1995

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Supreme Court decisions establish two separate lines of analysis concerning whether arbitration agreements should pre-empt judicial remedies for parties already covered by employment and labor legislation. First, in cases like Gilmer v. Interstate/Johnson Corp., *the Supreme Court espouses a procedural analysis: the Court considers the extent to which the arbitration procedures reflect judicial processes. In* Alexander v. Gardner-Denver *and its successors, on the other hand, the Court examines whether the applicable statutes explicitly pre-empt the arbitration agreement. This article argues that neither approach is helpful. Rather, courts should consider whether the relevant statute applies standards derived essentially from "inside" the institutions the statutes regulate or from "outside" those institutions. Arbitration, Professor Gudridge argues, is plainly appropriate under statutes which reveal an "inside" orientation, and not appropriate under statutes with an "outside" orientation. The author uses the 1991 Civil Rights Act to reach conclusions concerning the applicability of arbitration agreements in the Title VII context. This amendment added a right to injunctive relief in the "mixed motive" Title VII action. The author uses a constitutional analysis of the 1991 amendment as a starting point for thinking about arbitration within Title VII generally. Professor Gudridge argues that this analysis reveals the focus of Title VII actions has shifted to an "outside" orientation. Title VII actions, therefore, are best solved through litigative, rather than arbitral procedures.*

† Associate Dean and Professor of Law, University of Miami School of Law. In the course of writing, I have learned much from the suggestions and criticisms of participants in faculty seminars at the University of Pennsylvania and University of Miami law schools—and also from the comments of colleagues outside the seminar setting per se. I owe particular debts to Lisa Iglesias and Kay Seibert for readings both intense and careful. Whatever counts as error, of course, is uniquely mine.

Arbitration, it is said, provides employers with a means to block aggrieved employees from resorting to courts to obtain the full range of remedies, most notably jury awards of compensatory and punitive damages, that the Civil Rights Restoration Act of 1991 added to the enforcement mechanisms previously incorporated in Title VII of the Civil Rights Act of 1964.[1] To be sure, the ability of employers to condition jobs on employee acceptance of arbitration procedures as alternatives to adjudication is limited to some degree. In the now relatively unusual cases in which employees and employers enter into collective bargaining agreements recognized and protected by the Labor Management Relations Act, the United States Supreme Court held in the famous case of *Alexander v. Gardner-Denver*[2] that arbitration arrangements do not prevent employees from resorting to litigation to enforce Title VII. But for most employees, *Gardner-Denver* is beside the point. The Supreme Court, ruling in 1991 in *Gilmer v. Interstate/Johnson Lane Corp.*,[3] has held that suits arising under the Age Discrimination in Employment Act are pre-empted by arbitration agreements covering statutory claims, at least in cases in which such agreements fall within the scope of the Federal Arbitration Act. The United

1. *See, e.g.*, N.Y. Times, March 18, 1994, § A, p.1, Col. 6.
2. 415 U.S. 36 (1974).
3. 500 U.S. 20 (1991).

States courts of appeals are so far unanimous in their view that *Gilmer* more or less automatically governs in cases arising under Title VII as well.[4]

I think that the courts of appeals are wrong: arbitration agreements both outside and inside collective bargaining should not be understood to bar litigation of Title VII claims. But I also think that the Supreme Court decided *Gilmer* correctly. The Civil Rights Act of 1991, the motivation for employer arbitration requirements, is also the key to deciphering the differences between ADEA and Title VII claims.

The argument is complicated.

Gilmer is not, within the terms of Justice White's majority opinion, an ADEA case as such—we will see that ADEA statutory language played only a peripheral role in the *Gilmer* analysis. Rather, as the opinion reads, *Gilmer* is one in a sequence of decisions dealing with arbitration of a variety of statutory claims. This sequence is notably cross-cutting.[5] One line of cases began in 1974 with *Gardner-Denver.* These decisions conclude that employees seemingly obliged by collective bargaining agreements to resort to grievance arbitration are nonetheless free to litigate de novo, even in the wake of adverse arbitral rulings, in order to enforce statutory rights arising under Title VII of the Civil Rights Act of 1964,[6] the Fair Labor Standards Act,[7] 42 U.S.C.A. § 1983,[8] and the Federal Employers Liability Act.[9] Starting with its *Mitsubishi*[10] decision in 1985, however, the Supreme Court has also held that parties to contracts with arbitration clauses reaching matters falling within the scope of federal antitrust or securities laws are limited to arbitral remedies in those statutory

4. *See, e.g.*, Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1440-41 (9th Cir. 1994); Bender v. A.G. Edwards & Sons, 971 F.2d 698 (11th Cir. 1992); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991). For disagreement carefully couched in a discussion of waiver, see Prudential Ins. Co. v. Lai, 1994 WL 705260 (9th Cir. 1994). These decisions, although they came in cases arising outside collective bargaining contexts, might seem to some to invite reconsideration of *Gardner-Denver* as well. Why should employees already benefiting from union representation also possess rights to litigate not shared by unorganized colleagues? The question of the relative significance of legally-protected collective bargaining institutions and independently guaranteed workplace rights is a matter of considerable current debate. *See, e.g.*, Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 636-38 (1992) (fragility of independent rights in absence of collective bargaining); Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects*, 51 U. CHI. L. REV. 1012, 1027-29 (1984) (importance of workplace rights guaranteed independently of collective bargaining outcomes). At minimum, it might be thought, the *Gardner-Denver* line is no longer relevant outside the collective bargaining context.

5. Richard Shell puts the point less diplomatically: "The Supreme Court has spoken out of both sides of its mouth regarding the arbitration of claims arising under federal statutes." Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 510 (1990).

6. *See, e.g., Gardner-Denver*, 415 U.S. at 59-60.

7. *See, e.g.*, Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981).

8. *See, e.g.*, McDonald v. City of West Branch, 466 U.S. 284 (1984).

9. *See, e.g.*, Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557 (1987).

10. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

actions absent extraordinary circumstances.[11] *Gilmer*, according to the Court, resembled *Mitsubishi* and its progeny. An employee of a securities industry firm who was not represented by a union was blocked from pursuing litigation under the Age Discrimination in Employment Act, and left to press his grievance within an industry-established arbitration system.[12]

Justice White, writing for seven Justices, depicted *Gilmer* as a straightforward case, an occasion for repeating conclusions that the Court had worked out earlier. As a summing up, though, White's opinion is notably subversive.[13] We will see in the first parts of this essay that *Gilmer's* formulations simply do not work. Despite its recurring references to earlier opinions, *Gilmer* fashions no satisfactory synthesis. If anything, White's opinion accentuates the conflict in the Supreme Court's prior decisions, unsettling analysis of not only the matter at hand, but also the Court's earlier work. Neither the *Mitsubishi* nor the *Gardner-Denver* sequence of opinions provides useful tools for reaching decisions. In order to draw conclusions about the role of arbitration in the ADEA and Title VII settings, I think, we are better off putting aside the Supreme Court's approaches, and substituting a very different framework for analysis.

The question, on one view, might be seen as initially inviting a rather general procedural analysis, an investigation of the differing characteristics of arbitral and litigative proceedings; only after this effort would it make sense to assess the significance of relevant differences, if any, in light of the features of particular statutory causes of action.[14] There is also, however, a second, more formal approach. Statutory provisions ordinarily limit the reach of otherwise binding agreements unless statutes themselves provide to

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11. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (securities action); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (same); *Mitsubishi Motors Corp.*, 473 U.S. 614 (antitrust action).

12. Section 1 of the Federal Arbitration Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C.A. § 1 (West 1970). In *Gilmer*, the Supreme Court held that this statutory exclusion had no bearing on the case because the pertinent arbitration agreement was not alleged to be part of *Gilmer*'s employment agreement per se, but rather part of "*Gilmer*'s securities registration application, which is a contract with the securities exchanges, not with [the employer]." 500 U.S. at 25. Especially since *Gilmer*, federal courts have disagreed concerning the breadth of the FAA exclusion—whether it addresses only the employment contracts of transportation workers, or the contracts of all workers whose efforts affect interstate commerce. *See* Crawford v. West Jersey Health Sys., 847 F. Supp. 1232, 1240-42 (D. N.J. 1994) (collecting cases).

13. Commentators discussing arbitration of ADEA claims before *Gilmer* divided on whether, in this context, arbitration should be treated as preemptive. *Compare* Shell, *supra* note 5, at 572 (not preemptive) *and* Comment, *Overcoming the Presumption of Arbitrability of ADEA Claims: The Triumph of Substantive Over Procedural Values in* Nicholson v. CPC International, Inc., 138 U. PA. L. REV. 1817 (1990) (same) *with* Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568 (1990) (preemptive).

14. *See, e.g.*, Shell, *supra* note 5, at 517-40, 562-65 (differences in labor arbitration and commercial arbitration processes suggest that the question of the arbitrability of ERISA claims turns importantly on which arbitral process is used).

the contrary.[15] Arbitration clauses, from this perspective, are no different from any other agreement term; the underlying question is one which should be resolved by construing the pertinent statute. But there is rarely only one pertinent enactment.[16] The Federal Arbitration Act, in the case of commercial dealings, and section 301 of the Labor Management Relations Act, in the case of collective bargaining agreements, in general oblige courts to respect arbitration agreements.[17] From the point of view of statutory interpretation, therefore, the status of arbitration agreements depends upon how courts reconcile seemingly conflicting statutes—on the one hand, the Arbitration Act and section 301; on the other, various statutes supplying the basis for rights of action.

Both of these approaches figure in Supreme Court opinions. Although in form they frame the analysis in terms emphasizing the consistency of arbitration with statutory objectives, *Gilmer* and the *Mitsubishi* cases in fact emphasize a procedural analysis minimizing the differences between arbitration and litigation. The *Gardner-Denver* decisions tend to draw conclusions based on the nature of the statutory actions at issue, albeit in a rather abstract and formulaic way. This essay, by contrast, proposes to investigate statutory actions more closely, developing a distinction between the ways in which actions characterize the institutions they address and regulate. On this view, some statutory actions reveal an "inside" orientation, a concern to hold institutions to their own norms. Other statutes show an "outside" emphasis, bringing external norms to bear to reconstitute, in part, regulated institutions. This distinction, which I think is capable of considerable elaboration in the contexts of particular statutes, yields alternate views of the arbitration of statutory claims. Simply put, arbitration is plainly noncontroversial in cases of "inside" statutes, and plainly troubling in cases of "outside" statutes.

The ADEA and Title VII, I argue, fall on opposite sides of this divide. Both statutes recognize multiple causes of action; the two statutory sets of actions are usually understood to be strongly similar. The 1991 Civil Rights Act, however, importantly changed the Title VII mixed-motive suit by adding a right to injunctive relief in circumstances that previously would have suggested no need for any remedy whatsoever. The effect of this supplement, we will see, shifts the focus of the mixed-motive action from inside to outside. Because the mixed-motive suit is difficult to separate out from other Title VII actions at any stage procedurally early enough to make arbitration a relevant option, the changed character of the mixed-motive

15. *See, e.g.*, Norfolk & Western v. American Train Dispatchers, 499 U.S. 117, 131 (1991).

16. Even in the case of an arbitration agreement grounded in the common law of contract, there is always a question, prior to enforcing statutory rights, as to whether the statute, within its own terms, works to oust (or rather respect) common law values. Choice of law becomes, implicitly, a part of the process of statutory construction.

17. *See* 9 U.S.C.A. § 1 et seq.; 29 U.S.C.A. § 185(a) (West 1978).

action, now plainly an inappropriate subject for arbitration, keeps the other Title VII suits within the litigative mode also.

The significance of the alteration of the mixed-motive suit is not easy to see from the face of the 1991 Act. I bring to bear, however, a perhaps unusual investigative device. Constitutional law, I think, can be understood as an ultimate language of legislation: on this view, it is the success or failure of efforts to restate congressional action within constitutional vocabularies that determines legislative validity. In the case of the 1991 Act's revision of the mixed-motive suit, the pertinent constitutional terms are those of the Article III case or controversy requirement. I use those terms first to identify the constitutionally difficult aspect of the 1991 addition—a congressional grant of standing on its face not easy to square with recent Supreme Court decisions. Close scrutiny of this difficulty, however, shows analyses of the absence of mootness to be more pertinent. As a consequence, it is not just that the reconceived Article III question suggests a resolution affirming the constitutionality of the congressional action. A window on the origins of the 1991 change also opens. It becomes apparent that the revision of the mixed-motive suit reintroduces into Title VII jurisprudence a point of view strongly evident in the early Title VII caselaw; a perspective that originally derived precisely from constitutional mootness doctrines. It is this point of view, now incorporated in the mixed-motive action, that discloses the external emphasis inconsistent with arbitral disposition.

Because the Supreme Court has understood the question of arbitration of statutory claims to cut across particular statutory domains, analysis of ADEA and Title VII issues cannot be left to stand alone without at least some consideration of the significance of the discussion vis-à-vis other statutory actions—in particular those the Court has already judged to be appropriate or inappropriate for arbitration. I briefly sketch this extension of my argument in the first appendix to this article. A second appendix considers the salience of the perspective I develop here in the contexts of state statutory causes of action potentially preempted by the Federal Arbitration Act or section 301 of the Labor Management Relations Act; I also consider the interaction of arbitration and federal administrative causes of action.

I

GILMER AS SUBVERSIVE

As Justice White saw the case, *Gilmer* turned on whether arbitration of claims arising under the Age Discrimination in Employment Act (ADEA) "would be inconsistent with the statutory framework and purposes of the ADEA."[18] This rather general inquiry, however, quickly narrowed:

18. *Gilmer*, 500 U.S. at 27.

> It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nonetheless also can further broad social purposes. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum the statute will continue to serve both its remedial and deterrent function."[19]

Thus, the particular objectives of the ADEA were only briefly the focus of attention.[20] Attention shifted, rather, to the features of the arbitral process, to determine whether any obstacles were present that would frustrate an individual seeking to "effectively . . . vindicate" a statutory cause of action.[21] The would-be litigant in *Gilmer* in fact raised "a host of challenges to the adequacy of arbitration procedures."[22] Arbitration panels might be biased; discovery was more restricted in scope than that afforded in federal courts; arbiters were not required to issue written opinions, restricting both public knowledge and appellate review; arbitration procedures provided no means for parties to obtain broad equitable relief or to pursue class actions.[23]

But these worries, earlier decisions of the Court suggested, might be discounted. "[G]eneralized attacks on arbitration" were no substitute for actually "showing" the existence of a problem.[24] The burden was squarely on the critic to demonstrate that in fact particular arbitration "provisions are inadequate."[25] Thus, it was not enough to allege the possibility of bias. Given that the applicable arbitration rules "provide protections against biased panels" and that the Federal Arbitration Act authorizes courts to overturn arbitral decisions in cases of " 'evident partiality or corruption,' " some more specific showing was necessary.[26] Similarly, complaints about discovery, to be persuasive, supposed a direct demonstration that the actual discovery provisions in place are inadequate to allow claimants a "fair opportunity to present their claims."[27] Criticism of a lack of any requirement

19. *Id.* at 27-28 (*quoting Mitsubishi*, 473 U.S. at 637).

20. *See Gilmer*, 500 U.S. at 27.

21. Justice White briefly discussed the impact of arbitration on EEOC enforcement of the ADEA, noting that EEOC action was not tied to private litigation, and that the ADEA required the agency to pursue informal methods of dispute resolution as well as litigation, suggestive perhaps of statutory flexibility with respect to enforcement modes. *See id.* at 28-29. These observations, however, were not treated as decisive in the case.

22. *Id.* at 30.

23. *See id.* at 30-32.

24. *Id.* at 30, 31. *Accord, e.g., McMahon*, 482 U.S. at 231-32; *Mitsubishi*, 473 U.S. at 634. The Court's distinction between "generalized attacks" and "actual showings" was also brought to bear in Justice White's brief dismissal of plaintiff's claim that the arbitration agreement was an unconscionable manifestation of unequal bargaining power. *See Gilmer*, 500 U.S. at 32-33. This argument, like the more procedural objections, had also been addressed in earlier cases. *See, e.g., McMahon*, 482 U.S. at 226; *Mitsubishi*, 473 U.S. at 627.

25. *Gilmer*, 500 U.S. at 31.

26. *Id.* at 30.

27. *See id.* at 31.

for written opinions was simply wrong: the relevant arbitral procedures "do require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued."[28] Even the supposed failure of arbitration to provide for broad class or equitable relief foundered in the face of analysis of the details of the actual arbitral rules at issue—the "rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to 'damages and/or other relief.' "[29]

Plaintiff was left only with his invocation of the collective bargaining cases, in which the existence of arbitration procedures had been repeatedly held not to bar litigation of federal statutory claims. Justice White saw several distinctions:

> First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, . . . the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the [Federal Arbitration Act], which . . . reflects a "liberal federal policy favoring arbitration agreements."[30]

Short work, but on close inspection, I think, troubling.

A. *Plasticity and the Absent Standpoint Within a Process-Based Model of Arbitration*

Initially, the problem lies in the interaction of two assumptions that play important parts in shaping Justice White's opinion. Neither assumption is, on its face, surprising. Indeed, many readers of *Gilmer* might regard both presuppositions as obviously appropriate, needing neither defense nor explicit statement.

First, Justice White by and large supposes that the question of the propriety of arbitration is one that implicates some sense we have of a "right" process that cuts across fields of substantive law. It is as though we can argue about process without too often looking to the policies or judgments or aspirations that organize any one particular statutory cause of action; some model of "right" process is usually already available, ordinarily pre-

28. *Id.* at 31-32.

29. *Id.* at 32. Arbitration rules adopted by securities exchanges and approved by the SEC since *Gilmer* have exempted claims associated with class action litigation from the reach of exchange-mandated arbitration agreements. *See, e.g.*, Rule 12(d)(3), NASD Code of Arb. Proc. (1994).

30. *Id.* at 35 (*quoting Mitsubishi*, 473 U.S. at 625).

empting the need for an action-specific inquiry. Thus, in *Gilmer*, the ADEA itself figures prominently only around the edges of the analysis.

Second, White also takes for granted and, in its specific manifestations in the case at hand, repeatedly exploits a particular feature of arbitral process—its plasticity; its potential in the face of the wishes of drafters of arbitration contracts or providers of arbitral services to take the desired procedural form.[31] The plaintiff in *Gilmer* seemed to suppose that the exercise of this freedom would, at least sometimes, result in proceedings differing substantially from federal litigative modes with respect to independence, thoroughness, articulateness, and breadth of relief. Justice White, however, emphasized that arbitration in the securities industry was not a matter of case-by-case improvisation. Designers of securities arbitration chose to cast a general form, along lines in pertinent respects closely mimicking judicial process. Plaintiff's fears were beside the point. In the earlier cases, the Supreme Court had noted a similarly familiar and therefore reassuring standardization.[32]

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31. "The important characteristic of an arbitration clause is that . . . the parties control their own destiny. They generally are free to construct any arbitration edifice desired." Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 103 (1992); *see, e.g.*, Keating v. Superior Court, 183 Cal. Rptr. 360 (Cal. 1982) (class action arbitration); Dickler v. Shearson Lehman Hutton, 596 A.2d 860 (Pa. Super. Ct. 1991) (same). This phenomenon was explicitly noted in *Mitsubishi* in the context of a challenge to the capacity of arbitral procedures to resolve complex issues:

> [A]daptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal. . . . We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.

Id. at 633, 634. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." Volt Information Sciences, Inc. v. Trustees of Stanford Univ., 489 U.S. 468, 476 (1989) (state arbitration act allowing stay of arbitral proceedings not preempted by Federal Arbitration Act). Thus, in Haviland v. Goldman, Sachs & Co., 947 F.2d 601 (2d Cir. 1991), for example, a Second Circuit panel held that securities industry arbitration agreements rendered the claim of the plaintiff against one defendant partnership to be arbitral and the plaintiff's claim against the other defendant partnership to be not arbitral even though both claims arose out of the same transaction and the same individual partners constituted both partnerships. The agreements, and not some generally applicable judicial policy favoring arbitration, governed even in the face of procedural mish-mash: "[T]he purpose of the Arbitration Act is 'to make arbitration agreements as enforceable as other contracts, but not more so . . . .' " *Id.* at 605 (*quoting Volt*, 489 U.S. at 478); *see also, e.g.*, Clark v. Merrill Lynch, Pierce, Fenner & Smith, 924 F.2d 550, 554-56 (4th Cir. 1991) (attempting to analyze in contractual terms arbitration agreements drafted to conform with now repealed SEC requirements); Wiepking v. Prudential-Bache Securities, Inc., 940 F.2d 996, 998-99 (6th Cir. 1991) (collecting cases); Higgins v. Superior Court, 1 Cal. Rptr. 2d 57, 63 (Cal. App. 2d Dist. 1991).

32. *McMahon*, 482 U.S. 220, may be the most pertinent of these precursors. Also addressing securities industry arbitration procedures, Justice O'Connor in that case responded to doubts expressed by plaintiffs about the adequacy of arbitral process by emphasizing the oversight role of the SEC in insuring "that arbitration procedures adequately protect statutory rights." *Id.* at 234; *but see id.* at 261-66 (Blackmun, J., dissenting in part) (doubting efficacy of SEC oversight). *See also Mitsubishi*, 473 U.S. at 633-34 (describing approaches "typically" or "frequently" or "expected" to be followed in international arbitration proceedings); Note, *supra* note 13, at 583-86 (endorsing arbitration of ADEA claims but calling on Congress to authorize the EEOC to standardize procedures).

At this point the problem becomes apparent: The full significance of imitation is difficult to assess. Perhaps *Gilmer* and its predecessors validate only fixed arbitration schemes that closely fit the judicial model. But how closely? Unless the Supreme Court means to require a one-to-one matching of arbitration and federal civil procedure, there must be some way of gauging the significance of divergences. Moreover, Justice White, like Justices in the Supreme Court's earlier decisions, not only noted the existence of standardized arbitration procedures, but restricted his discussion to a consideration of these procedures on their face. *Gilmer* thus does not address the question of how courts should respond when particular arbitral tribunals depart from what seem to be their own rules—a question that may arise repeatedly, reinforcing the need for a plausible analysis of variance.[33] It is clear, however, that to the extent that arbitral procedures are a matter of drafter's choice, and not simply given, analysis of proper arbitral procedures cannot begin with a model of arbitration itself.

In fact, if arbitration has no necessary form, or at least not one pitched in familiarly procedural terms, there are no benchmarks by which to evaluate particular arbitration agreements.[34] We might think that there exists some sense of the essentials of judicial process, and that this sense might be brought to bear in evaluating arbitral proceedings. It is not clear, however, how relevant judicial norms really are in the arbitral setting. Ideas of due

33. Courts that do not attempt to identify the procedures governing arbitration, of course, never reach this issue. *See, e.g.*, Robbins v. Day, 954 F.2d 679, 684-85 (11th Cir. 1992). The Federal Arbitration Act authorizes courts to vacate arbitral awards if "arbitrators were guilty of misconduct" because of procedural rulings "by which the rights of any party may have been prejudiced." 9 U.S.C.A. § 10(a)(3) (West Supp. 1994). What is "misconduct"? Some federal courts of appeals have held that courts may vacate arbitral awards revealing a "manifest disregard of the law" vis-à-vis governing federal statutes. *See, e.g.*, Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990); Merrill Lynch v. Bobker, 808 F.2d 930 (2d Cir. 1986). A similar standard might structure judicial review of arbitral procedural "misconduct." But what is "manifest disregard"? If courts are not to smuggle back in models of "right process," the only defensible approach may be one that conditions judicial intervention on the "pristine clarity" of pertinent statutes or rules. *See id.* at 933. Judicial reversal of arbitral ruling would then become highly unusual, at least in the absence of strong systems of statutory interpretation, and the force of the Supreme Court's invocation of rules regulating arbitral process would correspondingly diminish. In its approach in this regard, the Court is caught in a dilemma: its justification for deference to arbitration supposes that arbitration conforms in practice to the procedural rules that legitimate it, but close judicial review seeking to guarantee conformity threatens the autonomy of arbitration, and its status as a mode of dispute resolution independent of adjudication.

34. "It is impossible . . . to consider the relative merits of arbitration and adjudication in the abstract. Arbitration has no unique procedural aspects, and the two processes are frequently indistinguishable." Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 931-32 (1979). The subversive effect of the plasticity of arbitral process is plainly visible in Professor Shell's analysis, which requires a clear distinction between commercial arbitration and collective bargaining arbitration, but which (because of Shell's revealing carefulness), is repeatedly punctuated with qualifications like "usually," "frequently," and "typically," *see* Shell, *supra* note 5, at 531-34, as well as cautionary notes (e.g., that "[m]ore research is needed on the question of just what role formal law plays in commercial arbitrator decision making"). *Id.* at 532 n.155.

process are one source of inner coherence for adjudicative forms.[35] But the ways that we think about due process seem to be decisively bound up with the status of courts as imposed institutions, emphasizing and responding to notions of judicial process as involuntary or forced, with respect to both forms and consequences.[36] The problem here is not simply "state action" language in constitutional texts. Ideas of due process take as given, treat as the condition of their relevance, some prior infringement of individual autonomy, however characterized. It is this infringement that is the pertinent imposition; absent this infringement, there is nothing for due process norms to grasp. Agreements by individuals to forego due process, it would seem, cannot be analyzed in due process terms. Such agreements are expressions of individual choice, exercises rather than infringements of individual autonomy. This line of argument, therefore, suggests that due process notions are beside the point for purposes of analyzing arbitral procedures which are quintessential consensual artifacts.[37]

I do not mean to suggest that what counts as individual choice is not itself often, perhaps always, a complex question. Nor do I wish to deny that we often defer or displace the question of what is individual choice by engaging in an analysis strikingly similar to usual due process investigations.[38] In practice, we may frequently embrace agnosticism and in effect argue that, even if certain consequences were imposed rather than voluntarily faced, the end-results are nonetheless justifiable.[39] But this equivocation has its price, at least in the context of considering arbitral procedures. Perhaps end results are reasonable, and thus may be treated as though they were agreed to whether or not they really were, because the individual bur-

35. *See, e.g.*, Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 452 (1986).

36. *See* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371-74 (1953).

37. *But see* Edward L. Rubin, *Toward a General Theory of Waiver*, 28 U.C.L.A. L. REV. 478, 536-41 (1981). Rubin proposes a "functional equivalence" standard for judging waivers of rights; in the case of waivers of rights to adjudicative process, due process (he argues) defines functional equivalence. Rubin admits, however, that due process is not literally relevant: "the proposed standard is simply being advanced as a means of guiding judicial discretion, rather than as a constitutional command." *Id.* at 543. Perhaps the functional equivalence standard is better understood in equal protection terms:

> From the perspective of the individual, waiver represents an alternative, informal interaction that the state encourages by its enforcement of the waiver. Consequently, the state should be expected to provide the same level of protection for the individual when he chooses that alternative.

Id. at 537. "Same level," obviously enough, is not self-defining; at this level, the analysis is necessarily incomplete.

38. *See, e.g.*, Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1245-48 (1983). It is also sometimes the case, of course, that discussions of individual choice are plainly disguised discussions of the merits of particular choices. *See, e.g.*, Prudential Ins. Co. V. Lai, — F.3d — (9th Cir. 1994).

39. *See, e.g.*, D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174, 186-87 (1972); *see also* Newton v. Rumery, 480 U.S. 386, 394 (1987) (fact that "benefits of the agreement" to defendant "are obvious" one reason why agreement to drop civil suit in return for dismissal of criminal charges is not coerced).

dened by the agreement shares in the benefit that the burden produces, or because the burden is offset by some benefit conferred upon another individual who would have been burdened otherwise. But where burdens take the form of some procedural disadvantage, as in the case of a shift from adjudicative procedures to nonconforming arbitral modes, if the inquiry is not to become a judgment about whether procedural deficits are either reflections of the contours of substantive entitlements or offset by skews in substantive rules (an option ruled out by Justice White's first working assumption),[40] then procedural deficits must be either understood as costs of gains shared by all or as matched by disadvantages to the opposing party created by other variances. But both of these latter judgments are relative to judicial process.[41] This is clear in the case of collective benefits like speed or simplicity. In the case of offsetting burdens, there must also be some measure of offset and, if it is not obtained by referring to substantive entitlements, the other obvious resource is again the judicial model.

