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Taking the Alternative out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising out of Employment Contracts

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TAKING THE "ALTERNATIVE" OUT OF THE DISPUTE RESOLUTION OF TITLE VII CLAIMS: THE IMPLICATIONS OF A MANDATORY ENFORCEMENT SCHEME OF ARBITRATION AGREEMENTS ARISING OUT OF EMPLOYMENT CONTRACTS

I. INTRODUCTION

"Mary" is a 35-year-old woman who has worked at "Firm X" for seven years.[1] When Mary signed the arbitration[2] agreement contained in her employment contract with Firm X, she never dreamed that Firm X would deny her promotions because of her gender. Furthermore, Mary never dreamed that by signing this employment contract, she would be precluded from pursuing her claim of employment discrimination in a court of law. She only knew that she needed the job and that she had to sign the agreement as a condition of employment with Firm X. Later, when Mary tried to bring an employment discrimination claim against Firm X, the court informed her that she must arbitrate the claim instead. This hypothetical situation might occur if the courts enforce agreements to arbitrate contained in contracts of employment. The current atmosphere in the United States seems ripe for just such a decision.

In recent years Congress has increasingly recognized and approved the use of alternative dispute resolution (ADR) techniques to aid in relieving the congestion and backlog in the federal courts.[3] The United States Supreme Court has recognized the emerging importance of ADR techniques by its efforts to enforce arbitration agreements.[4]

In 1985, the Supreme Court began what was to be a trilogy of cases which recognized a presumption of arbitrability[5] for commercial con-

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1. This scenario is a hypothetical situation created for the purposes of this Note.

2. Arbitration is a method of dispute resolution in which the parties voluntarily submit their dispute to an impartial judge of their choice and agree in advance that the decision will be final and binding upon them. *See* FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 2 (4th ed. 1985).

3. *See* 28 U.S.C. § 473(a)(6) (Supp. IV 1992) (authorizing federal courts "to refer appropriate cases to alternative dispute resolution programs"); The Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (endorsing the use of alternative means of dispute resolution when appropriate).

4. For example, in 1984 the United States Supreme Court held that a California law was invalid because it undercut the enforceability of arbitration agreements covered by the Federal Arbitration Act, which creates a presumption of enforceability of certain arbitration agreements. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (citing 9 U.S.C. § 2). The Court stated that Congress did not intend for the Arbitration Act to be limited to those disputes brought in federal court, but that it would also be applicable in state courts. *Id.* at 15-16. Finally, the Supreme Court held that the California law in question violated the Supremacy Clause of Article Six of the United States Constitution because it undermined the Federal Arbitration Act's presumption of enforceability of arbitration agreements. *Id.* at 16.

5. This presumption basically means that there is a national policy favoring an arbitral forum over a judicial forum when an agreement to arbitrate a dispute has been signed. *Southland Corp.*, 465 U.S. at 10.

tracts.[6] The first case in this trilogy, *Mitsubishi Motors v. Soler Chrysler-Plymouth*,[7] involved claims arising under the Sherman Act and arose in an international commercial context.[8] Citing strong policy reasons favoring international relations in the business community, the Court enforced an agreement to arbitrate certain anti-trust claims.[9]

Two years later, in *Shearson/American Express, Inc. v. McMahon*,[10] the Supreme Court enforced agreements to arbitrate claims arising under the Securities Exchange Act of 1934 and claims arising under the Racketeer Influenced and Corrupt Organization Act (RICO).[11] Finally, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[12] the Court held that predispute agreements made pursuant to the Securities Act of 1933 were arbitrable even though the Act contained a nonwaiver provision.[13] In this *Mitsubishi* trilogy, the Court began to find statutory claims arbitrable.

The most recent decision raising a presumption of arbitrability, *Gilmer v. Interstate/Johnson Lane Corp.*,[14] extended the mandatory enforcement of arbitration agreements into the realm of employment discrimination suits.[15] At issue in *Gilmer* was the arbitrability of claims arising under the Age Discrimination in Employment Act of 1967 (ADEA).[16] In *Gilmer*, Gilmer, a securities representative, registered with the New York Stock Exchange (NYSE), as was required by his employer, Interstate.[17] The registration application required that Gilmer "agree to arbitrate any dispute, claim or controversy" that arose between himself and Interstate.[18] In 1987, when Gilmer was 62 years old, Interstate fired him.[19] Gilmer then brought an ADEA suit.[20] Interstate, however, filed a motion in federal court to compel arbitration of the ADEA claim.[21] Interstate's motion relied on the arbitration agreement Gilmer signed with his registration application and the Federal Arbitration Act (FAA).[22]

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6. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
7. 473 U.S. 614 (1985).
8. *Id.* at 616. It is from *Mitsubishi* that this series of cases became titled the *Mitsubishi* trilogy.
9. *Id.* at 638-40 (citing to the international policy of favoring arbitration).
10. 482 U.S. 220 (1987).
11. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).
12. 490 U.S. 477 (1989).
13. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)).
14. 111 S. Ct. 1647 (1991).
15. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1657 (1991).
16. *Id.* at 1650 (citing 29 U.S.C. §§ 621-633a (1988) [hereinafter the ADEA]).
17. *Id.*
18. *Id.*
19. *Id.* at 1651.
20. *Gilmer*, 111 S. Ct. at 1651 (suing after filing a charge with the EEOC).
21. *Id.*
22. *Id.*; 9 U.S.C. §§ 1-15 (1988) [hereinafter the FAA]. The FAA began as the Act of February 12, 1925, ch. 213, 43 Stat. 883. *Gilmer*, 111 S. Ct. at 1651. It was codified as Title 9 in 1947. *Id.* The Court in *Gilmer* relied on the FAA's enforcement provision which states that "a contract evidencing a

This arbitration agreement required Gilmer to arbitrate disputes arising out of his employment with Interstate.[23] The court of appeals enforced the arbitration agreement, holding that Gilmer must arbitrate his claim pursuant to the agreement, and the Supreme Court affirmed.[24]

Although commentators have applauded *Gilmer* for its apparent endorsement of ADR techniques,[25] *Gilmer* has its critics.[26] Many academics speculated about the degree to which this trend of enforcing arbitration clauses, signed in agreements ancillary to employment contracts, will impoverish the congressionally-created protections against employment discrimination, such as the ADEA and the Americans with Disabilities Act.[27]

This Note is concerned with individuals who seek to vindicate their rights protecting them against employment discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).[28] This Note will first address the history of the Supreme Court's treatment of Title VII arbitration.[29] It will then examine how *Gilmer*, decided in the context of the Age Discrimination in Employment Act of 1967 (ADEA), might affect the arbitration

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transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988).

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

24. *Id.* at 1657.

25. 137 CONG. REC. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

26. *See generally* 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 (1992) (offering a thorough analysis and thoughtful criticism of the *Gilmer* decision); *see also* Michael G. Holcomb, Note, *The Demise of the FAA's "Contract of Employment" Exception?* Gilmer v. Interstate/Johnson Lane Corp., 1992 J. DISP. RESOL. 213 (offering readers a quick overview of *Gilmer* and discussing the *Gilmer* dissent which highlights the majority's flawed manner of skirting the issue of the FAA's coverage, or lack of coverage, of employment contracts).

27. *See generally* Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993) (dealing with the ramifications of *Gilmer* on the Americans with Disabilities Act); *see also* Jennifer A. Clifton, Note, *The Right to Sue v. The Agreement to Arbitrate: The Dilemma in Title VII Cases*, 1991 J. DISP. RESOL. 407, 415 (articulating the effect that *Gilmer* had on Alford v. Dean Witter Reynolds, Inc., 905 F. 2d 104 (5th Cir. 1990), *vacated*, 111 S. Ct. 2050 (1991), *rev'd*, 939 F. 2d 229 (5th Cir. 1991)).

28. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §§ 2000e-2000e-17 (1988) [hereinafter Title VII]. Title VII provides that:

> [i]t shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any *individual*, or otherwise discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* race, color, religion, sex, or national origin.

Id. at § 2000e-2 (emphasis added).

This repeated use of the word "individual" in the language of Title VII suggests that Congress was particularly aware of individual litigants in Title VII actions and the importance of vindicating the rights of these individuals.

