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Contemporary Forum

HAVE THE FOXES BECOME THE GUARDIANS OF THE CHICKENS?* THE POST-GILMER LEGAL STATUS OF PREDISPUTE MANDATORY ARBITRATION AS A CONDITION OF EMPLOYMENT

JOHN A. GRAY**

A comparison of job application forms used thirty years ago with forms used today reveals the impact that common law and statutory law developments have had on the employment relationship. In response to federal and state anti-discrimination statutes,¹ today's application forms do not ask for information related to race, color, national origin, marital status, children or family plans, religion or age. Employers instead request such information on a separate form and on a voluntary basis for Equal Employment Opportunity Commission (EEOC) reporting or other purposes. Employers today also ask prospective employees to sign forms created in response to common law developments

* Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

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1. See, e.g., 42 U.S.C. § 2000e-2(a)(1) (1988) (unlawful for employer "to fail to refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin"); 29 U.S.C. § 623(a)(1) (1988) (unlawful for employer "to fail to refuse to hire or to discharge any individual . . . because of such individual's age"); MD. ANN. CODE art. 49B, § 16 (1991) (unlawful for employer "[t]o fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, age, national origin, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment").

in the areas of defamation,² privacy³ and wrongful discharge.⁴ These forms include: reference release forms;⁵ drug and alcohol testing release forms;⁶ and forms by which the employee acknowl-

2. *See, e.g.*, *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876 (Minn. 1986) (holding that employer who acted in accordance with its neutral reference policy was nonetheless liable for defamation under compulsory self-publication doctrine).

3. *See, e.g.*, *Rulon-Miller v. IBM Corp.*, 208 Cal. Rptr. 524 (Ct. App. 1984) (holding that employer violated implied covenant of good faith and fair dealing by invading privacy rights contractually conferred on employees); *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908 (Mass. 1982) (holding that employer could be liable for tort of abusive discharge by making obligation to provide personal, non-job related information condition of employment).

4. *See, e.g.*, *Adler v. American Standard Corp.*, 432 A.2d 464 (Md. 1981) (holding that cause of action for abusive or wrongful discharge by employer of at-will employee exists when employer's motivation for discharge contravenes public policy). "Wrongful discharge" refers to a judicially created exception to the common law employment at will doctrine. *Id.* at 467. The majority of courts recognizing a cause of action for wrongful discharge treat the employees' claims as tort actions. *Id.* at 468. Other courts, however, have held that an action for wrongful discharge would lie in contract (breach of an implied in fact contract). *Id.* at 467-68. The contract on which the action is grounded could be based on employer policies and practices, particularly those stated in employee handbooks, and/or a breach of an implied covenant of good faith and fair dealing.

The "abusive discharge" tort theory of recovery makes a discharge, whether actual or constructive, wrongful where the employer's motivation contravenes a clear mandate of public policy. *Id.* at 471. Typically, such cases fall into one of three categories of retaliatory discharge: (1) where an employee refuses to commit an illegal act as a condition of continuing employment; (2) where an employee refuses to forgo the exercise of a statutory right; or (3) where an employee refuses to forego the carrying out of a public responsibility. *Id.* at 468-69.

5. Typically, the form states in part:

I release, promise to hold harmless and covenant not to sue the Company on the basis of its attempts to obtain any of the forgoing information, and I further release, promise to hold harmless and covenant not to sue any persons, firms, institutions, or agencies providing such information to the Company on the basis of their disclosures. I have signed this release voluntarily and of my own free will.

MARYLAND CHAMBER OF COMMERCE, THE MARYLAND EMPLOYER'S GUIDE TO EQUAL OPPORTUNITY LAW 82 (rev. ed. 1990).

6. Typically, the application form states in part:

I consent to submit to fingerprinting and to take any physical examinations, including but not limited to blood, urine, breath or other examinations or tests for alcohol or drugs or other substance use, that may be requested by the Company in connection with processing of my application for employment, and further agree to take any such examinations that may be requested by the Company during my employment, with the understanding that these examinations will be performed by a health care professional designated by the Company, that the Company assumes no responsibility for advising me of the results of any such examinations and that any information obtained through such examinations may be retained by the Company and is exclusively the Company's property.

Id. at 77.

edges that the employment relationship is one at will and that employment policies and procedures, particularly those stated in the employee handbook, do not constitute binding contract terms.⁷

Similarly, in response to the recent Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.*,⁸ we may anticipate employers now adding a mandatory arbitration agreement provision as a condition of employment. Such a provision would require both the employee and the employer to resolve any dispute—including a statutory anti-discrimination claim—that arises from employment or the termination of employment by binding arbitration rather than by litigation. This is a result some commentators had only a short time ago believed unthinkable.⁹ Yet, as the discussion below will illustrate, after *Gilmer*, where an employer requires agreement to mandatory arbitration as a condition of employment, the only employees who likely will retain their right to litigate statutory employment claims will be union employees covered by collective bargaining agreements.¹⁰ Theoretically,

7. Typically, the application form states in part:

I understand that any employment I might be offered is "at will" and of indefinite duration, and that either I or the Company can terminate that employment at any time with or without notice for any or no reason, that no agreement to the contrary will be recognized by the Company unless made and in writing and signed by the President of the Company, and that none of the Company's practices or policies are to be construed as imposing any binding obligations on the Company and are subject to change and deletion at any time.

Id.

8. 111 S. Ct. 1647 (1991) (holding that age discrimination claim against employer was subject to arbitration under enforceable mandatory arbitration agreement in securities registration application).

9. See, e.g., G. Richard Shell, *Is Arbitration a Just Route?*, NAT'L L.J., Feb. 11, 1991, at 13, 13 (discussing potential impact of Supreme Court decision in *Gilmer*). "Until very recently, no one would have thought that such a contract provision would operate to deny an employee access to a court for something as important as a violation of a federal anti-discrimination law." *Id.* Similarly, two other commentators had previously concluded that employment discrimination claims could not be subject to mandatory arbitration. Ralph H. Baxter, Jr. & Evelyn M. Hunt, *Alternative Dispute Resolution: Arbitration of Employment Claims*, 15 EMPLOYEE REL. L.J. 187 (1989). "[W]ith the possible exception of employment discrimination claims, employers can establish mandatory written arbitration procedures as the sole method for resolving disputes with their employees" and those arbitration provisions would be enforceable so long as they satisfied "the requirements of the United States Arbitration Act or the analogous state arbitration statute." *Id.* at 187-88 (emphasis added). Baxter and Hunt, however, fail to mention, much less discuss, that § 1 of the Federal Arbitration Act (FAA) expressly excludes "contracts of employment." See 9 U.S.C. § 1 (1988) ("[N]othing herein contained shall apply to contracts of employment . . . of workers engaged in foreign or interstate commerce.") For a discussion of this exclusionary language, see *infra* notes 18, 44-48 and accompanying text.

