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ARBITRATION AND THE CIVIL RIGHTS ACT OF 1991

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—American workers should not be forced to choose between their jobs and their civil rights.¹

I. INTRODUCTION

David Ewing, former managing editor of the *Harvard Business Review*, described in 1989 a "significant new trend" among U.S. businesses: the development of in-house programs to resolve employee disputes fairly, quickly, and with relatively little expense.² One company Ewing studied was Federal Express, which launched its "Guaranteed Fair Treatment Procedure" ("GFIP") in the early 1980s. The Chief Executive Officer of Federal Express devotes most of his Tuesdays to sitting on a GFIP panel to hear employee appeals.³ One extraordinary feature of the GFIP is the complainant’s right to nominate a majority of the members of the employee review panel.⁴ The GFIP procedure is well-publicized within the company so that each employee knows her rights: there are plaques hanging in each company building describing how to use the procedure.⁵

Federal Express’s approach to addressing employee grievances is widely admired⁶ and is credited for avoiding unionization in a company

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3. See id. at 223-24.

4. Under the Guaranteed Fair Treatment Procedure (GFIP), the complainant may nominate six employees at or above his or her same job level in selecting the employee review panel. The complainant then sends these names to the person designated to chair the review panel and that person selects three names from the list. The chairperson then nominates four persons, from which the complainant selects two names. The five names selected through this process comprise the voting members of the review panel. See id. at 229-30.

5. See id. at 240.

that operates in a unionized industry.\(^7\) According to management, the GFTP was set up, among other reasons, to efficiently process employee complaints and to give employees an effective grievance procedure.\(^8\) One Federal Express executive believed the principal benefit of the program was that it empowered employees by showing them that "there is a way of dealing with a perceived injustice."\(^9\) Thus it appears that the GFTP not only makes good business sense, but is also good for employees.

The question that Ewing’s book did not address, however, is one on which the courts, as well as the public, are deeply divided—to what extent should in-house dispute resolution, particularly binding arbitration, be used as a means of denying victims of employment discrimination access to federal court? This article proposes that, to effectuate the intent of the civil rights statutes, while also recognizing the federal policy supporting arbitration, agreements to arbitrate statutory discrimination claims should be upheld only when truly voluntary.

On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991 (the “1991 Act”).\(^10\) The express purpose of the 1991 Act is to expand the remedies, such as compensatory and punitive damages, available to address intentional discrimination in the workplace\(^11\) and to overrule recent decisions of the United States Supreme Court which narrowed the scope of Title VII.\(^12\) Section 118 of the 1991 Act deals with the use of alternative means of dispute resolution (ADR) to address discrimination claims. It endorses “where appropriate and to the extent authorized by law” the use of ADR, including arbitration, to resolve claims arising under the antidiscrimination statutes—primarily Title VII, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA).\(^13\)

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8. See Ewing, supra note 2, at 238-39.
9. See id. at 239-40.
11. See id. § 3(1).
12. See id. § 3(4).
Just prior to the passage of the 1991 Act, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.* In *Gilmer*, the Court upheld for the first time an agreement to arbitrate statutory discrimination claims. Since 1991, the circuit courts generally have followed *Gilmer*, and have held that statutory employment discrimination claims are arbitrable, even when the agreement to arbitrate is imposed as a condition to employment. In May 1998, however, the United States Court of Appeals for the Ninth Circuit decided *Duffield v. Robertson Stephens & Company.* With *Duffield*, the Ninth Circuit became the first circuit court to rule that Congress’s enactment of the 1991 Act effectively nullified the Supreme Court’s holding in *Gilmer* as it applies to mandatory arbitration. The court in *Duffield* found unenforceable a standard form arbitration clause similar to that upheld in *Gilmer*. One month after

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15. The statute at issue in *Gilmer* was the ADEA. Because § 118 of the 1991 Act applies to all of the statutes amended by Title I of the 1991 Act, see supra note 13, the arguments made in this article with respect to arbitrambility apply to claims arising under a number of antidiscrimination statutes, including Title VII, the ADEA and the ADEA.

Notwithstanding similarities among the antidiscrimination statutes, however, some have suggested that the ADEA, which deals with age discrimination, has a different statutory scheme and protects a less fundamental interest than Title VII. See G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 571-72 (1990) (discussing differences in the respective statutory schemes between the ADEA and Title VII); Martin v. Smith Barney, Inc., 181 F.R.D. 243, 254 (S.D.N.Y. 1998) (questioning the applicability of *Gilmer* to Title VII claims given the "imperfect similarity" between Title VII and the ADEA). This article does not address these differences, but discusses equally the statutory right against discrimination, whether on the basis of age, race, gender, or disability.

16. See cases cited infra note 105.


18. In January 1998, several months prior to the ruling in *Duffield*, a federal district judge in Massachusetts ruled that a Form U-4 agreement to arbitrate discrimination claims through the New York Stock Exchange (NYSE) was invalid on similar grounds as those reached in *Duffield*. See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 204 (D. Mass. 1998). In addition to interpreting the 1991 Act as precluding mandatory arbitration, Judge Gertner also ruled that the NYSE arbitral forum was not adequate to vindicate Ms. Rosenberg’s discrimination claim, due to the existence of “an unmistakable pattern of bias within the NYSE system.” Id. at 207. As this article was going to press, the First Circuit affirmed Judge Gertner’s ruling, but on different grounds. See Rosenberg v. Merrill Lynch, 163 F.3d 53 (1st Cir. 1998). The court interpreted the 1991 Act to generally permit arbitration, and held that Judge Gertner erred in ruling that the NYSE forum was inadequate to protect Ms. Rosenberg’s rights. See id. at 36. However, the court ultimately agreed that on the facts of the case, arbitration was not “appropriate” within the meaning of the 1991 Act, as Merrill Lynch did not provide Ms. Rosenberg with a copy of the NYSE arbitration rules or otherwise specify that employment disputes were subject to arbitration. See id. at 72.
Duffield was decided, the United States Court of Appeals for the Third Circuit in Seus v. John Nuveen & Co.\textsuperscript{19} upheld mandatory arbitration of Title VII and ADEA claims, reasoning that the text of section 118 clearly encourages even mandatory arbitration.

The analysis in Seus is flawed. Although the court described the text of section 118 as evincing a "clear Congressional intent" to encourage arbitration,\textsuperscript{20} the language of section 118 is ambiguous. Section 118 encourages the use of ADR, but it does so only "where appropriate." In contrast, Congress has indicated in other contexts with detailed, exact language when a private right of action under a statute may be resolved by binding arbitration.\textsuperscript{21} Moreover, to interpret section 118 as endorsing mandatory arbitration flatly contradicts the history of the 1991 Act.\textsuperscript{22} A more appropriate reading of section 118 would balance these concerns against the federal policy favoring arbitration. The language "where appropriate" in section 118 should be interpreted to encourage arbitration only when the agreement to arbitrate meets a heightened voluntariness test, similar to the requirement for a "knowing and voluntary" waiver specified in the Older Workers Benefit Protection Act.\textsuperscript{23}

Part I of this article discusses the arbitrability of public law rights and analyzes the Supreme Court's decision in Gilmer in the context of the Court's prior decisions on arbitrability. Part II evaluates the Duffield and Seus courts' differing interpretations of section 118. Part III proposes that section 118 be interpreted to encourage arbitration only where the agreement to arbitrate meets a heightened voluntariness test. Part IV concludes that when arbitration of statutory discrimination claims is imposed as a condition to employment, it is not voluntary and should not be enforced.

II. DEVELOPMENT OF U.S. LAW ON ARBITRABILITY

The Supreme Court's recent decisions on arbitrability of statutory claims have proceeded from the Court's interpretation of the strong Congressional policy favoring arbitration expressed in the United States Arbitration Act of 1925 (Federal Arbitration Act or FAA).\textsuperscript{24} Thus,

\textsuperscript{19} 146 F.3d 175 (3d Cir. 1998).
\textsuperscript{20} Id. at 182.
\textsuperscript{21} See infra notes 120-22 and accompanying text.
\textsuperscript{22} See infra notes 129-31 and accompanying text.
arbitrability of statutory claims is presumed unless Congress expresses a contrary intention "discernible from the text, history, or purposes of the statute." However, the Court has not always adopted such a broad view of the FAA's purpose. The Supreme Court's strong policy favoring arbitration, grounded in its expansive interpretation of the FAA, evolved during the 1980s. Indeed, the notion that statutory rights are presumptively arbitrable unless Congress expresses a contrary intention was articulated by the Court only in 1985, more than half a century after the FAA was enacted.

A. Policy Concerns

Traditional judicial hostility to arbitration dates back to the practice of English courts in the 1700s, pursuant to which arbitration agreements as a general matter were not enforced. The unconvincing rationale often cited for this hostility was that arbitration "ousted the jurisdiction of the courts." Judicial suspicion of arbitration more significantly was grounded in policy concerns that Ian Macneil described as "countercurrents" to the arbitration movement. One countercurrent is a policy concern that arbitration enables business to evade public regulation. Because arbitrators, for example, may decide disputes pursuant to commercial or equitable principles instead of legal rules, early commentators of arbitration criticized its use by business to avoid the law. The other countercurrent against arbitration is a concern about one-sidedness, that is, that arbitration agreements entered into unfairly should not be enforceable.