29. *See infra* notes 34-49 and accompanying text (discussing the Supreme Court's historical treatment of the arbitration of Title VII).

of Title VII claims.[30] This Note will then consider the direction that federal courts should take with respect to the arbitration of Title VII claims in the future, and will discuss the exclusion of employment contracts from coverage by the FAA and the reason this exclusion is mandated.[31] Next, it will attempt to distinguish Title VII from the ADEA.[32] This Note concludes with the affirmation that Title VII claims should only be arbitrated when it is a truly voluntary process.[33]

II. ARBITRATION OF TITLE VII CLAIMS

A. THE DEVELOPMENT OF THE LAW THROUGH *GILMER*

The seminal case dealing with arbitration of Title VII claims is *Alexander v. Gardner-Denver Co.*[34] In *Gardner-Denver*, the United States Supreme Court held that an employee was entitled to trial de novo for the denial of his statutory rights under Title VII, despite the fact that he had already pursued the matter under the grievance-arbitration clause of his collective bargaining agreement.[35] The *Gardner-Denver* decision emphasized the importance the Supreme Court placed on the ability of Title VII claimants to litigate their employment discrimination claim. Although the *Gilmer* Court discounted many of the premises on which *Gardner-Denver* was based,[36] it did not expressly overrule *Gardner-Denver*.[37] Now,

30. *See infra* notes 50-66 and accompanying text (discussing the current status of the law governing the arbitration of Title VII disputes).

31. *See infra* notes 67-138 and accompanying text (discussing the future of the arbitration of Title VII claims and the FAA's employment contract exception).

32. *See infra* notes 139-164 and accompanying text (distinguishing Title VII from the ADEA).

33. *See infra* notes 165-167 and accompanying text (discussing when the arbitration of Title VII claims would be appropriate).

34. 415 U.S. 36 (1974).

35. Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974) (allowing an employee to pursue his Title VII claims trial de novo after receiving an unfavorable arbitration award).

36. The Court in *Gilmer* emphasized that the *Gardner-Denver* Court was acting under a "mistrust" of the arbitral process. *Gilmer*, 111 S. Ct. at 1656 n. 5. The Supreme Court further noted that this mistrust is no longer present in the Court today. *Id.*

It is questionable whether the *Gardner-Denver* Court really had such a "mistrust" for the arbitral process, for they recognized that under the right circumstances, it could be both an "inexpensive" and "expeditious" means for resolving employment discrimination suits. Alexander v. Gardner-Denver Co., 415 U.S. 36, 55 (1974). The *Gardner-Denver* Court also recognized that arbitration could have therapeutic benefits for any employee by satisfying their "perceived need to resort to [a] judicial forum." *Id.* The Court further stated that arbitration could offer a better way to eliminate misunderstandings and avoid the aggravation of a lawsuit. *Id.*

37. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1657 (1991) (distinguishing *Gardner-Denver* rather than overruling it). The *Gilmer* Court distinguished *Gardner-Denver* on the basis that *Gilmer* did not involve the enforceability of an agreement to arbitrate, but rather involved the issue of "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Id.* It also noted that unlike *Gilmer*, *Gardner-Denver* was not decided under the FAA. *Id.* The significance of deciding *Gilmer* under the FAA is that the FAA reflects a policy favoring arbitration. *Id.*

federal courts must guess which parts of *Gardner-Denver* that *Gilmer* left intact.[38]

Although commercial, rather than labor, arbitration is the focus of this Note,[39] it is nevertheless important to be familiar with *Gardner Denver*. In *Gardner-Denver*, the United States Supreme Court noted that Congress has entrusted federal courts with the responsibility of enforcing Title VII rights.[40] The Court recognized the significant role that individual employees play as "private litigant[s]" in the enforcement of Title VII rights.[41] These private litigants are not only redressing their own injuries but are also vindicating "the important congressional policy against discriminatory employment practices."[42] Finally, the Court stated that an employee's rights under Title VII cannot be prospectively waived.[43] Such a waiver would prove to be a defeat of the "paramount congressional purpose" on which Title VII was based.[44] These premises on which the *Gardner-Denver* decision are based are arguably as important in 1994 as they were in 1974, when *Gardner-Denver* was decided, since the purposes of Title VII have yet to be accomplished.

Until *Gilmer*, *Gardner-Denver* seemed to be the controlling law with respect to the arbitration of Title VII claims.[45] Before *Gilmer*, Title VII claimants could pursue their claims in the federal courts under *Gardner-*

38. *See infra* notes 40-44 and accompanying text (discussing the *Gardner-Denver* decision). It is likely that all of *Gardner-Denver* remains intact when an agreement to arbitrate made pursuant to a collective-bargaining agreement is at issue. *See Gilmer*, 111 S. Ct. at 1656-57 (distinguishing the collective-bargaining agreement from individual statutory rights). *See also* Cooper, *supra* note 26, at 236 (posing the question of whether collective-bargaining agreements are within the reach of the FAA). The question of whether collective bargaining agreements are within the reach of the FAA is left unanswered by *Gilmer* and is beyond the scope of this Note since this Note's concern is with *Gilmer's* implications on individual employment contracts. However, readers interested in this topic may want to see a recent case involving an arbitration provision signed in a collective-bargaining agreement which applied *Gardner-Denver* and held that the plaintiff was not precluded from pursuing her Title VII claim in a judicial forum. Tarrant v. United Parcel Service, Inc., No. 93 C 5660, 1994 WL 30552, at *3 (N.D.Ill. Feb. 3, 1994).

39. In commercial arbitration, the plaintiffs themselves have usually signed a contract to arbitrate their disputes, whereas in labor arbitration "the union has negotiated and signed the arbitration clause on behalf of its members." G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 531 (1990). In commercial arbitration, the individual decides whether or not to proceed with a claim, and the individual is responsible for representing his or her own interests or hiring an attorney to do so. *Id.* In labor arbitration, the union has the responsibility of representing the interests of the aggrieved party in any manner that the union sees fit. *Id.*

40. *Gardner-Denver*, 415 U.S. at 36. The Court in *Gardner-Denver* stated that "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII" and concluded that, in light of such a goal, it would be inconsistent for a court to defer to an arbitral decision. *Id.* at 56. The Court also stated that the right to enforce Title VII is "vested" with the federal courts. *Id.* at 44.

41. *Id.* at 45.

42. *Id.*

43. *Id.* at 51.

44. *Id.* The Court stated that it was Congress's purpose "that each employee be free from discriminatory practices." *Id.*

45. *See infra* notes 46-49 and accompanying text (discussing how the federal courts were deciding cases of arbitration agreements when Title VII claims were at stake before *Gilmer*).

Denver, even though they had signed compulsory arbitration agreements.[46] As late as 1990, federal circuit courts relied on *Gardner-Denver* as authority for allowing those who had signed compulsory arbitration agreements to pursue their claims in federal courts.[47] The Court made these decisions in spite of the *Mitsubishi* trilogy, which seemed to create a presumption in favor of compulsory arbitration in the commercial context.[48] Similarly, courts gave latitude to ADEA claimants to take their discrimination claims to the courts despite previously signed compulsory arbitration agreements.[49] In fact, the Fourth Circuit Court of Appeals, which decided *Gilmer*, was the only federal circuit court that strayed from this trend of allowing discrimination claims into the federal courts, despite previously signed arbitration agreements.[50] The United States Supreme Court affirmed the Fourth Circuit's decision in *Gilmer*.[51]

Though *Gilmer* was decided in an ADEA context,[52] at least one circuit court has extended its rationale to make the arbitration of Title VII

46. *See* Swenson v. Management Recruiters Int'l, Inc., 858 F. 2d 1304, 1307 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989) (concluding that in passing Title VII, Congress's intent was to assist victims of discrimination and that arbitration might hinder this mandate); Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990) (finding that Title VII does not mandate that a claimant arbitrate prior to a judicial hearing).