10. *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (holding that

even public sector employees may be required to arbitrate disputes over possible infringement of constitutional rights if the employing agency has such a provision as a condition of employment.¹¹

One fear expressed by those opposing mandatory arbitration provisions in employment contracts is that employers prefer arbitration because it somehow gives them an advantage in that it provides less protection to employees' rights than does litigation.¹² This fear, however, may not be entirely justified. It is possible that an employer, rather than seeking an advantage over the employee, might prefer mandatory arbitration because of its re-

employee's § 1983 claim was not barred by prior arbitration proceeding brought pursuant to collective bargaining agreement); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (holding that employees' wage claims under Fair Labor Standards Act were not barred by prior submission of these claims to contractual dispute-resolution procedures mandated by collective bargaining agreement); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding that employee's statutory right to trial de novo under Title VII was not foreclosed by prior submission of claim to final arbitration under nondiscrimination clause of collective bargaining agreement). Even employees covered by collective bargaining agreements, however, may be first required to arbitrate those claims.

11. This inference can be drawn by reading *Gilmer* in conjunction with *McDonald*. The Court, in *McDonald*, held that an adverse arbitral result under a collective bargaining agreement on a constitutional claim did not preclude subsequent de novo litigation of the identical issue. *McDonald*, 466 U.S. at 292. *McDonald* had been discharged from the city police force and had then filed a grievance pursuant to his collective bargaining agreement, contending that there was "no proper cause" for his discharge. *Id.* at 285-86. The grievance was taken to arbitration and the arbitrator ruled against *McDonald*. *Id.* at 286. *McDonald* then filed a § 1983 action in federal district court, alleging that he was discharged for exercising his First Amendment rights of freedom of expression and freedom of association. *Id.* The jury returned a verdict against the police chief; this judgment was reversed by the Court of Appeals for the Sixth Circuit on the grounds that the First Amendment claims were barred by res judicata and collateral estoppel. *Id.* at 286-87. The Supreme Court reversed. *Id.* at 293.

The *Gilmer* majority understood this outcome to result not from the nature of the claim (i.e., constitutional claims, unlike commercial contract claims, are not amenable to arbitration) but rather from the type of arbitral process (i.e., labor or industrial arbitration based on a collective bargaining agreement rather than an employment arbitration based on an individual contractual agreement). *Gilmer*, 111 S. Ct. at 1647. Thus, a public sector employee not covered by a collective bargaining agreement could be subject to a mandatory arbitration provision in her employment contract.

12. A similar fear—that somehow arbitration panels are biased in favor of and/or are controlled by employers—compelled organized labor's objections more than 65 years ago to the first draft of the then proposed FAA. "[T]he basis for labor's objection to the bill was the fear that weak unions, or individuals, would be compelled to submit to arbitration clauses, and that the arbitral decision-makers would as a practical matter be under the control of the employers." Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioner at 18, *Gilmer* (No. 90-18) (citing 53 A.B.A. REP. 351-52 (1928)).

puted efficiency, privacy and finality. Employers also might be willing to exchange their relative freedom from third-party scrutiny of employment decisions for more frequent scrutiny, but a scrutiny that entails less transactional costs, both monetary and non-monetary, than litigation.¹³ In addition, a mandatory arbitration provision can benefit and protect an employee as well as an employer. For example, an employee, under a mandatory arbitration agreement, can require an employer to submit adverse employment decisions to the scrutiny of a neutral third-party—decisions which otherwise might not be reviewed judicially for a variety of reasons—in accordance with an arbitral process structured to protect the employee's procedural and substantive rights.

Another, perhaps more intuitive, concern over these provisions is that, while an agreement to arbitrate is an agreement to a choice of a forum and not a surrender or waiver of substantive statutory rights or remedies,¹⁴ there is a "take it or leave it" coer-

13. See, e.g., Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Respondent at 2-3, *Gilmer*, (No. 90-18).

A resolution of this issue is of vital concern to the Chamber [of Commerce of the United States] and its members, many of whom have individual arbitration agreements with at least some of their employees. These agreements have been adopted in response to the extraordinary growth of employment-related litigation and the equally extraordinary increase in the cost of litigating such claims. Voluntary binding arbitration provides a means for resolving such employment claims in a forum that is quicker, more efficient, less disruptive, and less expensive, and one that has the same access to expertise as the judicial forum because the arbitrator can be selected with an eye to the nature of the claim.

Id.

14. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). Substantive rights provided by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1988), may be waived only by complying with the specific statutory requirements set forth in The Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified at 29 U.S.C.A. §§ 621, 623, 626, 630 (West Supp. 1992)). The OWBPA establishes three types of ADEA waivers, depending on the situation in which the waiver is given or requested: (1) settlement of an ADEA charge or age discrimination lawsuit; (2) a waiver requested in connection with an exit incentive program; and (3) a waiver given in all other circumstances. 29 U.S.C. § 626(f). All ADEA waivers must meet the following minimum requirements: (1) the waiver must be in writing and in language understandable to the employee; (2) the waiver must expressly provide that the employee is waiving ADEA rights and claims and only those that may have arisen before the signing of the waiver and not those that may arise thereafter; (3) the waiver is given in exchange for additional consideration beyond that to which the employee is already entitled; (4) the employee must be advised in writing to consult an attorney before signing the waiver; (5) the employee must be given at

cive aspect to the agreement, even though theoretically the employer is also surrendering its right to take the employee to court. The concern is that, while it is one thing to make an independent choice to agree in advance of a dispute to mandatory arbitration, it is quite another to be required to accept the arbitral forum as a condition of employment. In effect, with a mandatory arbitration provision, the employee gives up the right to settle a dispute with the employer in court in order to obtain or keep work. In addition, the employee has probably been asked to sign other liability releases, thereby possibly waiving such rights as reputation and privacy rights, as a condition for employment.

Several different solutions have been proposed to address these concerns. Some commentators advocate that employees be given a choice *after* they are hired.¹⁵ This proposal would prevent possible disadvantage to a job applicant who does not choose the alternative to litigation. Others, like Cathy Ventrell-Monsees, manager of advocacy programs for the American Association for Retired Persons Worker Equity Department, feel that “[a]rbitration may have benefits for some employees . . . [b]ut arbitration must be voluntary and the decision to arbitrate can only be made after a dispute arises.”¹⁶ Still others maintain that agreements to arbitrate anti-discrimination claims should never be enforceable.¹⁷

In response to these varying concerns and proposals, this ar-

least 21 days within which to consider the release; and (6) the waiver must advise the employee that she/he has a seven day revocation period. *Id.* In addition, each of the three situations imposes other, additional requirements. *Id.*

15. See Joseph E. Herman, *Arbitrate, Don't Litigate, at Work*, N.Y. TIMES, Apr. 14, 1991, at C11. Mr. Herman suggests:

If Congress wants to insure that employees may decide to have civil rights claims resolved through arbitration or litigation independently from their decisions on whether to accept a job, it could provide that employees must be given a choice after they are hired and that they could not be dismissed or disadvantaged for not choosing an alternative to litigation. Once made, the choice would be binding for the duration of the person's employment, unless both parties agreed to a change. Neither employers nor employees would be forced to agree to arbitration, but both would be able to establish a binding alternative.

Id.

