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MANDATORY ARBITRATION OF STATUTORY EMPLOYMENT DISPUTES: A PUBLIC POLICY ISSUE IN NEED OF A LEGISLATIVE SOLUTION

LEONA GREEN*

As we approach the third millennium, we find ourselves with a more demographically diverse workforce than ever before, with numerous statutory bases upon which to vindicate workplace rights. Our challenge as an industrial democracy is to determine how to devise fair, economical and efficient methods to resolve the myriad of statutory based workplace disputes. This public policy issue has become increasingly important in the aftermath of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*

In *Gilmer,* the Court, for the first time, held that a statutory civil rights claim can be subjected to mandatory arbitration. The Court noted that the Federal Arbitration Act (FAA) demonstrated a liberal federal policy favoring arbitration. The Court further noted that once a "bargain to arbitrate" has been made, "the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory right at issue." The Court's decision in *Gilmer* has had a profound impact on the ability of employees to seek judicial redress for violations of statutory civil rights claims when they are subject to arbitration agreements that are not initiated through collective bargaining. Wisconsin Senator Russ Feingold, in an

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3. *See Gilmer,* 500 U.S. at 35.
6. *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). To determine if Congress intended to preclude a waiver of judicial remedies, such a waiver must be found in the text of the civil rights statute at issue or its legislative history, or there must be "an 'inherent conflict' between arbitration and the [statute's] underlying purpose." *Id.*
7. As Wisconsin Senator Russ Feingold noted, "[a]n entire industry—Wall Street—and a growing number of companies . . . have been able to circumvent formal legal challenges to their unlawful employment practices in
early effort to return the tool of judicial redress to individuals who have had their statutory civil rights violated by employers, introduced legislation which sought to amend various civil rights statutes to prohibit the waiver of statutory rights.\(^8\)

The purpose of this article is to examine the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,\(^9\) the issues which remain unaddressed in its aftermath, and the attempts that have been made by lower courts, members of Congress, and various professional organizations and associations, such as the American Bar Association,\(^10\) the American Arbitration Association,\(^11\) the Society of Professionals in Dispute Resolution,\(^12\) JAMS/EnDispute,\(^13\) and the Center For Public Resources, New York Institute for Dispute Resolution to address the outstanding due process issues.\(^14\) Based on a critical analysis of one of these protocols, developed through the efforts of a number of organizations in this rapidly developing area, the author suggests

court . . . ." 141 CONG. REC. S2272 (daily ed. Feb.7, 1995) (statement of Sen. Feingold). Senator Feingold further noted that "[e]mployers can tell current and prospective employees, 'if you want to work for us you'll have to check your rights as an American citizen at the door'." Id.

8. See infra notes 311-15 and accompanying text (discussing the specific civil rights statutes which would be affected and the nature of the changes to the statutes).


10. The American Bar Association (ABA) is an organization of 375,000 attorneys who are members in good standing of the bar of any state in the United States. The purpose of the ABA is to conduct research and educational activities in an effort to encourage the professional development and improvement of its members. It also provides public services. See 1 ENCYCLOPEDIA OF ASSOCIATIONS 510 (Christine Maurer & Tara E. Sheets eds., 33rd ed. 1998).

11. The American Arbitration Association (AAA) provides administrative services for disputants interested in arbitration, mediation and negotiation. It also provides administrative services for the impartial administration of elections, provides for disputants a panel of arbitrators and mediators, and conducts training sessions in the area of conflict resolution. See 1 id. at 501.

12. The Society of Professionals in Dispute Resolution (SPIDR) has 3,200 members, consisting of professional neutrals. They include arbitrators, mediators, hearing examiners, and fact-finders. The neutrals are involved in the resolution of disputes in the areas of labor-management, employment, community, environmental, family and other types of disputes. SPIDR seeks to further the acceptability and increased public awareness of the processes of dispute resolution and provides skills training. See 1 id. at 503.

13. JAMS/EnDispute is a private service provider of neutrals in the areas of commercial disputes, employment disputes, etc. The organization uses retired judges among its core of arbitrators. See LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 504 (2d ed. 1997).

14. The CPR maintains a national and regional panel of arbitrators who primarily focus on major disputes. See id.
changes to the current proposed legislation that are designed to strike a fair, equitable and practical balance between the evolving public policy supporting mandated arbitration and the equally strong public policy of preserving individual statutory workplace rights.

Despite the fact that the arbitration of statutory employment discrimination disputes involves the individuals the civil rights statutes were developed to protect, not much attention has been paid to the reaction to, nor the effect upon, those participants in the processes.\(^\text{15}\) Throughout this analysis, the author attempts to address the issue of how these proposals may negatively affect or impact members of lower socio-economic groups and racial minorities, women, and the disabled.\(^\text{16}\) Section I will focus on the Supreme Court's treatment of the arbitrability of civil rights claims prior to \textit{Gilmer}. Section II will examine the \textit{Gilmer} decision and explain why the Court's decision cannot be reconciled with its prior holdings. Section III will advance the contention that civil rights claims are best served by a judicial rather than an arbitral proceeding. Section IV will discuss the cases decided by the lower federal courts since the \textit{Gilmer} decision was rendered. Section V will discuss the private and public initiatives advanced in the aftermath of \textit{Gilmer} and critically examine one of the proposals to test the degree to which it insures due process. Section VI will discuss the current response to the due process concerns in the use of mandatory arbitration. Section VII will discuss currently proposed legislation that will serve to preserve the judicial forum for employees who have experienced discrimination at the hand of their employers, while considering the legitimate concerns of employers and make suggestions for what should be included in any legislation in this area.

\(^{15}\) Eric K. Yamamoto has noted the paucity of literature referencing racial minorities, women and the poor in the discussions of the use of various ADR mechanisms. \textit{See} Eric K. Yamamoto, \textit{ADR: Where Have the Critics Gone?}, 36 \textit{Santa Clara L. Rev.} 1055 (1996). Yamamoto's survey of the 400 law review articles concerning ADR between early 1992 and late 1995 indicates there was 'notable treatment' of the assessment of various ADR devices, the cost and time reduction elements, efficiency, and general user satisfaction aspect of ADR. But, "[t]he race and gender critiques, by comparison, were either cited in passing or ignored." \textit{Id.} at 1063.

For a critique of ADR processes which focuses on the benefits to individual disputants but diminishes the more expansive goals of the civil rights laws, see Marjorie A. Silver, \textit{The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement}, 55 \textit{Geo. Wash. L. Rev.} 482 (1987).

\(^{16}\) The basic contention is that Title VII, the premier civil rights statute, was essentially developed and passed to protect blacks in employment due to historical discrimination. During the debates, members of Congress recognized that other classes of employees needed protection as well.
I. Mandatory Arbitration Prior to *Gilmer*

A. The Federal Arbitration Act

To fully understand the evolution of mandatory arbitration, it is necessary to first examine the United States Arbitration Act of 1925.\(^\text{17}\) The use of arbitration dates back to the earliest days of world history.\(^\text{18}\) In the United States, one of the earliest acknowledgments of the usefulness of arbitration was codified in the FAA, which was enacted to ensure judicial enforcement of privately made agreements to arbitrate.\(^\text{19}\) Prior to enactment of the FAA, American courts had adopted, as a reflection of English common law, a degree of judicial hostility towards arbitration agreements.\(^\text{20}\) However, Congress recognized that, because of the congestion in the courts and the resulting delay, expense and "technicality" of litigation, arbitration offered a cost-effective and expeditious alternative; thus, the FAA became law.\(^\text{21}\) It is now beyond question that arbitration offers a faster, less expensive, and less formal forum for litigants than does the judicial alternative.\(^\text{22}\)

The pertinent provision of the FAA, for purposes of mandatory arbitration, states that "[a] written provision . . . to settle by arbitration a controversy . . . or an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."\(^\text{23}\) The FAA, on its face, excepts from its reach certain contracts of employ-


\(^{18}\) See Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926). Arbitration was used as early as the medieval period to settle business disputes. *See id.*

\(^{19}\) See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). The House Report accompanying the act clearly stated that the FAA would place arbitration agreements "upon the same footing as other contracts, where it belongs." *Id.* (citing H.R. REP. No. 68-96, at 1-2 (1924)).

\(^{20}\) *See id.* at 220 n.6 (citing H.R. REP. No. 68-96, at 1-2 (1924)). The explanation for judicial hostility towards arbitration comes from a centuries-old rule, "rooted originally in the jealousy of courts for their jurisdiction, that parties might not, by their agreement, oust the jurisdiction of the courts." *See Cohen & Dayton, supra* note 18, at 283.

\(^{21}\) *See Cohen & Dayton, supra* note 18, at 265.


In Moses H. Cone Hospital v. Mercury Construction Corp., the Supreme Court noted that section 2 of the FAA evinced a "liberal federal policy favoring arbitration agreements." This position will come into play when we turn to our analysis of the Gilmer decision.

B. Pre-Gilmer Case Law

Prior to the Court's decision in Gilmer, two competing lines of arbitration cases had evolved. One line of cases held that a collective bargaining agreement could not require mandatory arbitration of civil rights claims. The other line of cases endorsed mandatory arbitration as a means to resolve commercial disputes. One of the distinguishing factors between the employment and commercial cases is that statutory civil rights laws have been promulgated, at least in part, to protect interests that we deem important to society. Thus, when a decision is rendered on a civil rights claim, its effect is felt by society as a whole. In contrast, decisions on commercial claims generally affect only the parties to the litigation. This helps to explain

24. See 9 U.S.C. § 1 (1994) (providing 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.")


26. Id. at 24. The Court went on to note that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." Id. at 24-25. See also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). Section 3 of the FAA further demonstrates a liberal policy of favoring arbitration agreements by requiring a stay of proceedings in any suit brought "in any of the courts of the United States" if the suit is referable to arbitration under a preexisting agreement. 9 U.S.C. § 3 (1994).


30. See Magyar, supra note 27, at 642-43.

31. See id.
why the courts have adopted a liberal federal policy favoring arbitration agreements in the latter cases, while simultaneously discouraging it in the former. With this in mind, we now turn to Alexander v. Gardner-Denver Co. and its progeny.

1. The Gardner-Denver Trilogy

In Gardner-Denver, the Court considered the relationship between the federal courts, an arbitration provision found in a collective bargaining agreement, and an individual's right to equal employment opportunities under Title VII of the Civil Rights Act of 1964. In Gardner-Denver, an African American, following his discharge, filed a grievance pursuant to an arbitration clause found in the union's collective bargaining agreement. The employee claimed that his discharge resulted from racial discrimination. The arbitration clause provided that "[t]he decision of the arbitrator shall be final and binding upon the Company, the Union, and any employee or employees involved." After the company rejected the employee's claim, an arbitration hearing was held in which the arbitrator ruled that the employee was discharged for cause. The employee then filed suit under Title VII, and the company responded with a motion for a summary judgment. The district court granted, and the court of appeals upheld, the company's motion and in doing so held that the employee "voluntarily elected to pursue his grievance to final arbitration . . . [and thus] was bound by the arbitral decision and thereby precluded from suing his employer under Title VII."
On appeal, the Supreme Court held that the employee could still seek redress for his claim in federal court. The Court noted that the lower courts must have based their decision in part on the Supreme Court's prior cases that upheld the liberal "federal policy favoring arbitration of labor disputes." Additionally, the Court noted that when an employee submits a claim to arbitration under a collective bargaining agreement, he seeks to vindicate a contractual right. In contrast, when an employee brings a claim under Title VII, "an employee asserts independent statutory rights accorded by Congress." Finally, the Court examined the legislative history behind Title VII and determined that it manifested "a congressional intent to allow an individual" to vindicate federal and state rights in a judicial forum.

The second component of the Gardner-Denver Trilogy is Barrentine v. Arkansas-Best Freight System, Inc. In Barrentine, a group

national origin, or ancestry." Id. at 39 (citing article five of the collective bargaining agreement). Title VII prohibits discrimination against employees on these same criteria. See 42 U.S.C. § 2000e-2(a)(1) (1994).

40. See id. at 60.

41. Id. at 46. The Court pointed to its prior holdings in the Steelworkers Trilogy as the impetus for the lower court's decision. See United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 568 (1960) (holding that a court's role as it relates to arbitration claims is limited to determining whether the party is seeking a claim which is covered on the face of the agreement and that, if so, the courts have "no business weighing the merits of the grievance."); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (holding that an order to arbitrate should "not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) (holding that the collective bargaining agreement is a question for the arbitrator and that "the courts have no business overruling him because their interpretation of the contract is different from his.").

42. See Gardner-Denver, 415 U.S. at 49.

43. Id. at 49-50.

44. Id. at 48. The Court also noted:

[O]ther facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Moreover, the fact finding process in arbitration usually is not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross examinations, and testimony under oath, are often severely limited or unavailable.

Id. at 57-58.

of truck drivers, pursuant to a collective bargaining agreement, filed a grievance against their employer for failure to properly compensate them. A committee of representatives from the union and the company rejected the grievance without explanation. The employees then filed suit in the district and appellate courts under the Fair Labor Standards Act (FLSA). The lower courts held that the employees voluntarily submitted their claims to arbitration and thus were barred from asserting their statutory wage claims because the "national labor policy encourages arbitration of labor disputes." The Supreme Court reversed and held that wage claims under the FLSA were "not barred by the prior submission of their grievances to the contractual-dispute resolution procedures." The Court noted that FLSA was enacted for the protection of covered workers from "substandard wages and oppressive working hours." Thus, FLSA and Title VII were motivated by similar societal interests. In fact, the Court cited Gardner-Denver throughout the opinion and drew the distinction between contractual and statutory causes of action.

