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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 1999; A.B., History, Dartmouth College, 1994. I would like to thank my parents, James and Mary Jane Murray, and grandparents, Patrick and Belinda Murray and John and Eileen Riordan, for their ongoing support during my education.

THE UNCERTAIN LEGACY OF *GILMER*: MANDATORY ARBITRATION OF FEDERAL EMPLOYMENT DISCRIMINATION CLAIMS

John W. R. Murray*

Introduction

In 1974, the United States Supreme Court ruled that an employee could not be forced to arbitrate his discrimination claim against his employer pursuant to his union's collective bargaining agreement.¹ The decision, *Alexander v. Gardner-Denver Co.*,² was widely viewed as foreclosing entirely agreements to arbitrate employee discrimination claims. Seventeen years later, however, the Court decided *Gilmer v. Interstate/Johnson Lane Corp.*,³ which held enforceable an agreement by an employee to submit to arbitration all statutory discrimination claims against his employer.⁴

Gilmer apparently limited *Gardner-Denver* to arbitration clauses in collective bargaining agreements, and though *Gilmer* involved an employee in the securities industry, many lower courts have read the decision as signaling approval of arbitration provisions in employment contracts both within and outside of the securities context.⁵ These developments have increasingly encouraged employers to require employees, as a condition of employment, to agree to such provisions in individual employment contracts and applications.⁶

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1. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

2. *Id.*

3. 500 U.S. 20 (1991).

4. *See id.* at 35.

5. *See, e.g.,* *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998); *Cole v. Burns Int'l Security Serv.*, 105 F.3d 1465 (D.C. Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997), *cert. denied*, 118 S.Ct. 299 (1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Rojas v. TK Communications*, 87 F.3d 745 (5th Cir. 1996); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1996); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995).

6. *See* John P. Furfaro and Maury B. Josephson, *Employment Arbitration*, N.Y. L.J., Sept. 11, 1997, at 3.

Proponents of mandatory arbitration agreements contend that arbitration is a cheaper, more expeditious forum for the resolution of discrimination claims, offering advantages to both employer and employee.⁷ The growing popularity of mandatory arbitration, however, has drawn intense criticism from opponents, including the Equal Employment Opportunity Commission ("EEOC"), who contend that the informal arbitral procedure is ill-suited to carry out the scrupulous enforcement of federal discrimination laws as per congressional design.⁸ Critics are equally troubled by the mandatory nature of these agreements, which they characterize as forcing prospective employees, with no real bargaining power, to sign away their statutory rights.⁹

The dispute has been played out in the lower courts, yielding a broad range of decisions on the proper application of *Gilmer*.¹⁰ While several circuit courts have enforced mandatory arbitration agreements, a number of circuit and district courts have imposed additional safeguards designed to protect employees, including the requirement that mandatory arbitration clauses be sufficiently specific, and that the arbitration itself provide employees with basic due process protections.¹¹ Still other courts have held that *Gilmer* has been overruled by subsequent congressional legislation, which they construe as barring mandatory arbitration provisions altogether.¹²

Part I of this Note analyzes the treatment of mandatory arbitration by the Supreme Court and lower federal courts, both leading up to and since *Gilmer*. Part II examines the principal arguments in favor of mandatory arbitration agreements, as well as the countervailing position, including the stance of the EEOC. Part III argues that in view of the unique potential of mandatory arbitration to further the policies underlying federal discrimination statutes,

7. See, e.g., Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are An Effective Alternative to Employment Litigation*, 52 DISP. RESOL. J. 19 (1997).

8. See, e.g., *Excerpts from the Text: EEOC Rejects Mandatory Binding Employment Arbitration*, 52 DISP. RESOL. J. 11 (1997) (reprinting EEOC Notice No. 915.002, July 10, 1997).

9. See, e.g., Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 29 (1996).

10. See *infra* Part I.C.1-2 and I.D.

11. See, e.g., *Cole*, 105 F.3d at 1488; (setting forth minimum due process requirements for arbitration proceedings); *Lai*, 42 F.3d at 1305 (holding invalid an arbitration clause that failed to specify the types of disputes covered).

12. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (1998); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998).

the Supreme Court should resolve the conflict in favor of mandatory arbitration. However, in order to ensure that arbitration lives up to its promise, the Court also should require that arbitration proceedings incorporate fundamental procedural protections for employees, as distinguished from the present scheme in which arbitrators may elect to do so on a purely voluntary basis.

I. The Law Pertaining to Arbitration of Discrimination Claims

A. Arbitration Disfavored: *Alexander v. Gardner-Denver Co.*

The Supreme Court's first assessment of arbitration as a forum for discrimination claims in *Alexander v. Gardner-Denver Co.* was a highly skeptical one.¹³ In reversing the dismissal of the plaintiff's claim under Title VII of the Civil Rights Act of 1964,¹⁴ the Supreme Court found "no suggestion in the statutory scheme that a prior arbitral decision . . . forecloses an individual's right to sue."¹⁵ First, the Court noted that Title VII was enacted for the purpose of expanding the remedies available to discrimination plaintiffs.¹⁶ It followed, the Court reasoned, that an individual could not relinquish his right to a private action under Title VII by submitting to arbitration.¹⁷ Second, in ruling that Alexander's union lacked the authority to waive his right to sue under its collective bargaining agreement ("CBA"), the Court emphasized the discord between the union's role of safeguarding the *collective* rights of all unionized employees, and the role of Title VII in vindicating the *individual* right of each employee to equal employment oppor-

13. 415 U.S. 36 (1974). Alexander was an African-American who had worked as a drill operator at the defendant's plant. After the company fired him for allegedly producing defective parts, Alexander filed a grievance pursuant to the collective bargaining agreement ("CBA") in force between the company and Alexander's union. The agreement included an arbitration clause, which required that the dispute, if not resolved through the grievance procedure, be remitted to arbitration, the result of which was to be "final and binding upon the Company, the Union, and any employee or employees involved." *Id.* at 38-42. After the arbitrator ruled in the company's favor, *see id.* at 42-43, Alexander brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994) [hereinafter Title VII]. *See Gardner-Denver*, 415 U.S. at 43. The District Court, holding that Alexander was bound by the arbitration provision, granted summary judgment for the company, and the Tenth Circuit Court of Appeals affirmed. *See* 346 F. Supp. 1012 (D. Colo. 1971); 466 F.2d 1209 (10th Cir. 1972).

14. 42 U.S.C. § 2000e *et seq.*

15. *Gardner-Denver*, 415 U.S. at 47.

16. *See id.* at 47-48.

17. *See id.* at 48-49.

tunity.¹⁸ "Of necessity, the rights conferred [by Title VII] can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII," the Court determined.¹⁹

Finally, the Court cast doubt on the structural competence of arbitration as a means for resolving discrimination claims.²⁰ The Court's discomfort stemmed in part from what it viewed as "the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation."²¹ Most significantly, however, the Court expressed doubt as to the capacity of arbitration to provide discrimination plaintiffs with adequate due process protections.²² Specifically, the Court identified a number of procedural shortcomings: the sparseness of the record of arbitration proceedings relative to that of judicial proceedings, the non-applicability of the rules of evidence, and the unavailability of "rights and procedures" typical of civil trials such as discovery, compulsory process, cross-examination, and testimony under oath.²³ It is this lack of confidence in the ability of the arbitral process to safeguard fundamental rights that remains the most influential basis of the *Gardner-Denver* decision, as it has provided the highest form of judicial validation for the principal misgiving of courts and commentators on both sides of the issue.

B. *Gardner-Denver* Restricted: The *Gilmer* Decision

The *Gardner-Denver* Court had appeared to foreclose any role for arbitration in the resolution of discrimination claims. By the mid-1980s, however, the Supreme Court had largely overcome its uneasiness. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,²⁴ the Court enforced an agreement to arbitrate an antitrust dispute under the Sherman Act, reasoning that in submitting to arbitration, "a party does not forego the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial forum."²⁵

18. *See id.* at 51.