For a long time, critics of arbitration have contended that it tends to be utilized by dominant groups in order to avoid liability while maintaining a semblance of harmonious relations with disadvantaged

28. See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942).
29. Id. at 983. Critical of the "hypnotic" power of this phrase, Judge Jerome Frank made the following pun: "Give a bad dogma a good name and its bite may become as bad as its bark." Id. at 984.
31. See id.
33. See Macneil, supra note 30, at 59-60.
groups. There is a difference, for example, between the use of arbitration to resolve disputes among individuals, and arbitration between an individual and a business. The latter situation creates “opportunities for dominant interests to weigh down the balance in their favor.” In a famous study of the development of alternative dispute resolution in the United States, Jerold Auerbach documented the use of arbitration over one hundred years ago to perpetuate disparities of class and race. Arbitration panels were established in the Reconstruction South to resolve disputes between white planters and freed slaves. As the white planters only accepted the tribunals to the extent that they could control them, Auerbach observed that arbitration “inevitably served the interests of the dominant group.” He made a similar observation with respect to the history of labor arbitration. Notwithstanding the “alluring” example of labor arbitration promoting peaceful relations between labor and management, Auerbach pointed out that this characterization is inaccurate. It was labor law reform during the New Deal, not the prior development of labor arbitration, which gave employees legal rights backed by government sanctions, required employers to enter into collective bargaining, and finally effected significant change in labor-management relations. Until that time, Auerbach wrote, “the vast disparity of power between labor and management, and the open warfare that punctuated American industrial relations, stifled the labor movement, which remained an unwilling and dependent participant in the arbitration process.” The fundamental problem in both instances was that arbitration, a creature of private agreement, “imposed harmony” between the parties while preserving the status quo to the benefit of the white planters and

34. Heinrich Kronstein gives, as an example of unobjectionable arbitration, an arbitration clause from George Washington’s will, providing that “all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding.” Kronstein, supra note 32, at 39 n.11 (quoting Fred I. Kent, Pioneers in American Arbitration, 17 N.Y.U. L.Q. REV. 501, 502-03 (1940)).

35. Id. at 39. German law recognized the danger of such domination in a 1933 amendment to its code of civil procedure. The amendment declared arbitration agreements “without effect if any party to the agreement exploits its economic and social superiority for the purpose of compelling the other party to enter into an arbitration agreement by virtue of which the compelling party would obtain a stronger position.” Id. at 52 n.84 (quoting CODE OF CIVIL PROCEDURE § 1025 II, amended by Reichsgesetzblatt, I 787 (1933)) The Nazi government subsequently nullified this amendment when it came to power. See id. at 52 n.84.

37. Id. at 59.
38. See id. at 118.
39. See id.
40. Id. at 65.
industry owners. As arbitration benefits dominant interests in this manner, its use to resolve public law claims may not be effective, especially where the parties are unequally situated.

These concerns are augmented when one considers the adhesive nature of a typical arbitration clause. Even when not imposed as a condition of employment, arbitration clauses are classic "contracts of adhesion." One commentator observed that courts pay "lip service" to the idea that pre-dispute arbitration is a creature of free bargaining. Arbitration cannot be consensual when presented as a "take-it-or-leave-it proposition." Employees, like adherents in other contexts, typically do not pay attention to arbitration clauses, but usually focus on the wage provision of an employment contract. Even when adherents read the actual arbitration clause, they, unlike the employer who drafted the clause, are unlikely to have sufficient experience to comprehend its significance, and therefore, are likely to undervalue the right they are giving up by agreeing to arbitration. The "voluntariness" of the

41. Id. at 66. In fact, Auerbach's book concludes that only in the case of communitarian forms of alternative dispute resolution, where the parties share a "commitment to common values," is it possible to achieve "justice without law." Id. at 16.

In his own study tracing the historical development of American arbitration law, Ian Macneil's assessment of arbitration was similarly equivocal: "In sum, I believe that the work of the arbitration reform movement . . . has been something of a Good Thing, but like all Good Things, hardly the Summum Bonum Free of Flaws suggested by its past and present partisans." MACNEIL, supra note 30, at ix.


43. See Schwartz, supra note 42, at 57.

44. See id. To illustrate the difficulties of comprehending arbitration clauses, consider the arbitration clause set forth below:

IN CONSIDERATION AND AS A MATERIAL CONDITION OF THE EMPLOYMENT AND CONTINUATION OF EMPLOYMENT OF THE EMPLOYEE AS OF THE DATE OF THIS EMPLOYMENT DISPUTE ARBITRATION PROCEDURE ("Employment Dispute Arbitration Procedure") BECOMES EFFECTIVE, THE EMPLOYEE AND THE EMPLOYER (as this term is defined below) (collectively, the "Parties") AGREE TO SUBMIT FOR RESOLUTION PURSUANT TO THIS Employment Dispute Arbitration Procedure ANY EMPLOYMENT DISPUTE (as this term is defined below), AND FURTHER AGREE THAT ARBITRATION PURSUANT TO THIS Employment Dispute Arbitration Procedure IS THE EXCLUSIVE MEANS FOR RESOLUTION OF SUCH DISPUTE AND THAT BOTH THE EMPLOYER AND EMPLOYEE HEREBY WAIVE THEIR RESPECTIVE RIGHTS, IF ANY, TO RESOLVE ANY DISPUTE THROUGH ANY OTHER MEANS, INCLUDING A JURY TRIAL OR A COURT TRIAL IN A LAWSUIT, EXCEPT AS EXPRESSLY PROVIDED IN THIS Employment Dispute Arbitration Procedure.

Katherine Van Wzel Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 Denv. U. L Rev. 1017, 1038-39 (1996) (citing Jay W. Waks & John Roberti, Challenges to Employment ADR: Process, Rather than Principles, Are at Issue, N.Y. St. B.J. (June 1996)). This clause, not exactly a paradigm of plain English, was proposed by the Center for Public Resources as a model to use
agreement is further compromised when it is imposed as a condition to employment or as a condition to future promotions or benefits within a company. 45

To summarize, some argue that arbitration enables businesses to evade legal rules and is one-sided. To the extent that arbitration is one-sided, both concerns may come into play. An employer who is able to control the arbitration process (for example, by setting the terms in the agreement for the selection of arbitrators, the arbitrators' authority to award damages, and applicable procedural rules) can somewhat evade enforcement under the statute by limiting its own liability.

B. Supreme Court Development of Public Policy Exception

Prior to the 1980s, the Supreme Court acknowledged the sorts of concerns raised in the previous section by carving out an exception to arbitrability under the FAA for disputes that implicated certain statutory, public law rights. 46 Characteristic of the Supreme Court's early approach towards arbitration of statutory, public law rights is its 1953 holding in Wilko v Swan, 47 in which the Court refused to enforce an arbitration agreement to resolve a claim arising under the Securities Act of 1933 (the "1933 Act"). 48 The Court, while recognizing the pro-

45. Katherine Van Wezel Stone refers to pre-dispute arbitration clauses as "the yellow dog contract of the 1990s." Id. at 1037. Yellow dog contracts, which have now been outlawed by federal legislation, condition employment on a promise by the prospective employee not to join a union. See id. at 1037. Stone argues that, like the 19th century yellow dog contracts, pre-dispute arbitration agreements are imposed on workers "without even the illusion of bargaining." Id.

46. This exception to arbitrability is analogous to the idea of mandatory rules of law whose application, for reasons of public policy, cannot be avoided through the use of a choice of law clause. Mandatory rules of law concern public policy (ordre public) and "reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws." Pierre Mayer, Mandatory Rules of Law in International Arbitration, 2 ARB. INT'L 274, 275 (1986). For a theoretical framework for analyzing the arbitrability issue grounded in a conception of Kantian rights, see Edward Morgan, Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question, 60 S. CAL. L. REV. 1059, 1070-75 (1987) (suggesting that arbitrability should be determined in reference to whether the claim embodies society-wide distributive or regulatory functions).

Finding that certain public law matters cannot be resolved by arbitration is not inconsistent with international practice. The international convention on mutual recognition and enforcement of arbitral awards recognizes an exception to arbitrability for public law issues. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V(2)(a), 330 U.N.T.S. 38, 40 (1959) (allowing a court to refuse to enforce award if subject matter of the dispute is not capable of settlement by arbitration under local law).


48. 15 U.S.C. §§ 77a-77aa (1933) (hereinafter "1933 Act").
arbitration policy reflected in the FAA, found that the pro-investor policy behind the 1933 Act would be better served by prohibiting the arbitration of 1933 Act claims.