The final leg of the Gardner-Denver Trilogy is McDonald v. West Branch. In McDonald, a police officer who had been discharged filed a grievance pursuant to a collective bargaining

46. See id. at 730-32. The collective bargaining agreement provided for binding arbitration. See id. at 731. The claim for failure to properly compensate arose from a company policy which required that when drivers arrived at work, after doing some preliminary office work while being paid, they were required to punch out and do their pre-trip safety inspection. If the vehicles did not pass the inspection, they had to drive approximately 15-30 minutes to a repair facility while not being paid. This 15-30 minutes of unpaid time was the subject of their claim. See id. at 730 n.1.

47. See id. at 731.


49. Barrentine, 450 U.S. at 734.

50. Id. at 745.

51. Id. at 739.

52. See id. at 737. The Barrentine Court further noted that without a judicial forum an employee's right to minimum wage and overtime pay may be lost for two reasons. See id. at 742. First, a union, "without breaching its duty of fair representation" may, in good faith, decide not to fully support the employee's claim in arbitration. Id. The union, "balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." Id. Second, the arbitrators may not have the expertise to handle the complex question of whether employees' rights, vis-a-vis the statute, have been violated. See id. at 743.

agreement that was in force between his union and the city.\textsuperscript{54} After the grievance procedure had been exhausted, the grievance was taken to arbitration and the arbitrator ruled that the police officer's discharge was for cause.\textsuperscript{55} The police officer, without appealing the arbitrator's decision, brought suit in federal court, claiming that the police force had violated his rights under section 1983\textsuperscript{56} by discharging him for "exercising his First Amendment rights."\textsuperscript{57} The case was tried before a jury and a verdict was returned in his favor.\textsuperscript{58} The court of appeals reversed by finding that because the parties had agreed to settle their dispute through arbitration and because the arbitrator had considered the reasons for the police officer's discharge, the arbitration process was not abused. Therefore, the court held that the claims were barred by res judicata and collateral estoppel.\textsuperscript{59}

On appeal, the Supreme Court held that the police officer's section action was not barred because a federal court should not afford res judicata or collateral estoppel effect to an arbitration proceeding.\textsuperscript{60} The Court began its analysis by stating that, although the Federal Full Faith and Credit Statute\textsuperscript{61} requires that each court give full faith and credit to decisions rendered in other courts, arbitration is not a judicial proceeding.\textsuperscript{62} The Court then noted that in Gardner-Denver and Barrentine, it had previously held that an award in an arbitration proceeding, brought pursuant to a collective bargaining agreement, should not preclude the individual or entity from vindicating his rights

\textsuperscript{54} See id. at 285-86. Although not mentioned anywhere in the decision, the City of West Branch claimed that McDonald was fired for "taking indecent liberties with a woman." Court Rules Arbitration Not Binding, SAN DIEGO UNION-TRIB., Apr. 18, 1984, at A9.

\textsuperscript{55} See McDonald, 466 U.S. at 285-86.


\textsuperscript{57} McDonald, 466 U.S. at 286. Specifically, the police officer alleged that the city violated his rights to freedom of speech, freedom of association, freedom to petition the government for redress, and deprivation of property without due process of the law. See id.

\textsuperscript{58} See id.

\textsuperscript{59} See id. at 286-87.

\textsuperscript{60} See id. at 287. The Court defined res judicata as "the effect of a judgment on the merits in barring a subsequent suit between the same parties or their privies that is based on the same claim." Id. at 287 n.5 (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979)). In defining collateral estoppel, the Court stated "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Id. (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)).


\textsuperscript{62} See McDonald, 466 U.S. at 287-88.
in a federal court.63 The Court further stated that in both of those cases, its decision was "based in large part on our conclusion that Congress intended the statutes at issue . . . to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings . . . ."64 Therefore, because Congress intended section 1983 "to protect people from unconstitutional action under color of state law," the Court reasoned that there was no doubt that Congress also intended section 1983 to be judicially enforceable.65 The Court then, to support its conclusion, discussed a series of policy considerations that it had previously mentioned in whole or in part in Gardner-Denver and Barrentine.

First, the Court noted that because the arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land," an arbitrator may not have the expertise that is required to resolve complex legal issues.66 Second, because "an arbitrator's authority derives solely from contract[,]" an arbitrator may not have the authority to enforce civil rights claims.67 Third, because the individual's and the union's interest are not always similar, the union may not vigorously present the employee's grievance.68 Finally, as noted in Gardner-Denver, because arbitration is designed to be cost-effective and expeditious, the fact-finding process is not as complete as the process used in judicial fact finding.69 These four factors provide a good overview of the

63. See id. at 288-89.
64. Id. at 289.
65. See id. at 290. The Court stated that "although arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard." Id.
67. See id.
68. See id. at 290 (citing Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 744 (1981)). The Court further noted: "[i]ndeed, when the rights guaranteed by § 1983 conflict with the provisions of the collective bargaining agreement, the arbitrator must enforce the agreement." Id. at 291. Finding that despite the fact that an arbitrator may be competent to decide a certain issue according to the statutes, it may still be beyond his power to do so, the Court pointed out that an arbitrator's power comes solely from and is limited by the contract between the parties. The Court further noted that if an arbitrator bases the decision upon his view of the "requirements of enacted legislation," rather than the requirements of the contract, then he has exceeded his authority and the award will be unenforceable. Id. at 290-91 (citing Gardner-Denver, 415 U.S. at 53 (quoting United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960))).
69. See id. at 291 (citing Gardner-Denver, 415 U.S. at 58 n.19; Barrentine, 450 U.S. at 742).
70. See id. (citing Gardner-Denver, 415 U.S. at 57-58).
Court's position vis-a-vis the Gardner-Denver Trilogy. The first, second, and fourth factors have formed the bases for extensive discussion and controversy about whether mandatory arbitration is appropriately applied to the nonunion setting as well. In light of the Gardner-Denver Trilogy, we will now examine the Court's posture of upholding mandatory arbitration in the commercial context as demonstrated in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., and its progeny which has paved the way for the Gilmer decision.

2. The Mitsubishi Trilogy

Prior to turning to Mitsubishi, however, a discussion of the ruling in Wilko v. Swan, a 1953 Supreme Court case of particular relevance, is helpful because it reflected the Court's thinking on mandatory arbitration at the time, which is contrary to its current posture. In Wilko, a consumer brought a claim against a brokerage firm in federal court under section 12 (2) of the Securities Act of 1933. The firm moved to stay the trial under section 3 of the FAA because, pursuant to a pre-dispute agreement, the parties had agreed to arbitrate all claims. The district court denied the stay and the court of appeals reversed. The Supreme Court held that because Congress wanted to "assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act," the provision in the agreement to waive vindication in a judicial forum should not be upheld. The Court noted that arbitrators, without "judicial instruction on the law," may not be able to conduct "subjective findings on the purpose and knowledge of an alleged

71. 473 U.S. 614 (1985). Mitsubishi is seen as the first in a series of Supreme Court decisions that led up to the Court's decision in Gilmer. See Malin & Ladenson, supra note 22 at 1203 n.73.
74. For a description of pre-dispute agreements and post-dispute agreements, see infra note 77.
75. See Wilko, 346 U.S. at 429. See supra note 26 for an explanation of section 3 of the FAA.
76. See Wilko, 346 U.S. at 430.
77. Id at 432-35. Pre-dispute arbitration agreements are different than post-dispute arbitration agreements. In post-dispute agreements, the parties waive the use of a judicial forum for a known dispute. Thus, they have an opportunity to fully appreciate the ramifications of their actions. In pre-dispute agreements, although the parties should contemplate the potential ramifications of signing the agreement, they are not always able to fully appreciate them. See Magyar, supra note 27, at 643 n.18.
violator of the Act.” Additionally, because arbitrators do not maintain a “complete record” of the proceedings, substantive judicial review would be impaired.

Thirty years later, the Court decided the first case in the Mitsubishi Trilogy. In Mitsubishi, two sophisticated entities (Mitsubishi, a Japanese corporation, and Soler Chrysler-Plymouth, an American corporation) entered into a sales agreement for Soler to distribute Mitsubishi manufactured automobiles. The sales agreement contained a provision that required the two parties to submit all disputes to binding arbitration in Japan. A dispute arose, and Mitsubishi brought an action in federal court to compel arbitration in accordance with the sales agreement. The district court granted the motion and the court of appeals reversed.

On appeal, the Supreme Court held that the mandatory arbitration provision contained in the sales agreement was enforceable for a claim arising under the antitrust laws. The Court rejected Soler’s argument that, as a matter of law, the arbitration agreement must specifically mention the statute giving rise to the claim that a party to the agreement seeks to arbitrate. The Court noted that the FAA’s overriding purpose was to guarantee the enforcement of private contractual agreements. In essence, the Court was stating that the proper focus is not the nature of the statutory claim itself, but rather the FAA’s “liberal federal policy favoring arbitration agreements.”

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78. Wilko, 346 U.S. at 435-36.
79. See id. at 436.
81. See id.
82. See id. at 618.
83. See id. at 621, 623.
85. See Mitsubishi, 473 U.S. at 624-25. The Court noted that “we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.” Id. at 625.
86. See id. at 625. The Court reasoned:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Id. at 628.
87. Id. at 625 (quoting Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
Court observed that if Congress had intended for the statute to be free from waiver of the right of a judicial forum, it would be "deducible from the text or the legislative history" of the statute. The Court went on to note the importance of arbitration as it relates to international agreements.

Additionally, the Court rejected Soler's argument that because anti-trust issues are complex and require "sophisticated legal and economic analysis," they are ill-suited for arbitration—noting that "adaptability and access to expertise are hallmarks of arbitration." Finally, because the national courts will still have an opportunity, at the award-enforcement stage, to ensure that the legitimate interest of antitrust laws has been addressed, the Court reasoned that mandatory arbitration of antitrust claims will still be an effective mechanism to protect the societal interest of a competitive national economy, which is the alleged goal of the Sherman Act.

The Court built upon the first leg of the Mitsubishi Trilogy two years later in Shearson/American Express, Inc. v. McMahon. In McMahon, customers of a brokerage firm brought suit alleging violations of the Securities Exchange Act of 1934 (SEA) and the Racketeer Influenced and Corrupt Organization Act (RICO). The customers had signed a brokerage agreement that contained a provision requiring arbitration of any controversy. When the customer attempted to bypass arbitration, the brokerage firm, pursuant to the FAA, moved to compel arbitration of the claims. The district court held that the SEA claim should be subjected to arbitration because of the "strong national policy..."
favoring the enforcement of arbitration agreements." The lower court held, however, that the RICO claim was not arbitrable because of society's strong interest in the federal policies underlying RICO. The court of appeals affirmed on the RICO claim but reversed the SEA claim.

The Supreme Court, in a highly divided opinion, held that both claims were arbitrable because of a strong federal policy in favor of arbitration. However, this presumption in favor of arbitration could be defeated if the party opposing arbitration could demonstrate a Congressional intent to preclude waiver of a judicial forum for the statutory rights at issue. The Court was unable to discern any such congressional intent to preclude waiver of the judicial forum in either the text, legislative history, or purpose of the SEA or RICO. In the alternative, the customers attempted to argue that, according to the Court's holding in Wilko, there was a judicial mistrust of arbitration and thus, the judicial forum should not be waived. Although the Court did not overrule Wilko, the Court did note that the judicial mistrust of arbitration had eroded and that many of the reasons given in Wilko were subsequently rejected.

The final case of the Mitsubishi Trilogy is Rodriguez de Quijas v. Shearson/American Express, Inc. In Rodriguez de Quijas, a group of investors signed a standard customer agreement to arbi-

98. Id. at 224 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)).
99. See id.
100. See id. The court of appeals said that the public policy considerations of RICO made the application of the FAA "inappropriate" and thus RICO claims should only be adjudicated in a judicial forum. See id. As to the SEA claim, in light of the Supreme Court's holding in Wilko, the court of appeals was bound by precedent. See id. at 225.
101. See id. at 238, 242. The Court noted that in keeping with the holding in Mitsubishi, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals, should inhibit enforcement [of controversies based on statutes]." Id. at 226 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27 (1985)) (citation omitted).
102. See id. at 226-27.
103. See id. at 231. The investors pointed to the following grounds for a distrust of the arbitral process: (1) arbitration proceedings were not suited to cases requiring subjective findings on the purpose and knowledge of the alleged violator; (2) arbitrators must make legal determinations without judicial instruction on the law; (3) an arbitration award may be made without explanation of the arbitrator's reasons and without a complete record of the proceedings; and (4) the power to vacate an award is limited. See id. (citing Wilko v. Swan, 346 U.S. 427, 435-37 (1953)).
104. See id. at 231-32.
trate any controversy that arose, unless the investors' agreement with the broker-dealer was unenforceable under federal or state law. When their investment turned sour, the investors brought suit alleging violations of the Securities Act of 1933 and the SEA. The district court ordered all claims were submitted to arbitration except for the Securities Act claims, because those were held to be non-arbitrable according to Wilko. The court of appeals reversed the Securities Act claim, concluding that the Court's subsequent decisions rendered Wilko obsolete.

