

NOTE

PRESERVING COLLECTIVE-ACTION RIGHTS IN EMPLOYMENT ARBITRATION

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INTRODUCTION

IT is an enduring irony of arbitration agreements—intended as they are to promote greater predictability in dispute resolution—that the law governing the enforcement of such pacts remains, in many respects, unsettled or subject to significant variation across jurisdictions. Nowhere is the indeterminacy of arbitration law more evident than in the arena of employment contracts,¹ where the current state of play has been described as being “far more unresolved than resolved.”² In particular, much uncertainty has surrounded the issue of whether, and to what extent, a pledge to arbitrate can lawfully preclude class actions or otherwise foreclose the collective pursuit of common-interest remedies. This has been a matter of distinct concern to pro-arbitration employers, who cite class-action avoidance as a principal, if not paramount, motivation for requiring workers to contractually waive their right to sue in court and instead submit claims to binding arbitration.³ So

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¹ The discussion of employment arbitration in this Note is limited to arbitration agreements entered into outside the labor-management collective bargaining process.

² Ira F. Jaffe, *Unresolved Issues in Employment ADR*, in *Arbitration 2002, Workplace Arbitration: A Process in Evolution*, Proceedings of the Fifty-Fifth Annual Meeting National Academy of Arbitrators 72, 99 (Charles J. Coleman ed., 2002).

³ See generally Hans Smit, *Class Actions in Arbitration*, 14 *Am. Rev. Int'l Arb.* 175, 176 (2003) (“[T]he preference for arbitration may be inspired in part by the perceived

when the United States Supreme Court ruled in 2003 that it is a matter of contractual interpretation whether parties to an arbitration agreement are entitled to class-based relief, proponents of arbitration were heartened. The decision in *Green Tree Financial v. Bazzle*⁴ confirmed that arbitrators ordinarily would have exclusive authority to determine whether claimants could proceed collectively when their agreements to arbitrate were silent on the issue of class arbitration,⁵ and it thereby signaled that companies could use arbitration agreements to limit their exposure to dreaded class actions.

Although *Bazzle* dealt with a consumer-loan contract, it also has repercussions for employment arbitration pacts—a device companies use with increasing frequency in nonunionized workplaces.⁶ Shortly after the Court ruled in *Bazzle*, an employment law newsletter of a major U.S. law firm declared that the decision “may be

lack of class actions in arbitration.”); Peter J. Kreher & Pat D. Robertson III, Comment, Substance, Process, and the Future of Class Arbitration, 9 Harv. Negot. L. Rev. 409, 423 (2004) (“Defendants use arbitration agreements, at least in part, to prevent class proceedings.”); Michael R. Triplett, Class Action Bans in Arbitration Pacts Could Create Limits on Substantive Rights, Daily Lab. Rep. (BNA), No. 220, Nov. 14, 2003, at A-6 (quoting a management-side labor attorney as saying that “the primary question asked by companies considering arbitration is: ‘Can we cut off class and collective actions by requiring arbitration’”). There are, of course, other features of arbitration that appeal to management, including decreased exposure to large jury verdicts in non-class suits, reduced process costs (for example, legal fees), and avoidance of negative publicity. But see Michael Z. Green, Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims, 31 Rutgers L.J. 399 (2000) (questioning whether employers actually realize many of the commonly perceived benefits of arbitration).

⁴ 539 U.S. 444 (2003).

⁵ Id. at 451–52.

⁶ A 1995 Government Accountability Office survey found that about 10% of all nonunion employers used arbitration and another 8.4% were considering implementing it. Katherine V. W. Stone, Employment Arbitration under the Federal Arbitration Act, in *Employment Dispute Resolution and Worker Rights in the Changing Workplace* 27, 27 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999). In 2000, more than five hundred employers and five million employees were covered by American Arbitration Association (“AAA”) programs. Michael H. LeRoy & Peter Feuille, Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future, 18 Ohio St. J. on Disp. Resol. 249, 284 (2003). By 2002, the number of employees covered by AAA plans had climbed to six million. Elizabeth Hill, Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association, 18 Ohio St. J. on Disp. Resol. 777, 780 (2003). Arbitration is especially popular among the nation’s largest employers; a 1998 study showed that 62% of large corporations had used employment arbitration. Id. at 779–80.

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read to enhance the enforceability of arbitration agreement provisions that expressly prohibit class actions.”⁷ Though it had been an article of faith for many arbitration advocates that agreements to arbitrate implicitly require individualized (rather than group) resolution, *Bazzle* gave employers a substantial incentive to include explicit bans on multiparty actions in their arbitration policies.⁸ As employers have done so, however, plaintiffs’ lawyers have fought back, responding to efforts to cut off class actions with a variety of challenges to the enforceability of arbitration agreements.⁹

Largely overlooked in this contest is the question of whether such an agreement, entered into as a precondition of employment, constitutes an unfair labor practice by interfering with the rights of employees to engage in “concerted activities for the purpose of . . . mutual aid or protection,” as guaranteed by Section 7 of the Na-

⁷ Morgan, Lewis & Bockius, Supreme Court Decides That Availability of Class Action Proceedings Arbitrations Will Depend Upon Arbitration Agreement Language, Law Flash, July 1, 2003, at http://www.morganlewis.com/pdfs/E6AE3AE2-E065-473C-B5315DC36D313D61_Publication.pdf. The newsletter, however, cautioned that “the enforceability of clauses prohibiting class actions remains an uncertain area of the law” and advised that some courts “have shown considerable hostility toward prohibitions on class actions in employment arbitration agreements, finding them unconscionable and contrary to public policy.” *Id.* The issue of unconscionability is addressed *infra* at Part IV.

⁸ See Kreher & Robertson, *supra* note 3, at 423 (arguing that, post-*Bazzle*, corporations “will avoid writing [arbitration] agreements that are silent or ambiguous as to class arbitration . . . [Those] that have not already expressly banned class arbitration will likely quickly move to do so”). Even before *Bazzle*, such clauses were becoming increasingly common in arbitration agreements. Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 *Wm. & Mary L. Rev.* 1, 6 (2000).

⁹ These approaches are discussed at length in Part IV. Arbitrators also have attempted to respond to these challenges. Notably, one of the leading private dispute resolution service providers, JAMS, announced in November 2004 that its arbitrators would no longer enforce class-action preclusion clauses in “consumer” contracts (which, under the JAMS definition, includes most employment agreements) because they are “an unfair restriction on the rights of the consumer.” Caroline E. Mayer, Arbitration Group Backs Class Actions, *Wash. Post*, Nov. 25, 2004, at E4. Four months later, however, JAMS rescinded the non-enforcement policy, because “[r]ecent court decisions on the validity of class action preclusion clauses have varied by jurisdiction.” See Press Release, JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy, at http://www.jamsadr.com/press/show_release.asp?id=198 (Mar. 10, 2005).

tional Labor Relations Act (“NLRA”).¹⁰ Precedents in this area of law certainly suggest that employer-promulgated arbitration agreements are vulnerable to unfair-labor-practice charges to the extent that they preclude direct employee collaboration in dispute resolution,¹¹ yet the issue has not been confronted directly in a reported court decision or an opinion of the National Labor Relations Board (“Board”).¹²

This Note will present a framework, supported by cases in the fields of employment arbitration and labor law, for evaluating whether arbitration procedures provide sufficient safeguards for concerted activity by employees in the resolution of disputes with an employer. It will argue that an arbitration contract’s prohibition of employee class actions and multiparty claims alone is not sufficient to establish illegal interference with concerted activity, provided that the arbitration process otherwise permits workers to communicate with and rely on each other. Though there is no talismanic formula for determining what Section 7 requires of employers (or, more precisely, what Section 8(a)(1) prohibits),¹³ an employer’s denial of access to one particular process by which employees can exercise Section 7 rights should not sustain an unfair labor practice charge when other avenues for effectuating the right remain open.¹⁴ This Note will sketch one possible alternative route,

¹⁰ 29 U.S.C. § 157 (2000). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” in § 7. 29 U.S.C. § 158 (2000).

¹¹ See *infra* Part II.

¹² See Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 *Wake Forest L. Rev.* 173, 181 (2003) (noting that “[n]o court has yet addressed the issue of the impact of Section 7 of the NLRA on arbitration agreements”). More recent searches of electronic databases of labor law cases likewise reveal no decisions on point. Determining what constitutes an unfair labor practice under the NLRA is within the primary jurisdiction of the National Labor Relations Board, but courts also may interpret the Act if it arises in a legal action as a collateral matter, such as a suit challenging whether there is a lawful agreement to arbitrate a statutory claim. See *id.* at 230–36.

¹³ The Supreme Court has said that § 7 protections are not limited “to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984).

¹⁴ See, e.g., *O’Charley’s Inc.*, No. 26-CA-19974, 2001 N.L.R.B. GCM Lexis 25, at *11 (Apr. 16, 2001) (stating that “Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection”).

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a concept it will call “open arbitration.” It will suggest that employers who are willing to sacrifice secrecy and embrace transparency in their arbitration systems can make a convincing case that their employees are able to cooperate in resolving grievances of mutual concern, notwithstanding the fact that the procedural devices of party joinder and class action are unavailable. Specifically, it will advise employers to adopt arbitration procedures that provide for public disclosure of outcomes and, as a corollary, the right to present relevant prior awards as nonbinding, but persuasive, precedent.

By implementing open arbitration, employers would provide a way to reconcile the “liberal federal policy favoring arbitration agreements”¹⁵ with the policy goals underlying Section 7,¹⁶ even while limiting their exposure to large-scale employment litigation.¹⁷

The appeal of open arbitration, however, is not limited to its ability to resolve the apparent incongruity between mandatory individualized arbitration and Section 7. It also offers an attractive compromise for proponents of arbitration’s efficiency and critics of its power imbalances—preserving many of the fundamental features of arbitration yet, at the same time, responding to many of the criticisms that courts and commentators have leveled against employer-mandated Alternative Dispute Resolution (“ADR”) programs. These criticisms include (1) the inadequacy of arbitration in fulfilling such public-law goals as developing and refining the law through precedent, deterring other potential violators, and educating the community through the articulation of public policy; (2) the substantive unconscionability (that is, one-sidedness) of various arbitration features, particularly confidentiality clauses; and (3) the advantage that employers enjoy as the repeat player in arbitration.¹⁸

¹⁵ *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24 (1983)).

