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## Mandatory Arbitration: Stripping Securities Industry Employees of Their Civil Rights

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## COMMENTS

### MANDATORY ARBITRATION: STRIPPING SECURITIES INDUSTRY EMPLOYEES OF THEIR CIVIL RIGHTS

In a recent series of decisions, negative judicial attitudes toward arbitration<sup>1</sup> have shifted to more positive views, resulting in current treatment of arbitration as a favored method of dispute resolution.<sup>2</sup> The enforceability of Pre-Dispute Arbitration Agreements (PDAAs)<sup>3</sup> in relation to statutory claims is an issue that has been extensively litigated.<sup>4</sup> In

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1. Arbitration, an alternative to litigation, permits "a dispute between two or more parties [to be] resolved by impartial persons . . . knowledgeable in the areas in controversy." SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, ARBITRATION PROCEDURES 3 (1992) [hereinafter ARBITRATION PROCEDURES]; *see also* HEALTH, EDUCATION, AND HUMAN SERVICES DIVISION, GENERAL ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 1 (1994) [hereinafter 1994 GAO REPORT]. "Arbitration is the submission of a dispute between parties to a neutral third party—an arbitrator—for resolution." *Id.*

2. *See, e.g., Wilko v. Swan*, 346 U.S. 427, 438 (1953) (finding that arbitration was not as effective as litigation for ensuring that investors receive the protections of the securities laws); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985) (stating that "we are well past the time" of judicial suspicion of arbitration and the competence of arbitrators, and noting that the Federal Arbitration Act (FAA) mandates a liberal federal policy favoring arbitration agreements); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 and n.32 (1983) (stating that the "liberal federal policy favoring" pre-dispute arbitration agreements (PDAAs) is manifested through the FAA).

3. A Pre-Dispute Arbitration Agreement should be differentiated from a Post-Dispute Arbitration Agreement. Pre-dispute agreements are made prior to any dispute, and "without a party's full understanding of the waiver or of possible liabilities because the dispute has not yet materialized." Jenifer A. Magyar, *Statutory Civil Rights Claims in Arbitration: Analysis of Gilmer v. Interstate/Johnson Lane Corp.*, 72 B.U. L. REV. 641, 643 n.18 (1992). On the other hand, "[i]n post-dispute agreements, the parties acknowledge that they are waiving a judicial forum for resolution of a known dispute. They are presumptively aware of potential liabilities." *Id.* Throughout this Comment, the author uses the term PDAA as the equivalent of what is commonly known as an arbitration agreement.

4. *See, e.g., Wilko*, 346 U.S. at 438 (requiring a judicial forum to protect the substantive rights created by the Securities Act of 1933); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-55 (1974) (refusing to give preclusive effect to an arbitral decision involving a claim under Title VII of the Civil Rights Act of 1964); *Mitsubishi*, 473 U.S. at 628-40 (enforcing an arbitration clause in a commercial contract arising under the Sherman Antitrust Act); *Shearson/American Express v. McMahon*, 482 U.S. 220, 238-42 (1987) (holding both the Securities and Exchange Act and the Racketeer Influenced and Corrupt Organizations

1991, the Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>5</sup> addressed the enforceability of a PDAA contained in a registered representative's<sup>6</sup> standard application for securities industry registration (Form U-4).<sup>7</sup> The plaintiff's claim arose under the Federal Age Discrimination in Employment Act (ADEA),<sup>8</sup> and the Court's holding opened the door

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Act claims arbitrable in a domestic dispute); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-86 (1989) (holding 1934 Act claims arbitrable); *see also* C. EDWARD FLETCHER, *ARBITRATING SECURITIES DISPUTES* 29 (Larry D. Soderquist ed. 1990) (explaining that "[t]he enforceability of arbitration clauses has been litigated extensively in past years").

5. 500 U.S. 20 (1991) (holding that a PDAA between a registered representative and a stock exchange, contained in Form U-4, mandates arbitration of claims arising under the ADEA). *Gilmer*, as a requirement of employment with Interstate/Johnson Lane Corporation (Interstate), registered with several stock exchanges. *Id.* at 23. His registration application provided that *Gilmer* "agree[d] to arbitrate any dispute, claim or controversy." *Id.*

6. "Registered representatives are firm employees who accept and execute customers' buy-and-sell orders." 1994 GAO REPORT, *supra* note 1, at 1; *see* 15 DAVID A. LIPTON, *BROKER-DEALER REGULATION*, § 2.05[1], at 2-48 to 2-49 (stating that all persons associated with an NASD member firm must register with the NASD). Securities firms frequently require employees to register with one or more stock exchanges, thus becoming registered representatives (RRs). *See* 1994 GAO REPORT, *supra* note 1, at 1 (stating that, "[r]egistered representatives constitute approximately 32 percent of securities industry employees in the largest 50 securities firms in the United States"). Pursuant to the PDAA in their registration application, RRs "agree to arbitrate any dispute, claim, or controversy that may arise." *Id.* The rules of most exchanges and the NASD provide for arbitration of employment disputes as an alternative to the judicial forum for resolving controversies between market professionals and their customers and among market professionals. Mark D. Fitterman & Robert Asher Love, *The Regulatory Framework of Securities Arbitration*, in *SECURITIES ARBITRATION: PRACTICE AND FORMS* § 1.01, at 1-1, 1-4 (Anthony Djinis & Joseph A. Post eds., 1994) [hereinafter *SECURITIES ARBITRATION*]; *e.g.*, NATIONAL ASSOCIATION OF SECURITIES DEALERS, *CODE OF ARBITRATION PROCEDURE* 4, § 1 (Dec. 1993) [hereinafter *NASD CAP*]; NEW YORK STOCK EXCHANGE, INC., *CONSTITUTION AND RULES* (CCH) ¶ 2347, Rule 347 (Nov. 1, 1993) [hereinafter *NYSE RULE*].

7. Form U-4, Uniform Application for Securities Industry Registration or Transfer, item 5, *reprinted in* *SECURITIES ARBITRATION*, *supra* note 6, at app. 1C-2 (highlighting the boilerplate provision found several pages into the Form U-4, whereby RRs agree to arbitrate any controversy that might arise between them and the firm that is required to be arbitrated under the rules of the securities exchanges); *e.g.* *NYSE RULE* 347. Form U-4 is used as the application for those associated with a firm as securities representatives. LIPTON, *supra* note 6, § 2.05[1], at 2-49.

8. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634 (1988 and Supp. V 1993)) (prohibiting discrimination on the basis of age against workers over age 40).

to compulsory arbitration<sup>9</sup> of employment discrimination claims in the securities industry's private arbitration system.<sup>10</sup>

*Gilmer* has had a significant impact on securities industry employment litigation.<sup>11</sup> *Gilmer* mandates that a PDAA can be invoked for the settlement of statutory employment law claims in the industry, nullifying the

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9. Compulsory arbitration refers to the judicial enforcement of PDAA's to resolve disputes through binding arbitration. See BLACK'S LAW DICTIONARY 105 (6th ed. 1990) (defining compulsory arbitration as that which takes place when the consent of one of the parties is enforced by statutory provisions). "Issues of compelling or resisting arbitration arise when one party to an apparently arbitrable dispute refuses to participate in the arbitration or seeks to use the judicial process . . . either to resolve the entire dispute or to obtain partial relief . . . outside the arbitration proceeding." Carol Goodman, *Compelling or Resisting Arbitration*, in SECURITIES ARBITRATION, *supra* note 6, § 5.01[1] at 5-6.

10. See Securities and Exchange Act of 1934, 15 U.S.C. § 78(c)(26) (1994) [hereinafter 1934 Act] (defining a self-regulatory organization); GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, SECURITIES ARBITRATION: HOW INVESTORS FARE, 14 (1992) [hereinafter 1992 GAO REPORT] (explaining the securities industry as one that "administers and oversees arbitration according to the industry's principle of self-regulation"). Self-regulatory organizations (SROs) "are groups of industry professionals [that both] . . . operate and regulate" market facilities. 1994 GAO REPORT, *supra* note 1, at 4. SROs, which include the nine securities exchanges, such as the New York and the American Stock Exchanges, and the NASD, which regulates the over-the-counter market, are overseen by the Securities and Exchange Commission (the "Commission") through the review, approval, or rejection of SRO rules under section 19(b) of the 1934 Act. 15 U.S.C. § 78s (b). See *id.* (providing that SROs must file proposed rule changes with the Commission, including the rules governing the conduct of its arbitration programs which are based on the Uniform Code of Arbitration). SROs have "primary regulatory responsibility [under the 1934 Act] to adopt and enforce standards of conduct for their member securities firms." 1994 GAO REPORT, *supra* note 1, at 4; see the 1934 Act, 15 U.S.C. § 78(f) (providing that no registration of a national securities exchange shall be granted or remain in force unless its rules provide for the expulsion, suspension, or discipline of a member for conduct inconsistent with just and equitable principles of trade); see also SECURITIES ARBITRATION, *supra* note 6, § 1.02[1], [2], at 1-14 to 1-15 (explaining the Commission's review of arbitration rules); *infra* notes 118-35 and accompanying text (discussing the SRO's role in the arbitration process).

11. Subsequent to *Gilmer*, federal and state courts consistently have upheld agreements to arbitrate disputes between employers and employees, including discrimination claim disputes. See, e.g., *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) (discussing Title VII and state law claims of battery, intentional infliction of emotional distress, and negligent retention); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 229 (5th Cir. 1991) (Title VII), *dismissed*, 975 F.2d 1161 (5th Cir. 1992); *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 117 (2d Cir.), *cert. denied*, 501 U.S. 1251 (1991) (ERISA); *Kaliden v. Shearson Lehman Hutton, Inc.*, 789 F. Supp. 179, 180 (W.D. Pa. 1991) (ADEA and the Pennsylvania Human Relations Act); *Moore v. Merrill Lynch, Pierce, Fenner & Smith*, 56 Fair Empl. Prac. Cas. (BNA) 1466, 1466 (D.N.J. July 23, 1991) (ADEA, New Jersey Conscientious Employee Protection Act, and the New Jersey Law against Discrimination); *Stuart H. Bompey & Michael P. Pappas, Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims after Gilmer*, 19 EMPLOYEE REL. L.J. 197, 197 (1993-1994) (stating that in response to *Gilmer*, federal and state courts hearing discrimination claims both inside and outside the securities industry have compelled arbitration).

view that such claims may not be subject to compulsory arbitration.<sup>12</sup> However, the current securities industry arbitration system may not be capable of preserving the intentions of the civil rights statutes nor adequately resolving the claims of industry employees in adherence with current employment law.<sup>13</sup> This potential clash between *Gilmer* and the intentions underlying the civil rights statutes needs to be resolved.

Securities industry arbitration was not designed to resolve the range of claims it currently encompasses.<sup>14</sup> The initial intent of securities industry arbitration was to resolve commercial disputes between the industry and public investors by providing them with an impartial third party who possessed an understanding of the securities industry.<sup>15</sup> In the commercial

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12. Bompey & Pappas, *supra* note 11, at 199 (stating that *Gilmer* rejects the traditional view that employment-related claims are not arbitrable).

13. See Margaret A. Jacobs, *Riding Crop and Slurs: How Wall Street Dealt With a Sex-Bias Case*, WALL ST. J., June 9, 1994, at A1 (illustrating the typical course of events resulting in mandatory securities industry arbitration). Helen Walters, a trading-room secretary at a California brokerage firm, filed a complaint alleging what appeared to be a clear example of sexual harassment. *Id.* at A1, A6. She claimed that her boss subjected her to crude anatomical slang, obscene name calling, physical threats, and unwanted gifts of condoms. *Id.* at A1. Walters' claim was arbitrated pursuant to the PDAA in her Form U-4. *Id.* at A6. The New York Stock Exchange oversaw the arbitration proceedings and empaneled three male arbitrators to hear the case—none of whom had any experience or training in current discrimination or sex-bias law. *Id.* The arbitrators focused witness questioning on the characterization of the behavior in question relative to the norm in the securities industry. *Id.* Their inquiry, however, should have been whether a reasonable person in the circumstances in which the complainant found herself would find the work environment "hostile or abusive." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66, 73 (1986) (finding that discriminatory behavior depends on the victim's perception that the environment is hostile). The arbitrators ultimately dismissed Walters' case. Jacobs, *supra*, at A1.

14. See SECURITIES ARBITRATION, *supra* note 6, § 1.01[2], at 1-6 (stating that the Uniform Code of Arbitration (Uniform Code) has expanded from its intended focus on "small claims" to provide a uniform set of rules for the arbitration of all investor/broker-dealer disputes"). Currently, the Uniform Code is invoked for the resolution of intra-industry disputes, such as disputes between a brokerage firm and their employees. *Id.*; see also Diana B. Henriques, *When Naïveté Meets Wall Street*, N.Y. TIMES, Dec. 3, 1989, at C1, C6 (explaining that the securities arbitration system is designed to be pro-investor and not designed to process the volume or complexity of the cases it now handles); *infra* notes 136-38 and accompanying text (discussing the original narrow intent of the securities industry arbitration system).

15. Originally, the Commission delegated development of a model arbitration system for the resolution of small claims to the SROs who implemented an investor dispute resolution system, including a uniform arbitration code. See SECURITIES ARBITRATION, *supra* note 6, § 1.01[2], at 1-5, (citing Securities Exchange Act Release No. 13470 (April 26, 1977)); see also SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, FIFTH REPORT 2-3 (April 1986) (stating that Securities Industry Conference on Arbitration (SICA), composed of representatives of all of the SROs as well as the public, drafted the Uniform Code, a mechanism for resolving disputes between brokers, dealers, and customers) [hereinafter SICA REPORT #5]; 1992 GAO REPORT, *supra* note 10, at 15 n.2 (stating that "SICA's original mandate was to develop rules for the resolution of disputes involving small claims").

dispute context, arbitration offers many advantages over litigation, and is an efficient and desired substitute for judicial resolution of disputes.<sup>16</sup> In true "securities" disputes (non-employment related commercial cases), these advantages make arbitration very attractive.<sup>17</sup> On the other hand, while employment discrimination claims involve the industry and its employees, they typically do not involve the same issues as commercial disputes involving the industry and public investors.<sup>18</sup>

Criticisms of securities industry arbitration with respect to employment-related disputes do not focus on deficiencies in the arbitration process, but rather, on the underlying effects of arbitration.<sup>19</sup> While an

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16. For example, because arbitrators possess an understanding of industry practices the chances are enhanced that an accurate outcome is achieved faster because less time is spent "educating the trier of fact." FLETCHER, *supra* note 4, at 106-07 (noting, "[a]ny lawyer who has had to enlighten a jury concerning . . . bear spreads, naked calls, and options on stock index futures will appreciate the time saved in arbitrating before a panel that already understands the language"). Similarly, arbitration is faster and less costly than litigation due to limited discovery, the absence of a jury, the limited availability of appeal, disregard of the rules of evidence, and the informality of procedures such as document exchange. *See id.* §§ 4.7-4.9, § 4.12 (explaining that the cost of arbitration is about 40% the cost of litigation); *see, e.g.*, SHELDON M. JAFFE, *BROKER-DEALERS AND SECURITIES MARKETS: A GUIDE TO THE REGULATORY PROCESS* § 17.01 (1977) (stating that arbitration provides cost and time savings advantages due to fewer pretrial motions, limited discovery, and relaxed rules of evidence); 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, 237-38 (1992) (explaining that the average judicially settled federal civil rights employment case lasts several months longer than a similar arbitration); FLETCHER, *supra* note 4, § 4.6, at 111 (noting that the average arbitration proceeding is approximately five and one-half months shorter than litigation).

17. Arbitration provides for faster and cheaper resolution of disputes in comparison to litigation. Godsil Cooper, *supra* note 16, at 237-38. Additionally, an arbitrator's knowledge or background in securities industry customs and practices can be utilized in his or her decision-making. Laura R. Hillock, Comment, *Arbitration of Title VII and Parallel State Discrimination Claims: A Proposal*, 27 CAL. W. L. REV. 179, 182 (1990-91) (noting that the arbitrator selected may be a technical specialist in the field); *see infra* notes 156-78 and accompanying text (discussing arbitrators' unique knowledge base).

18. *See New York Stock Exchange, Inc., Symposium on Arbitration in the Securities Industry*, 63 FORDHAM L. REV. 1501, 1613 (1995) (the employment discrimination panel discussed that the drafters of the Uniform Code of Arbitration did not specifically intend it to apply to employment discrimination disputes) [hereinafter *Symposium*].

19. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974) (stating that "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution," and noting, conversely, that this characteristic also makes arbitration "a less appropriate forum [than the courts] for final resolution of" statutory claims); *see* Joseph A. Post, *Determining Whether to Arbitrate or Litigate*, in SECURITIES ARBITRATION, *supra* note 6, §§ 4.05-.06, at 4-10 to 4-12 (explaining that the procedural limitations of arbitration are offset by the costs and time savings). Limited discovery may constrain parties who need to establish key elements in their claim. *Id.* § 4.05, at 4-10. Further, the lack of reasoned, written opinions limits both the collateral estoppel impact of an award and the "public relations" effect an award has on a brokerage firm. *Id.* § 4.06; *see also* David A. Lipton, *Mandatory Securities Industry Arbitration: The*

arbitrator's specific understanding of securities industry practices makes him or her an attractive intermediary with respect to commercial disputes, the arbitrator's industry knowledge does not necessarily afford an understanding of current employment laws.<sup>20</sup> This trade-off of efficiency, for the full procedural protections of litigation,<sup>21</sup> is considered tolerable in commercial claims, but has extremely high costs in civil rights employment claims.<sup>22</sup>

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*Problems and the Solution*, 48 MD. L. REV. 881, 883 (1989) (explaining that without limitations on the right to appeal arbitration awards, the efficiency of the forum would be reduced).

20. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743-44 (1981) (stating that many arbitrators may lack familiarity with the policy considerations underlying federal anti-discrimination statutes, and while arbitrators may be capable of resolving preliminary factual questions, they may lack the ability to determine ultimate legal issues). Employment disputes typically involve compensation, training costs, improper termination, defamation after termination, and the enforceability of non-compete clauses. MARILYN BLUMBERG CANE & PATRICIA A. SHUB, *SECURITIES ARBITRATION: LAW AND PROCEDURE* 370 (1991) (stating that the quality of arbitrators is impacted negatively by the lack of a training prerequisite for acceptance as an arbitrator); see 1994 GAO REPORT, *supra* note 1, at 12 (noting that neither the NASD nor NYSE systematically assigns arbitrators to panels based on subject matter expertise). Arbitrator selection is predicated on affiliation with the securities industry rather than on subject matter expertise. NASD CAP § 19(d); see also 1994 GAO Report, *supra*, at 12. Therefore, the classification of arbitrators results in only two categories—industry and public. *Id.* at 5. Industry arbitrators are those who currently are, or within the last three years were, affiliated with the industry, or are retirees from a profession where they devoted 20% of their professional time to securities industry clients. *Id.* at 5-6. While presumably industry arbitrators have knowledge of the securities industry, there is no reason to believe their knowledge base encompasses employment issues. SROs, however, are making an effort to provide arbitrators with current literature, case law developments, and periodic voluntary training opportunities. *SECURITIES ARBITRATION*, *supra* note 6, § 1.06[1], at 1-37; see *infra* notes 156-78 and accompanying text (explaining the importance of arbitrator knowledge in the matter in controversy).

21. Magyar, *supra* note 3, at 654-55 (explaining that “attendant costs that may be tolerable in statutory commercial claims [are] unacceptably high in a statutory civil rights context”); see *SECURITIES ARBITRATION*, *supra* note 6, § 4.05, at 4-10 to 4-11 (stating that the increased efficiency of arbitration is the result of procedural limitations which must be counterbalanced against the reduction in cost and delay).

22. *Alexander v. Gardner-Denver*, 415 U.S. 36, 58 (1974) (explaining that the informality of arbitration enables “it to function as an efficient, inexpensive and expeditious” forum of dispute resolution for commercial claims and that this is precisely what makes arbitration a less appropriate forum for statutory claims); see Hillock, *supra* note 17, at 182-83 (explaining that “where public policy issues like employment discrimination are concerned” the inherent advantages to arbitration “may become obstacles”). For example, arbitrators are not required to apply substantive or procedural law, rules of evidence, or reasons for their decisions. *Id.* at 183; Magyar, *supra* note 3, at 654-55 (explaining that the fundamental characteristics of arbitration inherently curtail statutory safeguards in civil rights disputes). For example, limited discovery with respect to arbitration of civil rights employment claims may make them more difficult to prove. *Id.* at 655; Godsil Cooper, *supra* note 16, at 218 (pointing out the difficulty in proving disparate impact without the benefit of full pre-hearing discovery). Conversely, if claimants were permitted access to extensive discovery in arbitration, the efficiency of arbitration would be reduced. See Lip-

The impact of securities arbitration on employment disputes negatively affects the antidiscrimination policies incorporated in the civil rights statutes because fewer claims can be brought successfully through arbitration.<sup>23</sup> Arbitration both shields civil rights decisions from public awareness and lacks precedential force in future disputes.<sup>24</sup> These characteristics prevent securities industry arbitration from advancing the deterrent and remedial functions of the civil rights laws.<sup>25</sup>

This Comment examines the capability of the securities industry's mandatory arbitration system to protect statutory employment civil rights. This Comment first traces the historical development of the arbitration of statutory rights and its extension to statutory employment rights. Second, this Comment examines whether the arbitral forum of the securities industry is appropriate to resolve statutory employment civil rights claims. This Comment concludes that given the unique characteristics of securities industry arbitration, this forum is incapable of advancing the protections and intentions of civil rights laws. This Comment suggests modifications to the current securities industry arbitration system which would provide greater safeguards for an employee's civil rights. In the alternative, this Comment supports the removal of employment disputes from the securities industry's arbitration arena.

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ton, *supra* note 19, at 883. Similarly, claimant's right of appeal is limited because by contract they forgo litigation to participate in a expeditious and efficient forum; if an arbitration decision was fully appealable, the efficiency of the arbitration mechanism would be reduced. *Id.*; *see infra* notes 239-45 and accompanying text (discussing the distinctions between commercial and civil disputes, and concluding that while arbitration is appropriate to resolve commercial claims, it is a poor adaptation for resolving civil rights and equal protection claims).

23. *See* Magyar, *supra* note 3, at 655 (noting that while Congress intended to protect the basic right to equal employment opportunity regardless of race, color, religion, sex, national origin, age, or disability by enacting civil rights legislation, the arbitration system procedurally inhibits these protections).

24. *Id.* (stating that public awareness and public involvement are critical to the deterrent and remedial functions of civil rights claims, and without written, reasoned, precedential, public opinions, the civil rights legislation is inhibited substantively); BLUMBERG CANE & SHUB, *supra* note 20, at 245 (noting that as a result of the 1989 SRO rule changes, most arbitration awards contain a brief summary of the issues in dispute and sometimes include specific findings of fact); *see also* SECURITIES ARBITRATION *supra* note 6, § 4.04, at 4-8 (explaining that the reduced reliance on precedent in arbitration means that past precedent will have little effect on current or future claims).

25. Magyar, *supra* note 3, at 655 (concluding that the discrete nature of arbitration makes it an inappropriate forum for civil rights cases because the less public awareness a claim receives the greater probability the problem will continue to be ignored); *see* FLETCHER, *supra* note 4, at 104-05 (noting that arbitration, unlike litigation, remains confidential because the public is excluded from the hearing and the transcript is not a public record); *e.g.* NASD CAP § 28 (providing that the arbitrators shall determine the attendance of all persons at a hearing).



## I. THE HISTORY OF THE DISPUTE OVER ARBITRATION

### A. *The Federal Arbitration Act Creates a Policy Favoring Arbitration*

Historically, courts refused to enforce arbitration clauses, viewing them as second class compared to other contractual provisions.<sup>26</sup> By this refusal, the judiciary maintained federal jurisdiction over claims and thereby the ability to implement the policies of federal statutes.<sup>27</sup> This tradition was so firmly embedded in the judicial system that legislation was needed to overturn it.<sup>28</sup> The enactment of the Federal Arbitration Act of 1925 (FAA)<sup>29</sup> established a federal mandate favoring arbitration,

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26. See *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 219-20 (1985) (pointing out that the purpose of the FAA was to overrule traditional judicial refusal to enforce arbitration agreements); see also *BLUMBERG CANE & SHUB*, *supra* note 20, at 255 (explaining that originally "arbitration was 'an unwanted stepchild in the courts,' . . . viewed . . . as [an] attempt[ ] to deprive [the courts] of their natural jurisdiction"); Stephen P. Bedell et al., *The McMahon Mandate: Compulsory Arbitration of Securities and RICO Claims*, 19 *LOY. U. CHI. L.J.* 1, 1 (1987) (stating that "authorities have accorded arbitration clauses a lesser status than other contract terms, and have concluded that the judiciary may, in its discretion, refuse to enforce arbitration clauses . . . to preserve . . . jurisdiction . . . or to . . . implement [policy]").

27. *Wilko v. Swan*, 346 U.S. 427 (1953) (requiring a judicial forum to protect the substantive rights created by the Securities Act of 1933). The Court explained that the "protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness." *Id.* at 437; see *BLUMBERG CANE & SHUB*, *supra* note 20, at 255 (stating that the FAA reversed traditional judicial hostility toward arbitration by providing for faster and more economical resolutions than litigation). The Court subsequently announced an exception to the *Wilko* doctrine. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-21 (1974) (finding that PDAs between parties of equal bargaining power and involving complex international business and legal questions was enforceable with respect to a claim arising under section 10(b) of the 1934 Act).

28. *Dean Witter Reynolds v. Byrd, Inc.*, 470 U.S. 213, 219 (1985). Because the judicial suspicion of arbitration was so "firmly embedded in the English common law and was adopted . . . by the American courts . . . [t]he courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment." *Id.* at 220 n.6. This view prevailed with little new analysis for 20 years. See, e.g., *De Lancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1258-59 n.4 (9th Cir. 1981) (noting that when it is impracticable "to separate out nonarbitrable from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over federal securities claims") (quoting *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 335 (5th Cir. 1981)); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 826-29 (10th Cir. 1978) (finding that the Securities Acts' policies requiring judicial direction to assure their effectiveness outweigh those favoring arbitration); *Allegaert v. Perot*, 548 F.2d 432, 438 (2d Cir.) (concluding that arbitration of a claim arising under the securities laws and Bankruptcy Act could not be compelled), *cert. denied*, 432 U.S. 910 (1977); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833-35 (7th Cir. 1977) (finding that waivers of the right to judicial trial would be inconsistent with Congress' overriding concern for the protection of investors in a 1934 Act context).

29. United States Arbitration Act, ch. 213, § 1, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (1994)) [hereinafter FAA].

and was instrumental in promoting greater judicial acceptance of contractual clauses providing for arbitration of future disputes.<sup>30</sup>

The FAA provides that a written provision in any contract which requires arbitration of a dispute shall be considered “valid, irrevocable, and enforceable” to the same extent as any other contractual provision.<sup>31</sup> The FAA, however, excludes from its coverage some employment contracts.<sup>32</sup> The statute further provides that if one party to an arbitration agreement refuses to comply with its provisions, the other party may petition a federal court for an order compelling arbitration.<sup>33</sup> The statute leaves the basic arbitration procedures, such as the manner of arbitrator selection and choice of law, to the parties’ discretion.<sup>34</sup> The FAA also limits judicial review of arbitration awards to situations involving arbitrator misconduct,<sup>35</sup> partiality,<sup>36</sup> or abuse of power.<sup>37</sup>

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30. *See, e.g.*, *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 and n.32 (1983) (stating that the “liberal federal policy favoring arbitration agreements,” manifested by this provision and the FAA as a whole, “creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate”); *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (stating that the FAA mandates a “liberal federal policy favoring arbitration agreements”) (quoting *Mercury Constr. Corp.*, 460 U.S. at 24).

31. 9 U.S.C. § 2. The FAA makes a written agreement to arbitrate “in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.* *See* SECURITIES ARBITRATION, *supra* note 6, § 1.01[2], at 1-6 (explaining that the FAA “places contracts to arbitrate on the same footing as other contracts”).

32. 9 U.S.C. § 1 (excluding “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”).

33. *Id.* at § 4 (providing that if the formation of the arbitration agreement is not at issue, the court shall order the parties to arbitrate pursuant to the terms of the agreement); *see* JAFFE, *supra* note 16, § 17.02, at 340 (explaining that upon motion, “the court shall stay trial of the action upon issues that are referable to arbitration and direct that arbitration proceed” pursuant to the terms of the PDAA).

34. 9 U.S.C. § 5.

35. An order vacating an arbitration award is authorized in any case where arbitrators refused to “postpone the hearing, upon sufficient cause . . . or . . . to hear evidence pertinent and material to the controversy; or of any other misbehavior” prejudicing the rights of the parties. *Id.* at § 10(c).

36. *Id.* at § 10(b) (providing that an actual conflict of interest or appearance of arbitrator bias would be sufficient to vacate an arbitration award); *see* SECURITIES ARBITRATION, *supra* note 6, § 1.05[2], at 1-29 to 1-30 (explaining that an arbitrator must disclose “both professional and personal relationships with securities industry personnel or firms as well as with the parties and their counsel”); *see* NYSE RULES 608 and 610, NASD CAP §§ 21 and 23 (providing that an arbitrator’s duty to disclose is ongoing).

37. 9 U.S.C. § 11(b) and (c) (allowing judicial intervention when arbitrators “have awarded upon a matter not submitted to them” and permitting modification or correction of an arbitral award that is “imperfect in matter of form not affecting the merits of the controversy”). The more frequently argued judicially created ground for vacating an arbitration award is manifest disregard of the law. SECURITIES ARBITRATION, *supra* note 6,

Despite the FAA's plain language mandating enforcement of arbitration agreements, the federal judiciary has disagreed about the statute's scope.<sup>38</sup> Traditionally, courts exempted certain statutory rights from the reach of the FAA.<sup>39</sup> These exemptions resulted primarily from judicial suspicion of the arbitration process as being an inadequate means of enforcing statutory rights.<sup>40</sup> Courts concluded that, while arbitration may be appropriate for contractual rights affecting only the immediate parties, it was inappropriate for those statutory rights affecting societal public

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§ 11.02[2], at 11-16, 11-37; e.g., *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (finding that a manifest disregard of the law requires a clear appearance of disregard, not just a misinterpretation of the law).

38. *Compare* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-40 (1985) (enforcing an arbitration clause in a commercial contract even though one party claimed antitrust violations under the Sherman Act) *with* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-55 (1974) (refusing to give preclusive effect to an arbitral decision involving a claim under Title VII of the Civil Rights Act of 1964).

39. *Wilko v. Swan*, 346 U.S. 427, 434-38 (1953) (holding that a securities customer's claims against his broker under § 12(2) of the Securities Act of 1933 were not subject to arbitration, despite the customer's contractual agreement to arbitrate all future disputes with his broker). The *Wilko* Court based its decision on a non-waiver provision of the Securities Act of 1933 which prohibits agreements waiving compliance with any provision of the statute. *Id.* at 434-35. The Securities Act of 1933 grants plaintiffs the right to seek enforcement of the civil liability provision, § 12(2), in any state or federal court with jurisdiction. *Id.* at 431; *see* 15 U.S.C. § 77(l) (1994) (creating a private cause of action). In addition, the Court doubted the capacity of the arbitration process to enforce the statutory rights Congress created by enacting § 12(2). *Wilko*, 346 U.S. at 437; *see also* *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 745-46 (1981) (exempting a Fair Labor Standards Act claim from arbitration); *McDonald v. City of West Branch*, 466 U.S. 284, 290-93 (1984) (refusing to enforce arbitration agreements that encompassed claims under 42 U.S.C. § 1983 (1982)).

40. The Court in *Wilko* stated four concerns with arbitration determinations: arbitrators make them without instruction on the law; arbitral awards may be made without a written, reasoned explanation; an arbitrators' conception of the legal standard applied cannot be examined; and there is limited opportunity for judicial review of arbitral decisions. *Wilko*, 346 U.S. at 436-37; *see also* *Barrentine*, 450 U.S. at 743 (stating that many arbitrators may not be familiar with the policy considerations underlying federal statutes and while arbitrators may be capable of resolving preliminary factual questions, they may lack the ability to determine ultimate legal issues); *Alexander*, 415 U.S. at 56-58. The Court explained various concerns it had with the arbitration process: the "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land"; the factfinding process in arbitration is not comparable to judicial factfinding; the arbitration record is not as complete as a judicial record; "the usual rules of evidence do not apply"; and the procedures used in civil trials, such as the discovery process, are limited or unavailable. *Id.* at 57-58. Statutory claims involve enforcement of laws designed to protect societal interests which create a public interest in their outcome as compared with contractual claims which generally affect only the parties to the contract. *See id.* at 57. *See generally* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21 (1985) (explaining that the FAA was designed to overcome judicial hostility towards arbitration); Magyar, *supra* note 3, at 642-43 (distinguishing statutory claims from contract claims). Courts typically favor enforcement of agreements to arbitrate contractual claims more so than statutory claims. *Id.* at 643.

policy.<sup>41</sup> The courts felt such statutory rights should be reserved for judicial resolution.<sup>42</sup> Thus, a public policy exception to the FAA developed.<sup>43</sup>

This public policy exception began to crumble in the early 1980s as the Supreme Court's confidence in the arbitration process grew.<sup>44</sup> Since then, the Court consistently has upheld compulsory arbitration of statutory commercial claims pursuant to the FAA.<sup>45</sup> Until *Gilmer* in 1991, however, the Court had refused to uphold arbitration agreements involving statutory civil rights claims.<sup>46</sup>

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41. See *Alexander*, 415 U.S. at 56 (remarking that while arbitration is well-suited to contractual claims it is comparatively inappropriate for the resolution of statutory claims).

42. See Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 482 (1981) (stating courts have found that "where an issue [is] of strong public policy, usually derived from statute . . . the matter must be considered by a court and not decided finally by arbitrators"). For example, federal and state courts have refused to enforce arbitration agreements with respect to anti-trust laws, patent laws, and child custody disputes. *Id.*

43. *E.g.*, *Wilko*, 346 U.S. 437-38 (requiring a judicial forum to protect the substantive rights created by the Securities Act of 1933); BLUMBERG CANE & SHUB, *supra* note 20, at 255-56 (explaining that the FAA conflicted with the protective provisions of the securities laws which provided for judicial resolution of claims because of the public concern over the disparity in bargaining power between buyers and sellers); Sterk, *supra* note 42, at 483 (stating that statutory rights effecting societal public policy can override the FAA's mandate for enforcement of agreements to arbitrate).

44. See, *e.g.*, *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (holding that the FAA establishes that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *Byrd*, 470 U.S. at 219-20 (pointing out that the purpose of the FAA was to overrule traditional judicial refusal to enforce arbitration agreements); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-40 (1985) (enforcing an arbitration clause in a commercial contract arising under antitrust violations of the Sherman Act).

45. See, *e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-85 (1989) (holding Exchange Act claims arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987) (holding both the 1934 Act and Racketeer Influenced and Corrupt Organizations Act claims arbitrable in a domestic dispute). Once a party agrees to arbitrate, the agreement should be enforced unless a congressional intent to preclude arbitration is shown. *Id.* at 237-38.

46. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing an agreement to arbitrate with respect to a statutory ADEA claim); *Alexander*, 415 U.S. at 59-60 (refusing to give preclusive effect to an arbitral decision involving a statutory Title VII claim); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 745 (1981) (holding that arbitration decisions under the FLSA would not be given preclusive effect); *McDonald v. City of West Branch*, 466 U.S. 284, 290-93 (1984) (refusing to give preclusive effect to an arbitration award under 42 U.S.C. § 1983); see *infra* notes 47-93 (discussing the history of arbitration prior to *Gilmer*).

*B. The Court's Treatment of Pre-Dispute Arbitration Agreements  
Diverges into Two Lines of Cases*

The growth of securities arbitration has developed in tandem with changes in the law regarding the enforcement of PDAs.<sup>47</sup> *Gilmer* represented the Supreme Court's first attempt to reconcile the distinct nature of discrimination claims arising under collective bargaining PDAs with PDAs arising under commercial statutory claims.<sup>48</sup> Determining how these two lines of precedent intersect is crucial in understanding the Court's jurisprudence regarding the arbitrability of discrimination claims arising under mandatory PDAs.<sup>49</sup>

*1. Labor Arbitration of Statutory Claims in Collective Bargaining Agreements*

At first, a line of cases involving labor disputes subject to arbitration pursuant to PDAs contained in collective bargaining agreements developed.<sup>50</sup> When the issue of arbitrability of statutory claims arose in the collective bargaining context, the Court completely disregarded the FAA. Instead, the Court decided the issue entirely under Section 301 of the Labor Management Relations Act (LMRA),<sup>51</sup> the statutory authority for labor arbitration.<sup>52</sup> Rejecting arbitration of these federal statutory

47. SECURITIES ARBITRATION, *supra* note 6, § 1.01[2], at 1-6. "[T]he number of arbitration cases administered under the Uniform Code increased . . . from 830 cases in 1980 to 5332 cases in 1990—reflect[ing] the growing acceptance of arbitration in Congress and in the courts during the twentieth century . . ." *Id.*

48. See *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 201 (4th Cir.) (representing the second appellate attempt to reconcile the *Alexander* and *Mitsubishi* lines and holding that a PDA to arbitrate all employment claims encompassed an ADEA claim), *cert. granted in part*, 498 U.S. 809 (1990), *and aff'd*, 500 U.S. 20 (1991); cf. *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 222 (3d Cir. 1989) (representing the first appellate attempt to reconcile the *Alexander* and *Mitsubishi* lines and holding a PDA is not enforceable for an ADEA claim). The split in the courts implied that neither line of cases is obviously controlling.

49. Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568, 577 (1990) (explaining that the employment cases contrast sharply with the commercial cases in that the Court refused to enforce PDAs in its employment decisions).

50. See *Alexander*, 415 U.S. at 59-60 (refusing to give preclusive effect to an arbitral decision involving a claim under Title VII of the Civil Rights Act of 1964); *Barrentine*, 450 U.S. at 745 (holding that judicial claims under Fair Labor Standards Act were not barred even if first arbitrated); *McDonald*, 466 U.S. at 292 (refusing to grant res judicata or collateral estoppel affect to an arbitral award under 42 U.S.C. § 1983 which would have barred petitioner's action).

51. Section 301 of the Labor Management Relations Act of 1947, Pub. L. No. 80-120, 61 Stat. 156, 156-57, codified at 29 U.S.C. § 185 (1988).

52. See *General Elec. Co. v. Local 205, United Elec. Workers*, 353 U.S. 547, 548 (1957) (holding "that § 301 furnishes a body of federal substantive law [to] enforce[] collective

claims, these decisions exemplified a clear distrust for the ability of arbitration to vindicate individual statutory rights.<sup>53</sup>

In *Alexander v. Gardner-Denver*,<sup>54</sup> a case involving a Title VII<sup>55</sup> claim, a unanimous Supreme Court held that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices could be reconciled best by allowing the plaintiff to pursue a remedy under both the arbitration clause of the collective bargaining agreement and Title VII.<sup>56</sup>

The Court based its holding on three factors. First, the Court found that Title VII's enforcement mechanism, managed by the Equal Employment Opportunity Commission (EEOC),<sup>57</sup> would be jeopardized if the

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bargaining agreements in industries in commerce or affecting commerce . . ."); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (finding that courts can enforce arbitration agreements based on a federal policy to promote industrial stabilization through the collective bargaining agreement); *see also* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 511-13 (1990) (noting the Court's preference for analyzing collective bargaining arbitration under § 301 of the LMRA, rather than under the FAA).

53. *Alexander*, 415 U.S. at 56-60; *Barrentine*, 450 U.S. at 742-45 (highlighting weaknesses in the arbitration system); *McDonald*, 466 U.S. at 290-91 (reiterating prior conclusions regarding the capability of the arbitration process when compared to judicial resolution); *see infra* part II (discussing the arbitration system's inadequacies in resolving statutory claims).

54. 415 U.S. 36 (1974).

55. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1982) (prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin). *Alexander* alleged that Gardner-Denver had discriminated against him on the basis of race. *Alexander*, 415 U.S. at 42. Upon termination for production of defective parts, *Alexander* filed a grievance under the collective bargaining agreement in force between the company and the union. *Id.* at 38-39. His claim was processed according to the broad arbitration clause contained in the collective bargaining agreement. *Id.* at 40-42. The arbitrator, ruling without reference to the racial discrimination allegation, found that *Alexander* had been discharged for just cause. *Id.* at 42-43. After receiving a right to sue letter from the Equal Employment Opportunity Commission (EEOC), *Alexander* sued Gardner-Denver in federal court. *Id.* at 43.

56. *Alexander*, 415 U.S. at 59-60 (concluding that Congress intended victims of employment discrimination to have overlapping judicial and administrative remedies for Title VII violations). The Court qualified its holding, however, by suggesting that a court has discretion to admit arbitral findings "as evidence" in a Title VII trial. *Id.* at 60.

57. 42 U.S.C. §§ 2000e-4 to 2000e-5 (outlining the role of the EEOC). *See* 1994 GAO REPORT, *supra* note 1, at 4 (explaining the functions of the EEOC). The EEOC enforces the basic right to equal employment opportunity regardless of race, color, religion, sex, national origin, age, or disability as guaranteed in federal legislation, such as The Civil Rights Act of 1964 and 1991, the Equal Employment Opportunity Act of 1972, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, and the Americans With Disabilities Act of 1990. *Id.* The EEOC receives and investigates charges of employment discrimination against private sector employers. 42 U.S.C. § 2000e-5(b). The EEOC will dismiss a charge after its investigation and examination if: (1) on its face, the charge

claims were arbitrated.<sup>58</sup> Second, the Court held that individual employees have a private right of action to bring statutory claims in addition to rights granted under collective bargaining agreements.<sup>59</sup> Finally, the Court questioned the capability of arbitrators to enforce statutory rights.<sup>60</sup> The Court emphasized that arbitrators cannot remedy the societal problems that statutes such as Title VII address, because they have no general authority to invoke laws that counteract with collective bargaining agreements.<sup>61</sup> Similarly, the Court found that although arbitration procedures were well suited to resolving contractual disputes, they were comparatively inferior to judicial processes in the protection of Title VII rights.<sup>62</sup>

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fails to state a claim under Title VII; (2) the charging party fails to cooperate with the EEOC in obtaining information; (3) the EEOC cannot locate the charging party after reasonable effort; (4) the charge is not timely filed; (5) the charging party refuses to accept from the employer a settlement offer which the EEOC determines is adequate to remedy the charge; or (6) after investigation of the charge, the EEOC finds no reasonable cause to believe the charge of discrimination is true. 29 C.F.R. §§ 1601.18(a-f) & 1601.19(a). If the EEOC finds cause to believe the charge is true it will try to eliminate the discriminatory practice by engaging in "conference, conciliation, and persuasion" with the employer. *Id.* § 1601.24. Remedies may include reinstatement, back pay, or an award of damages to compensate for actual monetary loss. 42 U.S.C. § 2000e-5(g). If conciliation attempts fail, the EEOC may either initiate a civil suit on behalf of the grievant or issue a right-to-sue notice which entitles the party to sue in federal court. *Id.* §§ 1601.18(e) & 1601.19(a).

58. *Alexander*, 415 U.S. at 44-45. Title VII does not provide the EEOC with direct powers of enforcement, rather final responsibility for enforcement remains with the federal courts under their broad remedial powers. *Id.* at 44 (stating that the "[EEOC] cannot adjudicate claims or impose administrative sanctions. Rather, . . . [Title VII] authorizes courts to issue injunctive relief and to order such affirmative action . . . appropriate to remedy the effects of unlawful employment practices").

59. *Id.* at 49-50 (stating, "[t]he 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"). The Court explained that, because Congress thought it necessary to provide a judicial forum for ultimate resolution of discriminatory employment claims under Title VII, the judicial forum should remain available. *Id.* at 44-45.

60. *Id.* at 56-57 (noting that the arbitrator's sole source of authority was the collective bargaining agreement, which must be interpreted and applied to the facts).

61. *Id.* at 53-54 (concluding that the parameters of the collective bargaining agreement hinder an arbitrator's effectiveness in vindicating rights protected by Title VII because an arbitrator is confined to interpretation of the collective bargaining agreement which is solely a contractual interpretation). The Court added that the arbitrator's award must draw "its essence from the collective bargaining agreement." *Id.* at 53.

62. *Id.* at 56. Typically, parties choose an arbitrator because they trust his or her knowledge and judgment with respect to the norms of industrial relations, customs and practices, not his or her familiarity with Title VII. *Id.* at 57 (explaining that arbitrator expertise "pertains primarily to the law of the shop, not the law of the land"). Conversely, judicial interpretation of statutory and constitutional issues belongs to the courts as the broad language of statutes such as Title VII can only be given meaning by reference to public law concepts typically not within the arbitrators' expertise. *Id.*; see *supra* note 20 (explaining that many arbitrators may not be familiar with the policy considerations under-

The Court extended *Alexander* in *Barrentine v. Arkansas Freight System, Inc.*,<sup>63</sup> holding that an arbitration decision, rendered pursuant to a collective bargaining agreement, did not preclude judicial resolution of a statutory violation under the Fair Labor Standards Act (FLSA).<sup>64</sup> The Court distinguished rights arising out of the arbitration provision of the collective bargaining agreement and rights arising out of the FLSA.<sup>65</sup> The Court found that individual employee rights which are not based on a collective bargaining agreement should be vindicated in a judicial forum.<sup>66</sup> In support of its holding, the Court echoed *Alexander's* attack on the capability of the arbitration process to resolve employees' statutory rights.<sup>67</sup>

The Court unanimously reaffirmed the *Alexander* and *Barrentine* holdings in *McDonald v. City of West Branch*.<sup>68</sup> The Court held that in a

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lying federal statutes, and while arbitrators may be capable of resolving preliminary factual questions, they may lack the ability to determine ultimate legal issues).

63. 450 U.S. 728 (1981). *Barrentine* and fellow employees filed a series of grievances alleging that they were not compensated for overtime, despite the collective bargaining agreement that required compensation "for all time spent in . . . service." *Id.* at 731 n.3 (quoting the collective bargaining agreement). Their grievances were rejected without explanation, and *Barrentine* filed a subsequent action in federal court under the Fair Labor Standards Act (FLSA). *Id.* at 731-33.

64. 29 U.S.C. § 216(b) (1988) (providing that employees are permitted to bring statutory wage and hour claims "in any federal or state court of competent jurisdiction"). The Court stated that the FLSA is intended to protect individual employees from substandard wages, oppressive working hours, detrimental working conditions, and to provide a judicial forum for its enforcement. *Barrentine*, 450 U.S. at 739, 745. The Court noted that the FLSA is distinguished from the purpose of the LMRA, which offers protection to employees collectively. *Id.* at 739.

65. *Barrentine*, 450 U.S. at 737-38 (disagreeing with respondent's attempt to distinguish *Alexander* on the basis that the FLSA dispute arose under a subject inherent to the collective bargaining process). The dissenting Justices did not believe that parties were precluded from agreeing to binding arbitration of disputes under the FLSA. *Id.* at 746-47 (Burger, C.J., dissenting) (stating, "[t]he existence of a right and the provision of a judicial forum do not necessarily make either nonwaivable").

66. *Id.* at 745. The Court expressed concern that employee rights under the FLSA might be lost if submitted to arbitration because the union has a collective objective—maximization of overall compensation—not necessarily the maximization of compensation for an individual. *Id.* at 742. Wage and hour disputes are processed by the union, not the individual, and therefore, even if the claim is valid, the union does not have to support the arbitration claim if it would not benefit the group as a whole. *Id.* A union may sacrifice an individual employee's statutorily granted wage and hour benefits if another expenditure of their resources could result in greater benefit to the entire bargaining unit. *Id.*

67. *Barrentine*, 450 U.S. at 743-45 (highlighting weaknesses such as an arbitrator's lack of competence in dealing with public law considerations underlying a federal statute, and the confinement of an arbitrator's interpretation to the terms of the contractual collective bargaining agreement as a means of effectuating the intent of the parties and determining the types of relief that can be awarded).

68. 466 U.S. 284 (1984). *McDonald*, discharged from his police officer position, filed a grievance pursuant to the collective bargaining agreement in force between the City of



§ 1983<sup>69</sup> action, a federal court should not give preclusive effect to an arbitration award brought pursuant to the terms of a collective bargaining agreement.<sup>70</sup> In light of the reasoning of *Alexander* and *Barrentine*, and the arbitration process' inadequacies, the Court maintained that arbitration cannot adequately safeguard federal statutory and constitutional rights.<sup>71</sup>

## 2. Commercial Arbitration of Statutory Claims

Following *Alexander* and its progeny, the Supreme Court addressed the arbitrability of statutory claims in a competing line of commercial cases.<sup>72</sup> The Court rejected traditional judicial suspicion of arbitration in favor of the FAA's policy calling for strict enforcement of agreements to arbitrate.<sup>73</sup>

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West Branch and the union, alleging that there was "no proper cause" for his discharge. *Id.* at 285-86. At arbitration, the arbitrator found just cause for the discharge. *Id.* Without appealing, McDonald filed a § 1983 action against the City of West Branch in district court. *Id.* The city contended that the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738 (1988), required the court to give preclusive effect to the arbitration award. *McDonald*, 466 U.S. at 287. The Full Faith and Credit provision provides, "[s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have . . . in the . . . State." *Id.* at 388 n.6 (quoting 28 U.S.C. § 1738).

69. 42 U.S.C. § 1983, originally passed as § 1 of the Civil Rights Act of 1871, provides that every person who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. 42 U.S.C. § 1983 (1988); see *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (stating that § 1983 purports to deter state actors from using "their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails").

70. *McDonald*, 466 U.S. at 290-91 (maintaining that the implementation of a preclusive effect to the arbitration award would likely eliminate the protection of federal rights the statute is intended to provide).

71. *Id.* at 290-91. The Court reiterated its prior conclusions regarding the capability of the arbitration process: an arbitrator may not have the requisite expertise to resolve legal questions; an arbitrator's authority is limited to the parameters of the collective bargaining contract; the union has control over the presentation of an employee's grievance; factfinding by arbitrators is not comparable to judicial factfinding; and the union's interest is the collective interest, which is not necessarily the same as the individual's. *Id.*

72. The commercial cases were not employment related. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (claiming antitrust violations under the Sherman Act); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claiming violations of federal securities acts and RICO violations); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (alleging federal securities acts violations).

73. See *Mitsubishi*, 473 U.S. at 628-29 (enforcing an arbitration clause in a commercial contract even though one party claimed antitrust violations under the Sherman Act); *McMahon*, 482 U.S. at 238, 242 (enforcing arbitration agreements when violations of RICO and the securities acts were alleged); *Rodriguez de Quijas*, 490 U.S. at 479-81 (enforcing arbitration agreements when violations of the 1934 Act were alleged).

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,<sup>74</sup> the Court upheld a compulsory arbitration agreement for an antitrust claim arising in an international context.<sup>75</sup> The Court explained that absent an explicit exception in the FAA or an express Congressional intent disfavoring arbitration,<sup>76</sup> international policy concerns required enforcement of the arbitration agreement.<sup>77</sup> The Court rejected the argument that the remedial function of the antitrust statute<sup>78</sup> would not be realized and held that as long as an individual vindicates his or her statutory rights in the arbitral forum, the statute would continue to serve both its remedial and deterrent functions.<sup>79</sup> Finally, the Court, relying on its substantive review power<sup>80</sup> at the award enforcement stage, concluded that the antitrust claim was arbitrable.<sup>81</sup>

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74. 473 U.S. 614 (1985).

75. *Id.* at 638-40 (asserting a cause of action under the Sherman Act). The arbitration agreement provided for the resolution of all disputes in Japan pursuant to the rules of the Japanese Commercial Arbitration Association. *Id.* at 617. Mitsubishi alleged a breach of the Sales Agreement and brought an action to compel arbitration pursuant to the FAA and to the broad arbitration provision in the agreement. *Id.* at 618-19. Soler denied those allegations and countered with antitrust claims, which Soler argued could not be arbitrated. *Id.* at 619-20.

76. *Id.* at 627-28 (explaining that while the FAA favors arbitration, the court must consider express congressional intent with respect to any claims as to which arbitration agreements should be held unenforceable). The dissent argued that the express statutory remedy of the Sherman Act provides the requisite congressional intent that antitrust claims were not meant to be administered by an arbitrator. *Id.* at 650-51 (Stevens, J., dissenting).

77. *Id.* at 629 (expressing that the need for predictability in the resolution of international commercial disputes requires enforcement of the agreement to arbitrate). The Court rejected the assertion that the complexity of an issue alone is sufficient to bar arbitration, rather it is a factor that the parties should consider when selecting arbitrators and determining the arbitral rules. *Id.* at 633 (explaining that "adaptability and access to expertise are hallmarks of arbitration," therefore, arbitration can respond specifically to complex issues by empaneling experts).