19. *Id.*

20. *See id.* at 56-59.

21. *Id.* at 56-57.

22. *See id.* at 57-58.

23. *Id.* at 57-58. The Court further suggested that heightening procedural safeguards in arbitration was an unfeasible solution, because this would rob arbitration of its most attractive characteristic, i.e., its informality. *See id.* at 58-59.

24. 473 U.S. 614 (1985).

25. *Id.* at 640.

The Court extended this receptivity to the arbitration of discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp.*²⁶ In affirming the Fourth Circuit's decision allowing the plaintiff's claim under the Age Discrimination in Employment Act of 1967 ("ADEA"),²⁷ the Court, in remarkable contrast to its prior evaluation, rejected the contention that adjudication alone was capable of tending the social policies that the ADEA was intended to advance.²⁸ "[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."²⁹

Moreover, the Court imposed upon employers the burden of showing that Congress intended to preclude arbitration of the claim at issue.³⁰ Here, the Court held, nothing in the text or legislative history of the ADEA evidenced an intent that the courts be the sole forum for resolution of ADEA claims.³¹ Nor did arbitration of statutory claims pose a threat to the EEOC's enforcement role, given that employees remained free to file charges with the Commission.³²

Most importantly, in dismissing Gilmer's due process arguments, the Court appeared to refute almost directly the *Gardner-Denver* Court's dim assessment of the fitness of arbitration for handling statutory claims.³³ Rejecting Gilmer's contention that arbitration

26. 500 U.S. 20 (1991). Gilmer, who had been a financial services manager for Interstate, alleged that he was terminated because of his age (sixty-two at the time of suit) in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1994) [hereinafter ADEA]. See *Gilmer*, 500 U.S. at 23-24. Gilmer's employment with Interstate had required him to file with the New York Stock Exchange ("NYSE") a "U-4" registration application, in which he agreed to arbitrate "any dispute, claim, or controversy" arising between him and Interstate "that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations" with which he registered. *Id.* at 23. One of those NYSE rules provided for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.* Gilmer nonetheless filed suit in federal court. The District Court, relying on *Gardner-Denver*, 415 U.S. 36 (1974), denied Interstate's motion to compel arbitration, but the Fourth Circuit Court of Appeals reversed on the ground that in enacting the ADEA, Congress had never intended to bar arbitration of ADEA claims. See 895 F.2d 195, 197 (1990).

27. 29 U.S.C. § 621 *et seq.*

28. See *Gilmer*, 500 U.S. at 28.

29. *Id.* (quoting *Mitsubishi*, 473 U.S. at 637).

30. See *id.* at 29 and 35.

31. See *id.* at 29.

32. See *id.* at 28.

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

panels are inclined to be biased in favor of employers, the Court noted that under NYSE rules, the parties were entitled to extensive information about arbitrators, could make peremptory and for cause challenges, and that arbitrators were required to disclose any conflicts of interest.³⁴ The Court also accorded little weight to Gilmer's argument that the limited availability of discovery in arbitration would make it unduly burdensome for plaintiffs to prove ADEA claims.³⁵ It was unlikely, the Court noted, that ADEA claims required more extensive discovery than other statutory causes of action held to be arbitrable by the Court, such as RICO and antitrust claims.³⁶ Moreover, the lesser extent of discovery in arbitration was counterbalanced by the arbitrator's freedom from the rules of evidence.³⁷ Though directed at the ADEA claim at issue, the Court's rationale dealt a grave blow to the argument that arbitration *per se* is an inadequate mechanism for the redress of civil rights claims.

Having made a near diametric reversal in its appraisal, the Court distinguished *Gardner-Denver* on the ground that it involved the issue of "whether arbitration of contract-based claims" barred later judicial resolution of statutory claims.³⁸ *Gilmer*, by comparison, centered upon the enforceability of the arbitration agreement itself.³⁹ Presumably because the plaintiff's union in *Gardner-Denver* could not validly waive his right to sue under the collective bargaining agreement in that case, the *Gilmer* Court held that the plaintiff in *Gardner-Denver*, in contrast to Gilmer, had never actually waived his right to sue.⁴⁰ In addition, unlike *Gardner-Denver*, Gilmer's waiver of his right to sue was not given pursuant to a CBA, so that the tension between collective and individual rights, a primary concern of the *Gardner-Denver* Court, was not implicated here.⁴¹

34. *See id.* at 30.

35. *See id.* at 31.

36. *See id.* at 31.

37. *See id.*

38. *Id.* at 35.

39. *See id.*

40. *See id.*

41. *See id.* In addition, the Court observed that *Gardner-Denver*, in contrast to *Gilmer*, was not decided under the Federal Arbitration Act, which reflects "a liberal federal policy favoring arbitration agreements." *Id.*

C. Mandatory Arbitration Extended: *Gilmer* in the Circuits

1. *Due Process Concerns*

Gilmer left unanswered the question of whether mandatory employment arbitration agreements were valid. The majority of circuits to address the issue have ruled in the affirmative, compelling employees to submit their discrimination claims to arbitration under the terms of their employment contracts.⁴²

Several of those courts, however, have signaled a continuing concern with the issue of due process.⁴³ Consequently, a number of courts have moved beyond *Gilmer* in imposing a variety of procedural requirements in discrimination cases.⁴⁴ One such court, the District of Columbia Circuit in *Cole v. Burns International Security Services*,⁴⁵ enumerated several potential procedural inequities in the arbitration of individual statutory claims: that only employers are “repeat players” in the arbitration process, affording them superior knowledge in selecting arbitrators; that the lack of public disclosure of arbitration awards could favor employers over individuals and make it difficult for plaintiffs to establish a pattern of discrimination; that employers are free to structure arbitration to their advantage in the contracts that they draft; and that many arbitrators are non-lawyers, unable to engage in the legal analysis required in statutory cases.⁴⁶

Pointing out that the Supreme Court’s endorsement of arbitration “has been based on the assumption that ‘competent, conscientious, and impartial arbitrators’ will be available to decide these cases,” the Court set forth several requirements to preserve the validity of that premise.⁴⁷ These include the criteria that arbitrators (1) educate themselves about that law, (2) follow precedent and adopt an attitude of judicial restraint when entering undefined areas of the law, (3) actively ensure that the record is sufficiently developed and “procedural fairness is provided,” and that (4) appointing agencies such as the American Arbitration Association (“AAA”) ensure that only persons meeting these requirements are added to arbitrator or panel lists.⁴⁸ Additionally, the Court held

42. See *supra* note 5.

43. See, e.g., *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998); *Cole*, 105 F.3d 1465; *Lai*, 42 F.3d 1299.

44. See *supra* note 11.

45. 105 F.3d 1465 (1997).

46. See *id.* at 1476-77.

47. *Id.* at 1488.

48. See *id.*

that employers are to bear the entire cost of mandatory arbitration, given that "arbitration has been imposed by the employer and occurs only at the option of the employer."⁴⁹

The Ninth Circuit, focusing on the agreement to arbitrate rather than the arbitration proceeding, has held that employers must disclose with a high degree of specificity the identity and nature of the rights that they require employees to waive.⁵⁰ *Prudential Insurance Company of America v. Lai*,⁵¹ like *Gilmer*,⁵² involved the arbitration provision in the U-4 securities industry registration application.⁵³ The form contained an agreement "to arbitrate any dispute, claim or controversy that . . . is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register."⁵⁴ The plaintiffs later registered with the National Association of Securities Dealers ("NASD"), which required that disputes "arising in connection with the business" of its members be arbitrated.⁵⁵

Reading *Gilmer* as mandating that a discrimination plaintiff "may only be forced to forego her claims if she has knowingly agreed to submit such disputes to arbitration," the Court held that the U-4 and NASD provisions failed to meet this standard, on the ground that neither described the specific types of disputes subject to arbitration.⁵⁶ In a subsequent case, the Court clarified the "knowing waiver" requirement as meaning that an arbitration provision must specifically identify the statutory claims subject to arbitration.⁵⁷ The Fifth Circuit, however, has taken a less stringent view, holding that a catchall phrase requiring arbitration of "other disputes" between employer and employee was sufficient to cover a plaintiff's Title VII claim.⁵⁸

More generally, the Second Circuit has underscored the role of judicial scrutiny of arbitration proceedings in discrimination

49. *Id.* at 1485.