More than twenty years after Wilko, the Supreme Court ruled in Alexander v. Gardner-Denver Co. that the right to a judicial forum to resolve Title VII discrimination claims could not be waived through an arbitration agreement. The agreement to arbitrate at issue in Gardner-Denver was contained in a collective bargaining agreement. Harrell Alexander, a drill operator, brought a Title VII suit against his employer, Gardner-Denver Co., alleging that he was fired on account of his race. Although Mr. Alexander had previously submitted his discrimination claim to arbitration pursuant to the collective bargaining agreement entered into by his union, the Supreme Court held that Mr. Alexander had not waived his right to take his Title VII claim to court. The Court interpreted Title VII as providing overlapping, rather than mutually exclusive, remedies against discrimination. In support of its holding, the Court emphasized the role that private claimants play in enforcing the statute: “although the 1972 amendment to Title VII empowers the [EEOC] to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII.” The Supreme Court later extended the rule in Gardner-Denver to other statutes protecting employee rights.

To summarize, with Wilko and Gardner-Denver and its progeny, the Supreme Court made an exception to the federal policy favoring arbitration, whether grounded in the FAA or the Labor Management Relations Act, when the agreement to arbitrate implicated public law statutory rights. This circumscribed approach to the arbitrability question continued for thirty-two years, beginning with the Court’s 1953

50. Labor arbitration pursuant to a collective bargaining agreement raises different issues than arbitration pursuant to an individual employment agreement. First, the fact that the agreement to arbitrate in the labor context is entered into between the employer and the union (not the plaintiff employee) creates a conflict of interest. See Shell, supra note 15, at 519. Second, the overall purpose of labor arbitration is geared towards keeping industrial peace. See id. at 522. Finally, the agreement to arbitrate is not governed by the FAA, but by § 301 of the Labor Management Relations Act. See id. at 518. See also Pryner v. Tractor Supply Co., 109 F.3d 354, 362-64 (7th Cir. 1997) (discussing the problem of consent in the collective bargaining context and noting that labor arbitration is governed by § 301).
51. See Gardner-Denver, 415 U.S. at 47.
52. Id. at 45.
decision in Wilko and lasting until the Court decided Mitsubishi Motors v. Soler Chrysler-Plymouth\textsuperscript{54} in 1985.

\textbf{C. Supreme Court Reversal on Arbitrability}

The first cases in which the Supreme Court upheld the arbitrability of statutory rights involved international commercial arbitration, in which arbitration has long been accepted\textsuperscript{55} and concerns about one-sidedness are mitigated. The Supreme Court first upheld an international agreement to arbitrate securities law disputes in 1974 in Scherk v. Alberto Culver,\textsuperscript{56} two years after the Supreme Court approved the use of forum selection clauses in international commercial transactions.\textsuperscript{57} In Scherk, in which the arbitration clause at issue was contained in an international commercial contract, the Court made an exception to its previous policy expressed in Wilko.\textsuperscript{58}

The Court's decision in Mitsubishi\textsuperscript{59} also involved international arbitration, but was more significant than Scherk in terms of the pro-arbitration rationale the Court adopted. Mitsubishi involved the arbitrability of Sherman Act claims arising out of a distribution and sales agreement between a Japanese company and a Puerto Rican dealership. The Court began by citing the strong policy favoring arbitration in the FAA and set forth a presumption in favor of arbitrability of public law rights: "[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies of the statutory rights at issue."\textsuperscript{590} As the

\textsuperscript{54} 473 U.S. 614 (1985). Although the Court upheld the arbitration of securities law claims in Scherk v. Alberto Culver, 417 U.S. 506 (1974), the Court carefully limited the holding in that case to international commercial arbitration. See infra note 58 (discussing Scherk).

\textsuperscript{55} For example, investment disputes between a state and a national of another state have been resolved by arbitration since the 1800s. See Gerhard Wegen, Dispute Settlement and Arbitration in INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT 59, 65 (Seymour J. Rubin & Richard W. Nelson eds., 1985) (describing a history of "rich practice" in international investment dispute arbitration).

\textsuperscript{56} 417 U.S. at 506.

\textsuperscript{57} In Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Court upheld the use of a clause designating the London Court of Justice to hear disputes arising under a towage contract entered into between a U.S. and a German company. The Court emphasized the fact that the agreement was entered into in an "arms-length negotiation by experienced and sophisticated businessmen" in the context of an international commercial transaction. Id. at 12.

\textsuperscript{58} The Court distinguished Wilko on the grounds that the agreement at issue in Scherk involved an international transaction. The Court reasoned that an arbitration clause contained in an international commercial agreement raises issues that are "significantly different" from those in a domestic transaction, in which the laws of the United States unquestionably would govern disputes. Scherk, 417 U.S. at 515-16.

\textsuperscript{59} 473 U.S. at 614.

\textsuperscript{60} Id. at 628.
Court did not find such an intention in the text of the Sherman Act,\(^6\) the Court also attacked the idea that arbitration was an inappropriate vehicle for resolving Sherman Act disputes.\(^6\) Although ruling that international arbitration was not \textit{per se} inadequate, the Court did suggest a limitation: "[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."\(^{63}\) Thus the Court suggested that an arbitration clause that prevented the arbitrators from applying the Sherman Act in resolving antitrust claims would be unenforceable.

Two years after \textit{Mitsubishi} the Court decided \textit{Shearson/American Express Inc. v. McMahon}.\(^{64}\) \textit{McMahon} was particularly significant because it involved a customer contract instead of an international commercial agreement. The customers in this case were Eugene and Julia McMahon, who opened brokerage accounts with Shearson/American Express on behalf of themselves and as trustees for a number of pension and profit-sharing plans. When the McMahons brought a lawsuit against Shearson, alleging that the broker who handled their accounts engaged in fraudulent, excessive trading, Shearson sought to compel arbitration pursuant to the arbitration clause. As the relationship between the contracting parties was customer-broker and, because the contract itself was apparently a non-negotiated standard form agreement prepared by Shearson,\(^{65}\) compelling arbitration of the McMahons' claims under the Securities Exchange Act of 1934 (1934 Act)\(^{66}\) raised

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61. See \textit{id}. at 628-29. After articulating a test of arbitrability based on congressional intent, Justice Blackmun's opinion noted the "absence of any explicit support" in the Sherman Act for precluding the arbitration of antitrust claims. \textit{id}. at 628. The Court also refused to read into the private right of action and treble damages provisions of the Sherman Act an intent to preclude arbitration. \textit{See id}. at 635-37.

62. See \textit{MACNEIL}, \textit{supra} note 30, at 74-76 (noting that in \textit{Mitsubishi}, the Court rejected much of its earlier reasoning against arbitrability).

63. \textit{See Mitsubishi}, 473 U.S. at 637 n.19.

64. 482 U.S. 220 (1986).

65. According to the district court opinion, the arbitration clause that Julia McMahon signed was contained in paragraph 13 of a "Customer's Agreement" prepared by Shearson which provided: [A]ny controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the [NASDAQ or NYSE] and/or the American Stock Exchange, Inc., as I may elect.


questions of fairness. However, a majority of the Court upheld the arbitration agreement.

As in Mitsubishi, the McMahon Court proceeded from the proposition that the FAA’s pro-arbitration policy should be followed wherever possible. The Court held that the McMahons bore the burden of demonstrating, through the 1934 Act’s text, legislative history, or underlying purposes, that Congress intended to “limit or prohibit” arbitration of 1934 Act claims. The Court found, contrary to Wilko, that the protections of the 1934 Act could be waived through an arbitration clause. Although the Act contained an antiwaiver provision, the Court interpreted it to apply only to the waiver of substantive obligations imposed by the Act and not to the waiver of a judicial forum. The Court also refused to find that amendments to the 1934 Act ratified the doctrine in Wilko, notwithstanding the fact that the legislative history to the amendments cited Wilko with approval. Ultimately the Court found that arbitration was not inconsistent with the 1934 Act’s purpose of protecting investors.

In McMahon the Court effectively, although not expressly, overruled Wilko. However, in doing so, the Court emphasized the role of the

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67. As Justice Blackmun argued in his dissent, “[C]ompelling an investor to arbitrate securities claims puts him in a forum controlled by the securities industry. . . . [T]he investor has the impression, frequently justified, that his claims are being judged by a forum composed of individuals sympathetic to the securities industry and not drawn from the public.” McMahon, 482 U.S. at 260-61. Although Justices Blackmun, Marshall, and Stevens were of the view that a customer’s fraud claim against a broker under the Exchange Act was not arbitrable—that Wilko was controlling—the Court unanimously found that the McMahons’ RICO claim was arbitrable. See id. at 241-42. Thus the controversy centered on the Exchange Act claim.

68. Id. at 227.

69. See id. Without explicitly overruling Wilko, the Court read Wilko narrowly as barring waiver of a judicial forum only when arbitration is “inadequate to protect the substantive rights at issue.” Id. at 229.


