Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change

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I. INTRODUCTION

Consider the case of a woman named Martha, a middle-aged African American who is a relatively well-paid secretary for a large manufacturing corporation. Before she began her first workday, the company required her to sign an employment agreement. Later, having watched younger, white secretaries receive promotions instead of herself, Martha believed that her employer promoted secretaries on the basis of age and race, contrary to her interests. After consulting the Equal Employment Opportunity Commission (EEOC) about her rights, Martha received clearance to bring race and age discrimination claims against her employer.

In response, the company filed a motion to compel arbitration. The supporting memorandum noted that Martha's employment agreement contained a clause requiring arbitration of employment disputes and that this employee was aware and understood such terms. The gavel falls in the employer's favor, and Martha must go behind closed doors to exert her statutory right to be free of impermissible discrimination. Arbitrators, perhaps ones selected by the company, will hear the evidence and, barring any extraordinary aberrations in the arbitral process, courts will be bound under federal arbitration law to enforce the predispute agreement. Martha's statutory claims, despite public interest against certain types of discrimination in employment, will be resolved in the privacy of arbitration and without some of the benefits of litigation.

Martha's situation recently has become an increasingly common phenomenon.[1] When Congress passed the Federal Arbitration Act (FAA)[2] in

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[1] The "phenomenon" is demonstrated by employers who increasingly rely on employment contracts with broad arbitration clauses and require their employees to sign them. During 1996, one study demonstrated that of all employers who used mandatory

the mid-1920s, the U.S. judicial system began to look favorably upon

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employment arbitration, 85% of them had implemented their plan during the preceding four years. *See* Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1, 5 n.6 (1996). Although the idea of labor contracts is not new insofar as union representation and employment-at-term positions are concerned, the idea is novel as it extends to include nonunion, low-ranking, at-will employees. While the employer's ability to restrict resolution of discrimination claims to an arbitral forum is an issue at all levels, the situation is particularly acute when the contract is made with low-ranking, less-educated employees who may lack bargaining power to affect the employment contract's terms.

Today, employment dispute arbitration often arises in the securities industry due to the arbitration clause present in the Form U-4, which the employee must execute before receiving authorization to become a securities representative. *See* Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460, 1462–1464, 1466–1470 (N.D. Ill. 1997) (discussing the Form U-4 and New York Stock Exchange (NYSE) and National Association of Securities Dealers (NASD) registration procedures for securities representatives); *see also infra* note 141 and accompanying text (discussing the Form U-4 at issue in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).

Following the wake of *Gilmer*, employers outside the securities field have begun to compel their nonunion employees to arbitrate employment discrimination claims and disputes. *See, e.g.*, Miller v. Public Storage Management, Inc., 121 F.3d 215 (5th Cir. 1997) (affirming lower court's order requiring former property manager to arbitrate her Americans with Disabilities Act (ADA) claims); EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500 (E.D. Mich. 1997) (compelling former secretary to arbitrate her Title VII claims); Golenia v. Bob Baker Toyota, 915 F. Supp. 201 (S.D. Cal. 1996) (compelling former car salesman to arbitrate his ADA claims); Powers v. Fox Television Stations, Inc., 923 F. Supp. 21 (S.D.N.Y. 1996) (compelling former television news reporter to arbitrate his state law discrimination claims); Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76 (D. Mass. 1993) (compelling former insurance salesperson to arbitrate her Title VII claims). Some of these contracts have required high-ranking and educated employees to arbitrate their claims. *See* Crawford v. West Jersey Health Sys., 847 F. Supp. 1232 (D.N.J. 1994) (compelling physician to arbitrate her Age Discrimination in Employment Act (ADEA) and Title VII claims); DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947 (W.D.N.Y. 1992) (compelling former operations manager for financial institution to arbitrate Title VII claims). Other contracts have required arbitration of discrimination claims even when the employee held a low-paying position that required minimal experience or education. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (affirming order to compel arbitration of former security guard's Title VII claims); Shankle v. B-G Maintenance Management of Colorado, Inc., No. 96 N 2932, 1997 WL 416405, at *1 (D. Colo. Mar. 24, 1997) (declining to compel arbitration of nonunion janitor's Title VII, ADA, and ADEA claims).

Note that the issue of well-educated and knowledgeable employees also arises in the securities industry. *See* Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) (compelling arbitration of the Title VII claims of two twenty-one year old securities employees whose highest educational levels were General Equivalency Diplomas).

[2] 9 U.S.C. §§ 1–16 (1994).

predispute arbitration agreements.[3] Enforcement under the Act, however, in the early years was limited mainly to the commercial arena when the Supreme Court explicitly denied arbitration of statutory claims.[4] During the 1980s, the Court reversed its position on the arbitrability of statutory claims.[5] Ultimately, the Court announced in 1991 its willingness to enforce arbitration of statutory employment discrimination claims under the Federal Arbitration Act.[6] The wake of this decision has resulted in a tidal wave of employment contracts containing arbitration clauses that encompass discrimination disputes.[7] The reaction to the proliferation is a rising outcry of commentators against the unfairness of such practices.[8]

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[3] The FAA "establishes by statute the desirability of arbitration as an alternative to the complications of litigation" and stresses the "need for avoiding the delay and expense of litigation." Wilko v. Swan, 346 U.S. 427, 431 (1953) (citing H.R. REP. No. 68-96, at 1-2 (1924) and S. REP. No. 68-536, at 3 (1924)).

[4] *See id.* at 438 (noting that the specific statutory rights that Congress guaranteed individuals under the Securities Act could not be reconciled with the general policy of promoting efficient commercial dispute resolution through arbitration).

[5] *See infra* notes 50-68 and accompanying text.

[6] *See Gilmer*, 500 U.S. at 20.

[7] *See supra* note 1. This onslaught of employment arbitration agreements coincides with a massive increase in the number of employment discrimination cases filed against employers. *See* Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-at-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443, 447 n.3 (1995) (noting that the number of employment discrimination claims filed in 1991 was five times the number filed in 1971). The fear is that with "three million terminations each year, the potential result is a flooding" of discrimination claims by disgruntled employees. Mark Berger, *Can Employment Law Arbitration Work?*, 61 UMKC L. REV. 693, 695 (1993) (footnote omitted).

[8] *See, e.g.*, Berger, *supra* note 7 (arguing for modification of arbitral procedures to recognize the unique demands of employment discrimination claims); Walter J. Gershenfeld, *Pre-Employment Dispute Arbitration Agreements: Yes, No and Maybe*, 14 HOFSTRA LAB. L.J. 245 (1996) (arguing for quality standards in employment arbitration procedures); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996) (arguing that mandatory arbitration agreements unilaterally imposed by employers are unenforceable); Lewis Maltby, *Paradise Lost—How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1 (1994) (suggesting that the *Gilmer* majority opinion failed to provide meaningful guidelines for arbitral resolution of employment discrimination claims).

Additionally, the EEOC continues to express a strong position against employer imposed mandatory arbitration. *See* Mark Hansen, *Contract Disputes*, A.B.A. J., Sept. 1997, at 26.

This Article suggests that the purposes and procedures of commercial arbitration under the Federal Arbitration Act must be balanced against competing concerns of public interest and employee remedies when federal employment discrimination claims are asserted. Part II examines the evolution of federal arbitration law as it developed through Supreme Court decisions that permitted parties to arbitrate statutory claims. Part III addresses the relevant federal employment antidiscrimination statutes as well as the evolution of the Court's treatment concerning the arbitrability of disputes based on these statutes. This Part also will examine how *Gilmer* altered the Court's prior stance and that decision's subsequent effect on analyses in the lower courts. Part IV proposes legislative amendments to federal arbitration law to ensure that contractual arbitration procedures sufficiently meet the special concerns of statutory antidiscrimination protection. This Part addresses several key issues that continue to arise in court cases challenging employment arbitration and offers balanced proposals to resolve these issues in the interest of both arbitrability and employee concerns by developing a new "hybrid" theory of employment arbitration. The final Part notes that while arbitration of employment disputes should, and is likely to, continue, the differences between disputes arising from employment and from ordinary commercial transactions call for a judicial and legislative clarification of the parameters of employment arbitration, because acceptable and consistent standards, rules, and limitations are not yet enumerated statutorily or in the case law.

II. HISTORICAL DEVELOPMENT OF FEDERAL COMMERCIAL ARBITRATION LAW[9]

In 1925, Congress passed the United States Arbitration Act, commonly known as the Federal Arbitration Act.[10] The purpose of this legislation was

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[9] In addition to the federal law of arbitration embodied by the FAA, the majority of states have adopted the Uniform Arbitration Act (UAA). *See* UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 1 (1997 & Supp. I 1998). The UAA was modeled on the FAA and is substantially similar to the federal act in that both address the minimum standards for arbitration agreement enforcement and grounds for review of an award. *Compare* Federal Arbitration Act, 9 U.S.C. §§ 1-2, 10-11 (1994), *with* UNIF. ARBITRATION ACT §§ 1-2, 11-13. While this article focuses upon federal arbitration law and its application to enforce employment contract arbitration agreements, the UAA is relevant to parts of the discussion and will be addressed appropriately. The most notable comparison will arise insofar as the UAA provides that the act "applies to arbitration agreements between employers and employees." *See* UNIF. ARBITRATION ACT § 1, 7 U.L.A. 1, 1 (1997); *see also infra* note 197.

[10] For an interesting and in-depth analysis of the history of the passage of the FAA and whether the FAA was intended to apply to employment contracts, see generally

to enforce predispute arbitration agreements by "reversing centuries of judicial hostility to arbitration agreements" and "to place arbitration agreements 'upon the same footing as other contracts.'"[11] Prior to passage of the FAA, parties could rely upon an agreement to arbitrate entered into after the dispute arose, but enforcement of an arbitration agreement executed prior to an existing dispute remained doubtful. The FAA sought to alleviate concerns about enforcement of predispute agreements.

Under section 2 of the FAA, a written agreement to arbitrate a dispute is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[12] The FAA governs agreements within "any maritime transaction or a contract evidencing a transaction involving commerce."[13] Section 1 of the FAA defines "commerce" as "commerce among the several States or with foreign nations," but explicitly states 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."[14] Generally, the accepted view of the section 2 "commerce" requirement was to empower the FAA to reach the full extent of Congress's commerce clause power.[15] The limitation in section 1 concerning certain employment contracts arose as the result of effective lobbying by the Seamen's Union.[16]

Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996) (arguing that the history surrounding the passage of the FAA implies that it was not intended to apply to employment contracts in general).

[11] Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–511 (1974) (quoting H.R. REP. No. 68-96, at 1–2 (1924)).

[12] 9 U.S.C. § 2. "The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[13] 9 U.S.C. § 2.

[14] *Id.* § 1. Note that section 2 uses the words "involving commerce" while section 1 uses the phrase "engaged . . . in interstate commerce." *Id.* §§ 1, 2. A distinction has been drawn for this difference in phraseology and is discussed *infra*, notes 200 and 201 and accompanying text.

[15] "[T]his Court has previously described the Act's reach expansively as coinciding with that of the Commerce Clause." Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 274 (1995) (citations omitted) (holding that section 2's interstate commerce language should be read broadly). This expansive view holds even though the "Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be [the case]." *Id.* at 275.

[16] When the Act was passed, seamen were the sole employees required by federal law

Once the first two requirements of the FAA are satisfied, a court is bound to honor the agreement to arbitrate. Section 3 of the FAA requires a court to stay judicial proceedings concerning any subject of the arbitration agreement and refer such issue to arbitration,[17] so long as the scope of the arbitration clause encompasses the issue. Additionally, when one party subject to the arbitration clause demonstrates a "failure, neglect, or refusal" to arbitrate as agreed, the other party may petition the court to compel arbitration in accordance with the parties' intention.[18] Although issues of arbitrability are for the court to decide as an initial matter,[19] a court may not review the merits of the dispute when considering whether to compel arbitration.[20] All other issues, including whether parties intended to arbitrate a particular dispute, are resolved in favor of arbitrability.[21] When the court holds that the dispute is arbitrable under the terms of the contract, the court must submit the issue to

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to execute individual employment agreements. *See* Finkin, *supra* note 10, at 286. The International Seamen's Union expressed concern over the ease with which arbitration clauses could be placed in these mandated contracts and the resulting detriment to seamen who would be forced to arbitrate their claims and rights, particularly under the Seamen's Act which guaranteed wage, food, and damage rights. *See id.* at 286–287. During a Senate Judiciary Committee meeting on the passage of the FAA, a representative of the American Bar Association (ABA), whose organization had drafted the proposed act, went on record as saying that the FAA was not

> an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

Id. at 285.

While these comments would insinuate that all employment contracts are exempt from coverage by the FAA, a narrow interpretation of the FAA has found otherwise. *See infra* notes 198–202 and accompanying text.

[17] *See* 9 U.S.C. § 3.

[18] *Id.* § 4.

[19] *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Id.* When a court decides whether an issue is arbitrable, it "should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 944; *see also* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202–203 (1956) (holding that enforcement of an arbitration agreement depended on state law). Note, however, that parties may agree to submit issues of arbitrability to the arbitrator. *See First Options*, 514 U.S. at 942.

[20] *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (stating that courts act only to enforce arbitration agreements rather than consider the merits of the underlying dispute).

[21] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

arbitration in accordance with the parties' predispute agreement and stay any further judicial intervention pending arbitration.[22]

Once a dispute has been submitted to arbitration, the parties present the dispute to one or more arbitrators. Because arbitration is contractual in nature, the parties may agree in advance upon the specific issues that will be referable to arbitration, the authority of the arbitrator, remedies available, selection of arbitrators, and the procedures to be employed.[23] Often, the parties will adopt the arbitration rules of a particular arbitration service and select the arbitrator(s) from the lists that such services maintain.[24] The arbitrator will review the case and hear arguments under informal rules of procedure and evidence.[25] Following the close of arbitral proceedings, the arbitrator will render an award,[26] which normally will not be written.[27] After the award is presented, the parties may either choose to comply voluntarily with the award,

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[22] *See* 9 U.S.C. § 3.

[23] Note that some limitations are placed on parties' ability to structure arbitration. *See* DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947, 953-954 (W.D.N.Y. 1992) (severing and staying issue of punitive damages from arbitral dispute due to New York law prohibiting arbitrators from granting punitive damages).

[24] The most common arbitration service is the American Arbitration Association (AAA), which publishes arbitration guidelines and rules and offers a variety of arbitration services. Another similar service is JAMS/Endispute. For commentary on arbitration services and their procedures, see generally Gershenfeld, *supra* note 8. Although these services can provide arbitrators to hear disputes, parties often agree to utilize the expertise of persons within the industry and will select arbitrators from among the ranks of their employment field. *See* Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 701 (2d Cir. 1978) (noting that a principal advantage of arbitration is the parties' ability to select the arbitrator, including members of the industry).

[25] While arbitration employs procedural and evidentiary rules in the resolution of disputes, the rules are informal and less strict than rules used within the judicial system and may be structured by the contracting parties. *See* Wilko v. Swan, 346 U.S. 427, 436–437 (1953).

[26] The arbitrator's authority to render a particular award is constrained only by his authority under the contract and the FAA, such that the arbitrator may award remedies that are different in kind from what a party would expect if the dispute had been conducted within a judicial setting. *See* Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1195 (7th Cir. 1987).

[27] "Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960) (footnotes omitted). The rationale for this phenomenon is that a written award may demonstrate that an arbitral decision was based on erroneous grounds, which a reviewing court could find sufficient to order correction, modification, or vacatur. *See* Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972).

seek confirmation, or attempt to obtain judicial review to modify, correct, or vacate the award.

When an arbitral award is rendered, a court is limited to a narrow review of the arbitral process and may not retry the merits of the case.[28] Section 9 of the FAA requires the court, upon petition by a party, to confirm and enforce an arbitral award.[29] Although the court may vacate,[30] modify, or correct[31] an arbitral award,[32] judicial review is limited to "whether the [arbitration] panel discharged its duty as measured by the more modest procedural and evidentiary strictures of arbitration."[33] The court is limited to determining whether the arbitrator interpreted the contract in accordance with his authority[34] and cannot review the merits of the underlying dispute even when

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[28] Judicial review of arbitration is limited by section 11 of the FAA and a court may only modify or correct an award under limited circumstances, such as when the award is obtained by fraud, when the arbitrator has been biased or exceeded her authority, or improperly conducted the hearings. *See* 9 U.S.C. § 11 (1994).

[29] "[A]t any time within one year after the [arbitral] award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon *the court must grant such an order unless the award is vacated, modified, or corrected.*" *Id.* § 9 (emphasis added).

[30] *See id.* § 10. A court may vacate an award when (1) the award was obtained by corruption, fraud, or undue means, (2) evidence demonstrates that the arbitrator was biased, (3) the arbitrator engaged in prejudicial misconduct by refusing to postpone a hearing or refusing to hear pertinent evidence, or (4) the arbitrator exceeded his powers under the contract or imperfectly executed a mutual, final, and definite award. *See id.*

[31] Modification or correction of an arbitral award is made under section 11, when (1) there is an evident material miscalculation or evident material mistake in the award, (2) the arbitrator has rendered a decision on a matter not submitted to arbitration, or (3) the form of the award is imperfect. *See id.* § 11.

[32] Additional, nonstatutory grounds exist for arbitral award correction, modification, or vacatur. The most common ground is manifest disregard of the law, which is used when an arbitrator has the correct law before her and knowingly refuses to apply it. *See* Wilko v. Swan, 346 U.S. 427, 436–437, 440 (1953). Additionally, some courts recognize public policy exceptions and arbitrary and capricious awards as grounds for altering or vacating an arbitral award. *See* Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 779 (11th Cir. 1993). Nonstatutory grounds for setting aside an arbitral award have not been adopted uniformly among the jurisdictions.

[33] Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1021 (5th Cir. 1990) (noting also that judicial review of commercial arbitration awards is limited to sections 10 and 11 of the FAA).