78. *Id.* at 635-36 (arguing that the antitrust laws are designed to promote the public interest in a competitive economy, therefore, an antitrust claim is not just a private matter). A treble damages provision within the antitrust laws measures the award to be provided by a multiple of the injury actually proved, and is effective in both deterring and penalizing antitrust violations. *Id.* at 635 (finding that a private remedy "does not compel the conclusion that it may not be sought outside an American court").

79. *Id.* at 636-37 (focusing on adaptability of arbitration, the Court explained that a party may provide in advance for a procedure to seek antitrust recovery).

80. *Id.* at 638 (recognizing that "it would not require intrusive inquiry [by the court] to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them").

81. *Id.* Because the Japanese Commercial Arbitration Rules require arbitrators to state the rationale for the award, unless the parties agree otherwise, a court may substantively review an arbitrator's decision. *Id.* at 638 n.20.

In *Shearson/American Express v. McMahon*,<sup>82</sup> the Court enforced a PDAA arising under section 10(b) of the 1934 Securities and Exchange Act<sup>83</sup> and under the Racketeer Influenced and Corrupt Organization Act (RICO)<sup>84</sup> in a domestic transaction thereby eroding further its traditional suspicion of the arbitral process' ability to vindicate statutory rights.<sup>85</sup> Relying on the FAA, the Court devised, with respect to statutory claims, a rebuttable presumption of enforceability for PDAAs; that presumption can be refuted in several ways: (1) an express textual prohibition of arbitration in a statute; (2) legislative history indicating intent to prohibit arbitration; or, (3) an inherent conflict between arbitration and the statute's underlying goals.<sup>86</sup> Absent proof of such an intent, the *McMahon* Court held that a PDAA was unenforceable only when arbitration is found incapable of adequately enforcing statutory rights.<sup>87</sup> Because the Commission approved the arbitration procedures, the Court concluded that

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82. 482 U.S. 220 (1987). The McMahons individually and jointly signed a series of customer agreements with Shearson Lehman Brothers, Inc. (Shearson), a registered broker-dealer. *Id.* at 222-23. Each customer agreement contained a PDAA for any controversy relating to the McMahons' accounts at Shearson. *Id.* at 223. Alleging that their broker violated section 10(b) of the 1934 Act by engaging in excessive trading, making false statements, and omitting material facts from advice, the McMahons filed suit in the district court. *Id.* Shearson moved to compel arbitration of the claims pursuant to the PDAA in the customer agreement and § 3 of the FAA. *Id.*

83. 15 U.S.C. § 78j(b) (1994).

84. 18 U.S.C. §§ 1961-1968 (1994).

85. *McMahon*, 482 U.S. at 242 (upholding an agreement to arbitrate claims arising under the 1934 Securities Act and RICO).

86. *Id.* at 226-28 (explaining that the FAA mandates arbitration unless "overridden by a contrary congressional command"). The opponent of arbitration has the burden of proving that Congress intended to preclude a waiver of the judicial forum. *Id.* at 227. The McMahons argued that § 29(a) of the 1934 Act, a provision forbidding the waiver of compliance with a statutory duty (waiver of a judicial forum), prohibits the weakening of their recovery and should be grounds for voiding the PDAA. *Id.* at 227-31. Using the congressional intent standard, the Court found nothing in the language of the RICO statute or its legislative history to bar RICO claims from the reach of the FAA. *Id.* at 238-39. Similarly, the Court failed to find an irreconcilable conflict between arbitration and RICO's purpose. *Id.*; see also Note, *supra* note 49, at 577 (maintaining that the *McMahon* Court asserted that "unless Congress expresses an intent to preclude arbitration, arbitration agreements are enforceable").

87. *McMahon*, 482 U.S. at 233-35 (limiting the *Wilko* decision). The *Wilko* decision was based on a mistrust of the arbitration process, which the Court found was no longer legitimate. *Id.* at 233. At the time of *Wilko*, "the Commission had only limited authority over the rules governing . . . SROs," including the national exchanges and NASD. *Id.* Since the 1975 amendments to § 19 of the 1934 Act, the Commission's oversight authority has expanded "to ensure the adequacy of the arbitration procedures employed by the SROs." *Id.* The Commission has the power to "abrogate, add to, and delete from" any SRO rule . . . to further the objectives of the [1934] Act." *Id.* (citing 15 U.S.C. § 78s(c)).

PDAAs do not result inherently in a waiver of the statutory protections of the securities laws.<sup>88</sup>

The Court went a step further in *Rodriguez de Quijas v. Shearson/American Express*,<sup>89</sup> when it expressly overruled the traditional view that the securities acts require a judicial forum to ensure their effective application.<sup>90</sup> The Court stated that, to the extent the traditional view relied on a suspicion of arbitration as a means of weakening statutory protections, the view is outmoded in comparison with the current endorsement of arbitral resolutions of statutory claims.<sup>91</sup> Further, the inconsistency between the traditional view and *McMahon* undermined the harmonious construction of the federal securities laws, which are supposed to fall under a single regulatory scheme.<sup>92</sup> As a result, the Court overruled the traditional judicial suspicion of arbitration and reinforced the mandate to strictly enforce PDAAs pursuant to the FAA.<sup>93</sup>

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88. *McMahon*, 482 U.S. at 234. Because the Commission has sufficient statutory authority to ensure that 1934 Act rights are vindicated, enforcement of a PDAA “does not effect a waiver of ‘compliance with any provision’ ” of the 1934 Act under section 29(a). *Id.* at 238. The dissent condemned the majority for embracing the arbitral forum at a of apparent industry abuses towards investors. *Id.* at 243 (Blackmun, J., concurring in part and dissenting in part) (noting the inadequacies of arbitration, such as limited judicial review, no requirement for written rationales, and control of the arbitration forum by the securities industry).

89. 490 U.S. 477 (1989). The claim arose from a signed standard customer agreement with Shearson that contained a PDAA. *Id.* at 478-79. The couple alleged that their broker made unauthorized and fraudulent transactions in their account and subsequently brought a claim for violations of § 12(2) of the Securities Act of 1933 (the 1933 Act) and the 1934 Act. *Id.*

90. See *McMahon*, 482 U.S. at 237-38 (refusing to extend *Wilko* to the Exchange Act); *Wilko v. Swan*, 346 U.S. 427 (1953) (requiring a judicial forum to protect the substantive rights created by the Securities Act of 1933). The *Wilko* Court explained that the “protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness.” *Id.* at 437.

91. Compare *Wilko*, 346 U.S. at 435-37 (resting its suspicion of the arbitral process on the fact that it fails to provide for judicial instruction on the law or judicial review of errors in interpretation and fails to provide records or a written opinion) with *Rodriguez de Quijas, Inc.*, 490 U.S. at 480-81 (finding a steady erosion of the old judicial hostility towards arbitration over the years); see *supra* notes 87-88 and accompanying text (explaining that the current oversight role of the Commission provides for vindication of statutory rights in the arbitration forum).

92. *Rodriguez*, 490 U.S. at 480-81 (explaining that *Rodriguez*' claims under the 1934 Act would be arbitrable according to *McMahon*, while the 1933 Act claim would not be subject to arbitration pursuant to the traditional view of *Wilko*).

93. *Id.* at 484. The majority explained that although the Court is generally reluctant to overrule prior decisions construing statutes, it had done so in the past “to achieve a uniform interpretation of similar statutory language . . . to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation.” *Id.* (citation omitted). The Court maintained that both of these purposes would be served by overruling *Wilko*. *Id.*

### 3. *Differences Between Collective Bargaining and Commercial Arbitration Justify the Divergent Treatment*

There are two potential explanations for the apparent conflict between the *Alexander* and the *Mitsubishi* lines of cases.<sup>94</sup> First, evidence of congressional intent applying the FAA to employment claims is sparse.<sup>95</sup> For example, the *Alexander* line refers to the LMRA, not the FAA, as the federal policy mandating arbitration of labor disputes.<sup>96</sup> Second, the nature of commercial arbitration differs from that of collective bargaining.<sup>97</sup> In a commercial case, claimants usually have signed a contract agreeing to arbitrate disputes.<sup>98</sup> For example, arbitration clauses are included in the contract between a brokerage firm and its customers.<sup>99</sup> This scenario differs from the collective bargaining relationship, where the union negotiates and signs the arbitration clause on behalf of its members.<sup>100</sup> In the collective bargaining context, an organization, such as a union, controls the resolution of the dispute.<sup>101</sup> Unlike collective bargaining, claimants in commercial arbitration personally control the decision to proceed with a claim and select representation sufficient for their interests.<sup>102</sup>

#### C. *Reconciliation of the Court's Arbitration Cases: The Arbitrability of Age Discrimination in Employment Act Claims*

*Gilmer v. Interstate/Johnson Lane Corp.*<sup>103</sup> represented the Supreme Court's first attempt to harmonize the *Mitsubishi* pro-arbitration cases<sup>104</sup>

94. See *infra* notes 97-102 and accompanying text (explaining that the conflict between the *Alexander* and *Mitsubishi* lines is based on the distinction between their collective bargaining and commercial natures).

95. See 9 U.S.C. § 1 (1994) (suggesting an exemption for some or all employment contracts).

96. This distinction is noted in Note, *supra* note 49, at 578 (the federal policy favoring arbitration of labor disputes lies in § 301 of the LMRA). See Shell, *supra* note 52, at 512-13 (explaining the Court's preference for analyzing collective bargaining arbitration under § 301 of the LMRA, rather than under the FAA).

97. Shell, *supra* note 52, at 531.

98. *Id.*

99. 1992 GAO REPORT, *supra* note 10, at 4. "Broker-dealer firms may require [prospective] investors, as a condition of doing business with the firm, to agree to use arbitration to resolve any . . . disputes between the investor and the firm." *Id.*

100. Shell, *supra* note 52, at 531.

101. *Id.*

102. *Id.*

103. 500 U.S. 20 (1991).

104. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (enforcing PDAs for possible violations of the 1934 Act); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing PDAs for possible violations of the Securities Acts and RICO); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (enforcing a PDA in a commercial contract despite allegations of antitrust violations under the Sherman Act).

with the *Alexander* collective bargaining cases.<sup>105</sup> The claimant in *Gilmer* formulated his position based on the collective bargaining cases<sup>106</sup> contending that an ADEA claim,<sup>107</sup> could not be resolved adequately in arbitration because the rights protected by the statute deserve the safeguards and public notice of the judicial forum.<sup>108</sup> Conversely, Interstate formulated its demand for arbitration on the commercial line of cases that enforced PDAs pursuant to the FAA.<sup>109</sup> Because the *Mitsubishi* line of cases allowed the arbitration of statutory claims and the *Alexander* line did not, the Court in *Gilmer* was forced to address the interplay between the FAA and the collective bargaining cases.<sup>110</sup>

The Court held that the commercial line of decisions applies to PDAs for statutory employment claims of discrimination, while the *Alexander* line applies only in the collective bargaining context.<sup>111</sup> Under the FAA,

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105. *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (refusing to enforce arbitration agreements that encompassed claims under § 1983); *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728 (1981) (refusing to enforce a PDA arising under the FLSA); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (refusing to give preclusive effect to an arbitral decision involving a claim under Title VII of the Civil Rights Act of 1964). Compare *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) (the first appellate attempt to reconcile the *Alexander* and *Mitsubishi* lines and holding that a PDA is not enforceable for an ADEA claim) with *Gilmer v. Interstate/Johnson Lane, Corp.*, 895 F.2d 195 (4th Cir.) (the second appellate attempt to reconcile the *Alexander* and *Mitsubishi* lines and holding that a PDA to arbitrate all employment claims included an ADEA claim), cert. granted, in part, 498 U.S. 809 (1990), and aff'd, 500 U.S. 20 (1991).

106. See *Gilmer*, 500 U.S. at 33-34 (finding *Gilmer's* reliance on *Alexander* and its progeny misplaced because they occurred in the context of a collective bargaining agreement).

107. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993)).

108. *Gilmer*, 500 U.S. at 29. The claimant raised familiar challenges to the adequacy of arbitral procedures including: biased arbitrator panels, limited discovery, lack of written opinions, limited judicial review, limited range of relief, and inequality of bargaining power. *Id.* at 30-33. *Gilmer* made no showing that the NYSE discovery provisions were insufficient. *Id.* at 31. Further, any limitations on discovery are compensated for by relaxed rules of evidence. See NYSE RULE 620 (providing that arbitrators are not bound by the rules of evidence). The NYSE rules do require written arbitration awards, although arbitrators are not required to provide a written rationale. See *id.* at 627 (mandating that awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued). Further, unequal bargaining power is not sufficient to void a PDA, whereas a showing of fraud or overwhelming economic power would be. See *Gilmer*, 500 U.S. at 33. *Gilmer* made no showing of fraud. *Id.*

109. *Gilmer*, 500 U.S. at 24. The district court, relying on *Alexander*, denied Interstate's motion. *Id.* The court of appeals reversed using the *McMahon* standard, which states nothing in the text, legislative history, or underlying purposes of the ADEA indicated a congressional intent to preclude enforcement of arbitration agreements. *Id.*

110. *Godsil Cooper*, *supra* note 16, at 207.

111. *Id.*; see *Gilmer*, 500 U.S. at 33-35. The first distinction was that the *Alexander* line did not involve statutory claims, but rather the preclusion of subsequent resolution of statutory claims. *Id.* at 35. Second, the *Alexander* line dealt with a collective bargaining agreement where representation was focused on the collective rather than individual statu-

PDAAs must be enforced unless Congress intended to preclude waiver of the judicial remedy.<sup>112</sup> Applying the *McMahon* three-prong analysis,<sup>113</sup> the Court examined the text, legislative history, and purposes of the ADEA.<sup>114</sup> Because the ADEA legislative history and text are silent on the issue, the focal point of the debate became *McMahon*'s incompatibility test—determining whether the ADEA's purpose conflicts with an arbitral resolution of those arbitration claims.<sup>115</sup> The Court was unpersuaded by the argument that the framework Congress established for the ADEA, which provided for EEOC oversight and enforcement, should preclude arbitration.<sup>116</sup> The Court also dismissed Gilmer's argument that compulsory arbitration deprived claimants of the judicial forum the ADEA provides.<sup>117</sup>

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tory rights. *Id.* Finally, the Court distinguished the two lines based on its reliance on the LMRA versus the FAA, which reflects a policy favoring arbitration agreements. *Id.* The strongest of these reasons for the Court's refusal to follow *Alexander* and its progeny lies in the collective bargaining context. Note, *supra* note 49, at 579-80 (noting that the Court in *Alexander* recognized the divergence of the interests of the individual with that of the union's).

112. *Godsil Cooper*, *supra* note 16, at 207-08.

113. See *supra* notes 82-88 and accompanying text (outlining the *McMahon* standard for determining the arbitrability of statutory claims).

114. See *Gilmer*, 500 U.S. 26-29 (finding neither the text, legislative history, nor social policies furthered by the ADEA recognize an inherent conflict between arbitration and the ADEA's underlying purpose). Thomas H. Stewart, Note, *Arbitrating Claims Under the Age Discrimination in Employment Act of 1967: Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir.), cert. granted, 111 S. Ct. 41 (1990), 59 U. CIN. L. REV. 1415, 1432-33 (1991) (stating, "[b]ecause the FAA creates a strong presumption of arbitrability, the party opposing arbitration carries the burden of proving that . . . congressional intent . . . preclude[s] the arbitration of ADEA rights").

115. *Gilmer*, 500 U.S. at 26.

116. *Id.* at 27 (noting that it "[did] not perceive any inherent inconsistency between [ADEA's] policies . . . and enforcing agreements to arbitrate [ADEA] claims"). The Court also rejected the argument that arbitration would impact negatively on the ability of the EEOC to enforce the ADEA, because the EEOC is not dependent on individuals to file charges before it can act. *Id.* at 28. It may receive information "'from any source,' and it has independent authority to investigate age discrimination." *Id.* In addition, the Court stated that "mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." *Id.* at 28-29.

117. *Id.* at 29. Although the Court noted that the Older Workers Benefit Protection Act amended the ADEA to ensure that rights and claims were not waived unless such waiver was knowing and voluntary, the Court stated that Congress did not explicitly preclude arbitration. *Id.* at 28-29. "[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Id.* (alterations in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

## II. THE SECURITIES INDUSTRY ARBITRATION FORUM AND THE RESOLUTION OF EMPLOYMENT CLAIMS

### A. *The Self-Regulatory Organization's Role in the Arbitration Process*

Prior to the development of the current system, the Securities and Exchange Commission (SEC) left the task of investor dispute resolution to individual self-regulatory organizations (SROs).<sup>118</sup> In 1976, the SEC, through its public rulemaking process, initiated the Securities Industry Conference on Arbitration (SICA), a group composed of SRO representatives, the Securities Industry Association and several public representatives.<sup>119</sup> SICA expanded the existing rules of SROs and developed the first version of the Uniform Code of Arbitration (Code).<sup>120</sup> The Code provides for a uniform system of dispute resolution for small claims in the securities industry<sup>121</sup> and arbitration procedures covering all disputes be-

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118. Deborah Masucci & Edward W. Morris, Jr., *Securities Arbitration at Self-Regulatory Organizations: Administration and Procedures*, in *SECURITIES ARBITRATION* 1988 309, 313 (1988). The NYSE Constitution of 1817 required all disputes to be resolved by a majority of the exchanges Board. The NYSE permitted arbitration between non-members and members in 1872, between members in 1935, and in places other than New York by 1939. *Id.* The NASD adopted its Code of Procedure in 1968. *Id.*; see also Mark D. Fitterman, Catherine McGuire & Robert A. Love, *The SEC and SRO Arbitration*, in *ALL-ABA COURSE OF STUDY: BROKER-DEALER REGULATION* 106-63 (1992) (outlining the evolution of current SRO arbitration programs).