B. Gilmer *and* Gardner-Denver *as Opposed Absolutes*

In any event, Justice White is inconsistent. At one important point in his opinion, his analysis ignores rather than underscores the plasticity of arbitral process. I refer here to the passage in *Gilmer* distinguishing the collective bargaining cases. This omission reveals the artifice latent in White's attempt to reconcile the Supreme Court's prior arbitration decisions. More significantly, it also calls attention to the uneasy coexistence of those decisions, their juxtaposition of two modes of approach, pointing across the board to opposite conclusions.

White suggested three grounds for treating the case at hand as different from cases like *Gardner-Denver*, but two of his three arguments are obviously makeweights. It is difficult to see the difference, for example, between an explicit agreement to arbitrate statutory claims and an agreement to arbitrate contract-based claims if contract terms directly implicate issues also addressed by statute.[42] As far as subsequent litigation is concerned, notions of collateral estoppel ought to be no less relevant than ideas of merger and bar.[43] Justice White's assertion that the Federal Arbitration Act is somehow more liberal than the Labor Managment Relations Act in its treatment of arbitration is equally hard to accept. The *Steelworkers Tril-*

40. *But see* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 327-28 (1986).

41. *See* McGovern, *supra* note 35, at 455-56; Rubin, *supra* note 36, at 557.

42. *But see* David E. Feller, *Relationship of the Agreement to External Law*, *in* LABOR ARBITRATOR DEVELOPMENT 33-54 (C. Barraca, A. Miller & M. Zimry eds., 1983).

43. In any case, if "same transaction" is the key to determining the applicability of *res judicata* notions, differences in statutory and contractual terminology may make little difference. *See* Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 U.C.L.A. L. REV. 623, 642-45 (1988).

ogy,[44] the Supreme Court's founding formulation of LMRA arbitration policy, is not usually understood as evidencing hostility to arbitration.[45] Indeed, the *Mitsubishi* Court, in framing the modern Arbitration Act standard, cited *Steelworkers*.[46]

Gilmer raises a more important issue, however, insofar as its majority opinion explains the *Gardner-Denver* cases by invoking "the tension between collective representation and individual statutory rights."[47] Unions, as bargaining agents, may possess interests that in particular cases diverge from those of individual employees pressing grievances; as a result, in perhaps difficult to detect ways, union case administration might be affected or arbitral attitudes changed. Arbitration pursuant to a collective bargaining agreement thus undeniably raises a possibility of conflict of interest not present in arbitrations outside the collective bargaining context which come under the Federal Arbitration Act.[48] Such conflict becomes a matter of less concern if individual employees remain free to litigate statutory claims notwithstanding the results of prior arbitrations.[49] How significant is the conflict of interest problem? Plainly, some arbitration schemes are more vulnerable than others. Changes in the process of selecting arbiters, for example the introduction of an element of randomness into the method of choice, or recognition of the right of a grievant to go to arbitration even over the objection of the bargaining representative, might considerably reduce the risk of bias. Even absent such revisions of usual grievance procedures, we may conclude that, if the availability of a superseding judicial action in cases of "evident partiality or corruption" is sufficient in Arbitration Act cases, the well-developed duty of fair representation action is a more than adequate LMRA analog.[50] Thus, the same sensitivity to the flex-

44. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrier & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (§ 301 of the LMRA authorizes judges to enforce arbitration agreements).

45. *E.g.*, Lividas v. Bradshaw, — U.S. —, 114 S. Ct. 2068, 2077 (1994); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1529 (1981) ("*Lincoln Mills* and the *Steelworkers Trilogy* established a federal common law of labor relations in which voluntary arbitration was made the primary institution for the resolution of disputes between management and labor.").

46. *See Mitsubishi*, 473 U.S. at 626 (citing *Steelworkers*, 363 U.S. at 582-83, as supporting Arbitration Act bias in favor of arbitration).

47. *Gilmer*, 500 U.S. at 35.

48. This is not to say that conflict of interest concerns are irrelevant in arbitral proceedings outside collective bargaining; conflicts of interest, however, may be easier to minimize. *See* Shell, *supra* note 5, at 538 (discussing procedures addressing conflicts of interest in securities litigation).

49. *See* Bernard Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 43-46 (1971).

50. *See, e.g.*, ALPA v. O'Neill, 499 U.S. 65, 68 (1991) (duty of fair representation governs contract negotiation as well as administration); Teamsters v. Terry, 494 U.S. 558, 565-70 (1990) (fair representation suit analogous to breach of trust and malpractice actions); Hines v. Anchor Motor Freight, 424 U.S. 554, 567 (1976) (breach of duty of fair representation by union restores employee right to enforce employment contract through litigation).

ibility of arbitral process that the *Gilmer* Court displayed in dealing with arbitration outside the LMRA, if brought to bear in assessing the place of arbitration within the collective bargaining context, points in the same direction: the possibility of deficiencies in the arbitral process is not a decisive ground justifying the independence of statutory actions. It is important to be clear about the implications of all this: Justice White's failure to distinguish satisfactorily the *Gardner-Denver* line does not suggest that *Gilmer* itself is necessarily wrongly decided. Perhaps the collective bargaining cases themselves need to be reconsidered—upon close inspection, perhaps collective bargaining grievance arbitration is really no different and is in important respects equally plastic, and thus ought to be treated just like arbitral procedures coming within the scope of the Arbitration Act.

Interestingly in this regard, we may note that *Gardner-Denver* and its successors treat conflict of interest as only a minor theme. Justices writing for the Supreme Court in these cases tended to place less emphasis on process in the abstract, but instead stressed the implications of fixed statutory entitlements. The pertinent statutes, it was said, were sources of "substantive protection . . . independent of the employer's obligations under its collective-bargaining agreement,"[51] "devolv[ing] on [employees] as individual workers, not as members of a collective organization."[52] As such, they were outside the reach of "majoritarian processes"[53] with respect to either outright waiver or procedural or substantive redefinition. And it was precisely because these entitlements were statutory in origin that arbitration was not the equivalent of adjudication. Arbiters possessed a "specialized competence" concerning "the law of the shop, not the law of the land,"[54] and thus arbitration was not "an adequate substitute for judicial proceedings"[55] in view of the "complex mixed questions of fact and law"[56] and "public law concepts"[57] that statutory questions would require arbiters to confront.

Once again, it is hard to see any limits on relevance, any stopping point short of universal application. All statutes serving as bases for causes of action, except the LMRA, are sources of rights strongly independent of collective bargaining and therefore, it would seem, entitlements capable of assertion even in the face of contrary arbitration. Again excepting the LMRA, all statutes in the process of construction and enforcement generate mixed questions of law and fact, and require in this process some reference to public law concepts. Arbiters, it should follow, always lack the tools to

51. Atchison, Topeka, & Santa Fe v. Buell, 480 U.S. 557, 565 (1987).
52. Barentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981).
53. *Gardner-Denver*, 415 U.S. at 51.
54. *Id.* at 57.
55. McDonald v. City of West Branch, 466 U.S. 284, 289 (1984).
56. *Barrentine*, 450 U.S. at 743.
57. *Gardner-Denver*, 415 U.S. at 57.

adjudicate statutory claims.[58] In the *Gardner-Denver* opinions, as in *Gilmer*, the analysis in effect crosses the line, and appears to group cases that the actual pattern of Supreme Court results dictates that we see as different.

II
ARBITRATION AND STATUTORY PROMINENCE

Standing alone, the terse formulations about statutes and arbitration that I extracted from the *Gardner-Denver* cases are obviously vulnerable to challenge. Statutory "substantive protection" almost always amounts to at most a qualified entitlement. Federal statutes are not only sources of claims but also defenses—direct and indirect, substantive and procedural. Close reading of Title VII, for example, yields considerable uncertainty about precisely what has been conferred, about whether it makes sense to characterize statutory provisions as conferring "rights" or imposing "duties" as usually understood. To be sure, a statutory scheme may carry a bias, skew results across the total set of cases in favor of either plaintiffs or defendants; sometimes this skew, or rather its justification, may be controversial—as Title VII's history illustrates. But the relevant perspective is no longer that of the individual litigant. The idea of rights or entitlements therefore loses salience; simple oppositions of individual and group, or minority and majority, are less apparent. Similarly, the idea that arbiters cannot manage public law concepts or mixed questions of law and fact triggers immediate suspicion. The assertion is not absolute, of course: only relative to judges. The origin of the confidence necessary to draw such clear conclusions is difficult to discern, however. Presumably some judges are better at statutory work than some arbiters, and some arbiters are better than some judges. There may be a pattern in the distribution of competencies, but absent some sort of empirical study, don't we need a reason for thinking so?

Legal theorists have called attention to the role of judges as participants in the process of generating public norms, as elaborators of, and therefore contributors to, the building up of constitutional, statutory, administrative, or common law language.[59] Several features of the adjudicative office seem to make possible or enhance the exercise of this role. These include: the status of judges as public officials, the public selection and confirmation process, the definite duration of judicial office; the responsibility of judges to explain in writing their decisions and thus to open up their decisions to criticism by other judges, other officials, and the public at

58. *See also* Shell, *supra* note 5, at 560 (invocation of remedial purpose of ERISA "proves too much" insofar as "public interest goals of nearly all federal laws arguably justify restrictions on the enforcement of the FAA.").

59. *See, e.g.*, Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 592-617 (1983); Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2, 9-10, 12-14 (1979); *see also* Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 417-20 (1987) (role of adjudication in fixing social norms).

large; and the involvement of judges in deciding cases across a range of topics, and thus their education as to the spectrum of public concerns. Parts of modern civil procedure are relevant also: not simply the techniques for managing multi-party and class litigation, but also the freedom often afforded for wide-ranging discovery, and the choreography of pretrial motion practice—its stylized, alternating law/fact emphasis, its use of simplifying hypotheses which seem precisely designed to foster an external, context-stripping perspective. These last procedural accompaniments, of course, are not exclusively properties of adjudication. As we have seen, contract-based arbitration possesses an essential plasticity that makes possible incorporation of parts, or perhaps all, of judicial process within the arbitral setting. At bottom, therefore, if there is any basis for clearly distinguishing judges and arbiters, it must be the public status of judges.[60]

Owen Fiss has formulated one view of the per se public status of judges: "Adjudication is more likely to do justice than . . . arbitration . . . or any other contrivance of ADR, precisely because it vests the power of the state in individuals who act as trustees for the public, who are highly visible, and who are committed to reason."[61] I see no reason to assume that arbiters are not committed to reason, and I am not sure in what sense judges generally are highly visible. Instead, I would emphasize a version of Fiss' first point, call attention to the role that individuals who become judges perform as marked participants in an articulated official politics cutting across the range of social concerns. There are two parts to this formulation. The first emphasizes the process through which judges acquire office. Judges, whether popularly elected or appointed and confirmed by elected officials, are named and initially educated to the requirements of their role in settings that model the maelstrom of politics generally, the conflict of constituency and counter-constituency.[62] The experience of appointment, in this respect, prefigures an important part of the work of judging per se. This is the second point. The maelstrom recurs: Formally, sources of law are irreducibly multiple, overlapping, and competing in their claims to organize each other;[63] normatively, an analogous welter presents itself. Non-state institutions (e.g., organizations, associations, congregations, cultures, customs, etc.) compete to inform commitments originating and enacted through governmental processes, commitments which in turn assert

60. *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 545-46 (1986).

61. Owen Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1673 (1985).

62. The politics of judicial nomination has been elaborately addressed, most recently in commentary concerning the significance of President Reagan's unsuccessful nomination of Robert Bork to the United States Supreme Court. *See, e.g., Essays on the Supreme Court Appointment Process*, 101 HARV. L. REV. 1146 (1988).

63. *See* Patrick Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663, 686-98 (1983).

supremacy for themselves.[64] Judges, having avoided or otherwise navigated the storms of appointment politics, often face the task of resolving, or otherwise managing, the formal and normative conflicts of American law, conflicts expressive of political struggles present and past.[65] It is this responsibility that we link with the office — or rather, by office we mean precisely the opportunity and obligation to undertake this responsibility repeatedly. It is repetition, judging again and again, typically across the wide range of cases, that we conceive as constitutive of status.[66]

We are likely to attribute to holders of judicial office, therefore, a sense of the overall, to presuppose in reading their work some sort of gen-

64. *See, e.g.*, Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

65. Professor Seidman, contrasting judges with legislators and executive officials, argues that courts "are the most private of our public institutions," and points to the judicial appointment process as reinforcing this tendency: "The selection process imposes some public check on the type of people who become judges, yet leaves judges free of prior, publicly coerced commitments that might interfere with the expression of private values in deciding future cases." Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1047 (1987). In part, Seidman's perspective is simply part of a different project. He sees the working agenda of constitutional law as a never-resolved effort to build into government institutions appropriate combinations of respect for universal and personal or private concerns or values. *See id.* at 1019-29, 1042-46. Judges introduce into government the private dimension, at the same time as they characterize the public. *See also* Paul Kahn, *Independence and Responsibility in the Judicial Role*, *in* TRANSITION TO DEMOCRACY IN LATIN AMERICA 83-84 (I. Stotzky ed., 1993) (judges as both citizens and state actors). I might agree with this thesis, at least as Seidman frames it; no particular conclusion seems to follow concerning whether adjudication and arbitration are similarly or differently situated as processes for mediating different sorts of values. But there is also a real difference, I think. Seidman sees the judicial appointment process as protecting judicial freedom because of the level of generality custom requires that scrutiny adopt—an airy inquiry into "general competence" and "judicial philosophy." *See* Seidman, *supra*, at 1047-48. It is all momentary theater without lasting significance. It seems to me, however, that if the process is seen as beginning with executive selection of judges, and if the difficulty candidates might encounter in speaking the appropriate language is acknowledged, it is harder to regard the process of appointment as without extended significance for judges. In particular, the business of attempted reconciliation that Seidman sees as the ultimate judicial task in my view plainly begins at the point the potential judge first contemplates the risks of the appointment/confirmation process. This difference is significant: Professor Seidman's account represents abstract formulations as tending towards emptiness not only in considering judicial appointment but also in assessing the significance of legal texts and judicial formulations in the process of adjudication per se. *See id.* at 1049-52. In the end, this view (he recognizes) turns back on itself, undermining the persuasiveness of his own abstract effort. *See id.* at 1053-57. An alternative approach, consistent with the initial view of the judicial appointment process as more politically-charged and thus as requiring more attention to the jurisprudential tasks involved in maneuvering through that process, might also represent interpretations of legal texts or other judicial formulations as similarly harder-won, as always contestable but (like the language needed to be spoken for confirmation) as themselves media for "real" work, whether adjudicative or academic, thereby assuming a more concrete focus and putting to the side the paradox of self-critical abstraction.

66. It is not necessary to argue, therefore, that because arbiters are selected by the parties themselves arbiters are tainted in ways that judges are not. *Compare* Getman, *supra* note 34, at 927-31 (party selection of collective bargaining agreement arbiters increases sensitivity to interests of parties and thus furthers use of arbitration to fill out details of bargaining agreements) *with* Kahn, *supra* note 65, at 85 (political processes for appointing judges increase the likelihood that views of judges will be congruent with those of the community at large).

eral orientation, to regard this stance as indeed prerogative.[67] In the case of arbiters we may allow that some similar disposition is certainly possible, plasticity promises this much, but we do not similarly presume it.[68] Against this backdrop, the appropriateness of arbitration depends upon the assumptions that interpreters make about the subject of the inquiry a statute triggers. If legislation is understood as evaluating particular situations in light of the context within which parties ordinarily deal, litigation and arbitration appear to be close substitutes. Any predisposition to see the overall more likely possessed by judges than arbiters is irrelevant.[69] There is thus no reason to refuse enforcement of an arbitration clause or deny the arbitration judgment preclusive effect.[70] If legislation, however, is understood to high-

67. There is a risk, of course, of over-stating and thus misstating the official dimensions of adjudication. A traditional argument has it that judges meet their duties best if they resist the idea of seeing themselves as elaborators or contributors. On this view, the development of legal norms figures as a by-product of judicial attention to dispute resolution, to resolution of the case at hand as presented from the perspective of the immediate parties involved. Elaboration becomes a cumulative or aggregate phenomenon; its warrant of reliability is the justness of each contributing decision, precisely as a response to a particular dispute. Adjudication from this perspective looks more like arbitration as collective bargaining theorists see it—preoccupied with the nuances of context, fact/equity sensitive, exploratory of norms implicit in the particular setting. It is necessary, thus, to acknowledge adjudicative duality—the possibility that sometimes the corollary of office, the public calling to jurisprudence, is especially salient, and that sometimes it is not, that sometimes also the demands of the individual setting prevail. *See* Jerome K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 433 (1986). As we will see shortly, the approach to arbitration of statutory claims that I am in the course of developing readily accommodates adjudicative duality.

68. Perhaps arbitration, as theorists of collective bargaining suggest, is best understood as a means of elaborating a single body of law; in the labor context, for example, formally the bargaining agreement and substantively the "law of the shop"—hence the sometime hostility, from the labor arbitration perspective at least, to "bringing in" statutory norms in the course of grievance proceedings. *See, e.g.*, Feller, *supra* note 42; Lewis B. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 289 (1980); Bernard D. Meltzer, *Labor Arbitration and Discrimination: The Parties' Process and the Public's Purposes*, 43 U. CHI. L. REV. 724, 731, 734 (1976). It is not necessary, of course, to frame a strong theory of the "law of the shop" in order to justify arbitration as a means of enforcing collective bargaining agreements; alternate approaches, however, tend to call attention to virtues suggesting similarities between arbitration and adjudication. *See, e.g.*, Getman, *supra* note 34, at 918-22. But even if we reject this view as a characterization of arbitration generally and even if we see arbitration (at the other extreme) as simply a means for parties to obtain the benefits of adjudication at the time and place of their own choosing, with process customized to fit their needs, there remains a sense (perhaps inescapable given its consensual origin) that arbitration separates out the individual case or cases. A sense of arbitration as somehow preoccupied with particular settings is common even in writing outside the collective bargaining sphere, both academic, *see, e.g.*, Fiss, *supra* note 59, at 30-31, and judicial, *see, e.g.*, Pearce v. E.F. Hutton Group, Inc., 828 F.2d 826, 829 (D.C. Cir. 1987) ("arbitration will be governed by procedures specifically tailored to the context from which the agreement to arbitrate arises, and will be conducted by arbitrators who are expert in the norms and practices of the relevant industry"). At the least, there is no special emphasis on connections.

69. *See also supra* note 67.

70. A similar analysis informs United Paperworkers Int'l v. Misco, Inc., 484 U.S. 29, 42-45 (1987), a collective bargaining case. There, the Supreme Court held that a federal district court could not invoke an asserted public policy against drug use on the job as justification for overturning an arbiter's decision reinstating the employee. The policy was not "properly framed," *id.* at 43, insofar as the district court made no effort to associate its concerns with particular statutory or common law commitments, instead seemingly relying only on "general considerations of supposed public interests," *id.* at 44 (*quoting* W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 766 (1983) (*quoting*

light features of a situation independent of, or obscured by, the usual terms parties treat as structuring their interaction, adjudication becomes the preferred choice. It is the better medium for conducting a suitably distanced investigation. It is not just that litigation may illuminate features of a situation that an arbitration might miss or mislabel as nonproblematic.[71] Legislation, in these cases at least, precisely evokes, and may be understood to bring to bear, the perspective that we hold to be distinctly adjudicative.[72]

The right question for purposes of assessing the appropriateness of arbitration, I would argue, is thus not whether statutory rights can be described as in some sense independent, or as assuring minimum guarantees. Every statute recognizing a private cause of action, whether explicitly or implicitly, might be so characterized. Rather, the relevant issue concerns the nature of the grievance that statutory remedies permit an individual to raise. Some statutes ultimately work to reinforce norms originating within the institutions or practices they address. It is a defense to a statutory action to show that challenged conduct is in fact ordinary practice, a constituent part of the routines that in toto define the enterprise. The statute at bottom is simply a guarantee of conventional practice; it provides a remedy for inconsistent or aberrant behavior.[73] Other statutes do not privilege conventional practice in this way but rather fix the legality of suspect conduct entirely through reference to criteria the statute itself describes—criteria which may not be at all natural within the frame of reference of affected

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Muschany v. United States, 324 U.S. 49, 66 (1945)). Moreover, the trial court's conclusions turned at least as much on specific factual inferences, thus falling within purview of the arbiter and not the court. *See Misco*, 484 U.S. at 44-45.

71. A version of this concern is plainly evident in the New York Court of Appeals decision Corcoran v. Ardra Ins. Co., 566 N.Y. Supp. 2d 575 (1990), holding that while it was "the policy in New York to encourage resolution of disputes through arbitration" the state superintendent of insurance, acting as liquidator, could not be obliged to honor a prior agreement of the insolvent insurer to arbitrate particular disputes:

> Arbitrators are private individuals, selected by the contracting parties to resolve matters important only to them. They have no public responsibility and they should not be in a position to decide matters affecting insureds and third-party claimants after the contracting party has failed to do so. Resolution of such disputes is a matter solely for the Superintendent, subject to judicial oversight, acting in the public interest.

Id. at 579. The point of this passage is not bias per se (although there is a faint implication) but point of view—the need to assure a properly general perspective.

72. It is in these cases that Owen Fiss's formulation seems most on point: "Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals." Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984).

73. The notion of "conventional practice" means to encompass a wide range of ways of characterizing institutions or practices, including (for example) conceptions of practices as "immanent reality," as simply irreducibly correct ways of acting (possessing the force of fact) for individuals engaged in the practice, *see, e.g.*, Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 624-25 (1975); or (more familiarly) as arrangements of reasonable means to ends built up from a sense of an organization's primary objectives, *see, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Turner v. Sefley, 482 U.S. 98 (1987). The pertinent theory of the constituent parts of organizations and practices may vary from statute to statute; it is enough for present purposes to see the family resemblance that the "inside" metaphor emphasizes.

individuals or institutions. This is not to say that such statutory criteria are in some sense mechanical; the distinction is not, necessarily, that of rules and standards, or categories and balances. Rather, the question is one of origins: Are statutory criteria the same criteria as those ordinarily used by individuals or institutions? Or rather, does a statutory action require a plaintiff to develop some sort of systematic critique, a view from outside as it were, bringing to bear not the institution's own norms, but those legislatively and judicially defined as society's at large?[74]

To be sure, the distinction between types of statutes that I draw here is no more air-tight than any other. Readers of statutes may disagree strongly about their orientation. But the relative ease with which we can conceive of this disagreement highlights the fundamental usefulness of the distinction I draw—especially vis-à-vis the Supreme Court's present approaches. It links the question of arbitration to issues central within any regime of statutory interpretation, issues no regime can avoid confronting, and therefore issues likely to present themselves within as rich a field of resources as possible for working through to conclusion.[75]

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74. *Cf.* Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1355-56 (1972) (arguing that state statutes regulating in terms similar to those descriptive of collective bargaining institutions should be seen as preempted but that state statutes framed more generally ought to be applicable in labor contexts also). It would be a mistake, certainly, to think that statutory structures are unequivocal in their implications. Reading involves a range of choices. Among these is a characterization of (what we may think of as) the perspective or orientation particular statutes afford, the location—inside or outside—from which statutory language or interpretive glosses view the institutions or practices that the statute addresses.

75. The key, I think, lies in treating the arbitration issue as at bottom a question about statutes. Approaches that find their fundamentals elsewhere tend to either stop short or conclude too broadly once analysis turns to particular statutory contexts. Thus, Edward Morgan emphasizes Kantian notions of individual autonomy and corrective justice as the basis for an inquiry into whether rights at issue "are conceivable as intrinsic to interacting personalties" or rather "instrumentally . . . further some policy extrinsic to the contractual relationship at issue." Edward Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 SO. CAL. L. REV. 1059, 1076, 1074 (1987); *accord* Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 491-92 (1981). Morgan concedes, however, that "a single legal claim might encompass a distributive task together with a corrective purpose." *Id.* at 1080; *see id.* 1076-81. As a result, he concludes by endorsing procedural solutions (like the "permeation" doctrine) which sidestep rather than confront the "complex splicing of characteristics," *id.* at 1080; *see id.* 1080-81, albeit in ways that within procedural terms themselves appear to be ad hoc. *See* Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238 (1985); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1340, 1351 (1985) ("intertwining" doctrine). Professor Sterk also acknowledged the problem of overlap, *see* Sterk, *supra*, at 519 n.137, 541, 543; his solution looked to false conflicts, cases in which resolution of disputes between the parties also addressed the interests of third parties, thus permitting arbitration; in cases of actual conflict, however, where (in his terms) "third party" concerns remained distinct, Sterk's analysis left no alternative but to reject arbitration—for example, in antitrust and securities cases, *see id.* 506, 519.

Interestingly, a similar difficulty is implicit in an otherwise rather different suggestion made by Owen Fiss:

> Of course, some disputes may not threaten or otherwise implicate a public value. All the disputants may, for example, acknowledge the norms and confine their dispute to the interpretation of the words of the contract or the price of a bumper. Such disputes may wind their way into court, and judges may spend time on these purely private disputes—private because only

III
THE ADEA, TITLE VII, ARTICLE III AND THE CIVIL RIGHTS ACT OF 1991

The preceding sketch, I think, supplies terms that make possible a discussion of the ADEA and Title VII that persuasively differentiates the two statutes for purposes of suggesting that ADEA arbitration is proper and Title VII arbitration is not. I begin by formulating accounts of the principal ADEA causes of action. Title VII causes of action are, at first glance, open to alternative characterizations either consistent or inconsistent with these ADEA accounts. The Civil Rights Act of 1991, for all relevant purposes, addresses Title VII but not the ADEA. I consider therefore whether or not any provisions in the 1991 Act help resolve interpretation of the Title VII suits. For my purposes, it turns out, the pertinent change is an adjustment of the mixed-motive cause of action providing for equitable relief in cases in which compensatory relief would not lie. The importance of this provision does not derive from the significance it assumed in legislative debate—within the congressional setting, it was relevant only at the margin. Rather, its importance becomes visible only when viewed constitutionally. Statutory authorization of injunctive relief in circumstances in which an individual can show no personal loss triggering compensatory remedies seems to raise Article III case or controversy questions given recent

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the interests and behavior of the immediate parties to the dispute are at issue. That seems, however, an extravagant use of public resources, and thus it seems quite appropriate for those disputes to be handled not by courts, but by arbitrators. . . .

Fiss, *supra* note 59, at 30. The point is not simply the artificiality of the distinction drawn between the "purely private" and the "public." *See also* Ernest J. Weinreb, *Adjudication and Public Values: Fiss's Critique of Corrective Justice*, 39 U. TORONTO L.J. 1, 8-11 (1989) (Fiss fails to see the "public aspect of corrective justice"). Plainly, all disputes showing up in court have public implications in the sense that they involve reference at some level to norms framed as though they were generally applicable (e.g., promises should be kept) and claimed to possess some sort of public origin (if only custom). *See* Kahn, *supra* note 65, at 75 ("The courtroom transforms the private into the public"). This is especially the case with respect to all disputes where parties treat statutes as pertinent. More importantly for present purposes, Fiss also separates disputes in which norms are not in question and those in which norms are in controversy, a separation of a piece with his larger effort to categorize lawsuits on the basis of whether they accept or challenge organizational structures. Fiss, *supra* note 59, at 17-31. This bright line is also obviously controversial: organizations, it may be, are constituted by repetition, and thus all departures from norms also count as (proposed) revisions of norms—organizational shape (and thus norms) are on this view always in question. *See generally* A. GIDDENS, THE CONSTITUTION OF SOCIETY (1984). The relevant question is whether enforcement of a particular norm is justified as a repetition, as a reinforcement of the prevailing organizational shape; or rather, whether enforcement is justified for reasons other than repetition, grounds independent of the existing organizational pattern. If notions like "public" and "private" are useful—my use of "inside" and "outside" here is in part an effort to sidestep this question—it is not because they define separate categories, but rather function as tendencies open to emphasis or de-emphasis in the process of fixing the approach taken by given legal materials in dealing with given institutions. At bottom, the deficiency in Fiss's categories lies in their tendency to treat questions of construction as already (or elsewhere) resolved, and therefore (in this respect like Morgan's approach) to provide little help in the construction process itself. (It is important to remember, of course, that it was precisely within the context of a contest of emphases that Fiss wrote, criticizing a (still-present) tendency in the Supreme Court to minimize the public dimension.)