[34] A reviewing court "do[es] not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987). Additionally, "so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

a party alleges that the award rests on misinterpretation of the facts.[35] Thus, in all but the narrowest of circumstances when an arbitrator commits an egregious error during the arbitral process, an arbitration award is "final" and virtually unassailable in court.

The FAA demonstrates a "liberal federal policy favoring arbitration agreements"[36] as a means of providing a "speedy, efficient process for resolving disputes."[37] Presumptions in favor of arbitrability, informal proceedings, and limited judicial review serve both to expedite dispute resolution and to contain the cost of litigation. These potential advantages do not require a party to arbitration to waive any substantive rights or remedies by agreeing to arbitration because that alternative to litigation is merely a procedural waiver representing a selection of the arbitral forum in place of a judicial one.[38] Thus, a party who agrees to binding arbitration should expect the courts to compel the party to honor the agreement in the event of a dispute and should realize that the opportunity for substantial judicial review of the merits of any such dispute is unlikely.

Throughout the years, the FAA has steadily established a secure footing in American jurisprudence. An impressive sequence of Supreme Court cases established the enforcement of arbitration agreements, demonstrating the liberal federal attitude favoring arbitration as an alternative to litigation. As early as 1953, the Court found an opportunity to express the "liberal policy" toward arbitration even while denying the arbitrability of a Securities Act of

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

[35] "The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Misco*, 484 U.S. at 36. Judicial review of arbitral awards is strict and narrow because "[a] rule of judicial review under which courts would independently redetermine the scope of an arbitration agreement already interpreted by the arbitrator would invite frequent and protracted judicial proceedings, contravening the parties' expectations of finality." Advanced Micro Devices v. Intel Corp., 885 P.2d 994, 1000 (Cal. 1994) (citing Van Tassel v. Superior Court, 526 P.2d 969 (1974)).

[36] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[37] Jardine Matheson & Co. v. Saita Shipping, Ltd., 712 F. Supp. 423, 429 (S.D.N.Y. 1989).

[38] "An agreement to arbitrate before a specified tribunal is . . . a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974). The Supreme Court has ruled that the "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633-634 (1985)).

1933 (Securities Act)[39] claim.[40] Although the Court would not then permit waiver of a judicial forum to resolve statutory Securities Act disputes in arbitration,[41] it nonetheless provided a strong endorsement of commercial arbitration in other types of nonstatutory transactions.[42]

The Court seven years after *Wilko* developed a strong policy in favor of labor arbitration.[43] The *Steelworkers Trilogy*[44] established an unequivocal judicial preference for the arbitral settlement of industrial disputes between

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[39] 15 U.S.C. §§ 77a–77bbbb (1994 & Supp. II 1996).

[40] *See* Wilko v. Swan, 346 U.S. 427, 431 (1953). *But see* Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 246 (3d Cir. 1968) (holding that statutory rights under the Securities Exchange Act of 1934 could be enforced by arbitration provided that the parties had agreed to arbitrate a pre-existing dispute and had proceeded to obtain a final award).

[41] *See Wilko*, 346 U.S. at 435. "When the security buyer, prior to any violation . . . waives his right to sue in courts, he gives up more than would a participant in other business transactions [and] . . . thus surrenders one of the advantages the [Securities] Act gives him." *Id.* When a party chooses to arbitrate the statutory claims, the "effectiveness . . . [of the Securities Act's advantages] is lessened in arbitration as compared to judicial proceedings." *Id.* The Court found that if the claims were submitted to arbitration, the findings would have to be "applied by the arbitrators without judicial instruction on the law. . . . [T]heir award may be made without explanation . . . [and] the arbitrators' conception of the legal meaning of such statutory requirements . . . cannot be examined." *Id.* at 436. Additionally, the Court noted that its "[p]ower to vacate an award is limited" and that the congressional policy "afforded participants . . . an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration" could not be subordinated to the congressional intent to "protect the rights of investors" by permitting a waiver of rights guaranteed by the Securities Act of 1933. *Id.* at 436, 438. *But see* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480–481 (1989) (overruling *Wilko* to the extent that *Wilko* relied upon suspicion of arbitration and held that the right to select a judicial forum was a nonwaivable right).

[42] *See Wilko*, 346 U.S. at 431–432 (denying arbitrability of statutory claims, but noting that commercial arbitration of nonstatutory claims was an efficient mechanism which courts should otherwise honor).

[43] Although the FAA does not figure prominently in labor arbitration involving collective bargaining agreements, *see infra* note 101 and accompanying text, the treatment here is to demonstrate that the Court simultaneously promoted and developed both commercial and labor arbitration law using similar principles.

[44] *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (holding that an arbitrator was not required to produce a written award and that a court could not alter an arbitral finding based on mere disagreement with the award); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (holding that doubts should be resolved in favor of arbitrability); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (holding that a broad collective bargaining agreement to arbitrate required the submission of all disputes to arbitration and not just those a court would find meritorious).

unions and employers. Although the Court acknowledged that labor and commercial arbitration purposes were differentiated,[45] the practice and deference to be shown by the court system are analogous. The Court continued to embrace its approval of arbitration several years later when the Court held that procedural arbitrability would be left to the arbitrator once the substantive issues were found to lie within the scope of the arbitration contract.[46]

Following a continued path of a liberal policy toward arbitration, the Court continued to expand and clarify its position. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[47] the Court held that, in the absence of any evidence to the contrary, an arbitrator could decide the issue of fraud in the inducement of the entire contract containing the arbitration clause.[48] Because all arbitral authority is derived from the contract, this decision gave arbitrators permission to decide whether an enforceable contract existed in light of the allegations of fraud. One year later, the Court delineated the degree of bias required to set aside an arbitral award.[49]

During 1974, the Court decided *Scherk v. Alberto-Culver Co.*[50] and began to lift the few restraints placed on arbitral subject matter. Although the *Wilko* Court had found that certain statutory rights could not be waived for resolution

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[45] "In the commercial case, arbitration is a substitute for litigation. Here [labor] arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here." *Warrior & Gulf*, 363 U.S. at 578. Additionally, the *Warrior & Gulf* Court noted:

> Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.

Id. at 581.

[46] *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964); *see also supra* notes 17–21 and accompanying text.

[47] 388 U.S. 395 (1967).

[48] *See id.* at 406.

[49] *See* Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147–148 (1968) (holding that evidence demonstrating that the arbitrator and one of the parties maintained a financial relationship raised a sufficient inference of bias to vacate the award).

[50] 417 U.S. 506 (1974).

in an arbitral forum,[51] the *Scherk* Court permitted the parties to arbitrate claims under the Securities Exchange Act of 1934 (Securities Exchange Act)[52] because the "considerations and policies" were different from those in *Wilko*.[53] The Court understood the agreement as a forum selection clause that established the place and procedures of resolution without detracting from recourse to substantive relief.[54] A similar analysis was applied subsequently in *Southland Corp. v. Keating*[55] in which the Court held that the FAA preempts a state law that attempted specifically to deny enforcement of arbitration clauses in franchise agreements and that state statutory law could not prohibit enforcement of an arbitration agreement. *Southland Corp.* was decided during the same period in which the Court reaffirmed the liberal national policy toward arbitration and the presumption in favor of arbitrability in commercial disputes.[56]

During the 1980s the Court continued the *Scherk* line of reasoning and enforced agreements to arbitrate numerous other statutory claims.[57] Identifying the international business context and a presumption in favor of arbitrability, the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[58] concluded that arbitration of Sherman Act[59] antitrust claims was permissible.[60] The Court held that a determination of arbitrability of

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[51] *See supra* notes 40–41 and accompanying text.

[52] 15 U.S.C. §§ 78a–78mm (1994 & Supp. II 1996).

[53] *Scherk*, 417 U.S. at 515. The "crucial difference" between the two cases was that *Scherk* involved a "truly international agreement" between a domestic and foreign party. *Id.* Due to the uncertainty engendered by international contracts, the Court found that an arbitration agreement covering broad subject matter was an "indispensable precondition to the achievement of the orderliness and predictability essential to any international business transaction" and prevented resolution of claims in hostile forums. *Id.* at 516.

[54] *See id.* at 519.

[55] 465 U.S. 1, 16 (1984) (holding that the FAA preempted California law prohibiting arbitration of certain franchise investment law claims); *see also* Perry v. Thomas, 482 U.S. 483, 490–491 (1987) (holding that under the Supremacy Clause, the FAA preempted state labor laws specifically prohibiting enforcement of arbitration agreements concerning wage collection actions). *But see* Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 476 (1989) (holding that the preemptive power of the FAA is limited to state laws that deny enforcement to arbitration provisions generally).

[56] *See* Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1982).

[57] The Court's treatment of statutory antidiscrimination claims in employment and arbitration is discussed *infra* Part III.

[58] 473 U.S. 614 (1985).

[59] 15 U.S.C. §§ 1-7 (1994).

[60] "[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." *Mitsubishi Motors*, 473 U.S.

statutory claims required a finding that an enforceable arbitration agreement existed, that the parties had agreed to arbitrate that particular type of dispute, and that Congress had not displayed any intent to foreclose a waiver of the judicial forum.[61] The *Mitsubishi Motors* Court also entrenched the merely "procedural" character of arbitration in relation to judicial fora.[62] The Court continued its trek to permit arbitration of statutory claims in *Shearson/American Express, Inc. v. McMahon*[63] and *Rodriguez de Quijas v. Shearson/American Express, Inc.*[64] These decisions, relying on the *Scherk* and *Mitsubishi Motors* decisions, hold that, so long as arbitration provides an adequate means of enforcing the statutory scheme and there is no congressional intent to prevent arbitration, the judicial system should honor the parties' agreement and enforce predispute arbitration agreements.[65]

As litigation costs rose dramatically and the court system adopted greater deference to arbitral authority, businesses found it advantageous to include arbitration clauses in their contracts to avoid costly suits.[66] Thus, sophisticated commercial entities, dealing in an arm's-length transaction, could effectively resolve to settle their future disputes without court intervention, in the expectation of privacy, speed, and cost containment. Parties now relied upon the courts to enforce and interpret liberally their arbitration agreements and also to insulate arbitral awards from intensive judicial review.

Today, the commercial purposes and goals of arbitration remain intact. Parties continue to realize the benefits of privacy, speed, and cost containment. In addition to the advantages of informal procedural and

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at 625.

[61] *See id.* at 626-628. The first prong is established by reference to the requirements of the FAA and state contract law, the second by the intention of the parties, and the third by whether anything in the text or legislative history of a congressional act demonstrates an intent to preclude arbitrability. *See id.* Additionally, the last prong may be proven by an inherent conflict between the purposes of the statute and the goals of arbitration. *See id.* at 628; *see also infra* notes 178-179 and accompanying text.

[62] "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628.

[63] 482 U.S. 220 (1987) (enforcing arbitration of Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act (RICO) claims).

[64] 490 U.S. 477 (1989) (enforcing arbitration of Securities Act of 1933 claims and overruling *Wilko*).

[65] *See id.* at 482-483; *see also McMahon*, 482 U.S. at 230-232, 239-242.

[66] *See* Wilko v. Swan, 346 U.S. 427, 431 (1953) (stating that the FAA establishes an alternative to litigation and meets a "need for avoiding the delay and expense of litigation").

evidentiary requirements, the parties may arrange for selection of the arbitral panelists (often employing experts in the industry), agree upon the scope of arbitral authority, and include limitations on awards.[67] Further, the arbitrators often do not, and may be encouraged not to, produce a written decision.[68] The overriding goal is to permit parties to escape litigation by entering into an arm's-length contractual agreement to settle disputes through arbitration, as that process is structured to their preferences. As such, federal arbitration law has developed to promote this goal by erecting presumptions in favor of arbitrability and by limiting judicial review to protect the needs of commercial parties who prefer a private forum to resolve disputes and, therefore, waive access to the judicial systems.

III. FEDERAL EMPLOYMENT ANTIDISCRIMINATION STATUTES AND ARBITRATION

The legal system's endorsement of binding predispute arbitration originally embraced contractual transactions in a commercial environment. Indeed, passage of the FAA focused on the purely commercial interests in arbitration.[69] An important question arose, however, when parties sought arbitration of statutory rights in addition to arbitration of contractual obligations.[70] Although the Supreme Court continued to affirm the federal policy favoring arbitration, early on it imposed procedural limitations on statutory right vindication in some circumstances,[71] and, until recently, the

[67] *See id.* at 436–437.

[68] *See id.* at 436.

[69] *See supra* notes 11-16 and accompanying text.

[70] *See supra* notes 40-65 and accompanying text (discussing the line of Supreme Court cases permitting arbitration of statutory claims under the Securities Act of 1933, the Securities Exchange Act of 1934, the Sherman Act, and RICO).

[71] The courts first addressed arbitration of employment discrimination claims in the context of collective bargaining agreements. The Supreme Court had adopted an early favorable attitude toward arbitration in the organized labor context through the *Steelworkers Trilogy*. *See generally* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). The Court found that this policy required a grievant under a collective bargaining agreement to exhaust the grievance procedure before seeking judicial remedy for discrimination claims, but that, upon exhaustion, the grievant could not be barred from instituting judicial action regardless of the grievance procedure's treatment of the claim. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 69–70 (1975) (finding that former employees' racial discrimination claims under Title VII were within the collective bargaining grievance procedures so that employees should first exhaust the available

Court did not regularly begin to enforce binding arbitration of public law claims.[72] This Part provides background on that portion of public law prohibiting discrimination in employment and the legal system's encouragement and enforcement of binding arbitration clauses that encompass claims made under these public laws.

A. *Federal Employment Antidiscrimination Statutes*[73]

The United States Congress has determined that a number of rights and obligations owed between parties should not be determined solely by agreement between them. Rather, the public interest requires some degree of involvement of the government. The legislature has created and protected

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procedures before seeking independent remedy). *But see* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (finding that racial discrimination claims that were exhausted under collective bargaining arrangements and that provided an arbitral award in favor of the employer would not bar subsequent judicial action on allegations arising from the same set of facts). The Court noted that the special function of labor arbitration for the peaceful resolution of industrial disputes required parties to observe collective bargaining rules. *See Emporium Capwell*, 420 U.S. at 69–70 (denoting the importance of collective bargaining arbitration agreements and delineating employee substantive rights from procedural requirements under the National Labor Relations Act).

[72] *See* discussion *supra* notes 40-65 and accompanying text (discussing the Court's evolution from its decision in *Wilko* to the present); *see also infra* Part III.B (examining pre- and post-*Gilmer* treatment of arbitration agreements concerning employment antidiscrimination statutes).

[73] While this article primarily addresses federal antidiscrimination statutes, states also have enacted employment antidiscrimination laws. *See, e.g.*, District of Columbia Human Rights Act, D.C. CODE ANN. §§ 1-2501 to 1-2557 (1992 & Supp. 1998); Minnesota Human Rights Act, MINN. STAT. ANN. §§ 363.01–363.15 (West 1991 & Supp. 1998); Missouri Human Rights Act, MO. ANN. STAT. §§ 213.010–213.137 (West 1996 & Supp. 1998); New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to 10:5-42 (West 1993 & Supp. 1997); New York Human Rights Law, N.Y. EXEC. LAW § 296 (McKinney 1993 & Supp. 1998). However, state antidiscrimination laws parallel federal antidiscrimination laws and are interpreted similarly to avoid any conflict of purpose. *See* Hull v. NCR Corp., 826 F. Supp. 303, 306 (E.D. Mo. 1993) (foregoing analysis of state antidiscrimination statute arbitrability after finding the statute parallel to Title VII).

Additionally, state antidiscrimination laws that prohibit a waiver of judicial access through arbitration are pre-empted by the FAA, such that their application is analogous to similar federal antidiscrimination statutes. *See* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 230–231 (3d Cir. 1997); Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1452–1453 (D. Minn. 1996); Benefits Communication Corp. v. Klieforth, 642 A.2d 1299, 1301–1302 (D.C. 1994) (using Title VII as a guide in interpretation of the District's antidiscrimination statute); Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 799 (Minn.

these rights through the enactment of public laws,[74] which by their nature cannot be abrogated by members of the general public, but are rights that inhere through the relationship between government and citizens. The laws protect rights of special interest or concern to the public. Public laws occur in a variety of forms, and they serve to effectuate the goal of preserving an overriding public concern for the retention of "basic" rights.[75]

An important subcategory of public laws is found in the federal employment antidiscrimination statutes. Congress has established a basic group of impermissible discriminatory conduct standards that employers generally must avoid in their hiring and discharging decisions. While employers often are free to conduct their business as they see fit,[76]

1995) ("[P]laintiff's reliance on a state statutory anti-discrimination scheme . . . rather than on a federal statutory anti-discrimination scheme, does not alter the analysis of enforceability of arbitration agreements under the FAA."); Fletcher v. Kidder, Peabody & Co., 619 N.E.2d 998, 1002 (N.Y. 1993) ("Where the [antidiscrimination] right is predicated on a State or local statute rather than on a congressional enactment, it is undisputed . . . that the courts are obliged to draw an analogy to the equivalent Federal law . . . .").

[74] A public law is defined as:

> A general classification of law, consisting generally of constitutional, administrative, criminal, and international law, concerned with the organization of the state, the relations between the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of the states to one another. An act which relates to the public as a whole. It may be (1) general (applying to all persons within the jurisdiction), (2) local (applying to a geographical area), or (3) special (relating to an organization which is charged with a public interest).

BLACK'S LAW DICTIONARY 1230 (6th ed. 1990). Employment antidiscrimination statutes qualify for the third category as a special public law applying to business organizations charged with protection of the public interest against unwarranted discriminatory practices in hiring and employment.