50. *See Lai*, 42 F.3d at 1305; *Renteria v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1106-07 (9th Cir. 1997).

51. 42 F.3d 1299 (1994).

52. *See supra* note 26 and accompanying text.

53. *See Lai*, 42 F.3d at 1301.

54. *Id.*

55. *Id.* The NASD has since abandoned its mandatory arbitration policy, effective Jan. 1, 1999. *See* Bertrand C. Sellier and Margaret A. Dale, *Rigorous Scrutiny of Arbitration Decisions: Employment Law Update*, N.Y. L.J., Aug. 20, 1998, at 5.

56. *Id.* at 1305. The Seventh Circuit had earlier held the NASD provision at issue in *Lai* inapplicable to employment disputes. *See Farrand v. Lutheran Brotherhood*, 993 F.2d 1253, 1254-55 (1993).

57. *See Renteria*, 113 F.3d at 1106-07.

58. *See Rojas*, 87 F.3d at 746.

cases.⁵⁹ The precise issue in *Halligan v. Piper Jaffray, Inc.*⁶⁰ was whether to overturn an arbitrator's decision in an ADEA case rendered in favor of the employer, despite overwhelming evidence to the contrary.⁶¹ In finding that the decision was in "manifest disregard" of the law, the Court emphasized the critical importance of procedural safeguards in discrimination cases.⁶² Noting that *Gilmer* rested on the assumption that "the claimant would not forgo the substantive rights afforded by the statute, [and] that the arbitration agreement simply changed the forum for enforcement of those rights," the Court remarked that the instant case "put[] those assumptions to the test."⁶³ The *Cole* Court had reached a similar conclusion, observing that the same rationale in *Gilmer* "[is] valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law."⁶⁴ *Halligan*, together with *Cole* and *Lai*, thus may be read to stand for the proposition that arbitration of statutory rights merits an especially vigilant regard for procedural fairness, both by arbitrators as well as the courts reviewing them.

2. CBAs and Individual Employment Contracts Distinguished

Gilmer effectively divided employees subject to mandatory arbitration agreements into two classes: unionized and non-unionized.⁶⁵ Because the Court appeared to leave intact the core holding of *Gardner-Denver*, employees in the former category, covered by CBAs, presumably still were barred from waiving their right to sue, while such agreements between employers and non-union employees were held valid.⁶⁶

The Fourth Circuit, however, has erased the union distinction altogether, applying *Gilmer* to agreements to arbitrate by unionized and non-unionized employees alike.⁶⁷ In *Austin v. Owens-Brockway Glass Container, Inc.*,⁶⁸ the District Court required a discharged employee to arbitrate her claims under Title VII and the

59. See *Halligan*, 148 F.3d 197.

60. *Id.*

61. See *id.* at 198-200.

62. See *id.* at 204.

63. *Id.*

64. *Cole*, 105 F.3d at 1487.

65. See Norris Case, *Arbitration of Workplace Discrimination Claims: Federal Law and Compulsory Arbitration*, 14 Touro L. Rev. 839, 851 (1998).

66. See *id.*

67. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (1996).

68. *Id.*

Americans with Disabilities Act ("ADA")⁶⁹ as provided under the CBA between her union and Owens-Brockway.⁷⁰ In affirming, the Fourth Circuit determined that

[w]hether the dispute arises under a contract of employment growing out of [a] securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of opinion it should be enforced.⁷¹

The Court further reasoned that the right to bring a private action was indistinguishable from other rights that unions validly may bargain away, such as the right to strike.⁷² "The right to arbitrate is a term or condition of employment, and as such, the union may bargain for this right."⁷³

The Supreme Court recently addressed the issue, but left it unresolved. In *Wright v. Universal Maritime Service Corp.*,⁷⁴ the Court refused to enforce an arbitration provision in a CBA, but on different grounds than in *Gardner-Denver*.⁷⁵ The Court held first that the presumption of arbitrability pursuant to a CBA does not extend to statutory claims,⁷⁶ and second, that any waiver of an employee's right to sue under a CBA must be "clear and unmistakable."⁷⁷ Because the waiver at issue fell short of this standard, the Court deemed it unnecessary to decide the question of whether such a waiver would be enforceable.⁷⁸ The continuing validity of *Gardner-Denver* thus remains indeterminate.

69. 42 U.S.C. § 12101 *et seq.* (1994).

70. 844 F. Supp. 1103, 1106-07 (W.D. Va. 1994).

71. *Austin*, 78 F.3d at 885.

72. *See id.*

73. *Id.*

74. 119 S.Ct. 391 (1998).

75. *See infra* Part I.A.

76. *See Wright*, 119 S.Ct. at 395-96. The Court commented that the presumption "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA . . . The cause of action *Wright* asserts arises not out of contract, but out of the ADA, and is distinct from any right conferred by the collective bargaining agreement." *Id.* at 396.

77. *Id.* at 396.

78. *See id.* at 397.

D. *Gilmer* Preempted? The 1991 Civil Rights Act and Mandatory Arbitration

Congress addressed the question of arbitration and discrimination claims directly, if ambiguously, in the Civil Rights and Women's Equity in Employment Act of 1991 ("1991 Civil Rights Act"),⁷⁹ which was passed as an amendment to Title VII of the 1964 Civil Rights Act⁸⁰ as well as the ADEA.⁸¹ Section 118 of the Act encourages the use of alternative dispute resolution in Title VII and ADEA cases "where appropriate and to the extent authorized by law."⁸² The ADA, passed one year earlier, contains nearly identical language.⁸³ Left unclear, however, was the question of whether Congress intended by these provisions to endorse *Gilmer*, and thus implicitly approve mandatory agreements to arbitrate discrimination claims, or whether these provisions apply only to voluntary agreements entered into after a dispute has arisen.⁸⁴

This first judicial adoption of the latter position emerged from a Massachusetts district court in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (recently reversed by the First Circuit).⁸⁵ The Court relied heavily upon the legislative history of the Act, including the accompanying House Education and Labor Committee Report,⁸⁶ which advised that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provi-

79. 42 U.S.C. § 1981; Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified as a historical and statutory note).

80. 42 U.S.C. § 2000e *et seq.*

81. 29 U.S.C. § 621 *et seq.*

82. 42 U.S.C. § 1981 note.

83. *See* 42 U.S.C. § 12212. The section provides: "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 this chapter." *Id.*

84. *See Duffield*, 144 F.3d at 1189; *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 503 (E.D. Mich. 1997).