Supreme Court decisions. Case or controversy doctrines, however, are multiple, and coexist complicatedly. The 1991 Act at first glance seems to present a standing question; but it also might be understood as a legislative variant on familiar judicial responses to suggestions of mootness. This second view suggests a reading of the Act grounded in Article III and therefore constitutional. It also illuminates an important dimension of the mixed-motive action itself. The same mootness analysis provided a starting point for early judicial opinions defining the Title VII cause of action. This starting point, finally, returns us to the distinctions that I have just drawn. It becomes apparent that the mixed-motive action fixes an external perspective in the Title VII setting even while retaining an internal orientation in the ADEA context. Arbitrability analysis adjusts accordingly.

A. Age Discrimination Causes of Action: A First Model for Title VII

Private causes of action under the Age Discrimination in Employment Act readily sort into three familiar categories.[76] The discriminatory treatment action organizes claims of age discrimination in cases in which there is no direct evidence of bias. Rather, the adversely affected employee or job applicant alleges facts concerning her or his age, her or his apparent job qualifications, and adverse employer conduct—taken together, these allegations suggest, as matter of circumstantial evidence, a prima facie case of discrimination. The employer typically responds by asserting a reason unrelated to the plaintiff's age that would explain the challenged action. It then becomes the burden of the plaintiff to show that this reason is a pretext or sham not fitting the case—in this way, the plaintiff revives the inference of age bias as the employer's underlying motive.[77] The mixed-motive suit addresses cases in which there is direct evidence of age bias on the part of at least some employer representatives who have acted contrary to plaintiff's interests. Given direct proof, the employer assumes the obligation to establish that the adverse action would have occurred in any event, for reasons unrelated to age bias. Finally, a willful discrimination action, entitling a plaintiff to liquidated damages up to double damages, supposes not only proof by a plaintiff of an injurious act motivated by age bias, but also proof

76. *See* ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION §§ 102.40-102.42, 103.52 (1994). Categorization of causes of action is useful for analytic purposes. It must be remembered, however, that in practice particular suits may display aspects of two or even all three of the actions, and that the nature of a suit may not become clear until its conclusion. Thus, a lawsuit understood by the parties to be an action of one type may ultimately be seen by judges as a version of another, and evaluated within the latter framework. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993), discussed at note 206, *infra*.

77. The inquiry is framed as a choice between two motivations—a discriminatory animus or the asserted business reason. *See, e.g.*, Alphin v. Sears, Roebuck & Co., 940 F.2d 1497, 1502 (11th Cir. 1991). If the asserted business reason loses credibility, the plausibility of the discriminatory explanation correspondingly increases.

by a plaintiff of, at minimum, reckless disregard by the employer of legal prohibitions against age discrimination.[78]

The case law depicts the discriminatory treatment suit as, at bottom, testing the good faith of employer explanations.[79] More often than not, the key to decision is the question of pretext. In framing standards for guiding inquiry in the various individual cases, courts repeatedly emphasize that the goal is not to determine whether the reasons that the employer has advanced are persuasive from the perspective of an independent observer.[80] Courts do not, it is often said, sit for the purpose of second-guessing business decisions.[81] Rather, judges organize an effort to reconstruct the employer's point of view, attempt to determine whether the offered reason for action is the sort of reason that, in the circumstances at issue, the employer might have treated as in fact a reason for action.[82] Plaintiffs find themselves at a considerable disadvantage, thus, if employers show that proffered reasons emerged as a result of routine company procedures, whether in the form of

78. *See* 29 U.S.C.A. § 626(b) (West 1985) (cross-reference limiting liquidated damages to double damages); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985). *See also* text *infra* at notes 90-94.

79. *See* Timm v. Mead Corp., 32 F.3d 273, 275 (7th Cir. 1994); Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991). Ordinarily, it is enough that the employee show that the reason asserted by the employer to explain adverse action is implausible, and therefore "pretextual"; it is not usually necessary that the employee also show directly that age was the determining factor in the employer's decision. *See, e.g.*, Armbruster v. Unisys Corp., 32 F.3d 768, 783 (3rd Cir. 1994); Valenteck Kisco, Inc. v. Williams, 964 F.2d 723 (8th Cir. 1992), *cert. denied*, 61 U.S.LW. 3401 (1992). *See also* note 206 *infra* (discussing *Hicks*).

80. *See, e.g.*, Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992); Fallis v. Kerr-McGee Corp., 944 F.2d 743, 747 (10th Cir. 1991).

81. *See, e.g.*, Guthrie v. Tifco Indus., 941 F.2d 374, 378 (5th Cir. 1991), *cert denied*, 112 S. Ct. 1267 (1992); Hawkins v. Ceco Corp., 883 F.2d 977, 980 n.2 (11th Cir. 1989), *cert. denied*, 495 U.S. 935 (1990).

82.

> No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. . . . Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior.

Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988) (internal quotation marks omitted). *See* Billet v. Cigna Corp., 940 F.2d 812, 825 (3rd Cir. 1991) ("what matters is the perception of the decision maker"); *Elrod*, 939 F.2d at 1470. This is not (or at least not necessarily) a simple exercise in apologetics. The employer's proffered reasons are not taken at face value; rather, the court tests those reasons against what it otherwise knows about the employer's ways of doing business, *see, e.g.*, Stein v. National City Bank, 942 F.2d 1062, 1066 (6th Cir. 1991); it may turn out, therefore, that the employer's attempt to explain challenged acts is false relative to what seems to be the firm's actual practice. What is taken as given, however, is this actual practice. There is no inquiry as to whether the firm was in some sense obliged to adopt its chosen modes of organization. *See Alphin*, 940 F.2d at 1501 ("Sears' business judgment—its decision to restructure its management program—does not concern us"). In many cases, the "given" of existing practice is so taken for granted that the court finds explicit discussion unnecessary, simply treating existing practice as the background against which the narrative of the particular case unfolds. *See, e.g.*, Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 117 (2d Cir. 1991) (employee's "different concept" of job in question "fully justified" employer's refusal to promote); *Billet*, 940 F.2d at 818-22; Wheeler v. McKinley Enters., 937 F.2d 1158, 1160 (6th Cir. 1991); Fallis, 944 F.2d at 745-46.

periodic reviews or as a result of complaints following apparent violations of company rules of conduct expressly communicated by the employer in advance of the particular acts in question.[83] Precedent by itself may create problems for the plaintiff, if it is clear that the reasons the employer asserts in the case at hand plainly motivated employer conduct in other circumstances in which there was no suggestion of age bias.[84] Conversely, plaintiffs are most likely to prevail if the reasons that employers offer in litigation appear not to advance any business objective pertinent to the activities falling within a litigating employee's job description,[85] or if the proffered reasons appear to be ad hoc, evident improvisation, without precedent within a defendant firm.[86]

The mixed-motive suit refines and intensifies scrutiny of employer practices. Even so, within the setting of this action as well, the jurisprudential beginning and end remains the description of those practices, as they actually figure within the particular enterprise, rather than a reconceptualization and thus ultimately a judicially directed reconstruction of the organization. Direct evidence typically consists of statements clearly suggestive of age bias by individuals who were in some way part of the process through which an employer discharged or otherwise adversely treated an employee. Courts treat this evidence as raising a question as to whether the nondiscriminatory reasons an employer invokes are, in truth, operationally relevant within the business—whether in fact such reasons shape business decisions.[87] Defendants are able to meet their burden in mixed-motive cases, for example, by showing that individuals manifesting bias are not, by

83. *See, e.g.*, *Timm*, 32 F.3d at 274-75; Binder v. Long Island Lighting Co., 933 F.2d 187, 189, 192 (2d Cir. 1991); Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 233, 235 (4th Cir. 1991); Danielson v. City of Lorain, 938 F.2d 681, 684-85 (6th Cir. 1991). This is not to say that company rules must necessarily be reduced to writing. *See* Stein, 942 F.2d at 1065 (enough that "policy was reliably communicated by the employer to its employees and that it was consistently enforced").

84. *See, e.g.*, Fallis, 944 F.2d at 745.

85. *See* Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1421-22 (10th Cir. 1991).

86. *See, e.g.*, Williams v. Valentec Kisco, Inc., 964 F.2d 723, 726-27 (8th Cir. 1992) (supervisor acted "arbitrarily" in dismissing older employee for conduct not prohibited in company manuals and usually permitted); Acrey v. American Sheep Industry Ass'n, 981 F.2d 1569, 1574 (10th Cir. 1992) ("management prematurely concluded plaintiff was not capable of functioning within the merged ASI organization"); Christie v. Foremost Ins. Co., 785 F.2d 584, 586-87 (7th Cir. 1986) (reduction in force policy not known by manager making termination decision). *See also* Perfetti v. First Nat'l Bank of Chicago, 950 F.2d 449, 457 (7th Cir. 1991) (pretext might be shown if evidence that job requirement "was disingenuous or inconsistently applied," or that decisionmaker "could and should have investigated . . . application objectively or more thoroughly," or that testimony of fellow employees as to applicant's qualities "was inconsistent") (dictum), *cert. denied*, 112 S. Ct. 2995 (1992). Evidence of other acts of age discrimination figures in the discriminatory treatment suit as another means of undermining the "reality" of the reason defendant offers to explain its action in the particular case—there is a suggestion of an alternative pattern, illegal motivations, competing with defendant's account. *See, e.g.*, Phillip v. ANR Freight Sys., Inc., 945 F.2d 1054, 1056 (8th Cir. 1991), *cert. denied*, 113 S. Ct. 81 (1992).

87. *See, e.g.*, Kirschner v. Comptroller of N.Y., 973 F.2d 88, 93 (2d Cir. 1992); Ostrowski v. Atlantic Mut. Ins. Companies, 968 F.2d 171, 182 (2d Cir. 1992)

themselves, in a position to act decisively.[88] Bias, we are made to see, is epiphenomenal. Plainly, such proof is not easy. If a prejudiced individual possesses discretion to decide whether or not to initiate a discharge process, for example, even if reviewers dutifully apply settled, nondiscriminatory company norms, a showing of possible selective prosecution by the biased initiator may be enough to justify liability.[89] The employer is more likely to prevail if supervising individuals proceed collegially rather than in sequence, or if sorting of employees involves an initial and essentially automatic reference to some prior record or other measure of employee performance which is treated as objective within the firm.

The willfulness suit takes the mixed-motive action one step further. The plaintiff must now demonstrate not simply a gap in the defendant's organizational structure, a space within which an individual's bias is free to motivate adverse action. In addition, it must appear that this opening is in some sense deliberate, or at least a result of reckless indifference to statutory concerns. Sometimes age discrimination is express company policy and willfulness is therefore apparent.[90] In other cases, however, age appears to figure in employer decision-making "on an ad hoc, informal basis rather than through a formal policy."[91] The formal test of willfulness is the same in both cases.[92] Inevitably, however, in the latter cases, judicial scrutiny of employer decision-making structures is more searching, and at least sometimes, judicial expectations regarding plaintiff's proof are higher. Successful willfulness suits, for example, have turned on showings that the individuals immediately responsible for the challenged acts are also the ultimate superiors and are themselves motivated by age bias;[93] or proofs that the possibility of age-biased conduct of subordinates was known to individuals with power to close off the opportunity for discriminatory decision-making, but who nonetheless did nothing.[94]

Against the backdrop of this account, arbitration appears to be an altogether appropriate means of resolving ADEA claims. Each of the three

88. *See, e.g.*, Armbruster v. Unisys Corp., 32 F.3d 768, 779 (3rd Cir. 1994).

89. *See* Glover v. McDonnell Douglas Corp., 981 F.2d 388, 392 (8th Cir. 1992) (reviewers lacked personal knowledge of plaintiff), *cert. denied*, 114 S. Ct. 1647 (1994).

90. *See, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985).

91. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1709 (1993).

92. *See id.* at 1710.

93. *See, e.g.*, Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 718, 722 (1st Cir. 1994); Biggins v. Hazen Paper Co., 953 F.2d 1405, 1410-12 (1st Cir. 1992), *vacated on other grounds*, 113 S. Ct. 1701 (1993); Ramirez v. Allright Parking El Paso, Inc., 970 F.2d 1372, 1374, 1378 (5th Cir. 1992); Brown v. Stites Concrete, Inc., 994 F.2d 553, 557 (8th Cir. 1993) (en banc); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1548 (10th Cir. 1988).

94. It is not enough, for example, if supervisors review discharge papers prepared by an individual who has triggered complaints about age bias, and satisfy themselves that the reasons stated in those papers conform on their face with company policy. If the supervisors do not explore the possibility of a motivating age bias, if they acquiesce without questioning the suspect initiator, double damages liability may follow for the employer. *See* Tennes v. Massachusetts Dept. of Revenue, 944 F.2d 372, 380-81 (7th Cir. 1991).

actions takes an employer's practices as the field of investigation, comparing the case at hand with usual behavior, and frames its particular decisive benchmarks in terms of possible results of the comparison. Each of the three actions, thus, orients itself, and in the process finds its working normative resources, within the institution whose acts are subject to challenge. Do the same conclusions follow with respect to arbitration of Title VII claims? The ADEA actions, it is often said, are mimics of Title VII suits.[95] The United States Supreme Court first worked out the mechanics of both the discriminatory treatment and mixed-motive causes in Title VII cases.[96] The Civil Rights Act of 1991 adds to Title VII a willfulness action similar to the ADEA cause.[97]

B. Implications of the Disparate Impact and Harassment Suits

There is, however, at least one Title VII suit that may differ in kind: The well-known disparate impact action, associated with the Supreme Court's decision in *Griggs v. Duke Power Co.*,[98] does not tie analysis to description of employer practices as they appear from within the firm, but rather attempts to judge such practices from an independent perspective. The initial burden on plaintiff to show adverse impact focuses on effect, on whether employer conduct, however rationalized, has the consequence of disproportionately disadvantaging employees grouped by race, gender, religion, or national origin. A plaintiff who succeeds in making this showing puts the onus on the employer to prove business necessity, to establish not simply that the challenged practice was one way of accomplishing business goals, but, given appropriate showings by plaintiff, that there were no other available alternatives.[99] Both halves of this suit, thus, plainly distance litigation, by defining languages of investigation that substitute for, rather than use, modes of description in use inside the firm.[100] As a result, within the terms of the analysis of this essay, arbitration is not a satisfactory substitute for adjudication for purposes of evaluating disparate impact claims: the *Gardner-Denver* acknowledgement of freedom to litigate follows. There is some question as to whether the ADEA recognizes disparate impact claims;[101] in any event such actions are extremely rare within the universe

95. *See, e.g., Trans World Airlines, Inc.*, 469 U.S. at 121. *But see* Lorillard v. Pons, 434 U.S. 575, 584 (1978).

96. *See, e.g.*, Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248 (1981) (discriminatory treatment suit); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (mixed-motive suit).

97. Civil Rights Act of 1991, Pub. L. 102-166, § 102, 105 Stat. 1072-74 (1991).

98. 401 U.S. 424 (1971).

99. *See* LARSON & LARSON, *supra* note 76, at chs. 14-15.

100. This "distancing" effect is easiest to see in testing cases. *See, e.g.*, Guardians Assoc. of N.Y. City v. Civil Serv., 630 F.2d 79 (2d Cir. 1980). *See also* Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 200-04 (1991) (similar characterization of BFOQ defense).

101. *See* Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706 (U.S. April 20, 1993) (noting that question is unresolved); *id.* at 1710 (Kennedy, J., concurring) (citing authority for proposition that impact suits are not proper under ADEA).

of age discrimination suits. Thus, setting ADEA and Title VII impact litigation apart would limit only slightly the reach of the *Gilmer* decision with respect to ADEA litigation in both collective bargaining and non-collective bargaining cases. But in truth, although important, disparate impact cases are not especially frequent in the Title VII setting either. An assimilation of ADEA and Title VII disparate treatment, mixed-motive, and willfulness actions, inside and outside collective bargaining, would leave *Gardner-Denver* with a severely restricted domain.

Perhaps we should reconsider the conclusion that the disparate treatment, mixed-motive, and willfulness actions simply take as given ordinary practices within a firm. There is a sense in which this proposition is obviously false. The Title VII sexual harassment suit, for example, is a version of a mixed-motive action. Plaintiff alleges she (or he) was subject to different treatment as an employee because of gender through the medium of sexually charged communications, gestures, or contacts by other individuals within the firm, for example.[102] The employer attempts to show that such behavior in and of itself had no work related consequences, sometimes because the incidents in question were not accurately depicted in plaintiff's account, and sometimes because effective remedies were available within the firm that plaintiff successfully utilized or chose not to pursue.[103] Underlying this action, clearly enough, is an assumption that there exists a normal work environment, prior to and independent of sexual politics, which plaintiffs may rightly demand.[104] This normalcy is also pretty obviously a fictional construct: a workplace free of all sexual interaction whatsoever, while not impossible, would seem to be not at all easy to maintain. But equally obviously, we may readily conclude that the image of such a chaste environment, as the defining element of the Title VII action, serves a useful purpose. It marks sexual encounters on the job as legally at risk, at least if there is any coercive edge, and thus parries that edge, by putting the target of sexual gestures in a position to endanger and thus regulate the encounter.[105] The existence of the action, in short, changes the sexual dynamic of the workplace—more modestly, it is best understood as an attempt at such change. Certainly, the emphasis in sexual harassment cases on the existence, or non-existence, of in-house remedies is of a piece with this reform interpretation: provision of such remedies affords employers a way to escape liability that may work to reduce the number of unwelcome encounters, but will in any event certainly label aggressive sex motivated

102. *See* ABIGAIL C. MODIESKA, EMPLOYMENT DISCRIMINATION LAW § 1:05 (1993).

103. *See, e.g.*, Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992) (first offense generates "its most serious form of reprimand" by employer; subsequent harassment not reported to employer); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 184-85 (6th Cir. 1992) ("adequate and effective" response).

104. *See* Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 SO. CALIF. L. REV. 1283, 1291-99 (1992).

105. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 860 (1991).

conduct as out of bounds, as potentially risky business on the job. Arguably, not only the otherwise beset employee but also the employer benefits. The end result, presumably, is greater attention to the task at hand.

But something like the same points might be made about the full range of discriminatory treatment, mixed-motive, and willfulness actions. In all cases, the image of the normal work environment is artificial. No one believes that work rules can, or should, entirely displace individual discretion; the possibility of biased acts is part and parcel of what is ordinarily the case. The effective aim of all employment discrimination actions, thus, cannot be to return firms to some previous perfect state. Rather, the point must be the affirmative management of tendencies—the threat of litigation adds an incentive for employers to monitor discretion and to increase the coverage of workrules; it (re)categorizes bias and biased acts as not customary and indeed as potentially dangerous for perpetrators; it legitimates and reinforces the resolve of employees who are likely subjects of biased conduct. In short, Title VII and ADEA suits result in revisions in the organization of firms within the terms of employer and employee experience. The gap between the disparate impact suit and other employment discrimination actions therefore seems to narrow. Is it now *Gilmer* whose domain shrinks (to nothing)? But statutory actions whose impact on prior patterns is itself figured or acknowledged in statutory language or judicial glosses remain importantly distinct within the superset of all statutory actions likely to provoke adaptive responses. Only these former actions make their effect itself, in some way or another, a topic or theme explicitly part of the process of statutory elaboration, and thus subject to express control within that process.[106] Only these actions, therefore, publicize their own enforcement, and take into account and thus attempt to regulate at least some consequences of their enforcement in the course of framing statutory norms, and thus squarely implicate, as a matter of process, politically significant differences dividing adjudicative and arbitral institutions. Accordingly, if disparate treatment, mixed-motive, and willfulness claims are not appropriate candi-

106. For example, the remarks President Bush offered in connection with his signing of the Civil Rights Act of 1991 catch the methodological point precisely in discussing the disparate impact suit—whatever the substantive merits of the statutory analysis:

> It is regrettable that enactment of these worthwhile measures has been substantially delayed by controversies over other proposals. S. 1745 resolves the most significant of these controversies, involving the law of "disparate impact," with provisions designed to avoid creating incentives for employers to adopt quotas or unfair preferences. It is extremely important that the statute be properly interpreted—by executive branch officials, by the courts, and by America's employers—so that no incentives to engage in such illegal conduct are created. [¶] . . . Opinions by Justices Sandra Day O'Connor and Byron White have explained the safeguards against quotas and preferential treatment that have been included in the jurisprudence of disparate impact. S. 1745 codifies this theory of discrimination. . . . [But its] change in the burden of proof means it is especially important to ensure that all the legislation's other safeguards against unfair application of disparate impact law are carefully observed.

Statement of President George Bush upon signing S. 1745, 27 WEEKLY COMP. OF PRES. DOC. 1701 (Nov. 25, 1991), *reprinted in* 1991 U.S.C.C.A.N. 768-69 (Volume 2, 102d Cong., 1st Sess.).

dates for arbitral enforcement, it can only be because of some feature of these actions we have not yet identified that provides a structure for reflection, a way of modeling and therefore managing statutory impact.

C. *The Relevance of the Civil Rights Act of 1991*

In this regard, it is worthwhile to consider the Civil Rights Act of 1991.[107] Except for one provision of little present relevance, the Act does not address ADEA matters.[108] If the 1991 Act alters our perception of Title VII civil remedies, therefore, a basis might be at hand for treating differently arbitration of Title VII and ADEA claims. At first glance, of course, this latest civil rights act is hard to see as transformative. In form, the statute is a series of detailed elaborations of provisions originating in prior legislation; in substance, as both statutory language and legislative history make clear, the 1991 Act repeatedly addresses recent Supreme Court decisions, and its various adjustments purportedly restore prior law.[109] Nonetheless, codification alone may, for present purposes, itself work a significant change in law. Judicial language initially framed to restate statutory obligations in terms capturing more precisely the circumstances of cases arising under Title VII, and thus ambiguously mixing judicial reactions to both statutory ideas and the dynamics of individual settings, becomes after codification a further projection of statutory norms, a more detailed legislative modeling of conditions requiring legal revision. Potentially at least, a further publicization of the statutory jurisprudence follows.

Ironically, the provision of the Civil Rights Act of 1991 that is most straightforwardly on point raises no questions at all about the significance of codification. Section 118 declares: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."[110] The language here is obviously hortatory, as demonstrated by the choice of words like "encouraged" and "to the extent authorized by law." Legislative history is consistent.[111]

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107. Pub. L. 102-166, 105 Stat. 1071 (1991) (*codified in* scattered sections of 42 U.S.C.A.).

108. *See id.* at § 115 (amending ADEA to provide for suit by aggrieved individual within 90 days of receipt of notice that EEOC has terminated proceedings).

109. The Act is usually depicted as so much the product of compromise as to be altogether ambiguous in its implications. *E.g.* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 924-25 (1993).

110. Pub. L. 102-166, *supra* note 107.

111. The conference committee report on the 1990 version of the bill that would become the 1991 Act observed the following concerning a provision identical in all pertinent respects to section 118:

> The Conferees emphasize . . . that the use of alternative dispute resolution mechanisms is intended to supplement not supplant, the remedies provided by Title VII. Thus, for example, the Conferees believe that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not pre-

Other parts of the Act, however, purport to be more decisive. Section 105 recedes from the *Wards Cove* description[112] of the order of proof in disparate impact suits. Notwithstanding ambiguities that leave unclear the precise degree to which the legislation reinstates the original format of the impact suit, it is evident that the Act codifies the external perspective of the action, its ultimate focus on "business necessity" as a defense framed in terms other than a simple reference to a defendant's own standard practice.[113] Thus, after passage of the 1991 Act, as was the case within the traditional Title VII jurisprudence, the disparate impact action appears as a poor candidate for arbitral processing.

Section 102 adds to Title VII in certain cases an authorization of compensatory and punitive damages, although limited in some respects, in the event that plaintiffs prove intentional discrimination; the same section confers a right to a jury trial in suits seeking compensatory or punitive damages. A jury trial right per se does not render a suit inappropriate for arbitral disposition.[114] Nor, obviously enough, does an allowance of compensation for injury, even noneconomic injury. Neither of necessity reveals a focus on the public dimensions of these suits. Punitive damage awards, by contrast, are quintessential means of signaling strong public commitments.[115] Particular statutory schemes may define the amount of awards in

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clude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in Alexander v. Gardner-Denver . . . . The Conferees do not intend this Section to be used to preclude rights and remedies that would otherwise be available.

S. CONF. REP. No. 2104, 101st Cong, 2nd sess., *reprinted in* CONG. REC. H8048, H8050 (daily ed. Sept. 26, 1990). In the 1991 debate in the House of Representatives, Representative Hyde invoked *Gilmer* as establishing that "there is no reason to disfavor the use of such [arbitral] forums," and stated that the statutory provision "encourages the use of . . . binding arbitration" in cases in which "the parties knowingly and voluntarily elect" such decision-making. *See* 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991); *see also* 137 CONG. REC. S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (identical remarks). But in the same debate, Representative Edwards echoed the views of the conference report of the preceding year, adding that "[n]o approval whatsoever is intended of the Supreme Court's recent [*Gilmer*] decision. . . ." 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards).

112. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656-61 (1989).

113. *See* Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 910-13 (1993). The 1991 Act's identification of less discriminatory alternatives as one (perhaps decisive) factor in judging liability given disparate impact is strong additional support (whatever the precise content of the LDA inquiry) for the proposition that the perspective the Act makes relevant in disparate impact cases is one which tests a firm's usual practices against an external standard. *See generally* Note, *The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation*, 106 HARV. L. REV. 1621 (1993). If Professor Belton's reading of the 1991 Act as codifying the BFOQ standard prevails, the external perspective would be especially apparent. *See* Belton, *supra* note 109, at 930-39; Automobile Workers v. Johnson Controls Inc., 499 U.S. 187 (1991).

114. *See* Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441 (9th Cir. 1994).

115. "It is a well-established principle of the common law, that . . . a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff." Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1852). Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991), holds that due process requires that punitive damages awards be made within a legal framework designed to assure that such awards are not "greater than reasonably necessary to punish and deter," *id.* at 1046; such "rational

advance, through a formula that, for example, doubles or triples compensatory damages. Such schemes do not make the process of enforcement itself a setting for gauging public concerns; the relevant judgments are already made, encoded in the liability rules as such, and as easily implemented therefore by an arbiter as by a judge and jury. But sections 102(b)(3)(A) - (D) set a sequence of ceilings for combinations of noneconomic damages and punitive damages, leaving full specification for case-by-case determination. A hard-to-answer question emerges: Is this space for individual calibrations of public concern large enough to mark arbitration as an inapposite process in cases in which plaintiffs seek punitive damages for Title VII violations?

Fortunately, it is not necessary to answer this question directly.[116] The Civil Rights Act of 1991 does not limit its review and revision of Title VII causes of action to confirmation of the structure of the impact suit and provision for the new punitive damages action; the Act also adjusts, and in the process seemingly recharacterizes the mixed-motive suit, a close cousin of the punitive damages action. We will ultimately see that it is this change, at first glance minor, that makes all the difference for purposes of assessing Title VII arbitration.

The Act revises the mixed-motive action in two ways. Section 107(a) requires a plaintiff to show that race, color, religion, sex, or national origin

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decisionmaking," *id.* at 1044, absent legislative limits on punitive damages might of necessity dictate scrutiny of the details of defendant's particular conduct—a "meaningful individualized assessment of appropriate deterrence and retribution," *id.*—but the touchstone remains "civil wrongdoing" and not simply the equities as between plaintiff and defendant, *id.*; *see id.* 1045. "A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power. . . ." Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2342 (1994) (Oregon rule drastically limiting appellate review of jury punitive damages awards violates due process); *see also* TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) (overlap of plurality and individual opinions indicating that grossly excessive punitive damages would violate due process).

