Yet the Court eschewed this route, perhaps because other elements of labor law had become so deferential to union authority (to both bind workers and poorly represent them) as to make public policy invalidation of an arbitration more attractive than a painful re-examination of questionable labor law doctrine. Notwithstanding the equities of *McDonald* and *Alexander*, one wonders how McDonald can avoid being bound by an arbitration clause and decision when stockbroker Fox is bound by his agreement and must arbitrate his ERISA claim. Fox seems to have a better case, since his arbitration agreement was imposed by a rule promulgated by the Stock Exchange, an organization undoubtedly more solicitous of large houses such as Merrill Lynch than it is of isolated employees like Fox. By contrast, McDonald's arbitration agreement arose after a negotiated agreement between the city and his union, an organization that probably had somewhat more regard for employee rights than did the Exchange.<sup>336</sup>

In applying the Arbitration Act or Section 301 of the LMRA, the issue should not be the quality of the arbitration forum but whether the parties agreed to abide by the decisions of that forum. The Court itself took this position in rejecting an antitrust exception to arbitrability in *Mitsubishi Motors v. Soler Chrysler-Plymouth*,<sup>337</sup> the 1934 Act exception in *McMahon*,<sup>338</sup> and the 1933 Act exception in *Rodriguez*,<sup>339</sup> and presumably applied this test tacitly in rendering other pro-arbitration decisions of the 1980s.<sup>340</sup> Although the realities of

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336. *McDonald v. City of West Branch*, 466 U.S. 284, 286 (1984).

337. 473 U.S. 614 (1985).

338. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

339. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

340. *Perry v. Thomas*, 482 U.S. 483 (1987); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213



franchise and securities agreements make the correctness of the Court's consent analysis debatable, the Court at least asks the right question when it focuses on the parties' consent rather than the nature of their claims. Consent remains the right question in Title VII and Section 1983 cases but the Court, like some latter-day Parzival,<sup>341</sup> seems unable to ask it.

Absent express statutory language, *McDonald* and *Alexander* suggest the Court has singled out Section 1983 and Title VII for special status, in essence saying that these claims are "too important" to be left to the arbitrators, even when the parties (governments and the entities that contract with them) had determined to commit them to arbitration. By writing into these statutes provisions not actually placed in them by Congress, the Court creates not only inconsistency but also doubt as to its faithfulness to the judicial commitment to interpret the laws according to the prevailing legal construct. The issue in *McDonald's* case: "why was he fired?" seems particularly within the competence of a labor arbitrator. This is the kind of task for which *McDonald* author Justice Brennan found arbitrators highly competent when he wrote *Alexander* ten years earlier.<sup>342</sup> To be sure, discrimination and constitutional claims are complex, but their resolution still turns on fact finding, something arbitrators probably do as well as jurors or judges. Even if the arbitrators are inferior as fact finders, the Court has yet to explain persuasively why parties predispute agreements to use these inferior tribunals should not be enforced.

The Court created an artificial inappropriateness for Section 1983 arbitration by invoking the same whipsaw argument used in *Barrentine*, to wit: Under the Court's long-standing *Enterprise Wheel* interpretation, a labor arbitrator must issue binding decisions that draw their essence from the collective bargaining agreement; if the arbitrator considers and applies legal standards from the outside world, the

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(1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1 (1983).

341. See E. Zeydel, *THE PARZIVAL OF WOLFRAM VON ESCHENBACH* (1951) (Young knight fails to inquire into older knight's injury; missing opportunity to invoke magic that will cure him).

342. *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 59-60 (1974). In other cases involving discrimination, the Court has viewed the motive of the defendant as a pure question of fact rather than a mixed question of law and fact and has, pursuant to Fed. R. Civ. P. 52(a) refused to set aside such determinations unless the Court finds them clearly erroneous. See *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 277-93 (1982).

arbitrator acts *ultra vires* and the award is infirm. The Court again implicitly read *Enterprise Wheel* as requiring arbitrators to enforce illegal bargains or condone illegal acts not prohibited by (or authorized by) the collective bargaining agreement.

The Court further buttressed the *McDonald* holding by finding the union's "exclusive control over the 'manner and extent to which an individual grievance is presented,'" <sup>343</sup> to exempt Section 1983 claims from the arbitration clause for fear that unions might sacrifice individual claims for the collective good—the imbedded union disloyalty to its individual members hypothesized by the *Alexander* and *Barrentine* Courts. As in *Barrentine*, the Court's posited conflict is both speculative and probably overdone.<sup>344</sup> On the facts of *McDonald*, the divided loyalties argument is even less persuasive. What possible interest could McDonald's union have in allowing him to be discharged for exercising his first amendment rights? How would this benefit other union members or the union as a whole? Only if one suspects that the union traded off the constitutional rights of its members for slightly higher pay, insurance benefits, or a health spa membership can this argument make sense when applied to McDonald's Section 1983 claim.<sup>345</sup>

### iii. Arbitration and Age Discrimination

In determining whether a current or former employee must arbitrate claims against the employer arising under the Age Discrimination in Employment Act (ADEA), decisions resemble treatment of ERISA claims, with no authoritative Supreme Court opinion. However, ADEA claimants have been more successful in persuading

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343. *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (citing *Gardner-Denver*, 415 U.S. at 58 n.19).

344. If the Court's assumption of rampant trade-offs diminishing individual rights is correct, perhaps it should rethink labor law doctrines that permit this result rather than distorting arbitration law.

345. Despite the wide discretion accorded unions to determine what is fair and apt representation of an employee in prosecuting his grievance, the union's conduct must not be "arbitrary, discriminatory, or in bad faith." See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *supra* text accompanying notes 265-68. Presumably, a conscious decision to sacrifice McDonald's right of free speech upon the alter of a fringe benefit or wage package would rise to this level of misconduct unless the type of speech restriction is small relative to the other benefits flowing to McDonald as a union member. This dilemma illustrates the need to examine each case in light of its facts, especially the agency between union and employee and the union's specific motivation in the instant matter.

courts that ADEA issues deserve a public policy exception akin to that of Title VII, the FLSA, and Section 1983. Like the ERISA debate, many of the ADEA-arbitration decisions are recent. Two of the best illustrations of the divergent approaches are *Nicholson v. CPC Int'l Inc.*,<sup>346</sup> and *Gilmer v. Interstate/Johnson Lane Corp.*<sup>347</sup>

*Nicholson*, a financial officer in the defendant corporation, had signed an executive employment agreement with a broad arbitration clause. A year later, his position as vice-president was eliminated in a "restructuring" he viewed as constructive discharge based on his age. He sued and the company moved to compel arbitration, which the court denied over a strong dissent.<sup>348</sup> The majority opinion found an implicit congressional intent to guarantee the judicial forum to ADEA claimants regardless of their contracts and the Arbitration Act.<sup>349</sup> Not surprisingly, the majority gave heavy emphasis and broad interpretation to *Barrentine*, *Alexander*, and *McDonald*, finding the EEOC's role in processing administrative ADEA claims to suggest a sufficiently public aspect to the claims to require adjudication.<sup>350</sup> The dissent sought to distinguish *Barrentine*, *Alexander*, and *Gardner-Denver* on the basis of the collective bargaining agreements in those cases, reasoning that perceived union-employee conflict was at the root of those decisions and that *Nicholson's* independent conduct prevented him from avoiding the arbitration clause.<sup>351</sup>

In *Gilmer*, plaintiff employee was a stock broker who, pursuant to

346. 877 F.2d 221 (3d Cir. 1989).

347. 895 F.2d 195 (4th Cir. 1990), cert. granted in part, 1990 U.S. App. Lexis 1522 (1990).

348. *Nicholson*, 877 F.2d at 231.

349. *Id.* at 230-31. The court also noted the similar importance of obtaining a job for new workers but stopped short of basing its decision on the perceived adhesion atmosphere: "Although this may not constitute the type of duress which renders a contract voidable, we cannot close our eyes to the realities of the workplace." *Id.* at 229. Although the *Nicholson* result may be correct, it is disappointing that the majority relegated the more principled and promising contract analysis to an afterthought.

350. *Id.* at 225-29.

351. *Id.* at 232-36 (Becker, J., dissenting). The dissent is more persuasive in opposing a public policy or institutional competence exception but has two shortcomings. It seeks to distinguish *Barrentine*, *Alexander*, and *McDonald* as collective bargaining cases and fails to examine the very realistic arguments for rescinding *Nicholson's* arbitration contract on adhesion, unconscionability, or duress grounds should the facts merit it. Absent unfair representation, the union's ability to enter into a truly consensual arbitration provision is probably better than that of most any individual employee, a fact the dissent seems to have backwards. The dissent also neglected to address whether a union is routinely authorized to act as agent for the employee regarding discrimination claims.

NYSE Rule 347, was required to sign an employment contract containing an arbitration clause if he wanted to work for defendant. After being discharged, Gilmer filed suit under ADEA, with Interstate moving to compel arbitration.<sup>352</sup> The Fourth Circuit required arbitration of ADEA claims, writing an opinion that took issue with *Nicholson* on virtually every point. In particular, the *Gilmer* court invoked the *Shearson/American Express, Inc. v. McMahon*<sup>353</sup> view that the Arbitration Act command of enforcing agreements could be overcome only by clear indication in a subsequent statute.<sup>354</sup> The majority found no such explicit indications in either the statute or the legislative history.<sup>355</sup> The panel majority was equally unimpressed with the contention that the administrative role of EEOC in ADEA claims suggested congressional intent to preclude arbitration, making the analogy to settlement and the parties' ability to waive jury trial, the right to counsel, and other substantive rights.<sup>356</sup> Similarly, the Fourth Circuit found ADEA to serve both private compensatory purposes and public deterrence purposes.<sup>357</sup> The court acknowledged the possibility of a defense to arbitration based on lack of consent but found no articulation of this defense by Gilmer.<sup>358</sup> In addition, the Fourth Circuit completely rejected arguments against arbitration based on arbitrator competency.<sup>359</sup> To avoid the exception trilogy of *Alexander*, *Barrentine*, and *McDonald*, the *Gilmer* Court engaged in a bit of hair splitting, finding these cases inapposite because they were not, technically, decided under the Federal Arbitration Act.<sup>360</sup>

Other cases addressing the issue have found ADEA claims not arbitrable.<sup>361</sup> In these cases, as well as *Nicholson*, the anti-arbitration

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352. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196 (4th Cir. 1990).