85. 995 F. Supp. 190 (1998). The decision was reversed by the First Circuit shortly prior to publication of this Note. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 98-1246, 1998 WL 880910, *7-*9 (1st Cir., Dec. 22, 1998). The Court determined that the legislative history relied upon by the district court was "insufficient to overcome the presumption in favor of arbitration which *Gilmer* establishes." *Id.* at *7. In addition, the Court viewed the persistent failure of Congress to pass legislation that would bar mandatory arbitration provisions as indicative of an intent to approve such agreements. *See id.*

86. H.R. REP. NO. 40(1), 102nd Cong., 1st Sess. 1991.

sions of Title VII.”⁸⁷ In other words, Congress intended that the 1991 Civil Rights Act preclude employers from requiring employees to arbitrate their Title VII claims.⁸⁸

Additionally, the Court pointed out that *Gilmer* was not decided until several months after the Act had been finalized, deducing that Congress could not have intended to endorse a case that it had no occasion to consider.⁸⁹ Rather, Congress could only have sought to codify what it viewed as the generally accepted pre-*Gilmer* rule that mandatory agreements to arbitrate were unenforceable.⁹⁰

Four months later, the Ninth Circuit reached a similar result. In *Duffield v. Robertson Stephens & Co.*,⁹¹ the Court premised its holding on what it perceived as the core purpose of the 1991 Civil Rights Act: to “expand employees’ rights and ‘to increase the possible remedies available to civil rights plaintiffs.’”⁹² It would thus be paradoxical, the Court stated,

to conclude that in the very Act of which the primary purpose was to to strengthen existing protections and remedies . . . Congress encouraged the use of a process whereby employers condition employment on their prospective employees surrendering their rights to a judicial forum . . . and force those employees to submit all such claims to compulsory arbitration.⁹³

To remain consistent with congressional intent, the Court determined that the qualifier “where appropriate” in Section 118 should be read to mean “where arbitration furthers the purpose and objective of the Act – by affording victims of discrimination an opportunity to present their claims in an alternative forum, a forum that they find desirable – not by forcing an unwanted forum upon them.”⁹⁴

The First, Third, and Fourth Circuits have flatly rejected this construction of the 1991 Act.⁹⁵ Acknowledging the Education and La-

87. Rosenberg, 995 F. Supp. at 201 (quoting H.R. REP. NO. 40(I) 102d Cong., 1st Sess. 1991).

88. *See id.*

89. *See id.* at 203.

90. *See id.*

91. 144 F.3d 1182 (1998).

92. *Id.* at 1192 (quoting *Lai*, 42 F.3d at 1304).

93. *Id.* at 1192-93 (quoting H.R. REP. NO. 40(II) at 1).

94. *Id.* at 1194.

95. *See Rosenberg*, 1998 WL 880910, *7-*9 (1st Cir. 1998); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182-83 (3d Cir. 1998) (stating that the House Committee Report “cannot be ‘interpreted’ to mean that the [Federal Arbitration Act] is impliedly repealed with respect to agreements to arbitrate Title VII and ADEA claims that will arise in the future”); *Austin*, 78 F.3d at 880-82 (4th Cir. 1996).

bor Committee's interpretation, the Fourth Circuit nevertheless remarked that the "committee's belief is not dispositive of what Congress intended."⁹⁶ To hold to the contrary would require that "*Gilmer* has no effect at all and that *Alexander* is still the law We do not think Congress intended to return to the old law."⁹⁷

A district court in Michigan has taken a different approach to the same result, construing the legislative history as consistent with mandatory arbitration.⁹⁸ In considering a statement by the chairman of the Education and Labor Committee that Section 118 does not cover "coercive attempts to force employees to forego statutory rights," the court reasoned that mandatory arbitration, rather than requiring employees to forfeit such rights, "only submits to their resolution in an arbitral, rather than judicial, forum."⁹⁹ Moreover, the court rejected the assertion that the agreement involved "force" within the usage of the Committee.¹⁰⁰ "If [the employee] disagreed with anything contained in the application she was free to simply look elsewhere for employment."¹⁰¹

The Supreme Court's recent denial of *certiorari* in *Duffield* suggests that the validity of either reading of the legislative history will remain uncertain for at least the near future.¹⁰² Not content to await the Court's resolution of the issue, however, *Gilmer*'s opponents in Congress have introduced a bill that would amend several statutes, including the ADA and ADEA, to prohibit mandatory arbitration of employment disputes.¹⁰³ The bill has not been passed to date, nor does it appear to occupy a prominent position on the congressional agenda.¹⁰⁴

96. *Austin*, 78 F.3d at 881; see also *Beauchamp v. Great West Life Assurance Co.*, 918 F. Supp. 1091, 1093-96 (E.D. Mich. 1996); *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1457-58 (D. Minn. 1996) (finding legislative history of § 118, including remarks of individual members of Congress and committee reports, non-determinative of Congressional intent due to "obvious bias" and "continuous amendment and supplementation").

97. *Id.* at 882.

98. *Frank's Nursery & Crafts*, 966 F. Supp. at 503-04.

99. *Id.* at 503 (citing 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991)).

100. See *id.* at 504.

101. *Id.*

102. See *supra* note 83.

103. See Civil Rights Procedures Protection Act of 1996, H.R. 983, S. 63, 105th Cong. (1997). The bill would also amend the FAA to prevent its application to discrimination claims, and would add language to a number of federal employment discrimination statutes, including the ADEA and ADA, making judicial recourse the exclusive procedure under each covered claim in the absence of a voluntary agreement to arbitrate entered into after such claim has arisen. See *id.*

104. See 1997 US H.B. 983 (SN); 1997 US S.B. 63 (SN) (Westlaw Congressional Bill Tracking). The Act was introduced to the House Committee on Education and Labor

E. Open Issue: The Applicability of the Federal Arbitration Act to Employment Disputes

Both *Gilmer* and the 1991 Civil Rights Act left unresolved the fundamental issue of whether the Federal Arbitration Act (the "FAA") applies generally to individual contracts of employment.¹⁰⁵ Section 1 of the Act provides an exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."¹⁰⁶ What remains unclear is whether the FAA's conception of "workers engaged in interstate commerce" comprehends all workers whose employment impacts upon interstate commerce, or merely that narrow class of employees engaged directly in the interstate transportation of goods.¹⁰⁷

The significance of the issue to the question of mandatory arbitration of statutory claims is considerable. If the FAA does apply generally to employment contracts, arguments attacking the soundness of arbitration as a forum for resolving statutory claims are unlikely to succeed against the Act's presumption of validity of arbitration agreements.¹⁰⁸ Likewise, application of the FAA arguably would foreclose arguments that policies embodied in federal discrimination laws against waivers of judicial remedies should overcome the presumption of arbitrability.¹⁰⁹ Conversely, if the FAA is held not to apply, then *Gilmer* may be effectively restricted to applicants in the securities industry or other areas wherein agreements to arbitrate statutory claims are reached other than through employment contracts.¹¹⁰

The vast majority of the circuits have adopted the former view, and most of those after *Gilmer*.¹¹¹ On this reading, "workers en-

and the Senate Committee on Labor and Human Resources, but lapsed in both committees at the adjournment of the 1998 regular session. *See id.*

105. 9 U.S.C. § 1 *et seq.* (1994). The *Gilmer* Court declined to rule on the scope of the Section 1 exclusion, because *Gilmer's* agreement to arbitrate had been secured through his U-4 application, which Justice White determined did not amount to a "contract of employment" under Section 1. *See Gilmer*, 500 U.S. at 25 n.2.

106. 9 U.S.C. § 1.

107. *See* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1363 (1997).

108. *See id.* at 1362.

109. *See id.*

110. *See id.*

111. *See, e.g.,* *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-37 (8th Cir. 1997); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 226-27 (3d Cir. 1997), *cert. denied*, 118 S.Ct. 299 (1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357-58 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 295 (1997); *Cole v. Burns Int'l Security Serv.*, 105 F.3d 1465, 1470-72 (D.C.

gaged in interstate commerce” include only persons actually employed in the interstate transportation of goods, rather than all workers whose employment broadly affects interstate commerce.¹¹² The Ninth Circuit, however, reflecting its continued disenchantment with *Gilmer*, has recently reached a contrary result.¹¹³ Because Congress’s Commerce Clause power at the time of the FAA’s enactment in 1925 was confined to the actual interstate movement of goods, the Ninth Circuit reasoned that Congress’s exemption from Section 1 of the only class of employees it could permissibly regulate — that is, employees directly engaged in interstate commerce — denoted an intent to exclude all employees from the section’s scope.¹¹⁴

Justice Stevens raised the issue in his dissent from the *Gilmer* majority, arguing that Congress intended to exclude from the FAA all “labor disputes,” including the agreement to arbitrate statutory claims at issue in that case.¹¹⁵ However, the Supreme Court to date has not ruled on the question. The Ninth Circuit’s decision thus provides a much-needed opportunity for the Court to clarify the FAA’s applicability to this area.