16. Robert Lewis, *A Closing Door? Age Bias Victims See New Threat*, NRTA BULL., May 1991, at 1, 13 (quoting Ventrell-Monsees and discussing likelihood that Supreme Court decision in *Gilmer* “could limit the ability of employees alleging age discrimination to gain access to federal courts”).

17. See, e.g., Shell, *supra* note 9, at 13-14 (asserting that “[d]iscrimination claims belong in court”); see also Brief of American Association of Retired Persons as Amicus Curiae in Support of Petitioner at 16-18, *Gilmer* (No. 90-18) (arguing that compulsory arbitration is not appropriate forum for resolving discrimination claims).

ticle tackles the question of the meaning of *Gilmer* and its ramifications for both employees and employers. The *Gilmer* Court expressly decided no more than that employees in the securities industry whose registration agreements include a mandatory arbitration provision must arbitrate age discrimination claims.¹⁸ This decision, however, could also be understood to support the proposition that, under the Federal Arbitration Act (FAA),¹⁹ any employer may enforce a mandatory arbitration agreement which was required as a condition of employment.²⁰ This conclusion is premised on the idea that the *Gilmer* majority's reasoning in favor of enforceability is not securities industry specific, but rather is just as applicable to an individual employment agreement as it was to

18. See *Gilmer*, 111 S. Ct. at 1650. Justice White's statement of the question would seem to support limiting *Gilmer* to its precise facts: "The question presented in this case is whether a claim under the Age Discrimination in Employment Act of 1967 . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application." *Id.* (citations omitted). The majority's handling of the threshold coverage issue under § 1 of the FAA also supports this limitation. See *id.* at 1651 n.2. Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988). Justice White's opinion stated that "it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment." *Gilmer*, 111 S. Ct. at 1651 n.2. For a more detailed discussion of the threshold coverage issue, see *infra* notes 44-48 and accompanying text.

19. 9 U.S.C. §§ 1-16 (1988 & Supp. II 1990).

20. See *Gilmer*, 111 S. Ct. at 1661 (Stevens, J., dissenting). This potentially broader view of the *Gilmer* decision concerned Justices Stevens and Marshall: "Until today . . . the Court has not read § 2 of the FAA as broadly encompassing disputes arising out of the employment relationship." *Id.* (Stevens, J., dissenting). This broader view also concerned many individuals in the employment discrimination field. For example, before the Court announced its decision in *Gilmer*, Donald Livingston, acting General Counsel of the EEOC, discussed the implications the case would have for workers in all industries: "This would really change the legal landscape. It has the potential to be a very, very significant employment discrimination case." Lewis, *supra* note 16, at 1. Similarly, Cathy Ventrell-Monsees, with the American Association of Retired Persons (AARP), and Counsel of Record for the AARP Amicus Brief in support of Mr. *Gilmer*, stated: "In effect, the change would amount to 'closing the courthouse door' to victims of age bias discrimination. . . . This would be a major setback in efforts to stamp out discrimination in the workplace and expand job opportunities for older workers." *Id.* In its amicus brief on behalf of Mr. *Gilmer*, the AARP contended that, if the Supreme Court held that Mr. *Gilmer*'s agreement to arbitrate included an obligation to arbitrate statutory anti-discrimination claims, "[w]hole industries will attempt to remove themselves from the purview of the courts and enforcement agencies by including compulsory arbitration provisions in employment applications and contracts. The multitude of statutes protecting employees' rights will be subject to the vagaries of individual arbitrators." Brief Amicus Curiae of American Association of Retired Persons in Support of Petitioner at 4, *Gilmer* (No. 90-18).

a registration agreement.²¹

Part I of this article therefore analyzes the *Gilmer* opinion in light of the question of whether non-securities industry employers may enforce mandatory arbitration provisions as a condition of employment. Part II deals with the question of what rights employees have under *Gilmer*. Part III then addresses the question of how to limit the FAA's applicability to employment contracts after *Gilmer*. Specifically, this author concludes that: (1) after *Gilmer*, with the possible exception of unionized employers, any employer, private sector or public sector, will be able to enforce a pre-dispute arbitration provision as a condition of employment; (2) after *Gilmer*, an employee's basic right is only that the arbitral process be adequate; and (3) the applicability of *Gilmer* to employment contracts can best be precluded by amending the FAA or the Civil Rights Act.

I. THE *GILMER* DECISION: EMPLOYER'S PREROGATIVE

Gilmer was a Federal Arbitration Act (FAA) case. Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."²² Prior to *Gilmer*, the Supreme Court had addressed the enforceability of pre-dispute mandatory arbitration provisions under the FAA in two situations—securities industry account agreements with clients²³ and commercial agreements between

21. Once you prescind from the threshold coverage issue, the fact that *Gilmer* involved an employment relationship specifically in the securities industry is irrelevant to the reasoning in support of the outcome. For a discussion of the reasoning employed by the *Gilmer* majority, see *infra* notes 48-63 and accompanying text.

22. *Gilmer*, 111 S. Ct. at 1651 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)). The primary substantive provision of the FAA states:

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

9 U.S.C. § 2 (1988).

23. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (upholding enforceability of arbitration provision in agreement between securities brokerage firm and client with regard to claimed violation of 1933 Securities Act); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (upholding enforceability of arbitration provision in agreement between securities brokerage firm and client with regard to claimed violation of Rule 10b-5 under Securities Exchange Act of 1934). The fact that securities

merchants.²⁴ In both the securities industry account agreement and commercial agreement cases, the Court upheld the enforceability of the agreements. The Court recognized a liberal federal policy that creates a presumption in favor of arbitration, including the arbitration of statutory claims. In keeping with this policy, the Court held that, while “all statutory claims may not be appropri-

industry arbitration is ultimately monitored by and subject to the control of the SEC was a crucial factor in both cases.

In *McMahon*, the Court addressed the issue of whether claims brought under § 10(b) of the Securities Exchange Act of 1934 and RICO must be arbitrated in accordance with the terms of a pre-dispute arbitration agreement between a brokerage firm and its customers. *McMahon*, 482 U.S. at 222. The Court concluded that the FAA “mandate[d] enforcement of agreements to arbitrate statutory claims,” but “[l]ike any statutory directive, the Arbitration Act’s mandate may be overridden by a contrary congressional command.” *Id.* at 226. Thus, according to the Court, “the McMahons [were required to] demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under RICO and the Exchange Act, an intention discernible from the text, history, or purposes of the statute.” *Id.* at 227. The Court then concluded that the McMahons had not met their burden. “[T]here is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act. This silence in the text is matched by silence in the statute’s legislative history.” *Id.* at 238. Similarly, the Court concluded that “Congress did not intend for § 29(a) [of the Exchange Act] to bar enforcement of all predispute arbitration agreements.” *Id.* “[W]here the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, enforcement does not effect a waiver of ‘compliance with any provision’ of the Exchange Act” *Id.*

In *Rodriguez*, the Court overruled *Wilko v. Swan*, 346 U.S. 427 (1953), which 36 years earlier had held unenforceable an agreement to arbitrate a claim arising under the 1933 Securities Act. *Rodriguez*, 490 U.S. at 484. The Court reasoned that, in the interim, securities industry arbitration which was now overseen by the SEC had significantly improved. *Id.* at 481-82. The Court also reasoned that Congress’ prohibition in § 14 of the Act against enforcing any waiver of rights conferred by the Act applied only to substantive rights and not to procedural provisions, because, *inter alia*, the Act itself allowed a claimant a choice of forums between the federal courts and the state courts. *Id.* at 480-82.

24. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (upholding enforceability of arbitration provision in international agreement between business parties with regard to violations of U.S. antitrust law); *Scherk*, 417 U.S. 506 (upholding enforceability of arbitration provision in international agreement between business persons with regard to violation of U.S. securities law).

The international dimension was a crucial factor in both of these cases. For example, in *Mitsubishi*, the Court addressed the question of the arbitrability of the claims arising under the Sherman Act “and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction.” *Mitsubishi*, 473 U.S. at 616. The Court concluded that, as in *Scherk*:

[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Id. at 629.

ate for arbitration,” the burden is on the claimant to show the congressional intent not to have specific statutory claims subject to arbitration.²⁵ Thus, the enforceability of mandatory arbitration provisions under the FAA was not a new issue at the time *Gilmer* reached the Court.

The enforceability of these provisions in a general employment context, however, was largely unexplored territory and neither of the situations previously addressed necessarily mandated the result reached by the Court in *Gilmer*. The context of both agreements is inherently different from that of an employment contract. Neither the commercial relationship between merchants nor the relationship between a securities firm and its clients is like that between employer and employee. This difference in the type of relationship is significant. With respect to commercial merchants, business parties are not in an “adhesive contract” situation, but rather have an “arm’s length relationship.” This is a relationship in which both parties hold equal bargaining power when negotiating the terms of an agreement. Thus, when these parties agree to a broad pre-dispute mandatory arbitration clause that covers statutory claims, they understandably should be held to the terms of their agreement. While the non-negotiable “contract of adhesion” aspect of a mandatory arbitration provision is present in securities industry account agreements with clients, securities industry clients can be considered to be sufficiently protected in the arbitral process by the oversight and control of the Securities Exchange Commission (SEC). This outside element of control thus could distinguish the required use of arbitration under these circumstances from its use in employment relationships.

Prior to *Gilmer*, the Court had also addressed the issue of the arbitrability of employment-related statutory claims, at least to

25. *Gilmer*, 111 S. Ct. at 1652. The Court reiterated: “If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an ‘inherent conflict’ between arbitration and the ADEA’s underlying purposes.” *Id.* Given the legal complexity of the enforcement schemes for and the socio-economic significance of this nation’s antitrust and securities laws—laws addressed in *McMahon* and *Mitsubishi*—one wonders whether the Court will ever find any statutory claim not appropriate for arbitration in the absence of an express congressional intent against arbitration in the text and/or in the legislative history. Further, one wonders whether the Court, after *Gilmer*, will ever find an “inherent conflict” between arbitration and a statute’s underlying purpose. For a discussion of the Court’s response to *Gilmer*’s contentions that compulsory arbitration of ADEA claims would be inconsistent with the statutory framework and purposes of the ADEA, see *infra* notes 49-53 and accompanying text.

some extent. In three cases, *Alexander v. Gardner-Denver Co.*,²⁶ *Barentine v. Arkansas-Best Freight System, Inc.*²⁷ and *McDonald v. City of West Branch*,²⁸ the Court held that the collective bargaining-based arbitrability of employment-related statutory claims did not preclude individual employees from subsequently litigating the identical claims after adverse arbitral results. The special circumstances of collective bargaining, however, likely limit the precedential value of these cases to other cases arising in a union environment. In addition, none of these cases were brought under the FAA. Thus, *Gilmer* did present a new issue to the Court.

Interstate/Johnson Lane Corporation hired Robert Gilmer in May of 1981, as a Manager of Financial Services.²⁹ As a condition of employment, Gilmer was required to register as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE).³⁰ His NYSE registration application included a provision whereby he agreed to arbitrate "any dispute, claim or controversy" arising out of his employment or termination of employment.³¹ Six years later, at the age of sixty-two, Gilmer was terminated by Interstate.³² Gilmer claimed that Interstate had assigned his duties to a twenty-eight year old woman whom he had trained and that Interstate had fired him be-

26. 415 U.S. 36 (1974) (holding that worker alleging racial discrimination in violation of Title VII was entitled to trial de novo even though he had previously asserted identical claim unsuccessfully in arbitration pursuant to collective bargaining agreement).

27. 450 U.S. 728 (1981) (holding that arbitration under collective bargaining agreement did not preclude subsequent litigation of identical claim under Fair Labor Standards Act).

28. 466 U.S. 284 (1984) (holding that arbitrator's decision in civil rights claim under 42 U.S.C. § 1983 (1988) had no res judicata or collateral estoppel effect, regardless of whether parties had agreement to contrary).

29. *Gilmer*, 111 S. Ct. at 1650.

30. *Id.*

31. *Id.* at 1650-51. More precisely, Mr. Gilmer's registration application, which was filed with the National Association of Securities Dealers (NASD) and entitled "Uniform Application for Securities Industry Registration or Transfer" (U-4 Form), provided among other things that Gilmer "agreed to arbitrate any dispute, claim, or controversy" arising between him and Interstate "that [was] required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which [he] register[ed]." *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196 n.1 (4th Cir. 1990) (quoting paragraph 5 of Gilmer's securities registration application), *cert. denied*, 111 S. Ct. 1647 (1991). Similarly, NYSE Rule 347 requires arbitration of "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Gilmer*, 111 S. Ct. at 1650-51 (citing App. to Brief for Respondent 1).

32. *Gilmer*, 111 S. Ct. at 1651.

cause of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA).³³ Gilmer never filed for arbitration because he felt that arbitration would not provide him a "fair hearing"—that arbitration panels hearing employment complaints were comprised of industry members whom Gilmer considered biased in favor of industry employers.³⁴ Instead, he filed an age discrimination claim with the EEOC and subsequently brought suit in the United States District Court for the Western District of North Carolina.³⁵ Interstate moved to compel arbitration under the provisions of Gilmer's registration application and the FAA.³⁶ The district court denied the motion, concluding that "Congress intended to protect ADEA claimants from the waiver of a judicial forum."³⁷ A divided Fourth Circuit panel reversed, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements."³⁸ The Supreme Court granted Gilmer's petition for a writ of certiorari in order to resolve a conflict between the circuits on this issue.³⁹

In his brief, Gilmer made three arguments against the enforceability of the mandatory arbitration provision. He first argued that the Court had recognized in *Gardner-Denver* and its progeny that certain claims based on infringements of individual rights are not subject to compulsory arbitration and that age discrimination should be one of those claims.⁴⁰ Second, he argued that Congress, in the Civil Rights Act of 1990, expressly indicated

33. *Id.*; Peter T. Kilborn, *Age Bias Case Could Limit Right of Workers to Sue*, N.Y. TIMES, Mar. 25, 1991, at A1.