116. Lower federal courts presently treat arbitration of punitive damages claims as simply another issue to be resolved by assessing the breadth of the arbitration agreement. *See, e.g.*, Kerr-McGee Refining Corp. v. M/T Triumph, 924 F.2d 467, 470 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991); Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512, 521 (2d Cir.) (Mahoney, J., dissenting in part) (collecting cases), *cert. denied*, 112 S. Ct. 380 (1991). Cases enforcing state law restrictions on punitive damages emphasize the consent of the parties to be governed by state law, *see, e.g.*, Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117, 122 (2d Cir. 1991), or (if agreements are silent) the artifact of diversity jurisdiction requirements obliging federal courts to set aside the Federal Arbitration Act, *see Fahnestock*, 935 F.2d at 518. In *Mitsubishi*, the Supreme Court rationalized this approach on the ground that punitive damages questions are principally questions of remedy, and therefore properly seen as within individual control (and thus contractual negotiation) even if public interests are also implicated. *See Mitsubishi*, 473 U.S. at 634-36. Read strongly, this argument would justify arbitration of all statutory claims, insofar as the purpose of all private litigation is always remedial in some sense. But if the argument is not pushed to this extreme, it may be understood as raising the question of the relationship of liability rules and remedial rules. In *Mitsubishi*, the inquiries with respect to liability were appropriate for arbitration; the only question was whether the remedy standing alone barred this conclusion. In other circumstances, if liability investigations were ill-suited for arbitration, it might follow that the relative priority of public and private dimensions with respect to remedy would shift. In yet other cases, if the status of liability rules was unclear, it might be that the details of remedial process could decide the arbitral question.

was "a motivating factor" for purposes of a challenged employer act, codifying Justice Brennan's formulation in *Price Waterhouse v. Hopkins*, and thus apparently receding from Justice O'Connor's "direct evidence" requirement stated in the same case.[117] More significantly, section 107(b) changes the effect of a showing by defendant that it "would have taken the same action in the absence of the impermissible motivating factor"; rather than defeating liability in toto, as *Hopkins* posited,[118] this showing now merely limits the relief available to plaintiffs. A court "may grant declaratory relief, injunctive relief . . . and attorney's fees and costs . . . directly attributable . . . to the pursuit of . . . [the] claim,"[119] but "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . ."[120]

For purposes of determining whether the 1991 Act affects the arbitrability of mixed-motive suits, it is useful initially to explore in some detail the nature of the residual declaratory/injunctive relief that section 107(b) authorizes.[121] Legislative history, while limited, indicates that the Act means to adopt the approach followed chiefly by the Eighth and Ninth Circuits of the United States Court of Appeals prior to the Supreme Court decision in *Hopkins*.[122] Unfortunately for present purposes, the cited courts of appeals opinions are not especially revealing—grounded most obviously in an analysis of Title VII statutory language that, while plausible, was

117. *Compare, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (Brennan, J.) (plurality opinion), *with e.g., id.* at 278 (O'Connor, J., concurring in judgment). Justice O'Connor's version presumably posed a more difficult task for plaintiffs; some courts, however, have used the two formulations interchangeably. *See, e.g.*, Burns v. Gadsden State Community College, 908 F.2d 1512, 1518 (11th Cir. 1990) ("plaintiff has presented direct evidence that her gender played a motivating part in the defendants' decision to refuse to hire her"). It is not clear that courts perceive the 1991 Act as rejecting the direct evidence test. *See* Note, *Despite the Smoke, There is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959, 970-78 (1994) (reviewing caselaw).

118. *Hopkins*, 490 U.S. at 244 & n.10 (Brennan, J.) (plurality opinion). Justice O'Connor explicitly agreed with Justice Brennan. *See id.* at 261 (O'Connor, J., concurring in the judgment). Justice White implicitly concurred. *See id.* at 258-61 (White, J., concurring in the judgment). The Supreme Court's conclusion in *Hopkins* paralleled the results reached in Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977), dealing with the significance of mixed motives for constitutional claims, and NLRB v. Transportation Management Corp., 462 U.S. 393, 401-02 (1983), addressing proof of unfair labor practices.

119. § 107(b)(3)(i), 42 U.S.C.A. § 2000e-5(g)(2)(B)(i) (West Supp. 1994).

120. *id.* at § (3)(ii), 42 U.S.C.A. § 2000e-5(g)(2)(B)(ii) (West Supp. 1994).

121. For present purposes, I treat declaratory and injunctive relief as interchangeable. *See generally* Samuels v. Mackell, 401 U.S. 66, 72-73 (1971).

122. *See* Testimony of William T. Coleman, Jr., Before the Senate Committee on Labor and Human Resources, February 23, 1990, *reprinted in* CONG. REC. S9352-54 & n.67 (July 10, 1990); *id.* at S9348 (Sen. Simon introducing testimony into record and characterizing Coleman as "[t]he most powerful witness"). Literally, of course, this legislative history refers to the 1990 bill ultimately vetoed by President Bush. Secretary Coleman's analysis, however, appears to be equally relevant in considering the similar language of the 1991 Act. *Compare* Civil Rights Act of 1990, H. CONF. REP. No. 856, 101st Cong, 2nd sess., § 5, *reprinted in* 136 CONG. REC. H9552 (daily ed. Oct. 12, 1990) *with* Pub. L. No. 102-166, § 107, 105 Stat. 1075-76 (Nov. 21, 1991).

hardly mandatory, as Justice Brennan's discussion and the opinions of other circuit courts showed.[123] We must proceed, therefore, somewhat speculatively. In a sense, it is as though the Act posits a separate action, permitting a court to enjoin a defendant simply upon a showing by plaintiff that "race, color, religion, sex, or national origin was a motivating factor" for a challenged employment practice. If the defendant "would have taken the same action in the absence of the impermissible motivating factor," what purpose does such a court order serve? Perhaps the plaintiff becomes a private attorney general.[124] Following the pattern of several other federal statutes,[125] the Civil Rights Act of 1991, it may be said, confers the right to seek injunctive relief not because plaintiff is injured in her or his individual capacity as a current, former, or would-be employee, but because the plaintiff, in effect representing the public at large, proclaims an interest in law enforcement per se.

This reading has the virtue of explaining why section 107(a)'s capacious reference to "any employment practice" seems to treat as interchangeable plaintiffs in very different circumstances—those who were never employed by defendant, those who are no longer employed, and those who remain employed but frustrated in seeking advancement.[126] The idea of a Title VII private attorney general, however, also poses difficulties. The

123. The most elaborate discussion favoring provision of the injunctive remedy occurred in Bibbs v. Block, 778 F.2d 1318, 1321-24 (8th Cir. 1985). Other cases seemingly treated the result as easily reached. *See, e.g.*, King v. Trans World Airlines, Inc., 738 F.2d 255, 259 (8th Cir. 1984); Ostroff v. Employment Exchange, Inc., 683 F.2d 302, 304 (9th Cir. 1982) (result stipulated by parties); Nanty v. Barrows Co., 660 F.2d 1327, 1333 (9th Cir. 1981). *See also* EEOC v. General Lines, Inc., 865 F.2d 1555, 1559-60 (10th Cir. 1989) (blurring approaches). *Bibbs* relies primarily on the statutory argument, but the opinion also cites prior decisions. *See* 778 F.2d at 1323. Some of these decisions, we will see subsequently, evoke considerations, largely ignored in later cases like *Bibbs*, that suggest a fuller account. *See* text *infra* at notes 166-193. For the Supreme Court's analysis rejecting *Bibbs et al.*, see *Hopkins*, 490 U.S. at 244-45 n.10. Court of appeals decisions anticipating *Hopkins* include, *e.g.*, Fields v. Clark University, 817 F.2d 931, 937 (1st Cir. 1987); Haskins v. United States Dept. of the Army, 808 F.2d 1192, 1197-98 (6th Cir.), *cert. denied*, 484 U.S. 815 (1987); McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659, 664 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988). The leading academic analysis supporting the *Bibbs* approach (and thus that of the 1991 Act) is Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982). Unfortunately for present purposes, Professor Brodin simply treats as given (e.g., in light of legislative history and court of appeals precedent) the proposition that discriminatory motive is per se violative of Title VII, *see id.* 317, 318 & nn. 105, 110, 17, and thus begs the question that *Hopkins* and the 1991 Act taken together open up.

124. The Supreme Court has used the "private attorney general" label to characterize Title VII plaintiffs in connection with questions of, e.g., attorneys fees, *see* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978), and access to administrative records, *see* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 602 (1981).

125. *See, e.g.*, Clean Water Act, 33 U.S.C.A. § 1365(a) (West 1986 & Supp. 1994); Clean Air Act, 42 U.S.C.A. § 7604 (West 1983 & Supp. 1994); Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6972 (West 1983 & Supp. 1994); Toxic Substances Control Act, 15 U.S.C.A. § 2619 (West 1982 & Supp. 1994).

126. But other segments of the statutory text send mixed signals. Section 107(a) refers to a mixed-motive action as being brought by "the complaining party," which is a shorthand term defined by section 104 to refer equally to the EEOC, the Attorney General, or individual litigants. Section 107(b)(3), how-

problem is not simply that the injunctive remedy is only available in cases in which plaintiffs establish that discrimination was "a motivating factor," and not in disparate treatment and disparate impact suits, within which conclusions about motive per se play no necessary part. The 1991 Act elsewhere singles out intentional discrimination as especially pernicious in section 102's provision for punitive damages. But why does such discrimination remain a remedial concern in cases in which the defendant's adverse treatment of plaintiff turns out to be justifiable on other grounds? It is as though the fact that the specific, individual plaintiff incurred no redressable loss is accidental, an irrelevance from the perspective of statutory policy. And yet, in cases in which it becomes apparent in the course of litigation that a plaintiff engaged in conduct plainly justifying termination, but utterly unrelated to the case at hand, courts hold that, at minimum, denial of injunctive relief is proper, and sometimes require termination of a Title VII suit in toto.[127] How are these cases different from those falling within section 107(b)(3)?

D. *The Article III Case or Controversy Requirement as a Starting Point for Statutory Interpretation*

The private attorney general characterization of actions ending in exclusively injunctive relief also invites justiciability worries.[128] In *Gwaltney of Smithfield v. Chesapeake Bay Foundation*,[129] the Supreme Court acknowledged Article III considerations in holding that, as a matter of statutory interpretation, it was sufficient, but also maybe necessary that, at the pleading stage, a Clean Water Act citizen suit allege a continuing injury as a precondition for injunctive relief.[130] More emphatically, the Court stated

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ever, speaks of suit by "an individual," perhaps implying that the "individual" suit has a separate (e.g., injury-correcting) purpose.

127. *E.g.*, Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993) (terminating lawsuit); Wallace v. Dunn Const. Co., 968 F.2d 1174, 1181-82 (11th Cir. 1992) (denying injunctive relief but permitting some backpay); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708-09 (10th Cir. 1988) (terminating lawsuit); *see* Cheryl Krause Zemdman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175 (1993) (collecting cases).

128. *Compare Elrod*, 939 F.2d at 1469 & n.2 (issue is existence of redressable injury) *with* Tyler v. Bethlehem Steel Corp., 958 F.2d 1177, 1182 (2d Cir. 1982) ("there may be case-and-controversy difficulties with the remedial portion of this act which allows a plaintiff without a personal stake in litigation to act as a private attorney general"). *See also* 136 CONG. REC. S15,406 (daily ed. Oct. 16, 1990) (remarks of Sen. Hatch) (calling provision for injunctive relief in predecessor 1990 bill "a needless spur to litigation" inconsistent with notion that legal duties are owed to "injured parties for injuries caused by . . . wrongs").

129. 484 U.S. 49 (1987).

130. *See id.* at 65-67. Defendant could test the factual basis for plaintiff's allegations via summary judgment motion, *id.* at 66, or by seeking to have the case dismissed as moot, *id.* at 66-67. Thus, it was clear from the Court's opinion that the *allegation* by itself was not the point, but the actual existence of a continuing injury. *See also id.* 70-71 (Scalia, J. concurring) (noting Article III obligations).

in *Lujan v. Defenders of Wildlife*[131] that congressional recognition of an interest in law enforcement does not by itself justify an inference of injury sufficient for case or controversy purposes.[132] For Article III, thus, the "private attorney general" label becomes precisely the opposite of helpful.

It is possible, of course, to make too much of *Lujan*. Justice Scalia's majority opinion stressed that the case at hand raised peculiar separation of powers concerns because plaintiffs claimed the capacity to enforce against federal officials an interpretation of statutes the officials were charged with enforcing, despite the fact that the officials themselves had earlier rejected the plaintiffs' statutory interpretation—the Take Care Clause of Article II seemingly reinforced Article III concerns, justifying especially close scrutiny of the congressional grant of standing.[133] The Supreme Court might afford greater latitude, Scalia seemed to suggest, if litigation implicates only the dealings of private parties.[134] Title VII rights are enforceable both through private suit and EEOC action. In any event, *Lujan* proceeds on the assumption that Article III requirements define a model within the terms of which all congressionally conferred causes of action must be expressible. However loosely or innovatively, federal actions should identify a present or imminent judicially redressable injury specific enough to statutorily identified plaintiffs to exclude the public at large.[135]

The section 107(b)(3) injunction, therefore, must be conceived as a response to an injury more peculiar or individual to the plaintiffs bringing suit. Presumably, this injury would be somehow an outgrowth of the circumstances that provoked plaintiffs to initiate litigation in the first place, seeking the full range of compensatory remedies otherwise available if defendants had not shown that "the same action" would have been taken "in the absence of the impermissible motivating factor." Because it is injunctive relief that plaintiffs are left seeking, we also know that the injury, whatever it is, must be either continuing or at risk of recurring. Injunctive relief is prospective.

Against this backdrop, it is useful to revisit the characterization of the mixed-motive suit that I outlined and put to use previously. Evidence that discriminatory motives prompted adverse action puts in question the structure of the firm. The considerations that the employer says inform decision-

131. 112 S. Ct. 2130 (1992).

132. *See id.* at 2142-46.

133. *See id.* at 2145. For criticisms of Justice Scalia's use of the Take Care Clause, see Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 211-14 (1992) [hereinafter cited as Sunstein]; *The Supreme Court, 1991 Term*, 106 HARV. L. REV. 163, 314-18 (1992). *Lujan* is also discussed at length by several contributors to the *Twenty-Fourth Annual Administrative Law Issue*, 42 DUKE L.J. 1141-42 (1993).

134. "[I]t is clear that in suits against the government, at least, the concrete injury requirement must remain." *Lujan*, 112 S. Ct. at 2146. *But see* Sunstein, *supra* note 132, at 231-32.

135. *Lujan*, 112 S. Ct. at 2145-46; *See, e.g.* Fair Employ. Council v. BMC Marketing Corp., 28 F.3d 1268 (D.C. Cir. 1994).

making within the enterprise, it appears, are either not accepted by all participants as always governing or, as articulated, leave space for unregulated exercises of discretion. Success in showing that the same action would have been taken regardless of any discrimination permitted the employer to claim, within the *Hopkins* formulation, that the litigating employee had failed to demonstrate that the working language of the firm was indeed deficient. In the absence of a clear conclusion as to the employer's motivation, plaintiff lost. But the fact that plaintiff was able to point to "direct evidence" of discriminatory animus remained. The congressional rereading of *Hopkins* may be understood as recognizing that evidence that individuals are in a position to act on the basis of discriminatory animus is by itself a cause for concern. Because of the employer's showing, plaintiff is unable to prove that the circumstances giving rise to the case warrant compensatory relief. Those circumstances may nonetheless suggest that the employer's work rules by themselves are not adequate to the task of deterring discrimination-minded individuals. Injunctive relief is in order to prevent repetition.[136]

This account raises several questions. Initially, we might doubt the plausibility of the conclusion that there is a real risk that discriminatory acts will recur; some mixed-motive suits may call attention to repeated past incidents, but if injunctive relief is not to be simply a peripheral possibility, we would expect it to be allowable even in cases in which plaintiffs prove the statutory minimum of only one past act of discrimination. Is one past act enough? EEOC pattern or practice suits are instructive. In these cases, courts grant injunctive relief "even after apparent discontinuance of unlawful practices."[137] "[A] court cannot abdicate to defendant's good faith its duty of ensuring removal of all vestiges of discrimination."[138] The risk of recurrence, however, must be "more than the mere possibility."[139] As the "pattern or practice" formula itself implies, courts usually require more than a single past incident as a basis for entering an injunction.[140] Importantly, however, proof requirements lessen in cases in which a defendant's practice

136. This analysis suggests that the after-acquired evidence cases, *see supra* note 127, might be usefully subdivided. In cases in which plaintiffs can show an impermissible "motivating factor," the existence of an additional proper reason for employer action—whenever discovered—is relevant under the 1991 Act to questions of relief, not liability: whether or not the employer "would have taken the same action in the absence of the impermissible motivating factor." Disparate treatment suits would seem to make after-acquired evidence relevant to liability. For employers, the new information provides a business reason for the action taken; the burden then shifts to plaintiffs to establish that the new information would not ordinarily have resulted in the adverse action actually taken (perhaps because it did not in other cases or perhaps because such information was not ordinarily discovered), thus raising the question of pretext. *See also supra* note 106 (discussing theory of disparate treatment suit).

137. U.S. v. Gregory, 871 F.2d 1239, 1246 (4th Cir. 1989).

138. Barnett v. W.T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975).

139. EEOC v. Sheet Metal Workers Local 122, 463 F. Supp. 388, 431 (D. Md. 1978) (*quoting* Hirsch v. Green, 382 F. Supp. 187, 192 (D. Md. 1974)).

140. *See* U.S. v. Lansdowne Swim Club, 713 F. Supp. 785, 805-07 (E.D. Pa. 1989) (public accommodations action).

is open, even if not consistent.[141] In the section 107(b)(3) setting, if a court concludes that an individual within a firm acted on the basis of discriminatory animus, we may ask whether the court is, of necessity, concluding that this animus is open and conspicuous — is expressed somehow in a way that is understandable to other individuals within the firm. How otherwise would the court know about the individual's motivation? Even if proof is circumstantial, and perhaps therefore off-limits under the former "direct evidence" locution, if it persuades a court, isn't it likely to be evidence that the "real basis" of the adverse action was advertised within the firm? Even if affirmative answers to these questions are not inevitable in the abstract, were plaintiff's burden understood to be the equivalent of a requirement to show that challenged acts are openly and conspicuously discriminatory from at least some perspective within the firm a basis for moving from past act to future risk would be at hand.[142] There would be a structural cause for concern: evidence not simply of individual motives, but evidence instead of an ability of individuals, notwithstanding firm efforts to focus attention along other lines, to act on discriminatory animus in ways apparent enough within the firm to suggest that the possibility of acts so-motivated is real.

Is this formulation an adequate response to the case or controversy concern? Interestingly, in his concurring opinion in *Gwaltney*, Justice Scalia suggested that a showing of past violation, unaccompanied by reform, might be a sufficient proof of continuing injury[143]—a showing not far different from the demonstration that the discussion above depicts as implicit in plaintiff's proof in a mixed-motive case. But what exactly is the injury? If it is the future adverse action that the past discriminatory act suggests is possible within the firm, it may seem necessary to come to some conclusion about likelihoods. The population of a firm, of course, is several orders of magnitude less than a large city, for example, and thus Supreme Court opinions like those in *Rizzo v. Goode*[144] and *Los Angeles v. Lyons*,[145]

141. *See* U.S. v. Philadelphia Bd. of Educ., 911 F.2d 882, 892 (3rd Cir. 1990); *see also* King v. General Elec. Co., 960 F.2d 617, 624 (7th Cir. 1992) (relating need for proof of multiple individual instances to use of statistical proof and treating as touchstone "significant evidence of the alleged routine" or "substantial proof of the practice").

142. *Cf.* SEC v. Pros Intern., Inc., 994 F.2d 767, 769 (10th Cir. 1993) (knowing single violation of securities laws may be sufficient to justify injunction) (dictum); SEC v. Steadman, 967 F.2d 636, 648 (D.C. Cir. 1992) ("flagrant or deliberate" past violations as predicate for injunction against violation of securities law in the future). A formulation like that advanced in the text has the advantage of substituting a model of inquiry rooted in substantive statutory concerns for the free-floating distinctions based on types of evidence (e.g., direct, circumstantial, circumstantial-plus) courts frequently use in deciding mixed-motives cases. *See* Note, *supra* note 126, at 980-81 (criticizing misuse of evidentiary terminology).

143. "When a company has violated an effluent standard or limitation, it remains . . . 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring).

144. 423 U.S. 362 (1976).

145. 461 U.S. 95 (1983).

treating as de minimis the chance of repeated acts of police brutality directed against particular individuals, are not precisely on point. But still, even allowing for a relatively small potential target population, the risk of repetition might be hard to evaluate.

If the relevant injury is the creation of or failure to abate the risk itself, however, actual injury is already at hand, even if too difficult to measure for purposes of compensatory relief and therefore forecasting becomes unnecessary. Notably, several federal statutes treat various risks, standing alone, as triggers for injunctive relief.[146] The idea that creation of risk may be wrongful in and of itself is a live question in contemporary tort law.[147] The hostile environment cases supply Title VII precedent, albeit extreme.[148] And yet, because the definition of injury in terms of risk per se, if generally available, would empty almost all content from the Article III requirement of present injury, we may suspect, especially after *Lujan*, that resort to this approach to establishing a case or controversy would provoke considerable judicial skepticism, and thus require some special sign of aptness.[149]

There is, however, a second line of Article III decisions that may be relevant here. Mootness inquiries also sometimes bring together the themes of repetition and risk. "[V]oluntary cessation of allegedly illegal conduct," the Supreme Court has said, "does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot."[150] A case may nonetheless be judged moot "if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' "[151]

These formulae define the surface of a surprisingly rich jurisprudence. The starting point sounds in abuse of process: a concern that, since federal courts adjudicate only real controversies, a party aware of this constitutional restriction might unilaterally choose to end litigation prematurely, short of a final decision on the merits, for the moment ceasing challenged acts in order to remain free afterwards to resume or repeat the conduct at issue. To avoid this manipulation of Article III requirements, therefore, the courts treat announcements of an end to challenged activity as occasions for scrutiny, investigating whether the dispute underlying the litigation is really over. But "really over" is not an easy concept. The relevant inquiry may address the persuasiveness of a party's claim to have broken with the past.

146. *See, e.g.*, 15 U.S.C.A. § 2604(f) (West 1982 & Supp. 1994), 42 U.S.C.A. § 300i(a) (West 1991 & Supp. 1994).

147. *See, e.g.*, William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1713 (1992); Glen O. Robinson, *Risk, Causation, and Harm*, *in* LIABILITY AND RESPONSIBILITY 317-47 (R. G. Frey & C. M. Morris eds., 1991).

148. Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

149. *But see* Harris, 114 S. Ct. at 372 (Scalia, J., concurring) (noting that hostile environment standard is not "very clear" and that it is "the test of whether legal harm has been suffered" but seeing no basis for "limitation in the language of the statute").

150. United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

151. *Id.* at 633 (*quoting* United States v. Aluminum Co. of Am., 148 F.2d 416, 448 (2d Cir. 1945)).

Thus, dissolution of an allegedly illegal association did not render a case moot where defendants insisted that their combination had been "perfectly proper, legitimate, and salutary," thus suggesting a motivation to try again.[152] Often enough, though, the key question is not motive per se but opportunity. Some feature of a given dispute, persisting even after a party asserts cessation, that the party cannot or has not changed, may bias circumstances in a way pointing clearly to a likely renewal of hostilities. For example, the continuing mental illness of a person subject to commitment suggests a sufficient likelihood that officials might in the future again administer psychotropic drugs, notwithstanding the conclusion of the course of treatment provoking litigation.[153] Or the claim of a business that it had no choice other than to join a cartel if it were to trade in Europe, raises the possibility that, notwithstanding the combination's wartime irrelevance, a similar pressure might reassert itself in the future.[154] Frequently, legal forms constituting, organizing, or otherwise making possible past and perhaps future action define pertinent incentive structures. Thus, a complex pattern of administrative regulations, because it excluded only some, but not all, transactions of a particular type, seemed to the Supreme Court to deny conclusiveness to the claim that economic rationality now cut against resumption of contested dealings.[155] Sometimes it is the transience or permanence of a legal obstacle that matters. Official compliance with lower court rulings in the case at hand, for example, does not moot higher review inasmuch as officials would presumably reverse their course following an ultimately favorable disposition.[156]

This mootness analysis reverses the bias of cases like *Lyons*.[157] Judicial skepticism now visits the claim of cessation rather than the allegation of likely recurrence. What justifies the shift? It is not enough to note that, in cases in which mootness issues arise, a justiciable controversy existed at an earlier stage in the litigation. Article III fixes jurisdictional requirements equally obligatory at all stages of a suit; once satisfied, constitutional requirements do not thereafter disappear or diminish.[158] Nor is it sufficient to

152. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 308 (1897).

153. Washington v. Harper, 494 U.S. 210, 218-219 (1990).

154. *Aluminum Co. of Am.*, 148 F.2d at 448; *see also* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 577-78 (1987) (fact that mining company has ceased current operations does not moot case since company regards its "investments and activities" to date as dictating "continuing operation").

155. *See* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968).

156. *See, e.g.*, Norfolk & Western Ry. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156, 1163 n.3 (1991); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)

157. *See* Richard H. Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 24-30 (1984). Mootness analysis may also be at odds with *Lujan*. *See* Christian Knights of KKK v. District of Columbia, 972 F.2d 365, 371 (D.C. Cir. 1992); Marshall J. Breger, *Defending Defenders: Remarks on* Nichol *and* Pierce, 42 DUKE L.J. 1202, 1215 (1993).

158. *Lujan*, 112 S. Ct. at 2136.

point to the risk of spurious acquiescence. Various levels of abuse of process investigation are possible; notably, in mootness cases courts often move well past a preoccupation with obvious indicators of duplicity, focusing not only on a defendant's more or less immediate objectives, but also on possibilities inherent in a situation regardless of the defendant's current aims. It is not the existence of concern about strategic behavior, but this unusually elaborate investigation in particular, that requires explanation.

The key, I think, lies in recognizing that standing and mootness inquiries are in an important respect genuinely distinct. Judges investigate standing because of doubts about the coherence of an alleged case or controversy. Plaintiffs, it seems, raise legal questions but present no sufficiently organizing factual backdrop. Scrutiny thus invokes notions like interest, imminence, causation, and redressability in order to test the claim that a dispute exists possessing a form amenable to judicial resolution.[159] Since the standing issue arises because courts are unsure of their jurisdiction (the necessary outlines are not clear), judges understandably put the burden of proof on plaintiffs, the parties seeking judicial intervention. Judges investigate mootness because of suspicions of transience. The outlines of a dispute are not in question, but rather the fixity of the outlines.[160] Because jurisdiction is given at the time a mootness issue arises (the outlines of the dispute are clear), judges understandably put the burden of proof on whichever parties would now call jurisdiction into question.[161]

I do not mean to suggest, however, that standing and mootness are entirely independent ideas. The mootness analysis of fixity supposes injurious circumstances of some sort; injury implicitly assumes some limit on transience. In this sense, there is a kind of co-dependency. Still, depending upon circumstances, one or the other notion takes priority, seems to illumi-

159. A view of standing law understood in terms of a judicial need for a coherent dispute emerges, almost as an aside, in two of Louis Jaffe's brilliant essays: "[T]he court should not intervene unless it can see the law as reasonably clear." Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1305 (1961) (emphasis deleted); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 271 (1961) ("If the issue is not well focused, if its significance and weight are closely related to the situation of absent persons, the court may properly abstain"). This perspective is greatly elaborated by my colleague Steven Winter in his well-known article, in ways suggesting both the inevitability of *some* organizing prototype and the ready availability of several such alternative models. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). Professors Jaffe and Winter do not endorse the Supreme Court's current formulations of standing rules—but these formulations, among others, fit within their general approach.

160. Henry Monaghan's famous formula thus remains relevant: "Mootness is . . . the doctrine of standing set in a time frame . . . ." Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973). I should note, however, that the argument here, set as it is post-*Lujan*, supposes that the specific contents of standing and mootness doctrines and thus the nature of their interactions, are quite different from the contents and relationships Monaghan took as given in 1973.