353. See *supra* text accompanying notes 158-167 (discussing *McMahon*).

354. *Gilmer*, 895 F.2d at 196-97.

355. *Id.* at 197. The dissent, like the *Nicholson* majority, argued that ADEA claims were sufficiently similar to Title VII claims that *Alexander* should control. *Id.* at 203 (Widener, J., dissenting).

356. *Id.* at 197-200.

357. *Id.* at 200.

358. *Id.*

359. *Id.* at 201 (noting Supreme Court rejection of complexity/competence exceptions to arbitrability of antitrust, securities, and RICO claims).

360. *Id.* at 201-202.

361. See, e.g., *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 143, 107 L. Ed. 2d 102 (1989); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Criswell v. Western Airlines, Inc.*, 709 F.2d

rhetoric seems unnecessary to the decision.<sup>362</sup> The scorecard for the exception is onesided and the issue remains open absent Supreme Court decision on the matter.<sup>363</sup> Although the "exception trilogy" of *Barrentine*, *Alexander*, and *McDonald* provides strong analogy for an ADEA exception, recent cutbacks in the antitrust and securities exceptions counter this argument. Still, the best argument for an ADEA exception to arbitrability is reverence for the *Alexander* precedent, since ADEA was a hybrid modeled on Title VII and the FLSA,<sup>364</sup> which suggests applying *Alexander* and *Barrentine*. However, this rationale ignores the possibility of needlessly perpetuating precedential error.

Ultimately, the exception issue probably turns on whether one finds persuasive the suggestion that administrative enforcement and availability of the judicial forum for important rights forecloses persons from committing those disputes to arbitration. Courts permit parties to settle federal job discrimination claims without consent but will not enforce predispute agreements to arbitrate them. The inconsistency seems unwarranted.

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544 (9th Cir. 1983); *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D.N.J. 1987).

Of these cases, *Swenson* is the most strident in its invocation of the *Alexander*, *Barrentine* and *McDonald* rhetoric about the incompatibility between arbitration and discrimination claims. It is also perhaps the most antiquated in that it repeatedly refers to a "nonwaivable," "substantive" right to try ADEA claims in court, echoing the always suspect *Wilko* characterization of the 1933 Act, one now stripped of authoritative force by subsequent cases. *Swenson*, 858 F.2d at 1305, 1306. Although *Swenson* can find a basis for this in *Alexander*, it is worth remembering that *Alexander* predated the counter-revolution in characterization of the non-waivability provisions of the Securities Acts. See also Note, *A Test of Arbitrability: Does Arbitration Provide Adequate Protection for Aged Employees?*, 35 VILL. L. REV. 389, 392 (1990) (finding *Gilmer* more consistent with recent supreme court cases than cases holding ADEA claims not arbitrable).

362. For example, the *Cooper* court merely refused to find that an arbitrator's award foreclosed further relief at trial in light of the arbitrator's limited power. The arbitrator had found in *Cooper's* favor and ordered reinstatement, which *Cooper* refused to accept due to workplace tensions. *Cooper*, 836 F.2d at 1553-54. This episode suggests the error of assuming arbitrators are inherently pro-defendant on these claims. In *Criswell* as well, the court refused to accord preclusive effect to an arbitration award where the proceeding did not seem to satisfy ordinary claim or issue preclusion standards as well as the considerations of *Alexander*. *Criswell*, 709 F.2d at 547-49. Although both opinions invoke policy exception techniques, both are distinguishable from *Nicholson* because forbidding arbitration of a matter differs from limiting its preclusive effect.

363. The Court heard *Criswell* but not on the question of the impact of the arbitration. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).

364. See Note, *Administrative Res Judicata and the Age Discrimination in Employment Act*, 89 COLUM. L. REV. 1111 (1989).

#### iv. Admirable Goals but Lurking Dangers

Ultimately, the civil rights exception to arbitration rests on the Court's view that these claims are too vital to be conclusively arbitrated, regardless of the parties' consent, a view one can understand and appreciate. Civil rights are important; the laws protecting them should be stringently applied and vigorously enforced. However, if civil rights claims are inarbitrable because they are important, it is hard to see why all laws are not sufficiently important to escape arbitration. Courts do not hesitate to enforce arbitration agreements in commercial disputes, although the arbitrators thereby decide a dispute that would otherwise be more strictly governed by a myriad of state and federal statutes and the judicial common law: UCC claims; fraud; misrepresentation; breach; necessity; force majeure; and now securities, antitrust, and apparently ERISA claims as well. Are these statutes and common law rights less worthy than Section 1983, Title VII, the FLSA, and ADEA? Perhaps worse yet, the distinctions the Court makes by this conclusory leap admit of no principled stopping point. How should the Court decide which laws are too important for arbitration and which are not? The problem is of course magnified by the congressional command in the Arbitration Act that no such distinctions be made. Despite these failings of *Barrentine*, *Alexander*, and *McDonald*, these decisions have been not only accepted by the legal community but largely praised.<sup>365</sup>

#### c. Miscellaneous Mistreatment of Arbitrability

Other exceptions or quasi-exceptions to arbitrability also exist, the most important of which is probably the discretion bankruptcy judges seem to have to ignore arbitration agreements. In addition, several state law claims have been given public policy exceptions to arbitrability in actions brought pursuant to a state arbitration act.<sup>366</sup> For

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365. See, e.g., Comment, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving Grace in the Search for a Well-Defined Public Policy Exception*, 42 U. MIAMI L. REV. 767 (1988); Shank, *Deferral to Arbitration: Accommodation of Competing Statutory Policies*, 2 HOFSTRA L.J. 211 (1985); Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979); Edwards, *supra* note 212, at 64 (Title VII exception 13 "sound, well-reasoned resolution of the issues poised"). An even stronger view in favor of non-arbitrability is expressed in Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30 (1971), which can be viewed as providing the blueprint for the reasoning of *Alexander* and *McDonald*, if not *Barrentine* as well.

366. See Sterk, *supra* note 102, at 493, 523, 527, 538 (reviewing public policy exceptions

five decades after passage of the Arbitration Act, courts were hostile to enforcing arbitration that touched on patent validity. Some courts strained to find that patent issues involved neither commercial nor maritime transactions, ignoring the plain language of the Act that required only that the contract containing the arbitration agreement be one involving commerce.<sup>367</sup> Other courts applied an implicit or express public policy rationale to hold patent validity claims "inappropriate" for arbitration because the patent laws were designed to benefit the public and patent issues were complex and beyond the ken of arbitrators.<sup>368</sup> Spurred by the business community, Congress amended the patent law in 1982 to provide that arbitration clauses involving patent claims are enforceable to the same extent as any other claims, incorporating the language of Section 2 of the Arbitration Act.<sup>369</sup>

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to arbitrability concerning family law, usury, liquidated and punitive damages claims, public employee labor relations, covenants not to compete, and consumer fraud acts). For an example of state legislation affecting arbitration, see Md. Cts. & Jud. Proceed § 3-206 (1984) (restricting arbitration clauses in employment contracts). In my view, all exceptions but those for the family law claims involving children (who did not sign the arbitration agreement and are substantially affected by the adjudication) are ill-conceived. However, absent effect on interstate commerce, these exceptions are for the states to make. Where interstate commerce is implicated, such laws are probably preempted by the Act. See *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1117-19 (1st Cir. 1989), cert. denied, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2559, 109 L. Ed. 2d 742 (1990).

367. See, e.g., *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184, 186 (D. Del. 1930).

368. See, e.g., *Hanes Corp. v. Millard*, 531 F.2d 585, 593 (D.C. Cir. 1976); *Foster Wheeler Corp. v. Babcock & Wilcox Co.*, 440 F. Supp. 897, 901 (S.D.N.Y. 1977).

369. 35 U.S.C. § 294 (1988). The amendment reflects some congressional rejection of the "complexity" rationale that also supports other public policy exceptions such as those of anti-trust and discrimination law. It also demonstrates legislative intervention to cure judicial inconsistency: courts have normally refused to apply a public policy exception to arbitration in copyright validity and infringement claims. See, e.g., *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1199 (7th Cir. 1987); *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982). The same is true of trademark and trade name claims. See, e.g., *Homewood Indus. Inc. v. Caldwell*, 360 F. Supp. 1201, 1204 (N.D. Ill. 1973); *Saucy Susan Products, Inc. v. Allied Old English, Inc.*, 200 F.Supp. 724, 728 (S.D.N.Y. 1961).

The patent amendment poses fascinating questions outside the scope of this article: Why did Congress act against this exception to arbitrability and not others? What, if anything, should courts make of this history of congressional behavior? Most observers find efforts to make interpretive sense of Congressional inaction or differential action hopelessly complex. See, e.g., Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1396-1409 (1988); Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.Y.U. L. REV. 737 (1984); Tribe, *Toward a Syntax of the Unsaid: Constructing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982). Unfortunately, the courts have inconsistently assumed significance in legislative inaction. See Eskridge, *Overruling Statutory Precedents*, 76 GEO. L. J. 1361, 1402-09 (1988).

