

NOTES

COMPULSORY ARBITRATION IN THE UNIONIZED WORKPLACE: RECONCILING *GILMER*, *GARDNER-DENVER* AND THE AMERICANS WITH DISABILITIES ACT

No one can be found . . . and . . . no case has . . . fallen within the scope of my researches, in which an agreement to refer a claim to arbitration, has ever been specifically enforced
. . . [I]t has often been said, that the judgment of arbitrators is but *rusticum judicium*.

—Justice Joseph Story, *Tobey v. County of Bristol*¹

Justice Story's remarks represent the strong judicial hostility to arbitration that existed in 1845.² Following in the common law tradition, early American courts guarded their turf ardently and mistrusted any institution that might rob them of jurisdiction.³ Today, by contrast, courts are deluged with litigation and are welcoming alternative dispute resolution mechanisms that might ease their load.⁴ A corresponding willingness to enforce arbitration agreements has replaced the judiciary's traditional hostility.⁵

¹ 23 F. Cas. 1313, 1320, 1321 (C.C.D. Mass. 1845) (No. 14,065) (Story, J.).

² LAURA J. COOPER & DENNIS R. NOLAN, *LABOR ARBITRATION: A COURSEBOOK* 2 (1994).

³ *Id.*

⁴ See *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 748–49 (1981) (Burger, C.J., dissenting).

⁵ See *id.* "Arbitration" refers to a method of resolving disputes by submitting them to the judgment of one or more neutral persons. See generally FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* (4th ed. 1985 & Supp. 1985–89). Arbitration agreements generally refer to contracts in which parties have agreed to submit future disputes to arbitral resolution. *Id.* Another type of arbitration agreement not discussed in this Note is a contract in which parties agree to submit an existing dispute to arbitral resolution. *Id.* Commercial arbitration stems from a clause in an individually bargained contract and traditionally acts as an alternative to litigation. *Id.* Labor arbitration stems from a clause in a collectively bargained contract and traditionally acts as an alternative to the strike. *Id.* In this Note labor arbitration is used to mean grievance arbitration, where an arbitrator interprets or applies the terms of a collective bargaining agree-

While courts have begun to enforce arbitration agreements with greater frequency, they have also begun to play a larger role in protecting the rights of individual employees.⁶ In the past thirty years the number of individual employment rights statutes enforced by the courts has increased dramatically.⁷ This phenomenon has given rise to debate on whether actions under individual employment statutes are appropriate subjects for arbitration.⁸

Inconsistent statements by the United States Supreme Court on this issue mix into the debate. In 1973, in *Alexander v. Gardner-Denver Co.*, the Supreme Court held that an action under Title VII of the Civil Rights Act of 1964 was not a proper topic for arbitration.⁹ In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, by contrast, the Court held that an action under the Age Discrimination in Employment Act was a proper topic for arbitration.¹⁰

Also in 1991, Congress passed the Americans with Disabilities Act ("ADA"), adding to the number of individual employment statutes potentially enforceable through arbitration.¹¹ As part of a national mandate for the elimination of discrimination against individuals with disabilities, Title I of the ADA sets forth specific standards for an employer dealing with a disabled applicant or employee.¹² In general, an employer may not discriminate against an otherwise qualified disabled person who can perform the "essential functions" of a job.¹³ Additionally, an employer must make "reasonable accommodation" for a disabled person to enable that person to perform the essential functions of a job, unless the employer can show that such accommo-

ment negotiated between a union and employer. *Id.* Another type of labor arbitration is interest arbitration, where the arbitrator actually writes the agreement for the parties. *Id.* Although there are many similarities in the way the judiciary treats these two types of arbitration (commercial arbitration and labor arbitration), the two are fundamentally distinct and, at least at the federal level, derive their legitimacy from separate and unconnected statutes. *See infra* notes 23-181 and accompanying text.

⁶ See MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 31, 32-33 (3d ed. 1994).

⁷ *Id.* at 32-33.

⁸ See *infra* text accompanying notes 23-181.

⁹ See 415 U.S. 36, 53-54 (1973).

¹⁰ 500 U.S. 20, 27 (1991).

¹¹ 42 U.S.C. §§ 12101-12213 (1994).

¹² 42 U.S.C. §§ 12111-12117. Prior to 1991, the most comprehensive federal legislation prohibiting disability discrimination was the Rehabilitation Act of 1973. 29 U.S.C. §§ 701-797 (1994). The Rehabilitation Act of 1973 implements affirmative action programs for handicapped persons at various federal agencies and generally prohibits discrimination by federal employers, contractors and recipients of federal aid. *See id.* The ADA is much broader than the Rehabilitation Act in that it covers all private employers with more than 15 workers. *See* 42 U.S.C. § 12112(2), (5).

¹³ 42 U.S.C. § 12112(a).

ation would pose "undue hardship."¹⁴ Determining the meaning and applicability of such vague terms as "essential functions," "reasonable accommodation" and "undue hardship" promises to be a source of conflict for many years to come.¹⁵

This Note examines the compatibility of arbitration and the ADA. Specifically, this Note argues that in the collective bargaining context, arbitration and the ADA are not only compatible, but also inseparable. Absent an express collective bargaining agreement provision to the contrary,¹⁶ courts should require arbitral resolution before allowing an employee to file individual suit under the ADA.¹⁷ Under this mechanism, an employee would retain the right to a judicial trial on the merits following resolution of the claim in arbitration.¹⁸

Section I traces the history of judicial enforcement of arbitration agreements in both the commercial and labor contexts.¹⁹ Section II examines the text, legislative history and framework of the ADA and argues that the ADA passes the judiciary's test for determining statutory arbitrability.²⁰ Section III discusses the advantages of compelling arbitration of ADA claims in the collective bargaining context.²¹ Sec-

¹⁴ 42 U.S.C. § 12112(b)(5)(A).

¹⁵ Although courts may be able to borrow meaning for some of the language of the ADA from Rehabilitation Act precedent, the ADA differs from the Rehabilitation Act in many important respects, and the Supreme Court has yet to resolve many issues under the Rehabilitation Act. ZIMMER ET AL., *supra* note 6, at 743-44.

¹⁶ See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960). The Supreme Court holds that disputes between parties to a collective bargaining agreement are arbitrable unless the agreement explicitly provides otherwise. *See id.*; *see also infra* text accompanying notes 81-92.

¹⁷ See *infra* text accompanying notes 81-92. To date, no Court of Appeals has ruled on this issue. The few district courts that have faced the issue have split. Compare *Austin v. Owens-Brockway Glass Container, Inc.*, 844 F. Supp. 1103, 1107 (W.D. Va. 1994) (employee is estopped from bringing suit under ADA by collective bargaining provision mandating arbitration of grievances) with *Block v. Art Iron, Inc.*, 866 F. Supp. 380, 387 (N.D. Ind. 1994) (employee is not required to arbitrate ADA claims under collective bargaining agreement's arbitration provision) and *Claps v. Moliterno Stone Sales, Inc.*, 819 F. Supp. 141, 147 (D. Conn. 1993) (collective bargaining agreement cannot as a general matter require an employee to arbitrate individual statutory claims).

¹⁸ Determining the weight to be given the arbitral decision in cases where an employee elects to reassert statutory rights in court is beyond the scope of this Note. A few possibilities are as follows: (1) giving the arbitration discretionary evidentiary weight, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1973); (2) deferring to the arbitration on issues of fact and collective bargaining agreement interpretation but only granting it evidentiary weight on other matters, *see id.*; and (3) deferring to the arbitration where certain preconditions are met, under a scheme analogous to the National Labor Relations Board's *Spielberg* Policy, *see Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955).

¹⁹ See *infra* text accompanying notes 23-181.

²⁰ See *infra* text accompanying notes 182-230.

²¹ See *infra* text accompanying notes 231-60.

tion IV discusses the relationship between *Gardner-Denver* and compulsory arbitration and argues that courts should not view *Gardner-Denver* as a bar to enforcing arbitration agreements under the proposed mechanism.²²

I. HISTORY

Under the common law, courts would not enforce agreements to arbitrate future disputes in either the commercial or the labor context.²³ Before 1925, only New York and New Jersey had statutes abrogating the common law rule.²⁴ Congress has since changed the common law rule, and the judiciary has begun to enforce arbitration agreements with increasing regularity.²⁵

A. Commercial Arbitration

Responding to pressures from the business community, in 1925, Congress passed the Federal Arbitration Act ("FAA")²⁶ and made commercial arbitration agreements enforceable under federal law.²⁷ Under Section 2 of the FAA,

[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁸

FAA Section 1 provides the following exception to Section 2's mandate: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."²⁹

²² See *infra* text accompanying notes 261-304.

²³ See COOPER & NOLAN, *supra* note 2, at 2, 4.

²⁴ Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 249 (1927).

²⁵ See COOPER & NOLAN, *supra* note 2, at 4.

²⁶ 9 U.S.C. §§ 1-16 (1994).

²⁷ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting). For a more detailed discussion of the history of the FAA's enactment and the impact of that history on the arbitration of employment discrimination statutes, see Maria C. Whitaker, *Gilmer v. Interstate: Liberal Policy Favoring Arbitration Trammels Policy Against Employment Discrimination*, 56 ALB. L. REV. 273 (1992).

²⁸ 9 U.S.C. § 2 (emphasis added) (also providing for enforcement of agreements to arbitrate existing disputes).

²⁹ *Id.* § 1. The meaning of this exception remains unresolved with respect to the enforceabil-

Since passage of the FAA, the judiciary has spoken considerably on the scope of its mandate.³⁰ The Supreme Court first addressed the issue in 1953, where it interpreted the FAA's mandate very narrowly.³¹ In *Wilko v. Swan*, the Court refused to enforce an arbitration agreement with respect to claims under the Securities Act of 1933 ("'33 Act").³² *Wilko* involved a suit brought by a customer against a securities brokerage firm to recover damages under the civil liabilities provisions of the '33 Act.³³ The customer and the firm were bound by a prior agreement to arbitrate any future disputes arising between them.³⁴ The Supreme Court decided that the agreement to arbitrate conflicted with a clause in the '33 Act that provided that "[a]ny condition, stipulation, or provision binding any person . . . to waive compliance with any provision of [this Act] . . . shall be void."³⁵ The Court determined that the right to select the judicial forum was a "provision" that the parties could not legally waive.³⁶ Reasoning that the statute's guarantees would not be adequately protected in an arbitral forum, the Court decided that an agreement to arbitrate constituted a "stipulation" which purported to "waive compliance" with the Act.³⁷ The Court, therefore, held the arbitration agreement void and unenforceable.³⁸

In the 1960s, several lower courts followed the Supreme Court's *Wilko* rationale and held arbitration agreements unenforceable with respect to other statutes.³⁹ In 1968, in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, for example, the United States Court of Appeals for the Second Circuit held an arbitration agreement unenforceable with respect to Sherman Act claims.⁴⁰ In *American Safety*, a party to a

ity of arbitration clauses in individual employment contracts. *Gilmer*, 500 U.S. at 25 n.2. Although the Supreme Court has never explicitly addressed the issue, the Court has implied that the Section 1 exemption does mean that arbitration clauses in collective bargaining agreements are not enforceable under the FAA. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987); *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting) (finding implicit rejection of the availability of the FAA to enforce arbitration clauses in collective bargaining agreements in the silent treatment given the FAA by the majority).