71. See McMahon, 482 U.S. at 236. The legislative history referred to is a sentence from a Conference Report which read as follows: “It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in Wilko v. Swm, concerning the effect of arbitration proceedings provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations.” Id. at 236-37 (citing H.R. CONF. REP. NO. 94-229, at 111 (1975), reprinted in 1975 U.S.C.C.A.N. 1, 289) (citation omitted). The Court responded by noting that (i) Congress never expressly extended the doctrine in Wilko (a 1933 Act case) to 1934 Act claims; (ii) the exact reason for which the committee cited Wilko is unclear; and (iii) the excerpt quoted above fails to reveal the Committee members’ understanding of “existing law.” Id. at 237-38.

72. See id. at 238.

Securities and Exchange Commission (SEC) in overseeing the securities arbitration system. Specifically, the Court reasoned that Wilko's assumptions regarding the adequacy of securities arbitration were no longer true, given amendments to the 1934 Act which expanded the SEC's power to "ensure the adequacy" of arbitration organized by self regulatory organizations within the securities industry.\textsuperscript{74} Thus, the SEC's authority to regulate the arbitration process was found to be sufficient to assure that arbitration of statutory claims was consistent with the regulatory and remedial purposes of the 1934 Act.

\section*{D. Upholding Arbitrability of Discrimination Claims in \textit{Gilmer}}

Throughout the 1980s, as the Supreme Court established that public law claims under the antitrust and securities statutes could be submitted to binding arbitration, \textit{Gardner-Denver}, which held that employment discrimination claims could not be precluded through arbitration, still prevailed. \textit{Gardner-Denver} is still generally considered to be controlling law with respect to labor arbitration.\textsuperscript{75} Although not directly addressing the effect of \textit{Gilmer} on \textit{Gardner-Denver}, the Supreme Court unanimously held this term that a general arbitration clause in a collective bargaining agreement cannot waive an employee's right to litigate a discrimination claim under the ADA.\textsuperscript{76}

In 1991, the Supreme Court decided \textit{Gilmer}, and, for the first time, recognized that a discrimination claim under the ADEA could be subject to compulsory arbitration pursuant to an individual employment

\textsuperscript{74} \textit{McMahon}, 482 U.S. at 233-34. The 1934 Act requires approval from the Securities and Exchange Commission (SEC) for any rule change adopted by a "self-regulatory organization" (SRO) in the securities industry, including any national securities exchange such as the NYSE or registered securities association such as the National Association of Securities Dealers (NASD). See 15 U.S.C. § 78s(b) (1994). In fact, as the Court pointed out, the SEC exercised this regulatory authority when it approved the securities industry arbitration procedures at issue in \textit{McMahon}. See id. at 234. For the text of these procedures, see \textit{Uniform Code of Arbitration}, reprinted in Fifth Report of the Securities Industry Conference on Arbitration, Exhibit C (Apr. 1986), cited in G. Richard Shell, \textit{The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v. McMahon}, 26 AM. BUS. L.J. 397, 410 n.92 (1988).

\textsuperscript{75} See, e.g., Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) (holding that \textit{Gardner-Denver} still controls an arbitration clause contained in a collective bargaining agreement). \textit{But cf.} Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) (finding that an arbitration clause contained in a collective bargaining agreement could preclude judicial resolution of Title VII and ADA claims).

\textsuperscript{76} See Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391 (1998). Justice Scalia's opinion in \textit{Wright} deliberately left open the question of whether a predispute agreement to arbitrate is enforceable in light of the ADA provision, identical to § 118 of the 1991 Act, that only encourages arbitration where "appropriate." Without elaboration on the effect of this language on \textit{Gilmer}, Justice Scalia simply stated that "a union waiver of employee rights to a federal judicial forum for employment discrimination claims" would not be "appropriate" when the waiver was not "clear and unmistakable." \textit{Id.} at 397 n.2.
agreement. The plaintiff in the case, Robert Gilmer, was employed by Interstate as a financial manager. The agreement that contained Mr. Gilmer's arbitration clause was not the employment agreement itself, but was rather a "Form U-4," the standard application for registration in the securities industry.\(^7\) As the U-4 was required as a condition to Mr. Gilmer’s registration with the New York Stock Exchange as well as with other exchanges, signing the U-4 was in essence a prerequisite to obtaining employment in the securities industry.\(^8\) After being fired at age sixty-two, Mr. Gilmer brought a suit against Interstate alleging age discrimination in violation of the ADEA, and Interstate in turn sought to compel arbitration under the FAA, citing the U-4 that Mr. Gilmer signed.

Citing its previous holding in *McMahon*, the Supreme Court first looked to whether the ADEA's text, history, or purpose evinced an intent to preclude arbitration.\(^7\) Finding no such evidence in the text or legislative history of the ADEA, the Court’s decision ultimately turned on a conclusion that arbitration was adequate to promote the purposes underlying the ADEA;\(^8\) in other words, the Court found no inherent conflict between arbitration and the purpose of the ADEA in eliminating age discrimination.

The Supreme Court’s ruling in *Gilmer* has had an enormous impact on employment law. Understandably, the decision has also generated a considerable amount of controversy.\(^8\) On the one hand, it was to be

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77. Interstate’s terms of employment required that Mr. Gilmer register as a securities representative with the NYSE, which in turn required completion of the Form U-4. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1990).

The Form U-4, the "Uniform Application for Securities Industry Registration or Transfer," must be completed by any person associated with a registered broker or dealer. In 1993, the SEC enacted a rule requiring that any person associated with a registered broker or dealer who is involved in buying or selling securities must be registered in accordance with standards adopted by the self-regulatory organization of which such broker or dealer is a member. Self-Regulatory Commission Organizations, Exchange Act Release No. 34-39,421, 62 Fed. Reg. 66,164, 66,164 n.3 (Dec. 10, 1997) (citing 17 C.F.R. § 240.1567-1 (1993)). In accordance with this rule, self-regulatory organizations within the securities industry, including the NYSE and the NASD, require any person associated with a registered broker or dealer to complete the Form U-4. Id. at 66,165. The arbitration clause contained in the Form U-4 is quoted at *infra* note 112.

78. The NASD recently eliminated the arbitration requirement for statutory employment claims, effective January 1, 1999, and the NYSE has proposed a similar rule change pending SEC approval. See *infra* notes 173-77 and accompanying text.


80. For example, the Court rejected Mr. Gilmer’s arguments challenging the adequacy of arbitration procedures as "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." Id. at 30 (citing *Rodríguez de Quijas v. Shearson/American Express*, Inc., 490 U.S. 477, 481 (1989)).

81. Many articles have been published on *Gilmer* since the Supreme Court handed down the decision in May 1991. See, e.g., Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); Stone, *supra* note 44; Robert A. Gorman, *The Gilmer Decision and the Private
expected, and is consistent with cases such as *McMahon* and *Mitsubishi*, that the Court refused to challenge the adequacy of arbitration *per se*. However, there are a number of questionable assumptions on which the *Gilmer* Court relied in concluding that arbitration in Mr. Gilmer's case was consistent with the purposes of the statute.

First, the Court rejected Mr. Gilmer's argument that arbitration would undermine enforcement of the ADEA. The Court reasoned that, because a claimant under the ADEA who has signed an arbitration agreement is still free to file a charge with the Equal Employment Opportunity Commission (EEOC), the EEOC will still receive information of violations of the Act. Thus the *Gilmer* Court implicitly rejected the reasoning in *Gardner-Denver* that emphasized Congress's intent of utilizing private enforcement to eliminate discrimination under Title VII.

The *Gilmer* Court cited *McMahon* in support of this proposition, noting that securities law claims were held to be arbitrable notwithstanding SEC involvement in enforcement. However in *McMahon*, arbitration was upheld because of the SEC's broad authority to enforce the statute. When the Supreme Court upheld securities arbitration in *McMahon*, it noted that the SEC has "expansive" power to oversee securities arbitration conducted by self-regulatory organizations ("SROs") in the industry. In this sense, the facts in *Gilmer* are rather different. The

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82. See Gilmer, 500 U.S. at 30 ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators" (quoting Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 634 (1984))).

83. This article does not address the primary argument on which Justice Stevens based his dissent and which has been discussed at length elsewhere—that § 1 of the FAA expressly exempts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce." Gilmer, 500 U.S. at 36 (Stevens, J., dissenting) (citing 9 U.S.C. § 1 (1988)). For further analysis on determining the scope of FAA § 1, see Estreicher, supra note 81, at 1363-72; Wendy S. Tien, Compulsory Arbitration of ADA Claims: Disabling the Disabled, 77 MINN. L. REV. 1443, 1448-53 (1993); Developments in the Law—Employment Discrimination, 109 HARV. L. REV. 1568, 1675-76 (1996).

84. See id. at 28.

85. See id. at 28-29.

86. See id. at 28-29.

87. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 233 (1986). Included in such powers is the power to "abrogate, add to, and delete from" any SRO rule if it finds such changes necessary or appropriate to further the objectives of the Act. Id. (citing 15 U.S.C. § 78s(c) (1994)); see also supra notes 64-74 and accompanying text.