47. Alford v. Dean Witter Reynolds, Inc., 905 F. 2d 104, 108 (5th Cir. 1990), *vacated*, 111 S. Ct. 2050 (1991), *rev'd*, 939 F.2d 229 (5th Cir. 1991). In its initial decision, the *Alford* court relied heavily upon *Gardner-Denver*. *Alford*, 905 F.2d at 107-08. The court recognized that just as there had been strong federal policy favoring commercial arbitration, the same could be said about labor arbitration. *Id.* at 107. The policy favoring labor arbitration failed to cause the *Gardner-Denver* Court to subordinate the interests in Title VII to the policies favoring labor arbitration. *Id.* The court also stated that *Gardner-Denver* appeared "to rest first on a construction of Title VII" rather than on its context in a collective-bargaining situation. *Id.* Thus, since *Alford* involved a Title VII suit, the court said *Gardner-Denver* was controlling rather than recent decisions favoring commercial arbitration. *Id.* at 108.

48. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (making up the string of cases commonly called the *Mitsubishi* trilogy which mark the turning point where the Supreme Court started to favor commercial arbitration). *But see* Atchison T. & S. F. R. Co. v. Buell, 480 U.S. 557 (1987). In *Buell*, decided two years after *Mitsubishi* and in the same year as *McMahon*, the Supreme Court stated that despite the strong policies favoring arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to *individual* workers." *Id.* at 565 (quoting Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 737 (1981)) (emphasis added).

49. *See* Nicholson v. CPC Int'l Inc., 877 F. 2d 221 (3rd Cir. 1989). The *Nicholson* court thoroughly analyzed why the FAA's presumption of arbitrability does not apply to the ADEA. *Id.* at 224-30. At issue in *Nicholson* was "an employee's prospective waiver of a judicial forum for ADEA claims." *Id.* at 230. The court concluded that evidence of a contrary congressional intent expressed by the ADEA overcame the presumption of arbitrability arising under the FAA. *Id.*

50. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 203 (4th Cir. 1990), *aff'd*, 111 S. Ct. 1647 (1991) (ordering the plaintiff to arbitrate his discrimination claim). The Fourth Circuit found the *Mitsubishi* trilogy to be evidence that the Supreme Court "endorsed arbitration as an effective and efficient means of dispute resolution." *Id.* at 196. The Fourth Circuit held that the question of whether an employee was maltreated because of his age was a "straightforward factual matter" that was "within the capabilities of an arbitrator" and therefore, the FAA's presumption of arbitrability must apply. *Id.* at 201.

51. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).

52. *Gilmer*, 111 S. Ct at 1650 (stating that the issue in this case involves a claim brought under the ADEA).

claims mandatory.[53] After *Gilmer*, Title VII claimants who have signed separate agreements[54] to arbitrate disputes arising out of their employment could be required to arbitrate their Title VII claims with no chance for relief from the courts.[55] The Sixth Circuit found this to be the case in *Willis v. Dean Witter Reynolds, Inc.*[56] In *Willis*, the court seemed somewhat reluctant in concluding that *Gilmer*'s rationale required it to compel a plaintiff to arbitrate her sexual harassment and discrimination charges with her employer.[57] *Gilmer*, however, did not address whether the arbitrator's decision would actually be final and binding upon the employees or whether the employees would have a right to trial de novo of their statutory claim.[58]

Another source of current law that might provide for review of an arbitral decision is the FAA, which lays out strict standards for review of an arbitrator's decision.[59] The FAA governs in commercial arbitration situations such as the one in which *Gilmer* arose.[60] Federal courts may vacate an award only in situations involving fraud, corruption, or misconduct by the arbitrators.[61] Still more limited are the standards for a modi-

53. *See* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990), *vacated*, 111 S. Ct. 2050 (1991), *rev'd*, 939 F. 2d 229, 230 (5th Cir. 1991) The *Alford* court originally refused to mandate the arbitration of Title VII claims. 905 F.2d. at 107. It later reversed its decision, ordering the enforcement of the arbitration agreement when the case was vacated by the Supreme Court in light of its holding in *Gilmer*. *Alford*, 939 F. 2d at 229.

54. These are called "separate agreements" because these agreements are not a part of the employee's actual employment contract. These are agreements, in addition to the actual employment contract, that an employer requires future employees to sign before the employer will hire them. An example of this separate agreement is the one Gilmer signed in his registration application with the New York Stock Exchange. *Gilmer*, 111 S. Ct. at 1650. Gilmer was required to sign this agreement as a condition to his employment with Interstate. *Id.* The Supreme Court noted, however, that this agreement was not a part of his actual contract of employment. *Id.* at 1651 n.2.

55. *Id.* at 1651. *See also* Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991). *Willis*, a post-*Gilmer* decision, involved an arbitration agreement signed in a securities registration application. *Id.* at 306. At issue was whether the agreement to arbitrate claims should be enforced with respect to the plaintiff's Title VII claims. *Id.* The plaintiff alleged sexual harassment and gender discrimination. *Id.* The court concluded that the rationale of *Gilmer* compelled the court to enforce the agreement to arbitrate. *Id.* at 312.

56. 948 F. 2d 305 (6th Cir. 1991).

57. Willis v. Dean Witter Reynolds, Inc., 948 F. 2d 305, 312 (6th Cir. 1991) (stating that although *Gilmer* forecloses a holding that would prevent Willis from arbitrating her claim, it saw no reason for extending such a rule to agreements signed in an actual employment contract).

58. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991). If the employees had a right to trial de novo of their statutory claim in the federal courts, *Gilmer* decision would be consistent with *Gardner-Denver* because the *Gardner-Denver* Court allowed trial de novo to take place after the dispute had been arbitrated. Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974). The *Gardner-Denver* Court held that even with a trial de novo of the statutory claim, a federal court has discretion to admit evidence of the prior arbitral decision and to afford it the weight it finds appropriate in its consideration of the claim. *Id.* Nevertheless, the Supreme Court warned federal courts to "be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims." *Id.* at 60 n.21.

59. *See* 9 U.S.C. §§ 10-11 (1988) (setting out the standards for a vacation or modification of an arbitral award).

60. *Gilmer*, 111 S. Ct. at 1651-52 (discussing the applicability of the FAA to the contract involved in *Gilmer*).

61. 9 U.S.C. § 10(a) (Supp. IV 1992). A court can vacate an award:

(1) [w]here the award was procured by corruption, fraud, or undue means . . . [,]

fication or correction of an arbitration award.[62] Courts will vacate awards only when an arbitrator shows a "manifest disregard" for the law.[63] This standard provides only restricted grounds for a vacation of an award. For example, an award would not be vacated even if it were based on an arbitrator's mistaken interpretation of Title VII law.[64] When forced to arbitrate their employment discrimination claims, it is most certain that the FAA's system of review will not allow these claimants adequate review of their arbitral awards. This fact should prove alarming, not only for employees arbitrating Title VII rights, but also for employers engaged in arbitration, since arbitration is not always favorable to them.[65]

Thus, it seems that if the Supreme Court follows *Gilmer* rather than *Gardner-Denver* when the arbitration of Title VII claims is at issue, these Title VII claimants will be precluded from resorting to the courts for a remedy.[66] There is still room for the Supreme Court to alter this course, however, and give back to the Title VII claimant the choice between pursuing their discrimination claim in a judicial or arbitral forum.

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(2) [w]here there was evident partiality or corruption in the arbitrators[,]

(3) [w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced[, or]

(4) [w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

62. 9 U.S.C. § 11 (1988). An arbitral award can be modified or corrected by a court:

(a) [w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award[,]

(b) [w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted[, or]

(c) [w]here the award is imperfect in matter of form not affecting the merits of the controversy.

Id.

63. Wilko v. Swan, 346 U.S. 427, 436-37 (1953). Although Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989), overruled *Wilko*, the dictum from *Wilko* about "manifest disregard" still stands and over the last 50 years the courts have built on this language. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933-36 (2d Cir. 1986).

The *Merrill Lynch* court attempted to define "manifest disregard" when it stated that it "clearly means more than error or misunderstanding with respect to the law." *Id.* at 933. According to *Merrill Lynch*, "[t]he error must have been obvious and capable of being readily and instantly perceived by the average person . . . ." *Id.* Thus, in order for error to exist, an arbitrator must be aware that the law exists and decide to ignore it. *Id.* This standard is therefore quite limited in its power to reach an arbitral decision. *Id.* at 934.

64. *See Wilko*, 346 U.S. at 436.

65. *See* Cooper, *supra* note 26, at 237 (challenging the assumption that arbitration is always pro-employer and anti-employee).

66. *See* Clifton, *supra* note 27, at 416 (arguing that even after *Gilmer*, *Alexander v. Gardner-Denver* is binding on courts considering the compulsory arbitration of Title VII claims).