¹⁶ Section 7 reflects a particular concern for the protection of free communication among coworkers. See, e.g., *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986) (describing communication as “an indispensable preliminary step to employee self-organization”). See also *infra* notes 79–81 & 94 and accompanying text.

¹⁷ For an insightful discussion of arbitration as a risk management device, see Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 *Or. L. Rev.* (forthcoming 2005).

¹⁸ Each of these criticisms will be addressed *infra* at Part IV.

Although many federal courts will go to great lengths to promote the freedom to contract for arbitration—even if the process involves the surrender of otherwise guaranteed procedural rights¹⁹—employers can improve the odds of contractual enforcement by instituting open arbitration, a modest modification that not only would curtail the attacks on mandatory arbitration agreements but also would enhance public confidence in the arbitral process, enable a more efficient approach to arbitration (by allowing employees to share information and perhaps costs), and create a richer body of employment law.

Part I of this Note will provide a brief overview of the leading cases governing employer-mandated arbitration contracts in non-union employment settings. Part II will outline the protections afforded by Section 7 and then will consider the implications for arbitration agreements that preclude aggregated claims. Part III will describe the open arbitration model as an alternative to allowing multiparty claims. Part IV will review the lingering objections in judicial and academic circles to compulsory employment arbitration and will suggest that instituting an open arbitration scheme would mitigate many of the perceived public-policy deficiencies.

I. THE SUPREME COURT'S VIEW OF EMPLOYMENT ARBITRATION

In a series of rulings over the past two decades, beginning with a trio of commercial-law cases in the mid-1980s,²⁰ the Supreme Court blazed the trail for corporate-created arbitration programs to resolve private disputes over statutory rights. In *Mitsubishi Motors v. Soler Chrysler-Plymouth*, which dealt with the arbitrability of anti-trust actions in the context of an international commercial contract containing an arbitration clause, the Court explained that the Federal Arbitration Act²¹ “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”²² And, although the opinion acknowledged that “courts should remain attuned to well-supported

¹⁹ See *infra* notes 121 & 122 and accompanying text.

²⁰ See *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1 (1983).

²¹ 9 U.S.C. §§ 1–307 (2000).

²² *Mitsubishi Motors*, 473 U.S. at 626.

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claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract,’”²³ the ruling served as an invitation for corporations to channel statutory lawsuits away from courts and into private ADR fora. For corporate counsel who wanted to control the risks associated with employment litigation, especially discrimination suits, arbitration quickly became an appealing option. This Part presents a thumbnail sketch of the Supreme Court’s pronouncements on employer-promulgated arbitration systems.

Just a few months before Congress enacted the Civil Rights Act of 1991,²⁴ expanding statutory protections for workers against employer bias, the Supreme Court gave its approval to a mandatory arbitration agreement governing employment-related statutory claims. In *Gilmer v. Interstate/Johnson Lane*, the Court held that the defendant’s employee could be compelled to arbitrate a cause of action against the company under the Age Discrimination in Employment Act (“ADEA”) because he had signed a registration form with the New York Stock Exchange (“NYSE”) that included a broad arbitration clause.²⁵ “Although all statutory claims may not be appropriate for arbitration,” the Court wrote, “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”²⁶ The Court saw no such intent in the ADEA’s statutory scheme.²⁷

In rejecting the employee’s claims that the NYSE arbitration procedures were an inadequate substitute for those provided in the judicial forum, the Court offered several observations that may prove to be significant for employees challenging arbitration agreements on Section 7 grounds. It noted approvingly that the NYSE rules (1) require disclosure of arbitrators’ employment his-

²³ Id. at 627 (quoting 9 U.S.C. § 2 (2000)).

²⁴ Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991) (current version at 41 U.S.C. § 1981 (2000)).

²⁵ 500 U.S. 20, 23 (1991).

²⁶ Id. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

²⁷ Id. at 29. The Court, however, made clear that the agreement to arbitrate did not affect any of the substantive rights provided by the statute. Thus, the Court explained, an ADEA claimant is free to file a charge against his employer with the EEOC, as the statute permits, even though he cannot institute a private judicial action. Id. at 28.

tories and permit further inquiries by either party into the arbitrators' backgrounds,²⁸ (2) provide that all awards be in writing, with at least some explanation of the resolution,²⁹ and (3) make award decisions available to the public.³⁰ The Court also pointed out that the NYSE rules provide for collective proceedings and do not restrict the arbitrator's ability to grant broad equitable relief.³¹ The Court did not, however, indicate the extent to which a different set of characteristics would have altered its conclusion.

The opinion also left some uncertainty about the enforceability of arbitration agreements in employment contracts (though *Gilmer* involved a dispute between an employer and employee, the arbitration clause was in a securities registration application, not an employment contract), but the Court clarified that uncertainty ten years later in *Circuit City Stores v. Adams*.³² The Court held that the Federal Arbitration Act's ("FAA") exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applied only to employment contracts for workers directly involved in transportation.³³ In so doing, the Court unabashedly sanctioned the use of employment arbitration:

We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.³⁴

²⁸ Id. at 30.

²⁹ Id. at 31.

³⁰ Id. at 32.

³¹ Id.

³² 532 U.S. 105 (2001).

³³ Id. at 109.

³⁴ Id. at 123 (citation omitted). Interestingly, some objections to arbitration also have relied on the point that employment disputes tend to involve relatively small sums of money, emphasizing that prohibitions on multiparty arbitration create a financial disincentive to pursue a recovery. See *infra* notes 119 & 137 and accompanying text. See also Hodges, *supra* note 12, at 217-18.

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After *Gilmer* and *Circuit City*, potential challenges to the enforcement of employment arbitration agreements appeared tightly cabined. In general, courts have enforced the agreements unless the employee-complainant establishes either that (1) arbitration is inconsistent with the federal statute that provides the cause of action or (2) the agreement was made in violation of state contract law.³⁵ Each of these approaches—discussed at length in Part IV—has produced victories for employees seeking the procedural guarantees of a judicial forum, but obtaining those assurances often has meant sacrificing arbitration's desirable features and, in any event, neither method has addressed satisfactorily collective-action concerns on a national scale.³⁶ If, however, employees begin to assert Section 7 rights in challenging the terms of arbitration agreements, employers will be forced to defend their arbitration systems against charges that they violate federal law.

II. THE SECTION 7 CONFLICT

When the late Senator Robert F. Wagner outlined the purposes of the landmark labor legislation that would come to bear his name, he told his Senate colleagues in 1935 that the only way for Congress to ensure that workers could gain equality of bargaining power with their employers “is by securing for employees the full right to act collectively through representatives of their own choosing.”³⁷ That right eventually was codified as Section 7 of the NLRA, which guarantees that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to *engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*,”³⁸ and was rein-

³⁵ Although the Federal Arbitration Act broadly preempts state law by “withdr[awing] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), it explicitly incorporates state contract law by providing that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2000).

³⁶ Because many of the decisions invalidating arbitration agreements that prohibit class actions are grounded in state law, their applicability is limited geographically.

³⁷ 78 Cong. Rec. 3678 (1935), *reprinted in* 1 Legislative History of the National Labor Relations Act, 1935, at 18, 20 (1949).

³⁸ 29 U.S.C. § 157 (2000) (emphasis added).

forced by Section 8(a)(1), which forbids an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” by Section 7.³⁹ The Board and the Supreme Court have interpreted these provisions expansively to cover a range of employee⁴⁰ activities beyond traditional union organizing campaigns. This Part provides a brief survey of cases involving Section 7 protections, and it finds that (1) this statutory provision supports a claim to protection by employees who collectively pursue a legal case against their employer and (2) an employer commits an unfair labor practice by requiring employees to abandon this right as a condition of employment. It then considers the implications of interpreting Section 7 so as to categorically prohibit arbitration agreements that preclude multiparty actions, and it concludes that such an interpretation might eliminate entirely the use of mandatory predispute arbitration agreements in the workplace.

Employer attempts to circumscribe the reach of Section 7 have met with mixed success. On the one hand, the Board and the Court have broadly defined “mutual aid or protection” to encompass virtually any lawful activity that could be characterized as potentially benefiting workers (including employees of other companies). In *Eastex, Inc. v. NLRB*, most notably, the Supreme Court rejected the view “that employees lose their protection under the ‘mutual aid or protection’ clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee–employer relationship,” and it specifically acknowledged that employees’ resort to an administrative or judicial forum to “seek to improve working conditions” satisfies this prong of Section 7.⁴¹

On the other hand, the Board has, over time, narrowed the definition of “concerted activity” by rejecting the idea that “construc-

³⁹ 29 U.S.C. § 158(a)(1) (2000).

⁴⁰ The NLRA excludes from its coverage agricultural workers, domestics, government employees, railroad and airline employees (who are covered by the Railway Labor Act), independent contractors, supervisors, managerial employees, and confidential employees. 29 U.S.C. § 152(3) (2000).

⁴¹ 437 U.S. 556, 565–66 (1978). The case dealt with the distribution of a newsletter that urged employees to lobby against incorporation of right-to-work provisions into a state constitution and criticized a presidential veto of an increase in federal minimum wage. *Id.* at 569–70. The Court said such action met § 7’s “mutual aid or protection” requirement. *Id.*

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tive” concerted action exists when an individual merely intends his actions to benefit his fellow workers.⁴² The current interpretation of Section 7’s concert requirement is articulated in the Board’s *Meyers Industries (Meyers II)* decision, which says, “[i]n general, to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”⁴³ The touchstone of concerted activity, according to the Board, is “evidence demonstrat[ing] group activities,” which does not require specific authorization by the group to act, but does contemplate at least “general awareness on the part of the group as to the intended action of the individual employee.”⁴⁴ This leaves most *individual* employee activity, including even formal allegations that the employer has violated federal or state law, unprotected by Section 7,⁴⁵ while it may protect the same activity if done by, or on behalf of, a group of employees. Yet the *Meyers II* doctrine does recognize that activity may be concerted even if it “involves only a speaker and a listener” because such communication “is an indispensable preliminary step to employee self-organization.”⁴⁶ The definition of concerted activity, therefore, “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”⁴⁷

In any event, Section 7 rights are unquestionably implicated when two or more employees assert legal rights against their employer. In the 1953 case of *Salt River Valley Water Users’ Associa-*

⁴² *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 888 (1986).