The Supreme Court, in a five-four decision, overruled Wilko and held the agreement to arbitrate enforceable. The Court noted that Wilko was pervaded by the "old judicial hostility to arbitration," which had recently been eroded in McMahon and Mitsubishi. Therefore, to allow Wilko and McMahon to exist side-by-side would be problematic because the Securities Act and the SEA should be read "harmoniously." Additionally, the Court noted that because the FAA evinces a strong policy favoring arbitration, the party opposing arbitration must carry the burden of demonstrating that Congress intended, in a separate

106. See id. at 478.
107. See id. at 479. The Securities Act was also at issue in Wilko. In McMahon, however, the SEA was at issue.
108. See id. at 479.
109. See id.
110. Justice Kennedy delivered the opinion of the majority, in which Chief Justice Rehnquist and Justices O'Connor, White, and Scalia joined. Justice Stevens filed a dissenting opinion, in which Justices Brennan, Marshall, and Blackmun joined. The dissent noted that because Congress did not amend the Securities Act during the previous thirty-five years (since the Wilko decision), the Court should respect Congress' intent to let Wilko stand, much as the Court expects other courts to follow its decisions. See id. at 486. Justice Stevens went on to note:

In the final analysis, a Justice's vote in a case like this depends more on his or her views about the respective lawmakers' responsibilities of Congress and this Court than on conflicting policy interests. Judges who have confidence in their own ability to fashion public policy are less hesitant to change the law than those of us who are inclined to give wide latitude to the views of the voters' representatives on non-constitutional matters.

Id. at 487 (Stevens, J., dissenting).

This statement is truly remarkable when you consider that Justices Marshall, Brennan and Blackmun, who have traditionally applied the tools of reason and justice to 'interpret' the law rather than strictly adhering to the text of a statute, joined in the opinion.

111. See id. at 485.
112. Id. at 480 (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) (Frank, J.)).
113. See id. at 480-81.
114. Id. at 484.
statute, to preclude waiver of the judicial alternative. The Court thus had come full circle since its decision in Wilko.

As mentioned above, the Court had originally adopted two separate positions in relation to the arbitrability of statutory claims. If a dispute arose that required arbitration as the result of a collective bargaining agreement also implicated statutory civil rights, the Court appeared willing to preserve the judicial forum. In contrast, if a dispute arose that required arbitration as part of a commercial agreement and that agreement implicated statutory commercial rights, the Court would uphold the FAA's liberal policy favoring arbitration unless Congress had demonstrated an intent to preserve the judicial forum. From the background of these two distinct lines of cases came Gilmer v. Interstate/Johnson Lane Corp., a case involving a dispute both requiring arbitration pursuant to a commercial agreement and implicating statutory civil rights. It is to Gilmer that we now turn.

II. **Gilmer v. Interstate/Johnson Lane Corp.**

Gilmer, a broker-dealer in his 50's, was hired by Interstate/Johnson as a manager in May of 1981. As a condition of employment, Gilmer was required to register with several stock exchanges, including the New York Stock Exchange (NYSE). The registration application Gilmer signed with the NYSE provided for mandatory arbitration of any controversy that may arise between Gilmer and Interstate/Johnson. Interstate/Johnson terminated Gilmer's employment in 1987, at which time he was sixty-two years old. Gilmer filed a claim with the Equal Employment Opportunity Commission and then brought suit against Interstate/Johnson in federal district court. Interstate/Johnson subsequently filed a motion to compel arbitration as required under the terms of the arbitration agreement con-

115. See id. at 483.
117. See id. at 23.
118. See id.
119. See id. The registration application provided that the rules, constitution, and by-laws of the organizations with which Gilmer registered would determine whether a particular controversy was arbitrable. See id. At issue was NYSE Rule 347, which provided for arbitration of "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." Id.
120. See id.
tained in Gilmer's registration application with the NYSE. The district court denied Interstate/Johnson's motion and the court of appeals reversed. Because of a split among the circuits, the Supreme Court granted certiorari.

Justice White wrote the opinion for the majority. The Court began its analysis by briefly recapping the purpose and intent behind the FAA. Justice White noted that several amici curiae in support of Gilmer argued that the FAA excludes from its reach "all contracts of employment." However, the Court noted that this was not a case involving a contract for employment because the arbitration clause was contained in the registration application with the NYSE and not in the agreement with Interstate/Johnson.

Justice White then cited Mitsubishi and noted that just because a litigant agrees to arbitrate a statutory claim he does not waive his rights afforded by the statute. Rather, he merely agrees to their resolution through arbitration. Additionally, once a party agrees to arbitrate, the party should be held to it unless Congress has indicated an intent, to be determined from the text or legislative history of a statute or inherent conflict between arbitration and the statute, to preserve a judicial forum. Justice White also noted that the party seeking to avoid arbitration must bear the burden of demonstrating Congress' intent to preclude waiver of the judicial forum.

122. See Gilmer, 500 U.S. at 24.
123. See id. The district court based its decision on the Supreme Court's decision in Gardner-Denver and because, in its opinion, "[C]ongress intended to protect ADEA claimants from the waiver of a judicial forum." Id. (citation omitted).
124. See id. The court of appeals noted that "nothing in the text, legislative history, or underlying purposes of the ADEA [indicates] a congressional intent to preclude enforcement of arbitration agreements." Id. (quoting Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990)).
125. See id.
126. Joining Justice White in the majority were Chief Justice Rehnquist and Justices Blackmun, O'Connor, Scalia, Kennedy, and Souter. Justice Stevens wrote a dissenting opinion in which Justice Marshall joined.
127. See Gilmer, 500 U.S. at 24. See supra notes 17-26 and accompanying text for an overview of the FAA.
128. See id.
129. See id. at 26 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
130. See id. (citing Mitsubishi, 473 U.S. at 628; Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987)).
The Court observed, and Gilmer conceded, that nothing in the text of the ADEA, nor in its legislative history, indicated an intent to preserve the judicial forum. Therefore, for Gilmer to prevail, he had to demonstrate that "compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA.”

In support of his position that such an inconsistency did exist, Gilmer advanced five general arguments. First, Gilmer contended that "the ADEA is designed not only to address individual grievances, but also to further important social policies.” In response, the Court noted that, although arbitration involves specific disputes, as does judicial resolution, both of these mechanisms can further social policy. The Court was also not persuaded by Gilmer’s second contention that "arbitration would undermine the role of the EEOC in enforcing the ADEA.” The Court noted that an individual would still be able to file a claim with the EEOC, and because the EEOC has “independent authority to investigate age discrimination,” the EEOC would not be dependent upon the filing of the charge in order to commence its investigation.

Justice White then dismissed Gilmer’s third contention that “compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA.” Justice White reasoned that “Congress did not explicitly preclude arbitration or other nonjudicial resolution of claims.” Gilmer’s fourth contention, regarding the inconsistency of mandatory arbitration with the purposes of the ADEA, will be discussed slightly out of order because of its deep social policy concerns.

Shearson/American Express, Inc., 490 U.S. 477 (1989), which stated that under the FAA, "the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute.” Id. at 483.

133. See Gilmer, 500 U.S. at 26-27.
134. Id. at 27.
135. Id.
136. See id. at 28. Justice White noted that “[s]o long as the prospective litigant effectively may vindicate (his or her) statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” Id. (quoting Mitsubishi, 473 U.S. at 637) (alteration in original).
137. Id. at 28.
138. See id.
139. Id. at 29.
140. Id.
Turning next to Gilmer's fifth contention, he asserted that because there will often be "unequal bargaining power between employers and employees," the Court should refuse to enforce arbitration agreements relating to the ADEA. However, the Court noted that "mere inequality" in bargaining power is not dispositive. Justice White noted that an inequality in bargaining power "is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." Furthermore, the Court reasoned that arbitration agreements can be voided when they are entered into as the result of "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" The Court further noted that in this case, Gilmer was an experienced business man and there was a lack of evidence to indicate that he was "coerced or defrauded into agreeing to the arbitration clause."

Gilmer's fourth and most critical line of argument to advance his contention that arbitration is inconsistent with the purposes of the ADEA put forth a "host of challenges to the adequacy of arbitration procedures." Gilmer first argued that arbitration panels may be biased. Justice White responded to this by noting that Gilmer's argument was nothing more than a mere presumption. He further pointed out that the NYSE rules governing arbitration provide ample protections against biased panels. Gilmer next maintained that the discovery which is allowed in arbitration is much more limited than the discovery allowed in federal courts, thus making it more difficult to prove discrimination. The Court responded to this by noting that it is unlikely that age discrimination claims require more extensive discovery than those that have previously been upheld by the

141. Id. at 33.
142. Id.
143. Id.
144. Id. (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).
145. Id.
146. Id. at 30. Many of the factors that are advanced by Gilmer are similar to or identical with prior contentions that had previously been addressed by the Court.
147. See Gilmer, 500 U.S. at 30.
148. See id. For example, the parties may inquire as to the arbitrator's background and employment histories. See id. Additionally, each party is allowed one peremptory challenge and unlimited challenges for cause. See id. Finally, the FAA protects against bias by allowing courts to overturn arbitration decisions "where there was evident partiality or corruption in the arbitrators." Id. (quoting Federal Arbitration Act, 9 U.S.C. § 10(b)) (1994).
149. See id. at 31.
Court, but in any case, Gilmer had not demonstrated that the NYSE discovery provisions were inadequate. The Court noted that a further counterweight to the limited discovery is that an arbitrator is not bound by the rules of evidence. Gilmer’s third point was that because arbitrators do not render written opinions, there will be a lack of public knowledge of employers’ discriminatory practices and a stifling of the development of the law. The Court easily overcame this point by noting that the NYSE rules do require that all arbitration awards be in writing. Gilmer further argued that arbitration cannot “further the purposes of the ADEA” because arbitration procedures do not provide for broad equitable relief and class actions. As with the last argument, the Court noted that NYSE rules do allow for the fashioning of equitable relief. Additionally, the EEOC may bring action seeking class-wide and equitable relief. Therefore, Gilmer’s attempt to impeach the arbitration of ADEA claims as being against public policy, as well as his attempt to demonstrate that arbitration of ADEA claims was inconsistent with the statutory framework and purposes of the ADEA, had failed.

Asserting one additional, final argument, Gilmer contended that the Court’s decisions in Gardner-Denver, Barrentine, and McDonald all preclude arbitration of employment discrimination cases. In response, the Court distinguished Gilmer from those cases by noting that those cases involved a collective bargaining agreement and thus dealt with an employee’s contractual rights rather than an employee’s statutory rights. The Court also

150. See id. Justice White also noted that by agreeing to arbitration, a litigant “trades the procedures and opportunity for the review of the courtroom for the simplicity, informality, and expedition of arbitration.” Id. (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
151. See id.
152. See id.
153. See id. In addition, the NYSE rules required that arbitration awards “contain the names of the parties, a summary of the issues in controversy, and a description of the award issued.” Id. at 31-32.
154. Id. at 32.
155. See id.
156. See id.
157. See id. at 33.
158. See id. at 34 Justice White noted that the collective bargaining cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such
noted that those cases were not decided under the FAA, which reflects a "liberal federal policy favoring arbitration agreements."

In dissent, Justice Stevens chided the majority for failing to consider the antecedent question of whether "the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue." Justice Stevens took the position that arbitration clauses contained in employment contracts are exempt from the scope of the FAA. In response to the majority's claim that Gilmer did not involve an employment contract because the arbitration provision existed in the registration agreement with the NYSE, Justice Stevens noted that registration with the NYSE was a condition of employment and thus for all practical purposes was within the scope of the FAA exclusion of "contracts of employment."

Additionally, Justice Stevens would have sustained Gilmer's argument that "compulsory arbitration conflicts with the congressional purpose animating the ADEA . . . ." Justice Stevens noted that the ADEA authorizes courts to award broad class-based injunctive relief, while commercial arbitration is "typically limited to a specific dispute." Furthermore, Justice Stevens noted that "to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts" would be inconsistent with a statute that was designed to

claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. See id. at 35.

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

160. Id. at 36 (Stevens, J., dissenting). See supra note 24 for the text of the relevant section of the FAA that appears to limit the scope of the FAA.

161. See Gilmer, 500 U.S. at 36 (Stevens, J., dissenting). Justice Stevens looked to the legislative history behind the FAA and determined that the primary motivation for the enactment of the FAA was "the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities." Id. at 39. Thus, per Justice Stevens, the true purpose behind the FAA was not to encompass arbitration agreements between the employer and employee, but rather to facilitate the enforcement of agreements between two sophisticated business entities.

162. Id. at 40. Justice Stevens stated, "[I]n my opinion the exclusion in § 1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment." Id.