B. CHARTING THE COURSE THE COURTS SHOULD TAKE IN THE FUTURE

1. *Excluding "Contracts of Employment" from FAA Coverage*

a. The *Gilmer* Footnote

Despite *Gilmer*, there is still hope that Title VII claimants (and, in fact, all employment discrimination claimants) may avoid the mandatory enforcement of arbitration agreements.[67] This hope is based on a footnote in *Gilmer* which discusses the exclusion provided in the FAA.[68] This exclusion states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[69] If this exclusion is found to apply to Title VII, the presumption of arbitrability established by the FAA would not apply to agreements in employment contracts that would seem to require the arbitration of Title VII discrimination claims. The Supreme Court, however, did not decide whether this exclusion would apply to all "contracts of employment," stating that it would leave that issue "for another day."[70]

b. The Section One Exclusion in the Circuit Courts

Unfortunately, the Fifth Circuit Court of Appeal's decision in *Alford v. Dean Witter Reynolds, Inc.*,[71] which involved the arbitration of Title VII claims, did not address the section one exclusion either.[72] As in *Gilmer*, the arbitration clause at issue in *Alford* was contained in the employee's agreement with the Securities Exchange Commission and not with the employer directly.[73] Although the *Alford* court did not address

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67. For an overall survey of the other types of federal employment statutes whose future might be in jeopardy after *Gilmer*, *see* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509 (1990).

68. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1651 n.2 (1991); 9 U.S.C. § 1 (1988).

69. 9 U.S.C. § 1 (1988).

70. *Gilmer*, 111 S. Ct. at 1651 n.2. The Court did not find the section one "contracts of employment" exception of the FAA implicated in this case for two reasons. *Id.* First, Gilmer failed to address the issue in the lower courts, so it was not one of the questions presented upon petition for certiorari. *Id.* Second, the Court stated that the arbitration clause at issue was not even contained in a contract of employment since the "arbitration clause at issue [was] in Gilmer's contract with the securities . . . exchanges, not with Interstate." *Id.* at 1651-52 n.2.

Gilmer never actually raised this issue himself, but this issue was only brought to the attention of the Court by briefs of amici curiae. *Id.* at 1651 n.2. Perhaps the Court would have found that Gilmer's contract with the securities exchange was an employment contract within the scope of the section one exclusion if Gilmer had raised this issue instead of the amici curiae.

71. 939 F.2d 229 (5th Cir. 1991).

72. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991).

73. *Id.* at 230. The employee in *Alford* was a stockbroker just as the employee in *Gilmer*. Id. at 229-30.

the exclusion, it did warn that "[c]ourts should be mindful of this potential issue in future cases."[74]

In *Willis v. Dean Witter Reynolds, Inc.*,[75] the Sixth Circuit Court of Appeals was "mindful" of the FAA exclusion of "contracts of employment" even though it did not directly affect that case.[76] The *Willis* Court decided that "all employment contracts with employers subject to regulation under Title VII . . . f[e]ll within the exclusion . . . under [section] 1 of the FAA."[77] Since this section excludes "contracts of employment of seamen, railroad employees, or *any other class of workers engaged in foreign or interstate commerce*,"[78] an analysis of this statutory exception involves the question of who "the other class of workers" are.

c. The *Tenney* Court Analysis

The principal decision interpreting this exclusionary language was decided forty years ago in *Tenney Engineering Inc. v. United Electrical Radio & Machine Workers*.[79] In *Tenney*, the Third Circuit Court of Appeals interpreted the exclusionary language narrowly, finding it to apply only to those workers directly involved in the transportation industry.[80] Of the seven judges that heard *Tenney*, four held that the "other class of workers" language applied only to those workers who were "actually engaged in the movement of interstate or foreign commerce."[81] The chief judge of the court concurred in the opinion but wrote separately, however, to say that this view of the exclusionary language of section one was "too narrow to be supportable."[82] Similarly, the two dissenters in *Tenney* stated that a "broader view of interstate commerce" was needed in interpreting this exclusionary language.[83]

Although courts have followed *Tenney* for forty years, its analysis seems flawed. First, the *Tenney* court virtually ignored section two of the

74. *Id.* at 230.

75. 948 F.2d 305 (6th Cir. 1991).

76. Willis v. Dean Witter Reynolds, Inc., 948 F. 2d 305, 310-12 (6th Cir. 1991) The *Willis* court found it necessary to discuss this exception because Willis and the Equal Employment Opportunity Commission had argued that the agreement Willis signed in her registration application was an employment contract and therefore was within the FAA "contract of employment" exception. *Id.* at 310.

77. *Id.* at 311.

78. 9 U.S.C. § 1 (1988) (emphasis added).

79. 207 F. 2d 450, 453 (3d Cir. 1953).

80. Tenney Eng'g Inc. v. United Elec. Radio & Mach. Workers, 207 F. 2d 450, 453 (3d Cir. 1953).

81. *Id.* at 452. The *Tenney* court stated that it applied the rule of ejusdem generis in coming to the conclusion that "the other class of workers" referred only to those workers who were "actually engaged in the movement of interstate or foreign commerce." *Id.*

82. *Id.* at 454-55 (Biggs, C.J., concurring) (arguing that the "face of the statute" should control).

83. *Id.* at 459 (McLaughlin, J., dissenting). The *Tenney* dissenters stated that Congress could have easily worded the FAA to exclude only "transportation workers" if they had wanted to. *Id.* at 458.

FAA.[84] Section two is important because it contains the affirmative coverage of the statute, providing that it will apply to contracts "evidencing a transaction involving commerce."[85] Furthermore, it would create a paradox to interpret "engaged in commerce," which comes from the exclusionary portion of the FAA, more narrowly than the "involving commerce" language that is contained in section two of the FAA.[86] This is because "those employment contracts *most* involving interstate commerce . . . would fall *outside* the Act's [FAA] coverage [and] those with *less* direct connection to interstate commerce . . . would fall *within* the Act's affirmative coverage and would not be exempt."[87] It is hard to believe Congress intended this paradoxical result when it drafted the FAA, because it would have the effect of excluding transportation industries, which were, by their nature, heavily involved with interstate commerce and which were also the most likely to have signed arbitration agreements.[88] Furthermore, it is unlikely that the different wording of both sections, "involving commerce" as opposed to "engaged in commerce," arose out of anything other than grammatical necessity.[89]

The *Tenney* court based its narrow interpretation of the exclusionary language, "engaged in commerce," largely on the rule of ejusdem generis.[90] Under this rule, the *Tenney* court concluded that since the two specific contract exemptions named, seamen and railroad employees, were directly involved in the movement of interstate or foreign commerce, such must be the case with "the other class of workers."[91] By construing this exclusionary language in this limited manner, however, an anomaly develops: by merely excluding workers involved in the transportation industry, Congress would have excluded the only class of employees at that time who were likely to have signed agreements to arbitrate employment disputes and would have applied the law to other workers

84. *See id.* at 454 n.15 (saying that since the arbitration agreement in dispute was valid under state law, reference to section two was unnecessary).

85. 9 U.S.C. § 2 (1988).

86. Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioner at 14, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (No. 90-18) [hereinafter Amicus Brief] (arguing that a paradox would result if section one's language was interpreted more narrowly than section two).

87. *Id.*

88. *Id.* at 15.