119. SICA REPORT #5, at 2-3 (Apr. 1986) (discussing the proposal of a task force to consider the development of "a uniform arbitration code and the means for establishing a more efficient, economic and appropriate mechanism for resolving" disputes between brokers, dealers and customers at SROs). The first conference was composed of representatives of:

[T]he American, Boston, Cincinnati, Midwest, New York, Pacific and Philadelphia Stock Exchanges, the Chicago Board Options Exchange, the Municipal Securities Rulemaking Board, the National Association of Securities Dealers, Inc., the Securities Industry Association and three representatives of the public — Peter R. Cella, Jr., Mortimer Goodman and Professor Constantine N. Katsoris . . .

A fourth public member, Justin P. Klein, was added to the Conference in 1983.

*Id.* at 3. Today, members of the Commission, the Commodity Futures Trading Commission (CFTC), the American Arbitration Association (AAA), and the North American Securities Administrators Association (NASAA) also are invited to attend the conference. SICA REPORT #8, at 1 (1994). "SICA's original mandate was to develop rules for the resolution of disputes involving small claims. Over time, SICA assumed responsibility for formulating uniform arbitration rules for all securities SROs." 1992 GAO REPORT, *supra* note 10, at 15 n.2; see also Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 *FORDHAM L. REV.* 279, 284 (1984) (stating that the Code establishes a uniform standard of procedure to be applied for all claims in the securities industry).

120. SICA REPORT # 5, at 3-4 (explaining that the Code incorporated and harmonized pre-existing individual SRO rules and provided for arbitration of disputes between broker/dealers and customers).

121. *Id.* at 2 (citing Securities Exchange Act Release No. 12,528, dated June 9, 1976).



tween customers and broker/dealers.<sup>122</sup> The participating SROs adopted the code, with only minor variations, throughout 1979 and 1980 and it is amended periodically in SICA meetings.<sup>123</sup> As a result, various SROs have adopted similar arbitration rules amongst themselves.<sup>124</sup> Through its oversight authority, the Commission regulates the SROs, and therefore these arbitration processes,<sup>125</sup> in order to advance the objectives of the securities laws.<sup>126</sup> The SROs, however, retain control over the administration of the arbitration forum and are subsidized by their broker/dealer member firms.<sup>127</sup>

The Commission's oversight of the securities industry's arbitration program focuses on customer/firm disputes, as opposed to intra-industry employment disputes, such as discrimination claims.<sup>128</sup> Commission officials comment that discrimination cases are not a priority because, as the Com-

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122. *Id.* at 3-4 (explaining that SICA developed a comprehensive Code and explanatory booklets describing both small claims and regular arbitration procedures). Originally, small customer claims included those less than \$2,500. *Id.* at 3. Currently, the cutoff is \$10,000. SICA REPORT #8, at 1. Resolution of a small claim can be based on the pleadings alone in lieu of a full hearing. *Id.*

123. SICA REPORT #5, at 4. The Code was adopted by the SROs pursuant to § 19 and Rule 19b-4 of the 1934 Act, as amended. SICA REPORT #8 at 1. Many changes were made after the *McMahon* decision to provide parties with rights they would have had in litigation without forgoing the efficiency and economy of arbitration. *Id.*; see *supra* notes 82-88 and accompanying text (explaining the reasoning behind *McMahon*). Current amendment considerations include "the availability of punitive damages, representation in arbitration by non-attorneys, eligibility of claims for arbitration, form of pleadings, criteria for challenges for cause, and qualification and education of arbitrators." SICA REPORT #8, at 1.

124. Shell, *supra* note 52, at 535.

125. See 15 U.S.C. § 78s (a) (1994) (providing specific procedural requirements); see also 1994 GAO REPORT, *supra* note 1, at 5. The Commission has "broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." William A. Gregory & William J. Schneider, *Securities Arbitration: A Need for Continued Reform*, 17 NOVA L. REV. 1223, 1247 (1993) (quoting *McMahon*, 482 U.S. at 233-34).

126. Gregory & Schneider, *supra* note 125, at 1247 (stating that as a result of its oversight authority, the Commission can act more quickly than Congress or state legislatures to correct any inefficiencies in the securities industry). The Commission has the power to "abrogate, add to, and delete from" SRO rules. *Id.* (quoting 15 U.S.C. § 78s(c)). The Commission has to notify the SRO, publish notice of the proposed amendment in the Federal Register, and hold a public hearing for comment. 15 U.S.C. § 78s(c)(1) (1994); see also Fitterman, McGuire & Love, *supra* note 118, at 161 (explaining that the Commission is able to modify rules necessary to promote the fair administration of the SRO and conform to the federal securities laws).

127. 1992 GAO REPORT, *supra* note 10, at 5.

128. *Id.* at 3 (examining the oversight role of the Commission with respect to the SRO arbitration programs). The Report notes that Commission inspections focus on customer-firm disputes rather than discrimination disputes. *Id.* at 13. As a result, the Commission has no information on the efficiency or effectiveness of SRO processing of discrimination disputes. *Id.*

mission interprets the 1934 Act, the Commission's primary responsibility is consumer protection.<sup>129</sup> Commission staff have acknowledged that mandatory arbitration is final and binding upon registered representatives, and decisions may be rendered by arbitrators who have no understanding of how the civil rights laws are to be applied to the workplace.<sup>130</sup> While the Commission monitors the procedures that affect all arbitration cases, it does not have specific authority to review discrimination cases.<sup>131</sup>

Currently, the Commission does not compile information regarding the nature, type, or outcome of employment cases or whether any trends are emerging.<sup>132</sup> Critics who find Commission oversight of arbitration cases insufficient, recommend a more active role by the Commission. Their suggestions include establishing a formal periodic inspection system<sup>133</sup> to follow up on the resolution of deficiencies the Commission finds during inspections.<sup>134</sup> They also suggest including discrimination disputes among the cases the Commission reviews during inspections.<sup>135</sup>

### *B. The Characteristics of the Securities Industry Mandatory Arbitration System Impact Negatively on Civil Rights Policy*

The original purpose of the securities industry's arbitration system was to facilitate the efficient resolution of investor disputes, not to resolve

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129. *Id.*; see also Letter from Robert L.D. Colby, Deputy Director, Securities and Exchange Commission, to Linda G. Morra, Director, Education and Employment Issues, GAO 5, (Dec. 30, 1993), reprinted in 1994 GAO REPORT, *supra* note 1, app. at 25 (stating that in light of the rising interest in consumer protection in securities arbitration, the Commission focuses its oversight on cases involving public customers).

130. 1994 GAO REPORT, *supra* note 1, at 13 (noting that arbitrators sitting on employment cases may have no requisite background or expertise in employment law).

131. *Id.* (explaining that the Commission has general oversight authority over the whole industry arbitration, but focuses primarily on commercial disputes rather than on employment disputes).

132. The Commission has no data from which to analyze trends in the outcomes of these cases because SROs are not required to compile statistics on discrimination. *Id.* at 14.

133. The Commission's Division of Market Regulation conducts periodic inspections to review SRO compliance, administration, and processing of arbitrations in order to provide a recommendation to the SROs for the correction of deficiencies. *Id.* at 14-15. The GAO found that because of the lag time between inspections, SROs typically are slow in implementing Commission recommendations. See *id.* The GAO study concluded that "[b]y establishing a formal inspection cycle, SROs may be more inclined to respond expeditiously to [Commission] recommendations made during previous inspections." *Id.* at 15.

134. The GAO determined that SROs had not fully implemented Commission recommendations, allowing deficiencies to persist. *Id.* at 15. Therefore, the GAO suggested that the Commission "follow up more vigorously on the implementation of its recommendations . . ." *Id.* at 16.

135. *Id.*

intra-industry employment discrimination disputes.<sup>136</sup> Despite this initial focus, investors, exchange members, and securities industry employees abide by the same rules and procedures throughout the arbitration process, regardless of the nature of the pending claim.<sup>137</sup> Several features of the Code affect the appropriateness of resolving intra-industry employment claims through the securities industry's arbitration process, such as the selection of arbitrators, arbitrator classification, and arbitrator knowledge in the area of controversy.<sup>138</sup>

### 1. Selection of Arbitrators

While few discrimination complaints may be filed and arbitrated by the New York Stock Exchange (NYSE) and the NASD,<sup>139</sup> it is important to recognize that SROs use only one set of procedures to select arbitrators, regardless of the nature of the claim.<sup>140</sup> After reviewing a case, an SRO's

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136. See *supra* notes 136-38 and accompanying text (explaining that the arbitration system was designed to resolve disputes between customers (investors), brokers and dealers).

137. NASD CAP § 1 (1993). The NASD Code of Arbitration provides: "[F]or the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, . . . (1) between or among members; (2) between or among members and public customers, or others . . ." *Id.*; see also Shell, *supra* note 52, at 535-37. One real difference in treatment is the composition of arbitration panels: investor disputes have three industry arbitrators while employee disputes have a majority of public arbitrators on their panels. *Id.* at 537. In 1993, the NASD approved a rule which makes employment disputes arbitrable and provides that discrimination claims must be heard by an arbitration panel composed of a majority of public arbitrators. *NASD Announces SEC Approval Of Rules Making Employment Disputes Arbitrable*, 25 SEC. REG. & L. REP. (BNA) 1129, 1252 (Sept. 17, 1993).

138. Shell, *supra* note 52, at 535-36. In March 1994, the GAO published a report focusing on the use of arbitration to settle employment discrimination disputes amongst securities firms and their registered representatives. 1994 GAO REPORT, *supra* note 1, at 1. The report "arose out of a concern that statutory protections designed to safeguard the rights of employees were being systematically denied by the securities industry." *Levitt's Views Sought Regarding Changes to Industry Arbitration Process*, 26 SEC. REG. & L. REP. (BNA) 876 (June 17, 1994) (quoting Letter from Rep. Edward Markey (D-Mass), Rep. Marjorie Margolies-Mezvinsky (D-Pa), and Lynn Schenk (D-Calif), to Arthur Levitt, Chairman, Securities and Exchange Commission (June 9, 1994)). While the report did not comment on the fairness of individual NYSE and NASD discrimination cases, it identified weaknesses and inconsistencies in arbitration procedures that may result in inappropriate arbitrator selection. 1994 GAO REPORT, *supra*, at 9.

139. 1994 GAO REPORT, *supra* note 1, at 7. The report notes that 34 discrimination complaints were filed at the NYSE between January 1990 and December 1992. *Id.* Although the SROs do not compile data on these complaints, interviews with SRO officials indicate that of the 1,110 cases arbitrated at the NYSE between 1991 and 1992, 312 were employment cases and only 5% of those were discrimination cases. *Id.*

140. *Id.* at 5. When a discrimination complaint is filed by a registered representative, an arbitrator is selected by the SRO to serve on the panel. *Id.* The selection of arbitrators under the Code is managed by the director of arbitration at the securities exchange or the NASD. Shell, *supra* note 52, at 536. Conversely, the American Arbitration Association places the burden of arbitrator selection on the parties. *Id.*; see, e.g., AMERICAN ARBITRA-

arbitration staff will appoint a panel of arbitrators.<sup>141</sup> Although the parties may challenge the placement of an arbitrator on the panel, there is not a formal, initial consideration given to the capability of a prospective arbitrator to address the particular legal claim at issue.<sup>142</sup>

The current process of recruiting arbitrators frequently results in an inadequate arbitrator pool, causing an unqualified arbitrator panel.<sup>143</sup> Arbitrators primarily are recruited based on the recommendations of current arbitrators, employees of the SROs, and the NASD Board of Governors or the NYSE Board.<sup>144</sup> Additionally, the arbitration staff typically recruits candidates from local bar associations.<sup>145</sup> The arbitrators serving in the SRO pools are predominantly white males with an average age of sixty years.<sup>146</sup>

#### a. *Classification of Arbitrators—Industry or Public*

After securities arbitrators become part of the pool, they are divided into two groups—"industry" or "public."<sup>147</sup> Arbitrators classified as "industry" are employed, associated with, or retired from member firms.<sup>148</sup>

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TION ASSOCIATION, SECURITIES ARBITRATION RULES § 14 (as amended and effective May 1, 1993) (stating that both parties may object to and rank the remainder of prospective arbitrators in order of preference from two lists received from the AAA, the AAA then invites arbitrators based on both lists and mutual order of preference) [hereinafter AAA RULES].

141. See NASD CAP § 19. The parties are given notice of the names and affiliations of the arbitrators and an opportunity to challenge the selection. NASD CAP §§ 21, 22. The panel of arbitrators is also asked to initiate a conflict of interest check with the parties' names, legal representation, and potential witnesses. NASD CAP § 23(a).

142. See NASD CAP §§ 4, 9. In a claim for less than \$30,000, a single arbitrator shall be appointed. *Id.* § 9. If the claim exceeds \$30,000 three arbitrators shall be appointed. *Id.*

143. See BLUMBERG CANE & SHUB, *supra* note 20, at 369-70 (explaining that arbitrator rosters are limited due to the inadequate word-of-mouth recruitment system).

144. Masucci & Morris, *supra* note 118, at 321 (explaining the arbitrator recruitment process); see also BLUMBERG CANE & SHUB, *supra* note 20, at 369-70.

145. Masucci & Morris, *supra* note 118, at 321.

146. 1994 GAO REPORT, *supra* note 1, at 8. While SROs do not keep statistical data on characteristics of arbitrators, it is estimated that of the 726 arbitrators in NYSE pool as of December 31, 1992, 89% were men and 11% women. *Id.* With regard to the 349 arbitrators whose race was identifiable, 97% were white, .09% black, .06% were Asian and 1% other. *Id.* The average age was 60 for men and 49 for women. *Id.*; see also *Dunlop Panel Hears Alternatives For Resolving Workplace Disputes*, DAILY LAB. REP. (BNA) No. 188, at C-3 (Sept. 30, 1994) [hereinafter 1994 DAILY LAB. REP.] (highlighting testimony calling for an increase in the number of female and minority arbitrators to make pools "more demographically representative of the workplace").

147. See Masucci & Morris, *supra* note 118, at 321. One consideration given to choosing an arbitrator is his or her classification as industry or public. *Id.*

148. *Id.* An industry arbitrator is one who is currently associated with a member firm, or has been associated with a such firm within the last three years; is retired from a mem-

Additionally, industry arbitrators include professionals whose work substantially involves broker/dealer matters.<sup>149</sup> Arbitrators classified as “public” are persons not employed by member firms, and include attorneys, accountants, educators, and knowledgeable investors.<sup>150</sup> This method of classification, as well as the choice of the overall composition of an arbitration panel, attempts to limit the appearance of conflict and industry bias while maintaining a knowledgeable pool of arbitrators.<sup>151</sup> Arbitrations are generally categorized by the type of controversy at issue, then arbitrators are chosen pursuant to their “industry” or “public” classification.<sup>152</sup> For example, all arbitration matters between member firms are industry cases and require an industry panel of arbitrators.<sup>153</sup> On the other hand, an investor dispute with a member firm is classified as a public dispute, and its panel consists of mostly public arbitrators.<sup>154</sup> For arbitration purposes, employment disputes also are treated as public disputes and, therefore, are empaneled with a majority of public arbitrators.<sup>155</sup>

*b. Arbitrator's Knowledge*

Securities industry arbitration purports to provide parties with an impartial third-party arbitrator who possesses a unique understanding of the

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ber firm; is registered with a member firm; or associated with a futures association or commodity exchange. NASD CAP § 19(c)(1-5).

149. Masucci & Morris, *supra* note 118, at 321; *see* NASD CAP § 19(c)(4) (directing that industry arbitrators include those professionals who have devoted at least twenty percent of their work to industry clients within the last two years).

150. Masucci & Morris, *supra* note 118, at 321 (explaining that industry arbitrators are “individuals employed or associated with or retired from member firms”); *see* NASD CAP § 19(d) (amended effective May 10, 1989) (explaining that a person is not considered to be a public arbitrator if his or her spouse, or a household member, is an employee or is associated with a member firm).

151. *See* FLETCHER, *supra* note 4, at 109-10 (stating that SROs have attempted to limit possible bias by arbitrators against customers by amending the rules to require that a majority of the arbitration panel include non-industry arbitrators); *e.g.*, NASD CAP § 19(a); NYSE RULE 607.

152. *See* BLUMBERG CANE & SHUB, *supra* note 20, at 13 (explaining that SRO arbitration staff select arbitrators who are categorized as industry or public).

153. *See* NASD CAP § 9(b)(ii) (stating that, “in all arbitration matters between or among members and/or persons associated with members and where the amount in controversy exceeds \$30,000, a panel shall consist of three arbitrators, all of whom shall be from the securities industry”).

154. *See* NASD CAP § 19(b) (stating: “In arbitration matters involving public customers and where the amount in controversy exceeds \$30,000, . . . the Director of Arbitration shall appoint an arbitration panel which consists of [between three and five arbitrators], at least a majority of whom shall not be from the securities industry [unless requested by the public customer]”).

155. *See* NASD CAP § 9(a) (clarifying that employment related disputes are subject to arbitration); 25 SEC. REG. & L. REP., *supra* note 137, at 1252.

industry in which the controversy arose.<sup>156</sup> Both critics and supporters of securities arbitration agree that industry insight and expertise make arbitration an appropriate forum for disputes arising out of true securities issues (commercial cases).<sup>157</sup> Industry expertise allows arbitrators to evaluate a claim in light of their understanding of securities industry operations and customary standards of practice.<sup>158</sup>

Critics assert that securities industry arbitrators' lack of expertise in, and unfamiliarity with, current employment discrimination laws makes securities arbitration an inappropriate arena for claims involving statutory employment rights.<sup>159</sup> It is conceivable that an arbitrator with the proper training or background could resolve an employment discrimination case adequately by utilizing appropriate legal standards.<sup>160</sup> How-

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156. LIPTON, *supra* note 6, § 4.02[4], at 4-20 (stating that "securities industry arbitration, specifically, is intended as a system that can provide parties to a dispute with referees who possess a unique familiarity with the nature of the business in which the dispute arose and whose judgement reflects an understanding of that business"); ARBITRATION PROCEDURES, *supra* note 1, at 3-4 (stating, "[a]rbitration is a method of having a dispute between two or more parties resolved by impartial persons who are knowledgeable in the areas in controversy"); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985) (noting that "access to expertise" is one "hallmark[ ]" of arbitration).