⁴³ *Id.* at 885.

⁴⁴ *Id.* at 886.

⁴⁵ *Id.* at 887. In certain cases, however, whistleblower statutes protect employees when they alert government authorities to a potential law violation.

⁴⁶ *Id.* Group action or organization need not follow the speech for the speaker to gain § 7 protection. See, e.g., *Circle K Corp.*, 305 N.L.R.B. 932, 934 (1991) (finding that an employee’s letter soliciting the support of fellow workers in her effort to improve working conditions was protected concerted activity because it “plainly had an object of inducing group action,” even though her coworkers declined to participate by signing the letter).

⁴⁷ *Meyers II*, 281 N.L.R.B. at 887. But activity “which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely [unprotected] ‘gripping.’” *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

tion v. NLRB, the United States Court of Appeals for the Ninth Circuit said Section 7 protections extended to an employee who was fired for encouraging his colleagues—“zanjeros” (water managers) for an irrigation cooperative—to sign a petition demanding backpay and overtime wages allegedly due from their employer under the Fair Labor Standards Act (“FLSA”).⁴⁸ “By soliciting signatures to the petition,” the court said, the employee “was seeking to obtain such solidarity among the zanjeros as would enable the exertion of group pressure upon the Association [to settle] the zanjeros’ claims. If [a] suit were filed, such solidarity might enable more effective financing of the expenses involved.”⁴⁹ Twenty-two years later, the Board decided *Trinity Trucking & Materials Corp.*, which made clear that the filing of a work-related civil action by a group of employees is protected by Section 7, provided that the suit is not brought with malice or bad faith.⁵⁰ In that case, three employees sued their employer, alleging breach of contract based on alleged underpayment of wages over the course of six years.⁵¹ The suit sought compensatory damages of \$40,000 and punitive damages of \$200,000.⁵² When the employer learned of the suit, he ordered the employees to withdraw it within forty-eight hours or face discharge; the employees refused to withdraw the suit, and the employer fired them.⁵³ Absent proof by the employer that the employees acted in bad faith or with malice, the Board said, the firing would constitute a violation of Section 8(a)(1). More recently, the Board’s general counsel, in an advice memorandum, expressly stated that an employee class action constituted protected concerted activity under Section 7.⁵⁴

That protection, moreover, not only forbids firing based on the exercise of Section 7 rights, but also prohibits the conditioning of employment on an employee’s waiver of Section 7 rights.⁵⁵

⁴⁸ 206 F.2d 325, 328 (9th Cir. 1953).

⁴⁹ *Id.*

⁵⁰ 221 N.L.R.B. 364, 365 (1975).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *Allstate Ins.*, No. 20-CA-27085, 1996 N.L.R.B. GCM Lexis 17, at *13–14 (Apr. 24, 1996).

⁵⁵ See, e.g., *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940) (“[E]mployers cannot set at naught the National Labor Relations Act by inducing their workmen to

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For corporations that want to use mandatory arbitration agreements to prevent employees from bringing multiparty actions, Section 7 exposes a difficulty: how to preserve an efficient arbitration system without committing an unfair labor practice. Although the Board has yet to hear a case on this point, the *Green Tree Financial v. Bazzle* decision,⁵⁶ as explained above, likely will force employers and the Board—and possibly courts—to confront it.⁵⁷

Twice in the past decade, the Board's general counsel's office has issued advice memoranda related to the effect of arbitration agreements on Section 7 rights. In the 1995 *Bentley's Luggage* memorandum, the general counsel interpreted an employer-mandated arbitration agreement as "requir[ing] employees to waive their statutory right to file charges with the Board,"⁵⁸ and therefore concluded that the employer committed an unfair labor practice by firing an employee who refused to sign the contract.⁵⁹ "From its inception, the NLRA has permitted the Board to treat individual contracts of employment, when used to frustrate the exercise of statutory rights, as either void or voidable."⁶⁰ The general counsel said that Congress, in giving the Board the power to prevent or remedy unfair labor practices,⁶¹ evinced "an intention to preclude a waiver of judicial remedies for the statutory rights at issue," and, therefore, under *Gilmer v. Interstate/Johnson Lane*, claims of NLRA violations are inappropriate for arbitration.⁶² In the 2001 *O'Charley's Inc.* memorandum, the general counsel's Division of Advice reviewed an arbitration agreement that, unlike in *Bentley's Luggage*, explicitly stated that an employee had the right

agree not to demand performance of the duties which it imposes . . ."); *Retlaw Broad. Co.*, 310 N.L.R.B. 984, 991 (1993) ("It is clear that an employer may not condition an employee's reinstatement on a union's waiver of employees' Section 7 rights.").

⁵⁶ 539 U.S. 444 (2003).

⁵⁷ See *supra* note 12 and accompanying text.

⁵⁸ See *Bentley's Luggage*, No. 12-CA-16658, 1995 N.L.R.B. GCM Lexis 92, at *5 (Aug. 21, 1995).

⁵⁹ *Id.* at *8.

⁶⁰ *Id.* at *6.

⁶¹ See 29 U.S.C. § 160(a) (2000).

⁶² *Bentley's Luggage*, 1995 N.L.R.B. GCM Lexis 92, at *12–13 (quoting *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 26 (1991)).

to file an unfair labor practice charge with the Board.⁶³ An employee was fired because he refused to sign the agreement, and he alleged that the agreement required him to waive his right to act in concert with others in court. The general counsel found that “the text of the Agreement does not support this claim” because it did not require the employee to forego any substantive rights by restricting the choice of forum.⁶⁴ It is important to note, however, that this agreement was silent on the issue of whether employees could bring a class or multiparty action in arbitration—and the Division of Advice made a point of saying that it did not address “whether the Agreement could lawfully be applied in a way that interferes with Section 7 activity such as acting in concert or filing a lawsuit,” and that “the Employer has not applied the Agreement in such a manner.”⁶⁵ That question, therefore, remains open.

One employment law scholar has argued that the protections afforded by Section 7 prohibit courts from enforcing arbitration agreements that do not allow class actions or consolidation of claims.⁶⁶ Professor Hodges contends that, as long as the federal courts and Congress provide a judicial mechanism for collective legal action (whether under the Federal Rules of Civil Procedure that govern class actions and joinder of parties or under a statutory scheme for group proceedings), an employer may not demand that nonunion employees surrender the opportunity to avail themselves

⁶³ See *O'Charley's Inc.*, No. 26-CA-19974, 2001 N.L.R.B. GCM Lexis 25, at *9 (Apr. 16, 2001).

⁶⁴ *Id.* at *11–12.

⁶⁵ *Id.* at *12 n.16. In one of the quirks of § 7 law, had the employee and a coworker together refused to sign the agreement and been fired, they might have had a stronger claim for § 7 protection. See *Seneca Motors*, No. 6-CA-18976, 1986 N.L.R.B. GCM Lexis 117, at *3–5 (June 30, 1986) (stating that § 7 protected a group of nonunionized employees against discharge for their concerted refusal to sign a statement in an employee handbook that they understood policies contained in the handbook when they had requested clarification from the employer and the employer had refused to explain the policies).

⁶⁶ See Hodges, *supra* note 12, at 177. Another scholar in this field has taken the opposite view, arguing that a compulsory employment arbitration agreement probably does not violate § 8(a)(1). Richard A. Bales, *Compulsory Arbitration* 61 (1997). Professor Bales's argument presumes, however, that an employee's right to bring a class action is not waived by the signing of an arbitration agreement. See *id.* at 68. For a general discussion of the use of mandatory arbitration clauses to limit exposure to class actions, see Sternlight, *supra* note 8.

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of that mechanism in some forum.⁶⁷ Any such promise is obtained unlawfully, according to this theory, and, therefore, the agreement to arbitrate is void and unenforceable.

If Section 7 were interpreted to protect the right to bring a class or multiparty action, however, employers would be forced to respond in one of the following ways: (1) remove arbitration as a condition of employment or make it a voluntary option after the dispute arises, (2) provide an arbitration system that includes a process for resolving multiparty claims in a manner comparable with that used in courts, (3) allow class or multiparty claims to proceed in court, or (4) abandon arbitration entirely.

There is good reason to believe that the first alternative—making arbitration truly optional, either predispute or postdispute—would be rejected by many employers. Professor St. Antoine argues that, for management, “the sensible strategy is to agree to arbitrate only if everything can be included, and that almost necessarily means an agreement before any dispute arises.”⁶⁸ Professor Estreicher, likewise, sees voluntary arbitration as incompatible with the core objectives of employers who want to arbitrate. “[P]ostdispute arbitration, in all but the rarest cases, will not be offered by one party or accepted by the other,” he says, and nonmandatory predispute agreements will spawn litigation—precisely what employers want to avoid—over the voluntariness of the predispute promise.⁶⁹

⁶⁷ Hodges, *supra* note 12, at 217, 224–26. A union, however, can bargain away certain statutory rights of its members, such as the right to strike, which unions traditionally forfeit in exchange for the employer’s agreement to arbitrate union members’ grievances. See generally *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (declaring that a union may waive a member’s statutorily protected rights and “may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line”); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev. 395, 405–06 (1999) (stating that, in the collective bargaining context, “[t]he agreement to arbitrate, which is given in return for the promise not to strike, is an integral part of a self-regulating system”).

⁶⁸ See Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 Ind. L.J. 83, 92 (2001).