³⁰ See *infra* text accompanying notes 31-77.

³¹ See *Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

³² *Id.*

³³ *Id.* at 428.

³⁴ *Id.* at 429.

³⁵ *Id.* at 430 n.6, 434-35.

³⁶ *Wilko*, 346 U.S. at 435.

³⁷ *Id.* at 434-35, 432-33 & n.16.

³⁸ See *id.* at 434-35, 438.

³⁹ Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521, 527 (1994).

⁴⁰ 391 F.2d 821, 828 (2d Cir. 1968). Following the *American Safety* decision, the Courts of

license agreement attempted to stay judicial proceedings of a Sherman Act claim pending arbitration pursuant to the agreement.⁴¹ Citing the Supreme Court's *Wilko* decision, the *American Safety* court concluded that the Sherman Act claims could not be submitted to arbitration.⁴² The court explained that arbitration was inappropriate for resolution of the Sherman Act claims because of the importance of the statute's underlying policy goals, the inadequacy of the arbitral forum to decide complex antitrust issues, and the unequal bargaining position of the parties when they entered into the license agreement.⁴³

In 1985, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court departed from its hostility toward the arbitral forum and held an arbitration agreement enforceable with respect to Sherman Act claims.⁴⁴ *Mitsubishi* involved an antitrust dispute between a Japanese corporation and a Puerto Rican corporation that were bound by a sales agreement containing an arbitration clause.⁴⁵ The United States District Court for the District of Puerto Rico had ordered arbitration of the Sherman Act claims pursuant to the FAA.⁴⁶ On appeal, the United States Court of Appeals for the First Circuit reversed the order.⁴⁷ The First Circuit endorsed the doctrine of *American Safety* and held that despite international policy concerns favoring enforcement of the arbitration agreement, the FAA did not require arbitration of the Sherman Act claims.⁴⁸

On writ of certiorari, the United States Supreme Court reversed the First Circuit on the arbitration issue.⁴⁹ The Court began by emphasizing the liberal federal policy favoring arbitration agreements and rejecting the contention that the FAA required a presumption against the arbitration of statutory claims.⁵⁰ The Court explained that outdated

Appeals uniformly held that the rights conferred by the antitrust laws were inappropriate for enforcement by arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 620-21 (1985), discussed *infra* text accompanying notes 44-57. Other courts extended the rationale to other federal statutes. *Abrams*, *supra* note 39 at 529-31.

⁴¹ 391 F.2d at 822.

⁴² *Id.* at 825, 828.

⁴³ *Id.* at 826-27, 828. The court also implied that the commercial arbitrators employed to decide such claims were likely to be from the business community and biased against the customer whose rights the Sherman Act was intended to protect. *Id.* at 827.

⁴⁴ 473 U.S. at 641.

⁴⁵ *Id.* at 616-17. Paragraph VI of the Sales Agreement provided: "All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to . . . this Agreement or for the breach thereof, shall be finally settled by arbitration." *Id.* at 617.

⁴⁶ *Id.* at 620.

⁴⁷ *Id.* at 623.

⁴⁸ *Id.*

⁴⁹ *Mitsubishi*, 473 U.S. at 641.

⁵⁰ *Id.* at 625. The Court cited several of its own recent decisions that had construed arbitration

judicial suspicions about the competence of arbitral tribunals should no longer inhibit the development of arbitration as an alternative means of dispute resolution.⁵¹ The Court also noted that by agreeing to arbitrate a statutory claim, a party was not foregoing the substantive rights afforded by the statute, but was merely submitting their resolution to an arbitral, rather than judicial, forum.⁵²

The Court next established a two-part test for determining arbitrability.⁵³ A court should initially determine whether the parties' agreement evinced an intent to arbitrate the given dispute; in doing so, the court should construe the parties' intentions generously in favor of arbitrability.⁵⁴ Next, a court should analyze the text and legislative history of the statute at issue to determine whether Congress intended to preclude waiver of the right to a judicial forum.⁵⁵ Applying the test to the facts before it, the *Mitsubishi* Court determined that it should enforce the arbitration agreement with respect to the Sherman Act claims.⁵⁶ The Court stated that although it might rule differently in a purely domestic context, the international policy favoring commercial arbitration combined with the FAA mandate in this case and dictated enforcement of the arbitration agreement.⁵⁷

agreements liberally, including *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21 & n.6 (1985), *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 & n.4 (1974). *Id.* at 625-26. Interestingly, the Court also cited *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960), a case that established the liberal federal policy of construing labor arbitration clauses. *Id.* at 626.

⁵¹ *Id.* at 626-27.

⁵² *Id.* at 628.

⁵³ *Id.*

⁵⁴ See *Mitsubishi*, 473 U.S. at 626.

⁵⁵ See *id.* at 627-28.

⁵⁶ See *id.* at 628-29.

⁵⁷ See *id.* at 629. The Court stated that because international policy concerns dictated enforcement of the arbitration agreement, it did not need to decide the legitimacy of the *American Safety* doctrine as applied to a purely domestic conflict. *Id.* After saying so, however, the Court proceeded to express skepticism toward the *American Safety* doctrine in eight pages of dicta. *Id.* at 632-39. First, the Court stated that absent a clear showing to the contrary, a court should not assume contracts generating antitrust disputes were necessarily contracts of adhesion. See *id.* at 632-33. Second, the Court said that the potential complexity of the issues to be decided should not ward off arbitration, as "adaptability and access to expertise are hallmarks of arbitration." *Id.* at 633. Third, the Court said that even though the statute intended the private cause of action to be a central vehicle for deterring violators, there was no reason to assume arbitration would not provide an adequate mechanism. See *id.* at 634-37. The Court explained: "[s]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637. Finally, the Court said that even though maintenance of the efficacy of the arbitral process required retaining only minimal judicial review of arbitral awards at the award-enforcement stage, it would not require intrusive inquiry to establish that the arbitrator acknowledged the Sherman Act claims and actually decided them. *Id.* at 638.

In 1987, the Court extended the rationale of *Mitsubishi* to a domestic dispute in *Shearson/American Express Inc. v. McMahon*, where it held an arbitration agreement enforceable with respect to claims under the Securities Exchange Act of 1934 ("34 Act") and the Racketeer Influenced and Corrupt Organizations Act ("RICO").⁵⁸ *McMahon* involved a suit brought by customers against their brokerage firm.⁵⁹ The customers had entered into prior agreements with the firm providing for arbitration of any controversy relating to their accounts.⁶⁰ Citing *Mitsubishi*, the Supreme Court explained that the FAA mandated enforcement of agreements to arbitrate statutory claims unless Congress had evinced a contrary intent.⁶¹ The Court stated that such intent would be deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying framework and purposes.⁶²

Addressing the '34 Act claims, the Court first said that it did not infer a congressional intent to preclude waiver of a judicial forum from the text of the statute.⁶³ Although noting that the '34 Act contained an antiwaiver provision virtually identical to the '33 Act's antiwaiver provision at issue in *Wilko*, the Court stated that *Wilko*'s reasoning was only applicable to cases where arbitration was inadequate to protect a party's substantive rights.⁶⁴ The Court then rejected the customers' contention that arbitration would weaken their ability to recover under the statute.⁶⁵ The Court stated that even if *Wilko*'s assumptions about the inadequacy of arbitration were valid in 1953, they did not hold true in 1987.⁶⁶

The *McMahon* Court next refused to infer congressional intent from the statute's legislative history.⁶⁷ The Conference Report accompanying a recent amendment to the '34 Act provided that "this amendment [does] not change existing law, as articulated in *Wilko v. Swan*

⁵⁸ 482 U.S. 220, 238, 239, 242 (1987). The Court stated that although the holding in *Mitsubishi* was limited to the international context, much of its reasoning was equally applicable to the case at hand. *Id.* at 239.

⁵⁹ *Id.* at 223.

⁶⁰ *Id.*

⁶¹ *Id.* at 226-27.

⁶² *Id.* at 227.

⁶³ See *McMahon*, 482 U.S. at 227-28. Section 29(a) of the '34 Act declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of" the Act. *Id.* at 227.

⁶⁴ See *id.* at 228-29.

⁶⁵ *Id.* at 231.

⁶⁶ See *id.* at 233.

⁶⁷ See *id.* at 236-37.

. . . concerning the effect of arbitration proceeding provisions in agreements entered into by [customers]."⁶⁸ Despite the report's apparent facial clarity, the Court concluded that an intent of the conferees to preclude arbitration was not deducible from this language.⁶⁹ The Court explained the many inherent difficulties in inferring congressional intent from legislative history and concluded that if Congress had intended to extend *Wilko* to the '34 Act, it would have included such a provision in the law itself.⁷⁰ Thus, determining that neither text nor legislative history supported a contrary congressional intent, the Court ordered arbitration of the '34 Act claims.⁷¹

With respect to the RICO claims, the *McMahon* Court similarly found no support in either text or legislative history to support a holding against arbitrability.⁷² The Court then analyzed the policies underlying RICO and concluded that there was no inherent conflict between those policies and arbitration.⁷³ Following the reasoning of *Mitsubishi*, the Court decided that because the customers could effectively vindicate their rights in an arbitral forum, the RICO claims should be arbitrated in accordance with the arbitration agreement.⁷⁴

Finally, in 1989, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Supreme Court overruled *Wilko* and held an arbitration agreement enforceable with respect to '33 Act claims.⁷⁵ The Court explained that *Wilko* had "fallen far out of step with our current strong endorsement of the federal statutes favoring [arbitration]" and that resort to the arbitral process would not undermine any of the substantive rights afforded under the statute.⁷⁶ Accordingly, the Court enforced the parties' agreement and ordered arbitration of the statutory claims.⁷⁷

Thus, between 1953 and 1989, the judiciary's approach to enforcing commercial arbitration agreements underwent dramatic change. In the past, courts following *Wilko* rejected enforcement for reasons of the importance of a statute's underlying policy goals, the inadequacy

⁶⁸ *McMahon*, 482 U.S. at 236-37.

⁶⁹ *See id.* at 237-38.

⁷⁰ *See id.*

⁷¹ *Id.* at 238. Apparently the customers did not argue, and the Court did not address, the compatibility of arbitration with the underlying purposes of the '34 Act. *See id.* at 238-39.

⁷² *Id.* at 238. The Court stated that unlike the '34 Act, nothing in RICO's text or legislative history even arguably evinced a congressional intent to preclude waiver of a judicial forum. *Id.*

⁷³ *McMahon*, 482 U.S. at 239.

⁷⁴ *See id.* at 242.

⁷⁵ 490 U.S. 477, 485 (1989).

⁷⁶ *Id.* at 481, 486.