161. *E.g.*, Cardinal Chem. Co. v. Morton Int'l, Inc., 113 S. Ct. 1967, 1975-76 (1993); *cf.* Renne v. Geary, 111 S. Ct. 2331, 2338-40 (1991) (if case had become moot after suit, it would have been judged capable of repetition but because case becomes moot before suit was brought case declared to be not ripe because past acts provided no basis for judging future dispute).

nate more elaborately the difficulty at the heart of a particular lawsuit. And even though mootness and standing investigations at bottom take each other as given, whichever inquiry takes precedence in the particular case also possesses a relative autonomy—it is plainly through the one that we glimpse the other.[162]

After *Lujan*, of course, these propositions are capable of another, albeit equivalent, formulation. Mootness and standing concerns also describe matters for congressional attention, at least in cases where statutory causes of action are not grounded in the constitution; more precisely, we might describe Article III requirements in a positive sense as defining justifications for legislative recognition of causes of action.[163] A congressional en-

162. For example, in Associated General Contractors v. Jacksonville, 113 S. Ct. 2297 (1993), the Supreme Court held that repeal of a minority set-aside ordinance and adoption of a new set-aside ordinance with significantly different terms did not moot plaintiff's reverse discrimination equal protection challenge, *see id.* 2301; the Court also held that, even though the plaintiff association of contractors could not establish that, absent a set-aside ordinance, one or more of its members would in fact receive city construction contracts, the plaintiff nonetheless possessed standing to sue insofar as such an ordinance created obstacles to plaintiff's members obtaining such contracts, *see id.* 2303. As Justice O'Connor noted in dissent, the mootness holding in *Associated General Contractors* is troubling to the extent that, as the majority opinion of Justice Thomas declared, *see id.* at 2301, it is based on an application of the voluntary cessation doctrine—given that repeal was followed immediately by adoption of a substantially changed ordinance, it is difficult to characterize the legislative action as strategic behavior intended only to terminate litigation pending resumption of challenged conduct absent an added presumption of legislative bad faith, *see id.* 2309 (O'Connor, J., dissenting). But if the case is first read as a standing case, the majority's conclusion that standing follows from the mere existence of obstacles imposed on plaintiff's members not also imposed on other bidders may be seen as also resolving the mootness matter without recourse to the voluntary cessation notion. Differences in detail in the two ordinances do not matter so long as obstacles affecting only plaintiff's membership remain; given the general terms the Court uses in characterizing the objection plaintiff raises to the ordinances and therefore the relevance of the ordinances to the interests of plaintiff's members, the two ordinances are equivalent at least insofar as the standing issue is concerned—the only issue before the Supreme Court because the new ordinance was adopted after the Court granted certiorari, *see id.* at 2300, and therefore the only question that might be moot.

163. The notion that standing law in particular is concerned with the recognition or nonrecognition of causes of action is not new. *See, e.g.*, David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Lee H. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425 (1974). There is also little novelty in the conclusion that the criteria the Supreme Court currently uses in analyzing standing may be relevant in evaluating causes of action. *See, e.g.*, William H. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 272-76 (1988); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1462-69 (1988). It is sometimes assumed, however, that the cause of action analysis of standing is inconsistent with recognition of an Article III limit on congressional conferral of standing—at least in cases in which Congress is not acting to recognize a right of action vindicating constitutional claims. But even in these so-called statutory cases, Congress must act on the basis of some sense of whether or not a particular matter is amenable to litigation and thus judicial investigation and resolution. We may think that if Congress is to act constitutionally in conferring standing it must take cognizance of all relevant constitutional texts—at minimum, both its own subject-matter jurisdiction as defined by Article I and the Article III jurisdiction of the courts to whom it would delegate responsibility. In other words, Congress becomes obliged to act on the basis of some identifiable theory of both legislative power, *see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-32 (1937); United States v. DeWitt, 76 U.S. (9 Wall) 41, 44-45 (1869), and judicial power, *see* Muskrat v. United States, 219 U.S. 346 (1911). On this view, *Lujan* is an easy case, in which Congress refused to adopt any view of Article III whatsoever. If so, it becomes possible to accept the idea of a constitutional requirement that Congress address Article III without necessarily

actment, we suppose, is a response to circumstances within which lasting or recurring injury to some person occurs, of a sort which might be plausibly minimized or at least redressed by changes in conduct or payments of compensation by other persons.[164] A particular statutory action, it follows, may evidence an emphasis on one or more of the several starting points of justiciability analysis, depending upon which features of the circumstances provoking legislation are seen to be most worrisome; the other Article III elements figure in the background.[165]

E. The Significance of the Mixed-Motive Cause of Action

We may now usefully revisit section 107(b)(3) of the Civil Rights Act of 1991. The statutory language authorizing injunctive relief in the absence of immediately compensable injury, I noted previously, traces to one of the several approaches to the mixed-motive action that the various circuits of the United States court of appeals developed prior to the Supreme Court's temporarily clarifying ruling in *Hopkins*.[166] The cases developing this particular approach are therefore an equivalent of legislative history. As I also indicated earlier, the last cases in the sequence are rather opaque, relying either on glosses of statutory language or conclusory assertions.[167] But earlier cases, revealed in the citation lines, disclose a great deal.[168]

The first of these cases is *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*.[169] The defendant hospital, hitherto conspicuous in its practice of denying staff privileges to black physicians, suddenly offered staff membership to one of the plaintiffs during the pendency of the appeal, and argued that the case was now moot since the plaintiff accepted

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adopting in detail the Supreme Court's current view of standing, which remains controversial from a constitutional perspective. *See* Sunstein, *supra* note 133, at 226-35. For constitutional criticism of the Supreme Court's approach, see, *e.g.*, Fletcher, *supra*, at 231-34 (injury in fact requirement as substantive due process).

164. Professor Fletcher makes the point exactly, albeit in the course of arguing that standing ought not to be a separate constitutional concern from the perspective of the judiciary:

> I am not suggesting that the nature and degree of a person's injury should be irrelevant to a determination of whether that person should have a cause of action to protect the asserted right. Quite the contrary, for the nature and degree of injury are critical issues in deciding whether to provide legal protection. . . . [I]t must be seen as part of the question of the nature and scope of the substantive legal right on which plaintiff relies.

Fletcher, *supra* note 163, at 232-33; *see also id.* 242 (causation and redressability as questions for legislature).

165. This use of constitutional considerations to frame statutory elaboration differs from the familiar method of reading statutes to avoid constitutional difficulties insofar as the approach outlined in text does not treat the constitutional criteria as descriptions of hazards to be avoided, but in the first instance anyway, as a narrative and normative resource, as a language available for justifying and understanding legislative action. *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 211-12 (1824).

166. *See* text accompanying *supra* note 122.

167. *See* text accompanying *supra* note 123.

168. This line of cases formally becomes part of the pre-*Hopkins* case law per se chiefly through citation in Nanty v. Barrows, 660 F.2d 327 (9th Cir. 1981), or through citation in cases cited in *Nanty*. *Nanty* itself is treated as the point of departure in the cases that follow.

169. 375 F.2d 648 (4th Cir. 1967).

the offer. The Fourth Circuit panel hearing the case rejected the argument. The court, after initially noting that other plaintiffs had not received and accepted similar offers, proceeded to emphasize several points:[170] The case was a class action;[171] the "last minute change of heart" was "suspect, to say the least";[172] the defendant's "persistent refusals" to open its facilities to black physicians, its "continuing failure" to address the applications of the other black doctors, and "the absence of any further action to remove segregation bars," in any event justified injunctive relief.[173]

Versions of these three points recur in other early cases. *Jenkins v. United Gas Corp.*[174] involved a promotion offered and accepted within a few weeks of the filing of suit, evidently before certification of a plaintiff class. The Fifth Circuit saw no mootness bar, in part because the statutory action "is perforce a sort of class action for fellow employees similarly situated" given "the role of ostensibly private litigation in effectuating the congressional policies";[175] in part because "in this David-Goliath confrontation economic pressures" raise the possibility that settling in the face of litigation might be "equivocal in purpose, motive and permanence," and thus no "protection against a repetition of such conduct in the future."[176] Changes in employer practices, however laudable, again failed to moot the class action in *Rowe v. General Motors Corp.*,[177] an opinion notable throughout for its insistence that "any employment practices which operate to prejudice minority employees must be eliminated and their consequences eradicated,"[178] and its suspicion in particular of ostensibly neutral employer practices permitting racial discrimination to be "covertly concealed and, for that matter, not really known to management."[179] *Johnson v. Goodyear Tire & Rubber Co.*[180] and *Gamble v. Birmingham Southern Railroad Co.*[181] made the same points, even more than *Rowe*, largely setting aside mootness or class action analysis per se, restating the basic propositions in statutory right/remedy terms.[182] *James v. Stockham Valves & Fittings Co.*[183] reduced analysis to formula, instructing the district court hearing the

170. *See id.* at 657-58.

171. *Id.* at 657.

172. *Id.* at 658 (*citing, e.g.*, United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953); United States v. Oregon State Medical Soc., 343 U.S. 326, 333 (1952)).

173. 375 F.2d at 658; *see also id.* at 658-59 (HEW certificate of compliance is "no assurance of actual compliance").

174. 400 F.2d 28 (5th Cir. 1968).

175. *Id.* at 32, 33.

176. *Id.* at 33.

177. 457 F.2d 348 (5th Cir. 1972); *see id.* at 359.

178. *Id.* at 354.

179. *Id.* at 359.

180. 491 F.2d 1364 (5th Cir. 1974).

181. 514 F.2d 678 (5th Cir. 1975).

182. *See id.* at 682-83; *Johnson*, 491 F.2d at 1376-77 & n.36.

183. 559 F.2d 310 (5th Cir. 1977).

case at hand that, absent "evidence that there is no reasonable probability of further noncompliance," a "broad injunction" should issue.[184]

A sequence of government initiated pattern or practice suits constituted a second *Cypress* branch. In these cases, new union or employer management teams came to power during the course of litigation, instituted reforms, and argued against the necessity of injunctive relief. In *United States v. Hayes International Corp.*,[185] a Fifth Circuit panel closely scrutinized reforms instituted by a new collective bargaining agreement, concluding that they amounted to "only a partial correction of past illegal actions."[186] Ruling that statutory concerns supplanted traditional equity criteria,[187] the court held that "in order to insure the full enjoyment of the rights protected by Title VII . . . affirmative and mandatory preliminary relief is required."[188] *United States v. Electrical Workers Local No. 38*[189] did not find gaps, as such, in the remedial efforts of new union leadership—only that "[t]he record of compliance is very brief" and "written under the impact of this litigation."[190] An injunction was again in order:[191]

> Assuming . . . that the new leadership is in utter good faith, it has no mean task ahead in eliminating ingrained discriminatory practices of past decades. In many respects a more specific court order, plus retention of jurisdiction, might serve to support the stated objectives of the new administration of Local 38.

EEOC v. New York Times Broadcasting Service[192] codified this analysis: if "discriminatory . . . practices were employed by the defendant, at least as of the time a complaint was brought before the EEOC, plaintiff is entitled to injunctive relief prohibiting this conduct"; "apparent good faith efforts to eliminate . . . discriminatory practices" do not moot the "right to relief" but merely affect the scope of the injunction.[193]

Against the backdrop of these cases, four conclusions concerning section 107(b)(3) stand out:

First, the statutory injunctive action, we can now see, plainly harkens back to an earlier era in Title VII jurisprudence, before the Supreme Court began in *Burdine* its effort to separate and closely define the various Title VII causes of action. Equally plainly, the cases that would become the antecedents of the 107(b)(3) action are not marginal technical exercises, but part and parcel of the central project of the period—the management of the

184. *Id.* at 355. In this case also, the point is treated as one of statutory policy, not mootness or class action law. *See id.* 354-55.

185. 415 F.2d 1038 (5th Cir. 1969).

186. *Id.* at 1044; *see id.* at 1043-44.

187. *Id.* at 1045.

188. *Id.*

189. 428 F.2d 144 (6th Cir. 1970).

190. *Id.* at 151.

191. *Id.*

192. 542 F.2d 356 (6th Cir. 1976).

193. *Id.* at 361.

transition away from overt workplace segregation. These cases reveal considerable variety: not just individual suits, but class actions; not just private actions, but EEOC pattern or practice litigation. More importantly, this early injunctive litigation displays an approach to Title VII that does not draw the line between right and remedy as sharply as it is often drawn today. In the cases arising against the backdrop of express segregation, there was, for all practical purposes, no question but remedy. The issue was not whether change would occur, but what form the change would take. Perhaps as a result, courts (most famously, the Fifth Circuit) evidenced an awareness that their decrees effectively replaced business as usual, that judicial process was now the source of workrules, and that the design and implementation of these workrules must take into account that their source is alien to the workplace, and the resulting possibility of resistance and rejection.

Second, the appearance and transformation of mootness analysis in the early cases is precisely illustrative of the use of Article III case or controversy law as a starting point for elaborating the concerns justifying and organizing a particular cause of action. The justiciability inquiry, beginning with a suspicion of last minute conversions, quickly comes to extend beyond a review of defendant's past conduct, incorporating as well an awareness of structural dimensions of discrimination, in particular the opportunities that certain modes of workplace organization may create for biased individuals. The mootness discussions thus interweave two concerns—manipulative behavior within the litigation context itself and the survival of systems of discrimination. Long-term segregation makes courts suspicious of sudden conversions; indications of litigation game-playing reinforces the sense that real reform will not be easy. Mootness investigations accordingly merge with remedial judgments, ending up rephrased as a constituent part of a substantive statutory analysis, ultimately relevant in cases in which mootness per se is not directly in issue.[194]

From the judicial perspective, we can now see, section 107(b)(3) properly addresses Article III concerns. The injuries that are the ultimate target of the legislative response are classically personal—at the extreme, dismissal or failure to promote or hire; short of that, the full range of consequences for individuals who bear the brunt of workplace discrimination. Evanescence is also not a pertinent worry. The action originates in an awareness of spaces that workplace rules and behavior patterns sometimes define, spaces that leave room for action by discriminatorily motivated indi-

194. Later cases—the court of appeals decisions just prior to *Hopkins*—in effect sharpen and split out the concerns interacting in the mootness cases. Some see manipulation as key and ultimately assimilate the mixed-motive and disparate treatment actions. Others see structure as crucial. The latter line become the cases prefiguring section 107.

viduals.[195] It tests, by gauging the obviousness of discriminatory motives, whether such spaces exist in particular cases. The mixed-motive injunctive action, in other words, keys its remedy to a very specific and concrete demonstration by plaintiff: proof that an employer's organizational structure clearly leaves room for purposefully discriminatory acts, proof validated through consideration of plaintiff's own situation. The cause of action, thus, does not simply suppose the possibility of a risk of recurrence but shapes an inquiry that puts the matter in question.[196] This is the stamp put on the action by its origin, in part, in the early Title VII mootness cases.[197] Possible disagreement with Congress about whether section 107(b)(3) is too rough and ready in this regard does not rise to the constitutional level: Congress has plainly acted within the Article III framework—the statutory action possesses the shape of an Article III cause.[198]

In this setting at least, deference to a congressional identification of imminent or present injury for Article III purposes is not much different from acknowledgement of congressional power to redefine traditional equi-

195. *Cf.* Associated General Contractors v. Jacksonville, 113 S. Ct. 2297, 2301-2304 (1993) (contractors have standing to challenge minority set-aside program, even though contractors cannot show that absent program they would be chosen by city, given obstacles program creates for nonminority contractors only); *see also* Thomas v. Union Carbide Co., 473 U.S. 568, 581 (1985) (uncertainty occasioned by doubts about validity of statutorily mandated arbitration procedures justifies challenge to procedures notwithstanding ripeness objection).

196. *Cf.* Helling v. McKinney, 113 S. Ct. 2475 (1993) (Eighth Amendment supports cause of action for prisoners protesting risk of future illness insofar as usual criteria for identifying cruel and unusual punishment provide basis for identifying actionable risk).

197. *Cf.* SEC v. Steadman, 967 F.2d 636, 648 (D.C. Cir. 1992) (quoting *W.T. Grant Co.* in course of holding that "flagrant or deliberate" past violations justify injunction against future violations of securities laws).

198. Remedially, the section 107(b)(3) injunction plainly is not a nullity: the decree "affects the behavior of the defendant towards the plaintiff" and thus represents "a proper judicial resolution of a 'case or controversy' rather than an advisory opinion," Hewitt v. Helms, 482 U.S. 755, 761 (1987) (emphasis omitted), insofar as defendant comes under an obligation, on pain of contempt in case of recurrence, to do something, to change the employment setting in some way, in order to reduce the chance of repetition of the conduct triggering plaintiff's suit. *See also* Texas Teachers Ass'n v. Garland School Dist., 489 U.S. 782, 792 (1989) (attorneys' fees in § 1983 suit turn on whether plaintiff is "able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant"). Ruffin v. Great Dane Trailers, 969 F.2d 989 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1257 (1993), supplies an especially apt illustration. Plaintiff alleged the existence of "a racially hostile work environment," *id.* at 991, and challenged as well specific promotion, job assignment, and disciplinary decisions, *see id.* 990-91. The trial court concluded that business reasons supported these latter decisions, denying plaintiff's claim to compensatory relief, but found a hostile work environment to indeed exist, issuing an injunction ordering the employer to "take active steps" to correct the situation, *see id.* 991. The Eleventh Circuit panel reversed the trial court's refusal to grant attorney fees:

> By virtue of the court's grant of injunctive relief, Great Dane is now under a legal obligation to correct the racist behavior at its jobsite. Accordingly, Ruffin may now protect his rights through a civil contempt proceeding. . . . Given the alteration of Ruffin's legal rights and Great Dane's legal obligations that resulted from the court's grant of injunctive relief, there is no question that Ruffin prevailed. . . .

Id. at 993; *see also* Farrar v. Hobby, 113 S. Ct. 566, 574 (1992) ("No material alteration of the legal relationship occurs until plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant").

table limitations on the availability of injunctions.[199] Courts have accepted this latter authority for at least a half-century. Statutes, it is taken for granted, may resolve the question of the propriety of injunctions themselves, in which case relief follows automatically upon a finding of liability; or statutory language may provide criteria to guide judicial discretion different in content from the standards of equity jurisprudence; or statutory terms may invoke the traditional vocabulary. The issue is not one of power but of interpretation.[200] Again similarly, courts do not any longer consult some independent body of criteria to determine whether private causes of action follow by implication given statutory prohibitions. Rather, in most cases, the ultimate issue is one of statutory construction, an effort to tease out the underlying conceptual apparatus of legislative action to determine whether a logic appropriate to litigation is indeed evident.[201] As in the case of section 107(b)(3), at least as I read it, there is in the full range of cases to which I have just referred a repeated sense that statutory terms do not so much license departure from judge-defined limits on litigation as substitute new criteria for fixing both the opportunities and constraints that the parties face. Article III concerns may be addressed through the process of statutory elaboration as readily as, and indeed simultaneously with, matters of equity or litigative architecture.[202]

Third, the Article III investigation makes clearer the place of the 107(b)(3) suit within the larger Title VII jurisprudence. The discriminatory treatment action tests good faith—whether an employer complies with its

199. For an especially clear illustration of the use of a statutory injunction analysis to resolve what otherwise might seem to be a mootness question, see SEC v. Pros Intern., Inc., 994 F.2d 767, 769-70 (10th Cir. 1993).

200. *See, e.g.*, Amoco Production Co. v. Gambell, 480 U.S. 531, 541-44 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Hecht Co. v. Bowles, 321 U.S. 321, 328-30 (1944); OWEN FISS, INJUNCTIONS 132-60 (2d ed. 1984); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982).

201. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18-20 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 569-70 (1979).

202. There is one important issue pertinent to Article III that seems to be properly left to case-by-case adjudication under section 107(b)(3). The legislative language states that a court "may grant" declaratory or injunctive relief. Read permissively, this formulation suggests that, given a showing that unlawful discrimination was a motivating factor, it would be proper for the reasons set out above for a court to order injunctive relief without an additional inquiry into irreparable injury or other traditional equitable check-offs. At the same time, though, the nonmandatory cast of the wording plainly leaves room for courts to refuse relief in particular instances—without, however, leaving the statutory context. Specifically, this discretionary space seems helpful to courts working out the implications for section 107(b)(3) of the broad reference in section 107(a) to "any employment practice." I noted above that this wording was plainly appropriate from the public attorney general vantage point. But if the prospect of continuing individual injury is to be the emphasis, there seems to be obvious differences in the circumstances of not-hired or now-fired individuals, and still-employed persons. Only the last group, it would appear, run the risk of repeated subjection to discriminatory decision-making. In particular cases, though, it may be plausible to perceive not-hired (or even just-fired) individuals as likely to reapply; or the discriminatory acts at issue might, because of their specific character, be equally relevant for current employees, putting unemployed individuals in the position of de facto class representatives—all conclusions turning entirely on the features of the particular instance.

own rules in taking adverse action against employees protected by Title VII. It means, therefore, to work a form of corrective justice; in effect, to restore entitlements already established by the employer's own practices, and in effect wrongly appropriated by the employer's departure from those practices. The discriminatory impact suit tests the justification of honestly observed employer rules in light of their disparate effect on protected employees. This action, plainly, sounds in distributive justice: it determines whether reason exists for departure from a presumptively appropriate pattern of equal receipt of benefits (for example, jobs, promotions, etc.). The mixed-motive suit, finally, at bottom tests the texture of employer rules, perceiving these rules not so much as entitlements or distributions but as constitutive of an environment within which individuals are acceptably or unacceptably able to pursue personal agendas of one sort or another at each other's expense.[203] The concern here derives from notions of fair games—strategic justice, as it were.

This strategic perspective, it should be clear, formally enters Title VII jurisprudence precisely through the statutory repositioning, within the structure of the mixed-motive suit, of the question of whether the employer would have acted similarly in any event. Insofar as this question is seen as relevant to liability, it is quite plausible to characterize the action as evaluating rule-following, merely varying the structure of the discriminatory treatment suit somewhat by responding to plaintiff's stronger evidence via an adjustment of the defendant's burden. But if evidence of an individual's motivation is itself sufficient to establish liability, and thus a right to at least injunctive relief, proof of motivation is most plausibly understood, however seemingly paradoxically, as circumstantial evidence of the openness of the setting in which the individual feels free to act—appropriately, therefore, Congress abandoned the "direct" label for plaintiff's proof in the Title VII mixed-motive suit. It is now the setting per se, features of the firm environment, or more precisely the risks that this environment is now seen to occasion, that is legally objectionable.

Fourth, in terms of characterization, therefore, as in terms of statutory form, an important difference emerges after the enactment of section 107(b)(3), dividing the hitherto identical ADEA and Title VII mixed-motive suits. The ADEA mixed-motive suit, we have seen, sounds in good faith, and ultimately focuses on questions of rule-following after the fashion of the Supreme Court's *Hopkins* action. The revised structure and conceptualization that section 107(b)(3) brings about is not, within the terms of the Civil Rights Act of 1991, extended to cover ADEA cases. But is this differ-

203. *Cf.* Ohio Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158, 180 (1989) (pension plans are "subterfuges" violative of ADEA if plan provisions provide means of accomplishing employer aims otherwise in violation of ADEA).

ence relevant as seen from the perspective of arbitrability?[204] Arguably, nothing changes. Proof of motivation, whether or not it is called "direct evidence" of discrimination, remains proof of motivation; "same result regardless" similarly seems to be the same question whether it goes to liability or remedy. This conclusion, however, ignores the dynamics of causes of action, the ways in which elements of an action serve as contexts for each other's elaboration. Thus, proof of motivation, if juxtaposed with proof of "same result regardless" within the liability perspective, appears to lose significance—that is, it becomes less of a focus than the "same result regardless" question, which the good faith perspective marks off as central. In contrast, if proof of motivation stands alone for liability purposes, or rather is juxtaposed with the remedial concerns and values associated with the injunctive relief it triggers, motivation itself now becomes the focus, and in an important sense therefore is a different question.

More concretely: if injunctive relief follows directly from proof of motivation, it must mean that the situation that proof of motivation reveals to be the case is one amenable to address through an injunctive decree. Crucially, the defendant in the action is not necessarily the discriminatorily motivated individual, who may be a fellow employee or employee-supervisor, but the employer firm. The decree, therefore, must take a form capable of generating a response by the employer, some change in workrules or personnel or other features of the job environment likely to reduce significantly the likelihood of repeated incidents, perhaps not only involving plaintiff but others similarly situated. These considerations, we may suspect, will influence, even if only implicitly, the factfinder's evaluation of what counts as proof of motivation. (It is these considerations, ultimately, that explain the conclusion that motivation here is circumstantial evidence of gaps or other sources of strategic opportunities.) Alternatively, if courts maintain a strong right/remedy separation, considerations like these might cause courts to develop an elaborated body of remedial prerequisites separate from the liability trigger itself. Such interactions of remedy and right suggest that, at minimum, the Section 107(b)(3) action is not, at least within my terms, straightforwardly internal. The inquiry is not concluded by identifying, or failing to identify, a relevant employer practice, but by a double account of alternatives—the improperly motivated conduct that is the focus of the liability inquiry, and the revision in the employer's practice that the injunctive decree requires. These alternatives, once finally framed, work like photographic negatives and positives, oppositely describing a new em-

204. Arguments that age discrimination is in important respects different from race or sex discrimination, for example, are not implausible. *See, e.g.*, Dennis McKerlie, *Equality Between Age Groups*, 21 PHIL. & PUB. AFF. 275 (1992) (summarizing philosophical literature); Peter Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27 (1979). Notwithstanding the Supreme Court's practice of interpreting the ADEA and Title VII in parallel, there is no reason to insist that the procedural concomitants of age discrimination statutes and other anti-discrimination legislation are necessarily identical.

ployer practice, legally required precisely because it reacts against, and thus reflects, conduct originating outside the firm (motivationally) the liability-triggering acts. Because of this bracketing, the apt adjudicative perspective, within my terms, is ultimately external, and arbitral disposition is therefore inapt.[205]

F. Generalizing From the Mixed-Motive Suit

Title VII disparate treatment suits, like ADEA disparate treatment actions, focus on questions of pretext and therefore exhibit a clear inside orientation.[206] We might conclude, therefore, that after passage of the Civil Rights Act of 1991 Title VII mixed-motive actions join disparate impact claims in the not bindingly arbitrable category, but disparate treatment claims remain proper subjects for arbitration. Arguably, 1991 Act willfulness suits are analogous to disparate treatment actions. The relevance of these groupings, however, is a function of procedural mechanics. Courts usually decide arbitrability questions early in the course of litigation, working off the face of the complaint. Later disposition would, plainly enough, significantly reduce the appeal of arbitration as an alternative to often lengthy adjudicative proceedings. In advance of discovery, within the general language of a notice pleading complaint, especially given alternative

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205. Within the terms of Professor Fiss's famous characterization of injunctive remedies, the mixed-motive decree is "structural" insofar as it rejects the assumption that "the wrong exists independently of the organizational structure . . . The . . . wrong is the structure itself; the reorganization is designed to bring the structure within . . . bounds . . . ." OWEN FISS, THE CIVIL RIGHTS INJUNCTION 11 (1978). Although the mixed-motive injunction may not embrace the complexity of, say, a school desegregation decree, it nonetheless works "as a means of initiating a relationship between a court and a social institution," "a declaration that henceforth the court will direct or manage the reconstruction of the social institution . . . ." *Id.* at 36-37 (emphases omitted).

206. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) is not inconsistent with a characterization of the disparate treatment action as focusing on pretext. In some cases, evidence in the record will reveal either that an employer or its employees acted for statutorily forbidden reasons even though legitimate firm-related reasons for action are also relevant, thus justifying the inquiry mapped by the Supreme Court in *Hopkins* and modified by the Civil Rights Act of 1991. In other cases, even though it appears that firm-related reasons asserted by the employer are irrelevant, and thus pretextual, it may also appear that the actual motives of the employer or its employers may not have been firm-related but also were not prohibited by Title VII. *Hicks* was one such case. *See id.* 2748 n.2. Neither *Hopkins* nor *Hicks* was thus a disparate treatment case as such in the end, although early in their course both cases may have been litigated under this theory.