89. *Id.* at 13. The writers of the Amicus Brief argued that it would have been incorrect for Congress to have stated that the transaction was "engaged" in commerce or to have referred to "a class of workers involving commerce." *Id.*

90. This term is defined by Black's Law Dictionary as "[o]f the same kind, class, or nature." BLACK'S LAW DICTIONARY 517 (6th ed. 1990). Black's further provides that in constructing laws, this rule states that "where general words follow an enumeration of persons or things, by words of a particular . . . meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind . . . as those specifically mentioned." *Id.*

91. Tenney Eng'g Inc. v. United Elec. Radio & Mach. Workers, 207 F.2d 450, 452 (3rd Cir. 1953).

who probably had no dealings with arbitration contracts.[92] It would be strange if Congress had enacted a law that encouraged commercial arbitration yet excluded from its coverage those industries that utilized arbitration at that time. Furthermore, as the dissent in *Tenney* noted, "if transportation workers alone were to have been excluded Congress could have used more appropriate language to indicate such intention."[93] Thus, it seems that the "other class of workers" language should be interpreted more broadly than in *Tenney* and should be found to apply to all employment contracts.

d. The Legislative History of the FAA

It is also important to look at the legislative history of the FAA when interpreting this exclusionary language. This legislative history indicates that Congress's intent when enacting the FAA was to exclude all employment contracts from the Act's coverage.[94] The first hint of its intent comes from the title of the original bill. The bill was titled, "Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration."[95] Furthermore, as the hearings on this bill show, Congress's intent was that this bill apply purely to commercial disputes, with its aim being at the merchant.[96] During the hearings, supporter of the bill, Mr. Bernheimer, Chairman of the Arbitration Committees of the New York Chamber of Commerce, stated that "[t]he merchant is by instinct averse to . . . any formality. . . [b]ut the merchant finds that arbitration is a very direct and expeditious method" of resolving disputes.[97] Mr. Bernheimer also claimed that this statute would help reduce the price of goods for the consumer because the merchant will add costs in figuring prices based on the risk of rejection and litigation.[98] Similarly, Mr. Piatt, the Chairman of the American Bar Association's Committee of Commerce, Trade and Commercial Law, said the bill would offer an opportunity for saving perishable products, such as a carload of potatoes,

92. *See* Amicus Brief, *supra* note 86, at 15.

93. *Tenney*, 207 F.2d at 458 (McLaughlin, J., dissenting).

94. *Contra Tenney*, 207 F.2d at 452 (saying that "[t]he legislative history furnishes little light" on the intent of Congress in creating the section one exclusion).

95. *Sales and Arbitration: Hearing Before a Subcomm. of the Judiciary on S. 4213 and 4214*, 67th Cong., 4th Sess. (1923) [hereinafter *Hearing*].

96. *Id.* at 3-7 (statement of Charles L. Bernheimer, Chairman of the Arbitration Committee of the New York Chamber of Commerce).

97. *Id.* at 5. Mr. Bernheimer recognized that arbitration was a "time-honored method" for dealing with *business* disputes. *Id.* at 3 (emphasis added). By "business," it is clear that Mr. Bernheimer was referring to disputes between merchants and consumers, for he states the bill will help "establish and maintain business amity and . . . reduce the price of commodities to the consumer." *Id.*

98. *Id.*

by moving quickly in arbitration rather than waiting to litigate.[99] Thus, it seems that the bill's intent was to influence merchant relationships, not employment relationships.

Further evidence of this intention to exclude employment relationships is found in the objection of Mr. Furuseth, president of the Seamen's Union, which was discussed at the hearing.[100] Mr. Furuseth objected to the bill in fear that it would "compel arbitration of the matters of agreement between the stevedores and their employers."[101] To this, Mr. Piatt answered:

> It was not the intention of this bill to make an industrial arbitration in any sense . . . . It is not intended that this shall be an act referring to labor disputes at all. It is purely an act to give the *merchants* the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is *all* there is in this.[102]

Herbert Hoover, Secretary of Commerce, also addressed these fears, stating that if "objection appears to the inclusion of workers' contracts[,] . . . it might well be amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.' "[103] Mr. Hoover proposed this language (the same language that exists in section one today) because he feared that without this language, workers' contracts in general, and not just specific contracts, would be included within FAA coverage.[104]

Arguably, the amendment specifically referred to seamen because of Mr. Furuseth's objection at the hearing and similarly, inclusion of railroad workers was likely a result of their role as the major transporters of goods at that time.[105] The *Tenney* court may have been mistaken when it said that the legislative history did not shed light on Congress's intent in creating this exclusion. Thus, it seems that its analysis is flawed and should not be relied upon as accurate authority for this issue.

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99. *Id.* at 11. Mr. Bernheimer also noted that legally binding arbitration would "help to conserve perishable and semiperishable food products," saving millions of dollars in food expenditures. *Id.* at 3.

100. *See Hearing*, *supra* note 95, at 9.

101. *Id.*

102. *Id.* (emphasis added).

103. *Id.* at 14.

104. *Id.*

105. *See* Tenney Eng'g v. United Elec. Radio & Mach. Workers, 207 F.2d 450, 452 (1953) (discussing the objections that Mr. Furuseth had to the Act on behalf of the Seamen's Union).

e. The *Willis* Court's Broad Interpretation

Apparently, the court in *Willis v. Dean Witter Reynolds, Inc.*[106] was therefore correct to broadly interpret the FAA's exclusion and to look to the legislative history in doing so.[107] The *Willis* court found that the legislative history of the FAA showed "that the FAA was never meant to incorporate employment contracts with the requisite effects on interstate commerce within its scope."[108] It stated that such "requisite effects" refer to the contracts of employment of workers engaged in interstate commerce.[109] All of the employment contracts at stake in Title VII suits have this "requisite" effect on interstate commerce, for as *Willis* noted, Congress enacted Title VII within its power to regulate commerce.[110] The *Willis* court thus concluded that "all employment contracts with employers [which are] subject to regulation under Title VII . . . fall within the exclusion of 'contracts of employment' under § 1 of the FAA."[111]

2. *Why the Courts Should find Employment Contracts to be Excluded from FAA Coverage*

The continued survival and growth of Title VII, and all other similar statutes, such as the ADEA, which protect against employment discrimination, depend on the exclusion of employment contracts from the FAA's coverage.[112] There are many reasons why this conclusion is mandated, a number of which the *Gilmer* Court summarily and most unsatisfactorily dismissed.[113]

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106. 948 F.2d 305 (6th Cir. 1991).

107. Willis v. Dean Witter Reynolds, Inc. 948 F.2d 305, 311 (6th Cir. 1991).

108. *Id.*

109. *Id.* (referring to section one of the FAA).

110. *Id.* The definition of the term "employer" under Title VII is "a person engaged in an *industry affecting commerce* who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 2000e(b) (1988) (emphasis added). Congress also defined the term "industry affecting commerce" as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce." 42 U.S.C. § 2000e(h) (1988).

Almost every employer would be involved in interstate commerce for purposes of coming within the coverage of Title VII, for Title VII defines evidence of interstate commerce as "communication among the several States . . . or between points in the same State but through a point outside thereof." 42 U.S.C. § 2000e(g) (1988). Seemingly, the only thing needed to implicate "commerce" is a long distance phone bill, which most every place of employment has. *See, e.g.*, Equal Employment Opp. Comm'n v. Rinella & Rinella, 401 F. Supp. 175, 182 (N.D. Ill. 1975) (holding, on the basis of its long distance phone bill and ownership of reference books that were published out of state, that a law firm practicing predominantly in a localized area was a business engaged in industry affecting commerce for purposes of Title VII).

111. *Willis*, 948 F.2d at 311. The employment contracts of any employer who is subject to the ADEA similarly fall within the exclusion because the ADEA was also enacted under Congress's commerce power. *See* 29 U.S.C. § 630(b)(g)(h) (1988).

112. *See infra* notes 114-138 and accompanying text.

113. *See Gilmer*, 111 S. Ct. at 1654-56 (dismissing, with brevity, many of Gilmer's concerns with the arbitration of Title VII claims, such as the limited discovery allowed in arbitration and the private nature of arbitration proceedings). The *Gilmer* Court's fact-specific analysis, used to make such quick dismissals of Gilmer's arguments, seriously limits the precedential value of *Gilmer*.

First, the Court quickly dismissed Gilmer's concern with the limited discovery available in arbitration hearings.[114] Discovery, however, plays an important role in building proof of employment discrimination.[115] One commentator has suggested that because of the difficulty in proving employment discrimination, "access to information in the employer's control may be essential to a plaintiff's case."[116] Even one commentator calling for the elimination of discovery recognized that discovery should be retained in a few instances, naming employment discrimination as one such instance.[117]

In *Gilmer*, the Court stated that age discrimination claims probably do not require more extensive discovery than other claims, such as RICO and antitrust claims, which the Court previously found to be arbitrable.[118] The *Gilmer* Court failed to recognize, however, that discovery in employment discrimination claims often involves extensive inquiries into the work environment of the employer.[119] One court has noted that the

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114. *Id.* at 1654-55 (stating that there was no showing that the New York Stock Exchange discovery provisions were insufficient so as to prevent Gilmer from having a fair arbitration hearing).