34. Kilborn, *supra* note 33, at A15.

35. *Gilmer*, 111 S. Ct. at 1651.

36. *Id.*

37. *Id.* According to the Supreme Court, the district court had based this decision on its understanding of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The district court's opinion is unreported.

38. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (1990), *aff'd*, 111 S. Ct. 1647 (1991).

39. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 41 (1990). As an example of the circuit split on this issue, in *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 222 (3d Cir. 1989), the Third Circuit held that an ADEA suit could be maintained despite a mandatory arbitration provision in an employment contract because "Congress did not intend that the right under the ADEA to a judicial forum for protection against age discrimination would be subject to displacement." In contrast, the Fourth Circuit, in finding that Gilmer's arbitration agreement was enforceable, stated that "we find no congressional intent to preclude enforcement of arbitration agreements in the ADEA's text, its legislative history, or its underlying purposes . . ." *Gilmer*, 895 F.2d at 196.

40. Brief on the Merits for Petitioner at 7, *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (No. 90-18).

its intent to preclude binding arbitration of employment discrimination claims.⁴¹ Finally, Gilmer argued that compulsory arbitration would frustrate Congress' clear intent to end age discrimination through use of the enforcement scheme it provided in the ADEA.⁴² Gilmer conceded that nothing in the text of the ADEA or its legislative history specifically indicated any congressional intent to preclude arbitration of ADEA claims.⁴³ Rather, his basic contention was that compulsory arbitration of ADEA claims was inconsistent with the ADEA's statutory framework and purposes.

Before reaching Gilmer's contentions, the Court first had to address a threshold issue—whether the FAA applied at all to any employment contract. Section 1 of the FAA provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁴⁴ The majority opinion discussed this in a footnote, expressly refusing to address the issue of the scope of the § 1 exclusion “because the arbitration clause being enforced here is not contained in a contract of employment,” but instead is in a securities representative application.⁴⁵ The dissenting justices, however, took the position that

41. *Id.* at 13-14. The Civil Rights Act of 1990, as Gilmer acknowledged, was passed by Congress, but vetoed by President Bush. *Id.* Gilmer argued that Congress had made it clear in this proposed legislation that Title VII claimants were not bound by arbitration and that, because the ADEA is analogous to Title VII, Congress intended the same for ADEA claims. *Id.* at 14. According to Gilmer's argument, it was not necessary for Congress to preclude arbitration when the ADEA was enacted because case law at that time precluded arbitration of statutory claims. *Id.* at 13.

42. *Id.* at 14-15. According to Gilmer's argument, because Congress provided the EEOC with the authority to investigate and attempt to conciliate discrimination charges and because no action could be maintained under the ADEA or Title VII without first filing with the EEOC, compulsory arbitration of these claims would undermine the role of the EEOC and conflict with this statutory scheme. *Id.*

43. *Id.* at 13.

44. 9 U.S.C. § 1 (1988).

45. *Gilmer*, 111 S. Ct. at 1651 n.2. The Court stated:

The record before us does not show and the parties do not contend that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. . . . [W]e therefore hold that § 1's exclusionary language clause does not apply to Gilmer's arbitration agreement. Consequently, we leave for another day the issue raised by *amici curiae*.

Id. (citations omitted).

§ 1 excluded all contracts of employment—collective bargaining agreements and individual employee contracts—from FAA coverage and that this issue should have been addressed.⁴⁶ Under the dissent's construction, there would be no federal policy in favor of the enforceability of an arbitration provision in an employment agreement, and the enforceability of an arbitration provision would have to be decided on a legal basis other than the FAA and its state counterparts.⁴⁷

46. *Id.* at 1657 (Stevens, J., dissenting). Justice Stevens, joined by Justice Marshall, raised three points in his dissent. First, Justice Stevens argued that the Court should have raised and decided the § 1 coverage issue since "the issue whether the FAA even covers employment disputes is clearly 'antecedent . . . and ultimately dispositive.'" *Id.* at 1658 (Stevens, J., dissenting) (quoting *Arcadia v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990)). Further, Justice Stevens opined that this issue had been adequately briefed by and amply raised with both parties at oral argument. *Id.* (Stevens, J., dissenting). The dissent recognized, as had the majority, that Gilmer had not raised the issue of the applicability of the FAA to employment contracts at any prior stage of the proceedings, and that it was *amici* who first raised this argument in their briefs prior to oral argument. *Id.* at 1657 (Stevens, J., dissenting). Justice Stevens nonetheless felt that the issue should be addressed, as the Court had just that term "decided cases on grounds not argued in any of the courts below or in the petitions for certiorari." *Id.* at 1658 (Stevens, J., dissenting). In addition, Justice Stevens noted that "respondent and its *amici* had full opportunity to brief and argue the issue in opposition." *Id.* (Stevens, J., dissenting).

Second, in Justice Stevens' view of the FAA's legislative history, "the primary concern animating the FAA was the perceived need by the business community to overturn the common law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities" and the exclusionary language was intended to exclude agreements between employees and employers from arbitration. *Id.* at 1659 (Stevens, J., dissenting). According to Justice Stevens: "When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to standard form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship." *Id.* at 1661 (Stevens, J., dissenting). Justice Stevens further stated:

I see no reason to limit this exclusion from coverage to arbitration clauses contained in agreements entitled "Contract of Employment." . . . Rather, in my opinion the exclusion in § 1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment.

Id. at 1659 (Stevens, J., dissenting).

Third, not only did Justice Stevens find that the FAA did not apply to employment-related disputes between employers and employees in general, but he also found that compulsory arbitration conflicted with the congressional purpose animating the ADEA. *Id.* at 1660 (Stevens, J., dissenting). One reason in particular for the conflict, in Justice Stevens' view, is the fact that arbitration does not provide for class-wide injunctive relief, a remedy essential to eliminate discrimination in society. *Id.* (Stevens, J., dissenting).

47. An issue not addressed in this discussion is the meaning, or lack thereof, of the similarity between the FAA and state arbitration statutes. One may assume that state legislatures that have adopted the federal § 1 language excluding "contracts of employment" did so with the intent that the exclusion

By resolving the FAA § 1 coverage issue as it did, however, the majority in effect was saying that there was nothing in the FAA's text or legislative history that precluded arbitration of statutory anti-discrimination claims based on an arbitration provision in a securities representative application. The question then became whether there was anything in the ADEA's text, legislative history or enforcement scheme that evidenced a congressional intent to preclude arbitration of ADEA claims. The majority concluded that there was not.⁴⁸

In reaching this conclusion, the *Gilmer* majority opinion encompassed four lines of reasoning: (1) the compatibility of arbitration with the ADEA's statutory purpose and enforcement scheme; (2) the adequacy of the NYSE arbitral process; (3) the contract of adhesion aspect of the arbitration provision; and (4) the significance of *Alexander v. Gardner-Denver* and its progeny to this case.