[75] *See, e.g.*, Sherman Act, 15 U.S.C. §§ 1-7 (1994 & Supp. II 1996) (protecting free competition through antitrust provisions); Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (1994 & Supp. II 1996) (requiring mandatory disclosures for the protection of public capital markets); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78mm (1994 & Supp. II 1996) (establishing rules for exchange registration to protect the public from fraud and misleading information in capital markets); Copyright Act of 1976, 17 U.S.C. §§ 101-1008 (1994 & Supp. II 1996) (protecting rights in creative expressions to promote disclosure and provide a uniform system of law); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. I 1995) (preserving water quality for the benefit of the public); Patent Act, 35 U.S.C. §§ 1-376 (1994 & Supp. I 1995) (protecting rights in novel inventions to promote disclosure and invention).

[76] The employment-at-will doctrine allows an employer to discharge an at-will employee for good cause or no cause at all. This reflects a nonintrusive policy by the

discriminatory policies violate an elementary public interest to be free from unwarranted prejudice and harassment on the basis of age, gender, race, ethnicity, or disability—characteristics which often bear no relation to the operations of the employer or the employee's ability to perform.[77] Because a strong public concern seeks to prevent unfair and unjust employment practices grounded in improper biases, Congress has enacted several statutes to prevent these practices and protect employees from unjustified discrimination in the workplace.

The most commonly invoked of these statutes are Title VII of the Civil Rights Act of 1964 (Civil Rights Act or Title VII),[78] the Age Discrimination in Employment Act (ADEA),[79] and the Americans with Disabilities Act (ADA).[80] These enactments are designed to eliminate employment discrimination practices through which employers deny individuals fair and equal protection on the basis of their age, gender, race, ethnicity, or disability. The Civil Rights Act was "intended to implement and give further force to

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government to permit market forces to act independently and to allow management free reign over its operations. Recently, however, the at-will doctrine has come under increasing attack and restriction through the imposition of public policy and implied contract principles, such that the power of the employer to discharge workers under the at-will doctrine has been limited. *See generally* Hayford & Evers, *supra* note 7.

[77] *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (stating that justification for gender based discrimination cannot rely on "overbroad generalizations" about specific gender qualities, but must have more objective purposes); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995) (Stevens, J., dissenting) (stating that "racial characteristics so seldom provide a relevant basis for disparate treatment, and . . . are potentially so harmful to the entire body politic") (quoting Fullilove v. Klutznick, 448 U.S. 448, 533-534 (1980) (Stevens, J., dissenting)).

[78] 42 U.S.C. §§ 1981-2000h-6 (1994) (prohibiting race and gender discrimination).

[79] 29 U.S.C. §§ 621-634 (1994) (prohibiting age discrimination).

[80] 42 U.S.C. §§ 12101-12213 (1994 & Supp. II 1996) and 47 U.S.C. § 225 (1994) (prohibiting discrimination based on certain disabilities). In addition to Title VII, the ADEA, and the ADA, numerous other statutory employment rights appear throughout the United States Code. *See, e.g.*, Title III of the Consumer Credit Protection Act, 15 U.S.C. § 1674 (1994) (limiting employer ability to discharge on the basis of garnished wages); Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994 & Supp. I 1995); Older Workers Benefit Protection Act, 29 U.S.C. §§ 621-634 (1994 & Supp. I 1995); Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1994 & Supp. I 1995); Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (1994 & Supp. I 1995); Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1994); Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1994 & Supp. I 1995). Because many of the current disputes concerning the arbitrability of public laws against discrimination appear in the context of Title VII, ADA, and ADEA claims, this Article focuses on these statutes and addresses other public laws only when appropriate.

basic personal rights guaranteed by the Constitution" by prohibiting "discrimination based on race, color, age, or religion."[81] The ADEA was enacted to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[82] The ADA was enacted on similar grounds for the protection of the disabled.[83] The overall congressional purpose in enacting these statutes is straightforward—to generally protect members of the public from discriminatory employment practices when the basis for discrimination concerns traits unrelated to the employee's abilities in relation to job performance.

While the overriding purpose of the antidiscrimination laws is very clear, the mechanisms for their enforcement are not. The government has left enforcement of employment discrimination claims to the parties who allege discrimination and to the Equal Employment Opportunity Commission, an agency designed to investigate, process, and sometimes pursue illegal discriminatory practices.[84] An aggrieved employee seeking a statutory remedy may file an action in federal court against the employer, although the cost often is prohibitive.[85] Alternatively, some statutes, including Title VII, the ADEA, and the ADA, require the employee to file a timely charge with the EEOC for agency evaluation.[86] Following evaluation, the EEOC will notify the employee whether the claim has no merit, grant the employee a Letter to

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[81] BLACK'S LAW DICTIONARY 246 (6th ed. 1990). For instance, a main goal of the Civil Rights Act was "to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States," especially because "the state courts had been deficient in protecting federal rights" against discrimination. Allen v. McCurry, 449 U.S. 90, 98-99 (1980).

[82] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991) (quoting 29 U.S.C. § 621(b) (1988)) (alteration in original).

[83] *See* 42 U.S.C. § 12101.

[84] For a discussion of the EEOC's role in enforcement and investigation of statutory rights, see Nicholson v. CPC Int'l Inc., 877 F.2d 221, 236-240 (3d Cir. 1989) (Becker, J., dissenting), *overruled by Gilmer*, 500 U.S. 20.

[85] *See* Maltby, *supra* note 8, at 2 (noting that the current monetary range of litigating an employment dispute is at least $5000 to $10,000, or an average of $7500, while the average annual wage for employees is only about $23,000).

[86] *See* 29 U.S.C. § 626(d) (1994) (the ADEA); 42 U.S.C. § 2000e-5(e) (1994) (Title VII); 42 U.S.C. § 12117(a) (1994) (the ADA); *see also* Christine Godsil Cooper, *Where Are We Going with* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 205 (1992). A timely dispute is measured from the date of the alleged discrimination. *See id.*

Sue, or seek enforcement itself.[87] The EEOC usually does not sue[88] and merely advises the employee on his likelihood of success in court. Thus, the employee usually is left to vindicate his civil rights independent of any significant agency or government assistance during litigation.

In addition to providing enforcement through litigation, Title VII and the ADA contain express provisions encouraging settlement through the use of alternative dispute resolution.[89] Section 118 of the Civil Rights Act of 1991 states that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes" under the Act.[90] A similar provision appears

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[87] *See* 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117(a); Cooper, *supra* note 86, at 205 n.13, 238. So long as the EEOC does not decide to sue in its capacity as an agency before the employee files suit, no action taken by the EEOC prevents the employee from seeking an audience before the court. *See* Cooper, *supra* note 86, at 205 n.13, 238. Thus, the EEOC's role is to provide a centralized organization in order to provide advisory, investigatory, and review resources and, only in exceptional cases, direct enforcement against violators of antidiscrimination laws. *See id.* at 209. Unless the EEOC has instituted its own action, the employee is free at any time to file suit in state or federal court. *See id.* at 205.

[88] Of the ADEA cases filed with the EEOC, fewer than 0.25% of them are accepted for litigation by the EEOC. *See* Cooper, *supra* note 86, at 205 n.13, 238. Because the role of the EEOC centers primarily upon review of allegations of discriminatory practices, the agency's purpose appears to focus on keeping track of employment practices and enforcement of continuing violations rather than acting directly to litigate a substantial number of claims. This role is in accord with the public laws' purpose to expose and deter such practices.

[89] There is no direct indication whether the statutes encourage only arbitration agreements concerning existing disputes or even whether predispute arbitration agreements are permitted. *See* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881 (4th Cir. 1996) (noting that the legislative history for several public law statutes addressing discrimination promotes the "use of alternative means of dispute resolution, where appropriate and to the extent authorized by law") (quoting H.R. CONF. REP. NO. 101-755 (1990)).

[90] 42 U.S.C. § 1981 (1994). The conference report accompanying this piece of legislation states 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." H.R. REP. NO. 101-856 (1990), *reprinted in* 136 CONG. REC. H9552-01, H9559 (1990); *see also* 137 CONG. REC. H9505-01, H9530 (1991) (providing an analysis of section 118). Although the amendment was made after the *Gilmer* decision, debate exists concerning whether the amendment changed *Gilmer*'s applicability to Title VII. *See* Benefits Communication Corp. v. Klieforth, 642 A.2d 1299, 1304–1305 (D.C. 1994) (holding that the amendment and legislative history did not alter *Gilmer*'s application to Title VII claim arbitration). *But see*

in the ADA.[91] The ADEA does not contain such a provision. While the intent of Congress for inserting these sections is unclear,[92] the policy behind these "pro-alternative dispute resolution" clauses is to provide additional venues for broad substantive relief of discriminatory practices and to address impermissible discrimination in employment. The Supreme Court opines that alternative dispute resolutions are not to "supplant" any substantive rights under the statutes, but rather to provide an alternative forum for resolution of employment disputes concerning prohibited discriminatory practices.[93] Nevertheless, the issue of arbitrability of statutory employment antidiscrimination claims has arisen due to the recent court decisions. A full-scale war exists over the propriety of resolving employment rights in commercial arbitration. As the proponents and opponents of this alternative to litigation have girded for battle, the issues, if not the answers themselves, are clearly articulated.

B. *Evolution of Arbitration as Applied to Statutory Employment Claims*

Initially, the Supreme Court held that the Federal Arbitration Act could not be used to enforce arbitration of statutory or public law claims.[94] Arbitration was reserved for the commercial arena in which contract rights and remedies, not statutory law rights and remedies, were the basis of the dispute. Simultaneously, however, the Court also expressed a firm preference

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Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994) (finding that the 1991 amendment committee comments, which state that ADR mechanisms were "intended to supplement, not supplant" Title VII remedies, signified an intent to allow parties to pursue court remedies in contrast to *Gilmer*'s arbitrability standard).

[91] *See* 42 U.S.C. § 12212 (1994).

[92] The uncertainty arises over whether Congress intended to provide an "either/or" choice for prospective litigants or a "both/and" alternative. *See supra* note 71 and accompanying text (discussing labor arbitration in the union sector). Under the former, an employee would be bound to arbitrate or litigate a claim. *See supra* note 71 and accompanying text. The latter, however, would permit a party independently to pursue allegations in arbitration without foreclosing any right to bring the claims in court. *See supra* note 71 and accompanying text.

[93] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) ("[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 functions.") (alterations in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)); *see also* discussion *supra* notes 62-65 and accompanying text.

[94] *See supra* notes 40-65 and accompanying text (discussing shifts in judicial attitudes toward public law arbitration).

for the mechanism of labor arbitration as a means to resolve industrial disputes.[95] Here, too, the Court recognized the power of a negotiated contract—the collective bargaining agreement—and left the dispute resolution process to the parties' mutual agreement.

Historically, organized labor has provided a democratic voice for workers who could not effectively exert their voices individually. The National Labor Relations Act (NLRA)[96] recognized the "inequality of bargaining power between employees . . . and employers who are organized in the corporate" body and promoted the collective bargaining process as a means for employees to unite and bargain with employers over working conditions.[97] Unions, supported by a majority of the employees in a bargaining unit and operating under democratic auspices,[98] serve as representatives during the collective bargaining negotiations and develop a working contract encompassing the majoritarian concerns of its members. Because the collective arrangement encompasses "the whole employment relationship" and represents a "system of industrial self-governance,"[99] Congress endorsed inclusion of grievance arbitration as a means for those within the industrial environment to resolve the disputes that arose.[100] Due to the paramount importance of collective bargaining provisions for arbitration and the maintenance of a working employer-employee relationship, the Court required compliance with arbitration agreements and specifically enforced them under section 301 of the Labor-Management Relations Act (LMRA).[101] Thus, the

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[95] *See generally* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[96] 29 U.S.C. §§ 151-169 (1994).

[97] *Id.* § 151; *see also id.* §§ 158-159 (discussing rights of employees and unfair labor practices).

[98] Unions are selected based on a finding of majority support from the appropriate bargaining unit. *See id.* § 160. As such, the union does not represent the interests of a particular individual worker, but rather the majority interests of the workers in the unit. Additionally, the 1959 Landrum-Griffin Act added amendments to the NLRA that required democratic reform in union governance and increased participation of union members, again under the notion of "majority rule." *See id.*; *see also* Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1994).

[99] *Warrior & Gulf*, 363 U.S. at 578, 580.

[100] "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *Id.* at 581.

[101] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957) (using section 301 of the LMRA as a means to require specific performance of a collective

government accepted labor arbitration conducted under authority of a collective bargaining arrangement as a means to resolve employer-employee disputes in organized labor.[102]

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bargaining agreement and compel arbitration); *see also* Labor-Management Relations Act, 29 U.S.C. § 185 (1994) (codifying section 301 of the LMRA and embodying both federal procedural and substantive law for enforcement of collective bargaining agreements).

An important side note is the unresolved applicability of the FAA in regard to enforcement of collective bargaining agreement arbitration provisions. Several decisions have held that the FAA may not apply to enforcement of collective bargaining agreements. *See* Goodall-Sanford, Inc. v. United Textile Workers, 353 U.S. 550, 551 (1957) (finding that section 301 of the LMRA applied to collective bargaining agreement actions and failing to reach the issue of whether a similar decision based on the FAA was appealable); *see also* General Elec. Co. v. Local 205, United Elec., Radio & Mach. Workers, 353 U.S. 547, 548 (1957) (passing upon the lower court's reliance on the FAA to enforce collective bargaining arbitration and instead using section 301); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984) (finding that the collective bargaining agreement was within the FAA's purview, but that section 301 of the LMRA "was enacted long after the [Federal] Arbitration Act and . . . therefore supersedes . . . the standards of the earlier act"). Other decisions explicitly have used the FAA to enforce labor arbitration. *See* International Union of Operating Eng'rs v. Murphy Co., 82 F.3d 185, 188–189 (7th Cir. 1996) ("[The] FAA and LMRA establish [the] same governing principles and '[c]ourts routinely cite decisions under one statute as authority for decisions under the other.'") (quoting National Wrecking Co. v. International Bhd. of Teamsters, Local No. 731, 790 F. Supp. 785, 789 (N.D. Ill. 1992)); *see also* Pietro Scalzitti Co. v. International Union of Operating Eng'rs, 351 F.2d 576, 579–580 (7th Cir. 1965) (holding that the "contracts of employment" language in section 1 of the FAA did not exempt collective bargaining agreements from coverage). Still others have denied application of the FAA, although the facts dictate that the parties may have met section 1 of the FAA's exemption for those employees actively engaged in interstate commerce. *See* Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1067–1068 (4th Cir. 1993) (finding "the FAA does not apply to disputes stemming from collective bargaining agreements," but questioning whether the congressional policy in the FAA should extend to such agreements); Herring v. Delta Air Lines, Inc., 894 F.2d 1020, 1023 (9th Cir. 1990) (finding that the FAA did not apply to enforce arbitration of the pilots' union agreement); United Food & Commercial Workers v. Safeway Stores, Inc., 889 F.2d 940, 943–944 (10th Cir. 1989) ("The Arbitration Act . . . is generally inapplicable to labor arbitration.") (citing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987)).

An interesting point, relating to the exclusion of "contracts of employment of seamen" in section 1 of the FAA, is a decision holding that, unlike other union collective bargaining agreements, enforcement of maritime labor arbitration under section 301 of the LRMA is optional rather than required. *See* U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 357 (1971) (holding that section 301 of the LMRA did not abrogate the statutory remedy of seaman to sue for wages in federal court and was instead an optional remedy under the applicable collective bargaining agreement).

[102] Before the 1980s arbitration of employment disputes outside of the collective bargaining field was absent from the case law. This phenomenon likely was due to the lack

This reception, however, did not extend to all employment related disputes occurring in the context of organized labor. Reminiscent of the *Wilko* decision, several Supreme Court decisions held that statutory rights could not be subordinated to the confines of arbitration. In 1974 the Court held in *Alexander v. Gardner-Denver Co.*[103] that it would not enforce arbitration of an employee's Title VII claims, despite the existence of a collective bargaining agreement.[104] Alexander, a maintenance employee represented by the United Steelworkers of America, filed a grievance under the collective bargaining agreement upon being discharged.[105] Before Alexander's claim was referred to arbitration, he filed a charge of racial discrimination with the EEOC "because [Alexander felt] he 'could not rely on the union.'"[106] The arbitrator ruled against the discharged employee, without addressing any racial discrimination claims. The EEOC found no basis for a Title VII action,[107] but Alexander nonetheless brought a Title VII action against the employer. The U.S. District Court for the District of Colorado dismissed the action as one that had been resolved through the arbitral process that Alexander had voluntarily elected to pursue in lieu of a judicial hearing.[108] The court of appeals affirmed the lower court's analysis.[109]

In an unanimous decision, the Supreme Court reversed the lower courts and held that Alexander could pursue his Title VII claims before the judiciary.[110] Although the Court noted that election of remedies and the liberal federal attitude towards labor arbitration spoke directly to the relationship

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of contractual arrangements with at-will employees. While the rise of individual employment contracts in the context of the narrowing at-will doctrine is beyond the scope of this Article, some commentary exists on the subject. *See generally* Hayford & Evers, *supra* note 7.

103 415 U.S. 36 (1974).

104 *But see* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 71–73 (1975) (holding that individual employee protests against Civil Rights Act violations did not protect the employees from termination under the National Labor Relations Act where the employees failed to exhaust collective bargaining procedures for grievance arbitration).

105 *See Alexander*, 415 U.S. at 38–39. The company alleged that Alexander's discharge was based on poor performance and that, although Alexander's grievance claimed that such termination was unjust, he did not raise the issue of racial discrimination during the grievance procedure. *See id.*

106 *Id.* at 42.

107 *See id.* at 42–43.

108 *See id.* at 43.