⁶⁹ Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 567–69 (2001). But see Arnold M. Zack, *Agreements to Arbitrate and the Waiver of Rights under Employment Law, in Employment Dispute Resolution and Worker Rights in the Changing Workplace* 67, 82 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999) (noting that the New York Stock Exchange and Merrill Lynch & Co., two institutions

The utility of the second scenario—class arbitration—would depend, in part, on whether courts would accept class/multiparty arbitration as a substitute for similar court proceedings. That, in turn, would hinge on whether they interpret Section 7 as preserving the right to access a judicial forum or as merely preserving the right to collective dispute resolution in any chosen forum. But, even if class/multiparty arbitration were feasible⁷⁰ and permissible, employers may find such a system undesirable because some, if not all, of the benefits of arbitration vanish when it replicates a complex court proceeding.

The third approach—permitting only multiparty claims to proceed in court—seems unworkable because it often can be difficult to determine at the outset of legal action whether joinder of another party or creation of a class will be warranted. It also raises an additional question: Who decides whether to permit joinder or class status, an arbitrator or a judge? Moreover, this approach fundamentally undercuts one of the principal reasons employers prefer arbitration in the first place—the desire to avoid class actions.⁷¹

The fourth and final alternative—abandonment of arbitration entirely—thus appears to be the most likely path for employers, particularly those for whom class-action avoidance was the primary motivation for demanding arbitration.

Such a result, though, would be a Pyrrhic victory for workers, a majority of whom think that arbitration is a good or very good way to resolve employment disputes over legal rights.⁷² Indeed, a well-designed arbitration program can offer workers a device for dis-

that led the charge for employment arbitration, have abandoned compulsory arbitration agreements in favor of a voluntary system).

⁷⁰ Some ADR service providers have instituted procedures for dealing with class arbitration. See, e.g., JAMS, Class Action and Mass Tort Settlement Adjudication, at <http://www.jamsadr.com/images/PDF/classaction.PDF> (last accessed Mar. 23, 2005).

⁷¹ See *supra* note 3 and accompanying text.

⁷² A survey taken a decade ago indicated that more than 80% of U.S. workers support workplace arbitration, 62% thought it would work well at their company and increase fairness in dispute settlement, and more than 70% believed that workers and management would be better off if arbitrators replaced courts in solving most employee disputes about legal rights. Richard B. Freeman & Joel Rogers, *What Workers Want* 132–36, 157 (1999). A majority of survey respondents, however, felt that an ideal arbitration system would preserve employee access to courts. *Id.* at 136.

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pute adjudication that otherwise might be unavailable.⁷³ Arbitration encourages grievance resolution by providing a forum that is generally cheaper, faster, and more informal than litigation. Therefore, an employee can use arbitration to deal with work-related issues that likely would go unaddressed were a lawsuit the only option.⁷⁴

Perhaps, then, reading Section 7 as providing an absolute protection for workers to pursue legal claims jointly would be detrimental to the interests of employers and employees alike. That invites the question: Absent legislative action, are there circumstances under which a mandatory predispute arbitration agreement that precludes class actions can be enforceable without undermining Section 7? The next Part suggests one such possibility.

III. THE OPEN ARBITRATION MODEL

Although Section 7 protects the right of employees to engage in concerted legal action against their employer, an employer nonetheless may be able to require workers to assent to individualized arbitration without running afoul of the NLRA's proscriptions. This Part suggests that employers can, in fact, lawfully impose restrictions on the means by which employees engage in this protected activity (for example, by mandating that workers waive the right to file a joint or class action), so long as those limits do not preclude employee collaboration in dispute resolution altogether. It advocates an approach to construing Section 7 rights that would give pro-arbitration employers a clear choice: either permit employees to bring collective actions in arbitration, or, alternatively, provide guarantees of transparency in the arbitral process that

⁷³ See generally Comm'n on the Future of Worker-Mgmt. Relations, Report and Recommendations 30 (1994) (addressing the drawbacks of litigation vis-à-vis arbitration in public law disputes).

⁷⁴ Arbitration systems have the potential for bringing greater justice to more employees than if such employer-promulgated systems did not exist [and employees had to resort to the judicial process]. Despite its mandatory nature, arbitration [that incorporates due process protections] provides a faster process than litigation, precludes endless and costly appeals, and in most cases is funded by the employer[,] compared with the requirement of having to hire a lawyer to go to an administrative agency or to litigation. Zack, *supra* note 69, at 84–85.

would allow employees to work together effectively without aggregating their claims.

Many employers and ADR providers already have moved toward greater transparency in arbitration proceedings by requiring arbitrators to issue written, reasoned decisions and by allowing employees to have a representative present at hearings.⁷⁵ But these reforms, while essential to a truly open arbitration scheme, do little to foster concerted activity for mutual aid unless the employees involved also are permitted to use their experiences in individualized arbitration for the benefit of their coworkers. For this reason, employers seeking to justify a prohibition on multiparty actions would stand on surer legal footing, for purposes of Section 7, if their arbitration procedures provided for public disclosure of arbitration outcomes and the right to present relevant prior awards as non-binding, but persuasive, precedent. Although arbitration agreements typically mandate confidentiality,⁷⁶ publication of arbitral awards is not unprecedented,⁷⁷ and, in fact, it has the endorsement

⁷⁵ See Comm'n on the Future of Worker-Mgmt. Relations, *supra* note 73, at 30–32. See also *infra* note 106 and accompanying text (discussing the *Cole* decision).

⁷⁶ See generally Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, in *Employment Dispute Resolution and Worker Rights in the Changing Workplace* 95, 97 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999) (“[Most] employment arbitration awards are unpublished and confidential.”); Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 Va. J.L. & Tech. 4, 38 (2002) (“ADR processes have traditionally limited themselves to the disputes before them and have refrained from communicating their resolutions to future disputants.”); Ross Runkel, *Arbitration of Employment Disputes: The New Privatization of the Judicial System*, 6 Briefly... Perspectives on Legislation, Regulation, and Litigation 1, 36 (2002) (“An important aspect of arbitration is that it is a private process [with] no public records and no public hearings.”).

⁷⁷ Arbitrations conducted under the auspices of the New York Stock Exchange (“NYSE”) require awards to be in writing and publicly available. See NYSE Dep’t of Arbitration, Article XI NYSE Constitution and Arbitration Rules, R. 627, <http://www.nyse.com/pdfs/Rules.pdf> (2003). The National Association of Securities Dealers (“NASD”) requires that its arbitration awards be filed with the NASD Administrative Office, where anyone who knows the case number can obtain a copy of an award by completing a form and paying a five-dollar fee. Awards also are available through subscription services such as Westlaw and the *Securities Arbitration Commentator*. See Moohr, *supra* note 67, at 431 n.188. In traditional labor arbitration, written and reasoned opinions have been customary for years, and approximately 10% of all opinions are published. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1086 (2000).

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of numerous legal authorities.⁷⁸

An arbitration process that incorporates these features would ensure that workers can communicate effectively among themselves about employment-related grievances, rely on the experiences and knowledge of their colleagues, and pool their resources—all of which are among the goals underlying Section 7. Indeed, a series of individual arbitration awards could provide the impetus for a union organizing effort (a central focus of Section 7's protections).⁷⁹ Some commentators, in fact, have recommended that unions take advantage of the organizing potential of workplaces that have employer-promulgated arbitration systems by making representation in arbitration cases available to employees.⁸⁰ Additionally, a series of pro-worker arbitration awards could become the foundation for the collective pursuit of a complaint before a government agency.⁸¹

To be sure, individualized open arbitration lacks some of the characteristics of a class action—most notably, the ability to aggregate numerous small-value claims. But, as a functional matter, workers could use open arbitration to accomplish the same result as they might have in a group proceeding. Consider, for example,

⁷⁸ See *infra* Part IV.

⁷⁹ Alternatively, an employer who promotes collective action through arbitration may reduce the likelihood that disaffected employees will resort to other methods of group activity, such as union-organizing campaigns.

⁸⁰ See generally Zack, *supra* note 69, at 86–87. See also Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements through Collective Employee Actions*, 10 *Tex. Wesleyan L. Rev.* 77, 102–03 (2003) (claiming that “mandatory arbitration could become a rallying cry for [union] organizers”). Unions, however, must be careful about creating too close of a link between assisting nonunion employees in arbitration and direct organizing efforts in that workplace, lest they face unfair labor practice charges for vote-buying (that is, conferring benefits upon those who will be asked to vote for the union). But see *52nd St. Hotel Assn.*, 321 *N.L.R.B.* 624, 634 (1996) (holding that a union’s provision of legal services to nonunion employees seeking unpaid wages under the Fair Labor Standards Act was not an unlawful attempt to corrupt a union election).

⁸¹ The Supreme Court has said that the existence of an arbitration agreement between private parties does not change the statutory function of an agency such as the Equal Employment Opportunity Commission (“EEOC”), which is empowered to bring suits to enforce federal antidiscrimination laws and to seek both injunctive and victim-specific remedies (including damages in the form of “make whole” relief). See *EEOC v. Waffle House*, 534 U.S. 279, 288 (2002). See also *supra* note 27 and accompanying text (discussing the right of employees covered by arbitration agreements to file EEOC complaints).

an employee claim to unpaid overtime under the FLSA.⁸² An FLSA overtime action is a paradigmatic small-value claim, where the costs of pursuing an individual case may exceed the benefits the worker would obtain if he prevailed, but the aggregate value of a claim brought by a group of coworkers might be sufficient to justify the expense.⁸³ Absent an arbitration agreement, an employee who wants to pursue an FLSA claim on behalf of himself and his coworkers could elect to proceed in court under the statutory scheme for group proceedings, which permits collaboration by “similarly situated” employees who affirmatively consent, in writing, to join as plaintiffs.⁸⁴ By contrast, an employee who is covered by a typical arbitration agreement most likely would have to proceed as an individual claimant.⁸⁵

In an open arbitration system, however, such an employee would be free to seek out similarly situated coworkers for a possible collaborative effort in which they could pool resources to pursue individual claims in arbitration. Although the result of the initial individual arbitration would not be binding on subsequent arbitrators, it would carry persuasive weight and would, in all likelihood, influence the resolution of other claims. Although this process involves collective-action barriers—in that individual employees might have

⁸² 29 U.S.C. §§ 201–219 (2000).