The courts' treatment of arbitration in bankruptcy has been another disappointment for creditors. An insolvent person may elect to file bankruptcy under various parts of the Bankruptcy Code and seek to liquidate and get a fresh start, obtain protection from creditors in order to reorganize, or pay back debts under a court-approved protective schedule of repayment. When an entity, especially a company, files bankruptcy, it enters the process as a party to many contracts, some of which often contain arbitration agreements. Not surprisingly, disputes arise as to whether those agreements will be enforced or thwarted because of the bankruptcy. Where this type of dispute has been litigated, the courts have uniformly taken the view that the fate of the arbitration clause lies within the court's discretion.<sup>370</sup> Although this disregard of statutory command of the Arbitration Act is not terribly pernicious in terms of substantive result, delay, and cost, it provides another example of the probably unnecessary use of public policy reasoning to create an exception to a relatively clear statute.<sup>371</sup>

Courts have posited a conflict between the Bankruptcy Code and the Arbitration Act, resolving it in favor of judicial discretion to disregard the imperative language of the Arbitration Act and compel arbitration or stay judicial proceedings only when it is seen as wise to do so.<sup>372</sup> The courts have generally reasoned as follows: The Code re-

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370. See, e.g., *Zimmerman v. Continental Airlines, Inc.*, 712 F.2d 55, 59-60 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984).

371. Bankruptcy courts could reach the same result without resort to the relatively unguided notion of public policy. The Bankruptcy Code specifically provides that all actions against a debtor, including state court and non-bankruptcy federal court actions, are stayed upon filing of a petition until the bankruptcy court lifts the stay. 11 U.S.C. § 362 (1988). Claims involving the debtor, even if allowed to go forward, are first heard in the bankruptcy court. 28 U.S.C. § 157 (1988). If this express statutory language alters a litigant's usual access to state and federal court, it logically alters access to arbitral forums as well. Entitled to respect, an arbitration contract cannot be set above ordinary rights of access to the courts.

In addition, the bankruptcy code gives a trustee the right to reject executory contracts. 11 U.S.C. § 365(a). The arbitration provision in a contract could simply be construed as executory and the trustee given the option to avoid the arbitration so long as she was not seeking to enforce the contract, in which case allowing the debtor to treat the contract as continuing while simultaneously regarding its arbitration provision as rejected would unfairly seem to let her have it both ways (although that, to some extent, is the point of the Bankruptcy Code). However, there is precedent for regarding the arbitration clause of a contract as severable from the contract itself. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967).

372. See, e.g., *Zimmerman v. Continental Airlines, Inc.*, 712 F.2d 55, 59-60 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984); *In re Wm. S. Newman Brewing Co., Inc.*, 87 Bankr.



quires the bankruptcy to be processed expeditiously; applying the Arbitration Act to claims between debtor and creditors would often impede the speedy resolution of the bankruptcy. Therefore, the court has discretion to refuse to stay bankruptcy proceedings to permit arbitration.<sup>373</sup> Typically the debtor makes a claim against a creditor or other merchant with whom it has had dealings and the defendant seeks to enforce a pre-bankruptcy arbitration agreement. The debtor or trustee resists, preferring the claim be resolved in court rather than in arbitration.<sup>374</sup> Courts have applied various criteria to this balancing, including:

- 1) the extent to which special expertise is needed to resolve disputes; 2) the identity of the persons comprising the arbitration committee and their track record in resolving disputes between the parties; and 3) the degree to which the nature and extent of the litigation makes the judicial forum preferable to arbitration.<sup>375</sup>

As in *Barrentine*, *McDonald*, and *Alexander*, the bankruptcy courts presume that they provide better dispute resolution than arbitrators unless special factors are present. Because most of the arbitrable claims arising in the bankruptcy context will involve commercial transactions, a more plausible starting point might be to presume that commercial arbitrators will ordinarily do a better job of resolving commercial disputes. Thereafter, and with minimal delay, the bankruptcy court could use arbitration results in determining pro-rata payments to creditors as part of administering a debtor's estate or approving a Chapter 11 plan. Whatever its accuracy, the judicial preference for judicial decision illustrates some continued distrust of

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236, 241-42 (Bankr. N.D.N.Y. 1988); *In re Cross Elec. Co., Inc.*, 9 Bankr. 408, 410 (Bankr. W.D. Va. 1981).

373. See *Zimmerman*, 712 F.2d at 57-59. The *Zimmerman* court and others enunciating the discretionary treatment of arbitration clauses admit that this doctrine is not grounded in any explicit Bankruptcy Code language seen to overrule or abrogate the Arbitration Act but instead rests on the view that the 1978 Bankruptcy Code "impliedly modified the Arbitration Act." *Id.* at 59.

374. However, claims that lie outside "core" bankruptcy proceedings can not be conclusively determined by the Article I bankruptcy judges but must be finally resolved by Article III district judges based upon the report and recommendation of the bankruptcy judge (absent consent of the parties). See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982). As a result, the path of resolution of claims by and against the debtor's estate is not always so smooth and expeditious as posited by the rationale of the bankruptcy exception to arbitration.

375. *In re Wm. S. Newman Brewing Co., Inc.*, 87 Bankr. 236, 241 (Bankr. N.D.N.Y. 1988) (citing *In re Double TRL, Inc.*, 65 Bankr. 993, 998 (Bankr. E.D.N.Y. 1986)).

arbitration. Not surprisingly, the reported cases in which courts have exercised discretion or reviewed discretion concerning arbitration of bankruptcy disputes have almost uniformly concluded that the arbitration agreement should not be enforced. In other words, a creditor who does business with the debtor loses twice. Unless fully-secured, the creditor will likely receive only a small percentage of the funds owed by the debtor and will be unable to arbitrate the claim as called for in the contract, which has some negative implications for commerce.<sup>376</sup>

#### IV. NEGATIVE IMPLICATIONS OF THE PUBLIC POLICY EXCEPTION

##### A. *Good Public Policy and Its Evil Twin*

Public policy, defined by the collective wisdom of the bench and its feel for the legal, political, and social environment, has a role to play in the judicial functions of resolving disputes as well as articulating norms,<sup>377</sup> especially when a court's decision is supported by adjudicative facts of record or sound legislative fact.<sup>378</sup> However, this role is

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376. The accepted wisdom holds that commerce functions best when merchants are able to predict with relative certainty both the enforceability of their contractual undertakings and the likely result if a contract is breached and disputed. See *THE ECONOMICS OF CONTRACT LAW* 1-5 (A. Kronman & R. Posner ed. 1979). Consequently, something that tends to relieve a party of contractual obligations upon unforeseen grounds (e.g., the filing of a bankruptcy petition) would tend to make merchants more reluctant to continue to contract for and provide goods and services or to at least raise their prices in order to cushion the impact of occasional expectations disappointed by bankruptcy.

377. See Eskridge *Public Values*, *supra* note 6, at 1008 (defining "public values," as "legal norms and principles that form fundamental underlying precepts for our polity—background norms that contribute to and result from the moral development of our political community.") My use of the term "public policy" refers more specifically to the judicial assessment of preferred outcomes acquired through "legitimate" means that do not contradict the signals sent by the body politic. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 149 (1982). Dean Calabresi's discussion of the "legal topography" encompasses essentially the same notion.

378. An adjudicative fact is one that relates to the parties and happenings at issue in a specific case while a legislative fact is one involving happenings affecting the world at large. See Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 *HARV. L. REV.* 364, 402-03 (1942). Adjudicative facts are normally introduced in evidence by parties to the litigation during the trial process but can be "judicially noticed" by the court pursuant to Fed. R. Evid. 201. Legislative facts are not subject to the Rule's requirements. Essentially, courts are able to engage in unrestricted legislative fact-finding, constrained only by principled good sense, appellate court review, and fear of political reprisal by other government branches

most appropriate, some would say only appropriate,<sup>379</sup> when the statutes or settled precedents<sup>380</sup> are ambiguous, in unavoidable and intolerable conflict, or otherwise fail to definitively resolve the issues before the court. In appropriate cases, public policy can aid in determining whether a statutory or constitutional precedent should be overruled, but it is not normally a consideration with the force of statute in its own right.<sup>381</sup>

To some extent, even these more legitimate traditional uses of public policy beg the question of exactly what we mean by public policy. "Public policy" can be usefully viewed as the set of values, assumptions, aspirations, viewpoints and approaches currently holding sway in society as gathered by the judiciary through the legitimate channels of adjudication, precedent, judicial notice, and wise use of legislative

or social forces. See Davis, *"There is a Book Out . . .": Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1539 (1987).

Unwise use of legislative fact, often announced and off-handed, contributes to ill-advised use of "public policy" by the courts in that it allows the courts to determine preferred outcomes based upon "facts" that may only exist in the judge's mind. Compare *Wilko v. Swan*, 346 U.S. 427, 432-35 (1953) with *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) and *Rodriguez De Quijas v. Shearson/American Express, Inc.* — U.S. —, 109 S. Ct. 1917, 1921-23, 104 L. Ed. 2d 526, 536-37 (1989). In all three cases, the "facts" underlying the Court's views are supported by little or no evidence of record. The also lack persuasive, tested—let alone unquestioned—outside supporting material.

379. Public policy exceptions like that for arbitration are legitimate when they: are fairly supported by an unstrained reading of a statute; occur in a realm historically left for judicial common law development; or are required to resolve a gap, conflict, or ambiguity in the legal fabric. Many place significantly narrower confines on judicial interpretation, requiring that court decisions be based only on more or less direct statutory commands or clear intent of the legislature that enacted the measure. See Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 275 (1988) (hereinafter "Eskridge, *Politics Without Romance*") (identifying "plain meaning" and originalist or "archeological" approaches to statutory interpretation). The Supreme Court appears to have articulated an approach between these positions. See *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983) (citing *Muschany v. United States*, 324 U.S. 49, 66 (1945)) (labor arbitration awards can be set aside for violating public policy only if policy "well defined and dominant [as] ascertained 'by reference to the law and legal precedents and not from general considerations of supposed public interests.'").