163. Id. at 41.

164. Id. at 42.
enforce civil rights.\textsuperscript{165} In conclusion, Justice Stevens noted that the Court's decision overlooked the inequality in bargaining power between an individual and an entire industry.\textsuperscript{166}

III. Questions Left Unanswered by \textit{Gilmer}

As discussed below in Part IV, courts were quickly asked to expand \textit{Gilmer}, arguably beyond its original intent. The lower courts have responded by liberally applying mandatory arbitration to statutory employment disputes. The trend was predictable in light of the notion of the liberal federal policy in favor of arbitration. Before discussing these developments, however, it is illuminating to examine the questions glossed over and evaded by the Court, some of which the lower courts have addressed. As stated earlier, in \textit{Gilmer}, the Court held that a statutory civil rights claim, arising out of a written agreement contained in a registration application that an employee was required to fill out as a condition of employment, could be subjected to mandatory arbitration. The Court, to support its holding, pointed to the aforementioned "liberal federal policy"\textsuperscript{167} as evinced by the FAA along with a lack of identifiable congressional intent to preserve the judicial forum. However, in resolving \textit{Gilmer}, the Court failed to answer the antecedent question of whether the FAA even applies to "contracts of employment."\textsuperscript{168} Justice White was able to get

\begin{itemize}
\item 166. \textit{See id.} at 43.
\item 168. \textit{See supra} notes 160-62 and accompanying text. The question of whether the FAA applies to contracts of employment is the subject of three different theories. \textit{See} Cheryl Blackwell Bryson & Anurag Gulati, \textit{The Courts and Legislature Begin to Adopt ADR Methods to Deal With Growing Number of Employment Discrimination Claims}, 13 N. Ill. U.L. Rev. 221 (1993). One theory posed is that the section 1 exclusion comes into play only when workers are engaged in the transportation of goods in interstate commerce. The basis of this theory, which has been accepted by courts pre- and post-\textit{Gilmer}, is that only two specific classes of workers are listed in the exclusion, namely seamen and railroad workers. The general category of "any other workers engaged in foreign or interstate commerce" must also relate to other workers whose jobs involve the interstate transport of goods. \textit{See id.} at 236 (citing Signal-Stat Corp. v. Local 475, United Elec., Radio & Mach. Workers, 235 F.2d 298 (2d Cir. 1956), \textit{cert. denied}, 354 U.S. 911 (1957); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972); DiCrisi v. Lyndon Guar. Bank, 807 F. Supp. 947, 952 (W.D.N.Y. 1992)).
\item A second theory advanced, which has been endorsed by some courts and some Justices of the Supreme Court, is that the section 1 exclusion of "workers engaged in foreign and interstate commerce" referred to all employment contracts. \textit{See id.} at 237. This theory enjoys limited legislative historical support as demonstrated in the dissenting opinion of Justice Stevens in \textit{Gilmer}, in which
\end{itemize}
around the FAA exclusion for "contracts of employment"\textsuperscript{169} by noting that (1) the issue of the scope of the section 1 exclusion was not raised by the parties below, and (2) the writing that contained the arbitration agreement was not in a contract with Interstate/Johnson but rather in a registration application that Gilmer filled out with the NYSE.

In response to Justice White's first point, it should be noted that the Court has on many past occasions considered issues that were either waived or not considered by the parties below,\textsuperscript{170} when the issues were "so integral to the decision of the case that they could be considered 'fairly subsumed' by the actual question presented."\textsuperscript{171} In the \textit{Gilmer} case, it would appear that before the Court could make the determination that the FAA's liberal federal policy favoring arbitration dictates a certain result, the deter-

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\textsuperscript{169} He quoted the statement of the chairman of the ABA committee which drafted the bill when speaking before the Senate Judiciary Subcommittee: "[The bill] is not intended [to] 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." \textit{Id.} (quoting Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923)).

The third theory of the meaning of section 1, which has not received favor by the courts, is the view that the purpose of the exclusion was to respond to the concerns of organized labor by excluding bargaining agreements. The genesis of this concern appears to have come from labor leaders' fear that imposed arbitration was a threat to the right of their membership to strike with respect to interest disputes. See \textit{id.} at 238 (citing Samuel Estreicher, \textit{Arbitration of Employment Disputes Without Unions}, 66 CHI-KENT L. REV. 753, 757-60 (1990) (favoring the latter theory)).

\textsuperscript{170} See supra notes 17-26 and accompanying text for a brief overview of the FAA.

\textsuperscript{171} For a similar handling by the Court of issues presumed to have been waived, see, for example, Teague v. Lane, 489 U.S. 288 (1989) (deciding the petitioner's fair cross-section claim, which was not raised by the petitioner, but rather by an amicus brief); Batson v. Kentucky, 476 U.S. 79 (1986) (despite an apparently intentional failure to raise an equal protection argument by the petitioner, the court reached and decided the case based upon that argument, going so far as to completely disregard the petitioner's actual argument, which was based on the Sixth Amendment and focused only on the equal protection argument); Mapp v. Ohio, 367 U.S. 643, 646 (1961) (stating that "[a]lthough appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that \textit{Wolf} be overruled, the \textit{amicus curiae}, who was also permitted to participate in the oral argument, did urge the Court to overrule \textit{Wolf}). See also R. Stern, E. Gressman, & S. Shapiro, \textit{Supreme Court Practice}, \S\ 6.26 (6th ed. 1986) (discussing the rule which requires that a party present a question in a lower court prior to bringing it up on appeal and the exceptions to that rule).

\textsuperscript{171} \textit{Gilmer}, 500 U.S. at 37 (Stevens, J., dissenting).
mination of whether the FAA applies at all would clearly be an antecedent question.\textsuperscript{172}

The Court's second determination, that the FAA section 1 exclusion does not apply because the clause to arbitrate was not contained in a "contract of employment" between Gilmer and Interstate/Johnson, clearly exalts form over substance. To work in the securities industry, it was necessary for Gilmer to complete a registration application with the various exchanges. Had Gilmer failed to complete the registration application with the NYSE, he would not have been able to work for either Interstate/Johnson or any other brokerage house. Thus, completion of the registration application was clearly a condition of employment that arose out of the employment relationship.\textsuperscript{173} Because the registration application was a condition of employment, the Court should have considered it to be a part of the "contract of employment" and thus should have focused on the antecedent question of whether the FAA even applies to arbitration clauses contained in contracts of employment.\textsuperscript{174}

Despite what appears to be a clear intention on the part of the Court to bring mandatory arbitration into the fold as a dispute resolution mechanism of statutory employment discrimination claims, a number of lingering questions of great significance were not touched by \textit{Gilmer}. One such question is whether the EEOC can bring cases on behalf of employees who are covered by mandatory arbitration agreements. The EEOC has adopted a policy regarding the use of ADR pursuant to the Administrative Dispute Resolution Act\textsuperscript{175} and the National Performance Review. Under this policy, the agency has taken the position that while it is firmly committed to using ADR mechanisms as a means of resolving employment discrimination disputes, it is not bound by any agreements of the type found in \textit{Gilmer}. The EEOC's pronouncement of this policy came on the heels of a federal district judge's preliminary injunction of an employer's use of a mandatory ADR policy, which the court deemed unfair in \textit{EEOC v. River Oaks Imaging Diagnostics (ROID)}.\textsuperscript{176}

\textsuperscript{172} Justice Stevens noted: "I believe that the Court should reach the issue of the coverage of the FAA to employment disputes because resolution of the question is so clearly antecedent to the disposition of this case." \textit{Id.} at 36-37.

\textsuperscript{173} \textit{See infra} note 162.

\textsuperscript{174} \textit{See Magyar, supra} note 27, at 653.


\textsuperscript{176} 1995 WL 264003 (S.D. Tex. Apr. 19, 1995). In \textit{River Oaks}, the federal district court enjoined the employer from "requiring any present or future employees . . . to enter into any ADR policy which would cause an employee to pay the costs of ADR proceedings; [or] preclude or interfere with
The Court’s decision in *Gilmer* also raises a significant public policy question: whether civil rights claims are best served by a judicial or arbitral proceeding. At the outset, this can be viewed as a freedom of contract question. Should two informed adults (or as is probably more accurate a corporation and an adult) be allowed to determine the terms of conditions of their employment prior to entering into that relationship? On the surface, the answer to this question would appear to be yes. When parties agree to form an employment relationship, they consider factors such as hours, compensation, benefits, and expectations of the job. Against this backdrop, it would appear that two consenting adults should also legally be able to decide the method for resolving any disputes that may arise during the term of the employment relationship.

However, it is important to understand the purpose behind civil rights legislation. When Congress promulgates laws to protect civil rights, Congress is not only concerned with the fate of particular individuals, but also with the classes of people that deserve protection from abuses by the majority or big business. In other words, even though Title VII focused on minority rights initially, Congress’ primary concern is with society as a whole. In this light, it becomes important to ask a second question: can a system based on arbitration as its terminal procedure—a procedure that is designed to assist in the enforcement of business agreements and settle individual grievances—foster the congressional intent behind legislation, such as the ADEA and Title VII, and thus adequately protect society’s interest? The qualified answer to this question is no, unless certain due process protections are included in the system. As the Court noted in *McDonnell*, “[arbitration] cannot provide an adequate substitute for a judicial proceeding in protecting federal statutory and constitutional rights . . . .”177 Mandatory arbitration fails to protect society’s interest for the following reasons: (1) the inequality in bargaining power between the employer and prospective employee; (2) the lack of adequate discovery procedures that are

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essential to prove instances of discrimination; (3) the lack of legal training possessed by arbitrators; and (4) the lack of a mechanism for social vindication.

1. Unequal Bargaining Power

Let us first turn to the issue of unequal bargaining power between an employer and a job applicant. From early childhood, we as a society learn one more rule that is painfully obvious for many of us—"he who has the gold makes the rules." Responding to Gilmer's contention that there "often will be unequal bargaining power between employers and employees" when entering into an employment relationship, the Gilmer majority dismissed this problem by noting that mere inequality in bargaining power is not a sufficient reason to hold arbitration agreements unenforceable in the employment context. The Court then went on to cite Mitsubishi and Rodriguez de Quijas in stating that although inequality may exist, agreements to arbitrate are enforceable. However, the Mitsubishi Trilogy cases dealt with disputes arising in the business context that involved parties of relatively equal bargaining power, involving at least the power to enter into a business relationship with another entity should they not like the terms of the proposed relationship.

In contrast, the relationship between an employer and a prospective job applicant simply does not involve the same type of mutual power shared between a buyer and a seller. As to where a seller in a business context may take his product and sell elsewhere, a prospective job applicant, especially in a tight job market, cannot just take his labor and sell it to another bidder. This would seem especially true in a case like Gilmer, in which the job applicant was an older person who presumably would be qualified by experience to work primary in the securities industry and perhaps in a limited number of other fields. The Court had previously recognized the importance of the unequal bargaining power between an employer and a prospective employee. In

179. See id. at 33.
180. See supra notes 72-116 and accompanying text.
181. See Stephen J. Ware, Employment Arbitration and Voluntary Consent, 25 Hofstra L. Rev. 83, 156-57 (1996). Professor Ware notes that outside the securities industry, an employee can seek employment with other employers within that industry if the employer makes arbitration a non-negotiable condition of employment. However, in the securities industry, an employee will not be able to find an employer for which to work without the arbitration clause.
Tony & Susan Alamo Foundation v. Secretary of Labor, Justice White noted that "employers might be able to use superior bargaining power to coerce employees to . . . waive their protection under the Act." In Perry v. Thomas, Justice O'Connor, in dissent, observed that the state legislature intended to "protect the worker from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance." Furthermore, Congress itself has recognized that an employer has substantially greater bargaining power than does an employee seeking to put food on the family table. When Congress enacted the Norris-LaGuardia Act, for example, it noted that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . . ." Clearly, the Court and Congress both understood prior to Gilmer that the unequal bargaining power between an employer and prospective applicant was significant. Nonetheless, the court is not willing to allow employees to extricate themselves from these agreements resulting from unequal power. The Court noted that courts should look into claims that an agreement to arbitrate was produced by fraud or overwhelming economic power. However, it is evident that the Court does not consider the economic power held by the securities

183. Id. at 302 (holding that a waiver of rights under the Fair Labor Standards Act was contrary to public policy).
185. Id. at 495 (O'Connor, J., dissenting) (citing Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 131 (1973)).
186. 29 U.S.C. § 102 (1994). Some have suggested that the way to eliminate the problematic question of voluntariness in the pre-employment agreement is simply to have employees enter into such agreements once they are employed, as a condition of continued employment. This method is fraught with problems from the tinge of coercion to the strong smell of retaliation for those employees who refuse to sign such agreements. At least one court has dealt quickly and taken an extraordinary step to protect employees from the use by an employer of a post-employment, in-house ADR tool that seemed more like a sword against employees. See EEOC v. River Oaks Imaging & Diagnostics, 1995 WL 264003 (S.D. Tex. Apr. 19, 1995). The court's ruling in River Oaks suggests the importance of clearly communicating to and certainly not misleading employees regarding any ADR policy adopted. Nevertheless, it is foreseeable that an employer against whom a number of discrimination suits have been filed runs the risk of being accused of unfairly changing the conditions, if it thereafter institutes a mandatory binding arbitration policy even with the inherent defects of employment for punitive reasons and retaliation against the workforce in general.
industry as a whole to be overwhelming as compared to that of a prospective job applicant. Thus, it is difficult to imagine circumstances where the Court would consider one party to have exercised overwhelming economic power.