Indeed, in *McMahon*, the SEC itself submitted an *amicus curiae* brief urging that arbitration be upheld. See id. at 250 (Blackmun, J., dissenting in part) (citing Brief for Securities and Exchange Commission as
EEOC does not enjoy comparable authority under the ADEA to regulate arbitration of age discrimination suits. 38 Indeed, the EEOC spent the first years of its existence without any power to bring enforcement actions, 39 and even today its powers are somewhat limited in practice. For example, although the ADEA authorizes the EEOC to bring enforcement actions, 90 a federal judge recently held that the EEOC could not seek monetary damages in an enforcement action that it brought under the ADEA when the employees had signed a mandatory, standard form arbitration agreement. 91 In addition, the EEOC has long been forced to operate under severe budget constraints. Although the EEOC has been charged with the enforcement of three new statutes since 1990, 92 its budget, when adjusted for inflation and existing employee salary increases, has actually decreased. 93 The holding in Gilmer, combined with a lack of resources to support the EEOC's activities, effectively dilutes the impact of the 1991 Act—by enforcing mandatory arbitration clauses to remove discrimination claims from federal courts while limiting financial support for EEOC enforcement efforts.

In finding that arbitration is consistent with the purpose of the ADEA, the Gilmer Court also emphasized the flexibility of ADR methods that the EEOC utilizes in resolving discrimination claims under the statute.

Amicus Curiae at 10, McMahon (No. 86-44)) (noting the SEC's argument that the problems with arbitration referred to in Wilko no longer exist because of the SEC's authority to oversee the self regulatory organizations).

38. This point was made by the United States Court of Appeals for the Third Circuit in a case that has now been overruled by Gilmer. See Nicholson v. CPC Int'l Inc., 877 F.2d 221, 228 n.6 (3rd Cir. 1989). While the EEOC has participated in workshops to educate arbitrators in employment discrimination law, it has no authority to regulate these associations.


90. See infra Part I (discussing EEOC's authority under ADEA to bring enforcement actions).

91. See EEOC v. Kidder, Peabody & Co., 979 F. Supp. 245 (S.D.N.Y. 1997). The EEOC filed an age discrimination suit under the ADEA, seeking back pay and liquidated damages on behalf of 17 former Kidder, Peabody employees. Because the employees had signed a Form U-4, the court accepted Kidder, Peabody's argument that the EEOC should be prevented from bringing suit. The court read Gilmer as meaning that "the EEOC may not seek monetary relief on behalf of claimants who have entered into valid arbitration agreements." Id. at 247.


93. See Testimony Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. and the Workforce, 105th Cong. 3 (1998) (statement of David A. Cathcart, partner at Gibson, Dunn & Crutcher in L.A., Cal.). Because of these constraints, the EEOC staff is overwhelmed with a backlog of cases. In May 1995, for example, the EEOC had only 761 investigators—116 fewer than it had in 1988—to investigate an inventory of employment discrimination charges that eventually reached 111,000. See id. at 6-7. See also Darryl Van Duch, Paralysis for EEOC Feared, NAT'L LJ., Aug. 24, 1998, at A1.
The Court found that this "flexibility" suggests that arbitration is consistent with the statutory scheme.\(^\text{94}\) However, the ADEA only directs the EEOC to utilize ADR "[b]efore instituting any action" under the statute,\(^\text{95}\) the statute does not limit the EEOC's authority to eliminate discrimination in the workplace by bringing actions in court. By analogy, there is a difference between a federal agency consciously choosing to utilize a nonbinding method of dispute resolution in an effort to avoid a lawsuit on the one hand, and an individual being bound by a standard form arbitration clause to forego adjudication on the other.

Another assumption of the *Gilmer* Court relates to the voluntariness of Mr. Gilmer's agreement to arbitrate. In assessing its validity, the *Gilmer* Court, citing the FAA, ruled that the arbitration clause is enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract."\(^\text{96}\) In compelling arbitration, the Court assumed that Gilmer, an "experienced businessman" was not "coerced or defrauded" into agreeing to arbitrate his claims when he signed the Form U-4.\(^\text{97}\) This aspect of the Court's decision has been criticized as reflecting indifference to the "obviously adhesive nature" of Mr. Gilmer's agreement to arbitrate.\(^\text{98}\) One suspects that Mr. Gilmer never read the arbitration clause contained in the standard form. But even if he did read the form, the decision he faced was to sign the form and submit to arbitration or choose another profession.\(^\text{99}\) In addition, the *Gilmer* opinion suggests that the validity, or voluntariness, of the

\(^{94}\) The Court cited the section of the ADEA which directs the EEOC to utilize informal methods of conciliation and the like prior to instituting any action under the Act. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1990) (citing 29 U.S.C. § 626(b) (1988)). The Court also made the related point that arbitration allows employees a "broader right" to select the forum in which disputes are to be resolved. *Id.*


\(^{96}\) *See* Gilmer, 500 U.S. at 33 (citing 9 U.S.C. § 2 (1988)).

\(^{97}\) *Id.*

\(^{98}\) *See* Gorman, *supra* note 81, at 650; *see also* Maltby, *supra* note 81, at 8 (suggesting that for the Court "[t]o imply that NYSE arbitration was the mutual desire of the parties is naive at best"); *MacNeil*, *supra* note 30, at 78-79 (commenting that the Court gave only "lip service" to any concern that Mr. Gilmer's agreement to arbitrate may have been one-sided).

\(^{99}\) Since all registered brokers are required to sign the Form U-4, Mr. Gorman could not simply take a job with another company. *See* supra note 77 and accompanying text (discussing Form U-4 requirement). Indeed, the lack of consent inherent in the Form U-4 was observed by one federal court that nonetheless upheld the agreement to arbitrate:

Even if Smith Barney had explained the scope of the arbitration clause to the plaintiff, the end result would have been the same; the execution of a Form U-4 is not unique to Smith Barney employees and it is not optional. It is an SEC industry-wide requirement, a prerequisite to registration with any securities firm.

agreement to arbitrate is to be determined by ordinary contract principles, notwithstanding the fundamental nature of the statutory rights that are at stake.\textsuperscript{100}

The upshot of \textit{Gilmer} is that an individual agreement to arbitrate statutory discrimination claims is now generally found to be enforceable.\textsuperscript{101} Another outcome of \textit{Gilmer} is that in the employment discrimination area, the question of arbitrability has been treated differently, depending on whether arbitration is pursuant to an individual employment agreement (governed by \textit{Gilmer}) or pursuant to a collective bargaining agreement (governed by \textit{Gardner-Denver}). Although it is of course appropriate to take into account important differences between labor arbitration and arbitration under the FAA, it is questionable whether a mandatory, standard form individual employment agreement to arbitrate is any more consensual than a collective bargaining agreement to arbitrate statutory discrimination claims.\textsuperscript{102}

One question that the Court did not address in \textit{Gilmer} was whether the outcome would have been the same if Mr. Gilmer’s claim had arisen under Title VII or the ADA, rather than the ADEA.\textsuperscript{103} Perhaps more significantly, the Court’s decision in \textit{Gilmer} did not take into account the 1991 Act, which was enacted several months after \textit{Gilmer} was decided. The Supreme Court issued its decision in \textit{Gilmer} on May 19, 1991, which was after the 1991 Act was drafted and the committee reports relating to the Act were issued, but six months before the Act was passed and signed into law by President Bush. Thus \textit{Gilmer} was decided in between the drafting and final passage of section 118.\textsuperscript{104}

Until recently, circuit courts followed \textit{Gilmer} without considering whether arbitration was consistent with the history or purpose of the

\textsuperscript{100} Professor Gorman also questioned the Court’s reference to common law fraud or unconscionability as the proper standard for assessing the validity of an agreement to arbitrate statutory employment discrimination claim. \textit{See} Gorman, \textit{supra} note 81, at 652; \textit{see also} Maltby, \textit{supra} note 81, at 10 (arguing that the agreement to arbitrate discrimination claims should be “knowing and voluntary”). The argument that the agreement to arbitrate discrimination claims should be subject to a heightened voluntariness standard is further elaborated in Part II.D below.

\textsuperscript{101} \textit{See} cases cited \textit{infra} note 105.

\textsuperscript{102} A standard form, mandatory arbitration agreement is not necessarily more likely to protect the employees’ statutory interests than a collective bargaining agreement. \textit{See} Shell, \textit{supra} note 15, at 566-72 (arguing that Title VII claims should not be arbitrable). Nor do the differences between labor and employment arbitration necessarily mean that employment arbitration is more likely to be fair. Indeed, one authority recently commented that, while labor arbitration is perceived as a “model of fairness,” employment arbitration is controversial, apparently because there is greater variability in the fairness and overall quality of employment arbitrations than labor arbitrations. Lisa Bingham, \textit{Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases}, \textit{47 Labor L.J.} 108, 118 (1996).

\textsuperscript{103} \textit{See} supra note 15 (discussing difference between Title VII and the ADEA).

\textsuperscript{104} For the text of § 118, see \textit{supra} note 13.
1991 Act. Some circuit courts, although not addressing the statutory interpretation issue, have limited the impact of *Gilmer* by denying enforcement of arbitration agreements on other grounds. One particularly notable case limiting *Gilmer* is *Cole v. Burns International Security Services.* In *Cole,* the District of Columbia Circuit interpreted *Gilmer* as mandating the enforcement of only those mandatory arbitration agreements that do not undermine the statutory scheme, for example, by providing for payment by the employer of arbitrator fees and allowing limited judicial review of arbitrator awards.