380. Statutes are traditionally viewed as more compelling than judicial precedent. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 149 (1982); Eskridge, *Overruling Statutory Precedents*, 76 GEO L.J. 1361, 1361 (1988); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

381. See Eskridge, *Public Values*, *supra* note 6, at 1009 ("public values . . . do not control statutory meaning when Congress has directed a fairly determinate result, but in a broad range of statutory interpretation cases public values are critical"); see also, R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 252-55 (1975).

fact.<sup>382</sup> Public policy creates much of the relevant context in which legal questions are examined.<sup>383</sup> Some public policies and their rationale are intrinsically known by judges: e.g., the constitutional commitment to free speech and the value it serves in promoting the American governmental organization. Other public policies must be discerned by the courts through weighing information stemming from other sources: e.g., support for environmental protection as embodied in various acts of Congress,<sup>384</sup> executive behavior,<sup>385</sup> and statements of the populace.<sup>386</sup> These factors can under apt circumstances exert a powerful influence over courts but should not be permitted to overturn or produce results at odds with a clear statutory directive unless

382. I include in these legitimate sources the hybrid of adjudicative and legislative fact labeled social facts, provided the court exercises care in the receipt of this material. See Monahan & Walker, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877, 877 (1988); Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 479-88 (1986).

383. Although judges have a good deal of discretion in applying public policy, that discretion should not be boundless and is best exercised when (a) used as a last resort after the traditional first line legal process tools of statutory construction have failed to provide an acceptable answer and (b) based upon evidence that tends toward the objective, empirical, and verifiable rather than the assumptive, theoretical, or unrepresentative. I do not suggest that judges should be complete mirrors of society or puppets to public opinion despite the cost this entails to principled judges. See generally Culver & Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81 (1986).

A case such as *Brown v. Board of Education*, 347 U.S. 483 (1954), demonstrates that a court, when acting at its best, can look forward in time and above even widely held but undesirable social views without overstepping these boundaries. The judicial legitimacy of *Brown* (as opposed to its romantic appeal) lies in the Court's faithfulness to text (after all, the fourteenth amendment did require equal treatment by the state), reflection of world norms among those who had seriously thought about race issues, and use of evidence of record to suggest that separate schools were inherently unequal by even the most benign segregationist vision, a factor I regard as important despite the criticism of this aspect of *Brown*. See generally P. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* 134-172 (1972); Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

384. See Elliot, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 YALE J. OF L. ECON. & ORG. 313, 330-38 (1985) (discussing Motor Vehicle Air Pollution Act of 1965, Air Quality Act of 1967, and Clear Air Act of 1970).

385. See *id.* at 335 (describing efforts of Nixon White House to jump on environmental bandwagon and Senator Muskie's reaction to prevent "his" issue from being stolen).

386. Public opinion polls consistently show adult Americans to be concerned about environmental protection. See Rheem, *Environmental Action: A Movement Comes of Age*, L.A. Times, Aug. 14, 1987, at 3, col. 1 (reviewing increased support in public opinion polls since 1970 for government action to protect environment). But see *Americans Want Tougher Drug Laws, Poll Finds*, L.A. Times, Aug. 15, 1989, at 15, col. 1 (6% of Gallup Poll respondents rate environment as top national concern as contrasted to 27% viewing drug abuse as top national problem).

the statute is unconstitutional, outdated, or clearly countermanded by another statute.<sup>387</sup>

In the matter of arbitrability, the courts begin with a reasonably clear federal statute, passed overwhelmingly by Congress, with a slim legislative history,<sup>388</sup> unchanged in more than 60 years. Courts have never faced equivalent statutory language opposing arbitration. On the contrary, the enactment of 35 U.S.C. § 294 (promoting arbitration of patent disputes), suggests that Congress has if anything moved toward greater solicitude for arbitration. All state jurisdictions except Alabama and West Virginia have arbitration statutes similar to the federal Act.<sup>389</sup> In addition, Supreme Court reinterpretation of the securities and antitrust laws as well as decisions regarding the pre-emptive reach of federal arbitration law, all suggest that public policy, if it is to be invoked at all, runs in favor of arbitrability rather than against it.<sup>390</sup>

Nonetheless, public policy rhetoric continues to be selectively employed against arbitration. In my view, this is public policy's evil

387. This approach is consistent with court use of public policy in non-arbitration contract cases. See E. FARNSWORTH, *CONTRACTS* 329-48 (1982) (citing cases where contracts modified or not enforced based on criminal legislation, local ordinances, administrative regulations); J. CALAMARI & J. PERILLO, *CONTRACTS* §§ 9-37 to 9-46 (3d ed. 1987). Discussion by contracts scholars suggests that courts invoking public policy seem in most cases to have an objective basis for determining the values employed, often with roots in legislation or other established facts.

388. Of course, a slim legislative history can nonetheless be vague or create ambiguities although the large legislative record perhaps poses greater risk of ambiguity in that it can contain inconsistent or contradictory statements. The vice of the shorter legislative history is its tendency to promote vagueness by failing to say enough to explain the meaning of terms or legislative purpose. In general, short legislative history tends to support interpreting statutory language in its most literal and commonly understood sense because nothing in the legislative materials suggests otherwise. Unless harried, the legislature was probably brief in its commentary because it viewed the statute as sufficiently clear. However, where other reliable information or intervening legal developments create a conflict with the statutory language, a textual approach may be misguided.

389. Liang, *Federal Arbitration Law and State Court Proceedings*, 23 *LOY. L.A.L. REV.* 473, 475-77 (1990).

390. The existence of the federal Arbitration Act and the state arbitration acts, mandatory (and growing) court-annexed arbitration in many districts, expanded arbitration schemes in no-fault insurance states, the norm of arbitration among merchants in the securities and commodities fields, and the growing use of AAA commercial arbitration which doubled between 1978 and 1988, all suggest that there is today both a national governmental policy and a social preference for allowing parties to contract to arbitrate and to attempt to expedite resolution of many disputes by means other than traditional litigation. See Bedell and Ebling, *Equitable Relief in Arbitration: A Survey of American Case Law*, 20 *LOY. U. CHI. L.J.* 39, 40 (1988)

twin. When invoked by the courts, this imposter often looks like legitimate public policy analysis and sounds persuasively inevitable, at least to those who agree with the outcome. On closer examination, several factors make this use of policy analysis illegitimate. Often, a court has positioned itself to invoke policy by unfairly ignoring or torturing the obvious meaning of text or legislative intent to create arguable ambiguity calling for the policy perspective. Frequently, a court manufactures an unnecessary conflict in statutes because it dislikes the result decreed by the most obviously apt law. Usually, a court then makes liberal use of unsupported extra-record assumptions in the guise of legislative fact and then proceeds to the “better” result without any significant proof that entities other than the court would concur. Even when used in principled fashion, public policy can be problematic. As one commentator puts it “[t]he Achilles’ Heel of public values analysis is that one person’s (my) public value is another’s (the Court’s) controversial proposition, or vice-versa.”<sup>391</sup> The evil twin is identifiable either by lack of substantial consensus on the matter or the inability of the court to marshal objective, verifiable evidence in support of its policy analysis.<sup>392</sup>

Judicial doctrines or methods that fail to give full and fair effect to the Arbitration Act on the basis of unconvincing “implicit” readings of a statute, notions of the “better” outcome, or relative preferences for litigation over arbitration are undesirable and ultimately indefensible on jurisprudential if not practical grounds. A generalized public policy exception for arbitration not grounded in compelling statutory language or equivalent evidence: (1) runs counter to the generally accepted role of courts; (2) lacks support in any widely accepted regime of statutory construction; (3) promotes inconsistent determinations, making it more difficult and less rewarding for actors to arrange their contractual relationships with predictability; (4) results in preferential treatment for some claims or claimants at the expense of others; and

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391. Eskridge, *Public Values*, *supra* note 6, at 1010.

392. I realize that objectivity, like public policy, often lies in the eye of the beholder. Nonetheless, some data lie more toward the objectivity pole of the continuum. For example, the passage of the Act, the growth of private arbitration, the use of court-annexed arbitration, passage of the patent arbitration provision, and the absence of textual restrictions on arbitration in laws passed after the Act (such as Title VII, the FLSA, ERISA, and ADEA) all are tangible, objective signs of a public policy favoring arbitration. By contrast, the *Alexander-Barrentine-McDonald* arguments that arbitration is dreadfully inferior to litigation or seriously undermines national anti-discrimination policy tilt toward the subjective pole of the continuum.

(5) fails to sufficiently respect the value of voluntary choice which animates Anglo-American contract law.

### B. *Public Policy and the Role of Courts*

So many forests were felled discussing the proper role of the judiciary in the American system of government that a detailed review of the literature and the issue obviously lies beyond the scope of this paper. Once the more unrealistic and obviously partisan comments (usually attacks on the judiciary) are eliminated from consideration, a prevailing mainstream, but one of wide channel, emerges. Despite all the debate that attends a proper definition of the judicial role, almost all of the conflict occurs at the margins of overwhelmingly accepted tenets.<sup>393</sup>

The vast majority of lawyers, politicians, and the public posit that the legislature has supreme lawmaking authority, bounded only by the confines of the Constitution.<sup>394</sup> The Constitution, although considered "countermajoritarian,"<sup>395</sup> is a democratic document at root, having been ratified by state legislatures of elected representatives.<sup>396</sup>

393. The discussion in this article necessarily focuses on "mainstream" legal thought about courts and legitimacy. As a result, it will not extensively discuss views of the judiciary held by Critical Legal Scholars. The Critical Legal Studies (CLS) movement has attacked the formal model of adjudication as hopelessly unrealistic and insensitive to the personal, class, and political factors that motivate judges and judicial decision. As one scholar has noted, the slogan of the CLS movement might be "law is politics." See Minda, *The Jurisprudential Movements of the 1980s*, 52 OHIO ST. L.J. 599, 621 (1989).