⁸³ One commentator estimated in 1992 that the average FLSA overtime claim was worth less than \$400. See Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. Pa. L. Rev. 457, 497 (1992). Note, however, that a successful FLSA plaintiff is entitled to recover from the employer “a reasonable attorney’s fee . . . and costs of the action.” See 29 U.S.C. § 216(b) (2000).

⁸⁴ Section 216 of the FLSA provides, in pertinent part, “An action to recover [damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” 29 U.S.C. § 216(b) (2000).

⁸⁵ Two federal appeals courts have held that employees surrendered their right to bring such a collective action under the FLSA when they agreed to arbitrate disputes with their employers. See *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready*, 303 F.3d 496, 503 (4th Cir. 2002). Neither court, however, addressed the potential conflict with § 7. But cf. *Walker v. Ryan’s Family Steak Houses*, 289 F. Supp. 2d 916, 924–26 (M.D. Tenn. 2003) (finding that an arbitration agreement impermissibly undermined the federal statutory policy reflected in the FLSA because, *inter alia*, it precluded collective actions).

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an incentive to free ride—these hurdles are no greater than those that exist with the FLSA's opt-in class-action structure.⁸⁶ And, in fact, employees who act in concert through open arbitration would avoid the costs associated with litigating the question of whether they are “similarly situated” within the meaning of the statute.⁸⁷

Moreover, from a practical standpoint, the procedural rights afforded by open arbitration would benefit even those employees who are pursuing claims of a truly individual nature because those workers would have the opportunity to assess previous adjudications. For this reason, open arbitration rights are far more valuable to workers generally than is the right to proceed in court or in arbitration as a class, where plaintiffs also must clear the substantial hurdles of establishing numerosity, commonality, typicality, and adequacy of representation.⁸⁸ Likewise, preserving the right to join a suit as a co-party, which requires showing common questions of law and fact,⁸⁹ or the right to sue under a statutory scheme for opt-in group proceedings,⁹⁰ likely would benefit far fewer workers than would a general requirement of transparency in arbitration proceedings.

As a doctrinal matter, an arbitration agreement's complete prohibition on class actions can be justified under Section 7—provided that transparency facilitates concerted action in dispute resolution by other means—on the theory that the statute “does not provide a right to select any particular forum to concertedly engage in activi-

⁸⁶ See Louise Sadowsky Brock, Note, *Overcoming Collective Action Problems: Enforcement of Worker Rights*, 30 U. Mich. J.L. Reform 781, 797–99 (1997) (discussing the obstacles to collective enforcement of the FLSA).

⁸⁷ For a recent example of such litigation, see *Pendlebury v. Starbucks Coffee*, No. 04-CV-80521, 2005 WL 84500 (S.D. Fla. Jan. 3, 2005).

⁸⁸ Fed. R. Civ. P. 23.

⁸⁹ Fed. R. Civ. P. 20.

⁹⁰ See *supra* note 84 (discussing the FLSA's provision for collective suits by “similarly situated” employees who affirmatively opt in). This provision is incorporated by reference in the Age Discrimination in Employment Act, Id. § 626(b). The Family and Medical Leave Act (“FMLA”) likewise permits a private right of action by a group of “similarly situated” employees, 29 U.S.C. § 2617(a)(2) (2000). Courts have interpreted Congress's use of that language in the FMLA to mean that the requirements of an FMLA collective action are the same as the FLSA. See, e.g., *Nero v. Indus. Molding Corp.*, 167 F.3d 921, 928 (5th Cir. 1999) (“[T]he legislative history of the FMLA reveals that Congress intended the remedial provisions of the FMLA to mirror those in the FLSA.”) (quoting *Frizzell v. Southwest Motor Freight*, 154 F.3d 641, 644 (6th Cir. 1998)).

ties for mutual aid or protection.”⁹¹ The Board’s general counsel articulated this important qualification of Section 7 rights in its *O’Charley’s Inc.* memorandum, and the Supreme Court has made much the same point in another context: rejecting union members’ asserted Section 7 right to engage in organizing activities on the private property of a nonunion employer where other alternative means of communicating with the nonunion employees were readily available.⁹² Although the “alternative means” balancing test of *Lechmere Inc. v. NLRB* has been applied only in cases where an employer’s property interests are at stake, it is instructive for the present purpose of considering whether employers have a privilege to restrict another protected concerted activity, filing a collective legal claim. In the latter case, the countervailing employer interest is not a traditional property right, but rather an interest in the FAA-recognized right to utilize arbitration for dispute resolution.

The Board has “wide latitude” to interpret Section 7, and it has said it attempts “to choose [the] construction that is most responsive to the central purposes for which the [NLRA] was created.”⁹³ It is, therefore, conceivable that the Board, recognizing that aggregation of claims is not the exclusive method by which employees can cooperate to resolve grievances of mutual concern, would permit a mandatory waiver of multiparty arbitration if the employer could show that employees have adequate alternative means of collaborating in the resolution of workplace disputes. Open arbitration not only provides such an alternative by allowing employees to share information and resources in resolving their individual claims, it also promotes a Section 7 value—free communication among workers⁹⁴—which is essential to the NLRA’s primary goal of equalizing the power balance between management and labor.

⁹¹ See *O’Charley’s Inc.*, No. 26-CA-19974, 2001 N.L.R.B. GCM Lexis 25, at *11 (Apr. 16, 2001).

⁹² *Lechmere Inc. v. NLRB*, 502 U.S. 527, 540–41 (1992). Cf. *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 1195 (1943) (finding that employees have a “right to full freedom of association in the plant on their own time, the very time and place uniquely appropriate” for such activities (internal quotations omitted)).

⁹³ *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 883 (1986).

⁹⁴ See *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (“Early in the history of the administration of the [NLRA,] the Board recognized the importance of freedom of communication to the free exercise of [§ 7] rights.”).

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The open arbitration model is not entirely speculative. In fact, elements of it emerged as part of the settlement of one of the most high-profile employment class actions of the past decade—a sex discrimination suit brought by more than nine-hundred women who had worked for the Wall Street brokerage firm Merrill Lynch & Co. In 1996, a group of female Merrill Lynch financial consultants filed a class-action lawsuit against their employer alleging, among other things, gender-based discrimination in violation of Title VII of the Civil Rights Act of 1964.⁹⁵ Two years later, Merrill Lynch agreed to cease efforts to compel the employees to arbitrate the claims before a panel of industry-selected adjudicators, in exchange for which the plaintiffs assented to a two-phase nonjudicial claims-resolution process that required them to pursue their grievances individually through mediation and, if necessary, binding arbitration.⁹⁶ The first phase of the process involved the collection of class-wide evidence that later would be available to individual claimants in arbitration proceedings.⁹⁷

The vast majority of claims resulted in mediated settlements between the claimant and the firm, and by the time the first arbitration decision was issued in April 2004, all but a few dozen of the claims had been resolved.⁹⁸ That decision was an overwhelming victory for the claimant, Hyde Sumner, with the panel of arbitrators concluding that Merrill Lynch had engaged in a pattern or practice of class-wide discrimination and awarding Sumner liquidated damages under the Equal Pay Act and \$500,000 in punitive damages.⁹⁹ The total award amounted to \$2.2 million.¹⁰⁰ The master settlement agreement did not specify how arbitration panels in subsequent proceedings should treat the findings made by earlier panels, but

⁹⁵ See *Ingram v. Merrill Lynch, Pierce, Fenner & Smith*, 371 F.3d 950, 951 (7th Cir. 2004), request granted and motion denied sub. nom. *Cremin v. Merrill Lynch, Pierce, Fenner & Smith*, 328 F. Supp. 2d 865, 866 (N.D. Ill. 2004).

⁹⁶ *Cremin v. Merrill Lynch, Pierce, Fenner & Smith*, 328 F. Supp. 2d 865, 866 (N.D. Ill. 2004).

⁹⁷ *Id.*

⁹⁸ See Patrick McGeehan, *Merrill Lynch Is Told It Must Pay in Sexual Bias Case*, N.Y. Times, Apr. 21, 2004, at A1 (reporting that about forty current and former brokers had outstanding claims). See also *Ingram*, 371 F.3d at 951 (placing the number of resolved claims at about 94%); *Cremin*, 328 F. Supp. 2d at 867 (stating that over 96% of the more than nine-hundred claims had been resolved as of July 30, 2004).

⁹⁹ See *Cremin*, 328 F. Supp. 2d at 867.

¹⁰⁰ See McGeehan, *supra* note 98, at A1.

the federal district judge overseeing the settlement ruled that claimants could present information on a prior decision in their own hearings and that the arbitrators in that proceeding would have discretion to decide whether to give it preclusive effect.¹⁰¹

The Merrill Lynch experience thus demonstrates how an open arbitration system can function to preserve the collective-action rights of workers in dispute resolution even when it requires individualized adjudication. And, as the next Part demonstrates, open arbitration also responds to many of the criticisms that have led courts to invalidate corporate-mandated arbitration pacts as unconscionable or contrary to public policy.

IV. ALTERNATIVE JUSTIFICATIONS FOR OPEN ARBITRATION

This Part outlines the contours of the debate over the enforceability and desirability of compulsory arbitration in nonunion workplaces, provides a sampling of cases in which courts have objected to the imposition of arbitration, and reviews some of the reforms that employers and arbitrators have instituted. It concludes that there is policy-based support, independent of Section 7, for requiring open arbitration proceedings when statutory rights are at stake.

As noted above, legal challenges to the enforceability of employee arbitration agreements have proceeded largely along one of two tracks: (1) inconsistency with the federal statute that provides the cause of action or (2) violation of state contract law.¹⁰² The first approach led to the influential decision in *Cole v. Burns International Security Services*.¹⁰³ In an opinion authored by Judge Harry Edwards, a distinguished scholar in the fields of employment and labor law, the United States Court of Appeals for the District of Columbia Circuit interpreted *Gilmer v. Interstate/Johnson Lane* as requiring that arbitration of federal claims¹⁰⁴ meet certain minimal due process standards that allow the prospective litigant to “effectively . . . vindicate [his or her] statutory cause of action in the arbi-

¹⁰¹ See *Cremin*, 328 F. Supp. 2d at 869.