This imbalance of bargaining power takes on a particularly destructive nature when the employee is a newly-hired employee or worse yet, just a job applicant. Pre-hire arbitration agreements often appear in the application for employment or they are presented to a newly-hired employee as a condition for employment and on a “take it or leave it” basis. Herein lies the problem: at the moment of hire the new employee lacks almost all bargaining power because of the need for employment. It is the need for employment which leads the new employee to sign the arbitration agreement even though the employee may not wish to. More often than not, the employee signs the contract without the ability to consult an attorney prior to signing. These pre-hire arbitration agreements have been likened to the labor law concept of the “yellow-dog contracts,” wherein the employer makes the employee promise not to join a union as a condition of employment. The current-day “yellow-dog” contract entails forcing employees to waive their statutory rights in order to get the job. For instance, in *Pony Express Courier Corp. v. Morris*, a job applicant was handed an arbitration agreement that stated “you will not be offered employment until [the arbitration agreement] is signed without modification.” The employee argued that the arbitration agreement was unconscionable and the *Pony Express* court still found the agreement enforceable.

The question of power imbalance becomes even more pronounced when compounded by instances in which the issues of race, gender, disability, and disadvantaged socio-economic position are superimposed upon the problem. Because of historical patterns of discrimination, including prejudicial stereotypes and unequal bargaining power, these employees who are already on

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189. See *id.* at 1036.

190. See *id.* at 1037 n.146 (explaining that such contracts were prevalent in the early twentieth century and were approved by the Supreme Court in *Hitchmen Coal & Coke Co. v. Mitchell*, 245 U.S. 299 (1917) and *Coppage v. Kansas*, 236 U.S. 1 (1915)). Such contracts were declared unenforceable in section 3 of the Norris-LaGuardia Act, codified at 29 U.S.C. § 103 (1994)).


192. *Id.* at 819.
unequal footing with the employer, will have the "civil rights rug of justice" snatched further from beneath them unless the courts are diligent in preserving due process protections.

2. Lack of Discovery

A second concern invoked by mandatory arbitration is with the lack of discovery afforded to the parties, especially when the parties are attempting to prove discrimination. Gilmer argued that the discovery allowed in arbitration is more limited than that allowed in the federal courts.\footnote{193} The Court responded that it is unlikely that age discrimination claims require more discovery than other claims that had been found to be arbitrable.\footnote{194} However, at least one commentator has noted that proving a "discrimination case in the absence of full discovery would be particularly problematic."\footnote{195} Thirty years ago, discrimination was overt. Some employers even admitted that they were excluding certain groups from consideration of employment or using different pay scales. However, today discrimination is more subtle. Without the ability to gain access to information, it may be very difficult, if not impossible, for an employee to prove that he or she has been the subject of discrimination. As Professor Cooper has noted, without full discovery, what can the arbitrator know?\footnote{196}

3. Arbitrators' Qualifications

A third concern revolves around the qualifications of arbitrators who decide these disputes based on statutory rights. The lack of adequate training possessed by some arbitrators in the specific statutes to be interpreted potentially poses numerous problems. Although the current cadre of arbitrators are gener-

\footnotesize
\begin{itemize}
  \item 194. See id.
  \item 195. 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, 218 (1992). Cooper has noted:
  \begin{itemize}
    \item Determining an employment discrimination case in the absence of full discovery would be particularly problematic. It would be impossible in a disparate impact case. The disparate impact case is rare in any event, and probably unheard of in arbitration. But the ordinary disparate treatment case requires the presentation of similarly situated non-class members in order to determine whether or not discrimination occurred. Proof of discrimination on the basis of race, for example, requires proof that similarly situated members of another race were treated better. Without full prehearing discovery, what can the arbitrator know?
  \end{itemize}
  \item 196. See id.
\end{itemize}
ally well-versed in labor and commercial disputes, they are not
normally as well-versed in civil rights litigation. In Gardner-Denver, the Court noted that civil rights statutes often require “reference to public law concepts.”197 In contrast, Professor Cooper has noted that while a labor arbitrator only has the authority to interpret and apply the contract at issue, commercial arbitrators have broad authority to interpret and resolve statutory issues.198 Nevertheless, Professor Cooper goes on to note that “an arbitrator who is limited in knowledge of or respect for the law cannot do justice.”199

Additionally, as the Court noted in Barrentine, a large number of arbitrators are not even lawyers.200 Yet, resolution of statutory and constitutional claims frequently requires reference to legislative history and prior case law.201 Furthermore, an arbitrator is not bound by the doctrine of stare decisis. Thus, an arbitrator’s decision may run contrary to a long-developed legal doctrine. This may also result in a situation in which potential employers are unaware of the law and as such are unable to plan to obey the law.

An additional concern is the possibility of the lack of a written opinion to support the arbitrator’s decision. The fact that a written opinion is not necessarily required leads to two problems. First, without knowing the basis of an arbitrator’s decision, other potential litigants cannot know what action is considered acceptable and what action is not. Employers will thus be unable to rely on legal precedent as a factor to consider when determining how to treat current and potential employees or otherwise determine whether certain actions were in compliance with the law. Additionally, any future wronged employees would be unsure whether an inflicted wrong would be actionable. Finally, without written decisions, the arbitrators themselves will not have the appropriate guidance as cases develop that are not necessarily appealed to the lower courts.

198. See Cooper, supra note 195, at 212.
199. Id.; see also Gardner-Denver, 415 U.S. at 57 (noting that arbitrators’ expertise “pertains primarily to the law of the shop, not the law of the land.”).
200. See Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 743 (1981). The Barrentine Court went on to note that “[a]lthough an arbitrator may be competent to resolve preliminary factual questions . . . he may lack the competence to decide the ultimate legal issue . . . .” Id.
201. While both legislative history and prior case law are no doubt very difficult for the average layperson to interpret, it is not necessary to ensure that all arbitrators are lawyers, just that the arbitrators know the law, are able to apply it to the facts of the case at hand, and render well-reasoned decisions.
Second, the lack of a written opinion makes it very difficult for a court to review an arbitrator's decision to determine if the proceeding has been infused with bias. The FAA allows arbitration awards to be vacated for a "manifest disregard of the law." However, if an arbitrator can make a decision on a statutory civil rights issue without rendering an opinion, then how can a reviewing court ever adequately determine whether there has been a manifest disregard for the law? Furthermore, when one stops to consider that many times the arbitrator who has been chosen will be one familiar to the industry as a whole, the lack of a written opinion will make it difficult for a reviewing court to determine what role bias played, if any, in the arbitration decision.

A recent federal appellate court decision in *DiRussa v. Dean Witter Reynolds, Inc.* demonstrates the narrow grounds on which arbitration awards are reviewed. In *DiRussa*, the Second Circuit refused to vacate or modify the award where the arbitrators had ruled that the company had discriminated against the plaintiff on the basis of his age, but the arbitrators did not award the plaintiff the almost $250,000 in attorneys' fees to which he was entitled under the Age Discrimination in Employment Act (ADEA). The court ruled that there was no requisite showing that the arbitrators knew of the mandatory provision in the ADEA with respect to the payment of attorneys' fees, nor was there any proof that the arbitrators intentionally disregarded the provision. The court noted that "mere ignorance of the applicable law is not basis for change."

Such a ruling seems to belie Judge Harry T. Edwards' earlier pronouncement in *Cole v. Burns International Security Service* that he was not concerned about the unconscionability or unenforceability of agreements to arbitrate statutory claims. His reason for such assuredness was that the "courts will always remain available to ensure that arbitrators properly interpret the dictates

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204. One commentator has noted that "[t]he same industry experience and expertise that makes a private arbitrator attractive as an alternative to a judge . . . may render the arbitrator in a discrimination case subject to the very biases that the . . . plaintiff is seeking to remedy." G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an 'Adequate Substitute' for the Courts?*, 68 Tex. L. Rev. 509, 569 (1990).

205. 121 F.3d 818 (2d Cir. 1997).

206. *Id.*

207. 105 F.3d 1465, 1469 (Fed. Cir. 1997).
of public law."\textsuperscript{208} The Cole court leads one to wonder whether a dependence on the courts' ability to preserve the sanctity of the civil rights laws is misplaced if in fact an arbitrator's knowledge of the law to be interpreted is not a prerequisite to the use of mandatory binding arbitration.

4. Social Vindication

Finally, there is a question as to whether mandatory arbitration of civil rights claims should be allowed because the arbitration proceeding is relatively private and thus does not result in social vindication. When Congress enacts civil rights legislation, Congress intends to address a wrong committed against society as well as the individual or class of individuals. By contrast, arbitration is a private process. In fact, while plaintiffs are not always against resolving certain disputes in privacy and confidentiality,\textsuperscript{209} this feature is one of the main attractions for employers, especially those who depend heavily on good will to survive in a competitive market. The results of an arbitrator's decision are private and touch only the immediate parties to the litigation. Because the decision is private, individuals who are not party to the litigation rarely learn of the wrong that has been committed. Thus, because the general public may be unaware that company X has been involved in discriminatory practices, public pressure cannot be brought against company X to change its practices. Additionally, because a written opinion is not necessarily issued, the potential for the law to change and evolve with the times is impaired.

There is also a question about an arbitrator's ability to implement programs that are designed to remedy the past effects of discrimination. An arbitrator's role is limited to resolving the dispute between the parties to the litigation, but sometimes this is not enough. All one has to do is reflect back on the school desegregation cases to see what an important role the courts have played in attempting to rectify past wrongs. An arbitrator would not be able to issue such broad injunctive relief. As commentator Shell has noted, commercial arbitration focuses on specific transactions and not on institutional goals.\textsuperscript{210} The Court in \textit{Gilmer} stated that society's interest can still be vindicated because

\textsuperscript{208} \textit{Id.}

\textsuperscript{209} Not all employees are interested in a public airing of their problems with their employer. Some might even be embarrassed for it to become public knowledge that they have allowed themselves to be treated a certain way for so long. Also, certain claims, such as racial or sexual harassment, might be more easily pursued in the privacy of an arbitration proceeding.

\textsuperscript{210} \textit{See} Shell, \textit{supra} note 204, at 572.
the employee could file a claim with the EEOC.\textsuperscript{211} However, it should be noted that the EEOC is not compelled to bring suit. In addition, Professor Cooper has noted that a realistic examination of the EEOC's capabilities shows that the EEOC does not have the proper resources to be the sole stalwart of societal vindication.\textsuperscript{212} Therefore, the use of mandatory arbitration agreements can conceivably result in the wholesale bypassing of one of the most effective solutions to societal discrimination, the judicially crafted resolution.

IV. The Post-\textit{Gilmer} Cases

Since the \textit{Gilmer} decision, there have been a number of related issues which the lower courts have had to address. These issues cover a range of areas, including civil rights and the contractual obligations that arise from an employee handbook. The courts are often split on the application and interpretation of \textit{Gilmer} with regard to the above issues and many others.

A. Knowing Waiver of Rights

The first of the major issues that the courts have had to address is whether an employee must knowingly waive rights to bring a claim in a court. The Ninth Circuit, in \textit{Prudential Insurance Co. of America v. Lai},\textsuperscript{213} held that an employee cannot be forced to arbitrate Title VII claims unless he or she has \textit{knowingly} agreed to submit such disputes to arbitration.\textsuperscript{214} Even if the employee is aware of the arbitration provision, the employee can still be without notice that he or she is agreeing to arbitrate any Title VII claims if the provision did not describe what specific types of suits were to be arbitrated and if there was insufficient time to review the agreements.\textsuperscript{215} The court relied on Senator

\textsuperscript{212} See \textit{Cooper}, supra note 195, at 219-20 (noting that the limited financial and political capability of the EEOC impacts its ability to protect society's interest and thus judicial vindication is warranted for civil rights statutes).
\textsuperscript{213} 42 F.3d 129 (9th Cir. 1994), \textit{cert. denied}, 116 S. Ct. 61 (1995); \textit{see also} Nelson v. Cyprus Bagdad Copper, 119 F.3d 756, 761 (9th Cir. 1997) (holding that just as there is a knowing requirement for Title VII claims, there is a knowing requirement for claims under the Americans with Disabilities Act); Pierce v. Atchison Topeka and Santa Fe R.R. Co., 110 F.3d 431, 433 (7th Cir. 1997) (holding that ADEA rights could only be relinquished through a knowing and voluntary waiver and that the employer has the burden of proving the employee's waiver was knowing and voluntary).
\textsuperscript{214} \textit{See id. at} 130; \textit{see also} Renteria v. Prudential Ins. Co. of Am., 113 F.3d 1104 (9th Cir. 1997).
\textsuperscript{215} \textit{See Lai}, 42 F.3d at 130.
Robert Dole's floor comments on Title VII that the employee could only be held to arbitration when the parties knowingly and voluntarily elect to use these methods.\textsuperscript{216}

However, other courts have held that Title VII does not have a "knowing waiver" requirement as long as employees sign an agreement to arbitrate their statutory rights.\textsuperscript{217} In \textit{Beauchamp v. Great West Life Assurance Co.},\textsuperscript{218} the court rejected the reasoning in \textit{Prudential}, stating that:

\begin{quotation}
[t]he portions of the [Title VII] legislative history relied upon by the Ninth Circuit [were] slender reeds upon which to rest the weighty and novel conclusion that an arbitration clause is only binding when the claimant has actual knowledge that his particular employment discrimination claims will be covered by the agreement.\textsuperscript{219}
\end{quotation}

\textbf{B. Substantive Rights}

The second major issue which the lower courts have had to address is the nature of the employer's ability to affect an employee's substantive rights in an arbitration agreement. In responding to this issue, the courts appear to place strict limitations on the employer's ability to force an employee to agree to waive statutory substantive rights. For example, in \textit{Graham Oil Co. v. ARCO Products Co.},\textsuperscript{220} the court refused to compel arbitration when the arbitration agreement "purport[ed] to forfeit certain important statutorily-mandated rights or benefits."\textsuperscript{221} The arbitration clause in this case eliminated the right to recover punitive damages and attorney fees, and it reduced the statute of limitations from one year to 90 days.\textsuperscript{222} Further, in \textit{Stirlen v. Supercuts},\textsuperscript{223} the court held that arbitration clauses that "provide the employer more rights and greater remedies than would otherwise be available and concomitantly deprive employees of

\textsuperscript{216} \textit{See id.}

\textsuperscript{217} \textit{See Brookwood v. Bank of Am.}, 53 Cal. Rptr. 2d 515 (Cal. Ct. App. 1996). The \textit{Brookwood} court held that the only reason for a court to find an arbitration agreement unenforceable is if there is a unilateral mistake by the contracting party. \textit{See id.} at 519. The court did not agree with the \textit{Prudential} court's holding that a lack of knowing regarding waiver is also reason to find the agreement unenforceable. Further, the \textit{Brookwood} court held that the court in \textit{Prudential} ignored the expressed endorsement of arbitration in the Civil Rights Act of 1991. \textit{See id.}


\textsuperscript{219} \textit{Id.} at 1096.