In the first line of discussion, addressing the compatibility of arbitration with the ADEA's statutory purpose and enforcement scheme, the Court found that the statutory purpose and enforcement scheme of the ADEA did not preclude arbitration of ADEA claims.⁴⁹ The majority did not perceive any inherent inconsistency between furthering the ADEA's important social policies and enforcing agreements to arbitrate ADEA claims because, according to the majority opinion, both the arbitral and the judicial forums further a statute's remedial and deterrent functions by providing a forum for an individual to vindicate his or her specific dispute.⁵⁰ Nor was the Court persuaded that enforcing arbitration would undermine the EEOC's enforcement role. As the majority pointed out, an individual could still file a charge with and provide information to the EEOC, or the EEOC could act independently in bringing a discrimination action against the employer (without the filing of a charge by an employee).⁵¹ Further,

would have the same meaning in the state statute as in the federal statute. If not, the federal statute would preempt a contrary state statute. *See Perry v. Thomas*, 482 U.S. 483 (1987) (holding that FAA preempted state statute allowing wage collection lawsuits despite existence of arbitration clause).

48. *Gilmer*, 111 S. Ct. at 1657.

49. *Id.* at 1653.

50. *Id.* According to the Court, "[b]oth [arbitration and judicial resolution] . . . can further broaden social purposes." *Id.* Just as the Court found in earlier cases that arbitration was consistent with furthering the important public policies underlying the Sherman Act, the Securities and Exchange Act of 1934, RICO, and the Securities Act of 1933, so also the Court found arbitration to be consistent with furthering the policies underlying the ADEA. *Id.*

51. *Id.*

according to the majority, individual disputes could be settled without EEOC involvement—the mere involvement of an administrative agency in the enforcement of a statute was not sufficient to preclude arbitration.⁵² In addition, the ADEA's flexible approach to resolution of claims suggested to the Court that "out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress."⁵³

The Court's second line of discussion focused on the adequacy of the arbitral process.⁵⁴ The majority concluded that NYSE arbitration rules governing the selection of arbitrators and the FAA provision that courts may overturn arbitration decisions due to "partiality or corruption in the arbitrators" were adequate safeguards against potential bias.⁵⁵ With regard to Gilmer's contention that the limited discovery afforded in arbitration would make a discrimination claim more difficult to prove, the majority concluded it would be unlikely that age discrimination claims would require discovery more extensive than that required by other statutory claims found to be arbitrable.⁵⁶

52. *Id.* The Court gave as an example the fact that "the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of those statutes may be subject to compulsory arbitration." *Id.*

53. *Id.* at 1654. The Court suggested that "arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts" because its enforceability serves "to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Id.* (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989)).

54. Gilmer had contended that arbitration panels would be biased against employee complainants, and that discovery would be more limited than in federal courts, thereby making it more difficult to prove discrimination. *Id.* Gilmer also alleged that, because arbitrators do not issue written opinions, there would be a resultant lack of public knowledge of employers' discriminatory policies, a diminished opportunity for appellate review and a stifling of the development of the law. *Id.* at 1655. In addition, according to Gilmer, arbitrators cannot provide for broad equitable relief and class actions. *Id.*

55. *Id.* at 1654 (quoting 9 U.S.C. § 10(b) (1988)).

56. *Id.* The Court again gave as examples of other statutory claims held to be arbitrable, RICO and antitrust claims. *Id.* The majority also expressed the opinion that arbitrators not being bound by the rules of evidence served as a "counterweight to reduced discovery," and "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* at 1655 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The majority also discussed Gilmer's other contentions in detail, but was not convinced that what he asserted was realistic or that, if it was, that arbitration was inadequate for resolving individual ADEA claims. *Id.* With regard to Gilmer's contention that arbitrators not issuing written opinions will result "in a lack of public knowledge of employers' discriminatory policies, an inability to

The third line of discussion focused on the unequal bargaining power between employers and employees. According to the Court, “[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”⁵⁷ Because the Court viewed the FAA’s purpose as placing arbitration agreements on the same footing as other contracts, the Court held that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁸ In other words, individual employment contracts with pre-dispute, mandatory arbitration provisions are enforceable to the same extent that other contracts of adhesion are enforceable under state common or statutory law. If the specific provision meets the state’s standards for an enforceable contract of adhesion, then it will be enforceable.

Finally, the fourth line of discussion distinguished *Alexander v. Gardner-Denver* and its progeny. According to the Court, there were several important distinctions between the *Gardner-Denver* line of cases and *Gilmer*, and therefore, reliance on those cases was “misplaced.”⁵⁹ First, as the Court noted, “those cases did not involve the issue of the enforceability of an agreement to arbitrate

obtain effective appellate review, and a stifling of the development of the law,” the Court noted that NYSE rules do require arbitration awards to be in writing, that “the award decisions are made available to the public” and that “judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements.” *Id.*

Gilmer had also contended that “arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions.” *Id.* In response to this argument, the Court noted that “arbitrators do have the power to fashion equitable relief” and that “arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.” *Id.*

57. *Id.*

58. *Id.* at 1656 (quoting 9 U.S.C. § 2 (1988)). While the Court also noted that courts should be alert for claims that fraud or overwhelming economic power led to an agreement to arbitrate—grounds “for the revocation of any contract” the majority did not think that *Gilmer*, “an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application.” *Id.*

59. *Id.* at 1656-57. According to the Court in *Gilmer*, the issue addressed in *Gardner-Denver* was “whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance.” *Id.* at 1656. The Court noted that it had stressed in *Gardner-Denver* “that an employee’s contractual rights under a collective-bargaining agreement are distinct from the employee’s statutory Title VII rights” *Id.* In addition, the Court noted in *Gilmer* that the “mistrust of the arbitral process” expressed in [*Gardner-Denver*] had been “un-

statutory claims,” but rather addressed the issue of “whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.”⁶⁰ Second, the arbitration in *Gardner-Denver* and the other two cases was pursuant to a collective bargaining agreement.⁶¹ According to the Court, because the claimants were represented by the union, whose desire to serve the collective interests of all employees in the bargaining unit could adversely affect its representation of the interests of an individual, “the tension between collective representation and individual statutory rights” was an important concern not applicable in *Gilmer*.⁶² Third, as the Court pointed out, none of these cases had been decided under the FAA, a statute which “reflects a ‘liberal federal policy favoring arbitration agreements.’ ”⁶³

After having taken the position that a securities representative application is not a “contract of employment” and therefore there was no need in this case to discuss and decide the scope of the FAA § 1 exclusion, the *Gilmer* majority came to several conclusions: (1) that enforcing mandatory arbitration of ADEA claims does not conflict with the statutory purpose or enforcement scheme of the ADEA; (2) that the arbitral process, at least under current NYSE rules, is adequate for the resolution of ADEA claims; (3) that a pre-dispute mandatory arbitration provision required as a condition of employment is an enforceable contract of adhesion provision if it satisfies relevant state contract law; and (4) that the *Gardner-Denver* trilogy of cases, focusing on whether an arbitral award pursuant to a collective-bargaining agreement on

dermined by our recent arbitration decisions.” *Id.* at 1656 & n.5 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987)).