In essence, CLS argues that partisan politics so pervades the judicial system that the purported limited and neutral functioning of courts posited by others is an illusion, making it unproductive to theorize about confining judicial discretion when all such attempts are doomed to failure. However, CLS writings do not suggest an obvious CLS approach to statutory interpretation. See W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 327-29 (1988) (hereinafter "ESKRIDGE & FRICKEY").

Most CLS writing seems to suggest open discussion of the politics of law to reach judicial decisions based on egalitarian community political values. See KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 186-212 (1987). CLS writers have also been unspecific about how this approach would work in practice in the resolution of particular cases.

394. See, e.g., ELY, *supra* note 5, at 1-11; Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948).

395. The Constitution is commonly termed countermajoritarian in that it has been interpreted to allow the unelected federal courts to strike down all or part of legislation by the elected Congress as well as actions by the elected executive and appointees. See generally STONE, *CONSTITUTIONAL LAW*; Parts I, IV (1986); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 1-7, 1-8 (2d ed. 1988); J. ELY, *DEMOCRACY AND DISTRUST* 6-10 (1980).

396. STONE, *CONSTITUTIONAL LAW PARTS I, IV* (1986); L. TRIBE, *AMERICAN CONSTI-*

By a process that virtually everyone regards as legitimate, the judiciary has authority to strike down legislation on a limited set of constitutional grounds. Even the courts' power to exercise these limited powers is further limited by requirements that the challenge to the law be brought by one that has standing to litigate, that the matter be "justiciable," that it be "ripe," but not moot and that it not pose an overt "political question."<sup>397</sup> When the courts, thus constrained, strike down a law, the decision is normally readily accepted.<sup>398</sup>

In the non-constitutional arena of statutory interpretation the courts are "required" to apply the legislative "command."<sup>399</sup> The task, radically simplified by some critics of "judicial activism," often proves difficult because of gaps, conflicts or ambiguities in the statutory fabric. Courts attempt to resolve these problems through mainstream methods of statutory interpretation, behavior widely viewed as legitimate by virtually all members of the profession. Disagreements occur over the best methods for decision or most apt tools for a particular case or class of cases. Certainly, specific results are often debated. However, the structure of the system has widespread acceptance. Under the prevailing legal thought, it is never legitimate for the court to disregard a clear statutory command unless: (1) the provision is unconstitutional; (2) the law has been clearly abrogated or confined by subsequent legislation; or (3) parties to the lawsuit

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TUTIONAL LAW § 1-7, 1-8 (2d ed. 1988); J. ELY, *DEMOCRACY AND DISTRUST* 6-10 (1980). See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

397. See generally C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 13-14 (4th ed. 1983).

398. Particular Court decisions rarely become controversial. When they do, such as when major New Deal legislation was struck down (*Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)), segregation declared illegal (*Brown v. Board of Education*, 347 U.S. 483 (1954)) or abortion declared legal (*Roe v. Wade* 410 U.S. 113 (1973)), the Court has nonetheless retained its authority and legitimacy. Even in the face of violent protest by some groups, such as calling the National Guard to Little Rock (*Cooper v. Aaron*, 358 U.S. 1 (1958)) and countless anti-abortion protests and bombings, and a strong counterattack by a popular president (President Roosevelt's court-packing plan), the Court has withstood assault, although often showing signs of some accommodation.

399. See H. JONES, J. KERNOCHAN & A. MURPHY, *LEGAL METHOD* 255-318 (1980). By contrast, courts facing common law questions of negligence, contract, or property can, in the absence of a statutory directive, "make law" in a nonconstitutional sphere constrained by the judicial norms of principled decision making and *stare decisis* rather than express statutory direction. See also Eskridge, *Overruling Statutory Precedents*, 76 *GEO. L.J.* 1361, 1377 (1988) (many statutes are "common law statutes" broadly drafted with the expectation that courts will develop set of more specific interpretations).



have waived rights under the statute in a manner permitted by law.<sup>400</sup>

Past use of the public policy exception to arbitration flies in the face of the collective consensus. As detailed above, the text of the Arbitration Act gives a clear legislative command that written arbitration agreements be enforced. Under the orthodox view of the judicial process, a court should deny enforcement to arbitration clauses only under procedures authorized under the Act or when required by a reasonably clear provision in a superseding statute. To be superseding, the countervailing statute must postdate the Act or must be so specific to the type of case under consideration that it can fairly be regarded as controlling when balanced against the more general imperative of the Act.<sup>401</sup>

With the possible exceptions of bankruptcy claims, these conditions have not been met where the public policy exception to arbitration has been applied. The problem is particularly apparent in cases refusing arbitrability for antitrust, FLSA, ERISA, ADEA and Section 1983 claims. Although the Securities Law exception of *Wilko* was based in part upon language in the 1933 Act, the language is not a sufficiently clear textual exception to arbitrability, as demonstrated by the Court's creation and retraction of the exception in little more than a generation. In interpreting Title VII, the Court seized upon statutory language vesting authority in courts and the administrative framework of the law. However, this same language and structure has not been interpreted to forbid settlement of Title VII suits or to require judicial approval of settlement terms. Courts ordinarily let the parties agree to avoid litigation. The courts would almost certainly allow Title VII disputants to agree to arbitration after the con-

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400. See J. ELY, *DEMOCRACY AND DISTRUST* 20-40 (1980), H. JONES, J. KERNOCHAN & A. MURPHY, *LEGAL METHOD*, 388-400 (1980).

401. Congress is presumed to be aware of its other laws at the time it enacts legislation. See W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 776-801 (1988) (but noting problems with this assumption); R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 226-27, 275 (1975). When Congress passed the Act and did not exempt other statutory claims (e.g., antitrust; Section 1983) from the Act, one presumes Congress intended no exemptions based upon the subject matter of such pre-Act statutes. Similarly, when Congress enacted subsequent legislation (e.g., Title VII, FLSA, ADEA) but said nothing about arbitration, one again presumes Congress intended the later statute to be governed by the Act. A traditional rule of construction holds that repeal or amendment of a statute by implication are disfavored. See *Universal Interpretive Shuttle Corp. v. Washington Metro Area Transit Comm'n*, 393 U.S. 186, 193 (1968); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

troversty arose.<sup>402</sup>

### C. *The Public Policy Exception and Statutory Construction*

The policy exceptions to arbitrability also tend to run counter to accepted approaches to statutory construction. Like the question of the judicial role, the question of statutory interpretation has received substantial scholarly attention.<sup>403</sup> In similar fashion, the debaters in this second arena have tended to disagree at the margin rather than over core assumptions and values. In fact, the disagreements among statutory constructionists result largely because they all accept the notion that at some point the legislature has ultimate authority, with the debate devolving to the proper judicial function in the absence of specific legislative guidance.<sup>404</sup>

With the exception of a minority of theorists who think that the text of a statute is so woefully and inevitably indeterminate that all interpretation efforts are completely subjective,<sup>405</sup> or that all legislatures (perhaps even all governments) are inherently illegitimate, the

402. Postdispute arbitration agreements are akin to settlements in that courts will not examine them or set them aside absent extraordinary circumstances such as fraudulent inducement or duress. See *Wilko v. Swan*, 346 U.S. 427, 438-39 (1953)(Jackson, J., concurring). This rubber stamp attitude toward post-dispute arbitration is difficult to square with policy exceptions to predispute arbitration agreements. In the latter situation, the courts have occasionally mounted a rhetorical soapbox to decry arbitration as inappropriate for resolving the claim despite consent. But ironically, party consent, deemed irrelevant in the predispute context, is viewed as all-powerful in the post-dispute context.

403. See Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 337 (1988) (scholarly interest in statutory interpretation, after some decline during the 1960s and 1970s, currently in resurgence).

404. See H. JONES, J. KERNOCHEN & A. MURPHY, *LEGAL METHOD*, 594-736 (1980); Eskridge, *Public Values*, *supra* note 6, at 1009 (1989).

405. See S. FISH, *IS THERE A TEXT IN THIS CLASS?*, 32-34, 97-111, 317 (1980) (suggesting that all writings, even those purporting to be clear, are essentially indeterminate with meaning co-created by the author and the reader; ultimately, a consensus within an interpretive community gives the text meaning). I accept this view as a general proposition but reject it as dogmatic and erroneous if it is taken to suggest that no writings can be said to have a sufficiently clear, enforceable, objective legal "meaning" apart from the culture-bound traits of the audience. For example, a class reading James Joyce's *Ulysses* or the poems of T.S. Elliot will perhaps have several different interpretations. This same class reading a news article headlined "U.S. Bombs Libya" will unanimously understand (because of the text rather than any exchange of interpretations) what has essentially happened even if the readers diverge as to the reasons or justification for the incident. Although one can define the class or even all newspaper readers as an interpretative community, this is tautological. I contend that anyone who reads English will get the gist of many texts. See, R. DICKERSON, *supra* note 381, at 34-42. Of course, even a clear text may prove difficult to apply to certain facts or in the face of a conflicting text.

basic ground rules of traditional or conventional statutory interpretation are well-established, if not candidly or consistently applied in practice. The ground rules, really a rank-ordered checklist of actions to take or things to examine, are as follows. First, look at the actual language of the statute. Where the words used have a widely accepted "plain meaning" that does not result in a ludicrous result if applied to the particular dispute, courts should follow and apply the more or less literal statutory language.<sup>406</sup> Second, where the language is clear but in conflict with other statutory language, courts examine the other statutes' language and determine (a) whether a more recent or more specific statute controls or (b) the facially inconsistent language can be reconciled through reasonable but not inevitable constructions of the statutory language.<sup>407</sup>

Third, if neither of these approaches yields a compellingly sane re-

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406. See, e.g., *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570-72 (1982). Of late, Justice Scalia has been the most vigorous proponent of this approach, promoting it even when going down to defeat or laterally to concurrence. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting); *Green v. Bock Laundry Mach. Co.*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 1981, 1994, 104 L. Ed. 2d 557, 575-77 (1989) (Scalia, J., concurring). Prof. Eskridge has labeled a strong version of the plain meaning approach "nominalist." See Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1079-80 (1989). This label perhaps understates the doctrine's substantial pedigree. See, e.g., Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 262-64 (1973).