II. Arguments Surrounding Mandatory Arbitration of Statutory Rights Claims

A. The Case for Mandatory Arbitration

1. Expanded Access to Remedies

One of the more compelling arguments for mandatory arbitration, stated simply, is that it allows a greater number of aggrieved employees to have their discrimination claims heard than would otherwise be the case.¹¹⁶ This is largely due to the dramatic proliferation of employment cases in federal and state courts, as

Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.2d 592 (6th Cir. 1995); *Ewing v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. du Pont*, 443 F.2d 783, 785 (1st Cir. 1971). *But see* *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 432 (1996) (stating that the FAA does not apply to collective bargaining agreements).

112. *See* *Estreicher*, *supra* note 107, at 1363.

113. *See* *Craft v. Campbell Soup Co.*, 161 F.3d 1199, 1206 (1998).

114. *See id.* at 1202-05.

115. *See Gilmer*, 500 U.S. at 38-43.

116. *See, e.g.*, Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 221 (1997).

well as the inability of the EEOC to respond effectively to the surge of discrimination charges in recent years.¹¹⁷

In 1996, over 23,000 discrimination suits were filed in the federal courts, accounting for approximately twenty percent of total cases pending in federal and state courts.¹¹⁸ Furthermore, between 1990 and 1994, federal court filings in employment-related civil rights suits increased ninety-three percent, from roughly 8,700 cases in 1990 to nearly 16,000 in 1994.¹¹⁹ The average time for resolution of federal cases is eight months, but in 1994 over nine percent of active cases had been pending for over three years.¹²⁰ Moreover, of the cases filed in 1994, only approximately eight per cent reached trial.¹²¹

At the same time, many blue collar and non-managerial claimants are unable to secure counsel, who are often reluctant to enter into a contingent fee arrangement with an employee whose potential recovery does not justify the substantial time and expense called for in discovery-intensive discrimination cases.¹²² Employees, then, must generally be prepared to devote a sizable amount of time, possibly several years, in pursuing discrimination claims in the courts, and, in many cases, possess the financial wherewithal to shoulder litigation costs over the same period.¹²³ Obviously, many lower-level employees are poorly positioned to meet these requirements.¹²⁴

Based on similar findings, the Dunlop Commission on the Future of Worker-Management Relations ("Dunlop Commission"), appointed by the Clinton Administration, reported in 1994 that "the costs and time involved in enforcing public employment rights through the court system are increasingly denying a broader slice of American workers meaningful access to employment law pro-

117. See Oppenheimer & Johnstone, *supra* note 7, at 22.

118. See *id.*

119. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, UNITED STATES COURTS: SELECTED REPORTS, Table C 2A, A1-58 (1994).

120. See *id.* at A1-84.

121. See *id.* at A1-78.

122. See Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 7-8 (1998).

123. See FitzGibbon, *supra* note 116, at 247, 255; Jay S. Siegel, *Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes*, 13 LAB. LAW. 87, 89 (1997).

124. See FitzGibbon, *supra* note 116, at 247, 255.

tection."¹²⁵ The Commission further noted that plaintiffs tend to be white-collar, managerial employees rather than lower-level workers.¹²⁶

Furthermore, the number of charges handled by the EEOC rose from over 73,000 in 1993 to nearly 97,000 in 1994 and again to over 111,000 in 1995.¹²⁷ On average, claimants must wait one year before either the EEOC or they themselves, depending on the outcome of the investigation, may even initiate judicial proceedings.¹²⁸ Consequently, employees seeking to litigate are forced to rely upon a severely overburdened administrative agency whose resources generally permit action no sooner than a year from the filing of a charge, and then, most likely, undertakes no more than a perfunctory investigation of their claims.

By eliminating much of the time and cost required in litigation, arbitration offers many employees a more realistic opportunity for redress. Whereas an employee forced to bring his or her claim in court must often both bear the expense of litigation and wait possibly years for a final disposition of the claim, arbitration is concluded relatively swiftly and inexpensively.¹²⁹ Thus, for workers whose potential recovery is unlikely to justify the investment demanded by litigation, arbitration offers the most feasible recourse.¹³⁰

Moreover, arbitration provides a crucial benefit to aggrieved employees in facilitating their access to counsel.¹³¹ The shorter time frame in which arbitration is conducted, in turn requiring a smaller financial commitment, makes arbitration, for plaintiffs' attorneys, a

125. COMMISSION ON THE FUTURE OF LABOR-MANAGEMENT RELATIONS, U.S. DEPT. OF LABOR AND U.S. DEPT. OF COMMERCE, REPORT AND RECOMMENDATIONS: EXECUTIVE SUMMARY 25-26 (1994) [hereinafter DUNLOP COMMISSION REPORT].

126. *See id.*

127. *See EEOC: Commissioners Question General Counsel about Drop in Number of Cases Litigated*, DAILY LAB. REP., Oct. 23, 1996.

128. *See FitzGibbon, supra* note 116, at 241.

129. *See Oppenheimer & Johnstone, supra* note 7, at 22. According to one estimate, arbitration as opposed to litigation of employment claims results in a fifty percent cost savings to the parties. *See Garry G. Mathiason, Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, Q227 ALI-ABA 23, 41 (1994). The same study concluded that the average duration of an arbitration claim is 8.6 months, compared to three to eight years for litigation claims. *See id.* (citing study by the Institute for Civil Justice of the Rand Corporation).

130. *See St. Antoine, supra* note 122, at 7-8.

131. *See id.*

far more attractive setting than litigation for the discrimination claims of employees with lesser earning power.¹³²

Apart from making recovery more likely, one commentator has observed that arbitration offers an additional remedial advantage over litigation: the greater potential for employee reinstatement.¹³³ Because arbitration is closer in time to the discriminatory conduct, the likelihood is greater that the employee will accept reinstatement rather than damages.¹³⁴ In contrast, many courts are reluctant to order reinstatement following protracted litigation, by which time animus between employer and employee has intensified and the trust required for a solid employment relationship is irretrievably lost.¹³⁵

2. *Advantages for Employers*

A chief benefit of arbitration to employers is the protection it provides from inconsistent liability in the form of large, emotion-influenced jury awards and settlements.¹³⁶ Prominent examples include the \$50 million in punitive damages assessed by a jury in 1995 against Wal-Mart for a sexual harassment claim,¹³⁷ and the \$176 million settlement by Texaco with the EEOC after tapes were discovered revealing use of racial epithets by Texaco executives.¹³⁸ Such risk is averted by recourse to neutral, dispassionate arbitrators, as well as the absence of generous fee-shifting in arbitration as provided under federal statutes.¹³⁹

3. *The Requirement That Arbitration Be Mandatory*

These procedural attributes, however, still beg the question: why should arbitration be mandatory; that is, why should employees be required to agree to arbitrate prospective discrimination claims as a condition of employment? The most persuasive response is that without a mutual obligation to arbitrate, the incentive for employers to agree to an arbitration scheme is nullified. From the employer's standpoint, a shortcoming of arbitration is its expansion of

132. See Oppenheimer & Johnstone, *supra* note 7, at 22.

133. See FitzGibbon, *supra* note 116, at 245-55.

134. See *id.* at 251.

135. See *id.* at 252-53.

136. See *id.*

137. See Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB LAW 21, 22 (1997) (citing *Kimzey v. Wal-Mart Stores, Inc.*, No. 94-4195-CV-C-5, 1995 U.S. Dist. LEXIS 9867 (W.D. Mo. June 29, 1995)).