The Court in *Gilmer* similarly distinguished *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728 (1981) and *McDonald v. City of West Branch*, 466 U.S. 284 (1984). According to the Court, those cases also “involved the issue whether arbitration under a collective-bargaining agreement precluded a subsequent statutory claim.” *Gilmer*, 111 S. Ct. at 1656-57. The Court then went on to state that the statutory claims were not precluded because of “the difference between contractual rights under a collective-bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators.” *Id.* at 1657.

60. *Gilmer*, 111 S. Ct. at 1657. “Since the employees [in the *Gardner-Denver* line of cases] had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions.” *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

an employment statutory claim precludes subsequent *de novo* litigation of the identical claim, provides no basis for refusing to enforce a condition of employment arbitration agreement.

The question to be decided in the future is the § 1 exclusion issue—will the Court limit *Gilmer* to the securities industry and comparable industries that require a similar application or will the Court extend *Gilmer* to cover individual employment agreements while continuing to exclude collective bargaining agreements? Without additional congressional legislation expressly covering the question of arbitrability,⁶⁴ the outcome will turn on how the Court interprets “contract of employment” in § 1 of the FAA.

If the Court were to find in the future that Congress intended the § 1 exclusionary language to cover only collective bargaining agreements in all union situations or exclusively in the transportation industry (and not individual employment contracts), then the FAA could be used as the legal basis for enforcing mandatory arbitration agreements made as a condition of employment. If the Court interprets the exclusionary language otherwise, then *Gilmer* will be a narrow decision, requiring only employees in the securities industry to arbitrate employment-related disputes based on a technicality—that the mandatory arbitration provision is not found formally in their employment agreement but in their registration application as a securities representative with the NYSE.

If the Court should hold that the FAA does not exclude individual employment contracts, the fourfold reasoning from *Gilmer* will apply to employment-related disputes of employees in other

64. After this article was begun, Congress enacted and President Bush signed into law the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, on November 21, 1991. Section 118, entitled, “Alternative Means of Dispute Resolution,” states:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Id. Title I of the Civil Rights Act of 1991 amends Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988) and the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991). The clear meaning of § 118 of the 1991 Civil Rights Act is that Congress recognizes the arbitrability of discrimination claims arising under the three acts mentioned above. This section is obviously applicable to individual employment contracts, although there may be a question of its applicability to arbitrations conducted pursuant to collective bargaining agreements based on the reasoning in the *Gardner-Denver* line of cases.

industries who have signed employment applications containing a conspicuous mandatory arbitration provision as a condition of employment. It is unlikely that any employee could bring a claim that would not fall within this reasoning. If the statutory purpose and enforcement schemes of the ADEA, the Sherman Act, the 1933 and 1934 Securities Acts and RICO are not inconsistent with mandatory arbitration, it is difficult to conceive of a statute that would have an "inherent conflict" with arbitration. The only real requirements imposed at that point would seem to be that the arbitral process utilized be at least as adequate as the NYSE model discussed in *Gilmer* and include the same range of remedies available under the relevant statutory and common law.⁶⁵ In addition, the contract of adhesion aspect of the employment contract would have to comply with state law standards.

The crucial insight to draw from the *Gilmer* majority's reasoning is that, while arbitration of statutory employment claims required by a collective bargaining agreement does not preclude subsequent litigation of the same claims, arbitration of statutory employment claims required by an individual employment agreement is enforceable and would preclude subsequent litigation of the identical claims. The key difference between *Gardner-Denver* and its progeny and FAA cases sustaining arbitrability is not that the former dealt with statutory employment claims inherently unsuitable for arbitration (e.g., Title VII) and the latter with statutory non-employment claims (e.g., antitrust, securities), but rather that the former were labor arbitrations in a collective bargaining context. By focusing on this distinction, the *Gilmer* majority has provided the basis for upholding the enforceability of arbitration of statutory claims, absent contrary congressional intent, in individual employment situations. It did so by distinguishing *Gilmer*'s situation from that of labor arbitration in a collective bargaining situation and not by distinguishing arbitration of employee complaints in the securities industry from that in other industries. Further, this approach allows the majority, when it does address the § 1 exclusion issue, to limit the meaning

65. Additional models that would appear to be adequate under *Gilmer* are those developed by the American Arbitration Association and the Center for Public Resources, Inc. Both have features identical, comparable with, or stronger than the features of the arbitration procedure available for *Gilmer*'s claim under the NYSE Rules (e.g., specific safeguards against potential arbitrator bias, adequate discovery procedures, written opinions available to the public and adequate relief). See MODEL EMPLOYMENT ARBITRATION PROCEDURES (Am. Arbitration Ass'n 1990); MODEL AGREEMENT AND MODEL PROCEDURE FOR EMPLOYMENT TERMINATION DISPUTE RESOLUTION (Center for Pub. Resources 1990).

of “contracts of employment” to collective bargaining agreements, an interpretation consistent with *Gilmer* and the FAA’s legislative history.

II. POST *GILMER* EMPLOYEE RIGHTS: TWO OPTIONS

Assuming that *Gilmer* provides a valid legal basis for the enforceability of an arbitration provision as a condition of employment, what rights does an applicant or employee have? One option is to submit the claim to arbitration in accordance with the terms of the employment agreement and then challenge any adverse result in court under the provisions of the FAA that provide the statutory grounds for vacating an award.⁶⁶ The other option is to refuse to arbitrate and, when the employer seeks court enforcement of the arbitration agreement, challenge the validity of the arbitration clause on state law grounds. The FAA provides that the validity of an arbitration provision may be challenged on “such grounds as exist at law or in equity for the revocation of any contract.”⁶⁷ Simultaneously, under either option, an individual claimant subject to an arbitration agreement is still free to file a charge with the EEOC.⁶⁸

III. LIMITING FAA APPLICABILITY

The basic question, of course, is why one would desire to preclude mandatory arbitration of statutory employment claims. One argument in favor of preclusion is that, while arbitration of claims—including statutory claims—arising out of a negotiated contractual arrangement between business parties makes good sense, the nature of the employment relationship is radically different from that of other business relationships.⁶⁹ Pre-dispute mandatory arbitration as a condition of employment is not the result of arm’s length negotiation. In addition, the focus of em-

66. See 9 U.S.C. § 16(a)(3) (Supp. II 1990) (appeal may be taken from final arbitration decision). *Gilmer* had suggested in his brief that judicial review of arbitration is too limited, but in response to this argument, the *Gilmer* majority expressed the view that judicial review “‘is sufficient to ensure that arbitrators comply with the requirements of the statute’ at issue.” *Gilmer*, 111 S. Ct. at 1655 n.4 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987)); see also Brief on the Merits for Petitioner at 20-21, *Gilmer* (No. 90-18).

67. 9 U.S.C. § 2 (1988).

68. See *Gilmer*, 111 S. Ct. at 1653 (“An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.”).

69. For a discussion of these differences, see *supra* notes 22-65 and accompanying text.

ployment claims is often not merely monetary damages but issues of equal employment opportunity and personal dignity.⁷⁰ It must be kept in mind, however, that it is possible to have an efficient, neutral, fully competent arbitral process for employment claims, even if this process has not been negotiated at arm's length.