⁷⁷ *Id.* at 486.

of the arbitral forum, and the relative bargaining position of the parties to the agreement.⁷⁸ In three 1980s decisions, however, the Supreme Court invalidated these reasons as grounds for refusing to compel arbitration of statutory claims.⁷⁹ Under the current standard, a court must order arbitration of statutory claims in accordance with a commercial arbitration agreement unless it can deduce a congressional intent to preclude arbitration from the statute's text, its legislative history, or from an inherent conflict between arbitration and the statute's framework or underlying purposes.⁸⁰

B. Labor Arbitration

While the enforceability of commercial arbitration agreements gained judicial acceptance, the enforceability of labor arbitration agreements developed under separate doctrine. In 1947, in an effort to promote industrial stabilization, Congress enacted the Labor Management Relations Act ("LMRA"), indicating approval of arbitration as a method of resolving labor disputes.⁸¹ In 1957, in *Textile Workers Union v. Lincoln Mills*, the United States Supreme Court interpreted Section 301 of the LMRA⁸² as granting courts power to enforce specific provisions in collective bargaining agreements.⁸³ In *Lincoln Mills*, a union sought to compel arbitration of a grievance pursuant to an arbitration clause in its collective bargaining agreement.⁸⁴ The Court reasoned that Section 301 gave it both jurisdiction to hear the suit and authority to create a federal common law to govern the suit.⁸⁵ The Court then ordered arbitration, thereby establishing the enforceability

⁷⁸ See Abrams, *supra* note 39.

⁷⁹ *Rodriguez*, 490 U.S. at 477; *McMahon*, 482 U.S. at 220; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 614 (1985).

⁸⁰ *McMahon*, 482 U.S. at 227.

⁸¹ 29 U.S.C. §§ 141-187 (1994). Section 203(d) provides: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1994); see *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 574, 578 (1960).

⁸² 29 U.S.C. § 185(a) (1994). Section 301(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

⁸³ 353 U.S. 448, 456 (1957).

⁸⁴ *Id.* at 449.

⁸⁵ See *id.* at 451, 456.

of collectively bargained arbitration agreements under federal common law.⁸⁶

The Supreme Court further developed the common law in 1960, in *United Steelworkers v. Warrior & Gulf Navigation Co.*, where it held that courts should liberally enforce arbitration clauses in collective bargaining agreements.⁸⁷ In *Warrior & Gulf*, a union sued to compel arbitration of a grievance pursuant to the arbitration provision in the parties' collective bargaining agreement.⁸⁸ The employer had refused to arbitrate, arguing that the particular grievance was not proper for arbitration.⁸⁹ The Court began its discussion by distinguishing labor arbitration from commercial arbitration and by emphasizing the strong federal policy in favor of peaceful resolution of labor disputes.⁹⁰ The Court explained that the judicial hostility to commercial arbitration evinced in *Wilko* had no applicability in the labor context.⁹¹ The Court then rejected the employer's argument that the grievance was inarbitrable and held that a court should deem a grievance arbitrable unless the agreement contained an express provision to the contrary.⁹²

Despite the liberal policy toward enforcement articulated in *Warrior & Gulf*, and in contrast to its treatment of commercial arbitration agreements, the Supreme Court has never enforced a collectively bargained arbitration agreement with respect to statutory claims. In 1974, in the seminal case *Alexander v. Gardner-Denver Co.*, the Supreme Court pronounced that arbitration was an inadequate forum for final adjudication of Title VII rights.⁹³ The *Gardner-Denver* Court held that an employee had a statutory right to a trial de novo under Title VII of the Civil Rights Act of 1964 ("Title VII") notwithstanding prior submission

⁸⁶ *Id.* at 451. In dissent, Justice Frankfurter sharply criticized the majority's holding as contrary to the common law precedent of denying enforcement of executory agreements to arbitrate. *See id.* at 467. He reasoned that if the FAA were necessary to grant courts power to enforce commercial arbitration agreements, a congressional act specifically granting courts the power to enforce labor arbitration agreements should likewise be required. *Id.* at 466-67. He noted that by not enforcing the collective bargaining agreement under the FAA, the majority gave implicit approval to the view that Section 1's exemption for employment contracts covered collective bargaining agreements. *Id.* at 466.

⁸⁷ 363 U.S. 574, 583 (1960).

⁸⁸ *Id.* at 577.

⁸⁹ *Id.* The employer had argued that the substance of the grievance, the company's decision to contract out work, was a matter strictly the function of management and was not subject to arbitration. *Id.*

⁹⁰ *Id.* at 577-78.

⁹¹ *Id.* at 578. *Warrior & Gulf* was decided seven years after *Wilko*, long before the Supreme Court had overcome its hostility to commercial arbitration in the 1980s.

⁹² *Warrior & Gulf*, 363 U.S. at 584-85.

⁹³ 415 U.S. 36, 56 (1974).

of his claim to arbitration under the nondiscrimination clause of a collective bargaining agreement.⁹⁴

The dispute in *Gardner-Denver* centered around an employer's termination of a black drill operator for allegedly producing too many defective parts.⁹⁵ The employee filed a grievance pursuant to the collective bargaining agreement, asserting that the employer had discharged him without just cause.⁹⁶ His grievance made no explicit claim of racial discrimination.⁹⁷ The union processed the employee's grievance under the agreement's multistep grievance machinery.⁹⁸ In the final prearbitration step, the employee raised a new claim and charged that his discharge had been the result of racial discrimination.⁹⁹

At the arbitration hearing, the employee testified that the employer had discharged him because of his race, that the employer had retained other, nonblack workers who had produced the same or greater number of defective parts, and that the employee felt he could not rely on the union.¹⁰⁰ The arbitrator decided in favor of the employer, ruling that the employer had discharged the employee for just cause; the arbitrator made no reference to the employee's allegation of racial discrimination.¹⁰¹ The employee then filed suit under Title VII.¹⁰²

⁹⁴ *Id.* at 49.

⁹⁵ *Id.* at 38.

⁹⁶ *Id.* at 39. Under Article 4 of the agreement, the company retained "the right to hire, suspend or discharge [employees] for proper cause." *Id.* Article 23, § 6(a) provided that "[n]o employee will be discharged, suspended or given a written warning notice except for just cause." *Id.*

⁹⁷ *Id.*

⁹⁸ *Gardner-Denver*, 415 U.S. at 42. The agreement contained a five-step grievance procedure culminating in compulsory arbitration for unresolved disputes as to the meaning and application of the provisions in the agreement. *Id.* at 40-41 n.3. The company and the union were to select and pay the arbitrator, and the arbitrator's decision was to be "final and binding upon the company, the union, and any employee or employees involved." *Id.* at 41-42.

⁹⁹ *See id.* at 42. Article 5, § 2 of the parties' collective bargaining agreement provided that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.* at 39. Prior to the arbitration hearing, the employee had also filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 42.

¹⁰⁰ *See id.* at 42. The union representative also testified that the company's usual practice was to transfer unsatisfactory drill operators back to their former positions rather than discharge them. *Id.*

¹⁰¹ *Id.* at 42. The arbitrator stated that there was insufficient evidence of a practice of transferring, rather than discharging, unsatisfactory drill operators, but suggested that the company and union confer on whether such an arrangement would be workable in the present case. *Id.* at 43. Contemporaneously, the EEOC determined that there was not reasonable cause to believe a violation of Title VII had occurred and informed the employee of his right to file suit in federal court. *Id.*

¹⁰² *Id.* at 43.

The United States District Court for the District of Colorado dismissed the suit, finding that the claim of racial discrimination had been submitted to the arbitrator and resolved in favor of the employer.¹⁰³ The district court held that because the employee had voluntarily elected to pursue his grievance to arbitration under the nondiscrimination clause of the collective bargaining agreement, the arbitral decision precluded him from bringing suit under Title VII.¹⁰⁴ The United States Court of Appeals for the Tenth Circuit affirmed the district court ruling.¹⁰⁵

Upon writ of certiorari, the United States Supreme Court reversed.¹⁰⁶ The Court began by discussing the policies underlying the detailed enforcement provisions of Title VII.¹⁰⁷ The Court noted that although Title VII did not specifically address the relationship between federal courts and the grievance-arbitration machinery of collective bargaining agreements, Title VII's enforcement scheme in no way suggested that a prior arbitral decision would foreclose an individual's right to file suit.¹⁰⁸ The Court stated that individual rights guaranteed by Title VII were different from collective rights guaranteed by the National Labor Relations Act ("NLRA") and were not subject to prospective waiver.¹⁰⁹ The Court stated that although an employee could presumably waive his cause of action under Title VII as part of a voluntary settlement, the arbitration clause in the collective bargaining agreement was not a voluntary settlement, and the submission to arbitration under a collective bargaining agreement could in no event constitute a binding waiver of an employee's Title VII rights.¹¹⁰

The Court next rejected the view that permitting an employee both an arbitral and a judicial forum was unfair to the employer.¹¹¹ The Court explained that in instituting a suit under Title VII the employee was not seeking judicial review of the arbitrator's decision on the

¹⁰³ *Gardner-Denver*, 415 U.S. at 43. The Court relied on the employee's deposition acknowledging that he had raised the issue of racial discrimination at the arbitral hearing. *Id.* at 43 n.4.

¹⁰⁴ *Id.* at 43.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* at 44-45.

¹⁰⁸ *Gardner-Denver*, 415 U.S. at 47. The Court further explained that the employee's actual submission of the grievance to arbitration did not alter the situation. *Id.* at 52.

¹⁰⁹ *Id.* at 51-52. Certain rights guaranteed by the NLRA, such as the right to strike, are subject to prospective waiver by the union negotiating the terms of the collective bargaining agreement for the individual employees it represents. *See id.*

¹¹⁰ *Id.* at 52 & n.15.

¹¹¹ *Id.* at 54. Both the district and appeals courts had reasoned that allowing the employee two forums to try his claim was unfair because it meant that only the employer was bound by the arbitral decision. *Id.*

contract's nondiscrimination claim, but was asserting a right of independent legal origin.¹¹² The employer did not have access to the judicial forum only because Title VII did not confer any rights on the employer.¹¹³

Finally, the Court explained that allowing an employee a judicial forum would not undermine the parties' incentive to arbitrate.¹¹⁴ The Court explained that the independent advantages of an arbitration clause, namely the union's corresponding agreement not to strike, and the arbitral forum's potential for expeditious dispute resolution, would remain, regardless of an employee's right to sue following an arbitral award.¹¹⁵ These alone, explained the Court, would provide adequate incentive to arbitrate.¹¹⁶ In sum, the Court concluded that Title VII's purposes and procedures strongly suggested that an individual did not waive a private cause of action by submitting a grievance to arbitration under a collective bargaining agreement.¹¹⁷

The *Gardner-Denver* Court went on to reject the company's proposal for a deferral rule, explaining that deferral to arbitration would be inconsistent with Congress's intent to give federal courts final responsibility for enforcement of Title VII.¹¹⁸ The company had proposed that a court should defer to a prior arbitration award where: (i) the claim was before the arbitrator; (ii) the collective bargaining agreement prohibited the form of discrimination charged in the Title VII suit; and (iii) the arbitrator had authority to rule on the claim and to fashion a remedy.¹¹⁹ The Court reasoned that arbitration was a comparatively inappropriate forum for the final resolution of Title VII rights.¹²⁰ The Court explained that because an arbitrator's role is to effectuate the intent of the parties, not the intent of enacted legisla-

¹¹² *Id.* at 54. The Court explained that the employee's rights under the collective bargaining agreement were distinctly separate from his rights under the statute and that this separate nature was not vitiated merely because both were violated in the same factual occurrence. *Id.* at 50. The Court next offered a lengthy discussion on the role of the arbitrator in the system of industrial self-government. *Id.* at 52-53. The Court explained that the arbitrator's source of authority is the collective bargaining agreement and that the arbitrator has no general authority to invoke public laws that conflict with the bargain between the parties. *Id.* at 53. The arbitrator's authority to resolve questions of contractual rights remains, regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII. *Id.* at 53-54.