115. *See* Cooper, *supra* note 26, at 218 (stating that it would be "particularly problematic" to determine an employment discrimination case without complete discovery). Proving the existence of "hostile environment" sexual harassment can be quite problematic. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986). Hostile environment sexual harassment is harassment that, "while not affecting economic benefits, creates a hostile or offensive working environment." *Id.* at 62. To even state a claim of hostile environment sexual harassment, the evidence of the alleged conduct must be "sufficiently severe or pervasive" so as to alter the victim's conditions of employment and create a working environment that is abusive. *Id.* at 67. Furthermore, the complainant must show that the sex-related conduct engaged in by the complainant was "unwelcome." *Id.* at 68.

The Court in *Meritor* recognized that determining whether the conduct was unwelcome "presents difficult problems of proof." *Id.* The trier of fact is required to look at "the record as a whole" and "the totality of circumstances." *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)). To obtain this type of proof, Title VII claimants often need the extensive discovery that litigation affords.

116. Susan Elizabeth Powley, *Exploring the Second Level of Parity: Suggestions for Developing an Analytical Framework for Forum Selection in Employment Discrimination Litigation*, 44 VAND. L. REV. 641, 683 (1991). Powley further stated that in a disparate impact discrimination case, discovery is especially important because the statistical data which plaintiffs need to prove their case can only be found in the employer's records. *Id.*

117. Loren Kieve, *Discovery Reform*, 77 A.B.A. J. 79, 81 (Dec. 1991). This exception is needed because plaintiffs in employment discrimination suits "[need] to have access to employer's statistical employment information." *Id. See also infra* note 119 (discussing disparate impact cases in more detail).

118. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1654 (1991). The Court failed to explain just why it thought that ADEA claims did not require any more discovery than RICO or antitrust claims. *Id.*

119. An example of such highly sensitive workplace discovery occurs under the law of "disparate impact" discrimination as developed by Griggs v. Duke Power Co., 401 U.S. 424 (1971). This type of discrimination is not easily recognizable since the discrimination is not purposeful. *Id.* at 431. An intent to discriminate by the employer is not needed because, in finding discrimination, the court must look to the "*consequences* of employment practices, not simply the motivation." *Id.* at 432. In *Griggs*, two aptitude tests were at issue. *Id.* at 427-28. Duke Power Company began requiring that their employees pass the two tests and have a high school education in order to transfer out of the labor department, one of the company's least desirable positions. *Id.* This policy effectively disqualified people of color at a significantly higher rate than whites. *Id.* at 426. In order to prove this disqualifying effect, undoubtedly the plaintiff needed to obtain statistics, which would have required extensive discovery into Duke's records.

If this same scenario had been submitted to an arbitral forum, it probably would have made a quick finding of "no discrimination" because the arbitrators would only be looking for evidence that

weapon of discovery is a "critical means of securing justice when information is exclusively in the hands of the adversary," which is often the case in employment discrimination cases.[120] Because adequate discovery is essential to Title VII plaintiffs' cases, courts must assure these plaintiffs that they will be allowed its use in proving their cases. Thus, arbitration agreements in employment contracts should not be enforceable and discrimination claimants should be allowed their day in court.

The Court in *Gilmer* dealt with this discovery problem by stating that there was no showing that the discovery allowed under the New York Stock Exchange [hereinafter NYSE] discovery provisions was inadequate.[121] While it may well be that the NYSE discovery provisions did not disadvantage Gilmer, the next challenger of an arbitration agreement may not be so fortunate. The Supreme Court has created a situation in which they will have to determine the adequacy of the specific discovery practices governing each arbitration agreement. Such a practice will detract from the speed with which arbitration proceedings are credited.[122] However, failing to look at the discovery allowed under every arbitration agreement simply because the Court found one arbitration system to be adequate would be unfair to future employment discrimination claimants for they might not be dealing with an arbitration system that allows for adequate discovery.

Another reason employment discrimination claimants must be allowed to pursue their claims in court is that arbitration proceedings are

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the employer was motivated by racial considerations. Richard F. Richards, Alexander v. Gardner-Denver: *A Threat to Title VII Rights*, 29 ARK. L. REV. 129, 132 (1975). In such a situation, there often is no evidence that the employer's motive was to discriminate, and unfortunately, an arbitrator frequently will merely make a factual determination that an employee's race or sex did not influence a decision. *Id.* This, however, is not the same as looking for an employer's alleged unlawful discrimination under Title VII because in a Title VII disparate impact case, the intention of the employer does not matter. *Id. See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 42 (1974) (stating that the arbitrator's ruling that the Title VII claimant had been "discharged for just cause" did not amount to a finding that no racial discrimination had taken place).

To defend a disparate impact claim, an employer has the burden of proof and must show that the given requirement has a "manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. This test is called the "business necessity" defense and was added to Title VII in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (1992) (amending Title VII). Duke Power was unable to carry this burden because the evidence before the Court showed that before the policy was instituted, the employees who had not taken the tests or finished high school did well and advanced. *Griggs*, 401 U.S. at 431. One can see the importance of extensive discovery here for it allowed the plaintiff to discover this type of statistical information.

120. Montalvo v. Hutchinson, No. 90 Civ. 0299, 1993 WL 483039, at *1 (S.D.N.Y. Nov. 22, 1993). *Montalvo* involved a police misconduct case. *Id.* However, employment discrimination cases and actions against the police have been grouped together as types of claims in which "the full panoply of discovery" is needed. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L. J. 1567, 1581 (1989).

121. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct 1647, 1654 (1991).

122. Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 488 (1989).

usually private proceedings.[123] This is another advantage that arbitration has over litigation.[124] When civil rights are at issue, however, private proceedings can prove to be a disadvantage for many reasons which even the Court in *Gilmer* recognized.[125] First, it can be a disadvantage if the employer's discriminatory policies are kept from public knowledge.[126] Second, private proceedings make it quite difficult to obtain adequate review of an arbitrator's decision.[127] Finally, without regularly reported decisions upon which to build, the danger exists that the law of employment discrimination will stagnate.[128] Because most court decisions are reported, litigating employment discrimination claims eliminates the danger of stagnation in this area of the law. Reported decisions enable a body of law to develop upon which future Title VII claimants can depend.

The *Gilmer* Court should have addressed Gilmer's concern with the privacy of the arbitral forum more broadly, for in the future, any purely "private" arbitral decision could be challenged using the privacy rationale that Gilmer employed.[129] As if to reassure themselves, the *Gilmer* Court commented that "ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements."[130] This may not be true in the future if the Court were to decide that all employment contracts were subject to the FAA. Should

123. ELKOURI & ELKOURI, *supra* note 2, at 242. The *Gilmer* Court once again summarily dismissed this argument. *Gilmer*, 111 S. Ct. at 1655. The Supreme Court stated that these concerns were not a problem in *Gilmer* because the New York Stock Exchange [NYSE] rules required that all arbitration awards be in writing. *Id.* at 1655. They also noted that the public is allowed to view the award decisions under the NYSE system. *Id. But see* Cooper, *supra* note 26, at 214 (arguing that the NYSE arbitration program is essentially private since the award is not published and a person who seeks information on an arbitration proceeding must travel to the NYSE office and request to see the award form).

Even if the NYSE system was to result in easy public access to arbitration decisions, this is not the norm. STEPHEN P. DOYLE & ROGER S. HAYDOCK, WITHOUT THE PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION 20 (1991). Arbitration hearings normally are only attended by parties and witnesses to the action, and the arbitration decisions are kept confidential unless the parties otherwise agree. *Id.*

124. DOYLE & HAYDOCK, supra note 123, at 21.

125. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1655 (1991) (noting the dangers that can result from the privacy of arbitral proceedings).

126. *See* Shell, *supra* note 39, at 568 (stating that the adjudication of a Title VII claim gives the public an opportunity to examine the institutions which engaged in the discrimination).

127. *See supra* notes 59-64 and accompanying text (discussing the grounds for review of arbitral decisions).