109 *See id.*

110 *See id.* at 59-60.

between courts and collective bargaining arrangements, the Court also noted that Title VII rights had nothing to do with protection against industrial strife.[111] The Court found nothing in the statutory scheme to prevent Alexander from pursuing remedies both in arbitration and the courts.[112] The Court delineated an employee's "contractual rights" under collective bargaining agreements from the "statutory rights" provided by Title VII.[113] Because the labor arbitrator's power did not extend beyond the negotiated contract, he could decide only the employee's rights under the collective bargaining agreement, and not the statutory claims.[114] Furthermore, the Court found that the federal policy favoring private arbitration was difficult to reconcile with the congressional mandate giving federal courts the responsibility to enforce statutory discrimination claims.[115] Still further, the opinion noted the inadequacy of arbitral procedures to resolve Title VII rights.[116] Foremost, the Court highlighted (1) arbitrators' general lack of competence to decide statutory matters, (2) the incompleteness of arbitral fact-finding and procedures, and (3) the lack of written awards.[117] Finally, the Court held that the policies of Title VII and other antidiscrimination laws "can best be accommodated by permitting an employee to pursue fully both his

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[111] *See id.* at 47 (noting that Title VII did invest "plenary powers" in the judiciary to enforce its dictates and that it established prerequisites for doing so).

[112] *See id.* ("[S]ubmission of a claim to one forum does not preclude a later submission to another."). The Court also noted that the legislative history recognized an intent to permit employees to seek redress under both grievance arbitration and judicial action. *See id.* at 48–49.

[113] *Id.* at 49–50 ("The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.").

[114] *See id.* at 53–54 (stating that a collective bargaining arbitrator "has no general authority to invoke public laws").

[115] The Court differentiated collective rights that unions bargain—and waive—in the interest of the majority of their members from an individual's rights under Title VII, which a union has no power to bargain under "majoritarian processes." *Id.* at 51. Because a union may not prospectively waive individual member rights under Title VII, a negotiated grievance arbitration provision does not act as a waiver to judicial resolution of Title VII claims. *See id.*

[116] *See id.* at 56.

[117] *See id.* at 57–58. The Court noted that efficiency arguments in favor of arbitral resolution were based on streamlined judicial procedures peculiarly inadequate to address complex statutory claims or to justify the possible detriment to victims of discrimination. *See id.* at 59.

remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII."[118]

The Court continued its *Alexander* line of reasoning in two analogous cases.[119] In *Barrentine v. Arkansas-Best Freight System, Inc.*,[120] the Court denied arbitration, under a collective bargaining agreement, of claims arising under the Fair Labor Standards Act (FLSA).[121] The Court recognized majoritarian concerns of permitting an individual's statutory rights to be circumscribed by a majority-rule union contract.[122] Additionally, the Court doubted that the arbitral forum could adequately protect the employee's rights.[123] The dissent differentiated *Alexander* and would have invoked the

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[118] *Id.* at 59-60. Federal courts should consider claims de novo and may admit the arbitral decision into evidence. *See id.* at 60. While foreclosing neither forum to discrimination claims, the Court retained a mechanism that would assist in resolution of duplicative contractual and statutory claims arising from the same set of facts. *See id.*

[119] The Court's holding in *Emporium Capwell* may seem apposite to *Alexander* on first reading. The *Emporium Capwell* Court held that employees who had engaged in concerted activity to protest alleged racial discrimination could be terminated under the NLRA, regardless of claims under Title VII, for their failure to utilize existing grievance procedures. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 73 (1975). The opinion noted that the need to protect the majoritarian influence of exclusive bargaining representatives superseded an employee's right to subvert the representative's exclusive status and instead seek redress in the interest of the individual rather than the bargaining unit. *See id.* at 62-65. As such, the substantive right to be free from discrimination must coincide with procedural rights under the NLRA. *See id.* at 69 (noting that "elimination of discrimination and its vestiges is an appropriate subject of bargaining"). Thus, alleged discriminatory dismissal may violate Title VII while comporting with the NLRA where the employee fails to process his grievance in accordance with the negotiated collective bargaining agreement. Note, however, that this holding does nothing to the primary holding of *Alexander*, which provides that an employee is permitted to pursue discrimination claims in court and through properly executed grievance procedures.

[120] 450 U.S. 728 (1981).

[121] *See id.* at 737 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) in support of its holding); *see also* 29 U.S.C.A. §§ 201-219 (West 1998).

[122] *See id.* at 734 (stating that "tension arises . . . when the parties to a collective bargaining agreement make an employee's entitlement to substantive statutory rights subject to [majoritarian-decided] contractual dispute-resolution procedures"). The Court noted that while collective bargaining rights inhered to the members of the unit as a whole, protection under the FLSA extended specifically to individuals. *See id.* at 739-740 (finding that no exhaustion of grievance procedures or waiver could bar FLSA claims by represented employees).

[123] *See id.* at 742-745. Deciding that a union could not be expected to defend vigorously individuals' claims that may clash with the position of the unit as a whole, the

federal endorsement for labor arbitration as the mechanism to resolve industrial strife.[124]

The second case, *McDonald v. City of West Branch*,[125] held that a labor arbitration decision concerning a claim under section 1983 of the Civil Rights Act could not be granted the beneficial effect of either res judicata or collateral estoppel in a subsequent court action.[126] After a discharged police officer lost in arbitration under the collective bargaining agreement,[127] the employee brought a suit under section 1983 of the Civil Rights Act against the City of West Branch. After holding that arbitration awards were not subject to full faith and credit,[128] the Court relied on *Alexander* and *Barrentine* to find that Congress intended federal statutes such as section 1983 to be enforced in and by federal courts.[129] Analogously, the Court also repeated arbitral inadequacies such as an arbitrator's inexperience with statutory claims, the hearing's limited proceedings, related evidentiary rules, and the majoritarian concerns.[130] Thus, an arbitral decision, rendered pursuant to a collective bargaining agreement, on a section 1983 claim was not a "judicial proceeding" providing the effect of res judicata or collateral estoppel.

The Court continued this line of reasoning throughout the 1980s, although it became increasingly liberal toward enforcing arbitration of other statutory claims. While the Court was beginning to reassess the *Wilko* bar on the arbitration of statutory claims arising within commercial contexts,[131] the judicial system demonstrated no sign of denying access to the courts for the redress of statutorily prohibited employment discrimination.[132] Following the

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Court also believed that arbitral competence, procedures, and lack of power beyond the collective bargaining agreement would not vindicate statutory claims. *See id.*

[124] *See id.* at 746-753 (Burger, C.J., dissenting) (distinguishing the FLSA from Title VII while arguing for the arbitrability of claims under the former statute).

[125] 466 U.S. 284 (1984) (unanimous opinion).

[126] *See id.* at 292.

[127] The officer alleged that his discharge was based on his exercise of First Amendment rights. *See id.* at 286.

[128] "Arbitration is not a 'judicial proceeding' and, therefore, § 1738 [of the Federal Full Faith and Credit Statute] does not apply to arbitration awards." *Id.* at 288 (footnote omitted).

[129] *See id.* at 289-290.

[130] *See id.* at 290-291.

[131] *See supra* notes 47-65 and accompanying text.

[132] Interestingly, the first cases to compel arbitration of statutory claims arising out of commercial transactions involved international business transactions. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (stating that the "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for

Alexander line of cases, courts began to deny the enforcement of arbitration agreements when statutory employment discrimination claims arose in the nonunion sector.[133] In addition to relying on *Alexander* as the reason to deny arbitration of employment discrimination claims,[134] the courts pursued several other arguments for denying arbitration. Both the inadequacies of arbitration to decide statutory employment discrimination claims[135] and the need for

predictability in the resolution of disputes" required recognition of an agreement to arbitrate); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (noting that an arbitration agreement was an "indispensable precondition to achievement of orderliness and predictability essential to any international business transaction"). If international policy played any substantial role in compelling arbitration of statutory claims, this rationale was dropped when the Court decided *Gilmer*, which involved an ADEA claim between domestic parties with absolutely no international nexus.

Additionally, one should note divergent reactions to arbitral competency among "commercial" statutory violations and "employment discrimination" statutory violations. *Compare Mitsubishi Motors*, 473 U.S. at 633 (stating that "potential complexity [of statutory antitrust law] should not suffice to ward off arbitration"), *with* Barrentine v. City of West Branch, 466 U.S. 284, 290 (1984) ("An arbitrator may not . . . have the expertise required to resolve the complex legal questions that arise in § 1983 actions.").

[133] *See generally* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990) (denying arbitration of securities representative's Title VII claims by reliance on *Alexander*), *vacated* 500 U.S. 930, *rev'd* 939 F.2d 229 (1991) (finding that the *Gilmer* decision controlled rather than *Alexander* such that arbitration of Title VII claims was required); Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) (denying arbitration of a salesperson's Title VII claims by applying the *Alexander* line of reasoning); Nicholson v. CPC Int'l Inc., 877 F.2d 221 (3d Cir. 1989) (refusing to enforce arbitration of ADEA claims made by attorney and relying on *Barrentine* for guidance), *overruled by* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988) (denying arbitration of Title VII claims by finding that *Alexander*'s holding derived from Title VII and not the nature of collective bargaining), *overruled by Gilmer*, 500 U.S. 20.

[134] *See Alford*, 905 F.2d at 106 (stating that "we regard *Alexander*'s rationale as broad enough to speak to *any* arbitration of Title VII claims") (emphasis added); *see also Utley*, 883 F.2d at 187 (noting the mere fact that an employee "signed an individual employment agreement rather than a collective bargaining agreement as in *Alexander* is not significant"); *Swenson*, 858 F.2d at 1306 ("Although *Alexander* involves a collective bargaining agreement, and not a commercial arbitration agreement under the FAA, this fact should not change the Court's analysis.").

[135] "The main problems with arbitration are the lack of expertise of arbitrators, the inferior fact-finding process, and the inability of arbitration to judicially construe Title VII by reference to public law concepts." *Swenson*, 858 F.2d at 1306–1307 (citations omitted); *see also Nicholson*, 877 F.2d at 228 (noting the "inadequacy of arbitration . . . to enforce the statute effectively," and its lack of power to "award broad equitable relief which courts have").

uniform enforcement[136] were advanced to deny employer motions to compel arbitration. While *Alexander* had concentrated on the "majoritarian" concerns of enforced labor arbitration, courts hearing individual claims began to analyze the unique position of employees who did not have the power of a bargaining representative to negotiate for them.[137] Furthermore, the decisions carefully defused arguments made under *Mitsubishi Motors* for the federal pro-enforcement attitude toward arbitration in general by stating that the unique concerns of antidiscrimination statutes warranted different and special treatment.[138] Thus, courts deferred to the *Alexander* line of cases and permitted employees to seek judicial remedy, regardless of arbitration provisions to the contrary, for violations of discrimination laws. All this, however, was about to change.

In 1991, *Gilmer* introduced a radical shift in the Court's attitude toward arbitration of employment discrimination claims.[139] Robert Gilmer was hired by Interstate/Johnson Lane (Interstate) as a financial services manager and, as required, registered as a securities representative with several stock

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[136] *See Nicholson*, 877 F.2d at 227–229 (noting that enforcement of ADEA arbitration would detract from EEOC investigation and enforcement, thereby undermining congressional design to deter age discrimination through the actions of a centralized public agency); *Swenson*, 858 F.2d at 1307 ("Title VII mandates the promotion of public interest by assisting victims of discrimination. The arbitration process may hinder efforts to carry out this mandate.").

[137] The *Nicholson* court addressed the issues of both adhesion contracts and the high-ranking versus low-ranking employee arguments. *See Nicholson*, 877 F.2d at 229 (noting the "disparity in bargaining power between an employer and an individual employee . . . [that] may lack any realistic option to refuse to sign a standard form arbitration agreement," and rejecting the idea that professional employees and managerial employees of higher sophistication did not need protection).

[138] The courts hinged on *Mitsubishi Motors*'s language that not all "controversies implicating statutory rights are suitable for arbitration." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985); *see also Nicholson*, 877 F.2d at 224; *Swenson*, 858 F.2d at 1307. The courts would then find that the congressional intent for judicial resolution of discrimination claims prevented enforcement of arbitration. *See, e.g.*, *Nicholson*, 877 F.2d at 229–230. Other courts merely refused to find that the *Alexander* line of cases had been specifically overruled or modified by the recent "arbitration-friendly" decisions in the international business cases. *See, e.g.*, *Alford*, 905 F.2d at 108; *see also Utley*, 883 F.2d at 186.

[139] For a concise background on *Gilmer*'s roots in the FAA and prior judicial treatment of employment arbitration agreements, see generally 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 U. L.J. 561 (1997).

exchanges.[140] Included among these registrations was the New York Stock Exchange (NYSE) "Uniform Application for Securities Industry Registration or Transfer," or "Form U-4," which contained an arbitration provision in which Gilmer agreed "to arbitrate any dispute, claim or controversy" arising between him and Interstate (such disputes required arbitration under the NYSE rules).[141] Following several years of service, Gilmer received his termination notice at the age of 62. Gilmer promptly submitted age discrimination charges with the EEOC and then filed ADEA claims in the U.S. District Court for the Western District of North Carolina. Relying on Gilmer's signed Form U-4 and the FAA, Interstate filed a motion to compel arbitration.[142] The district court ruled in favor of Gilmer on the basis of *Alexander* and congressional intent to prevent a judicial waiver for resolution of ADEA claims.[143] The Fourth Circuit Court of Appeals reversed after finding that nothing in the ADEA evinced congressional intent to preclude arbitration of claims under the statute.[144] The Supreme Court granted certiorari to resolve questions of ADEA arbitrability.

Ultimately, the Court held that an arbitration agreement signed pursuant to a broker's securities registration application was enforceable, requiring arbitration of statutory claims under the ADEA.[145] Relying on the liberal

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[140] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

[141] *See id.* at 23. Under the NYSE rules, any dispute arising over an employee's termination is subject to arbitration. *See id.* Other exchanges, including the National Association of Securities Dealers, incorporate similar provisions in their registration material and exchange rules. *See* Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 658 (5th Cir. 1995). Note, however, that the NASD amended its code in 1993 in regard to arbitration of employment disputes, and some conflicts have arisen over the applicability of such amendments to securities representatives who completed their initial registration prior to the changes. *See id.* at 659 (finding that termination after the amendments took effect was governed by changes in the NASD code); *see also* Kuehner v. Dickinson & Co., 84 F.3d 316, 320 (9th Cir. 1996) (finding that a termination that took place before the amendments took effect was nonetheless governed by NASD changes when an action was brought after the amendments took effect). These disputes comprise the larger issue concerning notice to employees of the arbitrability of their discrimination claims. *See* Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1302-1305 (finding that employees were not required to arbitrate state law discrimination claims because Form U-4 did not put them on notice that such claims were arbitrable).

[142] *See Gilmer*, 500 U.S. at 23-24.

[143] *See id.*

[144] *See id.*

[145] *See id.* at 35.

federal policy toward arbitration and the language of *Mitsubishi Motors*,[146] the Court found no inconsistency between the underlying public policy of the ADEA and arbitral goals under the FAA.[147] Following Gilmer's concessions that nothing in the ADEA's language or legislative history prohibited arbitration, the Court also found that there was no inherent conflict between compulsory arbitration and the ADEA's statutory framework and purposes.[148] The Court held that arbitration could further ADEA social policy[149] and that the decision would not undermine the EEOC's role in enforcement of the ADEA.[150] In addition, the Court opined that alleged inadequacies of the arbitral process in handling statutory claims resembled the same general judicial hostility toward arbitration that the FAA was enacted to reverse.[151]

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[146] *See supra* note 62 and accompanying text (discussing the *Mitsubishi Motors* holding that arbitration is not a waiver of substantive rights, but only a choice of forum).

[147] The Court noted that the language in the ADEA does not militate against alternative dispute resolution, but instead encourages it. *See Gilmer*, 500 U.S. at 27–28. Importantly, the Court did not reach the issue of whether section 1 of the FAA applied to "employment contracts" because Gilmer did not raise the issue on appeal. *See id.* at 25 n.2. Additionally, the Court also indicated that the issue would have remained moot regardless of whether it was raised on appeal, since a Form U-4 is not an employment contract, but a contract between the employee and a third party (the NYSE). *See id.*

Today, the issue of application of section 1 of the FAA to employment contracts continues without direct guidance from the Supreme Court. *See, e.g.*, Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995); Crawford v. West Jersey Health Sys., 847 F. Supp. 1232 (D.N.J. 1994). Issues surrounding the "nonemployment contract" characterization of the Form U-4, however, have been rejected and few employees have challenged this characterization. *See, e.g.*, Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 312 (6th Cir. 1991); Fletcher v. Kidder, Peabody & Co., 619 N.E.2d 998, 1005 (N.Y. 1993).

[148] *See Gilmer*, 500 U.S. at 26–27, 29 (noting the ADEA's flexible approach to dispute resolution).

[149] "[S]o long as the prospective litigant effectively may vindicate [his] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

[150] The Court noted that, regardless of an agreement to arbitrate, (1) individuals could still file EEOC charges, (2) the EEOC's investigatory authority was not compromised, and (3) nothing indicated that Congress intended the EEOC to be involved in all employment disputes. *See id.* at 28–29 (stating that "mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration").

[151] Similar to prior cases, *see supra* notes 117, 123, 130, 135 and accompanying text, the *Gilmer* Court addressed concerns that (1) arbitration would be biased, (2) discovery was too limited, (3) failure to write arbitral decisions would reduce public knowledge of discriminatory practices, (4) arbitrators cannot fashion certain types of relief, and (5) there was disparity in employee-employer bargaining power. *See Gilmer*, 500 U.S. at 30–33.