A few circuits, while not addressing the exact issue discussed in *Duffield* and *Seus,* have considered the text and legislative history of section 118 in determining the arbitrability of discrimination claims since *Gilmer.* The United States Court of Appeals for the Fourth Circuit upheld the arbitrability of an ADA claim under a collective bargaining agreement, citing section 118 in support of its holding. The Ninth Circuit adopted a different interpretation in a case it decided prior to *Duffield,* citing section 118 and its legislative history in support of the proposition that an agreement to arbitrate Title VII claims must be "knowing." Finally, the United States Court of Appeals for the First Circuit interpreted identical language in the ADA to condone a voluntary, predispute agreement to arbitrate an ADA claim in a case outside of the employment context.

In May 1998, the Ninth Circuit decided *Duffield,* holding for the first time since *Gilmer* that a nonconsensual agreement to arbitrate Title VII

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106. See Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1059 (11th Cir. 1998) (refusing to enforce an arbitration agreement that court found to be "woefully deficient" by using confusing language and providing for limited damage recovery); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir. 1997) (finding that agreement to arbitrate ADA and Title VII claims lacked consideration); Farrand v. Lutheran Bros., 993 F.2d 1253, 1255 (7th Cir. 1993) (concluding that NASD arbitration procedures did not require arbitration of employment disputes); cf. Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 203 (2d Cir. 1998) (reversing decision of arbitration panel on grounds that it ignored "overwhelming evidence of discrimination").

107. 105 F.3d 1465 (D.C. Cir. 1997).

108. See id. at 1468.

109. See Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 882 (4th Cir. 1996) ("Even if the provisions of the legislative history are contrary to the statute, the statute must prevail.").

110. See Prudential Ins. Co of Am. v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994).

111. See Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998) (upholding voluntary agreement to arbitrate ADA claims between a private school and the parents of a student). As this article was going to press, the First Circuit issued an opinion interpreting § 118 to allow arbitration of at least some employment discrimination claims. See supra note 18.
claims is not enforceable. In June 1998, the Third Circuit decided Seus, reaching the opposite conclusion. Both opinions considered the question of how Congress’s passage of section 118 affects the Supreme Court’s holding in Gilmer. The circuits’ respective interpretations of section 118 are discussed in Part II below.

III. STATUTORY INTERPRETATION OF THE 1991 CIVIL RIGHTS ACT

The histories of Duffield and Seus are very similar. Both Tonja Duffield and Sheila Seus were employed by brokerage firms—Robertson Stephens and John Nuveen, respectively. Both women signed a Form U-4 arbitration agreement as part of their registration to become securities representatives, as required by SEC rules and the terms of their employment. Ms. Duffield and Ms. Seus later brought actions against their respective employers on grounds of discrimination in violation of Title VII. The defendant employer in each case sought to compel arbitration of the dispute under the FAA, relying on the existence of a signed Form U-4 arbitration agreement. The district court in each case dismissed the complaint and compelled arbitration under the FAA, and both women appealed their respective dismissals. Finally, in each case, the EEOC filed an amicus brief in support of the employee’s position. In Seus, however, the Third Circuit upheld the dismissal of the district court whereas in Duffield, the Ninth Circuit reversed. The decision in each case revolved around the circuit courts’ differing interpretations of section 118 of the 1991 Act.

A. Text

In upholding arbitration of Ms. Seus’s Title VII claim, the Third Circuit found that section 118 of the 1991 Act “evinces a clear Congressional intent to encourage arbitration” of statutory discrimina-

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112. The text of Paragraph 5 of the Form U-4 reads as follows:
I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

113. The text of § 118 is excerpted supra at note 13.
tion claims of the sort brought by Ms. Seus. Notwithstanding Supreme Court precedent reading exceptions into the FAA for public law statutes, including Title VII, the Seus court reasoned that to read any limitation into section 118 would be tantamount to finding an "implied repealer" to the FAA itself. The court, having found that the text was "clear" and a "straightforward declaration of the full Congress," dismissed the legislative history as insufficient to suggest any alternate interpretation of section 118.

However, not only the Ninth Circuit, but also other circuit courts, have interpreted section 118 as something other than a "clear" endorsement of arbitration. The text of section 118 states that Congress did not encourage the use of alternate dispute resolution to resolve Title VII disputes in all circumstances, but only "where appropriate" and "to the extent authorized by law." The Ninth Circuit in Duffield read these words as meaning that Congress set definite limitations on the situations where arbitration could be utilized to resolve claims under Title VII. Although the court in Seus found that the words "where appropriate" should be read in reference to the FAA, these differing interpretations suggest at the very least that the text of section 118 is ambiguous.

Contrast section 118 with the type of explicit language that Congress used when it wished to make clear that infringement claims brought under the Patent Act are arbitrable. In 1982, Congress amended the Patent Act to overrule the holdings of courts that refused to enforce

114. See, 146 F.3d at 182. This is also the interpretation adopted by the United States Court of Appeals for the Fourth Circuit in Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881 (4th Cir. 1996) (stating that the language of the 1991 Act "could not be any more clear in showing Congressional favor towards arbitration").

115. See, 146 F.3d at 179. The Supreme Court has never suggested that finding a statutory right not arbitrable would amount to a repeal of the FAA. The Court in Mitsubishi discussed the interrelation between the FAA and other public law statutes:

Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.


116. See, 146 F.3d at 183.

117. See Pryner v. Tractor Supply Co., 109 F.3d 354, 363 (7th Cir. 1997) (describing § 118 as a "polite bow to the popularity of 'alternate dispute resolution'"), Bercovich v. Baldwin Sch., Inc., 133 F.3d 141, 150 (1st Cir. 1998) (reading § 118 as an endorsement of voluntary arbitration while suggesting that arbitration might not be appropriate in other contexts, such as employment).


119. See Seus, 146 F.3d at 183.
arbitration clauses to resolve disputes involving patent validity or infringement. The text of the amendment is as follows:

A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or equity for revocation of a contract.

The language of the amendment is unambiguous, providing without qualification that arbitration is permissible and explicitly stating that the enforceability of any such arbitration clause shall be determined by common law contract principles. Section 118, by contrast, is a qualified, generalized statement in support of the use of ADR in the resolution of discrimination disputes. Indeed, a minority of Republican congressmen in the Judiciary Committee, in their comments on what became section 118, complained that section 118 did little to help employers; in other words, section 118 fell short of the type of clear authorization of binding arbitration that was contained in the Patent Act.

Not only is the language of section 118 qualified, but given the nature of the 1991 Act, it would seem that the phrase “where appropriate” should be read with the purpose of protecting victims of discrimination, rather than with reference to the FAA as the court in Seus held. As the court in Duffield pointed out, it would seem that the section 118 should be interpreted to provide potential plaintiffs with alternative fora in which to resolve disputes, not to “forc[e] an unwanted forum on them.”

Distinguished scholarship on statutory interpretation supports the Ninth Circuit’s approach. Cass Sunstein has argued that statutory interpretation should be guided by interpretive norms as an alternative

121. 37 U.S.C. § 294(a) (1994). The amendment also requires that notice of arbitrator awards be given to the Patent Commissioner. See id. § 294(d).
122. See H.R. REP. NO. 102-40 pt. II, at 78 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 764 (dissenting views of congressmen Hyde, Coble, McCollum, Moorhead, Sensenbrenner, Gekas, Slaughter, Smith, and Ramstad in the report of the Judiciary Committee). In discussing § 118, while agreeing that mediation and arbitration are preferable to litigation, the dissenting congressmen described § 118 as “an empty promise which is [sic] no way will assist claimants or employers in the resolution of such claims.” Id. The quoted language suggests that even conservative members of Congress interpreted § 118 to be an endorsement of Gardner-Doner.
123. See Duffield, 144 F.3d at 1194.
to excessive focus, for example, on the "plain meaning" of a statute.\textsuperscript{124} One such norm is the idea that, where a statute is ambiguous, a court should interpret it in favor of disadvantaged groups.\textsuperscript{125} He reasons that those responsible for implementing the statute may do so inadequately, as a result of the same prejudices that the statute may have been intended to address.\textsuperscript{126} As an example, Sunstein cites cases applying disparate impact doctrine as a basis for finding discrimination under Title VII, and argues that, given "systemic barriers to the implementation of antidiscrimination statutes," the relatively pro-plaintiff test outlined in \textit{Griggs v. Duke Power} was a better method of implementing Title VII than the standard elaborated in \textit{Wards Cove Packing Co. v. Atonio}.\textsuperscript{127} Applying this norm to section 118, the qualifier "where appropriate" should be interpreted in a manner that will advance the implementation of the antidiscrimination statutes—by allowing potential plaintiffs more options rather than fewer for enforcing their rights.