128. In a discussion of the extension of ADR to constitutional and public law issues, Justice Edwards, circuit judge for the United States Court of Appeals for the District of Columbia, warned that "[i]n our rush to embrace alternatives to litigation, we must be careful not to endanger what law has accomplished or to destroy this important function of formal adjudication." Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986). The important function to which Justice Edwards referred was the ensuring of the proper application of public values. *Id.*

129. In fact, any future litigant who was involved in any type of arbitration other than that governed by the NYSE could once again raise the exact same concerns that Gilmer did.

130. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1655 (1991).

that happen, it would undoubtedly become standard practice to insert arbitration agreements into most employment contracts.[131]

Another reason that the courts should not be traded for arbitral forums is that the danger arises that those with greater bargaining power will take advantage of those with little or no bargaining power.[132] Unfortunately, most employees who are offered arbitration agreements have no bargaining power.[133] Often, employees are offered mandatory arbitration provisions on a "take-it-or-leave-it basis."[134] Employees are required to agree to the arbitration provision "as a term and condition of their employment."[135] Employees may either be denied a benefit related to the employment or denied employment altogether if they do not agree to the provisions.[136]

The courts should be wary of forcing an employee with less bargaining power than their employer to arbitrate instead of litigate issues of discrimination. Of course, the Supreme Court noted in *Gilmer* that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[137] The Court did, however, comment that the relative bargaining power of the contracting parties must be considered in every attempt to enforce an arbitration agreement, saying that the "claim of unequal bargaining power is best left for resolution in specific cases."[138] Once again, the Court has left open an issue that courts must decide anew every time it is raised. Since the *Gilmer* Court left so many questions

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131. In this way, employers would free themselves of the "hassle" and expense of litigation. Employers might then believe they could "afford" to look the other way in the face of discriminatory practices or policies in their workplace.

132. This concern is not a new one because it was addressed by Senator Walsh during the FAA hearing in 1923. *Hearing, supra* note 95, at 9. In voicing his concerns on this matter Senator Walsh stated that

> [t]he trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily things at all. Take an insurance policy: there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. *It is the same with a good many contracts of employment.* A man says "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court.

Id. (emphasis added).

133. Ralph H. Baxter, Jr. & Evelyn M. Hunt, *Alternative Dispute Resolution: Arbitration of Employment Claims*, 15 EMPLOYEE REL. L.J. 187, 191 (1989) (stating that most employees are required to agree to arbitration provisions as "a term an condition of their employment").

134. *Id.* Contracts offered on a "take-it-or leave-it basis" are contracts of adhesion. *Id.* Furthermore, employees seeking to avoid aribtrating a dispute "may assert that the arbitration agreement is a contract of adhesion." *Id.*

135. *Id.* The authors of this article state that "[r]arely, if ever, will individual employees be permitted to negotiate a change in the arbitration provisions that are offered." *Id.*

136. *Id.*

137. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1655 (1991).

138. *Id.* at 1656.

unanswered, the arbitration option is likely to be as time-consuming as litigation.

3. *Distinguishing Title VII from the ADEA*

There is still one final way that Title VII claimants may be able to avoid a arbitral forum, even though ADEA claimants in a similar situation have been told they must arbitrate. This "last straw" argument rests on the hope that the Supreme Court will not apply *Gilmer* to Title VII claims. Courts after *Gilmer* have enforced agreements to arbitrate when Title VII claims were at stake.[139] However, Title VII claimants may still be able to get their claim heard in a judicial forum if Title VII is distinguished from the ADEA, based on the standard set forth in *Shearson/American Express, Inc. v. McMahon.*[140] Title VII and the ADEA must be distinguished because the *Gilmer* Court applied the FAA to the ADEA.[141] In *McMahon*, the Supreme Court set out the standard for determining whether the FAA was applicable to a particular statute.[142] This standard involves looking at the "text, history, or purposes" of a statute.[143] Determining this applicability is important because if the FAA is found to be applicable to a statute, it establishes a presumption favoring the arbitration of statutory claims.[144] Distinguishing Title VII from the ADEA under the *McMahon* standard will involve a search for ways that the "text, history, or purposes" of Title VII differ from those of the ADEA.[145]

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139. Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (requiring plaintiff to arbitrate her Title VII claims because of an arbitration agreement signed in a securities registration application); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (reversing an earlier decision to allow a Title VII claimant to bypass arbitration). The Supreme Court seems to suggest that enforcing agreements to arbitrate these Title VII claims was the appropriate course for the circuits to take. *See Alford*, 111 S. Ct. at 2050 (vacating the fifth circuit's decision not to enforce the commercial arbitration of the plaintiff's Title VII claim in light of *Gilmer*).

140. 482 U.S. 221 (1987). In *McMahon*, Shearson/American Express moved to compel the consumer plaintiffs to arbitrate claims against them, based on the arbitration provisions contained in the customer agreements they had signed. Shearson/American Express, Inc. v. McMahon, 482 U.S. 221, 223 (1987). The claims brought against the defendants in this action arose under RICO and the Exchange Act. *Id.* To defeat this motion to compel arbitration, the Supreme Court stated that the plaintiffs would have to show that the FAA did not apply to the Exchange Act and RICO. *Id.* at 227. This is where the *McMahon* standard comes from.

141. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1651 (1991). *Gilmer* created a presumption favoring the arbitration of ADEA claims, but only when "contracts of employment" are not at stake. In *Gilmer*, the Court applied the FAA to the ADEA without even mentioning the *McMahon* standard. *Id.* at 1651-52. It will be interesting to note whether the Supreme Court will allow such an omission when a similar suit arises in a Title VII context, because in doing so, it would again be disregarding direct authority, being the *McMahon* standard.

142. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987). The Court in *McMahon* stated that in order for parties to demonstrate that Congress intended to exempt a statute from FAA coverage, they must show that Congress's intention is "discernible from the text, history, or purposes of the statute." *Id.*

143. *Id.*

144. *See id.* at 226 (discussing the policy of the FAA favoring arbitration).

145. *See id.* at 227 (determining the applicability of the FAA to a given statute based on the "text, history, or purposes" of the statute). Title VII's "text, history, or purposes" must be distinguished from the ADEA because in *Gilmer*, the Supreme Court has found that the text, history,

The task of separating Title VII from the ADEA is not easy because the ADEA is largely derived from Title VII.[146] Yet, since the two statutes are not exactly the same, an analysis of one should not be interposed on the other.[147] First of all, under the *McMahon* standard, a court must consider the text of the statute when determining the applicability of the FAA.[148] One key difference in the text of Title VII and the ADEA is that the ADEA expressly provides for a waiver of a judicial forum[149] while Title VII does not,[150] indicating that Congress intends that Title VII claims be heard by a court. Even though this waiver provision is very limited,[151] the lack of a similar provision in Title VII might imply that Congress did not intend for such important statutory rights to be waived.

A key procedural difference exists between the two statutes. That is, an action commenced under the ADEA supersedes any pending state action.[152] However, this is not the case under Title VII. Under Title VII, similar actions commenced under state law are expressly preserved by Congress when a Title VII action is commenced.[153] This allocation of concurrent jurisdiction may emphasize the vital role played by statutes designed to eradicate the types of discrimination at which Title VII is aimed.[154] This preservation broadens the equal employment opportunities for plaintiffs[155] by leaving open an additional judicial forum in which their rights might be vindicated.

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and purposes of the ADEA do not preclude a finding that the FAA is applicable to the ADEA. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1652-57 (1991).

146. *See* Lorillard v. Pons, 434 U.S. 575, 584 (1978) (stating that "the prohibitions of the ADEA were derived in *haec verba* from Title VII").

147. Even the counsel for Interstate/Johnson Lane Corporation believed that an analysis of the ADEA should not be adopted for Title VII, saying that "*McMahon* requires that a court separately analyze the text . . . of *each* statute in dispute." Respondent's Brief in Opposition to a Writ of Certiorari at 12, *Gilmer*, (No. 90-18) (alteration in original). Interstate's counsel went on to argue that since Title VII had never been in dispute in this litigation, the "circuit court decisions which involved Title VII claims do not present a true conflict with the statutory analysis of the ADEA presented here." *Id.* at 12-13 (citations omitted). In the same manner, the circuit courts should not be required to follow *Gilmer*'s rationale when Title VII claims are at issue since they require a separate analysis.

148. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987).