Finally, the Court distinguished the *Alexander*, *Barrentine*, and *West Branch* decisions that had permeated discussions of statutory employment discrimination claim arbitration. Foremost, the majority noted that prior employment arbitration cases involved collective bargaining agreements.[152] These cases had involved majoritarian concerns because unions, controlled by the majority of their members, negotiated arbitration clauses, rather than the individual employee, whose interests could be ignored by the union majority. When an agreement was made by an individual employee, with majoritarian involvement absent, the employee could protect her interests; the resulting contract at least resembled an arm's-length commercial contract between individual parties, rather than union-imposed terms that all members had to honor.[153] On this analysis, the Court found that the FAA applied and that the agreement to arbitrate federal statutory employment discrimination claims would be enforced.[154]

Following *Gilmer*, courts have reacted swiftly and expansively toward the enforcement of arbitration claims arising under federal antidiscrimination statutes and governed by the FAA. Within one week of the *Gilmer* decision, the Court vacated an order denying arbitration of an employee's Title VII claims, and on remand the court of appeals found that Title VII, like the ADEA, was arbitrable.[155] Subsequent cases expanded *Gilmer*'s reach to

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Unlike prior decisions, the Court rejected these generalized attacks and held that protections built into the FAA and the NYSE rules prevented abuse, NYSE provisions permitted extensive discovery and written opinions, cases not subject to arbitration would still be presented in the courts to clarify the law, and the NYSE rules did not restrict the types of arbitral relief available. *See id.* Note, however, that the employment discrimination issues in this case were addressed expressly by the NYSE arbitration rules and that these rules do not apply to all employment arbitrations. The Court also rejected any generalized undue influence or coercion claims based solely on the existence of an employee-employer relationship. *See id.* at 32-33.

[152] *See id.* at 34-35.

[153] The Court elaborated the following three significant distinctions between *Gilmer* and the *Alexander* line of cases: (1) the *Alexander* cases addressed only whether grievance arbitration precluded subsequent judicial action and did not involve enforcement of compulsory arbitration agreements, (2) the *Alexander* cases involved the presence of collective bargaining agreements, and (3) the cases were not resolved under the FAA. *See id.* at 35.

[154] *See id.* at 35. The dissent railed against the majority's failure to address whether section 1 of the FAA prohibited enforcement of arbitration agreements within employment contracts. *See id.* at 36-43 (Stevens, J., dissenting). The dissent also argued that compulsory arbitration conflicted with the ADEA's purpose. *See id.* at 41-42.

[155] *See* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990), *vacated* 500 U.S. 930, *rev'd* 939 F.2d 229, 230 (5th Cir. 1991) ("Because both the ADEA and

include other employment discrimination statutes such as the ADA,[156] the Civil Rights Act,[157] the Fair Labor Standards Act,[158] the Juror's Act,[159] and state law statutes.[160] During 1992, federal courts applied *Gilmer* to employment contracts in numerous job fields[161] beyond the Form U-4 registrations in the securities industry.[162] As a result of the mass acceptance of the arbitrability of statutory employment discrimination claims,[163] federal courts have all relegated such claims to the arbitral arena. However, this approval should not imply that the propriety of employment discrimination arbitration under the FAA has become moot. Rather, the law likely will continue to evolve through numerous challenges and interpretations. Beyond the EEOC's continued efforts to oppose enforcement of predispute arbitration agreements concerning workplace discrimination,[164] numerous courts have

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Title VII are similar civil rights statutes, and both are enforced by the EEOC, . . . we have little trouble concluding that Title VII claims can be subjected to compulsory arbitration.").

[156] *See generally* Golenia v. Bob Baker Toyota, 915 F. Supp. 201 (S.D. Cal. 1996).

[157] *See generally* Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) (compelling arbitration of employee claims under Title VII, the Civil Rights Act of 1991, and state statutes).

[158] *See generally* Kuehner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996) (compelling arbitration of FLSA claims after an employee failed to demonstrate congressional intent to prohibit arbitration under the statute).

[159] *See generally* McNulty v. Prudential-Bache Sec., Inc., 871 F. Supp. 567 (E.D.N.Y. 1994) (affirming an employer's motion for summary judgment where claims under the Juror's Act, 28 U.S.C. § 1875(a) (1994), and Title VII had been adjudicated in arbitration).

[160] *See, e.g.*, Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790 (Minn. 1995) (compelling arbitration of the Minnesota Human Rights Act).

[161] *See supra* note 1.

[162] *See generally* DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947 (W.D.N.Y. 1992) (applying *Gilmer* to an employment contract). Although the *Gilmer* Court expressly declined to resolve the issue of section 1 of the FAA's exclusion of employment contracts and further hinted that a Form U-4 was not an employment contract, the lower courts quickly filled the void with an overwhelming endorsement of arbitrability of individual employment contracts. Though vestiges of the unresolved issue of FAA applicability continue to appear in repeated employee attacks on the scope of section 1 of the FAA, no court considering the issue during the 1990s has adopted an expansive view of section 1 to exclude all employment contracts. *See infra* notes 196–199.

[163] The reader should note that besides *Gilmer*'s license to arbitrate ADEA claims, the Supreme Court has never ruled on the mandatory arbitrability of any other federal antidiscrimination statute. Nor has the Court directly addressed an arbitration provision appearing in an individual employment contract that requires arbitration of such statutes.

[164] *See* Hansen, *supra* note 8, at 26 (discussing the EEOC's ongoing efforts to oppose mandatory arbitration agreements in employment contracts).

avoided *Gilmer* through the application of novel arguments.[165] A powerful argument against the application of *Gilmer* arose in *Prudential Insurance Co. v. Lai*,[166] in which the court held that when the employees signed their Form U-4s, nothing in the contract put them on notice that they were agreeing to arbitrate important statutory rights and, accordingly, the court could not enforce the arbitration provision.[167] While numerous employees continue to

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[165] *See* Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130–1131 (7th Cir. 1997) (refusing to compel arbitration of ADA and Title VII claims when the employee had signed an arbitration/employment agreement after beginning work and the employer's failure to provide consideration for signing made the contract unenforceable); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1490 (10th Cir. 1994) (finding employer's conduct constituted a waiver of its right to compel arbitration); Berger v. Cantor Fitzgerald Sec., 942 F. Supp. 963, 966–967 (S.D.N.Y. 1996) (finding that issues of misrepresentation, inducement, and unfair dealing required additional discovery on the employment contract before enforcement of the arbitration provision); Arce v. Cotton Club, 883 F. Supp. 117, 123 (N.D. Miss. 1995) (interpreting the FAA to exclude its application and then denying arbitration of claims by looking to state contract law).

One is compelled to note, however, that the overwhelming majority of cases are decided in favor of the employer and most employee defenses are rejected. *See* Miller v. Public Storage Management, Inc., 121 F.3d 215, 218–219 (5th Cir. 1997) (holding that the issue of fraud in formation of the contract should be submitted to the arbitrator with the ADA claims); Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 54 (7th Cir. 1995) (holding that the issue of fraudulent inducement concerning contract signing would be submitted to arbitration with the ADEA claims); EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500, 505 (E.D. Mich. 1997) (restricting the EEOC's ability to bring a Title VII action because the employee involved had signed an arbitration agreement); Beauchamp v. Great W. Life Assurance Co., 918 F. Supp. 1091, 1098–1099 (E.D. Mich. 1996) (finding that Form U-4 was not an adhesion contract, the employee's inability to negotiate terms was not dispositive, and retention of the signed contract at another facility was not to the employee's detriment); Cherry v. Wertheim Schroder & Co., 868 F. Supp. 830, 835 (D.S.C. 1994) (holding that the employee's failure to pass securities registration exams was not a defense against enforcement of her Form U-4 agreement to arbitrate); Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76, 80 (D. Mass. 1993) (applying *Gilmer* retroactively to conduct that occurred prior to *Gilmer*'s decision); Dancu v. Coopers & Lybrand, 778 F. Supp. 832, 834 (E.D. Pa. 1991) (finding that the employer's delay and invocation of extensive discovery did not constitute a waiver of the arbitration provision); Benefits Communication Corp. v. Klieforth, 642 A.2d 1299, 1304–1305 (D.C. 1994) (finding that the 1991 amendments to the Civil Rights Act did not overrule *Gilmer*).

[166] 42 F.3d 1299 (9th Cir. 1994).

[167] *See id.* at 1305. *Lai* addressed the "knowing and voluntary" requirement in which a party must be put on notice that, by signing an arbitration provision, she is waiving judicial access for any employment discrimination claims. *See id.* The *Lai* court emphasized that even had the employees understood that they were agreeing to a general arbitration provision, nothing in the agreement purported to state the types of disputes

use *Lai*'s notice requirement, its success has been minimal.[168] Additionally, *Gilmer* has had minimal impact in the unionized sector. The courts, relying on the *Alexander* line of cases, continue to grant judicial access when collective bargaining arrangements are involved.[169]

Gilmer has, however, been modified by subsequent decisions that sought to provide employees further protection.[170]

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covered by the term, including statutory disputes and civil rights claims. *See id.* As such, the court found that the statutory framework of Title VII required employee contracts to explicitly provide notice of the statute's arbitrability if the employer sought to have these disputes covered by the agreement. *See id.*

[168] *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1195-1196 (9th Cir. 1998) (relying on *Lai*'s rationale to hold that Title VII claims are not subject to compulsory arbitration agreements in employment contracts); Reneteria v. Prudential Ins. Co., 113 F.3d 1104, 1105 (9th Cir. 1997) (following the *Lai* decision in holding that an employee was not put on notice by a Form U-4 arbitration provision and therefore arbitration could not be enforced). *But see* Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460, 1474 (N.D. Ill. 1997) ("The prevailing view is that *Lai* is incompatible with . . . *Gilmer*, ignores core principles of contract law, and inappropriately used legislative history to contradict plain statutory language."); Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1455 (D. Minn. 1996) (stating that "the Court finds the . . . *Lai* decision unpersuasive and declines to apply it"); *Beauchamp*, 918 F. Supp. at 1096 ("Fortunately, [*Lai*] is not binding precedent because this court is not persuaded by its reasoning. The portions of the legislative history relied upon by [*Lai*] are slender reeds . . . .").

Duffield is the most recent Ninth Circuit case inspired by *Lai*'s holding and focuses intently upon the same portions of legislative history relied upon by *Lai*. *See Duffield*, 144 F.3d at 1189-1200 (finding that Congress expressly intended to forbid compulsory arbitration of Title VII claims). Although thorough in its analysis of *Lai* and Title VII's legislative history, *Duffield*'s reliance may suffer the same criticism as *Lai* insofar as it fails to provide any additional analysis of the legislative intent surrounding Title VII.

[169] *See* Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 523-526 (11th Cir. 1997) (applying an *Alexander* analysis instead of a *Gilmer* test to a compulsory arbitration agreement in a collective bargaining contract); Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1453 (10th Cir. 1997) (rejecting Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) and adopting the majority view that *Alexander* applies in collective bargaining environments), *vacated*, 118 S. Ct. 2364 (1998); Randolph v. Cooper Indus., 879 F. Supp. 518, 521-522 (W.D. Pa. 1994) (stating that "the holding in *Gilmer* should be narrowly construed and should not extend to discrimination suits arising under labor contracts"); Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141, 147 (D. Conn. 1993) ("*Gilmer* does not alter or undermine the protection established in [*Alexander*] against waiver of individual statutory rights through collective-bargaining agreements."). *But see Austin*, 78 F.3d at 885 (following *Gilmer*). The *Austin* court stated:

> Whether the dispute arises under a contract of employment growing out of the securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So

Despite some pro-employee decisions, employers appear to have succeeded in having employment contract arbitration provisions legitimized and enforced. Yet, issues surrounding the enthusiastic judicial embrace of employment discrimination claim arbitration are far from fully and permanently resolved, and employers continue to face uncertainty in the future.[171] Under the current regime, the Supreme Court has not yet clarified whether the FAA applies generally to employment contracts or whether and what kinds of employment discrimination statutory claims (Title VII, ADA, or ADEA) are arbitrable; nor has the Court resolved a split among the circuits

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> long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced.

Id. at 885.

[170] *See* Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1482-1483 (D.C. Cir. 1997). *Cole* found that, at minimum, *Gilmer* requires that an employment contract arbitration provision, if applied to statutory discrimination claims, must demonstrate that it

> (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs *or* any arbitrators' fees or expenses as a condition of access to the arbitration forum.

Id. at 1482. These requirements assure procedural fairness. *See id. Cole* added an element by stating that an employer may not require arbitration in which an employee must pay *all or any* of the fees associated with arbitration. *See id.* at 1484 (finding that the requirement of having an employee pay arbitrator's fees would be analogous to having the same pay a judge to hear his statutory claims, which is an unheard of proposition). As such, an employer must bear the cost of arbitrator's fees and therefore provide the employee with an effective means of vindicating his statutory rights. *See id.* at 1485; *see also* Shankle v. B-G Maintenance Management, No. 96 N 2932, 1997 WL 416405, at *1,*3-*4 (D. Colo. Mar. 24, 1997) (relying on *Cole* to require an employer to pay an arbitrator's fees in order to enforce the arbitration agreement). Although a concern exists that arbitrators may become biased in favor of the employer who pays all of their fees, an argument is made that it is "unlikely that the arbitrators would jeopardize their professional reputations, which depend on their objective neutrality, by favoring an employer over an employee because the employer pays the bill." *Id.* at *3.

[171] *See* Margaret A. Jacobs, *Firms with Policies Requiring Arbitration Are Facing Obstacles*, WALL ST. J., Oct. 16, 1995, at B5 (noting EEOC movements to restrict employer-mandated arbitration agreements); Margaret A. Jacobs, *Workers Call Some Private Justice Unjust*, WALL ST. J., Jan. 26, 1995, at B1 (noting changing standards by arbitration services to handle increased use of employment arbitration). Additionally, a good deal of scholarly criticism has been aimed at the general and virtually unquestioned acceptance of the *Gilmer* rule to all facets of employment discrimination. *See* sources *supra* note 8.

on what standards are applicable to these issues.[172] For employment arbitrations to continue under the FAA while maintaining proper procedural and substantive fairness, these issues require further elaboration and comment.

IV. DIFFERENCES BETWEEN CLAIMS OF EMPLOYEE DISCRIMINATION AND OF COMMERCIAL CONTRACT BREACHES

Following *Gilmer*, one notes the common judicial treatment of commercial and employment arbitrations.[173] Commercial arbitration has thrived under the federal policy favoring its use by substantially limiting judicial intervention into the process and by the courts' standing ready to enforce awards.[174] The result is a speedier, private, and cost-contained process facilitated by informal procedural and evidentiary rules and insulated from prolonged judicial review. These three systemic goals are accomplished by the use of industry experts and personnel as well as the law's allowance for parties contractually to structure almost all details of the arbitration.[175] As demonstrated, this process has recently been infused into the arbitration of statutory claims, including those founded upon federal employment antidiscrimination rights.[176]

As noted above, courts permit arbitrators to resolve an employee's substantive rights on the theory that an arbitration agreement is not a waiver of substantive rights, but merely a forum selection clause.[177] Thus, virtually

[172] *See* Gershenfeld, *supra* note 8, at 249, 261-262.

[173] The commonality exists in that both commercial and employment arbitrations are enforced under the FAA, and the policies and procedures are substantially similar within both contexts. The reader may note that commercial and organized labor arbitration are more divergent, insofar as the latter is governed specifically by the policies of the NLRA and is a single part of a much broader industrial dispute resolution process under the collective bargaining agreement. *See* discussion *supra* notes 96–102 and accompanying text.

[174] As discussed earlier, commercial arbitration provides the parties with a faster, private, and more efficient dispute resolution mechanism. *See supra* notes 36–38 and accompanying text. The FAA and the arbitral process itself incorporate these goals by requiring strict judicial enforcement of arbitration agreements and contractual streamlining of the procedural process of arbitration.

[175] *See supra* notes 10–38 and accompanying text (discussing the basic characteristics and purposes of commercial arbitration).

[176] *See* discussion *supra* notes 50–65, 155–163 and accompanying text (addressing the Supreme Court's embracement of commercial arbitration of statutory claims arising in international business and subsequent application of similar principles to statutory employment discrimination laws).

[177] *See supra* note 62 and accompanying text. Recall that the "forum waiver" argument for permitting arbitration of statutory claims arose in the international business context and subsequently was used in employment discrimination claims. *See supra* note

any statutory right could be an allowable subject of arbitration insofar as arbitration permits the full substantive relief as would be available in a court of law.[178] As long as one accepts that the arbitral process affords the complete relief provided by Congress, enforcement of a predispute agreement does not conflict with underlying public policy.[179] Opponents of employment claims arbitration argue, however, that the characteristics of commercial arbitration fail to provide the type of substantive rights and relief for violations of statutory employee rights as would be available in litigation.[180]

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62 and accompanying text; *see also supra* note 132.

[178] *See* discussion *supra* notes 62–65 and accompanying text. Note that this statement is a somewhat broad generalization of the arbitrability of statutory claims. Under *Mitsubishi Motors*, a two-part test exists for determining whether parties have agreed to arbitrate statutory claims. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). First, the court decides whether the scope of the arbitration agreement encompasses the statutory claim. *See id.* Second, the court considers whether any external legal constraints bar enforcement of the agreement. *See id.* When the claim is statutory, the latter step involves a determination of whether the statute evidences a congressional intent to prevent arbitration of claims arising under the statute. *See id.* Congressional intent must be found within the statute's text or legislative history, or an inherent conflict must exist between the statute's policy and arbitration. *See id.* at 628–629. A part of this analysis includes insuring that an alternative forum affords the same substantive rights as a court of law so that statutory rights are fully vindicated. *See id.* at 637. When a party seeking to stay arbitration fails to demonstrate the requisite congressional intent, the liberal federal policy toward arbitration generates a presumption in favor of arbitrability. *See id.* at 628. This *Mitsubishi Motors* analysis has been incorporated into determining whether statutory employment discrimination statutes are arbitrable. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–33 (1991).