Professor Epstein argues that the disparate treatment action adopts the perspective of an "external agent" insofar as the defenses available to an employer require articulation in some conventional form and thus require more of employers than employment markets per se—which assume that "all elements of gains and losses are subjective" and, therefore, that "explicit measurement by external parties is not possible but is obtainable only by indirect reference." RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 163, 164 (1992). Interestingly, Epstein largely discusses employment discrimination law without reference to any explicit theory of the firm, instead drawing a contrast between markets and monopolies; in the latter context he thinks that employment discrimination law is more clearly justified. *See, e.g., id.* at 59-87. The possibility that firms themselves possess standard practices already articulated in advance of litigation receives only limited attention in his discussion. *See id.* at 180. Standard practices therefore appear to be costly. *See id.* at 181.

claims, a mixed-motive suit culminating in an injunction or declaratory judgment is not only difficult to distinguish from a similar suit resulting in an award of some form of retrospective relief; it is also hard to split off from a punitive damages action charging willful discrimination.[207]

Perhaps more significantly, the same initial allegations in a complaint may generate either a mixed-motive or a disparate treatment action.[208] In principle, it is possible to imagine a pleading rule analogous to the "well-pleaded complaint" rule governing the availability of federal removal jurisdiction[209]—in order to show equal respect for arbitral and adjudicative tribunals, federal courts will not dispose of statutory claims also subject to arbitration unless it is apparent on the face of plaintiff's complaint that the particular statutory claim at issue possesses the needed "external" focus. But federal courts in arbitration cases are not, strictly speaking, ruling on jurisdiction per se, and the constitutional values served by the well-pleaded complaint rule are not relevant here.[210] An elaborated obligation to plead statutory features would, in any event, fly in the face of the general hostility to "theory of the pleadings" doctrines evidenced by the Federal Rules of Civil Procedure.[211] The Supreme Court has recently held, albeit not in an arbitration case, that usual notice pleading rules govern in civil rights actions.[212] "[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims . . . ."[213]

Against this backdrop, therefore, the significance of section 107 of the Civil Rights Act of 1991 is great indeed. Because the mixed-motive suit is indistinguishable from other Title VII actions at the procedurally pertinent moment, section 107 closes off to arbitration, pulls outside the *Gilmer* circle, along with the disparate impact suit, all of the other principal Title VII

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207. It may be necessary for plaintiffs to plead punitive damages claims specifically. *See* Campbell v. Thornton, 644 F. Supp. 103, 105 (W. D. Mo. 1986). Nonetheless, in light of the opportunity afforded plaintiffs to plead in the alternative, the requirement of a particular allegation is not, by itself, sufficient to provide courts with a way to separate out (at the pleadings stage) willfulness suits, assuming such claims were thought to be amenable to arbitration.

208. Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs will often allege, in the alternative, that their cases are both. Discovery will often be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her.

Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989).

209. *See, e.g.*, Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); Gully v. First Nat'l Bank, 299 U.S. 109, 112-113 (1936).

210. *See* California Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983) (describing well-pleaded complaint rule as "avoiding more-or-less automatically a number of potentially serious federal-state conflicts").

211. *See* 5 CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1219, pp. 188-95 (2d ed. 1990).

212. Leatherman v. Tarrant County Narcotics Unit, 113 S. Ct. 1160, 1163 (1993) (§ 1983 claim).

213. *Id.* at 1163.

actions. *Gardner-Denver*'s result remains good law—inside and outside collective bargaining.[214]

IV
THREE PRESUPPOSITIONS

The distinction between internal and external perspectives is the theoretical starting point for the analysis of Title VII arbitration, and its relationship to ADEA arbitration, that I have developed in this essay. Earlier, I summarized some of the considerations that I think show this distinction to be plausible. But I did not attempt at that point to identify several important assumptions that putting the distinction to work presupposes. By way of conclusion, I note those assumptions here.

First, I have proceeded as though it were without question that statutory language and surrounding caselaw are always sufficiently rich resources for purposes of deciding whether a statutory action frames an inside or outside perspective. I do not believe, as I indicated earlier, that there is one right answer to the question of a given statute's perspective. Statutes are models of conflict. Statutory language itself, and certainly judicial or other glosses, may provide considerable room for choice, and thus a judge does not proceed mechanically. Nonetheless statutes and pertinent interpretations must provide *enough* with which to work, in the sense of supplying a language sufficiently elaborate to frame conclusions and supporting arguments. This assumption, however, may not always hold. If, for example, it is glosses that chiefly add mass, a newly enacted statute, not yet a frequent subject of interpretation, would, within my approach, suggest no answer whatsoever concerning the relationship of litigation and arbitration. Perhaps appellate courts, or maybe only the Supreme Court, should refrain from reviewing decisions about the preemptive impact of arbitrations of statutory claims until the statutory gloss reaches the appropriate degree of elaborateness. But in the interim, how would trial courts decide? Arguably, therefore, my analysis implicitly presupposes an argument that statutory language standing alone is rich enough.

Second, however much I have represented it as natural or easy, a sense of artificiality runs with the distinction between statutes pointing inside, toward arrangements as defined within the institution regulated, and statutes

214. Arguably, the Supreme Court's insistence on the generality of process, and on the autonomy of its dynamic, illustrates precisely what I mean by the "exteriorizing" effect of litigation—civil procedure becomes a source of artifice: its own conventions dictate interpretation, and therefore block any effort to depict actual institutional practice. This artifice is itself always a part of litigation, and therefore ought not to provide a basis, within litigation, for distinguishing cases. It is not process that is ultimately decisive, however: the overlap of Title VII actions is the precondition for the process effect. This overlap itself is substantive; it reveals at the level of legal technicality the multiple forms in which discrimination manifests itself. Indeed, the persistence of this overlap as a fact of Title VII jurisprudence signals an unwillingness to overlook the more structural in the course of evaluating the more personal, or vice versa, a crucial skepticism that we might see as lying at the very core of Title VII itself.

bringing to bear an outside, unfamiliar vocabulary. The point is not that statutes may mix both viewpoints. Notions of predomination provide a means already in use for expressing judgements in close cases.[215] Rather, the oddity traces, I think, to the distinction's implicit claim of relative autonomy, an insistence that ideas of inside and outside, although obviously and awkwardly metaphorical, remain a proper start for legal analysis, indeed a beginning preferable to discussions couched in terms of standard characterizations of statutes as furthering public or private goals, or as structural or corrective as a matter of remedial aspiration.[216]

This insistence is in part epistemological. In the course of elaborating statutory causes of action, the process through which we discover and state our sense of the right priority of public and private interests, say, or the scope of remedial measures, for example, may be one which works best by working indirectly. Efforts to characterize statutes in terms that call attention to the question of whether a statute works to protect the normal state of affairs within a given environment, or instead works to alter what was hitherto normal, might serve as especially productive starting points for analyses that end up proceeding in more usual vocabularies. But my claim is also metaphysical. I assume that statutes are capable of figuring as real, albeit complex, units of legal analysis. They are potentially ultimate subjects of inquiry; meaningfully prior to Hohfeldian or other conceptual descriptions of legal norms in terms of rights, duties, etc. Individual statutes may be usefully investigated on their own, as it were; each statute in principle describes a field, or environment, or world within which legal arrangements are constituted or, more crucially, reconstituted. To be sure, this state of affairs need not obtain. One way in which enacting conflicts play out formally is through denials, as well as affirmations, of statutory independence. Statutory references to interior or exterior norms supply one set of examples. Even to allow the option, however, supposes a strong assumption. It envisions at least the occasional reversal of a line of thinking originating with Bentham which holds that statutes or other legal instruments are simply fragments of law, revealing parts of underlying legal concepts. On this view, although legal analysis cannot begin except by assembling such fragments, the aim of the enterprise is to move as quickly as possible through the archeological stage to consideration of concepts themselves, obviously regarded within this perspective as more "real."[217] I

215. *See* FED. R. CIV. P. 23(b)(3) (if sole basis for class action, common question must predominate).

216. On statutes as expressions of public or private interests, *see* Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14-18 (1984); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818-20 (1983). The distinction between structural and regulatory remedies plays an important role in, *e.g.*, OWEN FISS, THE CIVIL RIGHTS INJUNCTION (1978).

217. *See, e.g.*, JEREMY BENTHAM, OF LAWS IN GENERAL 156-83 (H.L.A. Hart ed. 1970); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 70-92, 140-56, 168-86 (2d ed. 1980).

would, it should be clear, at least sometimes treat fragments as themselves organizational, as both beginning and end.[218]

Third, in part in defense of, but perhaps also in tension with, the formal pluralism I have just sketched, I also suppose that there is normative force in a notion of legal actors, in particular plaintiffs, identified in terms independent of those fixed by either the institutional settings that are the subject of suit, or the more or less different statutory terms brought to bear in the course of suit. I do not argue that arbitration of statutory claims is illegal, only that in some cases would-be plaintiffs should be seen as free to choose between arbitration and litigation, even in the face of prior contractual undertakings. What is the significance of this sometime procedural

218. I do not mean to suggest, however, that the argument here is somehow entirely independent of (or foreign to) familiar jurisprudential debates. Indeed, much of my argument is simply a variation on notions owing to H.L.A. Hart. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961). Hart's distinction between primary and secondary rules is both brought to bear and reinterpreted. Questions as to the content of secondary rules are resolved by identifying features of primary rules. The choice between arbitration and adjudication involves formulation of what Hart would call a "rule of adjudication," "secondary" in his terms; but the content of the rule depends upon the characteristics of statutes regulating someone's conduct, "primary" rules in Hart's scheme. But are the pertinent features of statutes themselves "secondary?" They pertain to features of rules to be enforced, but also suppose a degree of self-consciousness about the enforcing institutions. If the latter awareness is Hart's crucial marker, then the inquiry here is secondary. But Hart seems to suppose that secondary features are in some sense independent of particular primary rules. *See id.* at 89-96. Put another way (again using Hart's sense of the terms): Hart uses the notions of internal and external perspectives to describe orientations towards law and legal institutions, *see id.* at 55, 56, after a fashion similar (I borrow from Hart) to my use of the internal/external distinction to describe legal perspectives of other institutions. In effect, I restate the idea of internal and external perspectives within Hart's internal perspective. But this means that internal and external are relative terms: all of this inquiry is internal to legal discourse in Hart's sense, but only sometimes is a legal feature acknowledged to be internal.

Raz reformulates Hart, limiting the significance of the distinction between primary and secondary rules, emphasizing almost exclusively the internal perspective. *See* J. RAZ, PRACTICAL REASON AND NORMS 170-77 (2d ed. 1990). Norms are internally linked if the statement of norm A requires a reference to norm B. Norms include norms governing exercises of powers. As a result, invocations of mandatory or permissive norms may incorporate references to power-conferring norms, and thus Raz is able to build within the internal account something akin to Hart's distinction between primary and secondary norms. But it is important for Raz that norm-applying institutions make use of the same terminology, in working through the process of application, that ultimate subjects of norms would use for the same purpose. *See id.* at 139. Internal/external distinctions by and large disappear. The possibility that Hart's formulation proposes (the possibility of Felix Frankfurter)—that institutional considerations will for judges shape the content of rules that primary addressees will interpret normatively—is therefore absent (or at least harder to see) within Raz's construct.

Weinrib's notion of formalism is also implicated. *E.g.*, Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). Weinrib sees secondary rules as illustrative of forms of justice also implicit in primary rules—or rather, that neither primary nor secondary rules make sense unless understood in terms that suggest each other: thus the power of the idea of corrective justice. But my approach treats primary rules as disclosing another sort of form, as constitutive sometimes of the legislative process rather than the adjudicative. Statutes adopting the internal perspective plainly treat the adjudicative form as primary, and by inviting injury into context, implicitly invoke the corrective frame. But statutes displaying an external emphasis claim to establish legislation as itself constituting the world: such statutes may or may not frame the world in corrective terms, and to the degree that judges treat such statutes as decisive, the appropriate form for judicial process is that which makes possible the articulation of the legislative claim. This is plainly not a possibility that Weinrib would embrace. *See id.* at 956.

freedom? Arguably, the option to litigate notwithstanding an agreement to arbitrate is simply a by-product of judicial readings of statutes otherwise motivated. There seems to be a need, however, for an account of why judges should choose to read statutes as either reinforcing institutional norms or instead imposing a new context. Statutes, after all, might provide sufficient raw material for either gloss. My analysis of the appropriateness of arbitration of statutory claims therefore in the end requires an explanation of itself; an account of the individual's option to choose between arbitration and litigation, as well as that option's only occasional availability, in terms which themselves justify judicial effort, and which tie the exercise of judicial office to some larger legal politics. An interpretation from the perspective of the choosing individual, I think, meets this need.

I begin with an account of legal freedom—an account of at least one sense in which it is valuable for an individual operating within a universe of legal institutions to possess opportunities for choice. As much legally as in other settings, we might think, an individual's capacity to control circumstances is tied to the individual's ability to arrange and rearrange the priority or proximity of the various contexts, posing various risks and opportunities, within which she addresses her situation. Legally, these contexts present themselves as complexes of norms and associated institutions, within which the individual might find it better or worse to maneuver.[219] Freedom in law, therefore, becomes at least in part a freedom to choose law. This is not a new notion. The idea of freedom of contract, for example, in its radical Jacksonian/Reconstruction versions, was plainly understood as a freedom to fashion directly one's own sets of relationships; a freedom corrosive to relationships fixed by status. To be sure, it soon seemed obvious to many that important contractual relationships are often enough at the mercy of movements outside any one individual's control, at least past certain quickly reached points. Statutory and common law arrangements sometimes presented themselves as means through which individuals might extend their control and freedom, either directly through litigative enforcement or indirectly through ultimately representative administrative processes.

Of course, these alternative arrangements are vulnerable to the same risk of truncation as freedom of contract, to substituting in place of intervention an elaborate apologetics for a prior status quo. Plainly enough, legal freedom of the sort that I am describing is not the only project proper to legal norms and institutions. Legislators, administrators, or judges need not pursue interventionist goals. It becomes important to think hard when

219. *See generally* RAZ, *supra* note 218. It should be apparent that, for present purposes, I sidestep the traditional question of the degree to which legal norms are in some sense extrinsic to the individual's own perspective, or internal (and thus natural) to that perspective. I also mean to avoid the more recent debate, owing chiefly to Derek Parfit, concerning whether it makes sense to speak of a unitary individual.

interpreting statutory arrangements, for example, about the degree to which given statutes further the project of legal freedom or some other agenda. The key issue is still that raised by nineteenth century radicals: whether law works to reinforce status or to break it apart—but now, even more clearly, it is law itself that is the law's subject.

In some cases, therefore, in which applicable statutes are understood accordingly, it is as though individuals bringing suit have the opportunity to call into question, to repoliticize, usual patterns: the formalization of litigation has as its point precisely a highlighting, arguably an exaggeration of triggering circumstances. Such statutes reopen the question of structure, bring to bear again the concerns to which legislators initially responded by enacting statutes, require judges and juries to resolve these concerns within the setting of the particular case, and thus to reassert their relevance. Insofar as we associate litigation, and not arbitration, with enforcement of an external perspective, it is this opportunity that for individuals gives meaning to, as well as fixes the limits of, the procedural freedom that this essay defends. This conception of the role of statutes and therefore statutory litigation bears an obvious family resemblance to Bruce Ackerman's view of constitutional politics.[220] But there is also a crucial difference—the "constitutional" moments recur, and do not become the "normal" working out of past crisis and resolution, but instead re-instantiate the original crisis, inserting past politics into present practice. There is no bright line between either past and present or ordinary and constitutional politics.[221] Equally clearly, this reading suggests an at least partial rejection of the famous argument of Roscoe Pound and his heirs[222]—some statutes at least do not fit

220. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

221. Professor Ackerman's effort is too important, elaborate, and ingenious to be addressed adequately by way of summary characterization or footnote discussion. For present purposes, however, two points are sufficient. First, my analysis diverges from Ackerman's insofar as I treat constitutional moments in law as frequent rather than few (Ackerman asserts that there are only three—Founding, Reconstruction, New Deal). *Id.* at 34-57. In part, the increased number of constitutional events that I would imagine is the result of an altered definition of "constitutional." I would count statutes (for example) that serve to replace the ordinary norms of institutions as constitutional even if such statutes address only a limited range of activities; Ackerman continues to associate "constitutional" with the Constitution (even as he divides that document and recognizes at least one undocumented alteration), with norms informing or regulating in general the efforts of (mostly) political or governmental institutions. Second, Ackerman relies heavily on an idea of normalcy that represents the usual business of legislatures or courts as preoccupied with the application or synthesis of the three sets of constitutional norms that he recognizes. He therefore tends to treat his constitutional norms as resolutions of conflicts, and the normal work of legislatures and courts as the elaboration of these resolutions (although he also leaves room for disagreements). *Id.* at 58-80. By contrast, I treat conflict as ubiquitous in law, not merely simple disagreement but frequent and repeating differences concerning fundamentals (including the identification of constitutional texts).

222. For Pound's views, *see, e.g.*, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908). Successor efforts, differing in detail but sharing with Pound's work an effort to treat statutes as a piece of law generally, include, *e.g.*, RONALD DWORKIN, LAW'S EMPIRE 313-54 (1986); HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW

comfortably into an overall legal scene: they are best understood instead to call into question precisely that which, legally, is ordinarily validated.

But most importantly for present purposes, this account of the meaning of legal freedom vis-à-vis statutory litigation points up a sequence of correspondences, links between the politics of legislation and the politics of statutory interpretation. Ratification or challenge, as responses to conventional practices, are organizing terms within which either legislators or observers may evaluate the case for legislation,[223] as well as descriptions of statutory results. The images of internal and external orientations that provide working terms for statutory interpreters function likewise. The process of identifying the relationships of statutes to other legal orders implicates precisely the defining earmark of judicial office I identified earlier.[224] As a result, in the course of characterizing statutes, judges not only give specific content to the idea of legal freedom that from the litigant's perspective justifies, when it is directly applicable, the preference for litigation over arbitration. Judges at the same time justify, and therefore motivate, their own exercise of office.[225]

APPENDIX A: THE INTERNAL/EXTERNAL DISTINCTION IN OTHER STATUTORY CONTEXTS

A re-reading of the Supreme Court's decisions outside the ADEA and Title VII settings, I think, confirms the usefulness of the approach that I have just outlined. As we will see, it becomes possible to frame justifications for the differences in results in the cases, and in the process identify easier and harder questions. I should emphasize that the discussions that follow are intentionally one-sided. They aim to highlight features of particular statutory regimes that are of a piece with the conclusions that the Supreme Court has reached concerning arbitration of statutory claims. Particular statutes may also possess features that point to opposite conclusions. Within the capsule accounts here, I do not explore these reverse possibilities. To some degree, therefore, the descriptions of particular statutes I offer are incomplete, and should be understood as illustrations rather than definitive summaries. At the same time, I do not mean to minimize the persuasiveness of these capsule accounts. I think that in fact the Supreme Court has decided its cases rightly—as my approach shows, in some in-

1218-26, 1410-17 (1958) (unpublished manuscript); L. James MacCanley Landis, *Statutes as Sources of Law*, *in* HARVARD LEGAL ESSAYS 213 (1934).

223. *Cf.* Henry Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) (federal law as reaction to state law).

224. *See* text *supra* at notes 62-69.

225. *Cf.* Kahn, *supra* note 65 (undertaking an effort at harmonization differing chiefly in its defense of a sharp law/politics divide).

stances squarely in step with central statutory themes; in other instances, consistently with current judicial glosses.

A. *Section 1983 Arbitration*

Sometimes, from the new perspective, it is especially easy to see the independence of the federal action, and thus the inappropriateness of according arbitration contracts preemptive force. Legislative history and judicial glosses, it may appear, clearly indicate that the precise point of recognizing a right to sue is to permit plaintiffs to extract certain issues from within their usual context in order to allow a more distanced evaluation. For example, 42 U.S.C.A. § 1983, the origin of the cause of action at issue in McDonald v. City of West Branch,[226] on its face draws a distinction between the legal rules putting defendants in position to act detrimentally to the interests of plaintiffs—"color of law"—and the sources of law ("Constitution and laws of the United States") that courts are to consider in evaluating such acts.[227] Post-Civil War resistance to emancipation, tolerated or even aided and abetted by state and local officials, we all know, explains the congressional suspicion evident in this sharp statutory division.[228] The external perspective, therefore, expresses itself here, in choice of law terms, established in advance of the question of the point of view of particular constitutional or other federal rights.

Section 1983 jurisprudence is more complicated than statutory language alone suggests insofar as modern judicial interpretations show no similar sense of crisis;[229] nonetheless, important parts of the original statu-

226. 466 U.S. 284 (1984). McDonald, a police officer, brought suit under § 1983 alleging that the City of West Branch, Michigan, his employer, fired him in violation of constitutionally-recognized free speech guarantees. Prior to resorting to federal court, McDonald had obtained arbitration, pursuant to a collective bargaining agreement, of his claim of improper dismissal, but the arbiter ruled in favor of the city. *See id.* at 286.

227. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C.A. § 1983 (West 1981). The notion of "color of law" extends the reach of the statute beyond official acts authorized in fact by state law to acts office makes possible but state law may ultimately prohibit. In this way, the statute may be seen as recognizing the unresolved character of much official action—the ex post nature of full legal specification. Plainly consistent, the statute points to independent federal criteria for fixing proper official conduct, and independent institutions, federal, or at plaintiff's choice, state courts, within which such focusing occurs. *See also* 42 U.S.C.A. § 1988 (West 1981); Texas Teachers Ass'n v. Garland School Dist., 489 U.S. 782, 792 (1989) (attorney fees in § 1983 suit turn on whether plaintiff is "able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant"). For the crucial link between "color of law" and the unresolved quality of state action, see Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 396-404 (1992). Given this reading of § 1983, it is not surprising to discover that courts do not recognize a converse "color of law" doctrine with respect to federal law: federal law, if it is to govern the conduct of state officials must be in some sense "clear." *See, e.g.*, Lividas v. Bradshaw, — U.S. —, 114 S. Ct. 2068, 2083 (1994); Elder v. Holloway, — U.S. —, 114 S. Ct. 1019 (1994).

228. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 240-41 (1972).

229. *E.g.*, Heck v. Humphrey, — U.S. —, 114 S. Ct. 2364, 2374 n.10 (1994).

tory plan remain visible within the caselaw. For example, plaintiffs are said to be free to bring suit in federal court in advance of exhausting state administrative remedies.[230] The possibility that state law does not in fact authorize the challenged acts is no bar to suit; at most, federal courts may direct a temporary recourse to state courts.[231] The Supreme Court, however, also reads the Supremacy Clause as justification for treating state courts as constitutional equals of federal courts with respect to protection of federal rights; as a result, the onset of state judicial proceedings frequently bars a federal section 1983 suit.[232] "Judicial proceedings" include at least some state administrative hearings.[233] Against this backdrop, why not proceed by analogy and group arbitral decisionmaking with adjudication also? *McDonald*, suddenly, comes into question. The Supreme Court has held that administrative processes that are legislative in nature do not bar section 1983 actions, although finality concerns may remain relevant.[234] The Court has also indicated that administrative actions, however judicial in appearance, pose no barrier if state law treats such actions as imposing no constraint on subsequent state judicial rulings.[235] Other federal courts have ruled that state administrative procedures that appear to be too informal do not block federal litigation—what constitutes "too informal" is not clear.[236] These last cases, seemingly, are the most pertinent for purposes of characterizing arbitration. Recognition of state proceedings as Supremacy Clause "equals," however, turns on a second consideration as well. In both judicial and administrative settings, the Supreme Court requires that significant

230. Patsy v. McDonald, 457 U.S. 496, 516 (1982).

231. *See, e.g.*, Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988); *See generally* Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1358-59 (3rd ed. 1988).

232. *See, e.g.*, Hicks v. Miranda, 422 U.S. 332 (1975); Younger v. Harris, 401 U.S. 37 (1971). In principle, at least, state courts must provide litigants with adequate opportunities to raise federal claims. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975) (under Florida law pretrial issue could not be raised in defense to criminal prosecution). The Supreme Court has read narrowly this limit on the application of the Younger doctrine. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14-17 (1987); Moore v. Sims, 442 U.S. 415, 430-32 (1979). The related precept that bad-faith conduct by state officials justifies federal intervention also has only limited scope. *See, e.g., id.* at 432; Juidice v. Vail, 430 U.S. 327, 338 (1977).

233. *See, e.g.*, Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 627-29 (1986); Middlesex Cty. Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982).

234. New Orleans Public Serv., Inc. v. New Orleans City Council, 491 U.S. 350, 370-73 (1989).

235. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 238-39 (1984).

236. *Compare* Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1228 (4th Cir. 1989) ("informal fact finding conference" not formal enough to mandate abstention) *with* Phillips v. Virginia Bd. of Medicine, 749 F. Supp. 715, 722 (E.D. Va. 1990) (license revocation proceedings that are "manifestly formal and adversarial" and provide a "full panoply of proceedings and safeguards," are "judicial in nature" and support abstention) *and* Kim-Stan, Inc. v. Department of Waste Management., 732 F. Supp. 646, 649-50 & n.2 (E.D. Va. 1990) (regulatory agency's hearing requirements including right to a record, issuance of subpoenas and application of evidentiary rules were sufficiently "trial like trappings" to warrant abstention.).

state interests be at stake.[237] In this respect, the key here as elsewhere ultimately may be the presence of "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar."[238] This focus, we can see, suggests a proper concern underlying the informality cases. If so, it plainly marks, by way of emphasis, a perspective not only peculiarly apposite to section 1983 litigation, given its Reconstruction anti-discrimination origins, but also entirely consistent with the differentiation of adjudication and arbitration proposed by this essay. The result in *McDonald* follows.

B. Federal Employers' Liability Act (FELA) Arbitration

Atchison, Topeka & Santa Fe Ry. Co. v. Buell[239] requires a closer analysis. *Buell* involved an FELA suit based on allegations of job triggered emotional distress, an injury claim also subject to "minor dispute" arbitration pursuant to the Railway Labor Act. Insisting, unsuccessfully, that arbitration was the only remedy available to the plaintiff, the defendant also argued substantively that "purely emotional injuries" fell outside the scope of the FELA.[240] "[M]any workers alleging emotional injuries are really complaining of unhappiness arising out of everyday workplace disputes."[241] Explaining why the question should be left for remand, the Supreme Court responded at great length, noting the elaborate and varied formulas state courts have used to confine the emotional distress action.[242] The Court also observed, however, that "whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity."[243] Plainly enough, it would seem, context counted. We may wonder, therefore, at the Supreme Court's decision to accord injured employees the option of pursuing FELA actions over and above RLA arbitration rights. The FELA, it may appear, is among the least independent of federal statutes. Seemingly, it does little more than guarantee railroad workers a federal damages remedy in cases of injury actionable at common law.[244] To be sure, as the

237. *See, e.g.*, Hawaii Housing Auth., 467 U.S. at 237-38.

238. Ankenbrandt v. Richards, 112 S. Ct. 2206, 2216 (1992) (quoting Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 814 (1976)).

239. 480 U.S. 557 (1987).

240. *Id.* at 567.

241. *Id.* at 566.

242. *See id.* at 568-70.

243. *Id.* at 568. Subsequently, in Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994), the Court addressed the issue of the specific contours of the emotional distress cause of action, holding that the FELA incorporates the common law zone of danger test—allowing "recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 2406.

244. *See* 45 U.S.C.A. § 51 (West 1994).

Court emphasized, the statute limits certain employer defenses.[245] Arbiters, however, could easily take such limits into account.

FELA jurisprudence today looks most notable for what is sometimes portrayed as a procedural quirk—its extraordinary solicitude for plaintiff jury trial rights.[246] Perhaps this vagary reflects an effort by the Supreme Court to confer upon railroad workers the benefit of workers compensation schemes by other means.[247] But it is more plausible, I think, to read the statute and surrounding caselaw as a surviving fragment of the elaborate body of workplace tort law whose contours federal and state courts jointly worked out mostly in the latter part of the nineteenth century.[248] Certainly, this was the understanding of Justices Black and Douglas, the chief framers of the FELA pro-jury bias.[249] Within this pre-workers compensation tort law, courts closely scrutinized workplace structures of authority, contrasting "fellow servants" (no employer liability) and "vice-principals" (employer held liable);[250] substantively, courts enforced employer obligations to promulgate work rules and evaluated the reasonableness of rules in effect.[251] Especially with respect to substantive questions, the point of view

245. *Buell*, 480 U.S. at 561. The Court also observed that "[t]he Act expressly prohibits covered carriers from . . . entering into any contract . . . to limit their FELA liability." *id.* The actual statutory language, however, voided "[a]ny contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter . . . ." 45 U.S.C.A. § 55 (West 1994). Even if, in a sense, a collectively bargained grievance procedure is a "limit" on FELA liability insofar as it blocks access to federal judicial remedies, such a grievance procedure plainly does not "exempt" an employer from liability, notwithstanding remedial variations, so long as its provisions overlap the substantive terms of the FELA—at least unless FELA remedial provisions are understood to be part and parcel of the substance of the Act.

246. *See, e.g.*, *Buell*, 480 U.S. at 562 n.8; Dice v. Akron, Canton & Youngstown R.R, Co., 342 U.S. 359 (1952) (federal not state law controls allocation of responsibility between judge and jury in FELA case); Bailey v. Central Vt. Ry., 319 U.S. 350 (1943) (reversing state supreme court's order directing a verdict in favor of original jury finding of negligence); *see generally* — Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 488-94 (1956). For famous criticism of the FELA cases, see Hart, *supra*, note 223, at 508 ("a phase of the phantasy, which for fifteen years has bemused the Justices . . . ."). Hart started from the assumption that "federal law takes the state courts as it finds them," *id.*, echoing Justice Frankfurter's dissent in part in *Dice*, 342 U.S. at 365, 367-69. For a recent effort largely working within Hart's and Frankfurter's premise, although apparently endorsing at least some FELA results, see Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1213, 1142-45 (1986).