¹¹³ *Gardner-Denver*, 415 U.S. at 54.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 54-55.

¹¹⁶ *Id.* at 55.

¹¹⁷ *Id.* at 49.

¹¹⁸ 415 U.S. at 55-56.

¹¹⁹ *Id.* The Court noted that this proposal was analogous to the NLRB's policy of deferring to arbitral decisions on statutory issues. *Id.* at 56 n.17; see also *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955).

¹²⁰ *Gardner-Denver*, 415 U.S. at 56.

tion, an arbitrator would be compelled to apply the agreement over the statute in situations where the two were incompatible.¹²¹ The Court further explained that because arbitrators were competent in the law of the shop, not the law of the land, arbitrators were ill-equipped to interpret and apply statutory language.¹²² The procedure used in the arbitration was also less appropriate than judicial procedure for final resolution of Title VII issues.¹²³ Finally, the Court expressed concern over the union's exclusive control over the manner and extent to which an individual's grievance was presented.¹²⁴ The Court suggested that the union might not adequately represent an individual's Title VII rights because in the collective bargaining context an individual's rights were often subverted to the collective interests of all in the bargaining unit.¹²⁵

The Court also rejected the adoption of a more demanding deferral standard.¹²⁶ The Court explained that a standard that adequately ensured effectuation of Title VII rights in the arbitral forum would tend to make arbitration procedurally complex, expensive and time-consuming.¹²⁷ The Court reasoned, therefore, that any minimal savings in time and expense gained by such a deferral standard would not

¹²¹ *Id.* at 56-57.

¹²² *Id.* at 57. The Court noted that the broad language of Title VII, which required reference to public law concepts, was especially suited to judicial construction. *Id.*

¹²³ *Id.* at 57-58. The Court pointed out that the factfinding processes of arbitration were not equivalent to judicial factfinding. *Id.* at 57. The record of the proceeding is not as complete, the usual rules of evidence do not apply, and rights and procedures common to civil trials, such as discovery, cross-examination, and testimony under oath, are often severely limited or unavailable. *Id.* at 57-58. Arbitrators are also not required to give the reasons for an award. *Id.* at 58.

¹²⁴ *Id.* at 58 n.19.

¹²⁵ See *Gardner-Denver*, 415 U.S. at 58 n.19.

¹²⁶ *Id.* at 58. In a footnote, the Court gave an example of such a more demanding standard by citing to the standard adopted by the Fifth Circuit in *Rios v. Reynolds Metals Co.* *Id.* at 58 n.20 (citing 467 F.2d 54, 58 (5th Cir. 1972)). The *Rios* court had set forth the following deferral standard:

First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.

467 F.2d at 58.

¹²⁷ *Gardner-Denver*, 415 U.S. at 59. The Court reasoned that judicial enforcement of such a rigorous standard would almost require a de novo review on the merits. *Id.*

justify the risk to vindication of Title VII rights.¹²⁸ The Court did state, however, that the award could be admitted as evidence at trial.¹²⁹ In a final footnote, the Court explained that although the weight to be accorded the arbitral decision should be decided on a case by case basis in the trial court's discretion, relevant factors included the similarity of provisions in the collective bargaining agreement with provisions of Title VII, the degree of procedural fairness in the arbitral forum, the adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators.¹³⁰ The Court further explained that where an arbitrator gives complete consideration of an individual's Title VII rights, a court may give the decision great weight; this is "especially true where the issue is solely one of fact."¹³¹

In sum, the *Gardner-Denver* Court held that an employee does not lose his statutory cause of action under Title VII by submitting a claim to arbitration under a collective bargaining agreement.¹³² The Court reasoned that both the policies behind Title VII and the nature of the arbitral process compelled such a conclusion.¹³³ Thus, under *Gardner-Denver*, a court should grant an employee bringing a Title VII charge a full trial on the merits, affording a prior arbitral award evidentiary weight as it deems proper.¹³⁴

In 1981, in *Barrentine v. Arkansas-Best Freight System, Inc.*, the Supreme Court extended the rationale of *Gardner-Denver* to claims under the Fair Labor Standards Act ("FLSA").¹³⁵ The *Barrentine* Court held that prior submission of employees' wage disputes to the grievance procedure in a collective bargaining agreement did not foreclose suit under the FLSA.¹³⁶ The Court stated that despite the general

¹²⁸ *Id.* The Court speculated that such a deferral rule might also adversely affect the arbitration system by encouraging employees to bypass arbitration and institute suit. *Id.* The result would be more litigation, not less. *Id.*

¹²⁹ *Id.* at 60.

¹³⁰ *Id.* at 60 n.21.

¹³¹ *Id.*

¹³² 415 U.S. at 56.

¹³³ See *id.*

¹³⁴ *Id.* at 60.

¹³⁵ 450 U.S. 728, 745-46 (1981).

¹³⁶ *Id.* The employee truckdrivers filed grievances when their employer did not compensate them for certain pretrip time spent inspecting their trucks. *Id.* at 730-31. The employees' union presented these grievances to a joint grievance committee pursuant to the grievance machinery of the collective bargaining agreement. *Id.* at 731. The employees alleged that they were entitled to compensation according to the compensation clause in their collective bargaining agreement, which provided that truckdrivers be compensated "for all time spent in the service of the Employer." *Id.* at 730-32. The joint grievance committee rejected the employees' grievances

federal policy of deferring to collectively bargained dispute resolution procedures, not all disputes were suited for such resolution.¹³⁷ The Court disagreed that the FLSA claims were particularly suited for arbitration, even though they were based on wage and hour disputes, topics admittedly at the heart of the collective bargaining process.¹³⁸ Relying on the rationale of *Gardner-Denver*, the Court explained that arbitration was inappropriate for claims based on statutes designed to provide minimum substantive guarantees to individual workers.¹³⁹ The Court explained that in contrast to the LMRA, which was designed to promote the *collective* interests of employees, the FLSA was designed to give specific minimum protections to *individual* workers.¹⁴⁰ Finally, echoing the reasoning of *Gardner-Denver*, the Court described how the arbitral process might not adequately protect those individual rights.¹⁴¹ The *Barrentine* Court concluded that an individual's FLSA rights were best protected in a judicial, rather than an arbitral, forum and that they were not foreclosed by prior submission to contractual dispute resolution procedures.¹⁴²

without explanation. *Id.* at 731. According to the collective bargaining agreement, the joint grievance committee's ruling was to be final and binding on both parties. *Id.* at 731 n.5.

After their grievances were dismissed, the employees filed suit in federal district court alleging that they were entitled to compensation under the FLSA. *Id.* at 731-33. A detailed description of the provisions of the FLSA is beyond the scope of this Note. Relevant to this Note is only that the employees alleged that the same set of facts entitled them to certain rights under both their collective bargaining agreement and the FLSA. *Id.*

¹³⁷ *Id.* at 737.

¹³⁸ *Id.* at 738.

¹³⁹ *Id.* at 737. The Court did note that the FLSA contained some exceptions for employers where provisions in a collective bargaining agreement provided for compensation schemes different from those provided in the FLSA. *Id.* at 741-42 n.19. Where an employee's claim depended on application of one of those exceptions, the Court stated it "assumed without deciding" that a court should defer to a prior arbitral decision construing the relevant provisions of the collective bargaining agreement. *Id.* As the claim before it did not involve application of one of the exceptions, deference to the prior arbitral decision would be inappropriate. *Id.*

¹⁴⁰ *Barrentine*, 450 U.S. at 739. The Court cited its own decisions interpreting the FLSA that emphasized the nonwaivable nature of an individual employee's rights to fair compensation. *Id.* at 740-41. The Court also noted Congress's intent to achieve a uniform national policy of compensation through passage of the FLSA. *Id.* at 741.

¹⁴¹ *Id.* at 742. The Court explained the following: first, a union might enable an individual's statutorily granted wage and hour benefits to be sacrificed in exchange for increased benefits for workers in the bargaining unit as a whole; second, an arbitrator might not be competent to determine the meaning and application of the FLSA, the interpretation of which involved resolving complex questions of law and fact based on public law considerations, in light of volumes of legislative history and over four decades of legal interpretation and administrative rulings; third, an arbitrator might not have the authority to determine the statutory claim or to grant the aggrieved employees as broad a range of relief. *Id.* at 742-43.

¹⁴² *Id.* at 745. In dissent, Chief Justice Burger criticized the majority's holding for moving the law in a direction counter to the needs and interests of workers and employers and contrary to

In 1984, in *McDonald v. City of West Branch*, the Supreme Court extended the rationale of *Gardner-Denver* and *Barrentine* to actions brought under § 1983.¹⁴³ In *McDonald*, an arbitrator ruled against an employee who claimed he had been discharged without just cause.¹⁴⁴ Rather than appeal the arbitral award, the employee filed suit under § 1983, alleging that the employer had discharged him for exercising his First Amendment rights.¹⁴⁵ Reiterating the rationale of *Gardner-Denver*, the *McDonald* Court held that § 1983 was intended to protect individuals' federal statutory and constitutional rights and that arbitration was an inadequate forum for protection of those rights.¹⁴⁶ Thus, under *Gardner-Denver* and its progeny, an individual employee is entitled to a judicial trial de novo following arbitral disposition of collective bargaining agreement rights that parallel rights under a federal employment statute.¹⁴⁷

C. Gilmer

To date, the Supreme Court has never addressed the issue raised in this Note: whether a court may compel arbitration of statutory claims pursuant to the provisions of a collective bargaining agreement. In contrast to the commercial arbitration cases, which were brought in order to compel arbitration, *Gardner-Denver* and its progeny all arose after arbitration had taken place.¹⁴⁸ Recently, the Supreme Court handed down a decision that may serve to fill this gap and to bridge the doctrines of commercial and labor arbitration.¹⁴⁹

the interests of the judicial system, *Id.* at 746. Although agreeing that an individual's FLSA rights were unwaivable, he did not agree that limiting vindication of those rights to an arbitral forum amounted to a waiver of those rights. *Id.* at 746-47. He explained that the reasons for favoring arbitration were wise and obvious: litigation is costly and time consuming, and judges are less adapted to the nuances of the disputes that typically arise in shops and factories than traditional ad hoc panels of factfinders. *Id.* at 747. He distinguished the Title VII rights issue in *Gardner-Denver* from the FLSA rights at issue here and explained that there was a vast difference between resolving allegations of racial discrimination and settling a simple wage dispute. *Id.* at 749-50. Title VII, he explained, was aimed at eradicating discrimination long practiced by employers and unions. *Id.* at 750. Whereas deferral to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would be like making "the foxes guardians of the chickens," this, he explained, was not a discrimination case. *Id.*

¹⁴³ 466 U.S. 284, 289 (1984). The Court explained that § 1983 prohibits state actors from denying persons their constitutional and statutory rights. *Id.* at 290. The employee in *McDonald* was a police officer, employed by the city. *Id.* at 285.

¹⁴⁴ *Id.* at 286.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 289-91.

¹⁴⁷ See *supra* text accompanying notes 93-147.

¹⁴⁸ See *supra* text accompanying notes 93-147.