Where application of the literal language of a statute would yield a result deemed too odd by a majority of Justices, the Supreme Court has typically then looked to other evidence of legislative intent or the purpose of the statute to find the "true" meaning of the statute. See, e.g., *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892).

Where both statutory text and legislative background suggest Congress intended the result now seen as wrongheaded, the courts are faced with a dilemma: whether to aid Congress and the citizenry in traveling toward Hades or whether to apply other, generally less widely accepted, interpretative tools such as public policy to reach a more rational result. The Supreme Court has made liberal use of each fork in the road. See W. ESKRIDGE & P. FRICKEY, *supra* note 401, 592-94.

407. In a recent article, Prof. Schauer has referred to this type of judicial choice as one of norm selection, choosing from the competing norms embodied in statutes that may be applied to the case. The court usually selects the statute and underlying norm believed most apt for the subject matter of the case. See Schauer, *Formalism*, 97 YALE L.J. 509, 521 (1988).

Supporters of cases like *Wilko* and *Alexander* could argue that the Court simply applied this approach in choosing to follow 1933 Act language and Title VII language rather than the Arbitration Act. Unfortunately, the statutory language seized upon in these cases falls far short of posing the direct, obvious, and unavoidable conflict that should exist before the Court chooses one norm/statute to the exclusion of another. The most defensible example of refus-

sult or where the solitary statute under review is ambiguous, examine the legislative history of the statute(s) focusing first on “official” or “first order” legislative history such as committee reports, floor debates, hearings, or other congressional proceedings<sup>408</sup> that clarify the ambiguous language. If these sources are equally ambiguous, examine the “second order” legislative history such as the historical and political context in which the statute was passed or the goals for the statute sought by the interest groups that prevailed in its passage.<sup>409</sup>

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ing to apply the Arbitration Act and selection of a more apt statutory norm occurs in the bankruptcy cases. See *supra* text accompanying note 371.

The civil rights exceptions could perhaps be defended as norm selection to benefit discreet and insular minorities—groups “unconstitutionally deprived of their fair share of democratic influence.” See Eskridge, *Public Values*, *supra* note 6, at 1032 (quoting Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718 (1985)). This defense of the exception, however, assumes a conflict between arbitration and civil rights that may not exist and overlooks the role of voluntary choice by members of *Carolene Products* groups. See Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985). For example, a black worker may prefer arbitration to litigation of Title VII matters if working in an area where the federal bench is dominated by judges unsympathetic to civil rights claims. Or, she may find arbitration more cost-effective. See *Unequal Justice*, 75 A.B.A. J. 44 (Sept. 1989) (costs, delay of litigation discourage litigants with fewer resources); Edwards, *supra* note 212, at 69 (“arbitration is often the most convenient, inexpensive, and expeditious forum in which an aggrieved employee may pursue a charge of discrimination”).

408. Vigorous debate currently surrounds the reliability of various evidence of legislative intent. For a useful summary, see Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 442-52 (1988) (hereinafter “Farber & Frickey, *Legislative Intent*”). Justice Scalia has a preference list (apparently in the unlikely event he is willing to consider legislative history at all) quite different than mine in that it puts low stock in committee reports and attaches more importance to floor statements and the fortunes of floor amendments. For the reasons set forth in Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 440-46 (1988), I prefer my evaluation and that of Profs. Farber and Frickey to the Scalia approach.

409. See *id.* at 448; Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807-16 (1983). First order legislative materials are committee reports, member statements or overwhelming evidence presented at hearings, floor statements regarding the final act and key amendments, even if defeated. Second order legislative materials are everything else that realistically sheds light on the legislative purpose or meaning of the statute. First order materials are both official parts of the enactment process and have been traditionally treated as legitimate guides to meaning by the courts. In addition, they require some degree of legitimacy by the party making the statement and come cloaked in some official status.

Even within this first order group, I would differentiate between reasonably reliable material such as the committee reports, which are the product of some degree of consensus and are read by many of the members (or at least their staffs) prior to voting on the bill and more marginal materials such as isolated hearing testimony and floor statements that may reflect only idiosyncratic views.

Presidential signing statements lie somewhere in between but are perhaps most analogous to congressional floor statements. The value of both is context-specific. Where the speaker is a

Finally, where these techniques fail to resolve the dispute, courts face a genuine gap in the statutory law and are comparatively free of legislative hegemony and must fashion a common law resolution of the case, but one consistent with the legal landscape and judicial rules.

In my view, this is the mainstream approach espoused by the courts themselves<sup>410</sup> as well as "hornbook" canons of statutory interpretation. Modern schools or subschools of interpretation for the most part also accept these rank-order guidelines but in varying degrees according to varying situations. Currently, there appear to be six major schools of statutory interpretation: (1) textualism;<sup>411</sup> (2) "originalism," which confines the judiciary to effecting the will of the legislature that enacted the statute under consideration but looks to sources in addition to the statutory text;<sup>412</sup> (3) "evolutive" or "dy-

president or legislator who supported the legislation, introduced it, "authored" it, etc., the speaker's views may well shed light on general questions or fine points of interpretation. Where the speaker, especially a signing president, opposed the legislation, the statement may well be nothing more than a rear guard attempt to rewrite the bill. See Farber and Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 449-50 n.96 (1988) (approving "traditional doctrine that views of opponents of legislation are entitled to little weight in the interpretative process"); see generally ESKRIDGE & FRICKEY, *LEGISLATION AND STATUTORY INTERPRETATION: CASES AND MATERIALS* 734-35 (1988).

410. See, e.g., *Carpenter v. United States*, 484 U.S. 19, 25-28 (1988) (upholding mail fraud conviction based on text of statute); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 49-57 (1987) (finding ERISA pre-emption of bad faith claims by insureds based on text, purpose, structure, and history of statute); *Monell v. Department of Social Serv.*, 436 U.S. 658, 664-69 (1978) (overruling portions of *Monroe v. Pape*, 365 U.S. 167 (1961), on basis of revised view of legislative intent); see also *Erie R. Co. v. Tompkins*, 304 U.S. 64, 72-78 (1938) (overruling the interpretation of the Rules of Decision Act, 28 U.S.C. § 1652, set forth in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), in large part on the basis of historical data concerning legislative intent); cf. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1374-75, 1393-97 (1988) (arguing that *Monell* overstated its case of prior error in determining legislative intent).

411. See H. JONES, J. KERNOCHAN, & A. MURPHY, *LEGAL METHOD* 388-402 (1980); R. DICKERSON, *supra* note 381, at 229-36; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

412. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 67-120 (1975); H. JONES, J. KERNOCHAN & A. MURPHY, *LEGAL METHOD* 344-87 (1980). This is in essence what Prof. Eskridge has termed the "archeological" approach to statutory interpretation. See Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1363-64 (1988). I include in this camp even the less archeological approaches to according supremacy to the legislature that enacted the statute in question such as Judge Richard Posner's view that courts should engage in "imaginative reconstruction" to discern how the enacting legislators "would have wanted the statute applied to the case" before the court. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286 (1985). Judge Posner's views are sufficiently eclectic that he could as easily be included in the "Law and Economics/Public Choice" school of statutory interpretation which is how a leading casebook has classified his views. See *infra* text accompanying note 416; W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION*

namic” statutory interpretation, which attempts within broader confines to interpret the statute in light of intervening developments, updating the originalist perspective;<sup>413</sup> (4) Calabresian “common law” interpretation, which accords statutes, particularly older statutes, less deference, permitting courts to “overrule” a statute inconsistent with the legal terrain;<sup>414</sup> (5) a “free inquiry” approach, which permits courts to search for the “best” interpretation unhampered by deference to the legislature or required attachment to the legal topography;<sup>415</sup> and (6) interpretation driven largely by economic theory,

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597 (1988). The overlap among the major schools of statutory interpretation helps to prove my point: there is a general mainstream of thought on the issue and the public policy exception to arbitrability does not fit comfortably within this mainstream.

413. See, e.g., Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). Although Prof. Eskridge is the first to use and to some extent popularize this term (which he also refers to as an “evolutive” approach for determining when to overrule statutory precedent), this approach to legal decision making is, in my view, the underlying premise behind so-called “liberal” judicial decision making in which, for example, assertions of constitutional rights once denied are eventually recognized by the Supreme Court. See Gora, *A Justice for All Seasons*, 72 A.B.A. J. 19 (1986) (quoting Justice Brennan). “We current Justices read the Constitution the only way that we can: as 20th Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time.” *Id.*; see also *Baker v. Carr*, 369 U.S. 186, 193-95, 237 (1962) (recognizing fourteenth amendment as providing right to one person-one vote in legislative apportionment); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (tacitly overruling adverse precedent to find segregation violative of fourteenth amendment).