157. For example, arbitrators who possess an understanding of industry practices enhance the chances that an accurate outcome is achieved faster as less time is spent "educating the trier of fact." FLETCHER, *supra* note 4, at 106-07 (noting that any lawyer appreciates the time saved in arbitrating an issue before a panel that already understands complex financial instruments); LIPTON, *supra* note 6, § 4.02, at 4-20 (explaining that an industry arbitrator's insights to industry customs and practices are critical to evaluations of securities related disputes). "Securities" violations include allegations of churning, unsuitable investments, negligent supervision of a broker, breach of fiduciary duty and making unauthorized trades. BLUMBERG CANE & SHUB, *supra* note 20, at 119-74. *But see* BLUMBERG CANE & SHUB, *supra*, at 245 (noting that employment related disputes typically "involve compensation, training costs, improper termination, responsibility and indemnification for customer losses, defamation after termination of the relationship, and the enforceability of non-compete clauses").

158. LIPTON, *supra* note 6, § 4.02, at 4-20 (analogizing arbitrators to referees who possess a special and unique knowledge in their respective fields); *see* Bompey & Pappas, *supra* note 11, at 211 (explaining that an arbitrator familiar with the industry involved in the dispute will have a greater understanding of the issues involved).

159. 1994 GAO REPORT, *supra* note 1, at 12 (explaining that because discrimination cases raise issues different than typical commercial/securities issues, it is appropriate to empanel arbitrators with employment law expertise). For examples of the intricacies of employment discrimination laws, see Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 through 2000e-17 (1988) (prohibiting discrimination in employment on the basis of race, color, religion, sex or national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993) (prohibiting discrimination in employment solely on the basis of age).

160. *See* Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987) (stating that "arbitral tribunals are readily capable of handling . . . factual and legal complexities . . .") (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633-34 (1985)).

ever, there is currently no requirement in the selection process that an arbitrator be knowledgeable in employment law.<sup>161</sup>

All SROs have adopted<sup>162</sup> SICA's Arbitration Procedures. Those procedures provide that an arbitrator should be versed in the areas of controversy.<sup>163</sup> These procedures, however, only attempt to reduce the appearance of conflict through a method of classification, they do not ensure that public arbitrators empaneled on an employment dispute claim are any more knowledgeable in employment issues than industry arbitrators.<sup>164</sup> While public arbitrators may bring a sense of comfort to public investors and employees fearful of industry bias,<sup>165</sup> their public characterization does not guarantee that they have any expertise, background, or knowledge in employment law.<sup>166</sup> On the other hand, a member firm or public investor bringing a suit on a securities issue can be assured that an industry arbitrator will have a sufficient level of expertise or experience in the area and, thus, will be qualified to resolve the dispute.<sup>167</sup> Similarly, a public investor can feel comfortable with public arbitrators settling securities disputes because these arbitrators typically have some legal, practical, or educational experience with securities issues.<sup>168</sup>

Critics highlight the fact that the SROs do not necessarily consider an arbitrator's expertise in a particular subject area as a primary criterion for selection.<sup>169</sup> Contrary to the securities industry's assertion that arbitration provides parties with an arbitrator who is knowledgeable in the area

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161. See 1994 GAO REPORT, *supra* note 1, at 3 (stating that neither the NASD nor NYSE "systematically assigns arbitrators to panels on the basis of subject matter expertise"); BLUMBERG CANE & SHUB, *supra* note 20, at 370 (explaining that arbitrators receive no training as a prerequisite to acceptance as a panelist).

162. See *supra* notes 118-35 and accompanying text (explaining the role of SROs).

163. 1994 GAO REPORT, *supra* note 1, at 12.

164. See Masucci & Morris, *supra* note 118, at 321 (explaining that the method of arbitrator classification is intended to simultaneously limit the appearance of industry bias and maintain a pool of knowledgeable arbitrators). *But see* 1994 GAO REPORT, *supra* note 1, at 12-13 (noting that discrimination disputes raise unique issues such as the interpretation of federal civil rights laws as compared with the typical industry dispute involving securities statutes and industry practices).

165. See 1992 GAO REPORT, *supra* note 10, at 60 (stating that "[r]egardless of [the] forum, the fairness of any arbitration proceeding depends largely on the independence and capability of the arbitrators").

166. See Masucci & Morris, *supra* note 118, at 321 (indicating that public arbitrators are typically accountants, attorneys, academics in the field of securities, or others that are not affiliated with a securities firm).

167. See NASD CAP § 19(c)(1-5). Industry arbitrators are either currently active in the securities industry or were recently associated with it. *Id.*

168. See NASD CAP § 19(d).

169. See Katsoris, *supra* note 119, at 310 (stating that an SRO's Director of Arbitration may select arbitrators from a roster of individuals based on a "roll of the drum" rather than expending "effort to match the problems of the case with the expertise of the arbitra-

of controversy, individual arbitrators are not selected from the pool based on having expertise congruent to the type of dispute being decided.<sup>170</sup> Rather, industry-sponsored arbitration programs select arbitrators based on their classification, their availability for the hearing dates, and their willingness to sit on a panel.<sup>171</sup> Because securities arbitrators frequently are guided by commercial wisdom and not by a rule of law in resolving disputes,<sup>172</sup> these methods of selection are adequate when the issues presented in the claim are securities-related.<sup>173</sup> Critics contend, however, that this method of selection fails to consider the unique requirements of a non-securities claim, such as an employment discrimination suit. Nor, they say, does it take into account the requisite knowledge or training needed to resolve effectively a dispute under the current discrimination and civil rights laws and their underlying policies.<sup>174</sup>

The SROs require arbitrators to take an initial mandatory training program to ensure that they have been trained adequately in the arbitration process.<sup>175</sup> The SROs do not, however, require similar training in specific

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tors”); 1994 GAO REPORT, *supra* note 1, at 3 (highlighting the absence of a subject matter expertise requirement in SRO arbitration).

170. Masucci & Morris, *supra* note 118, at 321 (explaining that arbitrator selection is predicated on an arbitrator's affiliation with the securities industry—industry or public). Other factors that are considered in the selection process include the potential arbitrator's education, employment, availability, possible conflict of interest, frequency of service and ratings, and with respect to potential chairpersons, whether the candidate is an attorney. Telephone Interview with Attorney at the National Association of Securities Dealers, Arbitration Department, Washington, D.C. (April 19, 1995) [hereinafter Attorney Interview]; *see also* NASD CAP § 19(d) (providing for arbitrator selection based on industry affiliation rather than subject matter expertise).

171. For example, the NASD requires that arbitrators be knowledgeable in the area of controversy, yet assigns arbitrators based on an objective classification of either public or industry. NASD CAP § 19(a). Because arbitrators are essentially volunteers, availability is a key factor in the selection process. This statement is based on the author's experience empaneling arbitrators for the Washington, D.C. Arbitration Department (1994).

172. NASD, THE ARBITRATOR'S MANUAL 26 (1992) (stating that arbitrators are not “bound by case precedent or statutory law,” but are prohibited from manifestly disregarding the law) [hereinafter ARBITRATION MANUAL].

173. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (noting that parties utilize arbitration especially because of the expertise of the arbitrators).

174. *See Report and Recommendations of the Commission on the Future of Worker-Management Relations*, DAILY LAB. REP. (BNA Special Supp.) No. 6, at 31 (Jan. 10, 1995) [hereinafter 1995 DAILY LAB. REP.] (stating that arbitrators familiar with the laws at issue are an essential element to private arbitration); 1994 GAO REPORT, *supra* note 1, at 12. The Report concludes that: “Since discrimination cases involving registered representatives raise issues that are different from the securities-related disputes administered by SROs, it may be appropriate to consider whether the panels for these cases should be comprised differently, and include at least one arbitrator with expertise in employment or discrimination law.” *Id.*

175. NASD, INTRODUCTORY TRAINING FOR ARBITRATORS 2, (Feb. 1, 1994).



areas of the law.<sup>176</sup> Although the securities arbitration system effectively resolves securities issues within the arbitrator's range of expertise, critics contend that the arbitrator's narrow range of knowledge makes him or her underqualified to resolve issues beyond the scope of securities issues.<sup>177</sup> Critics therefore recommend that the Commission direct SROs to assess, maintain, and utilize information on an arbitrator's expertise when selecting arbitration panels, especially in cases involving discrimination disputes.<sup>178</sup>

## 2. *Impact on Civil Rights*

Even if competent securities arbitrators had expertise in the substantive areas of employment law, such arbitrated awards nevertheless fail to preserve one of the goals of civil rights law—the end of discrimination.<sup>179</sup> The securities industry arbitration system fails to provide internal guidance on employment relations between a registered representative and broker employers because arbitral awards do not disseminate information through written, reasoned opinions.<sup>180</sup> As a result, securities indus-

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176. *Id.* (stating that while training is an ongoing process and an introductory session is required, second level training, which is “a more indepth study of selected topics” such as employment law, is encouraged, but currently not required). The training manual does ask that arbitrators inform the NASD of any special knowledge in the area of employment discrimination. *Id.* at 3. Additionally, the NASD and the AAA offer joint employment law training seminars on an optional basis. Attorney Interview, *supra* note 170.

177. See 1994 GAO REPORT, *supra* note 1, at 12-13 (noting that arbitrators do not have any special training in the area of employment law and therefore are not equipped to handle such issues capably).

178. *Id.* at 16; see *id.* app. II at 28. The Commission responded, on review of GAO concerns in this area, that employment law issues raised in discrimination cases are sufficiently different from the experience of many arbitrators. *Id.* Therefore, it would be appropriate for SROs to develop additional training in that area. *Id.* The GAO notes that the NASD already has begun such training. *Id.* The Commission also agrees “that it may be valuable to assess arbitrators’ training and experience when appointing arbitrators to the panels for discrimination cases.” *Id.* The Commission cautions that arbitrator selections based solely on expertise may result in an imbalanced panel in favor of one of the parties. *Id.*

179. See, e.g., 140 CONG. REC. E1753 (daily ed. Aug. 17, 1994) (statement of Rep. Markey) (using the securities industry as an example to explain that mandatory arbitration of employment claims in effect allows corporate America to opt out of the antidiscrimination laws); *id.* (statement of Rep. Schroeder) (stating that mandatory arbitration forces many American workers to choose between protecting their jobs or protecting their civil rights, thereby undermining the goals of civil rights legislation); Godsil Cooper, *supra* note 16, at 214-15 (arguing that an essentially private arbitration system is not conducive to implementing the policies underlying antidiscrimination laws); see *infra* notes 243-48 and accompanying text (explaining that the procedural protections provided in nonarbitrated civil rights cases are not available in the securities industry arbitration system).

180. See Lipton, *supra* note 19, at 888 (stating that the securities industry arbitration system offers no internal guidance on the law regarding customer/broker relations and is similarly incapable of advancing this law); see generally Godsil Cooper, *supra* note 16, at

try arbitration does not operate on the principle of *stare decisis*.<sup>181</sup> More significantly, this lack of written explanation stifles the generation of legal precedent.<sup>182</sup> Although arbitrators' decisions are not based on precedent, prior decisions could assist a party in preparing written submissions and oral presentations in subsequent proceedings.<sup>183</sup>

On appeal of an arbitration award, the standard of review, whether the arbitrator has demonstrated a manifest disregard for the law, is also impaired by the lack of a written opinion spelling out the arbitrator's findings of fact and the reasons leading to the decision.<sup>184</sup> The manifest disregard standard is essentially meaningless unless the arbitral award sets out in visible terms the arbitrator's decision-making process.<sup>185</sup>

Other industries use precedential guidance in discrimination cases, yet, mandatory arbitration of employee discrimination claims in the securities

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211 (explaining that labor arbitration proceedings are very informal and, as a consequence, are "too thin to . . . develop public law").

181. Justin P. Klein & Heather Moyer, *The Award*, in SECURITIES ARBITRATION *supra* note 6, § 10.05 (stating that arbitral awards have no precedential value because they are devoid of findings of fact and conclusions of law); ARBITRATION MANUAL, *supra* note 172, at 26 (noting that when deliberating a dispute, securities arbitrators are not bound by case precedent).

182. Lipton, *supra* note 19, at 888 (stating that a rule of precedent is impossible when written, reasoned decisions are not required); *see also* ARBITRATION MANUAL, *supra* note 172, at 30 (noting that under current law, "an arbitrator is not required to give a reason for [his or her] decision"). The award should include: the names of the parties, the date of filing and what award was rendered, names of counsel, a summary of the issues, the amount of the claim, the number, time, and location of hearings, and any other miscellaneous matters decided such as jurisdiction or as the names and signatures of the arbitrator. *Id.*

183. Lipton, *supra* note 19, at 888 (arguing the virtues of a written, reasoned award).

184. *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (stating that an arbitral award which evidences a manifest disregard for the law will be subject to judicial review); *see also* *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986) (holding that disregard by arbitrators of "well defined, explicit, and clearly applicable" governing law constitutes grounds for setting aside an arbitration award).

185. Lipton, *supra* note 19, at 888; *see also* 1995 DAILY LAB. REP., *supra* note 174, at 32 (explaining that in order for a court to review an arbitral decision, the court must have a permanent record to ensure the arbitrators's "understanding and interpretation of the relevant legal doctrines"); *Bobker*, 808 F.2d at 933. In its decision, the court explained that "manifest disregard of the law" requires that

The [arbitrator's] error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

*Id.*

industry removes all opportunity for such precedential guidance.<sup>186</sup> As a result, the development of employment policy in the securities industry is impeded by an arbitration system that, in failing to use precedent, is inconsistent and unpredictable.<sup>187</sup> The lack of written rationales, aggravated by the absence of *stare decisis*, shields arbitrated employment disputes from public scrutiny, thereby violating the deterrent intent of the antidiscrimination laws.<sup>188</sup>

### C. A Proposal to Amend the Civil Rights Statutes

In August of 1994, three members of the United States House of Representatives<sup>189</sup> responded to the negative impact of compulsory arbitration of employment discrimination claims in the securities industry<sup>190</sup> by introducing the Civil Rights Procedures Protection Act.<sup>191</sup> This Act would prevent employers in all industries from requiring employees to submit any discrimination claims to arbitration.<sup>192</sup> The bill, if passed, would effectively overturn *Gilmer*, in which the Supreme Court compelled the arbitration of a securities industry employee's ADEA claim.<sup>193</sup>

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186. See Lipton, *supra* note 19, at 888-89. "If universal arbitration of broker/dealer controversies replaced judicial litigation . . . the arbitration system no longer would find the same precedential guidance from reported case law." *Id.* at 889.

187. *Id.*

188. The equal employment provisions of the Civil Rights Act were enacted to assure equality of employment opportunities by prohibiting those employment practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2-e-17 (1988); see also Magyar, *supra* note 3, at 655-56 (concluding that the public interest involved in civil rights claims requires public awareness and involvement).

189. *House Democrats Introduce Bill to Bar Compulsory Arbitration of Bias Claims*, DAILY LAB. REP. (BNA) No. 158 at A-1 (Aug. 18, 1994) [hereinafter AUGUST 1994 DAILY LAB. REP.]. The sponsors of the Civil Rights Procedures Protection Act were Representatives Markey, Schroeder, and Margolies-Mezvinsky. *Id.*

190. CONG. REC., *supra* note 179, at E1753 (statement of Rep. Markey) (highlighting that securities arbitration is run by SROs with industry members on each panel, and with arbitrators inexperienced with employment law in addition to "a distinct set of procedures, no access to a jury, no right to appeal, and no requirement that the arbitrators even follow the letter of the law in rendering their decision").

191. AUGUST 1994 DAILY LAB. REP., *supra* note 189, at A-1. The Civil Rights Procedures Protection Act "would amend seven federal laws, including Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Rehabilitation Act of 1973 . . ." *Id.* The amendment provides that protections granted by these laws cannot be overridden by contract, general federal law, or by any other means. *Id.* Additionally, it amends the Federal Arbitration Act, making that Act inapplicable to federal, state, or local claims of unlawful discrimination based on race, color, religion, national origin, age, or disability. See CONG. REC., *supra* note 179, at E1754 (statement of Rep. Markey) (regarding the protections of the Civil Rights Procedures Protection Act).

192. AUGUST 1994 DAILY LAB. REP., *supra* note 189, at A-1.

193. *Id.*

Responding to the increasing use of compulsory PDAAs, the bill would prohibit employers from denying employees the ability to bring employment discrimination and sexual harassment claims in a judicial forum.<sup>194</sup>

Introducing the bill, Rep. Edward J. Markey (D-Ma) asserted that PDAAs obstruct the goals of antidiscrimination laws, and he proposed to correct this problem through judicial enforcement.<sup>195</sup> The representatives who support the bill claim that without judicial review, employees cannot exercise their statutory rights, and therefore, employers are less inclined to comply with antidiscrimination laws.<sup>196</sup> Specifically, the bill responds to the securities industry's substitution of an impartial and independent judicial forum with a private arbitration system in which doubt exists as to the neutrality and independence.<sup>197</sup>

Arbitration is often an efficient and low-cost alternative to litigation.<sup>198</sup> Furthermore, if conducted fairly, arbitration may be beneficial to all parties.<sup>199</sup> But the benefits cannot outweigh the damages caused by the current securities industry arbitration system which undermines the public policy, remedial, and deterrent functions of civil rights laws.<sup>200</sup> In particular, the representatives noted procedural differences between arbitration and adjudication, such as limited discovery, the lack of written explanation for decisions, and the lack of legal precedent. These differences result in a non-adjudicative system poorly suited to protect individual civil rights.<sup>201</sup> Protection of civil rights "requires both a public forum and one that can bind employers through precedent, the for[c]e of law, and moral [per]suasion."<sup>202</sup> Compulsory industry arbitration provides none of these essential elements of civil rights protection.<sup>203</sup>

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194. CONG. REC., *supra* note 179, at E1753 (statement of Rep. Markey) (introducing the Civil Rights Procedures Protection Act of 1994). Representative Markey explained that signing an arbitration contract is frequently a condition of employment or advancement, or may be required to gain employee benefits, such as stock options. *Id.*

195. *Id.* The legislation, however, does specifically permit employees to voluntarily elect to resolve an employment claim under arbitration but only after the claim has arisen. *Id.* (statement of Rep. Schroeder).