The second limitation that Congress included in section 118 is perhaps even more ambiguous than the first. When section 118 provides that the use of ADR is encouraged "to the extent authorized by law," it is unclear whether the statute is referring to the state of the law before or after \textit{Gilmer}. As the court in \textit{Duffield} observed, at the time that section 118 was drafted, the prevailing law was that arbitration of statutory employment discrimination claims could not supplant judicial process: "Even as arbitration became increasingly popular in the 1980's, every circuit court to address the issue held firm in refusing to enforce any agreement—in the collective bargaining context or otherwise—that required employees to resolve discrimination claims through binding arbitration."\textsuperscript{128} In addition, the legislative history to the 1991 Act demonstrates that Congress emphatically rejected a Republican proposal that would have expressly allowed for the type of binding

\textsuperscript{124} Sunstein suggests that even adherence to the apparent "plain meaning" of a statute is policy-laden: "An interpretive strategy that relies exclusively on the ordinary meaning of words is precisely that—a strategy that reflects a choice among competing possibilities—and it will sometimes produce irrationality or injustice that the legislature did not intend." Cass Sunstein, \textit{Interpreting Statutes in a Regulatory State}, 103 HARV. L. REV. 407, 424 (1989).

\textsuperscript{125} The Supreme Court itself has held that civil rights legislation should be interpreted liberally in order to effectuate its remedial purpose. \textit{See}, e.g., Dennis v. Higgins, 498 U.S. 439, 443 (1991) (holding that \textsection{} 1983 must be "liberally and beneficently" construed).

\textsuperscript{126} \textit{See} Sunstein, \textit{supra} note 124, at 483.

\textsuperscript{127} \textit{See id.} at 483-85. In \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971), the landmark case that first established the disparate impact doctrine, the Court held that once a plaintiff demonstrates discriminatory impact of a business practice, to avoid liability the employer must show that it was justified by "business necessity." The second, more recent case was overruled with the passage of the 1991 Act. \textit{See Wards Cove Packing Co. v. Atonio}, 490 U.S. 642, 643-44 (1989) (holding that the employer need only produce evidence showing that an allegedly discriminatory practice serves the employer's "legitimate employment goals").

\textsuperscript{128} \textit{Duffield}, 144 F.3d at 1188.
arbitration that is prohibited by Gardner-Denver. However, the court in *Seus* makes a compelling point in this regard—even if a court were to accept the view that section 118 intended to "freeze" or codify the existing state of the law, the Supreme Court decided *Gilmer* in May 1991, six months before the 1991 Act was passed. Notwithstanding this problem, the fact that *Gardner-Denver* represented the law on arbitrability of Title VII claims at the time section 118 was drafted provides important context within which to interpret the arbitrability question.

**B. Legislative History**

In *Seus*, the court noted the legislative history of section 118 but dismissed it as conflicting with what the court interpreted to be the plain meaning of the statute. The *Duffield* court, on the other hand, found that "it is the unusual force and clarity of the statute's legislative history that is ultimately dispositive in this case." The Ninth Circuit elaborated by citing to the Committee Report on the bill which became the 1991 Act. In the report, the House Committee on Education and the Workforce explained that the purpose of section 118 was "to increase the possible remedies available to civil rights plaintiffs" and emphasized that an arbitration agreement "does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." The Committee also stated that its view was consistent with *Gardner-Denver*. In short, the reading of section 118 elaborated in the committee report states unequivocally that any predispute agreement to arbitrate is not binding; that is, it does not preclude resort to a judicial remedy. This interpretation of section 118 would "encourage" the use of ADR, not in place of, but only in addition to judicial remedies to enforce the antidiscrimination statutes.

129. See id. at 1196.
131. Indeed, the legislative history to the 1991 Act expressly cites *Gardner-Denver* as being consistent with the intended meaning of § 118. See infra note 134 and accompanying text.
132. See *Seus*, 146 F.3d at 182-83.
133. *Duffield*, 144 F.3d at 1195.
136. The court in *Duffield*, however, does not go so far as to hold that any predispute agreement to arbitrate is unenforceable. The court only invalidated an agreement that was compulsory, i.e., entered into as a condition of employment, and left open the question of whether voluntary, predispute agreements to arbitrate Title VII claims are valid. See *Duffield*, 144 F.3d at 1187.
The use of legislative history to interpret a statute has drawn a considerable amount of controversy, particularly when the statute at issue is politically divisive, as was the 1991 Act. Notwithstanding the controversy, however, when the issue is determining the arbitrability of statutory rights, *Mitsubishi*, *McMahon* and even *Gilmer* direct that a court examine the legislative history of the given statute to determine whether arbitration would conflict with the statutory scheme. Indeed, unlike the legislative histories of the 1934 Act and ADEA (at issue *McMahon* and *Gilmer*, respectively) the committee report on section 118 expressly refutes any suggestion that the statute should be construed to allow arbitration in lieu of judicial remedy.

The only weakness to the *Duffield* court's reliance on legislative history is the fact that, during floor debate prior to the 1991 Act's passage, Senator Bob Dole and Congressman Henry Hyde each submitted into the record an interpretive memorandum on section 118 that is not consistent with the interpretation of section 118 set forth in the committee reports. Each memorandum interpreted section 118 as encouraging the use of “binding” arbitration and other forms of ADR, and cited *Gilmer* in support of the use of binding arbitration. Even the text of the interpretive memoranda, however, limits its support of

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138. See infra note 187 (discussing divisiveness of 1991 Act). See also Breyer, supra note 137, at 856 (noting that the use of legislative history to interpret a statute that has “evoked strong political support and opposition in Congress” is particularly controversial as it risks “elevating the testimony to the level of a statute”).

139. The *Duffield* court cites this as “perhaps the most compelling reason” for ruling the way it did. 144 F.3d at 1198.

140. In terms of its legislative history, the 1991 Act is very different from the ADEA which was analyzed in *Gilmer*. See *Gilmer* v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-27 (1990) (“*Gilmer* concedes that nothing in the text of the ADEA or its legislative history explicitly precludes arbitration.”). The legislative history of the 1991 Act is also distinguishable from that of the 1934 Act at issue in *McMahon*. In *McMahon*, the plaintiffs argued that the legislative history of amendments to the 1934 Act stated explicitly that the amendment did not change existing law as reflected in *Widko*. See *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 237 (1986). The Court rejected this argument as “fraught with difficulties,” as there was nothing in the 1934 Act that even remotely addressed arbitrability. *Id.* The Court reasoned that the committee report failed to articulate the committee's views on what “existing law” provided. *Id.* In contrast, the committee report to the 1991 Act clearly states its views of what existing law provided. In addition, the 1991 Act expressly addresses arbitrability.

arbitration to situations where the parties "knowingly and voluntarily" elect to use such methods.142

Examining the legislative history thus yields two insights into the apparent intent of the legislators who passed the 1991 Act. The first is that the consensus emerging from both the Committee on Education and Labor and the Judiciary Committee interpreted section 118 to mean that a predispute agreement to arbitrate never precludes resort to a judicial remedy.143 The second is that even the minority Republican members of Congress who opposed the bill that became the 1991 Act were in favor of legislation that allowed for the enforcement of binding arbitration agreements, but only where "knowing and voluntary."144

C. Overall Purpose

The court in Senu based its holding on what it perceived to be the plain meaning of section 118, whereas the Duffield court relied heavily on the statute's legislative history. McMahon directs, however, that congressional intent to preclude arbitration may be discernible not only from the text or history of a statute, but also "from an inherent conflict between arbitration and the statute's underlying purposes."145 As discussed above, the Supreme Court in Gilmer found that arbitration of

142. The interpretive memorandum reads as follows:
SECTION 118. ALTERNATIVE MEANS OF DISPUTE RESOLUTION
This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.
In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. See Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).


143. Traditionally, reliance on committee reports is considered less controversial than reliance on the floor statements of individual legislators. See, e.g., ESKRIDGE, supra note 137, at 222 fig. 7.1 (citing committee reports as "most authoritative" in the hierarchy of legislative history sources).

144. It is somewhat ironic that the Republican bill, H.R. 1375, contained explicit language requiring that arbitration agreements be consensual. The relevant text of the bill reads as follows: "Where knowingly and voluntarily agreed to by the parties, reasonable alternative means of dispute resolution, including binding arbitration, shall be encouraged in place of the judicial resolution of disputes arising under this Act and the Acts amended by this Act." H.R. 1375, 102d Cong. § 12 (1991). The fact that Congress rejected the language in H.R. 1375 referring to consensual, but binding, arbitration in favor of more general language further suggests that Congress interpreted § 118 in a manner consistent with Gardner-Denver. See also Statement of George Bush upon signing S. 1745, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 25, 1991) (noting that § 118 of the 1991 Act encourages "voluntary" arbitration and mediation agreements between employers and employees).

ARBITRATION AND CIVIL RIGHTS

Mr. Gilmer's age discrimination claim would not conflict with the purposes underlying the ADEA. Yet the 1991 Act, unlike the ADEA, was enacted with the express purpose of expanding the remedies available to address intentional discrimination and responding to recent Supreme Court decisions which had cut back on protection to victims of discrimination. As Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit observed, in a case arising out of an arbitration clause contained in a collective bargaining agreement:

It would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to trial by jury for the first time, to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in these cases.