414. See G. CALABRESI, *supra* note 5, at 80-162. To some extent, the Calabresian common law approach is a bridge between the evolutive school and the “free inquiry” approach of continental theorists, discussed *infra*. Calabresi’s method is bounded by subtle but evident principles, although it is far less constrained than Eskridge’s in that it permits courts to strike down a law clear in language and legislative intent when faced with contrary evolutive data. The Calabresi approach seems to have been rarely taken with candor by courts. However, it has some tacit adherents in the real world. See, e.g., *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 381 (1970); *Vincent v. Pabst Brewing Co.*, 177 N.W.2d 513, 514-17 (1970). See also Davis, “*There is a Book Out. . .*”: *Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) (urging legislation to give older statutes only the status of judicial precedent, which may be overturned).

415. Free inquiry theory seems not in fact to be advocated by any domestic legal scholar or court, although doctrines with ostensible boundaries can lead to free inquiry results when concepts of evolution, public values, and ambiguity are stretched out of shape. Perhaps critical legal scholarship comes closest to advocating a free inquiry approach. See Kennedy, *Freedom and Constraint in Adjudication*, 37 J. LEG. EDUC. 518 (1987). However, Prof. Kennedy’s hypothetical judge seeking an acceptable means for achieving a desired result is constrained by the existing rules, public and professional perceptions, limited resources, and a political desire to fight another day. *Id.* at 526-31. The Kennedy judge seems, however, far less constrained than those of any school except free inquiry, which is more commonly used in continental civil law systems. See W. ESKRIDGE & P. FRICKEY, *LEGISLATION AND STATUTORY INTERPRETA-*

particularly public choice theory, which views legislation as the result of rent-seeking activity by interest groups.<sup>416</sup> Socio-political interpretation of the left stops short of being an interpretative school in its present form although it may influence case outcomes and other interpretative approaches.<sup>417</sup>

With the exception of the free inquiry, all of these approaches, including the more problematic public choice perspective, follow the guidelines outlined above in a typical case, which would lead to enforcement of the arbitration clause and rejection of the public policy exception. Unless the American polity is prepared to accept a free inquiry approach, the exception to arbitration lacks support under mainstream rationales. It also makes arbitrability inevitably turn on the gut feelings of the bench. While many of us may sometimes agree with these gut feelings (*e.g.*, civil rights cases) because we think our preferred litigant will do better in the judicial forum, there are undoubtedly just as many cases where we would be appalled, or at least upset, that persons who agreed to arbitrate escaped their bargain without penalty and caused detriment to one who relied on the bargain (*e.g.*, antitrust claims in business disputes).

Even if one measures the policy exception only by the evolutive or Calabresian approaches, neither can save the exception. Both allow the courts to reach results at odds with text only where there is supporting legislative intent or the text conflicts with current public values or legal landscape. Modern Congress appears to be at least as favorable to arbitration as was the 1925 Congress. For example, in 1982, Congress amended the patent laws to eliminate any public pol-

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TION: CASES AND MATERIALS 329-30 (1988); *see also* Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1, 9-13 (1987) (suggesting the CLS approach departs from historical notion of principal law).

416. The economic/public choice theory of legislation is more descriptive than prescriptive at this juncture. *See* Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 319-25 (1988) (drawing upon public choice theory to provide tools for traditional statutory interpretation). An exception is an article, in which the author argues that courts should in the main, concern themselves with enforcing the legislative "contract" between the members and the constituencies for whom the law was passed. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539-44 (1983). To the extent that public choice writings can be seen as a "how-to" approach, they argue for the approach taken in this article and the elimination of the policy exception. The Act was passed for the benefit of merchants seeking to arbitrate and carries the public-regarding banner as well (*e.g.*, lowered court congestion, increasing individual choice), which should prompt the judiciary to resist judge-made exceptions to the express language of the statute.

417. *See* M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 186-212 (1987).

icy exception to the arbitrability of patent claims.<sup>418</sup> Congress has supported alternative dispute resolution methods, including arbitration.<sup>419</sup> Congress has authorized court-annexed arbitration in the federal district courts<sup>420</sup> and recently amended the Federal Arbitration Act to make orders denying arbitration immediately appealable while orders compelling arbitration are not.<sup>421</sup> Practicing attorneys, the business community, and the legal academy have all endorsed alternative dispute resolution and arbitration in at least some form.<sup>422</sup> Under these circumstances, a strict enforcement of the Arbitration Act can not be said to be outdated and must triumph over any generalized public policy exception.<sup>423</sup>

I do not argue, however, that neither the judiciary nor Congress has an interest in ensuring that contested cases involving statutes be resolved in a manner consistent with the intent of the statutes that will effect the statutes' goals. On the contrary, both courts and Congress should care deeply that discriminators, unconstitutionally acting governments, and employers paying insufficient wages be held accountable. My point is that abrogating arbitration agreements in cases containing these statutory claims is a crude tool for fulfilling the legitimate mission of statutory enforcement. Courts might preferably, for example, make more aggressive use of the "manifest disregard of law" rationale for vacating arbitration awards that do not resolve dis-

418. 35 U.S.C. § 294 (1988).

419. See, e.g., 43 U.S.C. § 2001 (1988) (establishing arbitration for Trans-Alaska pipeline construction disputes); 17 U.S.C. § 801-810 (1988) (establishing copyright royalty tribunal); 10 U.S.C. § 2271(e) (1988) (arbitration of aircraft design contract matters).

420. See 28 U.S.C. § 651-658 (1988).

421. See 9 U.S.C. § 15 (1989).

422. See S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 191-245 (1985); J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 174-75 (1980).

423. Legal evolution since passage of the Act in 1925 has shown arbitration to be a more favored part of the legal landscape. The Act is not an example of modern society bound and gagged by the ghosts of Congress past. See generally Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647, 648-49 (1988).

Even if one reorders the burden of persuasion or rephrases the inquiry to ask why courts should overrule the precedents such as *Alexander*, *McDonald*, and *Barrentine* establishing public policy exceptions, the case for disposing of the exception is strong. Prof. Eskridge suggests, for example, that prior to overruling a statutory interpretation precedent, the Court asks whether the case was wrongly decided, whether it detracts from overall national policies, and whether the problems created by the precedent outweigh the dislocation costs occurring if the case is overruled. See Eskridge, *Overruling Statutory Precedents*, 76 GEO. L. REV. 1361, 1388 (1988). As I hope this article has demonstrated, the public policy exception cases are wrongly reasoned and hinder a national policy in favor of arbitration.



putes in accordance with statutory goals. Congress could amend Section 10 of the Arbitration Act to expressly provide greater judicial review of arbitration awards to ensure that they do not deviate too greatly from the results intended by substantive statutes. Courts could adopt a stricter regime for construing the scope of arbitration clauses or could take a more searching look at whether the agent signing a contract (e.g., a labor union) really has authority to bind the employer on issues of discrimination or constitutional rights. In addition, courts could pay meaningful attention to issues of contract consent. Perhaps the Supreme Court could reconsider the *Prime Paint*<sup>424</sup> rule that courts may not decide claims of fraud in the inducement in cases where the contract is one of adhesion and the objecting party had no realistic bargaining power.

#### D. *Inconsistency and Favoritism of the Public Policy Exceptions*

Another vice of the public policy exception is its inconsistency, unpredictability, and arbitrariness. In the face of a national law respecting arbitration agreements, it seems indefensible that some parties avoid arbitrability while similarly situated parties cannot. Once the public policy horse begins to ride, it inevitably tramples some arbitration agreements and leaves others undisturbed. Decisions vary with the court's views on courts or arbitrators. A "what the judge had for breakfast" world is well-illustrated by the courts' conflict over ERISA claims.<sup>425</sup>

Even if the judiciary were expressly given this power, the basis for its exercise is unclear. The proponents of the antitrust, civil rights, and securities claims never demonstrated that these matters are too special to be consensually arbitrated while claims of negligence and contract breach are too mundane for similar status. Neither have the proponents demonstrated that courts should protect contracting parties from bad arbitration bargains when an antitrust claim arises, but not when a merchantability dispute arises. The result is unequal treatment of substantive claims. As with other judicial uses of public policy, this poses a danger that courts will harken to the policy arguments of society's more powerful interests while turning a deaf ear to the powerless.<sup>426</sup>

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424. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967).

425. See *supra* text accompanying notes 213-25.

426. See Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007

The classic defense of the public policy exception posits that courts may exempt claims from arbitrability where a statute that forms the basis for the claim evidences a goal "designed to achieve ends other than doing justice between the parties to a dispute."<sup>427</sup> The problem with this approach is that virtually every statute<sup>428</sup> and all actions recognized by the common law seek not only to do justice between the parties but also to govern and mold conduct. For example, recognizing a cause of action for breach of contract obviously aims at making whole a party victimized by breach. It also inevitably seeks to discourage future breach, to encourage actors to rely on contractual agreements and to promote enterprise and order through a system of judicially enforceable obligations.<sup>429</sup> In this sense, there is a "social" or "public" interest in the average commercial contract dispute just as in a securities claim or a civil rights claim.<sup>430</sup> A decision vindicating a presumptively valid contract, a standard of care in negligence litigation or reasonable property rights in trespass litigation<sup>431</sup> carries so-

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(1989). Eskridge states that the "greatest danger of public values analysis in statutory interpretation is that it will be decisively influenced by the political preferences of the Justices, who are subject to biases that are hard to defend in a modern democracy." *Id.* Prof. Eskridge's own appraisal of the *McMahon* decision provides an ironic example of this tendency to play favorites in policy analysis. He suggests the decision "subordinated the securities law anti-fraud policy to the arbitration policy [because of] the demonstrated inefficacy of arbitration as a remedy for consumers who lack an equal footing with investment advisors." *Id.* at 1083. He cites as support for this empirical statement Justice Blackmun's *McMahon* dissent, which contains no empirical data on the point. The limited data on the efficacy issue gives arbitration reasonably high marks. See Note, *Arbitration of Securities Disputes: Rodriguez and New Arbitration Rules Leave Investors Holding a "Mixed Bag"*, 65 *IND. L.J.* 697, 722 (1990); Buck, *New York Stock Exchange Response to Securities Exchange Commission Request for Review of Predispute Arbitration* (Oct. 14, 1989) Exhibit A.