Some cases have extended the *Mitsubishi Motors* test, but such expansion merely represents an elaboration of the basic test and can be collapsed to fit the two-prong mold. *See, e.g.*, Maye v. Smith Barney Inc., 897 F. Supp. 100, 105–106 (S.D.N.Y. 1995) (arguing for a four-prong test which looks for (1) an agreement to arbitrate, (2) scope of the agreement, (3) congressional intent to permit arbitration, and (4) whether the separation of arbitrable claims from the nonarbitrable claims warrants a stay pending arbitration) (citing Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir. 1987)).

[179] Attacks on employment claims arbitration focus on demonstrating an inherent conflict between the arbitral process and the congressional policy underlying antidiscrimination statutes. *See, e.g.*, *Gilmer*, 500 U.S. at 26–33 (noting the petitioner's argument that arbitration circumvents congressional intent to provide only judicial enforcement of the ADEA and blocks an intent to have the EEOC enforce claims and that arbitral procedures fail to provide the protection envisioned by Congress). Many of the same arguments may be found in any judicial challenge to enforcement of an employment arbitration agreement.

[180] *See* Hansen, *supra* note 8, at 26 (stating that the EEOC's opposition to mandatory employment arbitration focuses on issues of bias, judicial foreclosure, and the courts'

Given the recent judicial response toward enforcing individual employee arbitration agreements,[181] an employee who seeks to vindicate her statutory rights in court faces a high hurdle once the employer files a motion to compel arbitration.[182] To avoid arbitration, she must show that the *Mitsubishi Motors* test[183] is not met. The first section below discusses the common attacks on employment arbitration agreements under the *Mitsubishi Motors* test and primarily focuses on claims that the FAA should not apply to employment contracts and, alternatively, to the oft-used "parade of horribles."[184] The next section advocates a series of proposals to address the claims made in the first section as well as provides a strategy by which individual rights may be vindicated and protected within a modified, or "hybrid," commercial arbitration process.

A. *Attacking* Gilmer*: Application of the FAA and the "Parade of Horribles"*

When a party asks the court to enforce a predispute arbitration clause, the court must assess the agreement to arbitrate under the *Mitsubishi Motors* test. A party opposing a motion to compel arbitration must prove to the court that at least one prong of that test is not satisfied. Thus, an employee who desires to remain in court must either show that his discrimination claim is not within the scope of the arbitration agreement or that Congress did not intend for his particular class of claims to be arbitrated in lieu of judicial enforcement.[185] Given *Gilmer*'s overwhelming endorsement of arbitration of statutory

essential role in enforcing civil rights); *see also* Cooper, *supra* note 86 (discussing the need for more stringent guidelines in employment arbitration to protect the ability to vindicate statutory rights).

[181] *See supra* notes 155–168 and accompanying text (discussing favorable treatment of employment arbitration of statutory discrimination claims in light of the *Gilmer* decision).

[182] An employer is not always the one seeking arbitration. Although rare, cases do exist in which an employee seeks to compel arbitration of his claims against an employer who attempts to litigate. *See, e.g.*, Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 602 (6th Cir. 1995) (compelling arbitration of consultant's claims against successor company that had purchased his employer and then allegedly breached his employment agreement).

[183] *See supra* note 178.

[184] Chisolm v. Kidder, Peabody Asset Management, Inc., 966 F. Supp. 218, 221 (S.D.N.Y. 1997). The parade of horribles argument is a series of five common contentions against the adequacy of arbitration to satisfy the congressional policy bolstering antidiscrimination statutes. *See id.* at 221–222.

[185] *See* Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1457 (D. Minn. 1996) (allocating the burden of proof to the party challenging a motion to compel arbitration).

employment discrimination claims, the employee likely has an uphill battle.[186] This is not to say, however, that the employee has no available arguments.[187]

The first prong of the *Mitsubishi Motors* test requires that the dispute at issue must fall within the scope of the arbitration agreement.[188] An employee challenge argues that the agreement with the employer was not meant to include statutory discrimination claims. If a disputed claim is outside the scope of the arbitration provision, an arbitrator will have no contractual authority to resolve the claim, and the court may proceed to try the issue.[189]

The problem, however, is that the scope of most arbitration agreements is sufficiently broad to cover virtually any dispute. Most arbitration provisions are worded to cover all disputes that may arise in the employment context.[190]

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[186] *Gilmer* cripples employee claims against arbitration in two ways. First, the Court refused to decide the issue of FAA applicability to employment contracts, thus leaving the broad sweep of the FAA to extend to virtually all arbitration agreements. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). Second, the Court's strong presumption of arbitrability makes it difficult to demonstrate that Congress intended to foreclose arbitration of statutory claims and that the arbitral process is inadequate to vindicate statutory rights. *See id.* at 26-33. An employee challenging arbitrability must differentiate her case from that presented in *Gilmer.*

[187] While going through the arguments that follow, the reader should understand that the party (usually the employee) challenging a motion to compel arbitration will carry the burden of proving that enforcement of the arbitration agreement fails to meet the *Mitsubishi Motors* test. *See id.* at 26. Again, the authors stress that the liberal policy toward arbitration makes this burden particularly problematic for the challenging party.

[188] This prong effectively bars judicial enforcement of arbitration provisions appearing in collective bargaining agreements. Because labor arbitrators have authority only to decide contractual rights, statutory rights are outside the scope of grievance arbitration provisions and thus fail to meet the first *Mitsubishi Motors* test prong. *See* discussion *supra* notes 113-114, 178 and accompanying text. This argument does not apply to individually bargained-for employment arbitration agreements because the majoritarian concerns of labor agreements, which define and limit the contractual scope of collective bargaining arrangements, are not present. *See Gilmer*, 500 U.S. at 35.

[189] *See* Federal Arbitration Act, 9 U.S.C. § 3 (1994) (providing that a claim must be referable to the parties' arbitration agreement before a court may enforce the provision).

[190] *See Gilmer*, 500 U.S. at 23 (involving an NYSE arbitration provision covering "any dispute, claim or controversy" in employment); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1128 (7th Cir. 1997) (involving an employee manual stating that "the resolution of all disputes, issues, controversies, claims, causes of action or grievances by an employee against [the employer] shall be through the process of arbitration"); Powers v. Fox Television Stations, Inc., 923 F. Supp. 21, 22 (S.D.N.Y. 1996) (involving an employment contract arbitration provision covering "[a]ll disputes and controversies of every kind and nature arising out of or in connection with this agreement").

Looking only to the contract and given a broad policy in favor of arbitrability, a court will err in favor of including the dispute within the scope of the arbitration provision.[191] Unless the employment contract explicitly bars arbitration of statutory discrimination claims or is very narrowly drafted, a pro-enforcement reading of the arbitration provision is inevitable, and the claim will be arbitrated.[192]

If the employer satisfies the first *Mitsubishi Motors* prong, an employee enjoys perhaps greater room to argue under the second prong, which requires the court to examine whether any external legal considerations prevent enforcement of the agreement.[193] Thus, even if a statutory discrimination dispute is within the scope of an arbitration provision, such provision will be unenforceable if the employee can demonstrate that existing public policy prohibits its arbitration. While general attacks on enforcement through the use of contract law principles have been unavailing,[194] employees have had only minimal success with the "knowing and voluntary" waiver argument.[195] Failing to prevail under the *Mitsubishi Motors* test, the employee is left to argue the two "bread-and-butter" issues that appear in nearly every case challenging enforcement of an employment contract arbitration provision covering statutory discrimination claims in dispute.[196] These two issues are

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[191] *See* Rojas v. TK Communications, Inc., 87 F.3d 745, 748-749 (5th Cir. 1996) (refusing to interpret narrowly an arbitration agreement so as to place an employee's Title VII claims outside the provision's scope); Maye v. Smith Barney Inc., 897 F. Supp. 100, 108-109 (S.D.N.Y. 1995) (finding that statutory discrimination claims were within the arbitration provision's scope).

[192] The employee's problem is exacerbated whenever the contract explicitly states that the arbitration provision covers civil rights and statutory claims. *See, e.g.*, Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 224-225 (3d Cir. 1997).

[193] *See* 9 U.S.C. § 2 (1994) (stating that a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*") (emphasis added).

[194] *See* cases cited *supra* note 165 (citing cases in which courts addressed contract law challenges to employment arbitration provisions).

[195] *See* Prudential Life Ins. Co. v. Lai, 42 F.3d 1299, 1303-1305 (9th Cir. 1994). The knowing and voluntary argument involves whether an employee was put on notice that an arbitration provision included civil rights claims. *See id.* According to *Lai*'s treatment of Title VII's legislative history, Congress intended that waiver of judicial access for statutory right vindication must be known and voluntary at the time the party signed the contract. *See id.* While *Lai* would require that either the contract explicitly list the employee rights covered or have the employer otherwise place the employee on notice, this requirement has been criticized by a significant number of other courts and is not commonly accepted. *See* discussion *supra* notes 166-168 and accompanying text.

[196] Many employees challenging a motion to compel arbitration will cite to the principles espoused in the *Alexander* line of cases. *See, e.g.*, Cole v. Burns Int'l Sec.

FAA applicability and an inherent conflict between statutory rights and arbitration of such rights.

First, most employees challenge the application of the FAA to enforce an employment contract provision. Even if an arbitration provision covers a statutory claim, the inapplicability of the FAA may preclude enforcement of the agreement and thereby mandate judicial hearing.[197] An employee will claim that the language of section 1 of the FAA, which excludes the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," will exclude his employment contract arbitration provision from the scope and effect of the FAA.[198]

While the inapplicability of the FAA to employment contracts is a standard argument in statutory discrimination claim cases,[199] the argument fails. Although the interpretation of section 1 has garnered a number of constructions,[200] the general consensus is that the section is limited to

Serv., 105 F.3d 1465, 1472–1479 (D.C. Cir. 1997) (analyzing differences between collective bargaining arbitration and individual employee contract arbitration provisions). Following the decision of *Gilmer*, the authors have found no case in which the court accepted an individual employee's use of the *Alexander* line of cases to defeat a motion to compel arbitration and, as such, the authors will not discuss this "argument."

[197] Even if the FAA does not apply, state arbitration law nevertheless may require enforcement. This result is probable in states that have adopted the Uniform Arbitration Act, which expressly includes employment contract arbitration agreements. *See* discussion *supra* note 9.

[198] 9 U.S.C. § 1 (1994).

[199] The argument is "standard" insofar as the Supreme Court refused to provide any guidance in *Gilmer* as to the FAA's applicability and in fact sidestepped the issue by declaring that the Form U-4 was not an employment contract. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991). Thus, the decision left the door open for parties to argue the issue until either the Court or Congress resolves the issue with a final, definitive rule.

[200] *See generally* Finkin, *supra* note 10 (discussing the evolution of section 1 of the Federal Arbitration Act as applied to employment contracts). One of the most cited constructions involves the use of ejusdem generis, so that the specific terms involving "seamen" and "railroad employees" limit the scope of "other employees" to those who are directly engaged in interstate transport occupations. *See Cole*, 105 F.3d at 1471. Additionally, courts have argued that broadly reading the "any other class of workers" language would render the preceding language redundant, which would be odd if Congress merely wanted to exclude all employment contracts. *See id.* Further, the Supreme Court differentiated the narrow "in commerce" language of section 1 with the broad "involving commerce" language of section 2, which means that the Court impliedly limits the application of section 1. *See* Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 275–277 (1995); *see also Cole*, 105 F.3d at 1471 (citing *Allied-Bruce Terminix*, 513 U.S. at 275–

employment contracts involving those who work directly in interstate commerce, such as truck drivers and airline pilots.[201] Jurisdictions have adopted a narrow reading of section 1, and only one court has interpreted the section broadly to include all employment contracts.[202] While the argument is worth making, an employee can predict, unfortunately, that the court will deny any challenge to FAA applicability when the dispute involves an individual employment contract.

Failing to succeed with arguments against FAA applicability, the employee has only one other significant argument against enforcing arbitration. The employee must demonstrate that Congress did not intend to permit parties to waive judicial resolution of discrimination claims. An employee may prove this by showing that either the statute's text or legislative history displays such an intent or, alternatively, that an inherent conflict exists between the congressional purpose in enacting the statute and the arbitral process.[203] Thus far, employees relying on the statutory text and legislative histories of federal antidiscrimination statutes to show congressional intent to prohibit arbitration have failed to win the courts' favor.[204] Once a court has found that the text and history of a federal discrimination statute do not expressly prohibit arbitration, an employee's remaining recourse is to argue that an inherent conflict exists between congressional purpose and arbitral process.

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[201] *See* Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1068–1069 (2d Cir. 1972); Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298, 301–303 (2d Cir. 1956); Tenney Eng'g, Inc. v. United Elec. Workers, Local 437, 207 F.2d 450, 452–454 (3d Cir. 1953); Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952, 955–959 (D. Md. 1994).

[202] *See* United Elec. Workers v. Miller Metal Prod., Inc., 215 F.2d 221, 224 (4th Cir. 1954) (finding that the legislative history of the FAA clearly demonstrated that the Act was to apply only to commercial arbitration and not to employment disputes).

[203] An additional argument may be that such a contract violates public policy and therefore is unenforceable as a matter of law. *See* Hoffman, *supra* note 8, at 149–152. This argument, however, is based in part on the *Lai* decision and thus may be questioned by the courts that have questioned *Lai*. *See supra* notes 166–168 and accompanying text.

[204] Some isolated controversy has surrounded the language and amendment of the Civil Rights Act of 1991. *See* discussion *supra* note 90 and accompanying text. However, the text and legislative histories of most of the antidiscrimination statutes have been uniformly interpreted as permitting, and even endorsing, resolution through alternative dispute methods. *See supra* notes 89–93 and accompanying text. As such, an employee may be forced to concede that the language and history of a statute do not directly support his position and instead must argue an inherent conflict. *See, e.g.*, *Gilmer*, 500 U.S. at 26–27.

A successful employee argument of the inherent conflict between policy and process requires an employee to demonstrate that Congress's goal in enacting the particular federal civil rights statute is frustrated by permitting arbitration of claims arising under the statute. Although acceptable as a "forum-shifting" procedural process, arbitration must provide the same substantive relief as a judicial forum.[205] If an employee can show that the arbitral process likely will deny or significantly impair vindication of her substantive rights, the employee demonstrates an inherent conflict between congressional intent to protect certain legislatively created individual rights and an out-of-court process that cannot adequately vindicate those rights. The common method by which an employee accomplishes this argument is by contending that the special rules and characteristics of arbitration make such a forum inappropriate to resolve sensitive antidiscrimination claims. These generalized attacks on the arbitral process to prove an inherent conflict are labeled the "parade of horribles."[206] This parade consists of five vehicles to convey the employee's argument.

First, employees argue that arbitrators likely will be biased in favor of employers.[207] Because the FAA permits parties to agree on the selection process for arbitrators,[208] an employer that drafts an employment agreement may "stack the deck" in its favor by providing for the selection of arbitrators who will side with the employer. This apprehension can arise from either of two scenarios. One, an employer may retain contractual authority to designate the members of the panel and thereby chose "nonneutrals" who are

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[205] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S.614, 628, 637 (1985) (stating that agreeing to arbitrate statutory claims "does not forego the substantive rights afforded by the statute" and "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function" as intended by Congress); *see also Gilmer*, 500 U.S. at 27–28 (noting that so long as an employee may vindicate his substantive statutory rights in arbitration, nothing should bar enforcement of an otherwise valid arbitration agreement).

[206] Chisolm v. Kidder, Peabody Asset Management, Inc., 966 F. Supp. 218, 221–222 (S.D.N.Y. 1997) (providing the five common arguments against the arbitral process that employees use when challenging employment arbitration agreement enforcement).

[207] *See, e.g.*, *Gilmer*, 500 U.S. at 30; *see also* Berger, *supra* note 7, at 715–718 (arguing that an employer should not be allowed to preselect arbitrators and that, over time, specialists will emerge to represent employee interests in arbitration); Maltby, *supra* note 8, at 18–22 (arguing that the best method to insure impartiality is to remove the choice of arbitrator from the parties).

[208] *See* 9 U.S.C. § 5 (1994) (providing for appointment of arbitrators).

promanagement.[209] Two, if an employee is allowed to participate in panel selection, the employer, unlike the employee, is a repeat player in the arbitration game.[210] Thus, an arbitrator will experience pressure to side with the employer, even if not always, to ensure his future selection and continued income.[211] Because the purpose of many federal antidiscrimination statutes is to avoid decisions of biased state courts, arbitration would appear to constitute an invidious reversion to the specter of congressionally condemned prejudice.

Second, many employment contracts often are, or are analogous to, contracts of adhesion when the terms are presented on a take-it-or-leave-it basis.[212] Generally, a job applicant will have to sign an employment contract before she begins working, and an existing employee may have the terms of her agreement modified on penalty of termination if she does not consent to an arbitration agreement.[213] The choice is simple: agree to the contract or look

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[209] *See* Berger, *supra* note 7, at 716.

[210] *See* Grodin, *supra* note 1, at 43–44 (noting that repeat player status may influence arbitrator decisions and also provides the employer with knowledge of the prior decision history of the individual).

[211] *See id.* at 43 (stating that while arbitrators may not consciously make decisions to favor repeat player employers, they may unconsciously skew decisions or balance the victories and losses of a repeat player to insure future employment).

[212] *See* Chisolm v. Kidder, Peabody Asset Management, Inc., 966 F. Supp. 218, 224–225 & n.2 (S.D.N.Y. 1997). This argument has received extensive treatment in the context of the Form U-4. *See Gilmer*, 500 U.S. at 32–33; *see also* Beauchamp v. Great W. Life Assurance Co., 918 F. Supp. 1091, 1098 (E.D. Mich. 1996) (finding that Form U-4 was not a contract of adhesion merely because the employee was required to sign the form without a reasonable opportunity to negotiate its terms). Adhesion and bargaining power issues also arise in other employment contracts. *See* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 227-228 (3d Cir. 1997).