\textsuperscript{221} \textit{Id.} at 1246.

\textsuperscript{222} \textit{Id.} at 1248.

\textsuperscript{223} 51 Cal. Rptr. 2d. 138 (Cal. Ct. App. 1997).
significant rights and remedies that they would normally enjoy” are unenforceable.\(^2\)\(^2\)\(^4\) In addition, the \textit{Stirling} court held that the clause was unenforceable because of an “imbalance in bargaining power.”\(^2\)\(^2\)\(^5\) However, this aspect of \textit{Stirling} is inconsistent with \textit{Gilmer}, which stated that “[i]n inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”\(^2\)\(^2\)\(^6\) This notable inconsistency which addresses substantive rights is more palatable than the \textit{Gilmer} view which ignores the basic structure of the employment relationship, especially at the application stage.

\section*{C. Employee Handbooks}

The third major issue the courts have addressed revolves around the enforceability of arbitration clauses found in employee handbooks.\(^2\)\(^2\)\(^7\) In \textit{Patterson v. Tenet Healthcare, Inc.}\(^2\)\(^2\)\(^8\) the employee had received and signed an employee handbook which contained an arbitration clause that was separated from the other sections of the handbook.\(^2\)\(^2\)\(^9\) The court agreed that employee handbooks are not generally considered to be binding contracts between the employee and the employer, but noted an exception in this case. The court based its determination upon the way in which the arbitration clause was presented in the handbook.\(^2\)\(^3\)\(^0\) The court found that the language of the clause (which included phrases such as “I understand,” “I accept,” and “I agree”), combined with the division between the main sections of the handbook and the arbitration clause, made it contractual in nature and thus enforceable.\(^2\)\(^3\)\(^1\)

Taking a somewhat different tack, the court in \textit{Heurtebise v. Reliable Business Computers, Inc.}\(^2\)\(^3\)\(^2\) agreed that, in general, an

\begin{itemize}
  \item \(^2\)\(^2\)\(^4\) \textit{Id.} at 151.
  \item \(^2\)\(^2\)\(^5\) \textit{Id.} at 146.
  \item \(^2\)\(^2\)\(^6\) \textit{Gilmer} v. Interstate/Johnson Lane Corp., 500 U.S 20, 33 (1991).
  \item \(^2\)\(^2\)\(^8\) 113 F.3d 832 (8th Cir. 1997).
  \item \(^2\)\(^2\)\(^9\) \textit{See id.} at 835.
  \item \(^2\)\(^3\) \textit{See id.}
  \item \(^2\)\(^3\)\(^0\) \textit{See id.}
  \item \(^2\)\(^3\)\(^1\) \textit{See id.}
  \item \(^2\)\(^3\)\(^2\) \textit{In addition to the employee handbook issue, the court also noted that it was because of \textit{Gilmer}, that the statutory claims of this employee were subject to arbitration agreements. \textit{See id.} at 837.
  \item \(^2\)\(^3\)\(^3\) 550 N.W.2d 243 (Mich. 1996). The plaintiff’s claim in this case was based on gender discrimination. She claimed that both she and a male co-worker took a lunch in excess of the allowable time, but that only she received adverse employment action as a result.
\end{itemize}
employee handbook is not a contract between the employee and the employer. The court noted that in this case, moreover, the employer had reserved the right to modify the employee handbook at any time during the duration of employment and that this rendered the arbitration clause contained in the employee handbook unenforceable. In order to ensure that an arbitration clause contained in an employee handbook is enforceable an employer would thus be well-advised to follow the courts' lessons in these cases and separate the arbitration agreement from the employee handbook to ensure its contractual nature.

D. Civil Rights Act of 1964

The fourth major issue that the courts have addressed since the *Gilmer* decision involves the ability of employees and employers to agree to arbitrate any disputes that involve a violation of the employees' civil rights. Despite the volatility of the issues involved in these cases, the courts have been fairly consistent in their rulings that an employee can agree to arbitrate his or her civil rights claims.

In *Austin v. Owens-Brockway Glass Container, Inc.*, for example, the court held that arbitration agreements that specifically state that the employees' gender and disability discrimination claims are subject to arbitration are enforceable. This ability to arbitrate these claims was viewed in the context of congressional intentions to support arbitration and weighed against the policies surrounding civil rights claims. The court in *Austin* found that “the language of the statutes [Title VII and ADA] could not be more clear in showing congressional favor towards arbitration.” This congressional favor to which *Austin* refers is also spoken of as the “national policy favoring arbitration.” This policy goes past the “at-will” nature of the employment and

233. See id. at 246.
234. See id. The specific text to which the court refers is “the company specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions may warrant.” Id. at 247.
237. See id. at 879 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 21 (1991)).
238. Id. at 881.
allows an arbitration agreement to be enforced as a contract despite the ability of the employee to leave at any time and for any reason.\textsuperscript{240}

This notion is observed and followed in other sex discrimination cases as well.\textsuperscript{241} Recently, the D.C. Circuit took issue with the enforceability of conditions of employment requiring individuals to arbitrate claims resting on statutory rights, while making a distinction between mandatory arbitration in and outside the context of the union collective bargaining.\textsuperscript{242} The court noted the legitimacy concerns that surround agreements outside the collective bargaining context.\textsuperscript{243} One of the concerns the court had was that as in this case, mandatory arbitration agreements are often presented to the employee on a take-it-or-leave-it basis and there is a lack of union negotiation for such a term.\textsuperscript{244} In addition, arbitrators may not have the competence to decide purely legal issues relating to statutory rights.\textsuperscript{245} But, the court found that the Supreme Court has made it clear that statutory claims are fully subject to binding arbitration.\textsuperscript{246}

E. Miscellaneous

In addition to the aforesaid issues, the courts have had to wrestle with numerous other issues, covering a wide range of situations.\textsuperscript{247} As with the major issues discussed above, the courts have also been divided in how to treat these situations. One of the reasons the courts are not in total agreement in the applica-

\textsuperscript{240} See Brown v. KFC Nat'l Mgt. Co., 921 P.2d 146, 149 (Haw. 1996) (holding that mandatory arbitration claims under state anti-discrimination statutes were enforceable even though the employee's status was that of "at-will").

\textsuperscript{241} See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997). The plaintiff claimed that the arbitration of this matter would be in violation of public policy because the statute of limitations was limited by the arbitration clause to one year, down from the statutorily based two years. In addition, the plaintiff claimed that the employer had waived its rights to an arbitration of these issues, to which the court answered that the resolution of that issue must be decided by the arbitrator.

\textsuperscript{242} See id. at 1473-79.

\textsuperscript{243} See id. at 1475.

\textsuperscript{244} See id. at 1477.

\textsuperscript{245} See id.


\textsuperscript{247} See Jay W. Waks, Predispute ADR Raises Fairness Issue: Courts Have Not Hesitated to Enforce Arbitration Agreements Except When the Fairness of the Process is Compromised, 19 Nat'l L.J. B8 (1997) ("The most troubling challenges to arbitration policies have focused on fairness of the process, not whether a judicial forum is the exclusive one."). Id.
tion of Gilmer is because of the lack of guidance provided by the Gilmer Court as to its application.

One such issue is the neutrality of the "arbitrator". In Cheng-Canindin v. Renaissance Hotel Ass'n, the court held that an employer could not force a plaintiff/employee to bring a wrongful discharge claim before the employer's review board pursuant to an ADR program. The court held that this was not "arbitration" because of the lack of impartiality of the board.

In analyzing other issues, the courts often rely on public policy to decide how Gilmer should be applied. In Cole v. Burns International Security Services, for example, the court noted the legitimacy concerns that surround the agreements outside the collective bargaining arena. One of the concerns the court had was that as in this case, mandatory arbitration agreements are often presented to the employee on a take-it-or-leave-it basis and there is a lack of union negotiation for such a term. In addition, arbitrators may not have the competence to decide purely legal issues relating to statutory rights.

V. Private and Public Initiatives in the Aftermath of Gilmer

In the aftermath of Gilmer there have been a number of professional organizations and bar associations which have attempted to address the fairness and due process issues arising from mandatory arbitration of statutory employment disputes. Initiatives have been advanced by the ABA, AAA, SPIDR, Jams/

249. Id.
250. See id. at 692-93.
251. See id. at 693.
252. See, e.g., Thomas James Ass'n v. Jameson, 102 F.3d 60 (2nd Cir. 1996); Cole v. Burns Int'l Sec. Servs. 105 F.3d 1465 (D.C. Cir. 1997).
253. 105 F.3d 1465 (D.C. Cir. 1997).
254. See id. at 1475. The court took issue with the enforceability of conditions of employment requiring individuals to arbitrate claims resting on statutory rights, while making a distinction between mandatory arbitration in and outside the context of the union collective bargaining. See id. at 1473-79.
255. See id. at 1477. The court also decided that employees cannot be required to pay the costs of the arbitrator when the employment is conditioned on the acceptance of the arbitration agreement. See id. at 1483. The court held that requiring the employee to pay for such expenses would be likely to prevent him from pursuing his statutory claims. See id. at 1484. Further, the court held that such expenses should be borne solely by the employer. See id. at 1485.
256. See id. at 1485.
EnDispute, CPR and U.S. Arbitration and Mediation (U.S. A. & M.). These professional organizations have been in the forefront of efforts to wade through the morass of public policy concerns surrounding mandated arbitration. They are to be commended for their efforts to step in where there is obviously a void to be filled in attempting to assist in the assurance that due process is observed in this critical area. This article focuses upon the protocol that was spearheaded by the ABA and that has achieved the most prominence. In developing the document, the ABA sought to achieve the consensus of a diverse group of labor and employment entities that represent disputants or provide administrative services, service providers, and neutrals.

A. The ADR Protocol

On May 9, 1995, the Task Force on Alternative Dispute Resolution in Employment of the ABA Section on Labor and Employment Law issued the results of its examination of "questions of due process arising out of the use of mediation and arbitration for resolving employment disputes." The document, entitled "A Due Process Protocol for Mediation," is to be used as "a means of providing due process in the resolution by mediation and binding arbitration of employment disputes of statutory rights." The ADR Protocol was endorsed by the National Academy of Arbitrators, American Arbitration Association, Society of Professionals in Dispute Resolution, National Employment Lawyers Association, Federal Mediation and Conciliation Service, and the American Civil Liberties Union.

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257. For another example of a protocol which covers substantially the same topics as the ADR Protocol, see CPR INSTITUTE FOR DISPUTE RESOLUTION PROGRAM FOR CORPORATE EMPLOYERS (1995).
259. Throughout the protocol the Task Force makes reference to mediation as well as arbitration. This article does not cover the comments about mediation because the focus of this discussion is on arbitration.
261. The following organizations designated representatives to participate in the development of the protocol. The statements, however, do not reflect or represent the policy of the designating organizations, but rather the personal views of the individuals: Council of Labor and Employment Section, ABA; National Academy of Arbitrators, Arbitration Committee of Labor and Employment Section, ABA (three representatives); American Arbitration Association (two representatives); Federal Mediation and Conciliation; Workplace Rights Project; American Civil Liberties Union; Society of Professionals in Dispute Resolution; and National Employment Lawyers Association. See id.
The ADR Protocol is divided into four sections and is confined to the examination of questions regarding "due process arising out of the use of . . . arbitration for resolving employment disputes." of a statutory nature. The stated focus of the protocol is on "standards of exemplary due process." The representatives could not reach a consensus on the "difficult issue" of the "timing of an agreement to arbitrate a dispute." Therefore, the protocol does not take a position on whether agreements to arbitrate statutory disputes should be entered into before the dispute arises or after the dispute arises (hereinafter pre- or post-dispute). The only consensus that was reached was that the agreements to arbitrate statutory discrimination claims should be "knowingly made." 