¹⁴⁹ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held an arbitration agreement enforceable with respect to an individual employee's claims under the Age Discrimination and Employment Act ("ADEA").¹⁵⁰ In *Gilmer*, a registered securities representative sued his employer, alleging that he had been terminated in violation of the ADEA.¹⁵¹ The employer moved to compel arbitration pursuant to the arbitration clause in the employee's registration application to the New York Stock Exchange ("NYSE"), which the employee had signed as a condition of his employment.¹⁵² The United States District Court for the Western District of North Carolina denied the employer's motion based on the Supreme Court's ruling in *Gardner-Denver* and because it found that Congress intended to preclude waiver of a judicial forum for ADEA claims.¹⁵³ The United States Court of Appeals for the Fourth Circuit reversed, finding nothing in the text, legislative history or underlying purposes of the ADEA indicating that Congress intended to preclude such a waiver.¹⁵⁴ On appeal, the United States Supreme Court affirmed the Fourth Circuit's ruling.¹⁵⁵

The Supreme Court began its discussion by stressing the liberal federal policy of enforcing arbitration agreements under the FAA.¹⁵⁶ Citing *Mitsubishi*, *McMahon* and *Rodriguez*, the Court explained that statutory claims could be subject to arbitration pursuant to an arbitration agreement enforceable under the FAA.¹⁵⁷ The Court then restated its test for determining whether Congress intended to preclude waiver of a judicial forum, and explained that in applying this test it would

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 23-24. The employee also filed charges with the EEOC. *Id.* at 23.

¹⁵² *Id.* at 24. The application provided that the employee "agree[d] to arbitrate any dispute, claim or controversy" arising between him and his employer "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which [he] register[ed]." *Id.* at 23. The NYSE rules provided for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.* In its motion, the employer relied upon the mandate of the FAA. *Id.* at 24.

¹⁵³ *Id.*

¹⁵⁴ *Gilmer*, 500 U.S. at 24.

¹⁵⁵ *Id.* at 23.

¹⁵⁶ *Id.* at 24-25.

¹⁵⁷ *Id.* at 26. The Court declined to rule on whether § 1 of the FAA excluded all contracts of employment from the FAA mandate. *See id.* at 25 n.2. The Court stated that it did not need to resolve the issue because the arbitration agreement was included in a registration application, not a contract with the employer. *Id.* The Court also pointed out that the employee had not raised the issue in the courts below. *Id.* The Court noted that lower courts addressing the issue had uniformly held that arbitration clauses contained in registration applications were not covered by § 1's exemption. *Id.* The Court said it left for another day the issue of the scope of § 1's exemption with respect to agreements between employees and their employer. *Id.*

resolve questions of arbitrability with a liberal policy favoring arbitration.¹⁵⁸

The Court then decided that arbitration was not inconsistent with the statutory framework and purposes of the ADEA.¹⁵⁹ First, the Court rejected the argument that arbitration would somehow undermine the role of the Equal Employment Opportunity Commission ("EEOC") in enforcing the ADEA.¹⁶⁰ The Court explained that the mere involvement of an administrative agency in the enforcement of a statute was not sufficient to preclude arbitration, and that the employee would still be able to file a charge with the EEOC even though he could not bring a private action.¹⁶¹ Second, the Court stated that arbitration was an adequate forum to further the important social policies underlying the ADEA.¹⁶² Third, the Court explained that arbitration was consistent with the flexible approach provided by Congress for resolution of ADEA claims.¹⁶³

The Court next rejected the employee's arguments on the procedural inadequacies of arbitration.¹⁶⁴ The Court did not agree that the limited discovery in arbitration would make it too difficult to demonstrate discrimination.¹⁶⁵ The Court reasoned that demonstrating discrimination required no more discovery than demonstrating RICO or antitrust violations, both of which were subject to arbitration.¹⁶⁶ The Court also disagreed that allowing arbitrators to decide ADEA claims would stifle the development of the law.¹⁶⁷ The Court explained that although arbitration often did not produce a written opinion detailing the reasoning behind an award, the same was true in voluntary settlements of ADEA claims, which Congress obviously did not intend to preclude.¹⁶⁸ Moreover, the Court explained that courts would still issue

¹⁵⁸ *Id.* at 28-29.

¹⁵⁹ *Gilmer*, 500 U.S. at 27. The employee had conceded that nothing in the text or legislative history of the ADEA precluded arbitration. *Id.* at 26.

¹⁶⁰ *Id.* at 28-29.

¹⁶¹ *Id.* The Court analogized to the SEC's involvement in enforcement of the '33 Act and the '34 Act, both of which were enforceable by arbitration. *Id.* at 29.

¹⁶² *Id.* Citing *Mitsubishi*, the Court explained that as long as the prospective litigant effectively may vindicate his or her statutory claim in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions. *Id.* at 28.

¹⁶³ *Id.* at 29. The Court explained that the EEOC is directed to pursue informal methods of conciliation, conference and persuasion for resolution of ADEA claims and that claimants have the right to select either state or federal court to pursue these claims. *Id.*

¹⁶⁴ *Gilmer*, 500 U.S. at 30-32. The Court stated that because it had already rejected these arguments in many prior cases it would only address them briefly. *Id.* at 30.

¹⁶⁵ *Id.* at 31.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 31-32.

¹⁶⁸ *Id.* at 32. The Court also noted that NYSE rules required arbitral awards to be in writing. *Id.* at 31.

opinions, as not all litigants were likely bound by arbitration agreements.¹⁶⁹ Finally, the Court rejected the notion that the often unequal bargaining power between the parties to an arbitration agreement in the employment context should rule against enforcement of such agreements.¹⁷⁰ According to the Court, mere inequality in bargaining power was not a sufficient reason to hold arbitration agreements unenforceable in the employment context.¹⁷¹

Finally, the *Gilmer* Court addressed and distinguished *Gardner-Denver*.¹⁷² The Court explained that *Gardner-Denver* did not involve the enforceability of an agreement to arbitrate statutory claims, but the separate issue of whether an arbitral award precluded subsequent judicial resolution of the claims.¹⁷³ The *Gilmer* Court reasoned that the arbitration agreement at issue in *Gardner-Denver* had not precluded judicial resolution because the employees there had not agreed to arbitrate statutory claims and the arbitrator was not authorized to resolve such claims.¹⁷⁴ The *Gilmer* Court further explained that the tension between collective representation and individual rights at issue in *Gardner-Denver* was not present in the case at hand.¹⁷⁵ Lastly, the Court stated that *Gardner-Denver* and its progeny were decided under the LMRA, not the FAA, and that the FAA strongly favored arbitration.¹⁷⁶ Accordingly, *Gardner-Denver* was not a bar to enforcement of the arbitration agreement in the case at hand.¹⁷⁷

Following *Gilmer*, there has been considerable debate on the arbitrability of employment statutes in both the commercial and labor contexts.¹⁷⁸ Much of this debate focuses on whether employment contracts and collective bargaining agreements are exempt from the FAA's mandate under the statute's exemption of "contracts of employment."¹⁷⁹ Resolution of this debate does not necessarily determine the enforceability of arbitration clauses in collective bargaining agreements, however, as federal courts have the authority to fashion a common law under LMRA section 301 independent of FAA jurispru-

¹⁶⁹ *Gilmer*, 500 U.S. at 32.

¹⁷⁰ *Id.* at 33.

¹⁷¹ *Id.*

¹⁷² *Id.* at 33-35.

¹⁷³ *Id.* at 35.

¹⁷⁴ *Gilmer*, 500 U.S. at 35.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See, e.g., Abrams, *supra* note 39; R. Bales, *A New Direction for American Labor Law: Individual Autonomy and Compulsory Arbitration of Individual Employment Rights*, 30 Hous. L. Rev. 1863 (1993); Whittaker, *supra* note 27, at 273.

¹⁷⁹ See *supra* note 29 (discussing this debate).

dence.¹⁸⁰ The Supreme Court has never determined whether section 301 empowers courts to compel an employee to arbitrate a statutory claim before being allowed to file suit.¹⁸¹ This Note argues that absent an express agreement provision to the contrary, courts *should* compel such arbitration.

II. INFERRING CONGRESSIONAL INTENT

As a threshold matter, the ADA passes the test prescribed by the Supreme Court for determining arbitrability in the commercial context.¹⁸² Although a court enforcing an arbitration agreement under section 301 would not be bound to analyze a statute in accordance with FAA precedent, historically such precedent has had great influence on the common law of labor arbitration.¹⁸³ To the extent that courts would find the ADA arbitrable in the commercial context, therefore, such a determination would support a finding of arbitrability in the labor context.¹⁸⁴

A. *The ADA's Text and Legislative History*

The text of the ADA¹⁸⁵ and the text of the Civil Rights Act of 1991 ("CRA"), which amends the ADA,¹⁸⁶ both encourage arbitration as an alternative method of dispute resolution.¹⁸⁷ Section 513 of the ADA provides: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this Act."¹⁸⁸ Section 118 of the CRA similarly provides: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by [this

¹⁸⁰ See *supra* text accompanying notes 81-86.

¹⁸¹ *Gardner-Denver, Barrentine* and *McMahon* all involved the issue of what effect to give an arbitral proceeding that had already occurred. See *supra* notes 93-147 and accompanying text.

¹⁸² See *infra* text accompanying notes 185-230.

¹⁸³ See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (noting that the courts have often looked to interpretations of the FAA for guidance in labor arbitration cases, "especially in the wake of the holding that Sec. 301 of the Labor Management Relations Act . . . empowers the federal courts to fashion rules of federal common law to govern suits for violation of contracts between an employer and a labor organization.").

¹⁸⁴ See *id.*

¹⁸⁵ 42 U.S.C. §§ 12101-12213 (1994).

¹⁸⁶ Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of U.S.C.).

¹⁸⁷ 42 U.S.C. § 12212; Pub. L. No. 102-166, § 18, 105 Stat. 1071, 1081 (codified in scattered sections of U.S.C.).

¹⁸⁸ 42 U.S.C. § 12212.

Act]."¹⁸⁹ This language supports the notion that Congress did not intend to preclude courts from compelling arbitration before allowing an employee access to court.¹⁹⁰

The ADA's legislative history is less clear on this issue.¹⁹¹ The House Judiciary Committee Report to the ADA states that the alternative dispute mechanisms encouraged in section 513 would supplement, not supplant, the remedies provided in the Act.¹⁹² The Report states that any agreement to submit disputed issues to arbitration, whether in a collectively bargained or an individual employment contract, would not preclude the affected person from seeking judicial relief under the enforcement provisions of the Act.¹⁹³ The Conference Report adopts by reference the Judiciary Committee Report's statement on section 513, and states that "[u]nder no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA."¹⁹⁴

The legislative history of the CRA is similar to that of the ADA, although even less conclusive.¹⁹⁵ On one hand, a two-part Report of the House Education and Labor Committee and the House Judiciary Committee¹⁹⁶ echoes the House Judiciary Committee Report on the ADA:¹⁹⁷

[T]he Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title

¹⁸⁹ Pub. L. No. 102-166, § 18, 105 Stat. 1071, 1081 (1991) (codified in scattered sections of U.S.C.).

¹⁹⁰ See 42 U.S.C. § 12212; Pub. L. No. 102-166, § 18, 105 Stat. 1071, 1081 (codified in scattered sections of U.S.C.).

¹⁹¹ See *infra* notes 192-204.