¹⁰² See *supra* note 35 and accompanying text.

¹⁰³ 105 F.3d 1465 (D.C. Cir. 1997).

¹⁰⁴ In this case, it was a claim under Title VII of the Civil Rights Act of 1964. *Id.* at 1467.

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tral forum.”¹⁰⁵ It purported to derive from *Gilmer* five requirements for finding that an arbitration process would adequately substitute for the judicial forum presupposed by federal antidiscrimination laws. There must be (1) neutral arbitrators, (2) “more than minimal” discovery, (3) a written award, (4) availability of all forms of relief that a court could provide, and (5) no requirement that employees pay arbitrators’ fees or expenses, or pay unreasonable costs as a condition of access to the arbitral forum.¹⁰⁶

The *Cole* court found that the arbitration program at issue fulfilled all five of these criteria, but its endorsement was equivocal.¹⁰⁷ The opinion pointed to a number of the shortcomings that exist in the arbitration of public-law claims, placing particular emphasis on the information asymmetry between parties in the employment context. In this respect, it distinguished individual contracts to arbitrate employment disputes from arbitration agreements arising out of collective bargaining agreements, stressing that the union-management negotiation process affords employees protections that “minimize the risk of unfairness or error by the arbitrator,” whereas similar assurances are lacking in the nonunion context.¹⁰⁸ “[B]ecause both unions and employers are repeat customers of arbitration and have a hand in selecting the arbitrator to hear their disputes,” Judge Edwards wrote, arbitrators who want to be rehired “have a strong personal interest in crafting awards that will be respected as fair by both parties.”¹⁰⁹ Nonunion employees who agree to arbitrate disputes, he explained, are at a comparative disadvantage because the employer has “superior knowledge with respect to selection of an arbitrator.”¹¹⁰ In the context of statutory claims, this repeat-player advantage is exacerbated by the lack of

¹⁰⁵ Id. at 1482 (quoting *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 28 (1991)).

¹⁰⁶ Id.

¹⁰⁷ See, e.g., id. at 1468 (indicating that the court was “constrained by *Gilmer* to find the arbitration agreement enforceable”). See also id. at 1488 (noting that “for all of arbitration’s shortcomings, the process, if fairly conducted, is not necessarily inferior to litigation as a mechanism for the resolution of employment disputes”).

¹⁰⁸ Id. at 1475.

¹⁰⁹ Id. The opinion, however, acknowledges that union agreements to arbitrate members’ statutory claims raise other concerns, most importantly that the union’s interests will not necessarily coincide with any individual member’s interests. Id. at 1479.

¹¹⁰ Id. at 1476.

public disclosure of arbitration awards, which “may systematically favor companies over individuals.”¹¹¹ Furthermore, he observed:

Judicial decisions create binding precedent that prevents a recurrence of statutory violations; it is not clear that arbitral decisions have any such preventative effect. The unavailability of arbitral decisions also may prevent potential plaintiffs from locating the information necessary to build a case of intentional misconduct or to establish a pattern or practice of discrimination by particular companies.¹¹²

Despite this cogent critique, the court’s articulation of the *Gilmer* factors makes no mention of a requirement that arbitration awards be publicly available—a significant and peculiar omission given that the NYSE arbitration rules at issue in *Gilmer* provided for public disclosure of arbitration outcomes,¹¹³ a fact the *Cole* opinion noted elsewhere.¹¹⁴ If hard facts make bad law,¹¹⁵ the *Cole* court’s interpretation of *Gilmer* may be proof that “easy” facts (such as those of *Gilmer*) can make bad law when judges applying the holding in later cases fail to acknowledge key factual distinctions.¹¹⁶ The conspicuous omission notwithstanding, *Cole*’s reasoning—that *Gilmer* established a baseline for determining what protections are necessary to effectively vindicate statutory rights—creates a plausible argument that publication of decisions is among the essential elements of due process in arbitration of federal statutory claims.

Other courts have conducted *Cole*-like inquiries in cases challenging arbitration as an ineffective substitute for the judicial forum,¹¹⁷ and one federal court recently concluded that the elimina-

¹¹¹ *Id.* at 1477.

¹¹² *Id.*

¹¹³ *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 31–32 (1991).

¹¹⁴ 105 F.3d at 1481. Others have noted this inconsistency. See, e.g., Adriaan Lanni, Case Note: Protecting Public Rights in Private Arbitration, 107 Yale L.J. 1157, 1158 (1998) (arguing that the *Cole* court “should have followed its own logic and required public disclosure of arbitration awards to protect the integrity of public law”).

¹¹⁵ See *Schein v. Chasen*, 519 F.2d 453, 458 (2d Cir. 1975) (restating this common adage).

¹¹⁶ The AAA rules governing the agreement between Clinton Cole and Burns Security required that awards remain confidential. Lanni, *supra* note 114, at 1160.

¹¹⁷ See, e.g., *Morrison v. Circuit City Stores*, 317 F.3d 646, 658 (6th Cir. 2003) (stating that “statutory rights, such as those created by Title VII, may be subject to mandatory

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tion of a provision that had allowed class actions contributed to a finding that the arbitral forum was inconsistent with the federal statutory policy reflected in the FLSA.¹¹⁸ In that case, the judge said,

[t]he unavailability of class arbitration . . . burdens employees and benefits employers. Employees must shoulder the fees of individual arbitration themselves and must summon the wherewithal to pursue individual claims that might be common to other employees; this disincentive might result in fewer claims, to the benefit of employers. Moreover, in the Fair Labor Standards Act area particularly, often each individual claim results in a small monetary remedy, whereas class actions often result in practice and programmatic change that benefit all employees.¹¹⁹

Similarly, in a class action involving an antitrust challenge to the program used by hospitals to assign novice physicians to “residency” jobs, a federal district judge in the District of Columbia declined to enforce the residents’ standard-form arbitration pledge because “compelling arbitration of any part of the conspiracy claim would undermine the purposes of the Sherman Act by improperly compartmentalizing plaintiffs’ single conspiracy claim.”¹²⁰

These decisions notwithstanding, it is relatively uncommon for a court to declare an employment arbitration agreement incompatible with federal law¹²¹—in fact, two federal appeals courts have re-

arbitration only if the arbitral forum permits the effective vindication of those rights”); *Shankle v. B-G Maint. Mgmt. of Colo.*, 163 F.3d 1230, 1235 (10th Cir. 1999) (concluding that the fee-splitting provision of an arbitration agreement precludes employees from effectively vindicating their statutory rights); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (finding that the arbitration fee requirements “[did] not comport with statutory policy”).

¹¹⁸ *Walker v. Ryan’s Family Steak Houses*, 289 F. Supp. 2d 916, 924–26 (M.D. Tenn. 2003).

¹¹⁹ *Id.* at 926.

¹²⁰ *Jung v. Ass’n of Am. Med. Coll.*, 300 F. Supp. 2d 119, 154–56 (D.D.C. 2004). The judge, however, rejected challenges to the arbitration agreement based on claims of “overwhelming economic power” on the part of the hospitals, improper fee-sharing, unconscionability, duress, and violation of Illinois arbitration law. See *id.* at 147–54.

¹²¹ For examples of cases where claims of incompatibility were rejected, see *Bradford v. Rockwell Semiconductor Sys.*, 238 F.3d 549, 558 (4th Cir. 2001) (finding that the employee failed to show that the arbitration costs were prohibitive or deterred him from pursuing his statutory rights); *Williams v. Cigna Fin. Advisors*, 197 F.3d 752, 764 (5th Cir. 1999) (stating that the employee failed to demonstrate that arbitration

jected the argument that the inability to bring a collective action in arbitration interferes with substantive FLSA rights¹²²—but these exceptional cases that do so are worthy of attention because they highlight the concerns about the effects of arbitration procedures on substantive statutory rights.

The second, and perhaps more robust, approach to challenging employer-mandated arbitration agreements—state contract law—has focused recently on the common-law doctrine of unconscionability.¹²³ This trend, which is evident as well in the parallel context of corporate-consumer arbitration agreements,¹²⁴ threatens to destabilize arbitration law by creating significant disparities among jurisdictions regarding the requirements for enforceability.¹²⁵ Of particular relevance to the present discussion is a discernable pat-

prevented effective claim vindication or that the arbitration proceedings inadequately substituted for a federal judicial forum).

¹²² See *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready*, 303 F.3d 496, 503 (4th Cir. 2002).

¹²³ Courts frequently break the unconscionability analysis into two components: procedural unconscionability, which tends to focus on gross inequality of bargaining power, and substantive unconscionability, which refers to terms unreasonably favorable to the stronger party; and both must be present for a contract to be invalid. See Restatement (Second) of Contracts § 208 cmt. d (1981). Employees also have based successful challenges to arbitration pacts on other contractual grounds, including deficiency in formation, absence of consideration, and breach of duty. See, e.g., *Floss v. Ryan's Family Steak Houses*, 211 F.3d 306, 315–16 (6th Cir. 2000) (holding that the arbitration firm's unilateral right to alter its rules and procedures without notice or consent rendered its obligation illusory); *Hooters of Am. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (declaring that “the promulgation of so many biased rules—especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties”); *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1131 (7th Cir. 1997) (finding that an employee's promise to arbitrate was not supported by consideration from her employer).

¹²⁴ The contexts are parallel in the sense that the relative bargaining position of an individual consumer vis-à-vis a corporation is roughly comparable to that of a nonunion employee entering into a contract with a corporate employer. A typical contract in either situation is likely to be one of adhesion, meaning the terms are, for practical purposes, not negotiable.