Regarding the right of representation, the protocol suggests that employees "should have the right to be represented by a spokesperson of their own choosing." It suggests that the arbitration procedure specify this right and that it "should include reference to institutions which might offer assistance, by listing bar associations, legal service associations, civil rights organizations, trade unions, etc." It leaves up to the parties the task of determining between themselves "the amount and method of payment for representation" and recommends "a number of existing systems which provide employer reimbursement of at

262. Id. at E-11.
263. Id.
264. Id.
265. The Task Force goes on to express the competing opinions of each of several contingents of representatives. The first contingent felt that the agreements to arbitrate should be "informed, voluntary and not a condition of initial or continued employment." The second contingent felt that employers have the right to insist on agreements to "arbitrate statutory disputes as a condition of initial or continued employment." The reasoning for the latter contingent's opposition to postponing the agreement until after the dispute arises is that there is a "stronger predisposition to litigate" resulting in "very few" agreements to arbitrate and therefore less likelihood of using alternative dispute resolution. This they declare will not result in helping to give relief to the overburdened administrative and judicial systems. The third contingent had determined that employees should not be forced to make the decision as to whether they want to arbitrate their individual cases until after the dispute arises. The fourth and final contingent did not believe that employees should be permitted to waive their right to judicial relief for any reason. See id. at E-11.
266. Id.
267. Id.
268. Id. at E-11 (Section B. 1., "Right of Representation").
269. Id. at E-11 (Section B.2., "Fees for Representation"). The protocol suggests that the arbitrator have "the authority to provide for partial or full reimbursement of fees" as part of the remedy or "in accordance with applicable law or in the interests of justice." Id.
least a portion of an employee's attorney fees, especially for lower paid employees."270

The ADR Protocol notes that one of the advantages of arbitration is usually the savings of time and money spent in pre-trial discovery. It encourages "adequate but limited discovery" and suggests that the employees "have access to all information reasonably relevant" to their claims.271 It also provides for "pre-hearing depositions consistent with the nature of arbitration."272

The protocol calls for arbitrators to have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment."273 The Task Force suggests that a "roster of available arbitrators be established on a non-discriminatory basis, diverse by gender, ethnicity, background, experience, and other characteristics to satisfy the parties that their interest and objectives will be respected and fully considered."274 It urges arbitrators to "reject cases if they believe that the procedure lacks requisite due process."275

With respect to training of the arbitrators, the protocol suggests the creation of a roster of arbitrators by the development of a training program "to educate existing and potential labor and employment arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted . . . ."276 This training is to be required for all arbitrators, conducted nationally, and provided by "the government agencies, bar associations,

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270. Id.
271. Id. (Section B.3., "Access to Information").
272. Id. (Section B.3., "Access to Information").
273. Id. (Section C.1., "Mediator and Arbitrator Qualification, Roster Membership"). On one hand, the protocol recognizes that "the existing cadre of labor and employment arbitrators, some lawyers, some not, . . . is unlikely, without special training, to consistently possess knowledge of the statutory environment" and the "nonunion environment." Id. On the other hand, the protocol recognizes the need for "arbitrators with expertise in statutory requirements in the employment field who may, without special training, lack experience in the employment area and in the conduct of arbitration hearings." Id. at E-11-12.
274. Id. at E-11. The protocol also recognizes the right of parties to jointly select an arbitrator at their discretion who does not possess the above qualities because they have the requisite trust in that individual as most promising to bring finality to the dispute and to "withstand judicial scrutiny." See id.
275. Id. at E-12.
276. Id. (Section C.2., "Training"). The protocol also suggests "the training of experts in the statutes as to the employer procedures governing the employment relationship as well a due process and fairness in the conduct and control of arbitration hearings." Id.
academic institutions, etc., administered perhaps by the designating agency, such as the AAA." As an alternative, training could be provided by a mentoring program.277

Regarding selection of the arbitrators, the protocol suggests a list procedure such as the one used by the AAA, by which parties strike unacceptable arbitrators, and it suggests that the parties empower the "designating agency to appoint a mediator and/or arbitrator if the striking procedure is unacceptable or unsuccessful."278 The protocol imposes on the arbitrator "a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest."279 It suggests that the arbitrator be "required to sign an oath affirming the absence of such present or preexisting ties."280 It further suggests that the arbitrator "be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency . . . ."281

With respect to the arbitrator's authority, the ADR Protocol states that the arbitrator should be empowered to "permit reasonable discovery, issue subpoenas, decide arbitrability, etc.," as well as to "award whatever relief would be available in court under the law."282 The protocol notes that "impartiality is best assured by the parties sharing the fees and expenses of the arbitrator," but suggests that where economic conditions do not permit the equal sharing of fees, the parties should mutually agree on arrangements.283

Finally, the ADR Protocol suggests that the arbitrator's award be final and binding and the scope of review limited.284

277. See id.
278. Id. (Section C.3., "Panel"). In addition, the protocol suggests that the parties receive the names of the parties and their representatives in recent cases decided by the arbitrators to help make the selection. See id.
279. Id. (Section C.4., "Conflicts of Interest")
280. Id.
281. Id.
282. Id. (Section C.5., "Authority of the Arbitrator"). Further, the protocol states that the arbitrator should issue an award consisting of, inter alia, a statement of any other issues resolved and a statement regarding the disposition of any statutory claim(s). See id.
283. Id. (Section C.6., "Compensation of the Arbitrator"). Otherwise, the suggestion is that the arbitrator "determine allocation of fees." It is also suggested that to "reduce the bias potential of disparate contributions," the designating agency may forward payment to the arbitrator "without disclosing the parties' share therein." Id.
284. See id. (Section D., "Scope of Review").
B. Response to the ADR Protocol

1. Inclusivity

Notwithstanding these laudable efforts, a glaringly apparent problem exists in the development of the ADR Protocols. There was an obvious lack of participation of representatives from many of the very classes of individuals the civil rights statutes were erected to protect. Just as it was found to be unlawful to deny the right of full participation in the efforts of members of protected classes to earn a living, it is inappropriate to fail to appreciate the tragic impact of the de facto exclusion or denial of participation of trained and qualified racial and ethnic minorities, women, and disabled voices in the development of the protocols. This group of individuals are some of the major stakeholders in the process. This observation is based on the fact that certain components are missing from the protocols that should be present.

2. Economic Considerations

There are several significant areas that also demand more sensitive development in light of the fact that many of the claim-

285. The observation regarding the demographic make-up of the drafters of the protocols and other problems mentioned below were first discussed in an unpublished advisory memorandum collectively prepared by the author and other Subcommittee members of the Law and Public Policy Committee of SPIDR. The purpose of the advisory memorandum was to attempt to influence needed changes in the then-proposed draft of the ADR Protocol. The comments herein are meant to reflect my personal comments, which may or may not mirror the comments of the subcommittee in its official capacity.

As far as the author understands, of the twelve representatives who participated in the development of the ADR Protocol, none were members of a racial or ethnic minority or disabled. Nor were there any participants whose main purpose was to represent the interests of these groups. Only one was a woman, and there was no indication from the information provided that she represented a group dedicated to women's issues. There were also no representatives of employees in lower socio-economic groups or of the aging workforce, specifically.

286. By urging that demographic stakeholders should have been included in the actual development of the protocol, the author does not suggest that the Task Force members were incapable of or did not intend to develop a protocol which seeks to be fair and regular in addressing the rights and interests of various affected individuals. However, from both a process and politically pragmatic perspective, it is important to include representatives of the major demographic stakeholders in the development of any ADR public policy. Such inclusion would have afforded the drafters of the ADR Protocol a different perspective, one which may have ultimately led to the recognition and incorporation of various elements and conditions that address particular needs, concerns, and interests.
ant-disputants are also members of disadvantaged socio-economic groups. They may not be able to afford either the cost of the arbitration, including the arbitrator's fee, or the services of an attorney or other competent representative. These are realities which create a serious dilemma. Many claimants who can least afford to be unemployed will be the most anxious disputants to have their claims resolved in the fastest and least costly fashion. These realities have the potential of effectively forcing such claimants to avoid what for them may be the costly procedure of arbitration. These claimants may agree to settlements out of desperation rather than enjoying the full benefits that arbitration provides, regardless of the due process concerns. The public policy implication of such realities poses the question of whether the primary function of mandatory arbitration is actually to act as a vehicle or mechanism to "close-out" cases under the name of administrative and judicial convenience.

3. Timing

Another significant public policy issue on which the Task Force failed to make a hard but necessary decision concerns the mandated or "imposed" use of arbitration as a pre-dispute condition of employment. The plaintiff's bar, under the auspices of the National Employment Lawyers' Association (NELA), has taken a strong position on this very heated issue and has even staged a boycott to demonstrate its importance. Since the ADR Protocol will be used as a guide by employers and ADR neutrals, the failure to directly address this issue head-on is a serious flaw. While sharing the thoughts of the various representatives on the Task Force was helpful to show that there is strong disagreement, it provides very little, if any, guidance. If the ADR Protocol is to serve its purpose as "a means of providing due process in the resolution by . . . binding arbitration of employment disputes involving statutory rights," then there is no place for "waffling" on such an issue. Perhaps now that NELA and others have taken a position on this and other issues, the Task Force can be reconvened and expanded to include some stakeholders, and more defined, informed and expanded positions can be developed and announced. Representatives from some suggested organizations include the NAACP, Urban League, Mexican

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288. See infra text accompanying notes 303-11 for a discussion about the various private and governmental organizations that have taken a position against certain aspects of mandated arbitration in recent years.
American Legal Defense Fund, NOW, Women's Legal Defense Fund, AARP, and disability advocacy organizations, such as the National Disability Action Center.

4. Unrepresented Claimants

One critical element of concern is the need for employees to have representation by counsel or a competent layperson. A problem attendant thereto is the difficulty of securing counsel for employment discrimination claimants. Employees may not have the necessary resources to afford to pay attorneys' fees, particularly in the case of termination. There is a general recognition which has been growing in recent years that claimants who are not represented do not fare well in the arbitration process. Richard Delgado and others have concluded through reviewing social-psychological theories and studies, that people have a tendency to act out their prejudices in informal settings such as those posed by some ADR processes. No doubt, despite the more formalized procedure of arbitration, represented employees would be less vulnerable in an arbitration setting than those who are unrepresented.

A significant question emerges as to whether ethically, ADR providers, ADR neutrals, and EEO enforcement agencies should encourage or rather discourage unrepresented claimants' submission of their public policy related disputes to such formalized

289. In the author's experience in working in the area of employment discrimination law, as a representative for both plaintiffs and defendants, as an Administrative Judge for the United States Merit Systems Protection Board, as a director of human resources, and as a mediator and arbitrator, it has been observed that trained laypersons, while perhaps not generally knowledgeable about proceedings in court, can be competent in the representation of claimants before administrative agencies, and in arbitration and mediation.

290. University of Michigan Professor Theodore St. Antoine, estimates that experienced lawyers agree to handle "only about one out of every 100 potential discrimination cases." Alternative Dispute Resolution: Mandatory Arbitration Better for Workers with EEOC, Courts Stretched, Professor Says, 151 Daily Lab. Rep. (BNA) C-2 (Aug. 6, 1997). He reasons that "many cases aren't worth their time to litigate." Id.

291. See id.

292. See Lewis Maltby, Paradise—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights, 12 N.Y.L. Sch. J. Hum. Rts. 1 (1994); see also Michael P. Maslanka, The Ultimate Objective: Mandatory Arbitration of All Non-Union Employment Disputes, Audio tape of Society of Professionals in Dispute Resolution, 22nd Annual Conference, Dallas, TX (October 26-29, 1994).

293. See Richard Delgado et. al., Minimizing Prejudice Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359.
adjudicatory processes as arbitration. An even more fundamental question remains as to whether ADR processes can ever be designed to meet one of the underlying objectives of the statutes, i.e., to prohibit discrimination.

Employers stand to receive a great benefit in time, money, and control over the process in devising ADR programs such as pre- as well as post-dispute mandatory arbitration. Some of those savings should be passed on to the employee. The Task Force has fashioned a novel and inventive approach to assure claimants a greater possibility of representation in arbitration. However, the author suggests that the employer go even further. In today's economy many social service organizations are severely underfunded and are unable to offer any assistance to employees who are in need of competent representation. The author suggests that the employers seriously consider covering all or part of the costs related to attorney fees by developing initiatives such as

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295. In their testimony submitted to the Commission on the Future of Management-Worker Relations, a conglomeration of women's groups stated that the "prevention of complaints through the removal of the cause of complaints should be the first priority of the Commission in addressing dispute resolution." Testimony of American Nurses Association, Black Women United for Action, Business and Professional Women/USA, Center for Advancement of Public Policy, Center for Women Policy Studies, Church Women United, Clearinghouse on Women's Issues, Coalition of Labor Union Women, Fund for the Feminist Majority, Mana, A National Latina Organization, National Center for the Early Childhood Workforce, National Committee on Pay Equity, Older Women's League, Wider Opportunities for Women, Women Employed Institute, Women's Legal Defense Fund, Women Work!, and YWCA submitted to the Commission on the Future of Worker-Management Relations, Presented by Martha Burk, Ph.D., President, Center for Advancement of Public Policy, September 29, 1994, at 1 [hereinafter Testimony of Women's Groups].