¹⁹² H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 76 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499; see also 136 CONG. REC. H2616 (1990) (remarks of Rep. Clickman) (noting that ADA bill "establishes an important principle that we ought to try to avoid litigation . . . if possible, and that encouraging dispute resolution between the parties is a positive idea").

¹⁹³ See H.R. REP. NO. 485(III), *supra* note 192, *reprinted in* 1990 U.S.C.C.A.N. at 499-500.

¹⁹⁴ H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess., *reprinted in* 1990 U.S.C.C.A.N. 565, 598.

¹⁹⁵ See *infra* notes 196-201 and accompanying text.

¹⁹⁶ H.R. REP. NO. 40(I), 102d Cong., 1st Sess. (1991) [hereinafter HRI], H.R. REP. NO. 40(II), 102d Cong., 1st Sess. (1991) [hereinafter HRII], *reprinted in* 1991 U.S.C.C.A.N. 549, 694, respectively.

¹⁹⁷ See *supra* notes 192-93 and accompanying text.

VII in *Alexander v. Gardner-Denver Co.* . . . The Committee does not intend [such alternative methods] to preclude rights and remedies that would otherwise be available.¹⁹⁸

On the other hand, interpretive memoranda placed on the record by Senator Robert Dole and Representative Henry Hyde during consideration of the issue, in identical language, indicate their support for final and binding arbitration.¹⁹⁹

This provision encourages the use of alternative means of dispute resolution, including *binding* arbitration, where the parties knowingly and voluntarily elect to use these methods. In light of the litigation crisis facing this county and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.²⁰⁰

In contrast to the House Report, which cites *Gardner-Denver* with approval, these memoranda cite *Gilmer* with approval.²⁰¹

On the whole, the ADA's text and legislative history are inconclusive as to congressional intent on compulsory arbitration.²⁰² The text strongly encourages the use of arbitration, but it does not compel it.²⁰³ The legislative history indicates a congressional intent to preserve access to a judicial forum, but it does not indicate whether Congress would view compulsory arbitration as an impermissible obstacle to that access.²⁰⁴

Courts facing this issue should decide that Congress would *not* view compulsory arbitration as an impermissible obstacle to judicial access. Courts should construe the textual encouragement of arbitration broadly because Congress passed the CRA six months after the Supreme Court decided *Gilmer*.²⁰⁵ Although Senator Dole's and Rep-

¹⁹⁸ HRI, *supra* note 196, HRII, *supra* note 196, *reprinted in* 1991 U.S.C.C.A.N. at 635, 735, respectively. The House Committee on Education and Labor had actually rejected the Republican version of the bill, which would have encouraged the use of arbitration *in place of* judicial resolution, reasoning that such a rule would fly in the face of Supreme Court decisions holding that workers have a right to go to court to resolve important statutory and constitutional rights. HRI, *supra* note 196, *reprinted in* 1991 U.S.C.C.A.N. at 642.

¹⁹⁹ See 137 CONG. REC. S15,478 (statement of Sen. Dole) (1991); *id.* at H9548 (statement of Rep. Hyde).

²⁰⁰ 137 CONG. REC. S15,478; *id.* at H9548.

²⁰¹ 137 CONG. REC. S15,478; *id.* at H9548.

²⁰² See *supra* notes 185-201 and accompanying text.

²⁰³ See *supra* notes 188-89 and accompanying text.

²⁰⁴ See *supra* notes 191-201 and accompanying text.

²⁰⁵ See Bales, *supra* note 177, at 1898.

representative Hyde's memoranda may not represent the intent of all in Congress, they do indicate that the conferees were aware of the recent Supreme Court decision.²⁰⁶ One commentator has suggested that if Congress had intended to preclude compulsory arbitration of ADA claims after *Gilmer*, it would have done so expressly in the text of the statute.²⁰⁷ Another commentator has noted that Congress traditionally used textual encouragement of arbitration to signal courts following *American Safety* that it intended a statute to be arbitrable.²⁰⁸ Under this rationale, textual encouragement alone could be adequate justification for inferring a congressional intent in favor of compulsory arbitration.²⁰⁹

Finally, even though some statements in the legislative history may weigh against binding arbitration, a court should not give those statements decisive weight. The Supreme Court has appeared reluctant to determine congressional intent from legislative history alone in this area.²¹⁰ In *McMahon*, for example, the Court indicated an unwillingness to rely on legislative history when it ordered arbitration of '34 Act claims despite a Conference Report that clearly expressed Congress's intent that the *Wilko v. Swan* anti-arbitration approach control.²¹¹ As the legislative history of the ADA appears even less clear and less probative than that of the '34 Act, courts should not rely on it to infer a congressional intent against compulsory arbitration.

B. *The Underlying Framework*

Courts also should not infer a congressional intent against compulsory arbitration from the ADA's underlying framework.²¹² Although one of the ADA's purposes is to ensure that the federal government plays a central role in enforcing the standards established by the Act,²¹³ the ADA incorporates by reference the remedial scheme of Title VII²¹⁴ and provides for a system of overlapping remedies.²¹⁵ Under this

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See Abrams, *supra* note 39, at 533.

²⁰⁹ See *id.*

²¹⁰ See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 237-38 (1987).

²¹¹ See *id.*; see also *supra* text accompanying notes 67-70.

²¹² One commentator has argued that *Gilmer* makes it virtually impossible, as a practical matter, to establish inherent conflict under the congressional intent standard, and that unless a statute's text or legislative history clearly establishes an exception to the FAA mandate, claims under the statute will almost inevitably be found arbitrable. See Abrams, *supra* note 39, at 551.

²¹³ 42 U.S.C. § 12101(b)(3) (1994).

²¹⁴ 42 U.S.C. § 12117 (1994).

²¹⁵ *Id.*

scheme, a plaintiff must file a charge with any existing state antidiscrimination agency before filing with the federal antidiscrimination agency (the EEOC) and before filing suit in federal court.²¹⁶ The purpose of this requirement is to give state agencies an opportunity to resolve problems of employment discrimination and thereby make resort to federal relief unnecessary.²¹⁷ Compelling arbitration before allowing an employee to file suit in federal court is entirely consistent with this approach. The existence of overlapping state and federal remedies, and judicial and administrative remedies, suggests that Congress did not view an employee's right to a federal forum as absolute and that it favored the use of more expeditious local proceedings.

Some commentators have argued that compulsory arbitration is inconsistent with the ADA's framework because arbitral awards do not have precedential value and therefore will not appreciably deter future discriminatory conduct nor provide guidelines for appropriate employer behavior.²¹⁸ The Supreme Court's rejection of this argument with respect to compulsory arbitration of ADEA claims in the commercial context, however, applies similarly to arbitration of ADA claims in the labor context.²¹⁹ Voluntary settlement agreements have no precedential value, but clearly they are not inconsistent with the ADA's framework.²²⁰ Moreover, courts will still issue decisions, because not all litigants are bound by arbitration agreements.²²¹ Finally, because labor arbitrators issue written opinions detailing the reasoning behind their awards, labor arbitration awards actually would have more value in the development of the law than would commercial arbitration awards.²²²

²¹⁶ 42 U.S.C. § 2000e-5(a) to -5(f) (1988). A charging party must normally wait at least 180 days from filing with the EEOC before undertaking judicial proceedings. *ZIMMER ET AL.*, *supra* note 6, at 951-52. Within those 180 days the EEOC will investigate the charge to determine whether there is reasonable cause to believe that the charge is true. *Id.* If the EEOC finds no reasonable cause, it must dismiss the charge and notify the charging party, who may then bring a private action. *Id.* If the EEOC does find reasonable cause, it is directed first to attempt conciliation. *Id.* If that fails, the EEOC may bring a civil suit in federal district court. *Id.* Where the EEOC brings such suit, the charging party loses the right to bring suit, but has a statutory right to intervene to protect his or her interests. *Id.* at 952. If the EEOC has not acted within the 180 days, the charging party may demand a "right to sue letter" and then bring a private cause of action. *Id.* at 987.

²¹⁷ *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (describing purpose of similar provision in ADEA).

²¹⁸ Wendy S. Tien, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443, 1471 (1993).

²¹⁹ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-32 (1991); see also *supra* notes 167-69 and accompanying text.

²²⁰ See *Gilmer*, 500 U.S. at 32.

²²¹ See *id.*

²²² Interview with Joan C. Dolan, Arbitrator and Professor of Arbitration, at Boston College Law School, Newton, Mass. (Apr. 18, 1995).

Although labor arbitrators' opinions would not have the precedential value of a court or agency decision,²²³ an arbitrator's reasoning could be useful for subsequent courts and employers facing ADA issues.

Furthermore, an argument against arbitration based on the need for judicial precedent is especially unpersuasive with respect to the ADA. The ADA is unique in that its "reasonable accommodation" requirement focuses on equal *opportunity* for disabled persons rather than on equal *treatment*.²²⁴ Resolution of ADA issues requires a more case by case, fact-specific analysis than resolution of issues under any other employment discrimination statute.²²⁵ Implementing the standard of "reasonable accommodation," for example, requires assessing both the resources unique to each employer and the dynamic unique to each shop floor.²²⁶ Regulations to the ADA state that:

Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time.²²⁷

Determining whether a disabled employee can be "safely" integrated into the employment environment will involve a similarly fact-driven analysis.²²⁸ According to the EEOC Handbook to the ADA, determining whether a disabled person will pose a direct threat to other employees requires an individualized assessment and should not be based on generalized truisms about the disability in question.²²⁹ Thus, assessing a disabled person's abilities requires an independent review of that person's unique condition and should not be based on precedent, even where a prior litigant was diagnosed with the same type of disability.²³⁰

²²³ *Id.*

²²⁴ ZIMMER ET AL., *supra* note 6, at 743.

²²⁵ *See id.*

²²⁶ *See* 29 C.F.R. app. § 1630.15(d) (1995).

²²⁷ *Id.*

²²⁸ *See* 42 U.S.C. § 12113(b) (1994); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N & U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT HANDBOOK I-47 (1992) [hereinafter ADA HANDBOOK].

²²⁹ ADA HANDBOOK, *supra* note 228, at I-47; *see also* Joan G. Dolan, *ADA Effect, Arbitration of Health-Related Issues, with Special Reference to the ADA*, in ARBITRATION 1994: CONTROVERSY AND CONTINUITY, PROCEEDINGS OF THE 47TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 42, 54-55, (Gruenberg ed., BNA Books, 1994).

²³⁰ *See* ADA HANDBOOK, *supra* note 228, at I-47; Dolan, *supra* note 229.

In sum, the ADA passes the test prescribed by the Supreme Court for determining statutory arbitrability. Courts should not infer a congressional intent against arbitration from the ADA's text, legislative history or underlying framework. The next Section will argue that in addition to being consistent with congressional intent, compulsory arbitration of ADA claims offers many advantages.

III. THE ADVANTAGES OF ARBITRATION

The litigation system in this country would benefit greatly if more ADA issues could be resolved in a private forum. Civil filings in federal district court increased last year to 228,162, marked by a 25% increase in employment related charges.²³¹ The EEOC received a record-breaking number of charges, highlighted by a 23.5% increase in disability-related claims.²³² The number of cases now awaiting investigation by the EEOC has risen to nearly 97,000.²³³ As the number of cases filed in the courts and agencies increases, employees must wait longer and longer for vindication of their rights in these traditional forums.