138. See *id.*

139. See Oppenheimer & Johnstone, *supra* note 7, at 22.

the number of disputes by making it easier for employees to bring claims.¹⁴⁰ What offsets this drawback, however, is the avoidance in arbitration of the reduced time and expense of litigation. Where arbitration is voluntary on the employee's part, however, this equilibrium is upset, because employees remain free to seek large jury awards in litigation.¹⁴¹ Employers naturally will be loath to accept such an arrangement.

Moreover, voluntary arbitration undermines another advantage of arbitration to employers — the assurance that disputes will be resolved with finality in arbitration rather than remain subject to an appeals process in the courts. When employees retain the option under a non-compulsory system of pursuing a claim in the courts, the process loses this promise of closure. Thus, in response to a speculative discrimination claim, many employers would logically elect against arbitration and take the gamble that the suit will be dismissed before judgment.¹⁴²

Likewise, mandatory agreements to arbitrate benefit employees in that employers, too, are required to foreswear litigation in all cases.¹⁴³ When arbitration is voluntary, an employer is likely to arbitrate only those claims that it believes the employee is likely to win, but will force employees with less certain claims to litigate.¹⁴⁴ By compelling arbitration in every case, mandatory arbitration deprives employers of the ability to prevail solely by virtue of their superior spending power.¹⁴⁵

4. *Due Process Safeguards in Arbitration*

Largely as a response to the due process concerns of the circuit courts following *Gilmer*, several prominent legal organizations and providers of arbitration have promulgated a series of procedural requirements designed to ensure procedural fairness for discrimination claimants. Among its recommendations, the Dunlop Commission concluded that arbitration proceedings, as a matter of fairness and accuracy, should provide the following protections: a competent arbitrator with knowledge of the laws in question; a reasonable place for the arbitration; a fair and simple method for the parties to attain information relevant to the dispute; no restriction

140. *See id.*

141. *See id.*

142. *See FitzGibbon, supra* note 116, at 248-49.

143. *See id.* at 249.

144. *See id.* at 248-49.

145. *See id.*

on the right to file charges with administrative agencies; a right to independent counsel at the option of the employee; a fair method of cost sharing to ensure affordable access to the system for all employees; a range of remedies equal to those available through litigation; a written award explaining the arbitrator's decision; and limited judicial review to ensure that the result is consistent with the law in question.¹⁴⁶

In line with the Commission's recommendations, in 1995 the American Bar Association ("ABA") Task Force on Alternative Dispute Resolution in Employment issued a Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship.¹⁴⁷ The Protocol adopted the Task Force's recommendations that employees be permitted representation of their choice and limited discovery, and that arbitrators be empowered to award the same relief as would be available from a court, racially diverse, and knowledgeable of the statute under which the claim is brought.¹⁴⁸ The Protocol has since been endorsed by the AAA, ABA, JAMS/Endispute, the National Academy of Arbitrators, the Society of Professionals in Dispute Resolution, and the American Civil Liberties Union.¹⁴⁹

Additionally, major providers of ADR services have implemented their own rules of procedure featuring similar protections.¹⁵⁰ In 1996, the American Arbitration Association brought into force its National Rules for Resolution of Employment Disputes, providing that arbitrators may allow discovery, that the parties bear the same burdens of proof as would apply in court, that only arbitrators with experience in employment law be appointed, and that arbitrators provide written opinions in the absence of contrary agreement by the parties.¹⁵¹ In 1995, JAMS/Endispute established similar guidelines.¹⁵²

Given the wide acceptance of the Dunlop Commission's recommendations among such organizations, it can be argued that these

146. See DUNLOP COMMISSION REPORT, *supra* note 125, at 30-31.

147. See *Employers Flock to ADR Although Uncertainties Remain*, EMPLOYMENT L. STRATEGIST, Mar. 1996, at 1.

148. See *id.* However, the Task Force did not reach agreement as to whether agreements to arbitrate statutory claims should be mandatory or voluntary, or at which point in time such agreements should be reached. See *id.*

149. See Bompey et al., *supra* note 137, at 34.

150. See *id.* at 32-34.

151. See NAT. RULES FOR RESOL. OF EMPLOYMENT DISP. (AAA, effective June 1, 1996).

152. See JAMS/ENDISPUTE RULES AND PROCS. FOR MEDIATION/ARB. OF EMPLOYMENT DISP. (1995).

due process protections, though perhaps not congruent with those in the courts, are sufficient enough to counteract the "informality of arbitral procedure" that so discomforted the *Gardner-Denver* Court.¹⁵³

B. The Case against Mandatory Arbitration

1. The EEOC Position

In July of 1997, the EEOC issued a policy statement announcing its opposition to mandatory arbitration agreements.¹⁵⁴ At the core of the EEOC's position is the notion that enforcement by public bodies of the federal civil rights laws is critical to their effectiveness.¹⁵⁵ For three principal reasons, mandatory submission of discrimination claims to arbitration "privatizes" the enforcement of those laws, thereby undermining the crucial public enforcement function.¹⁵⁶

The first reason cited by the EEOC is that the intrinsically private character of arbitration makes it unsuitable for resolution of discrimination claims.¹⁵⁷ In particular, the EEOC pointed to the lack of accountability by arbitrators to the public, as well as the constrained role of the arbitrator in resolving the immediate dispute before him or her rather than "giving force to the public values reflected in the antidiscrimination laws."¹⁵⁸ Additionally, the EEOC expressed concern that the absence of public disclosure of arbitration decisions in civil rights cases will make it impossible to identify discriminatory patterns among specific employers or within particular industries.¹⁵⁹ Further, the EEOC asserted that the lack of written opinions and limited grounds for judicial reversal in arbitration precludes it from contributing to civil rights jurisprudence through precedent.¹⁶⁰

Second, the EEOC argued that mandatory arbitration necessarily entails structural biases in favor of employers.¹⁶¹ For one, an employer, which typically submits to arbitration on a frequent basis over time, is a "repeat player"; the employee, on the other hand, is a "one-shot player," as a party to arbitration only in his or her par-

153. *Gardner-Denver*, 415 U.S. at 58.

154. See *EEOC Rejects Mandatory Binding Employment Arbitration*, *supra* note 8.

155. See *id.* at 11-12.

156. See *id.* at 12-14.

157. See *id.*

158. *Id.* at 12.

159. See *id.*

160. See *id.* at 13.

161. See *id.*

ticular dispute.¹⁶² Hence, the employer will enjoy superior knowledge in selecting arbitrators most likely to reach a result consistent with its position.¹⁶³ Moreover, the terms of mandatory agreements to arbitrate are nearly always dictated by the employer, as the party with greater bargaining power.¹⁶⁴ Consequently, the employer "is free to manipulate the arbitral mechanism to its benefit."¹⁶⁵

Finally, the EEOC asserted that mandatory arbitration impedes its ability to carry out its congressionally-mandated task of enforcing the civil rights laws.¹⁶⁶ EEOC enforcement is dependent to a great extent upon reports of discrimination by aggrieved employees, but employees who sign mandatory agreements may not be aware of their statutory entitlement to file an EEOC charge.¹⁶⁷ Even if employees are aware of this right, their incentive to do so is undercut by their inability to litigate their claims in court themselves.¹⁶⁸

2. *The Civil Rights Act of 1991*

The contention that the legislative history of Section 118 of the Civil Rights Act of 1991 evinces an intent to prohibit mandatory arbitration clauses is perhaps the most forceful argument against compulsory arbitration.¹⁶⁹ With respect to Title VII and the ADEA, Section 118 provides:

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.¹⁷⁰

162. *See id.*

163. *See id.*; see also Lisa B. Bingman, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998) (analyzing results of empirical studies on the "repeat player" effect).