196. *Id.* (statement of Rep. Markey) (explaining that the current securities industry arbitration system allows the whole industry to opt out of the antidiscrimination laws).

197. *Id.* (highlighting the limitations of securities industry arbitration).

198. See FLETCHER, *supra* note 4, §§ 4.7-4.9, § 4.12.

199. CONG. REC., *supra* note 179, at E1754.

200. *Id.*

201. *Id.*

202. *Id.* at E1753-1754.

203. See 1995 DAILY LAB. REP., *supra* note 174, at 27 (asserting that the *Gilmer* Court merely assumed that the securities industry arbitration system provided the essential protections for disputes in an employment setting).

### III. CHALLENGING *GILMER*'S CONTROL OF FUTURE EMPLOYMENT DISPUTES

Many courts have examined the arbitrability of employment-related claims since the *Gilmer* decision.<sup>204</sup> In *Gilmer*, the Court reasoned that arbitration, in conjunction with the role of the EEOC in statutory discrimination claims, offered sufficient nonlitigation procedural protections of the ADEA's goals.<sup>205</sup> Adopting the reasoning of *Gilmer*, courts have ruled in favor of allowing arbitration of employment discrimination claims arising under Title VII of the Civil Rights Act of 1964 (Title VII).<sup>206</sup> In enforcing agreements to arbitrate Title VII claims, pursuant to *Gilmer*'s reasoning, courts make several mistaken assumptions. First, courts assume that Title VII and the ADEA deserve similar treatment.<sup>207</sup> Courts also assume that the EEOC can adequately protect and advance the anti-age discrimination intent of the ADEA.<sup>208</sup> Finally, courts assume that commercial and civil rights disputes involve the same interests.<sup>209</sup> Operating under these misassumptions, the courts refuse to consider how the dispute resolution methods of securities industry arbi-

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204. See John P. Furfaro & Maury B. Josephson, *Enforcing Arbitration Agreements*, N.Y.L.J., Nov. 6, 1992, at 3 (providing examples and analysis of post-*Gilmer* cases).

205. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-29, 32 n.4 (1991) (concluding that the remedial and deterrent functions of the civil rights legislation were preserved through arbitration, the EEOC's independent enforcement role, and a limited judicial review of arbitration decisions).

206. Furfaro & Josephson, *supra* note 204, at 3; see, e.g., *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) (per curiam) (applying *Gilmer*'s mandatory arbitration to Title VII and state law claims of battery); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) (reconsidering and overturning a pre-*Gilmer* refusal to compel arbitration in a Title VII case); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991) (finding the lower court's denial of defendant's motion to arbitrate a securities dealer's discrimination claim to be in error after *Gilmer*); see also Civil Rights Act of 1964, Pub. L. 88-352, Title VII, § 703, 78 Stat. 255 (1964) (codified as 42 U.S.C. §§ 2000e-2, *et seq.* (1982)).

207. See, e.g., *Alford*, 939 F.2d at 230 (finding Title VII claims comparable to the ADEA for the purposes of requiring mandatory arbitration). *But see infra* notes 211-29 and accompanying text (explaining that PDAAs involving Title VII are distinguishable from those involving the ADEA and, therefore, deserve different treatment).

208. See, e.g., *Alford*, 939 F.2d at 230 (referring to EEOC enforcement of the ADEA); *but see infra* notes 230-38 and accompanying text (explaining that EEOC oversight does not effectively further the antidiscriminatory intent of Title VII).

209. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (comparing the concerns in arbitration bargaining power between a securities dealer and investor, to that between an employer and civil rights claimant). *But see infra* notes 249-58 and accompanying text (explaining that the *Gilmer* Court failed to recognize that while arbitration may be entirely appropriate to protect private commercial interests, it is wholly unfit to protect the public interest in civil rights).

tration fails to provide the appropriate safeguards in deciding civil rights arbitration cases.<sup>210</sup>

#### A. Title VII Requires Different Treatment Than the ADEA

The fundamental distinctions between Title VII and the ADEA illustrate the necessity of deciding Title VII arbitration cases differently than *Gilmer* decided similar ADEA claims.<sup>211</sup> Because the ADEA was modeled after Title VII, it is substantively similar to Title VII. However, the distinct basis of discrimination—age as opposed to race and gender—and the procedural variations—preservation of state antidiscrimination laws—suggest that Congress viewed race and gender discrimination as more egregious than age discrimination.<sup>212</sup>

The *Gilmer* decision suggests that even claims of societal interest are arbitrable, absent proof of Congressional intent to preserve access to a judicial forum.<sup>213</sup> The differences between Title VII and ADEA procedures may evidence such Congressional intent. While Title VII preserves parallel state antidiscrimination procedures,<sup>214</sup> the ADEA does not grant equal weight to such procedures.<sup>215</sup> Title VII's enforcement procedures require a claimant to file a discrimination charge with either the EEOC or a qualified state agency.<sup>216</sup> If the Title VII charge is initially received by the EEOC, it must defer to the appropriate state agency for sixty

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210. Godsil Cooper, *supra* note 16, at 214-19 (discussing how the decision in *Gilmer* may be faulted in light of civil rights' legislation goals and arbitration procedures).

211. See *infra* notes 212-29 (explaining that the different purpose, intent and procedures of Title VII and the ADEA require future Title VII decisions to be distinguished from *Gilmer*).

212. Godsil Cooper, *supra* note 16, at 225 (stating that “[t]he procedures of Title VII evince a legislative intent to preserve state antidiscrimination procedures. [But] ADEA does not recognize and preserve the state procedures to the same extent.”).

213. *Gilmer*, 500 U.S. at 29 (suggesting that even the most important claims should be arbitrated unless Congress specifically provides otherwise). *But see* Godsil Cooper, *supra* note 16, at 225 (explaining that the *Alexander* Court's review of legislative intent concluded that Congress intended Title VII claims not be sent to arbitration because of an overriding national policy designed to prevent race discrimination).

214. Godsil Cooper, *supra* note 16, at 225 (stating that one of the compromises reached in Title VII was the preservation of state's rights).

215. *Id.*

216. Hillock, *supra* note 17, at 197.

[T]he [EEOC] shall endeavor to enter into agreements with 706 Agencies and other fair employment practice agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the 706 Agency during the [exclusive sixty day processing period afforded to state agencies].

*Id.* at 197 n. 121 (citing 42 U.S.C. § 2000e-8(b)(1988); 29 C.F.R. § 1601.13(c)(revised as of July 1, 1990)) (alterations in original).

days.<sup>217</sup> Then, when the EEOC has the authority to process the claim, it notifies the employer of the claim and may conduct an investigation.<sup>218</sup>

A Title VII claim may be heard in federal court unless the state administrative proceedings have been reviewed by a state court.<sup>219</sup> Once the state court reviews the administrative proceedings, federal action is precluded.<sup>220</sup> Conversely, under the ADEA, a state proceeding must terminate upon the initiation of suit.<sup>221</sup> Congress' refusal to preempt state antidiscrimination laws which provide greater protection than federal law, demonstrates the weight Congress attaches to the goal of equal employment opportunity.<sup>222</sup>

In enacting Title VII, Congress relied upon the availability of judicial review to eliminate employment discrimination.<sup>223</sup> The courts retain final responsibility for the enforcement of Title VII.<sup>224</sup> Courts are authorized to remedy the effects of unlawful employment practices through affirmative action.<sup>225</sup> Title VII's preservation of the rights and procedures under state antidiscrimination laws connotes that such rights "should not be subject to waiver of a judicial forum, notwithstanding the FAA['s]" policy favoring arbitration.<sup>226</sup> There can be no compulsory arbitration of state antidiscrimination statutes under the FAA because Title VII precludes the waiver of state antidiscrimination rights and procedures.<sup>227</sup> Similarly,

217. *Id.* at 197. The EEOC determines which state and local agencies have the proper jurisdiction and enforcement authority to handle discrimination claims. *Id.* at 197 n.122. The EEOC will not, however, defer a charge to a state agency unless it has proper subject matter jurisdiction. *Id.*

218. *Id.* at 197; see 42 U.S.C. § 2000e-5(b) (stating that the Commission shall afford "substantial weight" to state or local agency findings to determine whether there is "reasonable cause to believe that the charge is true").

219. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3) (1994) (providing that federal courts have jurisdiction to hear alleged civil rights violations); *Godsil Cooper*, *supra* note 16, at 225 (stating that Title VII preserves states' rights by requiring the EEOC to give "great weight" to state agency findings regarding a charge of discrimination); see *University of Tennessee v. Elliott*, 478 U.S. 788, 798-99 (1986) (holding a Title VII suit was not barred by a prior, unreviewed administrative proceeding).

220. *Godsil Cooper*, *supra* note 16, at 225; *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 475-76 (1982) (declaring that Title VII actions must give full faith and credit to final state court judgements).

221. The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.* (1988 and Supp. V 1993).

222. *Godsil Cooper*, *supra* note 16, at 225-26 n.145 (noting that state laws are preempted by Title VII only when they require an act in violation of Title VII).

223. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974).

224. *Id.* at 44.

225. *Id.*

226. *Godsil Cooper*, *supra* note 16, at 226.

227. *But see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 n.3, 29 (1991) (rejecting claimant's nonwaiver argument because the ADEA does not expressly preclude arbitration). The recently enacted Older Workers Benefit Protection Act of 1990

the Title VII action should not be waived in lieu of arbitration because Title VII actions may be brought in either state or federal court.<sup>228</sup> Therefore, a claimant retains the right to file a Title VII claim in court, regardless of the FAA's validation of arbitration.<sup>229</sup>

*B. The Role of the EEOC Does Not Necessarily Effectuate  
Congressional Intent*

The claimant in *Gilmer* argued that arbitration of the ADEA claim would undermine the EEOC's investigation and enforcement role under the ADEA.<sup>230</sup> The Court rejected this argument noting that despite compulsory arbitration, an employee was still able to file a charge with the EEOC.<sup>231</sup> Additionally, the Court reasoned that the EEOC's independent authority to investigate discrimination claims furthered Congressional intent to eliminate discrimination. Hence, arbitration would not preclude enforcement of the ADEA.<sup>232</sup> An examination of the actual capabilities of the EEOC emphasizes the importance of preserving a judicial forum in both Title VII and ADEA cases.<sup>233</sup> The EEOC's overwhelming caseload continues to swell at the same time that there is a simultaneous decrease in the investigative staff. This causes a reduction in the quality of attention given to investigations and the number of court actions filed by the EEOC.<sup>234</sup>

As a result of growing case loads and decreasing staff, the EEOC's backlog presently approaches 97,000 cases.<sup>235</sup> These statistics cast grave

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(OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (codified at 29 U.S.C. § 621 (Supp. V 1992)), amended the ADEA. It provided that "[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." *Gilmer*, 500 U.S. at 28 n.3 (quoting § 201) (alteration in original). The OWBPA was not in effect when *Gilmer* was decided, however, the Court noted the Act in order to illustrate that the settlement of a claim without the involvement of the EEOC does not undermine the role of the EEOC in enforcing ADEA. *Gilmer*, 500 U.S. at 28.

228. *Godsil Cooper*, *supra* note 16, at 226.

229. *Id.*

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

231. *Id.* (noting that *Gilmer* had subsequently filed a charge with the EEOC).

232. *Id.* (noting that "the EEOC's role . . . is not dependent on the filing of a charge . . .").

233. *Godsil Cooper*, *supra* note 16, at 219-20 (explaining the *Gilmer* Court's conclusion that notwithstanding the arbitration of a discrimination dispute, the role of the EEOC is preserved because an individual retains the right to file a discrimination charge with the EEOC who may then initiate a subsequent investigation and/or a judicial action).

234. 1995 DAILY LAB. REP., *supra* note 174, at 44 (explaining that the decline in the number of EEOC investigators has caused an increase in the average caseload per investigator "from 51.3 in [fiscal year] 1990 to 122.0 in [fiscal year] 1994").

235. Currently, there are approximately 97,000 complaints awaiting EEOC investigation. *Id.*; see *Complaints of Bias Climbed in '92, EEOC Says*, L.A. TIMES, Dec. 2, 1992, at



doubt on the *Gilmer* Court's argument that the EEOC enforces statutory civil rights adequately.<sup>236</sup> The limited capacity and resources of the EEOC strongly support the proposition that private judicial actions are the best means to effectuate the intent of Title VII.<sup>237</sup> Yet, this means is extinguished when PDAAs, which bar judicial resolution of the claim, are enforced.<sup>238</sup>

### C. Differences Between Civil Rights and Commercial Disputes Warrant a Lesser Deference to Arbitration

The *Gilmer* Court did not address the fundamental differences between commercial and employment discrimination disputes, thereby making it weak precedent for subsequent employment disputes in the securities industry.<sup>239</sup> Civil rights are a public interest safeguarded by federal legislation.<sup>240</sup> This legislative commitment to ending all forms of discrimination mandates that remedies for violations of these rights be sought in the public forum.<sup>241</sup> Critics assert that the same characteristics of arbitration that make it inexpensive, effective, and efficient in resolving commercial claims, simultaneously defeat the purpose of civil rights protections. These characteristics essentially remove employment discrimination claims from the public eye, replace a judge and jury with arbi-

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D3 (explaining that, in 1992, "[j]ob-related discrimination complaints reached their second-highest annual total since the 1964 Civil Rights Act became law").

236. Godsil Cooper, *supra* note 16, at 220 (examining the number of suits filed by the EEOC in the Northern District of Illinois and comparing that number with the number of individual suits filed in that district, concluding that the EEOC tends to file mainly "class action" suits).

237. *Id.* EEOC suits tend to be class actions, however, individuals rarely satisfy class certification. *Id.* Thus, without private access to a judicial forum, an individual's claim might not adequately be resolved. *Id.*

238. *See id.*

239. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (relying on the FAA line of cases which resolved commercial arbitration disputes (non-employment related), the court failed to acknowledge the unique character of civil rights claims and the policies behind their implementation).

240. The basic right to equal employment opportunity regardless of race, color, religion, sex, national origin, age, or disability is guaranteed in federal legislation. *See* 42 U.S.C. §§ 2000e *et seq.* (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin); the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as 42 U.S.C. §§ 2000e *et seq.* (1982)) (prohibiting employment discrimination on the basis of gender); the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as 29 U.S.C. §§ 621 *et seq.*) (prohibiting employment discrimination on the basis of age); and the Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as 42 U.S.C. §§ 12101 *et seq.* (Supp. V 1993)) (prohibiting employment discrimination on the basis of a disability).

241. Magyar, *supra* note 3, at 654-55 (stating, "the public has a stake in statutory civil rights claims . . . because their resolution changes societal relationships").

trators, limit discovery, limit judicial review, and hinder the development of discrimination law and policy.<sup>242</sup>

These ramifications are precisely what distinguish civil rights claims from commercial claims in determining their appropriateness for arbitration in the securities industry.<sup>243</sup> In an effort to save time and resources, arbitrators are not required to provide written, reasoned arbitral decisions. The trade-off for this efficiency is a limited judicial review of arbitration awards. Furthermore, without written decisions the strict standard for judicial review, manifest disregard for the law, cannot be conclusively established.<sup>244</sup> Because arbitrators are not required to document their findings of fact or conclusions of law, it is impossible to determine whether the arbitrators actually manifestly disregarded the law.<sup>245</sup>

Limited judicial review combined with ambiguous arbitral awards, create the risk of perpetuated discrimination by allowing industry arbitrators to craft their own standards, rather than utilizing the "reasonable person" standard.<sup>246</sup> Furthermore, in order to be reviewed and possibly vacated by a court, arbitration awards require evidence of an arbitrator's failure to decide disputes correctly under antidiscrimination laws.<sup>247</sup> The fact that arbitrators are not required to document clearly their decisions under the law, makes the manifest disregard standard for judicial review essentially an anomaly.<sup>248</sup>

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242. *Id.* at 655.

243. See *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986) (holding that the disregard by arbitrators of "well-defined, explicit, and clearly applicable" governing law constitutes grounds for setting aside an arbitration award under the "manifest disregard" standard).

244. See *Klein & Moyer*, *supra* note 181, § 10.05 (noting that the reasons against written, reasoned awards include the amount of time needed to prepare an award and the possibility of discouraging individuals from serving as arbitrators since their determinations may be judicially challenged).

245. Patrick Daugherty & Clayton W. Davidson, III, *Enforcing or Appealing an Arbitral Award*, in *SECURITIES ARBITRATION*, *supra* note 6, at § 11.02[2], at 11-38 to 11-39 (noting the difficulty in determining whether an arbitrator has disregarded the law since arbitrators need not write opinions or fully explain their decisions).

246. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66, 73 (1986) (setting out the standard for discrimination as conduct which a reasonable person would find hostile); see also Mark Berger, *Can Employment Law Arbitration Work?*, 61 *UMKC L. REV.* 693, 718-19 (1993) (illustrating that the public interest in statutory employment law may demand more intensive judicial review).

247. 1995 *DAILY LAB. REP.*, *supra* note 174, at 32 (highlighting the importance of written arbitral opinions which spell out in "understandable terms the basis for the arbitrator's ruling").