In contrast to litigation, arbitration can save employees considerable time, expense and trouble.²³⁴ An employee asserting an ADA claim in court might have to wait three to five years before having the claim resolved,²³⁵ whereas arbitral resolution normally occurs in a matter of months.²³⁶ An employee asserting an ADA right in court would incur substantial legal fees and court costs. In arbitration, conversely, the union bears the entire expense.²³⁷ Whereas bureaucratic filing requirements, time lines and procedures would burden an employee asserting an ADA right in court, arbitration is comparatively informal and hassle-free.²³⁸ Finally, a disabled employee litigating an ADA claim in court would subject him- or herself to public examination and potential embarrassment. In arbitration, by contrast, the employee could keep matters private and confidential.²³⁹

²³¹ ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 2-3 (1993).

²³² XVI JUDICIAL/LEGISLATIVE WATCH REPORT NO. 3, at 6 (1995).

²³³ *Id.*

²³⁴ See ELKOURI & ELKOURI, *supra* note 5, at 7.

²³⁵ Interview with Dolan, *supra* note 222.

²³⁶ ELKOURI & ELKOURI, *supra* note 5, at 9.

²³⁷ Interview with Dolan, *supra* note 222. The employee's union dues normally entitles him or her to representation in grievance proceedings. *Id.*

²³⁸ See ELKOURI & ELKOURI, *supra* note 5, at 7.

²³⁹ Interview with Dolan, *supra* note 222.

Where an arbitration leads to final resolution, both the employee and the system benefit from a significantly cheaper and more expeditious resolution of the claim. Evidence shows that there is a strong probability an arbitral proceeding will lead to final resolution of the claim.²⁴⁰ The most comprehensive empirical study done on this issue found that of 1761 arbitration awards involving Title VII issues, employees subsequently litigated the discrimination claims in 307 cases and obtained a result different than the arbitration award in only twenty-one cases.²⁴¹

In addition to its potential for providing a final resolution of an ADA claim, arbitration may actually lead to a *better* resolution of the claim than would a judicial proceeding.²⁴² Arbitrators have experience in crafting suitable remedies for disputes in the workplace and are more likely to understand the nuances of the employer/union relationship than would a judge.²⁴³ Arbitration, therefore, would be more likely than litigation to lead to reinstatement and other imaginative remedies for accommodating disabled employees into the shop environment.²⁴⁴ An arbitrator's experience in devising remedies for parties in an ongoing bargaining relationship would be particularly beneficial for disabled employees seeking accommodation from employers with whom they will have an ongoing working relationship.²⁴⁵

Even where an employee intends to bring an action in court notwithstanding the outcome of arbitration, the benefits involved in crossing the arbitration "hurdle" far outweigh any burdens. A court deciding an ADA claim after an arbitration will benefit from the arbitrator's findings of fact and interpretations of collective bargaining agreement provisions that bear on resolution of the statutory claims.²⁴⁶ In contrast to Title VII rights, which the *Gardner-Denver* Court said "can form no part of the collective-bargaining process,"²⁴⁷ Congress clearly

²⁴⁰ See Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, ARB. J., Sept. 1984, at 49, 55.

²⁴¹ *Id.*

²⁴² See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 747-48 (1981) (Burger, C.J., dissenting); Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 991 (1993).

²⁴³ See *Barrentine*, 450 U.S. at 747-48; Skrainka, *supra* note 242, at 991.

²⁴⁴ See *Barrentine*, 450 U.S. at 747-48; Skrainka, *supra* note 242, at 991.

²⁴⁵ See *Barrentine*, 450 U.S. at 747-48; Skrainka, *supra* note 242, at 991.

²⁴⁶ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1973) (suggesting that courts could accord arbitral determinations great weight especially on factual issues); Dolan, *supra* note 229, at 48 (suggesting that arbitral findings of fact could be used, perhaps through stipulation or as a form of discovery, to significantly shorten the length of the trial).

²⁴⁷ *Gardner-Denver*, 415 U.S. at 51.

envisioned ADA rights to be integral to the collective bargaining process.²⁴⁸ The ADA explicitly prohibits an employer from participating in a collective bargaining agreement that has the effect of subjecting an otherwise qualified handicapped applicant or employee to the discrimination prohibited by the Act.²⁴⁹ Both the Senate and House Reports to the ADA actually advise that employers and unions negotiate their collective bargaining agreement with a provision permitting the employer to take all actions necessary to comply with the ADA.²⁵⁰

As the arbitrator is the only person authorized to interpret the collective bargaining agreement, to the extent that resolution of an ADA claim requires interpretation of a collective bargaining agreement, resolution of an ADA claim requires the input of an arbitrator.²⁵¹ The Senate Report to the ADA indicates that a collective bargaining agreement could be relevant in determining whether a given accommodation is reasonable.²⁵² The House Report contains language identical to that of the Senate Report and adds that if a collective bargaining agreement lists job duties, the agreement could be relevant in determining whether a given task is an essential function of the job.²⁵³ Interpretive guidelines to the ADA indicate that a collective bargaining agreement may be relevant in determining whether a proposed accommodation constitutes an undue hardship for the employer.²⁵⁴

An arbitrator's input would also be helpful where compliance with the ADA potentially conflicts with compliance with the NLRA or the collective bargaining agreement negotiated thereunder.²⁵⁵ Unilateral implementation of an accommodation to comply with the ADA, for example, might alter the terms and conditions of employment within the bargaining unit or might constitute "direct dealing" between the employer and the disabled employee, both of which the NLRA generally prohibits.²⁵⁶ A proposed accommodation also might adversely affect the rights of other bargaining unit members, such as when

²⁴⁸ See 42 U.S.C. § 12112(b)(2) (1994).

²⁴⁹ *Id.*

²⁵⁰ S. REP. NO. 116, 101st Cong., 1st Sess. 32 (1989); H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 346.

²⁵¹ See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

²⁵² S. REP. NO. 116, *supra* note 250, at 32.

²⁵³ See H.R. REP. NO. 485(II), *supra* note 250, at 63, *reprinted in* 1990 U.S.C.C.A.N. 303, 345.

²⁵⁴ 29 C.F.R. app. § 1630.15(d) (1995).

²⁵⁵ See Rose Daly-Rooney, *Reconciling Conflicts Between the Americans with Disabilities Act and the National Labor Relations Act to Accommodate People with Disabilities*, 6 DEPAUL BUS. L.J. 387 (1994) (offering a detailed description of these conflicts).

²⁵⁶ See 29 U.S.C. § 158(a)(1), (a)(5), (d) (1994).

accommodating a disabled employee would conflict with the seniority provisions of the collective bargaining agreement.²⁵⁷ Although most commentators agree that Congress intended to subordinate collective bargaining agreement provisions to provisions of the ADA, in many cases it would be possible to devise reasonable accommodations that comply with both.²⁵⁸ As the arbitrator is the only person authorized to interpret the collective bargaining agreement, the arbitrator's input would be instrumental in devising such accommodations.²⁵⁹ Thus, to the extent that the ADA is integrated into the collective bargaining process, it has a natural potential to become integrated with arbitration.²⁶⁰

In sum, the substantial advantages of compelling arbitration of ADA claims far outweigh any burdens which might be experienced by an employee preferring to go directly to court. Where the arbitration produces a result acceptable to the employee, all parties benefit from a faster, cheaper and potentially better resolution of the claim. Where the employee elects to pursue a claim in court following the arbitration, all involved benefit from the arbitral findings of fact and interpretation of collective bargaining agreement provisions.

IV. RECONCILING COMPULSORY ARBITRATION WITH *GARDNER-DENVER*

Despite the advantages of arbitration of ADA claims, courts may be disinclined to order arbitration in the labor context because of the Supreme Court's pronouncements in *Gardner-Denver* and its prog-

²⁵⁷ See generally Eric H.J. Stahlut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate Under the ADA by Claiming a Collective Bargaining Obligation?*, 9 LAB. LAW. 71 (1993). Seniority, the length of continuous service of an employee with an employer, is used to rank employees for various employment actions. Seniority provisions are found in the vast majority of collective bargaining agreements.

²⁵⁸ See generally Mary K. O'Melveny, *The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?*, 82 KY. L.J. 219, 240 (1994); Erika F. Rottenberg, *The Americans with Disabilities Act: Erosion of Collective Rights?*, 14 BERKELEY J. EMPL. & LAB. L. 179 (1993). Under the Rehabilitation Act, most courts have found compliance with collective bargaining agreements to be a full defense to violating the Rehabilitation Act. See B. Glenn George, *Americans with Disabilities Act and Civil Rights: Effect on Arbitration*, in ARBITRATION 1993: ARBITRATION AND THE CHANGING WORLD OF WORK, PROCEEDINGS OF THE 46TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 138-139 (Gruenberg, ed., BNA Books, 1993).

²⁵⁹ See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

²⁶⁰ See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.").

eny.²⁶¹ Courts might view the reasoning used by *Gardner-Denver* in rejecting deferral to arbitration²⁶² as weighing similarly against compulsory arbitration under the scheme proposed in this Note.²⁶³ *Gardner-Denver's* assertion that Title VII rights are legally independent from rights guaranteed under a collective agreement, for example, might seem to weigh against ordering arbitration of an ADA right under the provision of a collective agreement.²⁶⁴ Courts might also decide that, despite the development of the law in the commercial context, the hostility toward arbitration expressed by the *Gardner-Denver* Court retains validity in the labor context.²⁶⁵ Courts might see the Supreme Court's distinction of *Gilmer* from *Gardner-Denver* as a signal that they should not follow *Gilmer* in the labor context.²⁶⁶ This Section argues that courts should not view *Gardner-Denver* as a bar to compulsory arbitration of ADA claims.

As a threshold matter, compulsory arbitration is not inconsistent with the narrow holdings in the *Gardner-Denver* line of cases.²⁶⁷ Under the *Gardner-Denver* theory, an employee asserting a statutory claim has a right to de novo judicial review notwithstanding prior submission of his claim to arbitration.²⁶⁸ Requiring an employee to arbitrate before filing suit does not deny the employee access to a judicial forum, it only postpones that access to give the parties' own dispute resolution machinery a chance to succeed.²⁶⁹ To the extent that *Gardner-Denver* was grounded in a fear of denying an employee access to a judicial forum, therefore, courts should not follow it to reject compulsory arbitration under the mechanism proposed in this Note.

²⁶¹ See *supra* notes 93-147 and accompanying text.

²⁶² To avoid confusion this Note uses "deferral" to refer to a court accepting an arbitral decision after arbitration has taken place, and "deferment" to refer to a court refusing to hear a claim until an arbitrator has ruled on it. This use of terms is consistent with NLRB usage. See *Hammontree v. NLRB*, 925 F.2d 1486, 1490. (D.C. Cir. 1991).

²⁶³ See *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 55-58 (1991).

²⁶⁴ See *id.* at 50, 54.

²⁶⁵ See *id.* at 56-58.

²⁶⁶ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36 (1991).

²⁶⁷ See *Gardner-Denver*, 415 U.S. at 49.