164. *See EEOC Rejects Mandatory Binding Employment Arbitration*, *supra* note 8, at 13.

165. *Id.*

166. *See id.* at 14.

167. *See id.*

168. *See id.*

169. *See Duffield*, 144 F.3d at 1194-1200 (determining that "[t]he legislative history of § 118 unambiguously confirms that Congress sought to codify the law" prior to *Gilmer*); *Rosenberg*, 995 F. Supp. at 201-06 (concluding that the House Reports "resolve any doubt on [the] question").

170. 42 U.S.C. § 1981 note.

The ADA, enacted one year earlier, contains a nearly identical provision.¹⁷¹ The most convincing proof that Congress intended this language to apply only to voluntary agreements are the comments of the House Committees that reported on the legislation.¹⁷² In two House Reports drafted before *Gilmer* was decided, the Education and Labor and Judiciary Committees admonished that

[t]he use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.¹⁷³

Similarly, Representative Edwards, the chair of the Education and Labor Committee, added in the debates just before the passage of the Act that Section 118

is intended to be consistent with decisions such as *Alexander v. Gardner-Denver* . . . , which protect employees from being required to agree in advance to arbitrate disputes under Title VII and to refrain from exercising their right to seek relief under Title VII itself. This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights.¹⁷⁴

Representative Edwards further emphasized that “[n]o approval whatsoever is intended of the Supreme Court’s recent decision in *Gilmer*.”¹⁷⁵ In other words, the legislative history rejects the distinction made in *Gilmer* between CBAs and employment contracts, applying *Gardner-Denver* to both types of agreements.¹⁷⁶

This interpretation is bolstered by Congress’s rejection one year earlier of a proposed amendment that would have endorsed the use of mandatory arbitration clauses.¹⁷⁷ The Education and Labor

171. See *supra* note 83 and accompanying text.

172. See *Duffield*, 144 F.3d at 1195-96; *Rosenberg*, 995 F. Supp. at 201.

173. H.R. REP. NO. 102-40(I), 102d Cong., 1st Sess. 1991 (Education and Labor Committee Report); H.R. REP. NO. 40(II), 102d Cong., 1st Sess. 1991 (Judiciary Committee Report).

174. 137 CONG. REC. H9505-01, *H9530 (1991).

175. *Id.*

176. See H.R. REP. NO. 102-40(I), *supra* note 173 (stating that “any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII”).

177. See *Duffield*, 144 F.3d at 1196; *Rosenberg*, 995 F.Supp. at 201-02.

Committee noted its disapproval of the measure's effect of allowing employers to "refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints."¹⁷⁸

Finally, as the *Rosenberg* Court recognized, it may be argued that in order to be read consistently with the other forms of ADR cited in Section 118, all of which are typically voluntary, so too must "arbitration" be read as including only voluntary arrangements.¹⁷⁹ The fact that every other dispute resolution mechanism listed in the provision is consensual and non-binding lends support to the contention that Congress aimed to sanction only post-dispute agreements to arbitrate.¹⁸⁰

3. *Unequal Bargaining Power*

Although the EEOC alluded to the disparity of bargaining power between prospective employee and employer, other critics have focused not only on the employee's relative impotence, but also on the employee's inability at the onset of employment to make strategic legal assessments about a theoretical claim that may or may not arise at some future point.¹⁸¹ Employers presumably will have made the decision to submit to arbitration only after meticulous analysis of the range of legal and economic consequences, information about which it will likely have superior access.¹⁸² An employee, by contrast, asked to make an "on-the-spot" waiver of his or her right to sue, has no option but to make that decision extemporaneously, and then only on the basis of inexperienced conjecture as to the ramifications.¹⁸³

Moreover, employers, aware of such advantages, will quite naturally opt for mandatory arbitration in greater numbers.¹⁸⁴ Yet as the number of employers who do not insist upon such contracts diminishes, employees increasingly will be left with the Hobson's choice of accepting these agreements or rejecting employment in their chosen fields altogether.¹⁸⁵

178. See H.R. REP. NO. 102-40(I), *supra* note 173.

179. See *Rosenberg*, 995 F. Supp. at 202.

180. See *id.*

181. See Siegel, *supra* note 123, at 97-98.

182. See Grodin, *supra* note 9, at 29.

183. See *id.*

184. See John-Paul Motley, Note, *Compulsory Arbitration Agreements in Employment Contracts from Gardner-Denver to Austin: The Legal Uncertainty and Why Employers Should Choose Not to Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687, 716 (1998).

185. See *id.*

4. *Minimal Judicial Review*

Equally disturbing to opponents of mandatory arbitration is the limited availability of judicial review of arbitration decisions, affording the courts, according to this argument, little opportunity to ensure that civil rights statutes are being applied correctly.¹⁸⁶ In the 1953 Supreme Court decision *Wilko v. Swan*,¹⁸⁷ Justice Reed set forth the dictum that courts are authorized to set aside an arbitrator's decision under a federal statute where the decision was handed down in "manifest disregard of the law."¹⁸⁸ Whether this dictum should be accepted as law has divided the circuits, but on either side courts refuse to vacate arbitration awards merely because the arbitrator misapplied or misinterpreted the contract.¹⁸⁹ Moreover, the circuits accepting the "manifest disregard" standard have restricted its application to cases in which an arbitrator writes an opinion, indicates that he or she understands the applicable law, but chooses to ignore it.¹⁹⁰ It seems unlikely that an arbitrator, either explicitly or implicitly, will make such an admission.

The FAA provides few additional grounds for reversal, limiting judicial intervention to instances where a decision is rendered through fraud or corruption, or where the arbitrator exceeds his or her jurisdiction.¹⁹¹ Thus, even if the FAA is held to apply to employment contracts, critics argue that federal courts will have very limited grounds for evaluating the application of federal civil rights laws to a large number of discrimination cases.¹⁹²

5. *Race and Gender in Arbitration*

Opponents of mandatory arbitration query the impartiality of arbitrators with particular regard to discrimination claims.¹⁹³ The reason for this concern is the overwhelmingly white and male composition of the arbitrator pools of typical arbitration providers. A 1992 report by the United States General Accounting Office noted

186. See *EEOC Rejects Mandatory Binding Employment Arbitration*, *supra* note 8, at 12-13.

187. 346 U.S. 427 (1953).

188. *Id.* at 436-37.

189. See David E. Feller, *Fender Bender or Train Wreck?: The Collision between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS L.J. 561, 571 (1997).

190. See *id.*

191. See 9 U.S.C. § 10(a).

192. See Feller, *supra* note 189, at 572.

193. See Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN'S L.J. 267, 281 (1998).

that as of 1992, 89 per cent of New York Stock Exchange ("NYSE") arbitrators were male. Further, 97 percent of arbitrators were white, while only .09 percent were African-American, .06 percent were Asian, and 1 percent were designated as "other."¹⁹⁴ The average age of arbitrators for men was 60, and for women, 49.¹⁹⁵ The NASD admitted to similar distributions for its arbitrators.¹⁹⁶ The implication of this striking homogeneity is that employment discrimination cases before a NYSE or NASD arbitrator will almost certainly be heard by a white male at a senior level in his career.¹⁹⁷

Exacerbating such concerns about arbitrator neutrality is the fact that ninety-two percent of sexual harassment plaintiffs are women, and similarly, eighty-four percent of racial discrimination plaintiffs are African-American.¹⁹⁸ Given the gross dissimilarity, in terms of race and gender, between the arbitrator pools of two major arbitration providers and the preponderance of Title VII plaintiffs, there is a legitimate argument that arbitration is incapable of handling discrimination claims with an objectivity equal to that of the courts.¹⁹⁹

III. Resolution: Adapting Arbitration to Discrimination Claims

Despite the shortcomings highlighted by its detractors, one is hard pressed to argue that mandatory arbitration does not confer upon employees a major benefit in providing access to a less costly forum and augmenting their chances for relief. In this sense, arbitration can be viewed as consonant with one of the fundamental policies underlying federal discrimination laws, namely, the provision of a remedy for discriminatory wrongs in the workplace. Moreover, the acceptance of arbitration by employers is contingent upon their receipt of a reciprocal advantage in that arbitration be mandatory. At the same time, however, the inconsistency of, and largely voluntary compliance with, procedural safeguards in arbitration, as a private enforcement scheme, raise legitimate qualms about due process for plaintiffs.