[213] *See* Hoffman, *supra* note 8, at 153 ("When employees are forced to choose between signing an arbitration agreement and losing their jobs, they are not faced with any meaningful choice regarding arbitration."); Maltby, *supra* note 8, at 8 ("The reality is that Gilmer was required to accept NYSE arbitration as a condition of employment. To have resisted arbitration would have cost him his job. To imply that NYSE arbitration was the mutual desire of the parties is naive at best.") (footnote omitted). *But see Gilmer*, 500 U.S. at 33 ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); *Beauchamp*, 918 F. Supp. at 1098 ("[T]here is no evidence that the [employee] could not have worked as an insurance salesperson without signing such a form. Even if she couldn't have worked for defendants, she very well may have been able to work elsewhere.").

The reader should note that courts are likely to apply greater scrutiny when an employer amends an existing contract or requires a new agreement after the employee has started working, especially when the employer may leverage its position with threats of termination if the employee does not agree. *See, e.g.*, Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997); *see also* Berger, *supra* note 7, at 713

for other employment. Unlike sophisticated parties in arm's-length commercial transactions, employees may lack the personal economic security and effective bargaining power to avoid the promise to arbitrate.[214] Ergo, the contract may not be dictated by financial exigency and without the give-and-take characteristic of truly commercial dealings. Arbitration, then, is viewed not as a "choice," but as a unilaterally imposed condition.

Third, arbitration relaxes beneficial procedural and evidentiary rules available in a judicial forum.[215] While the federal statutes have provided broad procedural standards and discovery in discrimination cases, the arbitral process may serve to confine the employee's opportunity to present fully his claim.[216] Unlike commercial disputes, discrimination claims generally must

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(discussing differences between pre-employment and existing employment agreements to arbitrate). Additionally, similar issues arise when an "agreement" appears in an employee manual. *See* Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997) (finding that an arbitration clause in an employment handbook was a separable and valid contract). Enhanced scrutiny is also applied when an existing agreement changes during the course of employment. *See* discussion *supra* note 141 and accompanying text (addressing how courts treated the NASD's changes to its code and their subsequent impact on existing agreements).

[214] Beyond issues of whether an employee is sophisticated enough to interpret the effect of a provision, further problems exist concerning whether the status, importance, and bargaining strength of an employee can prevent employers from unilaterally demanding employee submission to an arbitration agreement. *See* Maltby, *supra* note 8, at 9 ("What is really at stake . . . is the ability of an employer to require its employees to waive statutory rights as a condition of employment.").

[215] Within the commercial arena, parties forego procedural and evidentiary strictures in order to resolve disputes more quickly and to reduce costs. *See* Wilko v. Swan, 346 U.S. 427, 438 (1953). Opponents to employment arbitration, however, argue that the process is inadequate since complex statutory discrimination claims are fact intensive and require extensive discovery and procedural protection. *See Gilmer*, 500 U.S. at 31; *see also* Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 802–803 (Minn. 1995) (stating that "[a]lthough arbitration procedures might not be as extensive as those used in courts, by agreeing to arbitrate, . . . [parties forego judicial procedure] 'for the simplicity, informality, and expedition of arbitration'") (quoting *Gilmer*, 500 U.S. at 31 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))).

[216] Courts may worry that "records of arbitration proceedings are incomplete, discovery is abbreviated, [and that] cross-examination and testimony under oath may be limited or unavailable." Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1478 (D.C. Cir. 1997). *But see* Berger, *supra* note 7, at 720 ("Arbitration entails no inherent limitations . . . . Discovery limitations . . . are in fact more imagined than real. Arbitrators can be vested with subpoena power . . . and this authority should be more than adequate to provide . . . all [the] necessary information.") (footnotes omitted); Maltby, *supra* note 8, at 26 ("But justice does not reside in elaborate procedural rules.").

rely on intricate patterns of circumstantial evidence from which intent and improper actions can be inferred and the case decided.[217] Limiting discovery may limit one's ability to demonstrate adequately a continuing and identifiable discriminatory practice.[218] Remember also, the courts hold that arbitration must only guarantee the same substantive relief as a court, not the same procedural protections.[219] Thus, it would appear that an arbitrator could devise rules that make the claimant's proof more difficult than could a judge, so long as the substantive relief was not thereby unattainable and the arbitrator acts within the confines of the arbitration agreement.

Fourth, the public policies condemning discrimination are thwarted by enforcing arbitration.[220] The statutes provided a federal forum for relief, but the current policy permits the forum to be waived in favor of a private resolution outside of the courts.[221] Moreover, the statutes are designed to prevent discrimination by instituting a public mechanism for investigation, enforcement, disclosure, and uniform application of the law.[222] When claims are arbitrated, however, proceedings occur behind closed doors, beyond public scrutiny, and even unknown to interested agencies of the government.[223] Further, the lack of written opinions and different notions of

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[217] *But see* Maltby, *supra* note 8, at 26 ("In large and complex cases . . . protracted discovery is often essential. The typical employment dispute, by contrast, generally involves the single question of the reason the employer terminated . . . a single employee. The relevant information is confined to a handful of people . . . and a few documents . . . .").

[218] *See* Chisolm v. Kidder, Peabody Asset Management, Inc., 966 F. Supp. 218, 225 (S.D.N.Y. 1997) (discussing how arbitral rules in the interest of expediency may foreclose a presentation of a complex and continuing picture of discrimination).

[219] *See* discussion *supra* notes 61–62, 93 and accompanying text.

[220] *See Gilmer*, 500 U.S. at 28, 32 (noting and subsequently rejecting petitioner's claim that "arbitration procedures cannot adequately further the purposes of the ADEA"); *see also* Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 838 (8th Cir. 1997) (stating that any gaps left in public policy through arbitration of public laws will be filled by the EEOC and parties who are not subject to arbitration agreements); McNulty v. Prudential-Bache Sec., Inc., 871 F. Supp. 567, 570–571 (E.D.N.Y. 1994) (analyzing whether public policy of Title VII can be met through arbitration). Often, the issue of public policy arises when a party asserts that Congress did not intend to permit parties to resolve disputes by waiving judicial access. *See* Hoffman, *supra* note 8, at 149 (discussing the public policy defense and noting claims alleging that Congress intended for parties to litigate civil rights claims only through the courts).

[221] *See* Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460, 1471 (N.D. Ill. 1997).

[222] *See id.*; *see also supra* notes 84–88 and accompanying text (discussing the EEOC).

[223] "[C]laims that statutory rights have been violated rest upon legislative enactments, and as such add the interest of the public to what would otherwise be a purely private

justice by various arbitrators make uniform treatment of discrimination unlikely.[224] Unlike commercial disputes, every employment arbitration concerning statutory discrimination carries a rich blend of fairness toward the employee, the employer's right to manage its workforce, and public interest. The alternative to litigation is a lopsided exchange to achieve speed, privacy, and cost containment.[225]

Lastly, employees claim that statutory rights would not be vindicated.[226] While courts opine that the same substantive relief must be available to a claimant, as a practical matter no mechanism exists for a court to require that the arbitrator provide it. Further, inexperienced arbitrators may lack the skill and wisdom to follow the nuances of discrimination in the employer-employee relationship and for any number of reasons, fail to apply the law as Congress

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dispute between the parties." Berger, *supra* note 7, at 718.

[224] *See Gilmer*, 500 U.S. at 31–32 (rejecting the contention that failure to issue written arbitration opinions will result in a "lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law"). Some commentators argue that written awards are necessary if there is to be any meaningful judicial review of arbitral decisions in statutory employment discrimination claim cases. *See* Grodin, *supra* note 1, at 47 (alleging that the lack of a written award serves to protect awards from judicial review, but that "a rule which insulates the award from judicial review [particularly in the stacked deck situation of employment arbitration] is hardly neutral").

[225] As one commentator has noted:

> Full trial procedures go beyond what is needed to insure objectivity and equity in an arbitration setting. Conversely, the absence of any procedural requirements applied to arbitrations virtually insures that the proceedings will not be fair. The correct intermediate standard is the one that ensures fair and predictable procedures without compromising the independence and expediency of arbitration.

Maltby, *supra* note 8, at 17. Additionally, "[a]longside the advantages of arbitration . . . [including] cost reduction, increased efficiency, and expedited dispute resolution, there exist several distinct disadvantages." Hoffman, *supra* note 8, at 133.

[226] *See Gilmer*, 500 U.S. at 32 (noting that petitioner argued that arbitrators lack certain judicial authority to declare remedies); Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1458–1459 (D. Minn. 1996) (rejecting an employee's view that arbitration erodes rights under Title VII). This argument also applies to employees who may claim that state law rights assure vindication in a judicial forum. *See* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 231 (3d Cir. 1997); *see also supra* note 73 (noting the FAA's preemption of state statutes requiring judicial fora for resolution of statutory claims). One commentator has argued that mandatory arbitration "vitiates many of the individual rights delineated in the employment discrimination statutes." Hoffman, *supra* note 8, at 157. These rights include "right of access to a federal or state court . . . and the right to trial by a presumably impartial judge or jury." *Id.*

intended the protection sought.[227] Additionally, judicial review of any arbitral decision would be limited by the FAA and offer only a narrow window of opportunity to nullify the most egregious of arbitral errors.[228]

If *Gilmer* adequately addressed and authoritatively resolved many of the "procedural" concerns that arise in the arbitration of statutory discrimination claims, why does the parade of horribles march on through the current case law? The answer involves the undisputable fact that arbitrations are conducted under contractual terms that set varying procedures and guidelines from arbitration to arbitration. While *Gilmer* was decided in the context of the NYSE arbitration rules and procedures,[229] other employment contracts employ disparate procedures and guidelines for arbitration.[230] Whenever a court faces a heretofore unseen arbitration format, the court must evaluate the procedural character in the context of prior case law and the sometimes shadowy boundaries of the discrimination statutes. Thus, courts are left to navigate through recurring issues without any clear mandate on what is and what is not acceptable.[231] The following section proposes a number of legislative possibilities to rectify the courts' predicament and solidify standard guidelines for the ongoing application of commercial arbitration principles to claims of statutory employment discrimination.

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[227] *See* Chisolm v. Kidder, Peabody Asset Management, Inc., 966 F. Supp. 218, 225–226 (S.D.N.Y. 1997); *see also* Maltby, *supra* note 8, at 22–23 (calling for seasoned arbitrators who have both a knowledge of the industry and the applicable law).

[228] *See supra* notes 17–20, 28–35 and accompanying text (discussing limited judicial review under the FAA). Some commentators argue for increased availability for judicial review. *See* Berger, *supra* note 7, at 719. Others argue that reviewability should remain substantially the same. *See* Maltby, *supra* note 8, at 25. As with purely commercial arbitration, an overwhelming factor in limiting judicial review is cost containment. *See id.* (noting the need for final arbitral awards if an impecunious employee is to be upon the same footing with wealthy corporations that can bear the cost of continued litigation).

[229] *See Gilmer*, 500 U.S. at 30–33. Notably, the NYSE arbitration rules provide procedural protections, provide extensive discovery, require written awards, and afford broad arbitral power to fashion relief. *See id.*

[230] *See generally* Gershenfeld, *supra* note 8. Gershenfeld's article examines the evolving guidelines and procedures that several arbitration services are developing to address the unique concerns of employment arbitration, as well as the results of two reports examining the current state of the law. Many of the results demonstrate disparate conclusions. *See id.* at 255. For instance, the ability to appeal an arbitral decision and the procedural guidelines for such differed for all the listed organizations. *See id.*

[231] While courts may recognize that commercial arbitration procedures are somewhat inadequate to protect the employees from discriminatory practices, no generally applicable law exists to assess the situation in each instance. Instead, courts are left to apply the FAA and then engage in a piecemeal assessment of minimum arbitral requirements by matching the arbitration procedures in question with the existing case law.

B. *"Hybrid" Arbitration: Proposed Modifications to the Current Employment Arbitration Regimen*

Commercial arbitration has proven an invaluable mechanism for dispute resolution among those who seek levels of efficiency and privacy generally not available in court systems. Commercial-type arbitration has been extended to cover individual employment disputes, but arguably as a threat to the protection and vindication of employee rights. Threats arise in part from uncertainties that surround the application of various contractual arbitration procedures to civil rights claims that may require delicate procedural treatment. Courts have probably traveled too far down the pro-enforcement road to return to pre-*Gilmer* denials of statutory employment discrimination claim arbitration.[232] Thus, the most practicable and justifiable alternative is to develop a modified arbitration law for employer-employee disputes—one that addresses current concerns through a "hybrid" form of existing arbitration law.

As noted above, the availability of myriad arbitration rules results in a continuous procession of employee claims arguing that certain specific aspects of a given arbitration procedure frustrate congressional intent to protect statutory rights.[233] The solution to this compounding parade of horribles is a federally mandated set of uniform requirements that provides certain minimum procedural protections whenever statutory employment discrimination claims are arbitrated.[234] These rules would apply to every arbitration procedure that addressed statutory employment discrimination claims and thus would resolve

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[232] One commentator has stated that:

> The trend toward settling employment disputes . . . in private arbitration is real, large, and irreversible . . . . The question is whether private arbitration will become a fair and reasonable alternative to the civil courts which the average person can afford, or whether it will become a corporate coliseum that employees will be forced into like so many early Christians, and with equal chances of success.

Maltby, *supra* note 8, at 28–29. The trend toward arbitration is both a result and an exacerbation of spiraling litigation costs and lengthening court backlogs. *See* Berger, *supra* note 7, at 721; *see also* discussion *supra* notes 7, 85 and accompanying text (addressing the cost of litigating an employment claim and the rise in total claims over the past 20 years).

[233] *See supra* note 229 (discussing how *Gilmer* addressed the employees' claims only in the context of the NYSE arbitration rules).

[234] Whether such requirements would, or should, extend to those arbitrations that address other statutory rights is beyond the scope of this Article, and the authors here focus solely upon arbitrations that involve statutory discrimination claims in the employment context.

the fragmented analyses that courts currently must apply whenever an employee challenges a specific arbitration agreement or procedure.[235] The mechanism to accomplish such a sweeping alteration of the existing case law must arise from federal legislation. The authors therefore focus on the FAA as the means to effectuate the proposals.[236]

Before presenting the proposals, a brief treatment of the expected reaction of opponents of employment arbitration is appropriate. Following *Gilmer*, proponents of arbitration have opined and courts have held that detractors' arguments are reminiscent of the pre-FAA judicial hostility toward arbitration.[237] Concerns that the arbitral process lacks the experience, impartiality, and protections of a judicial forum ring with the same high-pitched tone once used to challenge commercial arbitration.[238] Further, so long as an arbitration can promise the same substantive relief to a claimant, the process is equivalent to court proceedings.[239] The proarbitration argument concludes by noting that, should errors or impartialities taint an arbitral

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[235] Note that the authors propose to use the FAA as the mechanism of enforcement and, as such, do not intend to include collective bargaining agreement arbitration procedures within the scope of the proposed amendments. Instead, union-represented employees may continue to rely on the *Alexander* line of cases and will retain access to judicial fora for their statutory claims. *See supra* notes 96–138 and accompanying text (discussing treatment of statutory employment discrimination claims in the collective bargaining field).

[236] Much of the existing commentary focuses upon guidelines that a court should adopt when reviewing employment arbitration agreements. *See, e.g.*, Grodin, *supra* note 1. However, the views presented here focus exclusively upon legislative enactment of guidelines. The FAA is the prime candidate to embody the proposed regulations insofar as the Act provides enforcement authority, comprises the federal law of arbitration, and provides the basic structure for modification, rather than the development of a new employment arbitration law substantially divergent from commercial arbitration law.

Note that the focus upon the FAA is not meant to preclude similar changes to arbitration law as embodied within the Uniform Arbitration Act. Rather, jurisdictions adopting the UAA into state law are subject to preemption by the provisions of the FAA and, as such, the importance of amending the FAA takes precedence over emendation of state arbitration law. *See supra* notes 55, 73 (discussing FAA preemption).

[237] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) ("[G]eneralized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'") (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989)).

[238] *See Gilmer*, 500 U.S. at 30.

[239] *See id.* at 28.

decision, sections 10 and 11 of the FAA will adequately protect an employee from arbitral failures in resolving her claim.[240]

Although employment arbitration proponents are correct in their understanding of commercial arbitration law, their reaction fails to rectify fully the differences that do exist between purely commercial and employment arbitration. Commercial arbitration has been developed over the course of seventy-five years, and the practice has been molded satisfactorily to fit established goals.[241] Arbitral relaxation of judicial rules and insulation from court review on the merits of the claim have promoted the efficiency that arm's-length commercial parties consider advantageous when selecting this alternative to litigation.[242] Arbitrators familiar with the industry have added integrity to the dispute process by applying their expertise to business contract interpretations that rely heavily upon industry practices and customs. The form of voluntary arbitration is compatible with the commercial function.

Employment arbitration outside the collective bargaining sector, on the other hand, is a more recent development, only about a decade old.[243] As its popularity has increased among employers, the newer process apes the processes of traditional commercial arbitration under the FAA. The function, however, is different. The focus is not centered on private commercial agreements, often for the sale of goods or services, but rather on the violation of rights extended by the federal government to members of the national workforce. An employee may not be the same type of arm's-length party to a commercial agreement, especially where the rights consist of nonnegotiable statutory protections from discrimination.[244] Efficiency in resolving legal controversies with finality must be weighed against a public interest to enforce

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[240] *See* 9 U.S.C. §§ 10, 11 (1994); *see also Gilmer*, 500 U.S. at 30–31 (noting procedural protections implicit in the FAA that address arbitrator bias and provide for judicial review in the event of a violation). The two cited sections of the FAA provide the bases upon which a court may vacate, modify, or correct an arbitral award and generally protect against errors that occur in the arbitral process. *See supra* notes 28–35 and accompanying text (discussing the FAA provisions for judicial review and alteration of an arbitration award).

[241] *See supra* Part II.

[242] *See supra* Part II.