²⁶⁸ See *id.*

²⁶⁹ The NLRB employs a similar policy of "deferment" to arbitration where an employee charges both a breach of the collective bargaining agreement and an unfair labor practice under the NLRA. *Hammontree*, 925 F.2d at 1490-91. The NLRB refuses to hear unfair labor practice charges until the parties have exhausted the grievance machinery of the collective bargaining agreement. *Id.* In *Hammontree*, the D.C. Circuit explained that "[d]eferment does not diminish [an employee's] right to a public forum; it merely delays it." 925 F.2d at 1497 & n.23. In holding that *Gardner-Denver's* reasoning was not a bar to its deferment policy, however, the *Hammontree* court did note that even if it were, it would not be dispositive because of the differences between Title VII and the NLRA. *Id.* at 1497-98 & n.25.

Furthermore, developments in the commercial context have substantially invalidated *Gardner-Denver's* reasoning.²⁷⁰ *Gardner-Denver's* analysis of Title VII's statutory framework, for example, no longer has precedential value. The *Gardner-Denver* Court had reasoned that Title VII was not subject to binding arbitration because it found nothing in Title VII's enforcement scheme to suggest that a prior arbitral award would foreclose an individual's right to sue.²⁷¹ Essentially, the Court presumed that the statute was not subject to arbitration and looked for something in the framework to rebut that presumption.²⁷² Under present doctrine, however, the Court does the reverse: it presumes arbitrability unless it can find a congressional intent to the contrary.²⁷³ Under the current approach the Circuit Courts of Appeals have unanimously held Title VII arbitrable in the commercial context.²⁷⁴ The ADA adopts the enforcement scheme of Title VII, and, as demonstrated above, would pass the Supreme Court's current test for determining arbitrability.²⁷⁵ To the extent that *Gardner-Denver* was based on outdated methods of statutory analysis, therefore, courts should not follow its reasoning to reject compulsory arbitration of the ADA.

Moreover, *Gardner-Denver's* distinction of NLRA rights from Title VII rights on the ground that Title VII rights are "not subject to prospective waiver," lacks justification after *Gilmer*.²⁷⁶ *Gardner-Denver's* reasoning was based on *Wilko v. Swan* and the notion that certain procedural infirmities of arbitration meant that agreeing to submit a right to arbitral vindication amounted to a waiver of that right.²⁷⁷ The Supreme Court has explicitly overruled this notion in the commercial context.²⁷⁸

The increasing judicial acceptance of arbitration in the commercial context should apply similarly in the labor context. The *Gardner-Denver* Court had explained that because labor arbitrators were competent in the law of the shop, not the law of the land, arbitrators were ill-equipped to interpret and apply statutory language.²⁷⁹ Competency in the law of the shop, however, would be highly useful in interpreta-

²⁷⁰ See *supra* text accompanying notes 44-80.

²⁷¹ *Gardner-Denver*, 415 U.S. at 47.

²⁷² See *id.*

²⁷³ See *Gilmer*, 500 U.S. at 26.

²⁷⁴ See Bales, *supra* note 177, at 1896, nn. 214-18.

²⁷⁵ See *supra* text accompanying notes 182-230.

²⁷⁶ See *Gardner-Denver*, 415 U.S. at 51-52.

²⁷⁷ *Id.*

²⁷⁸ See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481, 486 (1989).

²⁷⁹ *Gardner-Denver*, 415 U.S. at 57.

tion and application of the ADA. To be "qualified" under the ADA, for example, an employee with a disability must be able to perform the "essential functions" of a position.²⁸⁰ Determining job functions is a traditional subject of arbitration, making an arbitrator equally if not better equipped than a judge to make determinations of "essential functions" of a job.²⁸¹

The ADA also does not require an employer to accommodate an employee if doing so would create "undue hardship."²⁸² An arbitrator, especially one familiar with the parties' bargaining history and the extent of an employer's resources, would be equally if not better able than a judge to make determinations as to "undue hardship."²⁸³ Moreover, an arbitrator would be in a good position to gauge the effect an accommodation would have on the other workers.²⁸⁴ Regulations to the ADA provide that the restructuring of a job that results in undue disruption of coworkers may constitute undue hardship.²⁸⁵ An arbitrator competent in the practices of the industry and the interrelationship of jobs in the shop would appear extremely well-qualified to make such determinations.²⁸⁶

Furthermore, nothing prevents arbitrators from being competent in both the law of the shop and the provisions of select statutes. The EEOC, state agencies, or the National Academy of Arbitrators ("NAA") could keep rosters of arbitrators specially trained in ADA issues. Currently, many arbitrators are already deciding ADA claims and are training to acquire better expertise at applying the statute.²⁸⁷

The *Gardner-Denver* Court had also suggested that because a labor arbitrator's role is to effectuate the intent of the parties, not the intent of enacted legislation, an arbitrator would be compelled to apply the agreement rather than the statute in situations where the two were incompatible.²⁸⁸ Even if one accepts the validity of this assertion,²⁸⁹

²⁸⁰ 42 U.S.C. § 12111(8) (1994).

²⁸¹ See James J. Kelley, *Arbitration of Health-Related Issues: ADA Effect, Management Perspective*, in *ARBITRATION 1994: CONTROVERSY AND CONTINUITY, PROCEEDINGS OF THE 47TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 63, 73 (Gruenberg, ed., BNA Books, 1994).

²⁸² 42 U.S.C. § 12112(b)(5)(A) (1994).

²⁸³ See *Warrior & Gulf*, 363 U.S. at 582.

²⁸⁴ See *id.*

²⁸⁵ 29 C.F.R. app. § 1630.15(d) (1995).

²⁸⁶ See *Warrior & Gulf*, 363 U.S. at 582.

²⁸⁷ See generally Dolan, *supra* note 229. One speech at the most recent meeting of the NAA, for example, examined the use of medical testimony in ADA claims and explored some approaches for arbitrators in analyzing this testimony. See *id.* at 52-56.

²⁸⁸ *Gardner-Denver*, 415 U.S. at 56-57.

²⁸⁹ See generally David E. Feller, *Arbitration and the External Law Revisited*, 37 ST. LOUIS U. L.J. 973 (1993). This assertion is only valid if one agrees that an arbitrator is confined to

under the proposed mechanism, courts would not compel arbitration where the parties did not intend for the arbitrator to decide external law issues.²⁹⁰ It is also likely that future collective bargaining agreements will include a provision enabling the employer to take all steps necessary to comply with the ADA.²⁹¹ The *Gardner-Denver* Court's concern thus appears moot for practical purposes.

Finally, courts should not view the *Gilmer* Court's distinction of *Gardner-Denver* as a reason to bar compulsory arbitration of ADA claims. First, the *Gilmer* Court distinguished *Gardner-Denver* because the latter was not decided under the FAA's liberal policy in favor of arbitration.²⁹² Although true, this is a distinction without meaning, as section 301 of the NLRA carries an equally liberal policy in favor of arbitration.²⁹³ Second, *Gilmer* explained that the collective bargaining agreement did not preclude arbitration in *Gardner-Denver* because the agreement expressly prohibited the arbitrator from interpreting external law.²⁹⁴ This distinction will have narrow applicability, however, as collective bargaining agreements can easily be written so as not to prohibit the arbitrator from resolving statutory claims.²⁹⁵

Third, *Gilmer* distinguished *Gardner-Denver* because in the labor context there is a tension between the union's collective representation and the individual's independent statutory rights.²⁹⁶ The *Gardner-Denver* Court had expressed concern over the union's exclusive control over the manner and extent to which a grievance was presented,

interpretation of the collective bargaining agreement and prohibited from relying on external law in reaching decisions. *Id.* A discussion of the merits of this assertion is beyond the scope of this Note.

²⁹⁰ Under the mechanism proposed in this Note, arbitration would not be compulsory under a collective bargaining agreement with language like the one in *Gardner-Denver*, which specifically stated that the arbitrator was confined to interpretation and application of the agreement and that the arbitrator's decision must be based "solely" upon an interpretation of the provisions of the agreement. See 415 U.S. at 41 n.3.

²⁹¹ See S. Rep. No. 116, *supra* note 250, at 32.

²⁹² See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

²⁹³ See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). The *Mitsubishi* Court actually cited *Warrior & Gulf* to support the development of the liberal policy in the commercial context. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

²⁹⁴ See *Gilmer*, 500 U.S. at 35; *Gardner-Denver*, 415 U.S. at 42. The collective bargaining agreement in *Gardner-Denver* contained the typical language that the arbitrator was not to amend, take away, add to, or change any of the provisions of the agreement. 415 U.S. at 42. The agreement was stronger than the typical collective bargaining agreement in that it provided that "the arbitrator's decision must be based solely upon an interpretation of the provisions of" the Agreement. *Id.* at 41 n.3.

²⁹⁵ Drafting such contract language will undoubtedly pose a challenge for labor lawyers in the coming years. For some recent attempts, see Skrainka, *supra* note 242 at 987, 1000-02.

²⁹⁶ See 500 U.S. at 35.

suggesting that a union might not adequately represent an individual's statutory rights.²⁹⁷ Although a potentially valid concern, under the scheme proposed in this Note, employees retain the option of reasserting their rights in a judicial forum when the union has not represented them adequately in arbitration. As explained above, the advantages of arbitration outweigh any inconvenience such an employee would face by being required to go through the arbitration process.²⁹⁸

Furthermore, it is far more likely that a union would adequately represent an ADA claimant today than it would have a Title VII claimant in 1973.²⁹⁹ Congress passed Title VII after a long history of invidious discrimination by both employers and unions, and the *Gardner-Denver* Court was justified in its suspicion of employer/union conspiracies robbing an employee of his or her Title VII rights in an arbitral proceeding.³⁰⁰ Such a suspicion would be much less justified, however, with respect to arbitration of ADA claims today.³⁰¹ Although there are potential tensions between the ADA's prohibitions and the union's role as a collective bargaining representative,³⁰² there appears to be no evidence that a union would not advocate as zealously for a disabled union member as it would for a nondisabled member.³⁰³ A union that did not represent a disabled employee adequately in an arbitration proceeding would risk being sued itself both for discrimination under the ADA and for breach of the duty of fair representation.³⁰⁴ Again, to the extent that a disabled employee does not feel adequately represented by the union, the employee retains the option of reasserting the statutory rights in a judicial setting.

V. CONCLUSION

Thus, the unique features of the ADA make it very well suited for arbitration in the labor context. Compulsory arbitration is consistent

²⁹⁷ See 415 U.S. at 51-52.

²⁹⁸ See *supra* text accompanying notes 231-60.

²⁹⁹ See O'Melveny, *supra* note 258 at 220; see also Note, *Judicial Deference to Arbitrators' Decisions in Title VII Cases*, 26 STAN. L. REV. 421 (1974) (arguing that the main obstacle to judicial deference to arbitration in Title VII cases is a union/employer tendency to favor discriminatory employment practices).

³⁰⁰ See *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting); see also Note, *supra* note 299.

³⁰¹ See O'Melveny, *supra* note 258, at 240.

³⁰² See *id.* (offering a complete discussion of the potential conflicts between a union's duty of fair representation to individual workers and its obligations as a collective bargaining representative).

³⁰³ *Id.*

³⁰⁴ See *id.* at 224.

with congressional intent and judicial precedent, and it offers significant advantages to all parties involved. In light of the litigation crisis facing this country, compelling arbitration of ADA claims under the private system set up by parties to a collective bargaining agreement is a sensible and reasonable approach.

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