Perhaps a stronger argument is that the systematic end result of mandatory arbitration is not necessarily the reduction of justice in the resolution of individual disputes, but rather a detrimental impact on the development of substantive statutory law at the appellate level. Since arbitral decisions need not be based on precedent, are private and are final with limited judicial scrutiny, the development of the substantive law will become almost exclusively a function of public enforcement agencies.⁷¹ In other words, it is the privacy and finality aspects of arbitration that are most troubling, rather than the neutrality or competency aspects. Such a systematic consequence may be desirable in the world of commercial relationships and securities investors, but may not be desirable for employer-employee relations.

Prior to the enactment of the Civil Rights Act of 1991,⁷² one way to attempt to preclude the FAA's applicability to individual employment contracts would have been to bring an appropriate § 1 case, contending that *Gilmer* should be limited to the securities industry on the grounds that a securities registration agreement is not an employment contract and that § 1 of the FAA excludes "contracts of employment." While at this point in time there is no indication whether the Court would interpret "contracts of employment" to exclude individual employment agreements as well as collective bargaining agreements, the enactment of the Civil Rights Act of 1991 has made the point moot with regard to

70. See Shell, *supra* note 9, at 14.

The use of arbitration may make sense in some commercial contexts, such as customer-broker disputes, in which routine claims of economic harm predominate. When employees have claims that they were fired or passed over because of race, sex or age, however, something beyond economic harm is at stake. A person's personal dignity and the expectation that he or she will be judged on merit rather than stereotype is a fundamental characteristic of America's approach to work.

Id.

71. In response to this expanded role and to advance the development of a coherent body of substantive law to guide arbitrators and lower courts, agencies would need to be more aggressive in bringing litigation and in appealing adverse results. A side effect of this expansion would most likely be a need for greater enforcement resources in this effort.

72. Pub. L. No. 102-166, 105 Stat. 1071 (1991). For a discussion of the Act, see *supra* note 64.

discrimination claims.⁷³ Further, the *Gilmer* majority's distinction between a securities application registration as a condition of employment and a contract of employment focuses on formality, not on substance. To enforce arbitration in the securities industry but not in other industries on this basis does not make sense.

A legislative route to preclude FAA applicability is more certain. This approach also provides the opportunity to consider whether to preclude any arbitration—post-dispute as well as pre-dispute—of any employment claims (statutory, common law or constitutional) or simply to preclude the enforceability of pre-dispute mandatory arbitration provisions.

There are several legislative alternatives. First, the FAA itself could be amended to expressly declare that its provisions requiring enforcement of pre-dispute mandatory arbitration do not apply to any employment agreement. The amendment would have to be worded to preclude the enforceability of any pre-dispute mandatory arbitration provision in any contract of employment on any legal basis unless Congress expressly authorized arbitration. Under the Supremacy Clause of the U.S. Constitution, this amendment would also preempt any state counterpart to the contrary. An alternative legislative approach would be to amend the Civil Rights Act of 1991 to eliminate § 118 and to substitute language excluding the arbitrability of claims arising under the federal anti-discrimination laws.

73. The legislative history of the FAA indicates that Congress in 1925 intended to enforce commercial arbitration agreements voluntarily arrived at between merchants as a result of arm's length negotiating and to exclude, at least, from enforceability under the Act arbitration clauses in collective bargaining agreements between management and labor involved in transportation industries. See *Tenney Eng'g v. United Elec. Radio & Mach. Workers*, 207 F.2d 450, 452 (3d Cir. 1953) (holding that Congress intended FAA § 1 to exclude only workers engaged in transportation industries). Organized labor objected to the first draft of the proposed legislation because it could be read to cover disputes between labor and management. To meet this objection, the exclusionary language recommended by then Secretary of Commerce Herbert Hoover was added to § 1. The legislative history is silent about individual employment contracts. For contrasting versions and interpretations of the legislative history, compare Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioner at 17-22, *Gilmer* (No. 90-18) with Brief of Securities Industry Association, Inc. as Amicus Curiae in Support of Respondent at 18-20, *Gilmer* (No. 90-18); Brief Amici Curiae of the Equal Employment Advisory Council and the Professional Employment Research Council in Support of Respondent at 14-16, *Gilmer* (No. 90-18); Brief on the Merits for Respondent at 46-50, *Gilmer* (No. 90-18).

IV. CONCLUSION

The law does not require arbitration except on the basis of a signed contractual agreement in writing. Prior to *Gilmer*, it was already clear that broad language in an arbitration agreement (e.g., “any dispute,” or “any controversy”) would be held to include statutory claims as well as common law tort and contract claims. Moreover, the Court had already determined that the only statutory claims that would not be held to be arbitral were those that Congress intended not to be arbitrated. The party claiming such a congressional intent has the burden of establishing it from the statutory language, the legislative history or by showing an inherent conflict between the statute’s purpose and enforcement scheme and arbitration.⁷⁴ Given the absence of any evidence of such a congressional intent in either the text or legislative history of most statutes since 1925, it would seem that “conflict analysis” would be crucial to those opposing arbitration. Given, however, the unsuccessful use of “conflict analysis” to establish congressional intent in recent years,⁷⁵ and most recently in *Gilmer*,⁷⁶ one may reasonably conclude that the best way for those opposing the arbitration of employment-related statutory claims to limit the FAA’s applicability is to ask Congress to amend the FAA to clarify its § 1 exclusionary language, to amend § 118 of the Civil Rights Act of 1991, or to amend both acts.

Since enactment of the Civil Rights Act of 1991 seems to have rendered the FAA § 1 coverage question moot with regard to discrimination claims, the only remaining challenges to a pre-dispute arbitration agreement are under the FAA’s judicial review provisions and state contract law. With regard to judicial review of an arbitration decision, the role of the courts under the FAA is to compel arbitration, stay judicial proceedings and review and enforce arbitral awards. After the *Gilmer* majority’s comments

74. *Gilmer*, 111 S. Ct. at 1652.

75. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (holding that enforcement of pre-dispute arbitration agreements furthers purpose and effect of FAA without undermining purpose or effect of 1933 Securities Act); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that arbitrability serves purposes of Securities Exchange Act and RICO); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985) (holding that mere appearance of anti-trust dispute under Sherman Act does not warrant invalidation of arbitration clause; nothing in nature of federal antitrust laws prohibits parties from agreeing to arbitrate antitrust claims).

76. *Gilmer*, 111 S. Ct. at 1651-53 (holding that there is no inconsistency between policies furthered by ADEA and enforcing agreements to arbitrate age discrimination claims).

about judicial review of arbitration, we can most likely expect increased and more expansive judicial scrutiny of the arbitral process itself. This increased level of scrutiny should provide further stimulus to the evolution of the law governing arbitration. With regard to a state law challenge to a mandatory arbitration clause, § 2 of the FAA requires that arbitration provisions “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁷⁷ If the use of a mandatory arbitration clause in an employment contract is a contract of adhesion, then it is unenforceable under state law only on the same grounds and to the same extent as any other contract of adhesion in that state.

77. 9 U.S.C. § 2 (1988).