247. *See* Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 926-27 (1971).

248. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 65 (1967).

249. *See, e.g.*, Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943) (Black, J.); Bailey v. Central Vt. Ry. Co., 319 U.S. 350 (Douglas, J.).

250. *See, e.g.*, Chicago, Mil. & St. P. Ry. Co. v. Ross, 112 U.S. 377, 390 (1884); Hough v. Railway Co., 100 U.S. 213, 218 (1879). For cases hostile to the vice-principal doctrine, see, *e.g.*, Northern Pac. R.R. v. Hambly, 154 U.S. 349, 359-60 (1894); Baltimore & O. R.R. v. Baugh, 149 U.S. 368, 382-84, 389 (1893). Justice Field's dissent in *Baugh* illustrates the controversial character of this area of law. *See id.* 405-11 (Field, J., dissenting). *See generally* 4 C. B. LABATT, MASTER AND SERVANT 4141-4665 (1913).

251. For a late contemporary summary, see H. GERALD CHAPIN, HANDBOOK OF THE LAW OF TORTS 175-86 (1917). My colleague Jonathan Simon has revealingly discussed this body of law in *For the*

of the legal inquiry was not that of the employer, but of the community at large.[252] Not surprisingly, within this body of law, the allocation of responsibility between judge and jury was chronically controversial.[253] The FELA, it was understood, reflected, or required, a choice within that controversy.[254]

Ordinarily, the existence of a jury trial right would not resolve the arbitration question. A jury may as readily evaluate claims concerning an organization's own practices as bring to bear an external perspective. But here, precisely because of the unusual emphasis, and its history, the FELA action acquires an added dimension.[255] In particular cases, as *Buell* itself shows, the content of the substantive law applied may subtly but decisively vary depending upon whether, for example, emotional distress is a jury question or a matter for arbitral inquiry. If plaintiff's allegations are judged, *inter alia*, against a standard of what is "normal" in the workplace, significant differences might result if what is normal is a question of what is ordinary within the particular work setting or rather what is ordinary within a larger community.[256] If the point, more precisely, is to bracket "the law of the shop," to evaluate how far it diverges from social expectations, to provide injured workers therefore with a way to challenge the legitimacy of the routine, recognition of a jury trial right plainly follows. It is a jury trial right, above all, that the FELA supplies: against this backdrop, the reason

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Government of its Servants: Law and Disciplinary Power in the Workplace, 1870-1906, 13 STUD. IN LAW, POL. & SOC'Y 105 (1993).

252. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law.

Wabash Ry. Co. v. McDaniels, 107 U.S. 454, 461 (1882). *See generally* Simon, *supra* note 251.

253. For criticism of juries and calls for closer judicial supervision, see comments collected in *The Abuse of Personal Injury Litigation*, 18 THE GREEN BAG 193 *passim* (1906). A more positive view of juries is evident in, *e.g.*, Washington & Georgetown R.R. v. McDade, 135 U.S. 554, 571-73 (1890) (collecting cases).

254. *See* Tiller, 318 U.S. at 68 n.30. Earlier FLSA cases placed greater emphasis upon judicial control. *See, e.g.*, Delaware, Lackawanna & W. R.R. v. Koske, 279 U.S. 7, 11 (1929); Toledo, St. Louis & West. R.R. v. Allen, 276 U.S. 165 (1928).

255. The Supreme Court, it should be noted, gave little attention to the possible relevance of jury trial rights. *See* Atchison, Topeka and Santa Fe Ry. v. Buell, 480 U.S. 557, 565 (1987).

256. A difference in perspective might matter greatly, for example, in defining the content of the zone of danger approach to emotional distress that the Supreme Court has held applies in FELA suits. *See Consolidated Rail Corp.*, 114 S. Ct. at 2411. "[I]mmediate risk of physical harm" is a notion that might easily accommodate either workplace conceptions of usual or ordinary or background and thus not immediate risks or alternative accounts emphasizing concatenating hazards. The choice of a baseline, moreover, may be decisive not only in emotional distress cases, but in all suits in which some notion like due care, for example, is pertinent. *See also* Hirras v. National R.R. Passenger Corp., 39 F.3d 522 (5th Cir. 1994) (in sexual harassment case "outrageousness" defined by community rather than workplace standard and therefore Railway Labor Act grievance procedures do not pre-empt state cause of action).

for permitting the worker to retain FELA rights in the face of arbitration is apparent.[257]

C. *Fair Labor Standards Act (FLSA) Arbitration*

FLSA caselaw, the Supreme Court noted in *Barrentine v. Arkansas-Best Freight System*, underscores "the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act."[258] But why does arbitration constitute a waiver? Presumably arbiters will take FLSA claims seriously. *Barrentine*, like *Buell*, at first appears clearly to beg the question. Importantly, however, the decisions to which the Court referred, dating from the first years after the statute's enactment, insist that wages and hours standards are not matters of industry custom, even custom acknowledged in collective bargaining agreements.[259] The FLSA itself, through criteria drawn from statutory language, is to be the source of wage and hour standards. This basic proposition shaped not only the cases *Barrentine* cites, but the larger cascade of Supreme Court FLSA decisions in the 1940s, a surprisingly little noted but remarkable effort to reframe basic categories of workplace compensation.[260] Accompanied by allusions to a political economy of labor surplus and demand stimulation,[261] the principal theme in the Court's opinions was the need to fix uniform

257. Note that this reasoning does not suggest a preference for federal courts vis-à-vis states courts, and the FELA indeed confers jurisdiction on state courts, but it does suggest that state courts ought to be subject to federal jury trial rules, as the Supreme Court indeed held in Dice v. Akron, Canton & Youngstown R.R, Co., 342 U.S. 359 (1952).

258. 450 U.S. 728, 740 (1981).

259. *See* Martino v. Michigan Window Cleaning Co., 327 U.S. 173, 177-78 (1946); Walling v. Harnischfeger Corp., 325 U.S. 427, 430 (1945); Jewel Ridge Coal Corp. v. Mine Workers Local No. 6167, 325 U.S. 161, 167 (1945). Justice Jackson, concurring in the result in Walling v. Portland Term. Co., 330 U.S. 148 (1947), but disagreeing with the prevailing methodology, clearly understood that the Supreme Court's general approach was not merely an accident of statutory construction, but a matter of substantive choice:

> [T]he complex labor relations of this country, which vary from locality to locality, from industry to industry, and perhaps even from unit to unit of the same industry, were left to be regulated by collective bargaining under the National Labor Relations Act. . . . Organized employees on one side, free of employer domination or coercion, and employers on the other side best know the needs and customs of their trades; they know something of the strain their industry can stand; and after all, it is they who feel the effects. Given thus the machinery to change customs that had outlived their time or, in the alternative, to adjust wage rates to take account of these customs, it was, I think, our duty to pay at least some deference to the customs and contracts of an industry and not to apply the Fair Labor Standards Act to put industry and labor in a legal strait jacket of our own design.

Id. at 154. *See also, e.g.*, Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 477-95 (1948) (Frankfurter, J., dissenting).

260. For surveys, see E. Merrick Dodd, *The Supreme Court and Fair Labor Standards 1941-45*, 59 HARV. L. REV. 321 (1946); Comment, *Overtime Provisions of the FLSA: Unexpected Liability and Windfall Recovery*, 12 JOHN MARSHALL J. PRAC. & PROC. 581, 586-90 (1979).

261. *See, e.g.*, Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-78 (1942); *see generally* Benjamin Kline Hunnicutt, *The End of Shorter Hours*, 25 LAB. HIST. 373 (1984).

standards in terms independent of employer definitions or demands.[262] One motivation, obviously, was to minimize opportunities for circumvention, a goal especially pressing in a regime lacking free-standing administrative enforcement capacities.[263] But the same problem of variation and revision lay at the base of traditional employee complaints, in the nineteenth century often framed in anti-slavery terms and in the early twentieth century voiced as a critique of perpetually tinkering scientific management.[264] From either perspective, the question was whether specifications of wages and hours were variables always at issue in a continuous competition for control or rather a more or less fixed language outside and therefore regulating terms of workplace bargains.[265] Against this backdrop, the possibility that arbitration, even if competently undertaken, might bring to bear the perspective of the jobsite, because that viewpoint is exactly that which the statute rejects, plainly justifies the decision to deny arbitration processes' preclusive effect. In *Barrentine* as in *Buell*, the option the individual employee retains is the choice whether to challenge local consensus. The Supreme Court's conclusion in each case seems precisely right within the perspective we are exploring.

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262. "[S]pread of employment is not the sole purpose of the forty-hour maximum provision . . . Its purpose is also to compensate an employee in a specific manner for the strain of working longer than forty hours." Bay Ridge Operating Co., 334 U.S. at 470 (emphasis added). "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact." Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424 (1945).

Initially, it appeared that the Supreme Court would by and large respect contractual categories in enforcing the FLSA, developing independent criteria only in gap-filling cases. *See* Walling v. A.H. Belo Corp., 316 U.S. 624, 634-35 (1942). Wage contracts were associated with "common sense" and held to be "proven mutually satisfactory"; in contrast, the effort to develop free-standing statutory criteria amounted to "an inflexible and artificial interpretation of the Act." *Id.* at 635. By Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944), however, the polarities were reversed. Contractual terms were now "twisted," "fictitious," and "illusory"; statutory criteria invoked "only" a "simple process," directly identifying "wages actually received" and "hours actually and regularly worked." *Id.* at 40, 41; *see also, e.g.*, United States v. Rosenwasser, 323 U.S. 360, 364 (1945); Dodd, *supra* note 260, at 357-64.

263. *See, e.g., Helmrich & Payne*, 323 U.S. at 41, 42 (characterizing contract terms as derived "not from the actual hours and wages but from ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale"; contrary result "would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act"). Concerning problems created by the absence of independent agency enforcement, *see* Dodd, *supra* note 260, at 346-50, 370. The problem of circumvention in the context of wage and hour standards is, of course, chronic. *See, e.g.*, 1 KARL MARX, CAPITAL 231-302 (trans ed. 1887) (European experiences); Ronald G. Ehrenberg & Paul L. Schumann, *Compliance With the Overtime Pay Provisions of the Fair Labor Standards Act*, 25 J.L. & ECON. 159 (1982).

264. On nineteenth century hours arguments, *see* David Brody, *Time and Work During Early American Industrialism*, 30 LAB. HIST. 5 (1989); David Roediger, *Ira Steward and the Anti-Slavery Origins of American Eight-Hour Theory*, 27 LAB. HIST. 410 (1986).

265. On this view, the passage of the Fair Labor Standards Act, and its construction by the Supreme Court, precisely achieved the objective of hours reforms, thus solving "the end of shorter hours" puzzle; for other explanations (and formulation of the problem), *see* Hunnicutt, *supra* note 261.

D. Antitrust Arbitration

There are also clear cases pointing to the opposite conclusion. In these, the statutory claims at issue reveal an internal preoccupation, a focus on expectations, relationships, or norms constitutive of an organization or practice. Adjudication and arbitral process thus become interchangeable; there is no reason not to give effect to an arbitration agreement.

Justice Blackmun's majority opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[266] for example, depicted Sherman Act protections of market integrity as losing their "constitutional" character in the international setting.[267] Blackmun also noted that the antitrust challenge at issue concerned the propriety of a vertical restraint, a contractual regulation of the behavior of a retailer by a supplier effectively limiting the ability of the retailer to compete directly with either the supplier or other retailers. Resolution of this sort of case, he observed, did not involve any special complexity; as the court of appeals below had demonstrated, the vertical restraint question turned on some of the same questions raised by the dealer's obviously arbitrable contract claim against Mitsubishi.[268] This last point is the crucial one for the approach I am applying. Vertical restraint cases are generally analyzed in terms which suppose an initial, and usually decisive, inquiry into the dynamics of the relationships between a supplier and a complaining dealer, and the supplier and other dealers, whether or not those relationships are described explicitly in written contracts or instead manifest themselves in courses of dealing.[269] Plaintiffs typically assert the existence of a conspiracy between the supplier and some dealers to fix resale prices, and an effort to punish plaintiffs for breaking with the scheme, all in violation of a traditional per se prohibition first announced in the *Dr. Miles* decision.[270] But courts give great weight, even in the face of effects on price competition, to regulatory efforts undertaken by the supplier vis-à-vis the dealer that appear to reflect the logic of the relationship itself.[271] Relevant supplier and dealer practices consistent or inconsistent with objectives of the relationship other than price control per se include, for example,

266. 473 U.S. 614 (1985).

267. *See id.* at 629-31, 634 n.18, 634-36. For references to antitrust law as "constitutional" vis-à-vis market transactions, see, *e.g.*, United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933), *overruled on other grounds*, 467 U.S. 752 (1984).

268. *See id.* at 633, 621-22 & n.9. *See also* Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395, 398-99, 404-05 (1993) (*Mitsubishi* as classic case of "partnership" dispute amenable to arbitration).

269. Thus Professor Areeda, in his elaborate treatment of the topic, begins his discussion by sensitizing readers to the range of possible reasons explaining challenged restraints; legal argument per se proceeds in particular cases by identifying the relevant parts of the range. *See* 8 PHILLIP E. AREEDA, ANTITRUST LAW 2-243 (1989).

270. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

271. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 n.23 (1977); Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1558-62, 1569-73 (11th Cir. 1991).

supplier efforts to regulate the quality of dealer service in order to protect the supplier's reputation with ultimate customers, and dealer efforts to minimize such quality control.[272] The decisive question, as the courts see it, is frequently whether such business needs explain challenged supplier acts, such as terminating a dealer, thus blunting the force of conspiracy charges, or whether evidence of supplier relationships vis-à-vis other dealers justifies a conclusion that supplier regulatory concerns were a mere pretext.[273] The inside perspective, obviously, dominates either way. It is the pattern of relationships as the parties themselves construct it that a court must tease out and characterize; once the pattern is characterized, decision follows readily.[274] To this extent at least, arbitration becomes nonproblematic—even, it would appear, in purely domestic vertical restraint cases, a question Justice Blackmun purported to leave open.[275]

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272. *See Sylvania*, 433 U.S. at 52; Business Elec. v. Sharp Elec., 485 U.S. 717, 727-28 (1987); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762-63 (1984). *Business Electronics*, in particular illustrates the extent to which contemporary antitrust law protects supplier regulatory efforts—the burden is put on plaintiffs to show plain evidence of a price-fixing conspiracy; ambiguous circumstances preclude any further analysis. *Id.* at 726, 722; *see, e.g.*, Ben Elfman & Son, Inc. v. Criterion Mills, Inc., 774 F. Supp. 683, 685-86 (D. Mass. 1991).

273. *See, e.g.*, Monsanto Co., 465 U.S. at 763-64; Parkway Gallery Furn. v. Kittinger/Pennsylvania House, 878 F.2d 801, 805-06 (4th Cir. 1989); Chicago Prof. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 674-76 (7th Cir. 1992); City of Long Beach v. Standard Oil Co., 872 F.2d 1401, 1406 (9th Cir. 1989); *see also, e.g.*, Eastman Kodak Co. v. Image Tech. Serv., Inc, 112 S. Ct. 2072, 2091 (1992) ("valid business justifications" as defense to monopoly charge); Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 593-98 (1986).

274. *See, e.g.*, United States v. All Star Indus., 962 F.2d 465, 469-75 (5th Cir. 1992), *overruled on other grounds*, United States v. Calvertey, 1994 U.S. App. LEXIS 29266 (5th Cir. 1994); Bailey's Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1020-32, 1030 (6th Cir. 1991). If facts support a claim of a conspiracy to fix retail prices, the per se rule against price fixing applies. If facts suggest that supplier regulatory concerns underlie challenged action, a rule of reason analysis may be appropriate; but the general thrust of that analysis suggests an inquiry not very different from the investigation already undertaken to bring into focus the dealings of the parties, see National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (rule of reason analysis applies to "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reason why it was imposed"). *But cf.* note 275 *infra* (discussing role of market models in rule of reason cases).

275. *See Mitsubishi*, 473 U.S. at 629. It is difficult to read Justice Blackmun's restraint as anything more than pro forma after *McMahon*, a purely domestic case in which passages from the *Mitsubishi* opinion figure prominently. *See* Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226-27, 229-30, 232, 239-40 (1986). And indeed, although mostly in dicta, lower federal courts have repeatedly declared that *Mitsubishi* applies in domestic antitrust cases—in all cases, the underlying antitrust claims challenge "vertical" arrangements. *See, e.g.*, Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441-42 (9th Cir. 1994); Swensen's Ice Cream Co. v. Corsair Corp., 942 F.2d 1307, 1310 (8th Cir. 1991) (dictum); Kowalski v. Chicago Tribune Co., 854 F.2d 168, 173 (7th Cir. 1988) (dictum).

To be sure, the propriety of arbitration of antitrust claims may be less clear, even in vertical restraint cases, where the decisive issue is the anti-competitive effect of the restraint, and analysis therefore focuses on, e.g., definitions of relevant markets—matters turning in part on lessons to be learned from the parties' own arrangements, but also in part on across-the-board, and thus fundamental statutory, assumptions about market dynamics. *See, e.g.*, Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722-29 (3rd Cir. 1991); Cranfill v. Scott & Fetzer Co., 773 F. Supp. 943, 953 (E.D. Tex. 1991). In addition, in cases where a picture of actual market behavior must be built up by examining the behavior of third parties, as in cases turning on allegations of the existence of a cartel, if the focus therefore shifts

E. Securities Arbitration

Shearson/American Express Inc. v. McMahon[276] and *Rodriguez de Quijas v. Shearson/American Express, Inc.*[277] invite a somewhat closer analysis. Notwithstanding *Mitsubishi*, arbitration of antitrust claims occurs only infrequently. Arbitration of securities fraud claims, by contrast, has quickly become commonplace. Within the terms of the argument of this essay, the Supreme Court's conclusion that the securities fraud allegations at issue were appropriate for arbitration is plainly defensible. The approach I take here, however, ultimately suggests that the matter is rather more fact sensitive, and that securities fraud statutes are rather more limited in their amenability to arbitration, than the opinions in the cases themselves might seem to suggest.[278]

McMahon involved a suit by customers of a brokerage firm alleging excessive trading and various misrepresentations, all in violation of SEC rule 10b-5.[279] 10b-5 suits take as their model the common law fraud action.[280] But the focus of litigation may vary significantly, depending upon the background of the particular suit. A plaintiff must prove some version of scienter, nominally an inquiry into the willfulness of a defendant's misrepresentations or omissions, but in litigation involving bureaucratic or professional defendants in fact usually an investigation into the magnitude of a defendant's deviation from established norms of investigation and reporting.[281] Plaintiff, however, must also supply a basis for inferring that the

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from courses of dealing among particular market participants to an account of a given market's dynamics taken as a whole, arbitration again may be less appropriate. In this respect the analysis of Messrs. Baker and Stabile, *supra* note 268, is especially interesting: writing as experienced antitrust counsel proceeding from the point of view of drafters of arbitration agreements, they distinguish between "partnership" cases, turning mostly on the direct dealings of plaintiff and defendant, which they see as easy to handle within arbitral process, and "third party" cases—typically, horizontal conspiracy cases, which they believe require careful procedural design in advance if arbitration is to work well, or else exclusion of such cases from within the scope of the arbitration agreement. *See id.* 425-26, 421-23. Baker and Stabile also recommend that courts "develop some useful rules in this area, rejecting petitions to compel arbitration when arbitration appears unlikely to vindicate federal statutory rights." *Id.* at 422. It appears that the approach developed in this essay, distinguishing "internal" and "external" antitrust actions, would separate cases more or less along the lines that Baker and Stabile urge.

276. 482 U.S. 220 (1987).

277. 490 U.S. 477 (1989).

278. I do not discuss in text the Supreme Court's holding in *McMahon* that the RICO claims brought along with the rule 10b-5 action are also arbitrable. *See McMahon*, 482 U.S. at 238-42. RICO suits require as a predicate the existence of independent violations of federal or state law. " '[R]acketeering activity' consists of no more and no less than commission of a predicate act . . . ." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985); *see* 18 U.S.C.A. § 1961(1) (West Supp. 1994). The approach of this essay thus suggests that the arbitrability of the RICO claims depends on the arbitrability of the predicate claims.

279. *See McMahon*, 482 U.S. at 222-23; 17 C.F.R. § 240.10b-5 (1994).

280. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 471-74 (1977).

281. In Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), the Supreme Court defined scienter, for purposes of the rule 10b-5 cause of action, as referring to "a mental state embracing intent to deceive, manipulate, or defraud," *id.* at 194 n.12. The Court left open the question of whether reckless conduct might count as scienter, *see id.*; however, most circuits of the U.S. Court of Appeals have subsequently

misleading conduct of defendant affected plaintiff's decision-making. If the transaction in question is a market transaction, if defendant did not deal with plaintiff personally but rather disseminated or failed to disseminate information available to a universe of buyers and sellers of securities, courts treat proof of the materiality of the misstatement or omission as presumptively sufficient: absent rebuttal there is no need for a plaintiff to prove reliance or to reconstruct the actual decision-making process.[282] Judgements about materiality derive from a model of a reasonable investor.[283] This model, it is easy to see, is the device through which courts legally constitute and thus seek to regulate securities markets, acting on assumptions about the characteristics of ordinary market participants, gauging the costs and benefits of changes in available information.[284] In cases in which plaintiffs and defendants do transact directly, however, proof of reliance per se frequently remains necessary.[285] Here the inquiry ultimately investigates particular relationships, testing the degree of a plaintiff's dependency on

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answered the question affirmatively. *See, e.g.*, Van Dyke v. Coburn Enters., Inc., 873 F.2d 1094, 1100 (8th Cir. 1989) (collecting cases). The prevailing definition of recklessness derives from Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), and Franke v. Midwestern Okla. Dev. Auth., 428 F. Supp. 719, 725 (W.D. Okla. 1976), *vacated on other grounds*, 619 F.2d 856 (10th Cir. 1980):

> [R]eckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers and sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Sundstrand Corp., 553 F.2d at 1045; *see, e.g.*, Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 n.8 (9th Cir. 1990) (en banc) (collecting cases). In cases involving organizational defendants, obviously, the question of *whose* intent is always present; at least where rules of respondeat superior, for example, are not relevant, *see id.* 1576-78, plaintiffs typically attempt to meet their scienter obligations by seeking to show clear departures from standard practices and thus recklessness, and courts analyze the issue similarly. *See, e.g.*, Ambrosino v. Rodman & Renshaw, Inc., 972 F.2d 776, 788 (7th Cir. 1992) (defendant's care "higher than the custom and practice of the industry at that time"); SEC v. Steadman, 967 F.2d 636, 642 (D.C. Cir. 1992) (like defendant, independent auditor "who had substantial experience in mutual fund accounting" did not question attorney's (erroneous) advice). *See also* McGonigle v. Combs, 968 F.2d 810, 819 (9th Cir. 1992) (no showing of falsity and thus no predicate for scienter inquiry where "no industry standards . . . serve as a basis for an attack" on defendants' representations).

282. *See* Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988).

283. *See id.* at 246-47; TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445, 452-53, 460 (1976); Shapiro v. UJB Fin'l Corp., 964 F.2d 272, 281-82, 283 (3rd Cir. 1992). For an especially clear illustration, see Jonathon Macey, Geoffrey Miller, Mark Mitchell and Jeffrey Netter, *Lessons from Financial Economics: Materiality, Reliance, and Extending the Reach of* Basic v. Levinson, 77 VA. L. REV. 1017, 1022-28 (1991).

284. *See, e.g.*, Roots Partnership v. Lands' End, Inc., 965 F.2d 1411, 1419, 1420 (7th Cir. 1992).

285. *See* Citibank, N.A. v. K-H Corp., 968 F.2d 1489, 1494 (2d Cir. 1992). In rule 10b-5 cases chiefly involving omissions, even if transactions were face-to-face, the difficulties involved in proving reliance on what was not stated have led courts to treat proof of materiality as equivalent to proof of reliance. *See, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972); *Akin*, 959 F.2d at 529; Litton Indus. v. Lehman Bros. Kuhn Loeb Inc., 967 F.2d 742, 747-48 (2d Cir. 1979) (collecting cases).

defendant, the resulting division of labor, and the expectations built along the way.[286]

This brief account suggests four possible combinations of requirements organizing rule 10b-5 litigation:[287]

Case 1: scienter turns on individual defendant's knowledge; reliance to be inferred from characteristics of personal relationship of plaintiff and defendant	*Case 3:* scienter turns on individual defendant's knowledge; reliance to be inferred from materiality of misrepresentations or omissions, as judged in light of market characteristics
Case 2: scienter turns on degree of organizational defendant's departure from standard practices; reliance to be inferred from characteristics of personal relationship of plaintiff and defendant	*Case 4:* scienter turns on degree of organizational defendant's departure from standard practices; reliance to be inferred from materiality of misrepresentations or omissions, as judged in light of market characteristics

The first sort of case, we may suppose, is most obviously amenable to arbitration—both questions at issue are likely to be resolved through evaluation of the details of the relationship of plaintiff and defendant.[288] The fourth category of cases would appear to describe a variant of the basic cause of action unlikely to be appropriate for arbitral process. Particularly if defendant is a professional organization such as an accounting firm, and thus standard practices are obviously fixed at least in part by outside norms, decisions in such cases will turn to an important degree on judgments about

286. *See, e.g.*, Milton v. Van Dorn Co., 961 F.2d 965, 970-72 (1st Cir. 1992); Wright v. National Warranty Co., 953 F.2d 256, 261-62 (6th Cir. 1992); McGonigle v. Combs, 968 F.2d 810, 817 (9th Cir. 1992).

287. Obviously, I do not mean to suggest that scienter and materiality/reliance are the only elements of securities causes of action. Even if these requirements are met, plaintiffs may still need to show, for example, the existence of a duty, often conceived as originating outside securities law per se, running from defendant to plaintiff. *See, e.g.*, Dirks v. SEC, 463 U.S. 646, 653-54 (1983); Chirella v. United States, 445 U.S. 222, 227-29 (1980); Glazer v. Formica Corp., 964 F.2d 149, 156-57 (2d Cir. 1992). I focus attention on scienter and materiality/reliance because these two investigations describe the primary attributes of (mis)communications in connection with securities trading that securities law marks as problematic; analysis of duty, by contrast, tests whether a particular (mis)communication, concededly a matter of concern for securities law, is an appropriate subject for civil suit. Duty per se, thus, is an issue unlikely to arise in securities cases concerning the availability of arbitration: the agreement incorporating the arbitration clause establishes the necessary relationship.

288. *See, e.g.*, Litton Indus. v. Lehman Bros. Kuhn Loeb Inc., 967 F.2d 742, 748 (2d Cir. 1992) ("all the proof it needs of its own reliance lies in its own hands").

the content of standards regulating both organizational and market practices, and thus will presuppose adoption of an entirely outside perspective.[289] In any event, in such market cases, it is difficult to discern how an arbitration agreement might come into existence in the first place. The second and third cases are obviously mixed. Arguably, the third type is less important for present purposes, since, like the fourth variant, it seems not to be the sort of securities action for which an arbitral forum would be available in any event. The second version is more interesting: the key here, with regard to arbitration, may well be the extent of the overlap between the organizational norm questions presented and the principal regulatory concerns of securities law. Thus, for example, if the auditing practices of accountants were a traditional focus of SEC attention in the course of that agency's implementation of its statutory agenda, the scienter inquiry should perhaps be understood as an occasion for articulating and enforcing public standards rather than for simply testing the degree to which an accounting firm is consistent in its own practices.[290]

McMahon is a case of either the first or second sort. Brokerage firms like Shearson/American Express are traditional targets for close regulatory scrutiny within the terms of administrative, judge-made, and statutory securities law. If the acts of individual brokers at issue implicated Shearson/American Express policies, we might conclude that the cases were sufficiently part of the process through which courts or administrators elaborate securities trading rules; as a result, arbitration agreements should not preempt. But if the responsibility of Shearson/American Express was purely a matter of respondeat superior, if employees acted within a zone of discretion properly conferred, then disposition of the cases would depend upon the dealings in the particular instances and, notwithstanding the dense regulatory environment, an arbitration agreement should be enforceable.[291] Alternatively, if the SEC retains jurisdiction to enforce rule 10b-5 notwithstanding arbitration agreements, the need to draw a bright line between the two categories for purposes of private litigation may diminish; we might see the SEC as assuming responsibility for defining regulatory norms.[292] The court of appeals and Supreme Court opinions in *McMahon* did not approach

289. *See, e.g.*, Warren v. Reserve Fund, Inc., 728 F.2d 741, 745-46 (5th Cir. 1984) (disclosure complying with SEC recommendations not reckless even if misleading; disclosure also consistent with industry practice).