296. Part of the impetus for the implementation at Brown & Root in 1992 of an ADR program, in which the employer pays a majority of the employee's expenses for dispute resolution, was a $400,000 legal fee paid to outside counsel for successfully defending itself in a single discrimination suit. The employer's Associate General Counsel for Human Resources' assessment was that it was a case that "nobody won." Three years after the ADR program began, the employer spent "less than half of what it used to spend on legal fees for employment-related cases" and legal fees alone were reduced by about 90 percent. See Alternative Dispute Resolution-Employers Experiences With ADR in the Workplace, Report to the Chairman, Subcommittee on Civil Service, Committee on Government Reform and Oversight, 105th Cong. 39-40 (1997).
the much touted program utilized by Brown & Root,\textsuperscript{297} which pays for each employee to secure representation in mediation or arbitration.\textsuperscript{298} Obviously, Brown & Root is a leader in this respect. However, other companies should follow this lead if they want to receive the full benefit of ADR. One of the features of the Brown & Root Dispute Resolution Program includes the payment by employees of a $50.00 processing fee to take his/her case to external mediation or arbitration and an additional $25.00 deductible for each dispute as required. This is part a of a unique "Legal Consultation Plan" that pays 90 percent of an employee’s attorney fees, up to a maximum benefit of $2,500 annually.\textsuperscript{299} The relatively small payment by employees is an important part of the program because there is a school of thought that it is more likely and may be even more effective in some environments if the claimants pay some amount. This helps the claimants have some economic stake in the process and feel some sense of control over the process.

The payment of the arbitrator’s fees and any other administrative costs should be borne by the employer. Again, employers receive significant financial benefit from the use of mandatory arbitration. At least one court has found that it was only fair that the employer pay the costs of the arbitrator.\textsuperscript{300} A "blind" fee arrangement similar to the one suggested by the ADR Protocol, where fees are paid through a neutral agency so that the arbitrator does not know which party is paying all or what percentage of the fee, is also a good idea.

5. Publication of Arbitration Awards

The suggestion that the parties receive the names of the parties and their representatives in the arbitrators' most recent cases may provide valuable information regarding the arbitrators' temperament and demeanor, but it ignores one of the main tenets of arbitration—privacy for the parties involved. This means privacy not only with respect to the substantive nature of the claim and the decision of the arbitrator, but privacy with respect to the

\textsuperscript{297} In the GAO Report, with respect the use of ADR in the federal and private sectors, the agency revealed its conclusions on the study of (1) six private companies: Brown & Root, Hughes Electronics Corp., Polaroid, Rockwell International Corp., and TRW, and (2) five federal agencies: the Departments of Agriculture and State, the Postal Service, the Air Force, and Walter Reed Army Medical Center. See id.

\textsuperscript{298} See id. at 38.

\textsuperscript{299} See id.

\textsuperscript{300} Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1483-85 (D.C. Cir. 1997).
mere existence of a claim. What the parties and their representatives need is to have access to the arbitrators' written decisions. Therefore, the arbitral awards should be made public. Where possible, they should be published by such reporting services as the Bureau of National Affairs and Commerce Clearing House. The use of arbitration in these disputes is akin to the federal district court systems, whose decisions are public documents. A contractual agreement to arbitrate statutory rights should not convert those individual statutory rights to private contractual rights.

There are a number of benefits to be derived from publication of arbitral awards. These include but are not limited to (1) creating a body of arbitral cases which may be reviewed and evaluated in light of the statutory case law developed under the public justice system; (2) developing a body of arbitral awards which can be reviewed to ascertain and evaluate the decision-making process of private arbitrators, which would be helpful in the future selection of arbitrators; and (3) removing the concern that the private arbitration process may be used to hide the incidence and frequency of discrimination in the workplace.

6. Right to Discovery

Since ordinarily the employer controls most of the relevant information for a dispute, it is critical that an employee's right to discovery, which would be guaranteed in court, is observed in mandated arbitration. While the extensive discovery allowed in court may not be necessary in arbitration, the ADR Protocol's assessment of what discovery is necessary, i.e., "access to all information reasonably relevant to... arbitration," is appropriate. It should be noted, however, that federal rules generally allow discovery of information that might "lead to" relevant information. This causes one to wonder how much employees giving up under this newly developed standard.

7. Arbitrator Qualifications

*The ADR Protocol* has captured the essence of the skills, training, background and experience necessary for arbitrators to competently decide these statutory issues. One concern is the designation of the diversity of individuals who should be included as arbitrators in terms of "gender, ethnicity, background, experience, etc." One designation conspicuously absent from the list is that of "racial minorities." If the designation of ethnicity was assumed to include racial minorities, that assumption is incorrect and does not take into consideration the reali-
ties of the American culture and its demographical makeup. Ethnic minorities and racial minorities are two distinct categories. In a General Accounting Office Report, the conclusions were that the "vast majority of securities arbitrators were white men over the age of 60." If the arbitration panels are to become more diverse, then certainly race must be a serious consideration.

VI. The Post-Gilmer Backlash

As mentioned earlier, the EEOC has taken a stand squarely against mandatory arbitration of statutory claims when the agreement to arbitrate is entered into prior to the dispute and when the right to pursue the claim at the EEOC and in the courts is considered waived at the outset. Several significant players in the field have followed by announcing their positions on the subject as a group and individually.

In the fall of 1995, the National Employment Lawyers Association (NELA), an organization which primarily represents plaintiff/employees in employment cases, announced its boycott against ADR providers, namely arbitrators who service employers and employees who have entered into agreements that result in mandatory arbitration. The announcement of NELA's boycott had a swift response from two of the largest ADR service providers, AAA and JAMS/EnDispute, who rejected the boycott as an inappropriate measure in light of the ruling in Gilmer. Although this plan fizzled for lack of support among its over 2000 members, it initiated discussion among the various groups in the employment area who had previously been fairly silent on the issue.

The National Academy of Arbitrators (Academy), "one of the nation's most respected groups of ADR providers" has recently entered the fray and "raised the stakes in the battle over mandatory arbitration" by announcing its opposition to mandatory arbitration under certain circumstances. In its "State-

301. For a discussion of the multiple characteristics on which discrimination can be based, see Leona Green, Mixed Motives and After-Acquired Evidence: Second Cousins Benefit From 20/20 Hindsight, 49 ARK L. REV. 211, 220 n.22 (1996).

302. See GAO Report, supra note 296, at 99.


304. In reflecting upon how the Academy came to decide to take a position in the ever-controversial area of mandatory arbitration, the immediate past president of the organization, George Nicolau stated, "We were concerned about it because the field was growing, and we knew that a lot of employment
ment of the National Academy of Arbitrators on Condition of Employment Agreements," the Academy took a strong stand against its members' participation as arbitrators in certain types of cases by declaring, "The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." The Academy urges its members to "consider and evaluate the fairness of any employment arbitration procedures in light of the Academy's 'Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems.'" These guidelines, which are to be followed in addition to the Code of Professional Responsibility for Arbitrators of Labor Management Disputes, provide the Academy members with some "practical, procedural and evidentiary questions of application that the arbitrator might encounter in deciding whether to hear these cases and, if so, how they might be resolved." The guidelines go as far as noting to the Academy members that they should be aware that the power to "withdraw from a case in the face of policies, rules, or procedures that are manifestly unfair or contrary to fundamental due process carries considerable moral suasion."

The Academy refers its members to the ADR Protocol if the agreements under which the arbitration arises present questions of due process. This action on the part of an organization like the Academy, which has every economic interest in keeping these disputes out of court and in their forum, is yet another strong signal that there is something fundamentally unfair with the present system granted by Gilmer. This system, which allows employers to dictate to employees how they will go about achieving satisfaction for the employer's alleged wrongdoing when there are statutory procedures to the contrary, must be changed.

An even more surprising announcement from within the industry which has perhaps enjoyed the fruits of the Gilmer decision more than any other is that of the National Association of Securities Dealers (NASD) on August 7, 1997. The Board of Governors of the NASD voted to eliminate the rule which requires contracts were unfair. We decided on the theory that any bad arbitration gives arbitration a bad name." Id.


307. Id.

308. See supra notes 258-84 and accompanying text.
that all registered representatives submit their statutory discrimi-
nation claims to arbitration. This turnabout sentiment on the part of this segment of the industry is no doubt partly attributable to the efforts of members of Congress to put pressure on the industry to change the now famous part of the U-4 provision that appears in each broker's application to become a licensed securities broker or dealer and that makes mandatory arbitration of employment disputes a condition of registration.

VIII. S.63 AND H. R. 938: INADEQUATE ATTEMPTS TO CORRECT GILMER AND TO PRESERVE THE JUDICIAL FORUM

In the wake of Gilmer, it appears that the Court will uphold mandatory arbitration of statutory employment claims if two conditions are met: first, a bargain to arbitrate has been made; and second, the party seeking to avoid arbitration cannot demonstrate that Congress intended to preserve the judicial forum. As mentioned previously, a party can demonstrate that Congress did intend to preserve the judicial forum by showing the existence of such an intent in either the text or legislative history of the statute at issue, or by showing an inherent conflict between the statute and arbitration. Barring this showing, however, the only other solution available to plaintiffs appears to be the time-honored remedy of a legislative amendment.

On January 21, 1997, Senator Russ Feingold (R-Wis) introduced Senate Bill 63, and on March 6, 1997, Rep. Edward Markey (D-Mass) and Rep. Connie Morella (R-Md) introduced H.R. 983, a companion bill. Sen. Feingold has noted that there is a

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As introduced, the current bills, S. 63 and H.R. 983 would "amend certain Federal civil rights statutes to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, sex, national origin, age, or disability; and for other purposes."

rapidly growing practice of requiring employees "to submit claims of discrimination and harassment to arbitration." Senator Feingold further notes that an entire industry, Wall Street, has been able to circumvent civil rights laws by requiring mandatory arbitration.

The two bills, entitled the Civil Rights Procedures Protection Act of 1997, will accomplish a very important purpose of preserving the judicial forum by showing a congressional intent to preserve such forum on the face of the statute. In this respect, it will clearly meet the test as spelled out in *Gilmer*. It addresses, to a certain extent, two of the due process concerns discussed above: (1) the "voluntariness" question posed by mandatory arbitration and (2) the pre-dispute/post-dispute question, making the statutory procedures the exclusive ones unless the agreement is reached after the dispute arises. Under this legislation, the rules would change and *Gilmer* agreements would be limited to post-dispute circumstances. These are broad, sweeping changes that the author does not foresee taking place in light of the popularity of pre-dispute agreements among employers and the relative ease with which employers have bound employees to such agreements.

Notwithstanding the above major proposed changes, in light of the concerns of the professional organizations, bar associations, public entities such as the EEOC, and the realities defined for the stakeholders, what should additionally be included in any legislation passed in this area are as follows. First, there must be specific provisions for insuring that the agreements are "knowing and voluntary." Second, the arbitrators must be properly trained and include a demographically diverse group of arbitrators with respect to race and gender. Third, the procedures must be fair regarding discovery. Fourth, employees must get financial assistance where needed to secure attorneys or other capable repre-

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Notwithstanding any Federal statute of general applicability that would modify any of the powers and procedures expressly applicable to a claim arising under this title, such powers and procedures shall be the exclusive procedures applicable to such claim unless after such claim arises the claimant voluntarily enters into an agreement to resolve such claim through arbitration or other procedure.

312. See supra note 311.
313. See supra note 7 for a discussion of Senator Feingold's comments.
sentatives and to pay the costs of arbitrations. Finally, the arbitral awards must be published.

To accomplish these goals, any legislative amendment will additionally need to detail the above provisions necessary to meet the public policy changes and due process requirements in the agreements and the actual processes offered by employers. The Older Workers Benefit Protection Act of 1990 (OWBPA)\(^{314}\) is instructive on how go about accomplishing this goal. In fact, in *Gilmer*, the Court as much as invites such assistance in interpreting its decision by its reference to the OWBPA provisions, which permit a waiver of rights under the ADEA only if certain elements listed are met which satisfy the "knowing and voluntary"\(^{315}\) provision of the OWBPA. Otherwise, employers will continue to lack the knowledge to avoid the due process criticisms they now encounter.

**CONCLUSION**

Mandatory arbitration of statutory employment disputes has emerged as an important mechanism for resolving some of the most significant employment problems that exist in our society today. It is apparent from its widespread use that it is favored by employers as an alternative to the sometimes long, involved and expensive procedures that are statutorily available to disputants. Nevertheless, from the numbers of federal cases being filed, due in part to the unanswered questions in *Gilmer* and from the outcry of those who realize that the current system is fraught with due process concerns, what is even more apparent is that certain safeguards must be put in place to assure that this ADR mechanism does not render void employees’ statutory rights. The unfairness of the procedures involved in challenging employment actions demands such changes. Unless and until legislative changes are instituted to assure that the statutory rights underpinning the employment discrimination disputes are guaranteed, the injustices about which employees complain will be further amplified in their workplaces, and neither employers nor employees will be well-served.

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