149. 29 U.S.C. § 626(f) (Supp. III 1991). The ADEA provides that in order for a judicial waiver to be valid it must be "knowing and voluntary." *Id.* at § 626(f)(1). The ADEA strictly governs the considerations to be given in determining what constitutes a "knowing and voluntary" waiver by specifying it in the statute. *See id.* at § 626(f)(1)(A)-(H).

150. *See* 42 U.S.C. §§ 2000e-2000e-17 (1988) (omitting a waiver of a judicial forum).

151. *See* 29 U.S.C. § 626(f) (Supp. III 1991) (limiting the waiver to only those cases where it is knowing and voluntary).

152. 29 U.S.C. § 633(a) (1988). Section 633 states that "upon commencement of action under [the ADEA] such action shall supersede any State action." *Id.*

153. 42 U.S.C. § 2000e-7 (1988). This section, titled "Effect on State Laws," states that "[n]othing in [Title VII] shall be deemed to exempt or relieve any person from any liability . . . provided by any . . . law of State or any political subdivision of a State . . . ." *Id.*

154. Title VII seeks to eliminate discrimination based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

155. *See* Cooper, *supra* note 26, at 225-26. Cooper further argued that:

Furthermore, these two statutes have different purposes.[156] While one of the purposes of Title VII is to actively "remove barriers that have operated in the past to favor an identifiable group,"[157] the main purpose of the ADEA is to "promote employment of older persons" in the future.[158] In other words, the aim of Title VII is both retroactive and proactive,[159] whereas the aim of the ADEA is mainly proactive in nature.[160] In order to make sure that the retroactive goal of Title VII is furthered, the courts should ensure the future litigation of Title VII disputes. Future litigation is needed to ensure the retroactive goal of Title VII because discovery works to unveil the vestiges of past discrimination. However, discovery is limited in arbitration.[161] Thus, allowing Title VII plaintiffs to discover past evidence of discriminatory practices by their employers is necessary because the retroactive purposes of Title VII have yet to be fulfilled.[162]

Consideration should also be given to the fact that "age" as a classification is notably different from those classifications, such as race and gender, which Title VII protects. The Supreme Court has recognized that "old age does not define a 'discrete and insular' group" but rather "marks

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> [t]he congressional intent of Title VII to preserve rights and procedures under state antidiscrimination statutes suggests that such rights could not be subject to waiver of a judicial forum, notwithstanding the FAA. Because the congressional intent is to preclude waiver of state antidiscrimination rights and procedures, there can be no compulsory arbitration under FAA of rights protected by state antidiscrimination laws. Further, since Title VII actions can be brought in either state or federal court, full preservation of state rights would require that the Title VII action as well as its state counterpart not be waived by arbitration. Therefore, a claimant could sue under Title VII in court notwithstanding the FAA.

Id. at 226. (citations omitted).

156. *See infra* notes 157-160 and accompanying text (discussing the difference in purpose).

157. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). Another purpose of Title VII is to "achieve equality of employment opportunities" for its protected classes. *Id.* at 429. For a discussion of *Griggs*, *see supra* note 119.

158. 29 U.S.C. § 621(b) (1988).

159. *Griggs*, 401 U.S. at 429-30. The Supreme Court stated in *Griggs* that "[t]he objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities (proactive) and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees (retroactive)." *Id.*

160. The ADEA's express purpose is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1988).

161. *See* Shell, *supra* note 39, at 534 (writing that in commercial and labor arbitration, "discovery is limited"). This is one reason that the arbitral process is oftentimes more expeditious than going to trial. ELKOURI & ELKOURI, *supra* note 2, at 9 (stating that compared to litigation, arbitration is relatively quick); for more on the importance of discovery, see *supra* notes 115-120 and accompanying text.

162. One example that Title VII's retroactive purposes have yet to be fulfilled is the overwhelming evidence that women are still "concentrated in low-paying, low-status jobs," and women with college degrees often earn less than males with only high school diplomas. Heather K. Gerken, *Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions*, 91 MICH. L. REV. 1824, 1825 (1993). There is also much evidence that women are less likely than men to obtain advancements in professional levels and pay. *Id.*

a stage that each of us will reach if we live out our normal span."[163] Thus, the Supreme Court has recognized that the classification protected by the ADEA, the aged, does not constitute a discrete and insular class. However, this is not the case with classifications protected by Title VII. These classifications do describe discrete and insular groups since they are based on distinctions a person has at birth and is not likely to change. Perhaps in the arbitral forum, ADEA claimants require less protection than Title VII claimants since age is a status everyone will someday attain and therefore, arbitrators would be conscious of protecting those parties discriminated against on the basis of their age. Further, since ADEA claimants have generally not been subject to a "history of purposeful unequal treatment" as have those claimants under Title VII, perhaps the aged are not as in need of such strong protections as are those who have suffered discrimination on the basis of race or gender.[164] On the basis of this differential treatment of the classifications protected by Title VII and the age classification protected by the ADEA, the Supreme Court could decide against extending *Gilmer* to Title VII claims.

III. CONCLUSION

The arbitration of Title VII claims can benefit all parties involved, but only when the parties voluntarily decide to arbitrate after the employer's disputed behavior has already occurred.[165] This ideal situation, however, is not the norm in arbitration agreements that are written into employment contracts. These largely nonnegotiable contracts are

163. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1975) (quoting United States v. Carolene Products Co., 304 U.S. 144, 152-53, n.4 (1938)). At issue in *Murgia* was a Massachusetts law requiring police officers to retire at the age of 50. *Id.* at 308. Robert Murgia, a Massachusetts police officer, argued that this law denied him his right to equal protection under the Fourteenth Amendment. *Id.* at 308-309.

164. *Id.* at 313. For the purposes of the Fourteenth Amendment's equal protection analysis, the Court in *Murgia* held that a classification based on age would be subject to only the lowest level of scrutiny, rational-basis scrutiny. *Id.* at 314. Under the rational-basis scrutiny, a classification will be upheld if it is "rationally related to the State's objective." *Id.* at 315. Classifications based on race, however, are automatically suspect and are therefore subject to the "most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944). The Court in *Murgia* noted that because of the history of purposeful discriminatory treatment towards suspect classes, they require this extra protection from "the majoritarian political process." 427 U.S. at 313.

While classifications based on gender have never been held to be suspect, the Supreme Court has recognized that this classification deserves to be examined with heightened scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976). In order to withstand judicial scrutiny, the gender-based classification must serve a "legitimate and important" state objective. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982). Not only must there be an important governmental objective, but there must also be a "direct" and "substantial" relationship between this objective and the means chosen to achieve this objective. *Id.* United States Supreme Court Justice Ginsburg has raised the issue that a classification based on gender may be subject to strict scrutiny by stating in a footnote that "it remains an open question whether 'classifications based upon gender are inherently suspect.'" Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring) (citing Mississippi University for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982)).

165. *See infra* note 167 and accompanying text.

often offered on a "take it or leave it" basis and therefore do not qualify as being voluntary.[166] For these reasons, courts should proceed cautiously when deciding whether or not to enforce arbitration agreements when claims of employment discrimination are at stake.

To be a true "alternative" for both employees and employers, arbitration must be voluntarily entered into after the dispute has materialized. This voluntary, dispute-oriented arbitration was what Congress endorsed when enacting the Civil Rights Act of 1991, which encouraged courts to authorize parties to engage in ADR techniques "where appropriate."[167] Courts faced with employment discrimination claims should give heed to this statement and give careful thought to whether the enforcement of a given arbitration agreement is wise. When the courts are asked to extend *Gilmer*'s rationale to include employment contracts, they should decide this in the negative.

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166. *See Hearing*, *supra* note 95, at 9.

167. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991). The House Democrats' intent in expressly authorizing the use of ADR for resolving employment discrimination claims was that the proviso be used "to supplement, not supplant, remedies provided by Title VII, and [was] not to be used to preclude rights and remedies that would otherwise be available." 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991). The House Democrats also stated that section 118 was intended to be consistent with Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), which emphasized the importance of allowing the courts to hear Title VII claims, even in the face of an arbitration agreement. *Id.* Furthermore, the House Democrats specifically stated that no approval of the *Gilmer* decision was intended. *Id.* They concluded by stating that section 118 contemplated "the use of *voluntary* arbitration to resolve specific disputes *after* they had arisen, not coercive attempts to force employees in advance to forego statutory rights." *Id.* (emphasis added).