¹²⁵ See, e.g., *Carter*, 362 F.3d at 301 n.5 (noting that “California law and Texas law differ significantly [in their application of the unconscionability doctrine], with the former being more hostile to the enforcement of arbitration agreements than the latter”). But see Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 Ohio St. J. on Disp. Resol. 757, 767 (2004) (arguing that “[a]lthough the unconscionability norm presents drawbacks, it remains an essential tool for policing arbitration terms in contracts”); *id.* at 840–58.

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tern in the cases that refuse to compel arbitration; that is, unconscionability frequently involves corporate-imposed restraints on information sharing and collaboration by individual claimants.

In *Plaskett v. Bechtel International*,¹²⁶ a federal judge said the American Arbitration Association's ("AAA") rule requiring that awards not reveal the identities of parties, as well as other AAA rules providing for confidentiality in the arbitral process,¹²⁷ rendered the agreement to arbitrate substantively unconscionable.¹²⁸ The AAA rules, incorporated in the agreement by reference, require that the award be "publicly available, on a cost basis,"¹²⁹ but the court found "the restriction on the publication of the parties' identities disproportionately favors Bechtel" and disadvantages employees.¹³⁰ Citing *Cole*, the court concluded that "the ability of a party to unilaterally prevent the inclusion of its name in the award favors the repeat participant and makes it difficult for a potential plaintiff to build a case of intentional misconduct or to establish a pattern or practice of discrimination by a particular company."¹³¹

A judge in the United States District Court for the Northern District of California, applying California contract law, reached a similar conclusion in a case involving an arbitration clause in a consumer-loan agreement.¹³² Among the arbitration provisions in the loan agreement was a requirement that any award be kept confidential.¹³³ Focusing on the repeat-player benefit, the court said "[t]he secrecy provisions of the arbitration agreements both affect the outcomes of individual arbitrations and clearly favor Defendants. . . . By keeping all awards confidential, any advantages that inure to Defendants as repeat participants are effectively concealed, thereby preventing the scrutiny critical to mitigating those

¹²⁶ 243 F. Supp. 2d 334 (D.V.I. 2003).

¹²⁷ See Nat'l Rules for the Resol. of Emp. Disp., R. 17, R. 18, R. 34(b), at <http://www.adr.org/sp.asp?id=22075> (last accessed Mar. 28, 2005) [hereinafter AAA Rules].

¹²⁸ See *Plaskett*, 243 F. Supp. 2d at 343. The court found that other elements of the agreement, including the elimination of attorney's fees and the thirty-day notice requirement, contributed to a finding of procedural and substantive unconscionability. *Id.* at 340-42.

¹²⁹ AAA Rules, *supra* note 127, R. 34(b).

¹³⁰ *Plaskett*, 243 F. Supp. 2d at 343.

¹³¹ *Id.*

¹³² *Acorn v. Household Int'l*, 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002).

¹³³ See *id.* at 1171.

advantages.”¹³⁴ This, together with other one-sided provisions, made the agreement unconscionable and, therefore, unenforceable.¹³⁵

An identical consumer arbitration agreement was the subject of litigation in another federal trial court, this time under Washington state law, and that court likewise found the terms to be unconscionable.¹³⁶ In *Luna v. Household Finance Corp. III*, the court emphasized the interplay between the arbitration plan’s confidentiality requirement and its ban on class actions:

The Arbitration Rider’s prohibition of class actions is likely to bar actions involving practices applicable to all potential class members, but for which an individual consumer has so little at stake that she is unlikely to pursue her claim. The unfairness of the class action prohibition is magnified by other Arbitration Rider provisions, such as the confidentiality provision.¹³⁷

Addressing the confidentiality clause, the court relied on *Cole’s* discussion of the concerns associated with a lack of public disclosure and the strategic advantages that attend superior knowledge.¹³⁸ It found that “the Arbitration Rider’s confidentiality provision magnifies the effect of those advantages.”¹³⁹

In two cases in 2003, one involving a consumer arbitration contract and the other dealing with an employment arbitration agreement, the Ninth Circuit followed the example set by these lower courts. In the consumer case, *Ting v. AT&T*, the court said that even a facially neutral confidentiality provision (in other words, one that imposed the same disclosure limitations on both parties) can provide cause for a finding of unconscionability:

[I]f the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in [the company] being a repeat player. . . . Thus, AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T

¹³⁴ Id. at 1172.

¹³⁵ See id. at 1174.

¹³⁶ *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1183 (W.D. Wash. 2002).

¹³⁷ Id. at 1179.

¹³⁸ See id. at 1180–81.

¹³⁹ Id. at 1181.

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accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. Further, the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T.¹⁴⁰

In the employment arbitration case, *Ingle v. Circuit City Stores*,¹⁴¹ the court concluded—after first finding that the employer’s offering of an adhere-or-reject contract was oppressive and, therefore, procedurally unconscionable¹⁴²—that a rebuttable presumption of substantive unconscionability automatically arises under California law whenever an employer-mandated arbitration contract waives the employee’s right to sue in court for statutory violations.¹⁴³ As a result, the employer, as the party in the superior bargaining position, has the burden of proving that the terms of agreement are not “so one-sided as to shock the conscience.”¹⁴⁴ According to the court, *Circuit City* failed to carry that burden.¹⁴⁵

Taken together, these unconscionability cases demonstrate a patent hostility—at least in some parts of the judiciary¹⁴⁶—toward arbitration procedures that repudiate aspects of transparency and accessibility deeply rooted in the court system. This observation is reinforced by empirical research on judicial enforcement of predispute employment arbitration pacts. Professors LeRoy and Feuille

¹⁴⁰ 319 F.3d 1126, 1152 (9th Cir. 2003).

¹⁴¹ 328 F.3d 1165 (9th Cir. 2003).

¹⁴² See *id.* at 1172.

¹⁴³ See *id.* at 1174.

¹⁴⁴ *Id.* at 1172.

¹⁴⁵ See *id.* at 1175. The court said that the agreement’s provisions concerning coverage of claims (only claims by the employee against the employer were subject to arbitration), the statute of limitations (a one-year term, which deprives employees of the benefits of the continuing-violation theory), the prohibition on class actions and consolidated claims, the seventy-five-dollar filing fee (with no provision for an indigence-based waiver), cost-splitting (the arbitrator can hold nonprevailing employees liable for the employer’s arbitration costs and can require prevailing employees to cover their own costs), limitations on remedies, and the employer’s unilateral power to modify or terminate the arbitration agreement “all operate to benefit the employer inordinately at the employee’s expense.” *Id.* at 1173.

¹⁴⁶ See Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 Ga. St. U. L. Rev. 761, 775 (2003) (citing several cases dealing with consumer and commercial arbitration agreements as supporting the proposition that “[c]ourts have largely rejected the assertion that predispute arbitration agreements that waive class treatment of disputes are unconscionable”).

studied 396 federal court decisions issued over nearly a half-century¹⁴⁷ and concluded that “courts do not refer disputes to arbitration as reflexively as [*Gilmer* and *Circuit City*] suggest should occur.”¹⁴⁸ In fact, they found that “[p]ost-*Gilmer* and *Circuit City* courts have denied enforcement [of employer-mandated arbitration agreements] with surprising frequency, notwithstanding the Supreme Court’s strong and clear message to avoid interfering with these arrangements.”¹⁴⁹ The reality instead is that “the judiciary is currently developing a set of due process guidelines consistent with common law traditions dating to the early nineteenth century”¹⁵⁰ and that “*Gilmer* and *Circuit City* are more distinguishable on their facts than is widely assumed.”¹⁵¹

Many of the judicial concerns about arbitral due process mirror those identified in academic literature. Researchers, led by Professor Bingham, have used empirical studies to document the repeat-player effect,¹⁵² though the precise cause of this apparent advantage for employers is the subject of some debate.¹⁵³ Other scholars have focused their attention on normative matters. Professor Moohr, for one, argues that a well-designed arbitration program is preferable

¹⁴⁷ The cases were issued between 1954 and 2002. LeRoy & Feuille, *supra* note 6, at 249.

¹⁴⁸ *Id.* at 256.

¹⁴⁹ *Id.* at 250.

¹⁵⁰ *Id.* at 256.

¹⁵¹ *Id.* at 293.

¹⁵² Using data from 232 employment arbitration cases decided in 1993 and 1994, Professor Bingham demonstrated that employees won something in 63% of all claims, including those against repeat- and nonrepeat-player employers. In the subsample of repeat-player cases, however, the employee win rate was only 16%. Moreover, the amount of the recovery was significantly smaller for employees claiming against repeat-player employers. They recovered, on average, only 11% of what they demanded, whereas the average employee dealing with a nonrepeat-player employer recovered 48% of what he demanded. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 *Employee Rts. & Emp. Pol’y J.* 189, 213 (1997). Later research by Professor Bingham showed that employers arbitrating pursuant to a personnel manual do better than those arbitrating under an individual contract. See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 *McGeorge L. Rev.* 223, 224 (1998).

¹⁵³ See, e.g., Hill, *supra* note 6, at 816 (hypothesizing that the variation can be explained by the fact that “[r]epeat player employers isolate and resolve large numbers of meritorious employee claims through in-house dispute resolution programs, leaving only relatively meritless cases for appeal to AAA arbitration”).

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to litigation for satisfying the remedial objective of employment discrimination statutes because it is more affordable and expeditious, but that, even when employees are accorded a fair hearing, arbitration is inadequate to fulfill the statutory goal of ending workplace discrimination.¹⁵⁴ That, she argues, requires a public forum:

Litigation of employment discrimination claims generates several enforcement mechanisms that are integral to securing the end of workplace discrimination. First, judicial decisions, which speak with the authority of the state, provide general deterrence of future violators. Second, the courts develop and refine the law of employment discrimination, establish precedents, and define a uniform standard. Finally, the judicial process educates the community and forms public values, a crucial undertaking when a law seeks to change public sentiment.¹⁵⁵

Traditional arbitration lacks these enforcement mechanisms and, therefore, is less effective in achieving the public-policy objective because hearings are private and there is no public record of the proceedings or the outcome.¹⁵⁶ Professor Moohr endorses an arbitration regime in which all awards in statutory cases are written, reasoned, and available to the public:

[W]ritten, reasoned opinions . . . ensure that arbitral decisions conform to the statutory norm and provide another incentive for arbitrators to function impartially. Individual employees would also benefit if all arbitration awards were available to the public. Publication allows public scrutiny of awards and offers employees access to information about arbitration and to facts about specific employers and arbitrators. Thus, arbitrators become accountable to the public and to Congress.¹⁵⁷

Some commentators have said that concerns about the negative effects of private dispute resolution are overstated and compare arbitration with lawsuit settlements, which often contain confiden-

¹⁵⁴ See Moohr, *supra* note 67, at 399–401.