290. *See, e.g.*, *Akin*, 959 F.2d at 527-528 ("repeated violation of accounting principles" is evidence of recklessness and thus scienter); Platsis v. E.F. Hutton & Co., Inc., 946 F.2d 38, 41 (6th Cir. 1991) (no inference of recklessness given industry practice of nondisclosure and no contrary regulatory requirements); *Hollinger*, 914 F.2d at 1570-72 (NASD disclosure requirements permit defendant broker-dealer not to disclose eleven-year old forgery conviction of employee and thus omission was not reckless).

291. *Cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51, 354-5, 357 (1974).

292. Cf. *Gilmer*, 500 U.S. at 28 (dictum) (EEOC retains power to bring ADEA suit despite arbitration agreement). *See generally* Appendix B, *infra* notes 303-346. Or the SEC might use its power to regulate arbitration agreements to make clear which rule 10b-5 suits are not arbitrable. *See generally McMahon*, 482 U.S. at 233-34 (noting SEC supervisory responsibility).

the arbitration issue in the way I am exploring here, and therefore it is not easy to fix the case categorically; both statements of facts are extremely abbreviated. The available clues, though, point towards a conclusion that employee conduct per se was all that was at issue. If so, the Supreme Court's conclusion, if not its opinion, is in accord with the overall analysis here.

Rodriguez de Quijas also arose in the context of a broker/customer dispute culminating in charges of fraudulent transactions, in this case in violation of section 12(2) of the Securities Act of 1933.[293] Unlike the rule 10b-5 suit, the section 12(2) action establishes liability for "misleading" material statements or omissions without requiring plaintiffs to prove scienter;[294] instead, the statute affords defendants the opportunity to show that they did not know, or in the exercise of reasonable care could not have known of, an asserted untruth or omission.[295] Thus, while the section 12(2) action fits within the larger fraud model,[296] its specific template is the negligent misrepresentation suit. The concern with departures from usual standards of investigation and reporting, obviously, is even more evident here than in the rule 10b-5 cases.[297] Section 12(2), like rule 10b-5, imposes liability only for material misstatements or omissions. The question of reliance, however, is irrelevant.[298]

Section 12(2) cases, thus, will differ among themselves chiefly with respect to the relevant sources of the standard of care against which litigation measures the seller's claims of reasonableness. If the standard derives from industry practice or regulatory dictates,[299] we might within the terms of this essay see a strong outside perspective organizing the inquiry. If the standard originates in the defendant's own usual practice, and absent some link to outside sources, we might see the investigation in inside terms, a version of a traditional search for signs of good faith or its absence. *Rodriguez de Quijas* like *McMahon* discloses very little factual background. It

293. 15 U.S.C.A. § 771 (2) (West Supp. 1994).

294. If section 12(2) governs offerings of shares specifically addressed by a prospectus, but not routine trading, this statutory provision is pertinent in only a subset of market transactions generally. *Compare* Ballay v. Legg Mason Wood Walker, Inc., 925 F.2d 682 (3rd Cir. 1991) (section 12(2) does not apply to routine trading), *with* Pacific Dunlop Holdings, Inc. v. Allen & Co., 993 F.2d 578 (7th Cir. 1993) (disagreeing) *and* Louis Loss, *The Assault on Securities Act Section 12(2)*, 105 HARV. L. REV. 908, 911-17 (1992) (criticizing *Ballay* reading). Another important difference distinguishing the 10b-5 and 12(2) actions is irrelevant for present purposes: section 12(2) addresses only misrepresentations by sellers; rule 10b-5 includes no such limitation, although plaintiffs must be either purchasers or sellers.

295. *See Ballay*, 925 F.2d at 687-88 (3rd Cir. 1991); Loss, *supra* note 294, at 911.

296. *See* Shapiro v. UJB Fin'l Corp., 964 F.2d 272, 287 (3rd Cir. 1992); 9 LOUIS LOSS AND JOEL SELIGMAN, SECURITIES REGULATION 4206 (1992).

297. *See, e.g., Ambrosino*, 972 F.2d at 788-89 (rule 10b-5 scienter analysis incorporating § 12(2) finding of due diligence predicated in part on compliance with industry standards).

298. By its terms, section 12(2) requires proof of materiality only; courts have refused to add a reliance requirement. *See, e.g.*, Caviness v. Derand Resources Corp., 983 F.2d 1295, 1304 (4th Cir. 1993).

299. *See, e.g.*, DeMarco v. Edens, 390 F.2d 836, 842 (2d Cir. 1968).

would not be surprising, however, if the conduct of a particular Shearson/Lehman employee were at issue,[300] that usual company practice fixed the pertinent background for evaluating the employee conduct.[301] On this assumption, within the approach of this essay, arbitration of the section 12(2) claim would be in order.[302]

APPENDIX B: IMPLICATIONS FOR SECTION 301 AND FAA PREEMPTION AND FOR ADMINISTRATIVE ACTION

This appendix broadens the discussion further. Initially, it brings to bear the analysis that I have developed in this essay for purposes of considering state statutory causes of action. In many cases, federal courts have held that state actions are inconsistent with collective bargaining arbitration regimes, and therefore preempted by section 301 of the Labor Management Relations Act. In other cases, the courts have read provisions of the Federal Arbitration Act as blocking state actions. There are exceptions, however, in both lines of cases. I argue here that the internal/external distinction readily explains these diverging decisions. I also briefly consider the usefulness of the distinction in connection with questions about the impact of arbitration clauses on the power of administrative agencies to enforce statutory provisions.

A. Section 301 Preemption

Section 301(a) of the Labor Management Relations Act of 1947 declares that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."[303] The Supreme Court has repeatedly held that this provision, however modest in form, is strongly preemptive: it utterly obliterates state legislative jurisdiction with respect to matters within

300. *See* Rodriguez de Quijas v. Shearson/American Express, 490 U. S. 477, 478 (1989).

301. Employer liability would follow, given employee departure from usual practice, as a matter of respondeat superior. *See* Loss, *supra* note 294, at 913.

302. Since *McMahon* and *Rodriguez de Quijas*, SEC-backed changes in arbitration rules have exempted claims involving persons who are members of certified or putative classes participating in securities litigation. *See, e.g.*, Rule 12(d)(3) NASD Code of Arb. Proc. (1994). This differentiation of individual securities fraud claims and class-wide claims may significantly limit the Supreme Court arbitration decisions. In any case, it roughly parallels the approach that this article proposes. Securities class actions are not appropriate, as a matter of civil procedure, unless common questions predominate vis-à-vis matters peculiar to the circumstances of individual class members. *See* FED. R. CIV. P. 23(b)(3). Almost invariably, such "predomination" is not evident unless the principal issues in dispute concern general practices of a defendant, and thus possess some regulatory (and therefore public) dimension.

303. 29 U.S.C.A. § 185(a) (West Supp. 1994).

its compass.[304] On its face, section 301(a) does not refer directly to arbitration but to collective bargaining agreements, although these agreements frequently provide for grievance arbitration.[305] As a practical matter, thus, the section 301(a) preemption caselaw often concerns itself with the conflict, or lack of conflict, between arbitral processes subject only to federal law, and litigation seeking to enforce state common law or statutory rights. The Court has said, in fact, that "[t]he need to preserve the effectiveness of arbitration" is one reason for the aggressive approach to preemption evident in section 301(a) doctrine.[306]

There is an elaborate caselaw concerning the impact of section 301(a) on state law.[307] For present purposes, it is sufficient to note four Supreme Court decisions, focusing attention on the two most recent. In *Allis-Chalmers Corp. v. Lueck*[308] and in *Electrical Workers v. Hechler*,[309] the Court held that state common law tort suits were barred by section 301(a) because the success or failure of the actions turned in part on conclusions drawn from the content of collective bargaining agreements. Nonetheless, in *Lingle v. Norge Division of Magic Chef, Inc.*[310] the Court ruled that litigation seeking to enforce an Illinois statute prohibiting retaliatory discharge for filing a workers compensation claim might proceed in parallel with arbitration challenging the dismissal as in violation of a collective bargaining agreement. Invoking the *Gardner-Denver* line of cases dealing with the coexistence of federal statutory actions and collective bargaining arbitration,[311] the Court concluded that "separate fonts of substantive rights . . remain unpre-empted" insofar as questions concerning the content of these rights can be resolved without "construing the collective-bargaining agreement."[312] Subsequently, however, *Steelworkers v. Rawson*[313] appeared to undermine or at least limit *Lingle*. The Idaho Supreme Court had ruled that an employee could bring a common law action against a union alleging negligent inspection of a mine, reasoning that the union's duty of care de-

304. *E.g.*, Avco Corp. v. Machinists, 390 U.S. 557 (1968). Because section 301(a) entirely displaces overlapping state causes of action, claims falling within the federal statutory scope are treated as federal, even if alleged to sound in state law, for purposes of the removal jurisdiction of federal district courts. *See, e.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); Franchise Tax Bd. v. Construction Laborers Trust, 463 U.S. 1 (1983).

305. *See* Paperworkers v. Misco, Inc., 484 U.S. 29, 36 (1987).

306. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 219 (1985).

307. For a recent survey, see Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 593-620 (1992).

308. 471 U.S. 202 (1985).

309. 481 U.S. 851 (1987).

310. 486 U.S. 399 (1988).

311. *See id.* at 411-13.

312. *Id.* at 411, 407; *accord*, Hawaiian Airline, Inc. v. Norris, 114 S. Ct. 2239, 2246 (1994) (state cause of action protecting whistleblower from retaliatory discharge not preempted by RLA because state cause of action stands "[w]holly apart from any provision of the [collective bargaining agreement]").

313. 495 U.S. 362 (1990).

rived not from the collective bargaining agreement, but solely from the fact that the union had undertaken inspections.[314] The United States Supreme Court, without even citing *Lingle*,[315] concluded that the common law action was preempted. The action at issue, the Court thought, did not mark out as illegal "an act that could be unreasonable irrespective of who committed it and could foreseeably cause injury to any person who might possibly be in the vicinity."[316] The union's acts in inspecting the mine, therefore, could not be evaluated, notwithstanding the contrary claim of the Idaho Supreme Court, without taking into account the further fact that "the [u]nion's representatives were participating in the inspection process pursuant to the provisions of the collective-bargaining agreement, and that the agreement determined the nature and scope of the [u]nion's duty."[317] Federal law governed.[318]

Lingle and *Rawson* are in fact consistent. The Supreme Court's method in both cases, it is plain, reveals an important linguistic preoccupation: if the language through which a state statutory or common law cause of action works itself out is, even in part, the same language as the language used in a collective bargaining agreement, the state action cannot proceed.[319] The Court in *Lingle* carefully examined the format of both the plaintiff allegations and defendant responses posited by the cause of action at issue in order to be sure that disputed factual questions "can be resolved without interpreting the [bargaining] agreement itself."[320] It is not enough, however, that state actors simply announce, as in *Rawson*, an intention not to use collective bargaining language. Federal law requires a reason for believing that the state action is not simply a relabeling; the different terms used in the state cause of action cannot simply act as stand-ins or indirect references to bargaining agreement formulas.[321] This was the problem in *Rawson*: after initially acknowledging that the suit for failure to inspect imposed on the union a duty derived from language in the bargaining agreement, the Idaho Supreme Court subsequently sought to portray duty as fol-

314. *See* Rawson v. Steelworkers, 770 P.2d 794, 795-96 (Idaho 1988).

315. The Idaho Supreme Court had expressly relied on *Lingle*. *See id.* at 797.

316. *Rawson*, 495 U.S. at 371.

317. *Id.*

318. The Supreme Court ultimately held that, although section 301(a) in principle allowed employees to enforce bargaining agreement obligations against unions (whether or not the unions had breached the duty of fair representation), *see id.* at 372-74, in the case at hand the bargaining agreement afforded employees no basis for suing as third-party beneficiaries because the agreement imposed upon the union no duty enforceable by the employer, *see id.* 374-75.

319. *See also* Livadas v. Bradshaw, 114 S. Ct. 2068, 2079 (1994) (need to refer to bargained-for wage rates to compute remedy irrelevant to substance of underlying dispute).

320. *Lingle*, 486 U.S. at 410; *see id.* 406-07, 407-08 n.7.

321. On this view, there is room (at least) for the view that section 301 preemption law supplies resources available not only for defending collective bargaining regimes, but also for justifying causes of action that would protect the interests of workers without regard to collective bargaining outcomes. *But see* Stone, *supra* note 307 at 620-38 (section 301 preemption as chiefly apologetics for collective bargaining).

lowing directly from union actions without explaining how the relevant acts could be described, criticized, or justified (acts do not speak for themselves) entirely without reference to the bargaining agreement.[322]

Obviously, in their linguistic emphasis *Lingle* and *Rawson* evoke Archibald Cox's famous discussion of labor law preemption generally.[323] But *Rawson*'s handling of the problem of translation in particular is also notable insofar as the inquiry into forms of words tends to resemble the mode of analysis proposed by this essay. The Supreme Court concluded that the Idaho court had accomplished nothing more than relabeling only *after* addressing the question of point of view, the field of reference assumed by the state action. In the end, the Court thought, Idaho law was not enforcing a norm capable of elaboration and application without reference to the facts of workplace relationships;[324] since such relationships, and the expectations of reasonable conduct that they generate, are defined in part by collective bargaining agreement provisions, preemption follows.[325] *Lingle*, by contrast, highlights a difference between the section 301(a) setting and the statutory frames organizing the main body of my analysis. It was not the case that the Illinois action's perspective was one independent of the workplace—"outside" in my terminology. It was enough, rather, that the action merely adopted a point of view different from that of the collective bargain-

322. The tact shown by the United States Supreme Court in discussing the Idaho Supreme Court's changing views is notable: it is not that the Idaho court fails to understand its own tort law—rather, the two courts simply "see it" differently, *see* Rawson, 495 U.S. at 371. There is, nonetheless, at least a suggestion in the United States Supreme Court opinion that the Idaho court might be disingenuous: "Pre-emption by federal law cannot be avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective-bargaining agreement contract as a state-law tort." *Id.* at 371-72; *see also* id. 379 (Kennedy, J., dissenting) ("The Court reaches a different conclusion because it doubts that the Idaho Supreme Court means what it seems to have said").

323. Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

324. For cases in which a court concluded that there was no preemption because a state-law right could be understood as indeed independent of workplace references, *see* Lopez v. Continental Can Co., 961 F.2d 148, 149 (9th Cir. 1992); Gulden v. Crown Zellerbach Corp., 890 F.2d 195, 198-99 (9th Cir. 1989).

325. A parallel analysis is evident in Stikes v. Chevron USA, Inc., 914 F.2d 1265 (9th Cir. 1990), holding that a California law right of privacy, even though recognized in the state constitution, did not provide a basis for a cause of action falling outside the scope of federal preemption:

> Here, the district court could not ascertain Stikes' expectations of privacy at the workplace without considering the conditions of his employment enumerated in the collective bargaining agreement . . . By the same token, it could not assess whether Chevron's search of the car constituted an unreasonable intrusion without understanding the scope of Chevron's powers provided for in the collective bargaining agreement.

Id. at 1269; *accord, e.g.*, Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 117 (1st Cir. 1988) ("A [privacy] right subject to a balance involving the needs and interests of the parties is, almost of necessity, defined by the parties themselves"); *see also* Mock v. T.G.&Y. Stores Co., 971 F.2d 523, 530 (10th Cir. 1992) (similar analysis of various Oklahoma law tort claims); Perugini v. Safeway Stores, Inc., 935 F.2d 1083, 1087-89 (9th Cir. 1992) (somewhat conclusorily differentiating preempted job assignment and not-preempted sexual harassment emotional distress claims on basis of whether reference to bargaining agreement is needed to determine whether employer's "conduct exceeded all bounds usually tolerated in a civilized community").

ing agreement: in this case, by keying on questions of employer motivations, either too subjective or implicitly too managerial to be true bargaining agreement topics.[326] Because the language of section 301(a) and therefore preemption analysis makes the collective bargaining agreement the point of departure, "outside" includes parts of "inside."[327]

B. *Federal Arbitration Act (FAA) Preemption*

Section 2 of the Federal Arbitration Act states that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[328] The Supreme Court has held that state statutes which in effect sever arbitration clauses from other provisions in a contract and "take . . . meaning precisely from the fact that a contract to arbitrate is at issue"[329] are in conflict with FAA section 2, and are thus preempted.[330] The Court has

326. *See also* Hawaiian Airlines, Inc. v. Norris, — U.S. —, 114 S. Ct. 2239, 2251 (1994) (applying *Lingle* in Railway Labor Act context). The subjectivity of employer motivations was crucial in Bettis v. Oscar Mayer Foods Corp., 878 F.2d 192 (7th Cir. 1989), in which a court of appeals panel held that *Lingle* governed a workers compensation retaliatory discharge case even though the employer argued that the challenged furlough was justified by a provision of a collective bargaining agreement. Because the issue was motive, the court ruled, it was enough, if the employer were to prevail, to determine "that the motive was something other than the filing of a workers' compensation claim": if such a motive existed, it would not matter "whether, as a matter of law, the collective bargaining agreement justifies such a motive." *Id.* at 197. Another Seventh Circuit case, In re Amoco Petroleum Additives Co., 964 F.2d 706 (7th Cir. 1992), makes explicit the significance of background definitions of appropriate bargaining topics in applying *Lingle*. There, an employer defending video surveillance of employee locker rooms argued that the practice fell within a zone of discretion recognized by a management-rights clause in a collective bargaining agreement, and thus section 301(a) preempted an employee invasion of privacy suit. Read broadly enough, management-rights clauses might seem to bring within collective bargaining agreements all matters not directly addressed in the agreements, thus radically expanding the scope of section 301(a) preemption. In *Amoco Petroleum*, however, Judge Easterbrook carefully noted that "[p]rivacy in the workplace is an ordinary subject of bargaining," *id.* at 710, before ruling that in the case at hand the management-rights clause did indeed trigger preemption: "Even agreements that do not mention surveillance expressly may deal with the subject by implication." *Id.* Thus, it was not the management-rights clause alone that mattered, but a sense of the usual topics collective bargaining agreements address.

327. Section 301(a) thus may not preempt state actions whose inquiries would be appropriate for arbitration within the terms of the main analysis of this essay. *See, e.g.*, Smolarek v. Chrysler Corp., 879 F.2d 1326, 1334 (6th Cir. 1989) (en banc) (no preemption under *Lingle* of Michigan statutory handicap discrimination claim turning on employer motivation in much the same fashion as ADEA age discrimination claim). The different results, obviously, are entirely a function of starting points. Preemption analysis takes its cue from the principal concern of the relevant federal statute, here section 301(a); that concern focuses on the integrity of the text of the collective bargaining agreement. The analysis in this essay in cases dealing with the interaction of arbitration agreements and federal statutory actions, by contrast, emphasizes the implications of the relevant statutes without directly considering arbitration agreement terms.

328. 9 U.S.C.A. § 2.

329. Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987).

330. *Id.* at 489-90; Southland Corp. v. Keating, 465 U.S. 1, 16 (1984). Parties may by contract agree, however, that the arbitration procedures that they wish to be followed in case of dispute are to be taken from state law arguably less supportive of arbitration than the FAA itself. *See* Volt Info. Sciences

noted in dictum, however, that "state law, whether of legislative or judicial origin, is applicable if *that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.*"[331] But the Supreme Court's decisions themselves do not indicate, apart from a casual example,[332] how to identify "issues concerning the validity . . . of contracts generally."

A short but provocative line of decisions from other courts, however, does address the matter. The leading case for present purposes is *Supak & Sons Mfg. Co. v. Pervel Industries, Inc.*[333] There, a Fourth Circuit panel held Uniform Commercial Code section 2-207, regulating the applicability of non-negotiated terms in form contracts, did not conflict with FAA section 2, and therefore might be invoked to block enforcement of a form arbitration clause. Section 2-207, Judge Winter wrote, "is a general rule of contract formation"; it "does not apply only to arbitration clauses" but "merely applies to arbitration clauses the traditional common law rule that a term does not become part of the contract unless accepted by both parties."[334] The *Supak* opinion, insofar as it depicts UCC section 2-207 as "a general rule," plainly anticipates the Supreme Court's subsequent reading of FAA section 2.[335] But the real significance of the Fourth Circuit analysis lies elsewhere, ironically in its least persuasive aspect. *Supak* is difficult to follow, to say the least, insofar as it portrays section 2-207 as simply a "traditional common law rule" concerned with what the parties actually accepted. If an arbitration clause included in a contract form is not deemed to be a material alteration, it becomes legally enforceable pursuant to section 2-207(2)(c) without regard to whether the parties in some sense actually "accepted" it.[336] The UCC provision itself, and not the agreement of the parties, determines the applicability of the arbitration clause.

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v. Stanford Univ., 489 U.S. 468, 478-79 (1989). *But cf. id.* at 476 n.5 (state arbitration rules at issue "generally foster the federal policy favoring arbitration").

331. *Perry*, 483 U.S. at 493 n.9 (emphasis in original).

332. "We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement." *Southland Corp.*, 465 U.S. at 16 n.11.

333. 593 F.2d 135 (4th Cir. 1979).

334. *Id.* at 137.

335. There is a real question, however, whether *Supak*'s application of section 2-207 is consistent with the Supreme Court's FAA jurisprudence. Judge Winter, following North Carolina and New York law, ruled that "an arbitration clause constitutes a *per se* material alteration of the contract" excludable under section 2-207(2)(b). *Id.* at 136. This reading seemingly remains the New York interpretation. *See* F.N. Wolf & Co. v. Brothers, 613 N.Y. Supp.2d 319, 321 (Sup. Ct. 1994); Marlene Indus. Corp. v. Carnac Textiles, Inc., 408 N.Y. Supp.2d 410, 413-14 (Ct. App. 1978). Federal courts, though, have judged this singling out of arbitration as always material to be at odds with the Supreme Court's demand that only "generally" applicable rules govern the enforcement of arbitration agreements. *See* Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nat'l, 991 F.2d 42, 46 (2d Cir. 1993) (treating question as one of burden of proof and applying usual New York preponderance standard); Hatzlachh Supply Inc. v. Moishe's Electronics, Inc., 828 F. Supp. 178, 183-84 (S.D.N.Y. 1993) (applying case-by-case test of materiality as better interpretation of UCC in light of FAA).

336. *See* Bergquist Co. v. Sunroc Corp., 777 F. Supp. 1236, 1243-47 (E.D. Pa. 1991).

Subsequent cases are indeed more explicit. *Recold, S.A. de C.V. v. Monfort of Colorado, Inc.*[337] addressed an attempt to invoke UCC section 2-318, in a case in which appellee was concededly a third-party to the agreement to arbitrate that appellant sought to enforce; the statutory provision, allegedly, was the source of an arbitration right otherwise growing out of a " 'legal relationship' created by statute."[338] Unimpressed by the reading of section 2-318 that this argument urged, the Eighth Circuit panel deciding *Recold* held that appellant was hoist on its own petard: the UCC provision applied "independent of any contract" and therefore did not depend for its definitions of warranty remedies on the content of the agreements among some of the parties to the pertinent transaction.[339] *W.M. Schlosser Co. v. Fairfax County Sch. Bd.*[340] held the *Dillon* Rule, limiting the recognition of "governmental powers by implication,"[341] was a fundamental principle of Virginia law and as such " 'a general rule of contract formation' "[342] invalidating a school board arbitration agreement as *ultra vires* notwithstanding the FAA. The court, not surprisingly, undertook no effort to relate the relevance of the Dillon Rule to the terms of the parties' dealings.

Is it the case, therefore, that the FAA does not preempt if state law simply treats contract terms as *irrelevant*, including, but importantly not exclusively, arbitration terms, supplying instead independent criteria regulating matters at hand?[343] If so, in such cases arbitration agreements would be legally irrelevant, and therefore irrelevant in particular to the assertion of litigation rights. If so as well, we may conclude that the emphasis on state law "independent of any contract" is entirely of a piece with the emphasis on external versus internal perspectives suggested by this essay. I do not mean to make too much, however, of the implications of the *Supak* line. Article 2 of the UCC is famously difficult to categorize as entirely either a strongly regulatory statute or simply a point of entry for norms fixed by the parties themselves. Questions of ultra vires or capacity, even if also implicating state constitutional law, remain recognizably contractual. But at least in the absence of further pronouncements from the United States Supreme Court, the thrust of these no-preemption cases is intriguing.

337. 893 F.2d 195 (8th Cir. 1990).

338. *Id.* at 197. The case arose under section 202 of the Federal Arbitration Act, *see* 9 U.S.C.A. § 202 (West Supp. 1994), part of the statutory implementation of Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *see Recold*, 883 F.2d 195.

339. *Id.* at 199; *see id.* at 198-99.

340. 980 F.2d 253 (4th Cir. 1993).

341. *Id.* at 255.

342. *Id.* at 259 (*quoting Supak*, 593 F.2d at 137).

343. *See* Securities Indus. Ass'n v. Connolly, 883 F.2d 1114, 1121 (1st Cir. 1989) (dictum).

C. Arbitration and Administrative Action

There remains the question of the relationship of administrative action and arbitration. In *Gilmer*, the Supreme Court indicated without much discussion that the arbitration agreement in question would not block the EEOC from investigating the matters at issue.[344] How is it possible, within the terms I have outlined, for a court to conclude that private litigation but not agency action must give way in the face of an arbitration agreement? It is enough, I think, to note that statutory schemes might assign very different roles to agency action and litigation. Responsibility for general considerations of public interest, the external perspective, could be the exclusive business of the agency; litigation would then serve simply to protect the expectations of individuals within the structures the agency supervises. This distribution of roles, of course, is not necessary: litigation might parallel agency action in concern for structure.[345] But in at least some cases, the *Gilmer* result may be appropriate. Analysis of particular cases, therefore, follows the usual form. Thus, in *Farrel Corp. v. ITC*[346], a Federal Circuit Court panel reversed an International Trade Commission decision to terminate an investigation because of an arbitration agreement binding the disputing parties.[347] Relying heavily on the *Gilmer* dictum[348], the court also pointedly noted:

> The ITC, through its staff, conducts the investigations independently of the wishes of the parties, and in reaching its final determination on an alleged violation must consider factors that may or may not interest the parties: the "public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers."[349]

This is, in essence, the approach of this essay. Continuation of the ITC proceeding appears to have been readily justifiable.[350]

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344. *See* 111 S. Ct. at 1653.

345. Or agency action might resemble adjudication and arbitration insofar as all, under particular statutes, might be concerned chiefly with the contours of the dealings between plaintiff and defendant, and thus adopt an inside perspective. *See, e.g.*, Olde Discount Corp. v. Tupman, 805 F. Supp. 1130, 1133, 1139-40 (D. Del. 1992) (state securities law administrative proceeding does not take precedence over arbitration and is thus preempted by the FAA in part because claims at issue do not involve technical matters invoking doctrine of primary jurisdiction but rather "are within the conventional experience of . . . judges").

346. 949 F.2d 1147 (Fed. Cir. 1991).

347. *See id.* at 1149-50.

348. *See id.* at 1156.

349. 949 F.2d at 1152 (quoting 19 U.S.C.A. § 1337(c)) (emphasis in original).

350. In contrast, in Olde Discount Corp. v. Tupman, 1 F.3d 202 (3rd Cir. 1993), a state administrative agency initiating processes to require a securities broker-dealer to rescind particular transactions was arguably a mere surrogate for individual purchasers of securities who were parties to an arbitration contract, and who claimed securities fraud grounded in face-to-face dealings. The badly-split Third Circuit panel held that the FAA pre-empted the state proceeding, but agreed that in a case where regulatory concerns were more apparent, state action might continue. *See id.* at 210-11 (Greenberg, J.); *Id.* at 216 n.1 (Rosenn, J., concurring); *Id.* at 217-219 (Nygaard, J., dissenting).