[243] *See supra* Part III.B. Although labor arbitration law has developed over a substantial amount of time, its evolution is not applicable to the current state of individual employment arbitration law because *Gilmer* effectively switched the analysis from the labor arbitration context (relying on the *Alexander* line of cases) to the commercial arbitration context (relying on *Mitsubishi Motors* and the FAA). *See supra* Part III.B.

[244] *See* discussion *supra* notes 212–214 and accompanying text (addressing employee claims of adhesion and unequal bargaining power).

rights designed to end impermissible discriminatory practices.[245] Further, an expert, say in the textile industry, is no better equipped to decide discrimination claims of a fabrics plant employee than is an expert in the high technology sector because discrimination claims rely on statutory grounds that may have nothing to do with the manufacturing and sales practices of the industry.[246] Although form is the same, the function is not mere business efficiency, but in addition the maintenance of protections and rights afforded employees—persons who must support themselves financially and any dependants as well.[247]

The solution is to modify the arbitral form to fit the function. If arbitration must be simultaneously efficient and protective of unique federally-created, important rights, the commercial form of arbitration should be modified to accommodate the policy underlying those rights. In addition to clarifying the scope of the FAA, the authors propose five requirements of employment arbitration to supplement current procedures.

The initial step toward modification of employment arbitration law is to clarify section 1 of the FAA.[248] Although the judiciary has provided a fairly

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[245] "[A]rbitration should be recognized for what it can offer and be applied in a manner which is adapted to the unique aspects of employment law dispute resolution. This may mean the modification of some principles . . . ." Berger, *supra* note 7, at 721; *see also* Cooper, *supra* note 86, at 204 ("Arbitration can be a case of the fox guarding the chickens, or an expeditious route to justice. Which it is depends on the specific provisions of the arbitration system devised.").

[246] *See* Hoffman, *supra* note 8, at 133 (noting that many arbitrators were "not necessarily employment discrimination law experts," which seems to violate a call for arbitrators who are versed in the substantive law of their respective field). A possible compromise to this dilemma is to employ arbitrators who are either labor attorneys or nonlegal personnel who have served with employment agencies such as the EEOC or the National Labor Relations Board. *See* Maltby, *supra* note 8, at 22–23. Whether this concern is valid, however, is questioned by at least one study that found that judges and arbitrators (whether employment discrimination experts or not) often decide cases in the same way and with a low rate of judicial interference with arbitral awards. *See* Cooper, *supra* note 86, at 238–239.

[247] In other words:

> Judging whether employment law ADR represents a net positive benefit is thus a different calculation [from commercial arbitration law]. The weighing of gains and losses must account for not only the structural features of the litigation and ADR processes, but also the practical reality of employment law dispute resolution as it currently exists.

Berger, *supra* note 7, at 698.

[248] *See supra* notes 197–202 and accompanying text (discussing interpretation of section 1 of the FAA's exclusionary language for employment contracts).

uniform interpretation of the section's scope, with only one court finding a broad interpretation, the issue continues to arise in employee challenges to employment arbitration.[249] A final, definitive interpretation remains uncertain insofar as the Supreme Court has refused fully to address the issue. Although the supporting case law and mass acceptance of a narrow interpretation hints that the Court would support the majority view, reliance on the FAA's general applicability to employment contracts and continuing challenges remain precariously balanced. Resolution of the issue, however, does not require the Court's involvement. Instead, a legislative amendment to the language of section 1 would be appropriate. The FAA merely needs clarification of the scope of its employment contract exclusion.[250] Congress is aware of the trend toward arbitration of rights that it created to end discrimination, and of employment arbitration in general, such that a call for clarification is timely and necessary to avoid unnecessary litigation.[251]

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[249] *See supra* notes 197–202.

[250] This result could be accomplished by explicitly limiting the exclusion to "other class[es] of workers [directly] engaged in foreign or interstate commerce, [such as interstate transport occupations]," or by expanding inclusion within section 2 by enforcing an arbitration agreement in any "maritime transaction, [individual employment contract for employee not represented under a collective bargaining agreement], or a contract evidencing a transaction involving commerce." 9 U.S.C. §§ 1, 2 (1994) (authors' proposals for amendment appearing in brackets). Given the difficulty of defining "directly engaged in interstate commerce" within an exclusion, *see* Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952, 955-959 (D. Md. 1994) (attempting to determine if the manager for a warehouse that was a focal point for interstate commerce was "directly engaged" in interstate commerce under section 1), the latter option stating broad inclusion is preferable, though some emendation still would be required of section 1 to insure that no conflict was established between the existing language of that section and any new inclusion provision in section 2. The authors recognize that the drafting of any inclusion or exclusion requires intensive consideration and precision, particularly in the employment context, and the above suggestions are intended as examples rather than exact proposals.

[251] Thus far, Congress's predominant role has been to carve exemptions within specific statutes to prevent arbitration. *See supra* note 178 and accompanying text (detailing an analysis for determination of whether Congress has intended to preclude judicial waiver); *see also infra* note 273 and accompanying text (addressing recent congressional proposals to amend public laws to prevent enforcement of predispute arbitration agreements covering claims arising under such laws). While Congress has not acted in one fell swoop to exclude all employment arbitration from FAA enforcement, the rationale for the simultaneous piecemeal exclusionary provisions adopted on a statute-by-statute basis clearly indicates that Congress does not view employment arbitration as beneficial in all cases. This result, however, has left the courts an arduous task of analyzing the statutes individually rather than looking to the FAA for uniform enforcement provisions. *See supra* Part IV.A (discussing the *Mitsubishi Motors* test as applied to employment statutory

Following clarification, Congress should further amend the FAA to include provisions addressed to employment arbitration concerns. These provisions would apply to employment arbitrations involving statutory discrimination claims. Essentially, any amendments should address issues raised in the parade of horribles and provide more palatable procedural guidelines. First, predispute arbitration agreements must be in writing, must contain a clear statement of the arbitral process as well as panel selection procedures, and must be signed by the employee separately from the remainder of the employment contract.[252] Employees should be placed on notice concerning the dispute resolution process and what rights they are consenting to arbitrate. While an explicit list of arbitrable rights should not be necessary,[253] an enforceable arbitration provision should at least place an employee on notice that, by signing, she agrees to submit her civil rights claims to arbitration.[254] Additionally, the employee should be cognizant of arbitral panel selection and the arbitration rules that will apply to the process.[255] The "separate agreement" provision simply insures that an

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discrimination claims). While such analysis will remain integral to employment arbitration even with emendation, the state of the law, which requires courts to build a house of cards by first conjecturing upon FAA inclusion before then conjecturing on statute arbitrability, would collapse into more manageable propositions.

[252] Predispute arbitration agreements encompass broader issues than arbitration agreements that cover existing disputes. Within the employment context, in which contracts generally are signed prior to employment, the scope and extent of arbitration is not delineated by an existing dispute, but an expansive view toward what could occur. *See supra* note 190 and accompanying text (detailing language of numerous employment arbitration agreements).

Note that section 2 of the FAA states that all arbitration agreements that appear in writing are valid "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994).

[253] *See supra* notes 166–168 and accompanying text (detailing the inquiry into whether an arbitration agreement may go unenforced for failure to notify an employee of arbitrable rights).

[254] *But see supra* note 168. The general consensus is that a broadly written arbitration provision covering all disputes arising out of the employment relation places an employee on notice. *See supra* note 168.

[255] Some argue that arbitration panel selection in employment arbitration should require specific limitations. *See* Maltby, *supra* note 8, at 17–22. The authors believe that (1) this specific process is best left to the arbitration rules that the parties agree upon, and (2) any overreaching by an employer to stack the deck in his favor, or selection of biased arbitrators, will be subject to the provisions of section 10 of the FAA. Otherwise, the FAA would single out employment arbitrators as being particularly suspect, a seemingly incongruous result given the confidence the FAA should instill in the arbitral process.

arbitration clause is not buried within a contract or employee manual that a less astute employee may not catch among the fine print.[256]

Second, the employee must knowingly and voluntarily sign the agreement to arbitrate.[257] This requirement would address the concern raised in *Lai* and seeks to provide that, in addition to notice requirements, the employer insures that an employee is aware of and willing to sign the agreement.[258] Court interpretations of knowing and voluntary should produce reasonable employer practices without leaning toward extremism. For instance, the "specific waiver" requirements of *Lai* are too stringent. Yet, courts that reject *Lai* have been too lenient in charging parties with knowledge of their contract.[259] In theory, a contract satisfying the notice provisions in the first proposal should sufficiently collapse a knowing and voluntary inquiry to a single question of employer disclosure. The provision, however, would remain vital in situations in which an employee could demonstrate that an employer coerced the arbitration agreement or in which the notice provision inquiry is at issue.[260]

Third, at minimum, arbitration must promise the same substantive rights and remedies afforded under the applicable statute or statutes in a court of law. While this is an established judicial doctrine, the provision is not codified.[261] Due to the general court acceptance of this provision, passage of

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[256] Once a contract is signed, the court presumes that the party has read and understood the import of the agreement, regardless of whether the party has read the contract or not. *See* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 228–229 (3d Cir. 1997).

One concern, however, is that the enforceability of an arbitration agreement should not be made to depend on the sole fact that the contract is one of arbitration. *See* Doctor's Assocs., Inc., v. Casarotto, 517 U.S. 681, 686-688 (1996) (invalidating a state law that required specific notice provisions that a contract involved arbitration, because this requirement specifically targeted arbitration agreements and not all contracts).

[257] *See supra* notes 166–168 and accompanying text (discussing the knowing and voluntary waiver issue).

[258] *See supra* notes 166-168. *Lai*'s status as compelling persuasive authority is questioned. *See supra* notes 166–168. Protection of the employee rights, particularly for employees who may not be able to bargain for specific terms or even realize what they are bargaining for, is an imperative concern.

[259] *See, e.g.*, Beauchamp v. Great W. Life Assurance Co., 918 F. Supp. 1091, 1098 (E.D. Mich. 1996) (rejecting *Lai* and instead charging the employee with knowledge of the existence and scope of the arbitration agreement he signed).

[260] *But see supra* notes 137, 212–214, 240 and accompanying text (discussing issues of adhesion would fall within the language of sections 10 and 11 of the FAA that bars enforcement where ordinary contract law would operate to avoid the contract).

[261] *See supra* notes 61-62, 178 and accompanying text.

this element would simply represent enactment of the *Mitsubishi Motors* standard and provide explicit reference to the standard when denial of statutory rights are at issue in arbitration.

Fourth, an arbitral panel must issue written awards, permit more than minimal discovery, and state the reasons for deciding each issue as it did.[262] The first portion of this proposed requirement is the most problematic because arbitrators have not had to issue written opinions and, in fact, have been encouraged not to disclose their reasoning.[263] Employment arbitration, however, involves strong public interests that may require greater emphasis on decisional reasoning.[264] As such, a record of that reasoning provides crucial insight into the arbitral process. Additionally, arbitration of public law claims under discrimination statutes requires threshold discovery minimums to assure that an employee will not be impaired in trying to prove her case, particularly when an employer retains control over corporate records or employs the witnesses who comprise the crux of an employee's essential evidence.[265]

Finally, no unreasonable costs must be imposed on the employee as a condition of access to arbitration, and the employee shall retain the right to be represented by an attorney.[266] While litigation requires a party to incur numerous court and filing expenses, an employee should not be forced to pay

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[262] *See supra* notes 23–27 and accompanying text (addressing issue of arbitration procedures and written awards). *But see supra* note 27 and accompanying text (stating that arbitrators are not required to submit written decisions).

[263] Recall that the rationale for unwritten awards is to insulate awards from judicial searches for any error that may appear in an arbitrator's reasoning and thus provide grounds for an alteration of the award. *See supra* note 27.

[264] While Congress may not have intended federal courts to provide the only forum for resolution of statutory discrimination claims, the exact scope of the judiciary's role in reviewing claims decided in other fora is unclear. *See supra* notes 89–93. Whether issuance of written awards provides a meaningful and significant element to this role thus, too, remains unclear. Given that the "no written award" rule arose to insulate awards from appellate scrutiny and thereby preserve arbitral efficiency, the same goal of efficiency may prove a lesser concern when juxtaposed with the public interest in deterring and ending discriminatory practices.

[265] *But see supra* note 217 (arguing that discovery in employment arbitration should prove minimal given the stark nature of a claim and the ease of locating evidence that tends to prove the case).

[266] *See supra* note 170 and accompanying text. This requirement is in part mandated by *Cole* in which an employee could not be required to pay the arbitral expenses under employer mandated arbitration. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997); *see also supra* note 170. Whether this requirement compounds the "repeat player" argument or encourages institutional bias in favor of the employer is an unanswered question. *See supra* notes 207–211 (discussing the repeat player argument).

arbitration fees that would appear unreasonable in light of litigation fees for arguing a similar claim in court.[267] Access should not be denied preemptively on the basis of an employee's inability to pay arbitral fees. Further, employees should retain the right to counsel representation in arbitration proceedings.[268]

Enactment of these guidelines as a new section of the FAA devoted to employment arbitration should assuage the concerns raised by detractors of the process. While several of these requirements already exist in the case law,[269] they should receive explicit legislative endorsement as amendments to the FAA. Additionally, the FAA should be amended to clarify that all nonunion employment contracts are within its scope.[270] Adding this clarification and the proposed requirements should ensure that arbitration protects the substantive rights of the complainant and should provide recognition of the divergence between the functional concerns of employment and purely commercial arbitration. While both employers and employees should enjoy the availability of the efficiency benefit of arbitration, this benefit also must be balanced in tandem with the public interest in ending certain discriminatory practices by employers. A clarified and modified arbitral process, built by hybridizing currently applicable commercial arbitration law, should remain viable. The proposed recommendations would supplement the existing FAA framework by molding it to the special situation.

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[267] The authors are not suggesting an adoption of the *Cole* decision, but rather that aggregate fees for the arbitral process, not including attorney's fees, should not appear unreasonable in relation to the aggregate judicial fees had the employee brought suit in court. Additionally, the authors include certain fee practices, such as a minimum prepayment of arbitrator's fees prior to arbitration, as possible unreasonable constraints on access.

[268] *See* Maltby, *supra* note 8, at 24 (arguing for comparable representation). Maltby provides two alternatives to the representation issue when there is a mismatch of employee and corporate counsel. First, an employer may have to bear the cost of employee's counsel. Second, an employer may be allowed representation only by a person of comparable ability to the employee's representative. *See id.* Overall, the goal is to prevent seasoned, high-priced corporate counsel from having a competitive advantage over an employee who cannot afford similar representation. *See id.* Beyond these alternatives, government agencies also may provide an opportunity for employee representation.

[269] *See Cole*, 105 F.3d at 1482.

[270] Recall that, unlike the FAA, the Uniform Arbitration Act, which has been enacted in substantially the same form in 33 states, provides explicitly that the UAA "applies to arbitration agreements between employers and employees." UNIF. ARBITRATION ACT § 1, 7 U.L.A. 1, 1 (1997).

V. CONCLUSION

Employment arbitration agreements have surged in popularity in reaction to the *Gilmer* decision. Employment arbitrations occurred earlier in the context of collective bargaining and were later applied to brokers in the securities field as a condition of market certification. Today, individual employees working in diverse fields face the prospect of arbitrating their legal disputes and statutory rights against the employer.[271] While some commentators still argue whether arbitration should ever be permitted in statutory employee right contexts, the more demanding debate centers upon how the legislature will accommodate the trend and yet protect substantive rights without compromising the benefits of arbitral efficiency.

Although employment arbitration is a process that is similar to commercial arbitration, it requires additional safeguards to protect the often precarious and weak bargaining position of the employee.[272] While some members of the 105th Congress have advocated an outright ban on all predispute arbitration agreements covering public law statutes,[273] this position, the authors believe, is too radical, despite the need for efficacious employee protections. While many employers may have an edge when negotiating employment agreements, the legislature should not remove the arbitral choice from the employee without recognizing that the employee, too, can benefit from arbitration.[274]

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[271] *See supra* note 1.

[272] *See generally supra* Part IV.

[273] *See* Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997); Civil Rights Procedures Protection Act of 1996, H.R. 983, 105th Cong. (1997). If passed, the Act would alter the language of several civil rights statutes, including Title VII, the ADA, and the ADEA, to permit arbitration only when parties voluntarily agree to such after the dispute arises.

[274] Employee interests in arbitration of public law rights include (1) reduced delay, (2) court-like proceedings and remedies, (3) an opportunity for low income employees to avoid the anxiety of full-scale litigation, and (4) a guaranteed hearing on the merits without the complex procedural hurdles present in litigation. *See* Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460, 1477–1478 (N.D. Ill. 1997); *see also* Berger, *supra* note 7, at 695–696 (noting that arbitration provides an alternative to the high-cost gridlock of litigation, which may fail to fully recompense the employee who has to wait in line to argue).

Perhaps the most striking metaphor in favor of employment arbitration is one drawn to highlight the high cost of litigation that an employee faces if he takes his claims to court: "We now have the judicial equivalent of a Rolls Royce, a marvelous vehicle whose sole imperfection is that it is so expensive that almost no one can afford to drive one, and most people end up walking." Maltby, *supra* note 8, at 27.

The legislature needs, as the modifications propose, to level the playing field rather than canceling the game.

Commercial arbitration in nonemployment cases succeeds because its form fits its function. In the interests of time, money, and privacy, arbitration provides an alternative to belabored and more contentious litigation. Employment discrimination disputes also arise in business contexts, but the matters themselves are more personal and less commercial. Time, money, and privacy are lesser concerns to discrimination in employment issues. Thus, the goal of employment arbitration is to address statutory right vindication without losing sight of those attributes of efficiency that have made arbitration a valuable managerial tool. The attainment of this goal merely requires fitting form to function by supplementing traditional commercial arbitration rather than supplanting it in the employment context.