194. See HEALTH, EDUCATION, AND HUMAN SERVICES DIVISION, UNITED STATES GENERAL ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN EMPLOYMENT DISPUTES 8 (1994).

195. See *id.*

196. See *id.* at 9.

197. See Cherry, *supra* note 193, at 281.

198. See *id.* at 299 (citing EEOC National Database, EEOC and FEPA Receipts, FY 1990-96).

199. See Cherry, *supra* note 193, at 280-82.

The most sensible resolution, therefore, would require agencies administering arbitration to adopt protections along the lines of those advocated in the ABA's Due Process Protocol.²⁰⁰ Such guidelines, however, should be implemented as a legal requirement. The purely discretionary adoption of such provisions by organizations such as the AAA and JAMS/Endispute is an inadequate substitute for compulsory application of due process standards. In this respect, the District of Columbia Circuit, which reached much the same conclusion in *Cole*, offered a workable reconciliation of *Gilmer* with federal civil rights policy.²⁰¹

With an assurance that those protections will apply uniformly, the due process-based arguments against mandatory arbitration lose much of their force. To be sure, arbitration, by its nature, cannot (and should not) reach the level of procedural formality observed in the courts. Yet, where there is certainty that plaintiffs will have adequate discovery, an equal voice in selecting an arbitrator, will not have to bear the total expense of bringing a claim, and will be entitled to the same remedies available under federal statutes, any lingering due process concerns should yield to the consideration that arbitration broadens the effect of federal discrimination statutes by making it feasible for many victimized employees to bring claims at all.

In addition, with compulsory adoption of due process safeguards, the disparity in bargaining power that renders employees powerless to negotiate the terms of their contracts becomes less objectionable in the context of mandatory arbitration, because those safeguards become implied terms of every employment contract. Likewise, employees' relative lack of information is of less consequence where they are as a matter of right afforded procedural protections analogous, if not identical, to those in court.

As a further protection, arbitration agreements should be required to provide that arbitrators are to be selected by both parties. The prospect that employers will gain an advantage as "repeat players" fades where employees, unlikely to agree to arbitrators before whom the employer has appeared in prior cases, have partial control over the selection process.

200. See *supra* Part II.A.4.

201. See *supra* text accompanying notes 42-58. In this regard, it is significant that Chief Judge Harry T. Edwards, who wrote the majority opinion in *Cole*, is a former law professor and author in the area of labor law, and has been an arbitrator and member of the National Academy of Arbitrators. See FitzGibbon, *supra* note 116, at 256.

Equally critical, however, is the need for ADR providers to redress the lack of diversity among their arbitrator pools. In the absence of the availability of non-white and female arbitrators, mandatory arbitration can neither inspire the confidence of Title VII plaintiffs nor assert an entirely accurate claim of impartiality in its handling of discrimination claims, particularly in view of the fact that juries in arbitration are non-existent.²⁰² As a starting point, organizations administering ADR services might consider more aggressive recruitment of female and minority arbitrators with solid backgrounds in employment law.

Less compelling is the claim that arbitration stymies the goals of federal policy by "privatizing" discrimination law. By conflating private enforcement with private interests, this argument assumes a process in which decisions are rendered without regard to statutory parameters. Yet cases such as *Halligan* and *Cole*, which have heightened the level of judicial scrutiny of arbitration in discrimination cases,²⁰³ as well as general acceptance of the Due Process Protocol,²⁰⁴ suggest the falsity of this assumption. Rather than enjoying a "free hand," unconstrained by substantive civil rights law, arbitrators are bound to conform their decisions to statutory requirements. Moreover, the persistent inundation of the federal courts with employment-related claims, which shows no signs of abating, ensures that courts will continue to have ample opportunity to develop civil rights jurisprudence and create precedent.

The chief obstacle remaining to proponents, then, is the effect of the 1991 Civil Rights Act; for if the Act proscribes mandatory arbitration of the statutory claims that it governs, the above discussion is moot. This is a far more difficult hurdle, as the legislative history appears to be quite explicit in its disapproval of pre-dispute agreements entered into as a condition of employment.²⁰⁵

Two arguments effectively address this issue. First, though the legislative history is unambiguous in its intent to prohibit coercive pre-dispute agreements, the statute itself is not. Section 118 simply authorizes "the use of alternative means of dispute resolution, including . . . arbitration,"²⁰⁶ remaining silent as to the timing or context of the arbitration agreement. The omission in the statutory language of what the Education and Labor and Judiciary Commit-

202. See Cherry, *supra* note 193, at 281-82.

203. See *supra* Part I.C.1.

204. See *supra* Part II.A.4.

205. See *supra* Part II.B.2.

206. See *supra* note 79.

tees emphasized repeatedly in their reports may fairly be viewed as the *absence* of intent to address the issue of mandatory arbitration. It follows that the rejection by Congress of an amendment specifically endorsing mandatory arbitration proves no more than a failure to legislate conclusively in the field one way or the other.

Second, even granting that the legislative history does control, it is by no means evident that all mandatory arbitration provisions fall within the class of "coercive attempts to force employees in advance to forego statutory rights" to which Representative Edwards referred in the House debates.²⁰⁷ Indeed, in cases where the employee has a genuine choice, both legally and financially, to reject an employment contract, such an agreement can hardly be characterized as coercive. Moreover, because with the incorporation of due process protections, substantive federal employment law governs, mandatory arbitration cannot be said to force employees to "forego" their rights under federal discrimination laws.

Similarly, in light of the requirement in the Protocol and similar proposals that arbitration provide for the same remedies as are available in litigation, mandatory arbitration does in fact "supplement, and not supplant, the remedies provided by Title VII," as was the concern of the House Committees.²⁰⁸ Indeed, the role of mandatory arbitration as a remedial "supplement" is reflected in the increased number of Title VII claims that arbitration makes possible.

Finally, the Committee Reports' instruction that arbitration "not preclude the affected person from seeking relief under the enforcement provisions of Title VII"²⁰⁹ leaves some room to argue that employees are not so precluded, because, again, the arbitrator's decision must be guided by the statute. Given that not all mandatory arbitration agreements fit the descriptions in the Reports of those agreements that the 1991 Act excludes, there is a plausible argument that despite their approval of *Gardner-Denver*, the Committees did not aim to prohibit all such provisions.

Conclusion

Because federal discrimination laws are designed to protect fundamental individual rights, the ability of arbitration to serve this end rightly has been subjected to intense scrutiny by both courts and commentators. With a proper application of due process stan-

207. See *supra* note 174.

208. See *supra* note 173.

209. See *id.*

dards, however, arbitration is capable of deciding statutory claims in a manner consistent with federal policy. In view of the inability of the courts and the EEOC to handle the exponential rise in the number of employment discrimination claims over the past three decades, the value of arbitration in providing plaintiffs with an affordable forum and a genuine prospect of securing a remedy outweighs concerns about the procedural adequacy of arbitration. Finally, the benefits of arbitration of statutory claims can only be brought to fruition where arbitration is mandatory, so that employers too can be assured of its advantages.