248. See Edward Brunet, *Arbitration and Constitutional Rights*, 71 *N.C. L. REV.* 81, 88 (1992) (stating that "if the arbitrator does not prepare a written opinion, the applicable law cannot be delineated and analyzed") (quoting Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 *OHIO ST. J. ON DISP.*

#### IV. THE *GILMER* COURT FAILED TO CONSIDER THE UNIQUE CHARACTERISTICS OF SECURITIES INDUSTRY ARBITRATION

*Gilmer* resulted in the compulsory arbitration of an employment discrimination dispute pursuant to a standard securities industry PDAA.<sup>249</sup> The Court's holding relied on the FAA's mandate favoring arbitration,<sup>250</sup> the role of the EEOC in discrimination claims,<sup>251</sup> and the Commission's oversight authority.<sup>252</sup> The Court determined that collectively, these protections provide procedural and substantive safeguards comparable to those available in a judicial forum.<sup>253</sup> The Court's reasoning, however, failed to recognize several key factors unique to the securities industry arbitration system. First, the Court ignored the fact that the securities industry arbitration system originally was created and designed to resolve customer's nonemployment-related, commercial claims, and further, that the creators did not foresee resolving the present scope of disputes.<sup>254</sup> Second, the Court failed to recognize that arbitration is intended to resolve disputes via an impartial third party who is knowledgeable in the area of controversy—a characteristic the current securities arbitration system gives little consideration when empaneling arbitrators.<sup>255</sup> Further, while the Court was comforted by existing Commission oversight of industry arbitration, the Court failed to recognize that Commission oversight of SRO arbitration focuses on reviewing nonemployment-related

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RESOL. 157, 198 (1989)). Daugherty & Davidson, III, in *SECURITIES ARBITRATION*, *supra* note 245, § 11.02[2], at 11-38 to 11-39 (noting the difficulty in determining whether an arbitrator has disregarded the law without written opinions spelling out the basis for the decision).

249. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that a PDAA mandates arbitration of a claim under the ADEA).

250. 9 U.S.C. § 2 (validating written agreements to arbitrate).

251. *Gilmer*, 500 U.S. at 28-29, 32 (stressing that the arbitration process does not preclude a subsequent EEOC judicial investigation and resolution); *see supra* notes 230-38 and accompanying text (discussing the EEOC's powers at length).

252. *Gilmer*, 500 U.S. at 29.

253. *Id.* at 26, 30-31 (explaining that parties trade-off some procedural and substantive rights for the efficiency and cost-effectiveness of arbitration but claimants do not "forgo" their rights entirely).

254. *See Symposium*, *supra* note 18, at 1601-02 (explaining that one Uniform Code of Arbitration may not be appropriate for the resolution of the different kinds of substantive claims it is currently facing); SICA REPORT #5 at 2-3 (stating that conference members drafted a uniform code of arbitration to resolve commercial disputes such as those between brokers, dealers, and customers).

255. Attorney Interview, *supra* note 170. Absent any procedural rule, the NASD's current policy is to consider employment law expertise when selecting a panel's chairperson. *Id.*

customer/firm disputes because its role is one of consumer protection.<sup>256</sup> Similarly, the Court failed to recognize the distinction between employment disputes and nonemployment-related commercial claims and their effect on procedural safeguards, especially in light of the unique characteristics of the current securities arbitration system.<sup>257</sup> In short, *Gilmer* fails to insist upon a fair system of arbitration for the resolution of future employment claims.<sup>258</sup>

A. *Modification of the Current Securities Industry Arbitration System vs. Removal of Employment Disputes from the System*

Employment discrimination claims demand a system of arbitration properly designed to satisfy the public interest objectives of the various antidiscrimination statutes governing the employment relationship.<sup>259</sup> The arbitration system must not foster discrimination problems through a lack of procedural and substantive safeguards.<sup>260</sup> The capability of securities industry arbitration to vindicate employment discrimination claims can be addressed in two ways: by amending portions of the arbitration system which affect fairness;<sup>261</sup> or by prohibiting arbitration of employment claims.<sup>262</sup>

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256. See Letter from Robert L.D. Colby, to Linda Morra, *supra* note 129, at 5 (explaining that SEC oversight focuses on consumer protection rather than intra-industry disputes).

257. See *Symposium*, *supra* note 18, at 1602 (commenting that a one size fits all arbitration system may not address the complex cases entering the forum); *supra* notes 249-58 and accompanying text (distinguishing between commercial and civil rights disputes).

258. Cf. 1995 DAILY LAB. REP., *supra* note 174, at 30 (explaining that private arbitration must meet certain quality standards to insure the protection of the "social values embodied in public employment law").

259. E.g., The Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin); the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e *et seq.* (1988) (prohibiting employment discrimination on the basis of gender); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (1988 and Supp. V 1993) (prohibiting employment discrimination on the basis of age); and the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (Supp. V 1993) (prohibiting employment discrimination on the basis of a disability).

260. See *Symposium*, *supra* note 18, at 1631 (commenting that SROs should adopt procedures directly addressing employment disputes); *supra* Section II (B) and accompanying text (explaining that the current securities industry arbitration system fails to provide the procedural and substantive protections necessary to safeguard civil rights claims).

261. See *infra* notes 263-78 and accompanying text (suggesting modifications to securities industry arbitration).

262. See *supra* notes 189-203 and accompanying text (discussing the proposed Civil Rights Procedures Protection Act which would prohibit mandatory arbitration of civil rights claims).

Modification of the securities industry arbitration system would include a divergence in the manner by which SROs currently treat commercial claims and civil rights employment discrimination claims.<sup>263</sup> The most important distinction between commercial claims and civil rights claims in securities industry arbitration is the composition of the arbitrator panel selected to resolve the dispute.<sup>264</sup> Securities industry arbitration was founded on a principle that arbitrators be “knowledgeable in the areas in controversy” and as a result, arbitrators with a core knowledge in the securities laws and securities industry’s customs and practices are considered the most desirable.<sup>265</sup> Securities related commercial disputes are currently resolved by a panel of arbitrators with a specialization in the field of securities.<sup>266</sup> Under the same principle, the arbitrators empaneled to resolve employment discrimination disputes should meet that same specialization requirement—specifically, an understanding of the civil rights laws and policies at issue in the dispute.<sup>267</sup> Therefore, arbitration panels resolving discrimination suits should be composed primarily of public arbitrators,<sup>268</sup> a majority of whom specialize in the area of employment law.<sup>269</sup> This treatment is mandated because the focus of employment discrimination disputes are the civil rights laws prohibiting such

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263. See, e.g., *Symposium, supra* note 18, at 1601-02 (inquiring whether the Uniform Code of Arbitration should be divided into “subchapters” to address different substantive claims).

264. Brunet, *supra* note 248, at 88 (explaining that historically, arbitrator’s were experts in the subject matter of the dispute). Employment discrimination disputes revolve around the civil rights laws affecting the employment relationship. See *supra* note 240 (highlighting the federal laws prohibiting employment discrimination). Currently, SROs characterize and select arbitrators based on their knowledge of, or affiliation with the securities industry. NASD CAP § 19(c)(1-5) and (d) (distinguishing between public and industry arbitrators).

265. See SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, *supra* note 1, at 4-5.

266. NASD CAP § 19(c)(1-5) (defining industry arbitrators).

267. See *Statement by Professor Samuel Estreicher before the Commission on the Future of Worker-Management Relations Panel on Private Dispute Resolution Alternatives*, DAILY LAB. REP. (BNA) No. 188, at D-3 (Sept. 30, 1994) [hereinafter SEPT. 1994 DAILY LAB. REP.] (noting that arbitrators should be lawyers or judges with experience in employment law).

268. NASD CAP § 19(d) (defining those who fit within the definition of public arbitrator).

269. See *Symposium, supra* note 18, at 1632 (recommending the maintenance of “a select panel comprised . . . of [arbitrators] with considerable experience in employment law”); *Symposium, supra* at 1679 (noting that the repair of the existing system for arbitrator training and selection should address criteria for inclusion in the pool of arbitrators, assignment of arbitrators to particular substantive matters, and the type of training that qualifies an arbitrator to be knowledgeable on the substantive area in controversy); 1994 GAO REPORT, *supra* note 1, at 12 (distinguishing between securities related disputes and employment disputes). SEPT. 1994 DAILY LAB. REP., *supra* note 267, at D1-D5 (calling for arbitrators specializing in employment law to resolve employment disputes).

activity, rather than the securities laws and industry customs and practices which are only relevant to commercial disputes.<sup>270</sup>

Moreover, this modification is based on the fact that discrimination claims involve a legal, universal standard, i.e., what a reasonable person would conclude, not what a reasonable person in the securities industry would conclude.<sup>271</sup> While commercial industry disputes focus on industry custom and practice, these standards are irrelevant in discrimination suits.<sup>272</sup> The current arbitration system pulls the securities industry from the reach of the antidiscrimination laws because of the system's reliance on self-review of industry custom and practice.<sup>273</sup> A requirement that arbitrators have experience or training in employment discrimination disputes would place securities industry employees on the same footing as those seeking relief in a judicial forum. By giving arbitrators the knowledge to understand and apply the federal policies and standards developed under the civil rights laws this equal footing is assured.<sup>274</sup>

An arbitrator specialization requirement for discrimination suits could be met through a comprehensive mandatory training program or focused recruitment efforts.<sup>275</sup> If the current "pool" of SRO arbitrators fails to provide an adequate number of arbitrators with a specialization in employment discrimination law,<sup>276</sup> non-SRO arbitrators, such as those affili-

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270. See *supra* note 240 (outlining the key civil rights laws governing the employment relationship).

271. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66, 73 (1986) (setting out the standard for discrimination as conduct which a reasonable person would find hostile).

272. See Brunet, *supra* note 248, at 85 (explaining that arbitrators are not confined to the substantive rules of law, but may fashion equitable awards reflecting facts and circumstances).

273. *Id.* (noting that the absence of written, reasoned arbitral awards combined with limited judicial review of arbitral awards, allows arbitrators to disregard the substantive rules of law).

274. See *Symposium*, *supra* note 18, at 1682 (suggesting that arbitrator pools be classified by area of substantive expertise, such that the expertise parallels the substantive issue involved).

275. *Id.* at 1681 (recommending that the curriculum for a mandatory training program for arbitrators cover substantive areas of law and procedural issues that will be supplemented with continuing arbitrator training on an ongoing basis); see Attorney Interview, *supra* note 170 (stating that employment law training seminars are currently offered by the NASD, but remain optional).

276. BLUMBERG CANE & SHUB, *supra* note 20, at 372 (explaining Professor Constantine Katsoris' proposal for a unified arbitration forum). A consolidation of the various arbitration pools would allow for dispersed pools of "experienced public arbitrators [to] be combined and shared." *Id.*; see MASUCCI & MORRIS, *supra* note 118, at 318-19 (inferring that the majority of arbitrators have a securities industry background).

ated with the American Arbitration Association (AAA),<sup>277</sup> who have an expertise in employment discrimination laws, should be utilized.<sup>278</sup>

### 1. *A Fair Arbitration System Can Be Developed*

While requiring arbitrator expertise in employment discrimination law is an effective "patchjob," it fails to address the procedural limitations that detrimentally effect civil rights claims— limited discovery, limited right to appeal, and lack of written, reasoned decisions.<sup>279</sup> A fair arbitration system for employment discrimination claims would permit an individual to choose the method of enforcement of their statutory employment rights rather than making the choice a condition of employment through an employment contract.<sup>280</sup> Further, a fair system would offer safeguards to ensure the selection of neutral and knowledgeable arbitrators.<sup>281</sup> Such a system would provide both parties an active role in the arbitrator selection process.<sup>282</sup> The arbitrator selected should be from a pool of neutral arbitrators demographically representative of the workplace, with consideration given to his or her subject matter expertise, specifically, specialization in the employment discrimination laws.<sup>283</sup> Additionally, the right to independent representation throughout the arbitration proceeding should be preserved.<sup>284</sup>

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277. The American Arbitration Association (AAA) is a public, non-profit, organization offering arbitration services for a broad range of fields. AAA RULES, *supra* note 140, at 3.

278. *Cf. Symposium, supra* note 18, at 1680 (commenting that the use of expert arbitrators dilutes the intent of the self regulatory principle—which is peer review of the industry).

279. *See supra* notes 179-88 and accompanying text (discussing the detrimental impact arbitration procedures have on civil rights disputes).

280. 1995 DAILY LAB. REP., *supra* note 174, at 33 n.15 (noting that compulsory arbitration forces employees to give up their right to pursue a claim in court or give up their job, a choice contrary to the social and economic safeguards intended by the employment laws); *see also* Magyar, *supra* note 3, at 643 n.18 (outlining the distinction between pre-dispute agreements and post-dispute agreements).

281. *See* SEPT. 1994 DAILY LAB. REP., *supra* note 267, at D-2 through D-3 (explaining the importance of neutral, knowledgeable arbitrators).

282. 1995 DAILY LAB. REP. *supra* note 174, at 31 (stating that the co-selection of arbitrators by both the employer and employee helps to ensure quality in private arbitration); *see also* Berger, *supra* note 246, at 716 (advocating the joint selection of potential arbitrators by both the employee and employer).

283. *See* BLUMBERG CANE & SHUB, *supra* note 20, at 370 (noting that lack of arbitrator training has a negative impact on the quality of arbitrators); 1995 DAILY LAB. REP. *supra* note 174, at 31-32 (stating that arbitrator neutrality could be further preserved by having both parties contribute to the arbitrator's fee).

284. SEPT. 1994 DAILY LAB. REP., *supra* note 267, at D-3 (explaining that parties should be represented by counsel of their choosing); *see also* Berger, *supra* note 246, at 717 (stating that individuals are disadvantaged by the absence of adequate representation).

Procedural safeguards should be implemented to allow for the unique nature of employment disputes, such as flexible pre-hearing discovery,<sup>285</sup> arbitral authority to provide remedies similar to those provided in a judicial forum,<sup>286</sup> a requirement for reasoned, written, public opinions,<sup>287</sup> as well as active Commission oversight to ensure that SROS are responding to Commission recommendations.<sup>288</sup> Similarly, a more intensive scope of judicial review should be instituted to determine whether the arbitral decision reflected an understanding of the relevant antidiscrimination laws, policies, and standards.<sup>289</sup>

## 2. Removal of Employment Claims from Mandatory Arbitration

Unless SROs are prepared to design an arbitration system that provides the procedural and substantive mechanisms necessary to protect statutory civil rights, the proposed legislation prohibiting arbitration of

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285. 1995 DAILY LAB. REP., *supra* note 174, at 31 (stressing the importance of access to personnel files in disparate impact of claims); *see also* Brunet, *supra* note 248, at 86 (commenting that full “litigation-style discovery” and “formal rules of evidence” inhibit the efficiency and cost-effectiveness of arbitration).

286. *See generally* *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1218-19 (1995) (holding that a New York choice of law provision contained in a PDAA does not preclude an award of punitive damages). The choice of law provision in *Mastrobuono* attempted to take advantage of a New York law precluding the award of punitive damages by arbitrators. *Id.* at 1214. Effectively, this provision forced customers signing the PDAA to give away substantive rights available to them under New York law. *Id.* at 1219. The Court found that the choice of law provision was not in itself an unequivocal agreement to exclude punitive damages from arbitration. *Id.* at 1218-19. In short, the Court suggests that punitive damages are excluded from arbitration only if the contract explicitly provides. *Id.* at 1219.

If the same philosophy applies when a registered representative signs an employment contract containing a PDAA, the contract would have to explicitly provide for the preclusion of an individual’s right to pursue the substantive rights available to them under the antidiscrimination laws. *See* 1995 DAILY LAB. REP. *supra* note 174, at 32 (providing that those arbitrators ruling on the antidiscrimination laws “should be empowered to award whatever relief—including reinstatement, back pay, additional economic damages, punitive awards, injunctive relief, and attorney’s fees—that would be available” in a judicial forum).

287. *See* 1995 DAILY LAB. REP. *supra* note 174, at 32 (stating that while written arbitral opinions need not be modeled after court opinions, they should set out the basis for an arbitrator’s decision); *see, e.g., Symposium*, *supra* note 18, at 1623 (pointing out the negative ramifications on an industry member when an award favoring a claimant is not accompanied by a written opinion).

288. 1994 GAO REPORT, *supra* note 1, at 15 (recommending that the SEC implement a formal inspection cycle focused on SRO arbitration).

289. 1995 DAILY LAB. REP., *supra* note 174, at 32 (explaining that reviewing courts must ensure that “relevant legal doctrines” have been understood and applied). For example, an arbitral decision should reflect and apply the universal, reasonable person standard set out in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66, 73 (1986), when ruling on a sexual harassment claim.



civil rights claims may be the most effective solution to safeguard the civil rights of securities industry employees.<sup>290</sup> The removal of discrimination cases from the arbitration forum unquestionably furthers the deterrent and remedial function of the civil rights laws by preserving a judicial resolution of such disputes and by safeguarding the statutory protections of the civil rights laws.

## VI. CONCLUSION

While securities industry arbitration of nonemployment-related claims is appropriate, the Court's decision in *Gilmer* fails to demand that a private arbitration system offer certain quality standards that ensure the fairness and adequacy of the arbitral process and the protection of public rights inherent in state and federal employment discrimination laws. Therefore, the arbitration codes of the various SROs should be amended to accommodate the resolution of employment discrimination disputes. These amendments should require that arbitrator-selection criteria include subject matter expertise, and provide for the requisite procedural protections of civil rights claims in light of the deterrent and remedial functions of the antidiscrimination laws. Absent these modifications, which recognize the strengths and weaknesses of the current securities industry arbitration system, the most appropriate alternative may be the implementation of the Civil Rights Procedures Protection Act which will restrict the availability of such a forum for the resolution of employment discrimination disputes. In an era of expanded rights and remedies, the securities industry must react to both the qualitative and quantitative expansion of this arena to remain an adequate substitute for the judicial forum.

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290. See CONG. REC., *supra* note 179, at E1753 (statement of Rep. Markey) (introducing the Civil Rights Procedures Protection Act which would prohibit the compulsory arbitration of civil rights disputes).