¹⁵⁵ *Id.* at 400.

¹⁵⁶ See *id.* at 402.

¹⁵⁷ *Id.* at 453 (footnote omitted).

tiality clauses.¹⁵⁸ Comparisons between confidential arbitration and *pretrial* settlements with confidentiality clauses, however, are unsatisfactory, because arbitration results in a third-party decision after an adversarial process.¹⁵⁹ There is an important distinction between confidential arbitration and a *postjudgment* settlement: The settlement does not erase the trial record or the jury's decision from the public record, even if the trial judgment is vacated after the settlement, whereas arbitration proceedings leave no public record.¹⁶⁰

Professor Reuben, in advancing his "unitary theory" of private dispute resolution and public civil justice, explained that published arbitration opinions "fulfill an important democracy-serving function, enhancing the integrity and legitimacy of the arbitration process" and that even those opinions which rely on nonlegal norms "provide rationality and transparency to an otherwise arbitrary and potentially awesome process."¹⁶¹ Written and reasoned awards also provide a degree of predictability, in that "they can be persuasive evidence . . . in individual cases and, more broadly, can coalesce into a collective arbitral wisdom, known in the European commercial arbitration community as the *lex mercatoria*, that may be drawn upon by both the parties and their arbitrators."¹⁶²

¹⁵⁸ See, e.g., Eric J. Conn, Note, Hanging in the Balance: Confidentiality Clauses and Postjudgment Settlements of Employment Discrimination Disputes, 86 Va. L. Rev. 1537, 1555-59 (2000).

¹⁵⁹ A better ADR analogy for pretrial settlements is mediation, where the resolution is voluntary and confidentiality is critical.

¹⁶⁰ See Conn, *supra* note 158, at 1556. If, however, the arbitral award is subject to judicial review, the appeal will create a public record of at least some of the details of the arbitration, but it is likely that this sample of awards would disproportionately consist of appeals by employees who lost in arbitration. Employers who lose at the arbitral level will have financial and reputational incentives to acquiesce in the award or enter into a postjudgment settlement with the prevailing employee, thereby keeping negative awards out of the public domain.

¹⁶¹ See Reuben, *supra* note 77, at 1085.

¹⁶² *Id.* See also Hans Bagner, Confidentiality in Arbitration, 14 Mealey's Int'l. Arb. Rep. 18, 22 (1999) ("The publication in legal periodicals of arbitral awards or extracts from them might in some areas be the only source to learn of the development of the law, since some types of dispute seldom reach the courts."); Alan Scott Rau, Integrity in Private Judging, 38 S. Tex. L. Rev. 485, 536 (1997) (arguing that the notice and guidance functions of rule-based opinions, that is, supplying predictability with respect to the outcomes of future disputes and facilitating reliance and informed planning by the parties in their dispute settlement and their primary conduct, "will be most striking . . . where the opinions are made public or distributed to non-parties").

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Other scholars have argued that technological advances, especially the use of the Internet for ADR proceedings, inevitably will lead to increased disclosure of arbitral decisions. In the burgeoning field of e-commerce law, where online arbitration of disputes between merchants and customers is the norm, “public policy considerations may compel the evolution of arbitration . . . to an open online arbitration process,” according to Professor Gibbons.¹⁶³ Implicit in his analysis of e-commerce ADR is the conclusion that the more common arbitration becomes in any area of public law, the greater the need becomes for transparency in the process. He also contends that

[w]ithout published awards, executive agencies and legislatures will be unaware of the interpretations of . . . public laws. Without the information provided by the judiciary in the form of both statistics and reasoned opinions interpreting the law, it is difficult to determine the true effect of a law. [And], to the degree that numerous private actions may indicate a systemic problem that needs a larger social or political solution, this barometer of public need is short-cutted by the private arbitral process.¹⁶⁴

Another technology law scholar likewise argues that “pressure exerted by the public and incentives towards more transparency in the online world will drive [ADR] processes to become more public through publication of resolutions” and points out that the World Intellectual Property Organization has “adopted a policy of transparency and has mandated the publication of [arbitration] resolutions on its website.”¹⁶⁵

The employment arbitration community has taken voluntary steps in the direction of open arbitration, most notably with the adoption in 1995 of the Due Process Protocol. The Protocol was fashioned by a task force composed of representatives from the AAA, the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the National Employment Lawyers

¹⁶³ Llewellyn Joseph Gibbons, *Private Law, Public “Justice”: Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 *Ohio St. J. on Disp. Resol.* 769, 793 (2000).

¹⁶⁴ *Id.* at 788.

¹⁶⁵ See Rabinovich-Einy, *supra* note 76, at 38.

Association, and the Society of Professionals in Dispute Resolution in response to recommendations by the presidential Commission on the Future of Worker-Management Relations (known as the Dunlop Commission).¹⁶⁶ It guarantees, among other things, that individuals arbitrating employment disputes have (1) access to the names of the parties who most recently presented cases to neutrals being considered to serve as arbitrators and (2) the right to a representative of his or her own choosing at hearings.¹⁶⁷ It also requires that the opinion and decision of the arbitrator be in writing and consistent with the law, and it provides a right of limited judicial review.¹⁶⁸

Adherence to the Protocol is prevalent among arbitration organizations such as the AAA, JAMS, and the CPR Institute for Dispute Resolution, all of which have set it as the standard for employment cases.¹⁶⁹ The National Association of Securities Dealers and the Massachusetts Commission Against Discrimination also have adopted the Protocol for cases under their respective jurisdictions, and the U.S. Department of Labor promulgated a rule applying the Protocol to cases involving administrative claims under the Family and Medical Leave Act and federal whistleblower statutes and for cases involving compliance with Occupational Safety and Health Act and Title VII settlement agreements.¹⁷⁰

For a brief time, JAMS went even further, declaring that its arbitrators would not enforce class-action preclusion clauses in most corporate-promulgated arbitration contracts because they amounted to “an unfair restriction” on employees and consumers.¹⁷¹ The JAMS policy, announced in November 2004, meant that employers who engaged JAMS to arbitrate disputes with their workers would either have to allow class-based arbitration or else obtain from the complaining employees postdispute waivers of the right to proceed as a class.¹⁷² By favoring class arbitration, however,

¹⁶⁶ See Zack, *supra* note 69, at 77–78.

¹⁶⁷ See *id.* at 78.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 79.

¹⁷⁰ See *id.* at 79, 82.

¹⁷¹ See Mayer, *supra* note 9. The policy used the term “consumer” to encompass an employee required to agree to a mandatory pre-employment arbitration clause as a condition of employment.

¹⁷² See *id.*

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the policy withdrew from employers a significant perceived benefit of arbitration: avoidance of large-scale adjudication.¹⁷³ As a result, the change was short-lived. In March 2005, JAMS rescinded the policy in response to criticisms that it “had deviated from its core value of neutrality.”¹⁷⁴ The arbitration firm said its “attempt . . . to bring uniformity to the administration of class[-]wide arbitrations . . . [had] created concern and confusion,” and it pledged to “apply the law on a case by case basis in each jurisdiction.”¹⁷⁵

Although arbitrator-instituted reform attempts are commendable, the Protocol’s failure to require public disclosure of arbitration outcomes or otherwise mandate open proceedings has left largely unaddressed the concerns about restraints on information sharing and collective action by employees—as evidenced by the numerous cases cited above that were decided after the Protocol’s adoption. And the failure of the JAMS policy demonstrates the limitations inherent in voluntary reform efforts. Indeed, such reforms amount to little more than best practices in the industry. Aside from the District of Columbia Circuit’s interpretation of *Gilmer* in the *Cole* case, nothing exists to establish a mandatory minimum for due process in employment arbitration. The statutory guarantees of Section 7, however, may do just that.

CONCLUSION

Despite its drawbacks, arbitration has great promise as a vehicle for efficiently and cost-effectively resolving work-related disputes on the merits—and doing so in a way that is more likely than litigation to satisfy all concerned parties. To preserve this promise, judges and policymakers must be vigilant in monitoring the use of arbitration by nonunion employers, lest it become a tool for exacerbating the imbalances of power between workers and management, and, thus, ultimately discredited.

As explicit bans on class actions become more prevalent in arbitration agreements, the question of interference with Section 7 rights is certain to arise. Meanwhile, mandatory agreements will continue to meet resistance from those courts that are inclined to

¹⁷³ See supra notes 3 & 70 and accompanying text.

¹⁷⁴ JAMS Reaffirms Commitment to Neutrality, supra note 9.

¹⁷⁵ *Id.*

view their terms as oppressive or contrary to public policy. This Note has attempted to provide a solution by which employers can address these parallel concerns and yet preserve arbitration as an informal and attractive alternative to the judicial forum. That proposal—open arbitration—is, in many ways, the logical, if not inevitable, next step in a process that began with the Supreme Court's ruling in *Gilmer* and continued with the adoption of the Due Process Protocol. The procedural features of open arbitration—public disclosure of arbitration outcomes and the right to present relevant prior awards as persuasive precedent—if implemented by employers and arbitrators, would assure that employees have the opportunity to work collectively in addressing workplace legal matters, even without the ability to resort to a class action. Such a regime would not only encourage a strength-in-numbers approach to dispute resolution that is consistent with the spirit of the NLRA, it would also enhance the public perception of arbitration and create a new, legitimate source of public-law values.

Viewed in this light, the protections afforded by Section 7 can provide a legal foundation for imposing minimum due process standards in workplace arbitration, rather than a basis for eliminating a practical, popular alternative to litigation.