427. See Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 *CARDOZO L. REV.* 481, 543 (1981); Morgan, *Contract Theory and the Sources Right: An Approach to the Arbitrability Question*, 60 *S. CAL. L. REV.* 1059, 1076-81 (1986).

428. The only exception that comes to mind are private bills, such as citizenship grants or anti-deportation measures, passed by Congress with the express and sole purpose of assisting a particular person or entity.

429. See E. FARNSWORTH, *CONTRACTS* 3-22 (1982).

430. Both civil rights discrimination claims and contract claims enjoy an express constitutional underpinning. See U.S. CONST., art. I, § 10, cl. 1 (the contract clause, prohibiting legislation "impairing the Obligation of Contracts"); U.S. CONST., amend XIII (prohibiting involuntary servitude); U.S. CONST., amend XIV (prohibiting denial of due process and equal protection). Although the contract clause by its literal terms applies only to the states, none of the interpretative schools previously discussed would support reading this language as authorizing the federal judiciary to impair arbitration contracts.

431. Property rights, like civil rights, have a constitutional base. The takings and just

cial import essentially equivalent to even the very compelling policy of non-discrimination, and probably carries import greater than that frequently found in the securities and antitrust cases where the arbitrability exception was traditionally applied.<sup>432</sup> To be sure, some statutes are more comprehensive than others and some more obviously result from legislative perception of a widespread social ill than do others. However, these traits alone are insufficient to compel the partial abrogation of a clear remedial statute such as the Act.

One commentator has suggested that a public policy exception to arbitrability is permissible where the "statute is enacted to protect one class of contracting parties from imposition of contractual terms by another class of contracting parties with greater bargaining power."<sup>433</sup> I completely agree that courts have a role to play in making sure that the agreements they enforce are truly consensual, but believe they should exercise this function through common law contract doctrine rather than a free roving public policy exception to a statutory mandate.<sup>434</sup>

#### E. *A Public Policy Against Free Choice?*

The policy exception to arbitrability also runs counter to the prevailing notion of Western legal, political, and social thought in that it fails to give effect to freely made agreements. The term "freedom of contract" has become something of a talisman in American law be-

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compensation clauses can be seen as a public policy promoting private ownership in the face of government power. Private property was of sufficient importance to the framers of the Constitution that one can posit a public interest in the matter equal to that in discrimination and wage claims. See Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701-16 (1985). See generally Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

432. Laws promoting a fair and reliable financial industry and a competitive economy have a constitutional link in that they were enacted pursuant to the commerce power. However, merely being within the sphere of authorized legislation under Article I of the Constitution suggests a less pivotal role in the basic ordering of the country than does express recognition in the Constitution. Rights concerning private property, contract commitments, free expression, non-discrimination, jury trial, and protection for the criminal defendant can be seen as somewhat more important than statutory rights created pursuant to Congress's concededly broad Article I commerce power. This may help explain, but does not authorize, the policy exceptions of *Alexander* and *McDonald* in that Title VII and § 1983 promote the constitutional goals of equality and liberty.

433. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 543 (1981).

434. Judicial application of common law contract defenses to an arbitration agreement is specifically authorized in 9 U.S.C. § 2.

cause our system has so thoroughly absorbed western liberal<sup>435</sup> philosophy that each person knows what is best for herself or at least should be accorded the freedom to make choices, even bad choices. Where critics attack this axiom of the law and modern philosophy, they usually do not argue that freedom of choice is a bad thing, but rather contend that truly free choice is rare or absent<sup>436</sup> in a complex modern society filled with inequality and compulsion.

Nonetheless, the legal system continues to operate on the tacit assumption that truly meaningful free choice is possible and that commitments made are, under the requisite circumstances, binding.<sup>437</sup> Although commentators have occasionally assailed this view as inaccurate, outmoded, or a handmaiden of hierarchal repression, the classic liberal notions of free choice and binding contract continue to dominate American legal thinking.<sup>438</sup> Indeed, it is hard to imagine

435. By "liberal," I refer not to George Bush's characterization of Michael Dukakis but rather to the tradition of Western liberal philosophy and political thought that places a high value on autonomous, individual decision making as expressed in writings. See J.S. MILL, *ON LIBERTY* (G. Himmelfardo ed. 1982) (1st ed. 1859); see also M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 2 (1987). Kelman states that "'liberalism' [as criticized by CLS] is little more than a very loose term for the dominant postfeudal beliefs held across all but the left and right fringes of the political spectrum." *Id.*

436. See Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 770-75; Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 560-65 (1982); Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 871-79 (1988); Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519, 520-21 (1988); Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129, 1158-69 (1986). All but Shapiro may be read as arguing that at some point free choice becomes not only subject to paternalist or communitarian regulation but also becomes affirmatively "bad" by allowing some to exploit others. I concur but find the problem better addressed, in the arbitration context, by greater scrutiny of arbitration outcomes, since mere participation in arbitration is seldom exploitative or unfair.

437. See Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 521 (1988). A number of contract scholars have noted the asymmetry between the icon of free contractual choice and actual life. See, e.g., Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741, 798-801 (1982); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763-65 (1983); Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1 (1974). The commentators vary in their perceptions of the magnitude of the difficulty created by this discontinuity and their prescriptions for dealing with it.

438. See, e.g., E. FARNSWORTH, *CONTRACTS* § 1.1-1.7 at 3-20 (1982). However, ordinarily available contract remedies usually do not provide exemplary, full delay, or other consequential damages, and may foster misbehavior because these low penalties also encourage breach to pursue other opportunities. See Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 661-65 (1988); Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 23-30 (1974).

the system functioning in anything like its present form if this axiom were altered or removed.<sup>439</sup> Our legal system is thus one of "antipaternalism."<sup>440</sup>

Of course, the legal system frequently departs from the assumptions of actor equality, the free market, and unfettered freedom of choice, even in that hallowed realm of individualism—contract law.<sup>441</sup> Almost every commentator accepts this premise but differences arise over the legitimacy of specific behavior. The weight of legal, political, social, and philosophical thinking holds that courts should be hesitant to act paternally, even for relatively good policy reasons, and should never act paternally when forbidden by legislative edict.<sup>442</sup> The policy exception to arbitrability runs counter to this notion and thus lacks support according to prevailing legal norms.

## V. CONCLUSION

Although public policy and the related notions of public values and legal topography have a significant role in adjudication, even the more activist notions of the judicial role fail to support the courts' use of a public policy exception to refuse to enforce arbitration agreements simply because of the nature of the claim in dispute. The Act, which at age sixty-five continues to reflect current public values (perhaps even better than it did in 1925), prohibits such claim favoritism. The existence of the public policy exception is understandable in light of the judiciary's natural desire to refrain from requiring sympathetic parties to participate in a seemingly disadvantageous forum. This undoubtedly explains the *Alexander-Barrentine-McDonald* exception trio and the differences among judges over ADEA arbitrability. It also explains, but perhaps does not completely justify, the courts' willingness to mount the unruly horse of public policy rather than push

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439. Although the 20th Century has been described as an age of statutes, see G. GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977), and the United States as something of a post-New Deal regulatory state rather than a laissez faire economy or legal system, see B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 1-6 (1985), these observers do not contest that the American system still retains a highly individualistic quality, with all the potential for satisfaction as well as the meanness and disappointment the construct implies.

440. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 519 (1988).

441. See E. FARNSWORTH, *CONTRACTS* § 5.2-5.4 at 330-47 (1982) (describing judicially derived public policy grounds for abrogating or modifying contracts).

442. See Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 521 (1988); Sunstein, *Legal Interferences with Private Preferences*, 53 U. CHI. L. REV. 1129, 1129-31 (1986).

less sophisticated parties toward a perceived inferno. Undoubtedly, the exception also springs from a concern that predispute arbitration agreements will be used to coerce or hoodwink parties into a less favorable forum rendering decisions that undercut important laws, particularly those regarding civil rights. Despite benign motives, the policy exception undermines the traditional axiom that courts seek justice within the so-called rules of the game.

In addition, the policy exception raises the spectre of judicial "overdiscretion" to create and eliminate exceptions according to a hidden political agenda that might give preferential treatment to matters less sympathetic than civil rights claims (e.g., a sudden decree that software or military hardware contract disputes are inappropriate for arbitration in view of national security interests). Just as easily, exceptions for civil rights claims could be swept away as was the securities law exception. Although currently tending to benefit the disempowered, too unrestrained a policy exception could easily turn on these groups without warning merely because of changes in the composition of the bench. To the extent courts seek tools to prevent arbitration clauses from becoming instruments of oppression rather than expedition, these tools already exist in the language of the Act<sup>443</sup> and can be employed effectively without skirting the channels of legitimacy. By ignoring these in favor of the episodic, unrestrained public policy exception, courts do a disservice to arbitration, contract law, litigants, the economic system and the judicial function in a tripartite government.

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443. See Stempel, *A Better Approach to Arbitrability*, 65 TULANE L.R. — (1991) (forthcoming). The Act allows courts to refuse to enforce an arbitration clause "save upon such grounds as exist at law or inequity for the revocation of any contract," which can, if properly invoked, prevent oppression. 9 U.S.C. § 2 (1988).