The Seventh Circuit thus recognized that an agreement to submit discrimination claims to arbitration, imposed without the consent of the employee, would conflict with a purpose of the 1991 Act—affording victims of intentional discrimination the right to a jury trial.

In addition to providing the right to a jury trial, the 1991 Act modifies the law in other ways that benefit victims of discrimination: (1) it allows a plaintiff to recover compensatory damages, for other than backpay, as well as punitive damages in cases involving intentional discrimination under Title VII and the ADA; (2) it establishes that an unlawful employment practice may be established under Title VII on the basis of disparate impact under a Griggs-type standard; (3) it allows a successful plaintiff to recover expert fees as well as attorneys' fees; and (4) it clarifies that Title VII and the ADA cover discrimination by U.S.-controlled employers located outside the territory of the United States.

The Act's purpose to facilitate private enforcement of the antidiscrimination statutes is unambiguous. It would defeat this

146. See supra notes 84-95 and accompanying text (discussing Gilmer).
147. See 1991 Act § 3.
149. Although Pryner involved labor arbitration and not an individual employment agreement, Judge Posner recognized that mandatory arbitration clauses pose a similar, albeit "attenuated," lack of consent problem as that raised in the collective bargaining context. See Pryner, 109 F.3d at 364 (noting that in Gilmer, Mr. Gilmer's employer had forced him, as a condition to his employment, to agree to NYSE arbitration).
150. See 1991 Act § 102. In addition to backpay, the Act allows for damages for future pecuniary loss as well as nonpecuniary loss such as pain and suffering, subject to a cap. See id. § 102(b)(3).
151. See id. § 105.
152. See id. § 113.
153. See id. § 109.
154. Even textualists such as Justice Scalia consider the overall text of the statute as relevant, and would decline an interpretation of a provision that conflicts with other parts of the statute. See ESKRIDGE,
purpose to allow employers to force employees to agree to replace a judicial forum with one that is subject to the employers' control.

From its beginning, Title VII emphasized the private right of action as the mechanism for enforcement. The thrust of the 1991 Act, as the text of the statute expressly acknowledges, is to expand plaintiff remedies for discrimination to encourage vigorous enforcement of the statute. The Act accomplishes this by allowing the right to a jury trial, allowing compensatory and punitive damages for intentional discrimination, and returning to a Griggs-type standard for proving a Title VII violation under disparate impact doctrine. It would be perverse to interpret section 118 in a manner that allows an employer to force employees to submit their disputes to a private forum, not because the private forum is necessarily inadequate, but because the overall purpose of the statute requires that the thumb be on the employees' side of the scale by allowing them a genuine, informed choice of forum in which to resolve discrimination claims.

D. Relevance of Agency Interpretation

In both Duffield and Seus, the EEOC filed an amicus brief urging dismissal. The court in Duffield took account of the weight to be given to the EEOC's "reasonable" interpretation of the 1991 Act whereas the court in Seus did not.

The Supreme Court has been inconsistent on the degree to which EEOC interpretations should be accorded deference. In EEOC v. Arabian American Oil Co. (Aramco), a majority of the Court declined from adopting the EEOC's position that Title VII should apply extraterritorially to prohibit discrimination by a U.S. employer operating abroad.

supra note 137, at 226-27 (noting that Justice Scalia "admits 'coherence' arguments, that is, arguments that an ambiguous term is rendered clear if one possible definition is more coherent with the surrounding legal terrain than other possible definitions"); see also Post, supra note 137, at 57 (discussing ANTONIN SCALIA ET AL., A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) ("Scalia readily acknowledges that if the meaning of a text is unclear, 'the principal determinant of meaning is context.'").

155. See supra notes 49-53 (discussing Gardner-Denver).

156. See Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1190 (9th Cir. 1998), cert. denied, 119 S. Ct. 445 (1998); Seus v. John Nuveen & Co., 146 F.3d 175, 179 (3d Cir. 1997), cert. denied, 1999 WL 80340 (U.S. Feb. 22, 1999). In addition, as discussed below, the EEOC in 1997 issued a policy statement opposing the use of mandatory arbitration to resolve employment discrimination claims. See infra notes 167-70 and accompanying text.

157. See Duffield, 144 F.3d at 1190 n.6 (deferring to the EEOC position on mandatory arbitration to the extent that it represents a reasonable interpretation of Title VII).

against a U.S. employee.159 However, as Justice Scalia pointed out in a concurring opinion, the Court had previously recognized that EEOC interpretations of ambiguous statutes “need only be reasonable in order to be entitled to deference.”160 Thus, in Aramco, Justice Scalia suggested that as a general matter the EEOC should be accorded the degree of deference otherwise extended to agency determinations under Chevron U.S.A. v. Natural Resource Defense Council.161

Judicial deference to the EEOC’s interpretation of the 1991 Act makes sense as a matter of policy. In his book on statutory interpretation, William Eskridge observes how statutes tend to be construed over time from a “bottom up” perspective—that is, taking into account not only the interpretation of the agency charged with the enforcement of the statute, but also developments that occur at the ground level, rather than the top of the agency’s hierarchy.162 Eskridge explains that looking at law from this perspective “reveals the cultural and political struggle for meaning” behind statutory interpretation issues.163 He provides as an example the EEOC’s role in “dynamic” interpretation of Title VII during the 1960s. From Title VII’s inception, “key players” in the EEOC realized that plaintiffs could make out a case of discrimination, even when there was no tangible evidence of actual intent to discriminate, by presenting statistical evidence of underrepresentation.164 The EEOC took the position that, in cases where hard evidence of discriminatory intent was lacking, the best way to carry out the purpose of Title VII was to permit victims of discrimination to prove a violation by presenting evidence of discriminatory impact.165 This position, which was shared by the NAACP Legal Education and Defense Fund, persuaded the Griggs court to employ disparate impact doctrine to enforce Title VII.166

Similarly, a controversy over mandatory arbitration has developed during the years since Gilmer was decided. On the agency level, the

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161. See id. at 259 (Scalia, J., concurring). In Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court held that a court may not substitute its own interpretation of a statute for that of an administrative agency, so long as the administrative interpretation is “reasonable.” Id. at 844.

162. See ESKRIDGE, supra note 137, at 71.

163. See id. at 72.

164. See id. at 73.

165. See id.

166. See id. at 73-74.
EEOC, as well as other agencies that have dealt with the issue, have questioned whether mandatory arbitration is appropriate in the employment discrimination context. In July 1997, the EEOC issued a detailed, formal notice of its position that mandatory agreements to arbitrate statutory discrimination claims are inconsistent with the intention of the antidiscrimination statutes. Citing the "profound importance" of the law against discrimination, and citing the private right of action as "an essential part of the statutory enforcement scheme," the EEOC asserts that the use of mandatory, predispute agreements to arbitrate discrimination claims harms both the individual employee and the public interest in eliminating discrimination in the workplace. Indeed, the EEOC's position regarding mandatory arbitration goes further than the holding in *Duffield*, because the EEOC opposes any predispute waiver of the right to a judicial forum whereas the Ninth Circuit's holding invalidated only mandatory waivers imposed as a condition to employment.

Other agencies that have dealt with the issue have also questioned the use of mandatory arbitration to resolve discrimination claims. The general counsel of the National Labor Relations Board (NLRB), for example, issued an opinion in 1995 taking the position that requiring an employee to sign an arbitration clause as a condition of employment is an unfair labor practice. Perhaps even more striking is the fact that

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168. *See id. pt. II.

169. *See id. pt. IV.D.

170. *See id. pt. VII.

171. For example, in its amicus brief filed with the United States Court of Appeals for the Ninth Circuit in *Duffield*, the EEOC expressed its position as follows:

> [T]he Commission fully supports the use of arbitration where dispute or claim to arbitration where there is an existing dispute or claim and the employee voluntarily agrees to submit that dispute or claim to arbitration.

The problem in cases of this nature is that arbitration is being "agreed" to, not in the context of an existing dispute or claim, but in advance of any claim arising.

Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 8, *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (No. 97-15698) [hereinafter EEOC Brief]. The EEOC's position is understandable, as it would protect employees from agreeing to arbitration pre-dispute when the employee is likely to underestimate the value of a judicial forum. Interpreting § 118 to endorse only post-dispute arbitration, however, conflicts with the Supreme Court's recent rulings on arbitrability. *See supra* notes 76-102 and accompanying text.

172. *See Bentley's Luggage Corp., No. 12-CA-16658, 1995 WL 912536 (N.L.R.B.G.C., Aug. 21, 1995).* In June 1994, Bentley's required all of its employees to sign, as a condition to continued employment, an arbitration clause. *See id. at *1. When Robert Letwin was fired for refusing to sign the agreement, he filed a charge with the National Labor Review Board (NLRB). *See id. at *2. The NLRB General Counsel found that the arbitration agreement violated § 8(a)(4) of the National Labor Relations
the National Association of Securities Dealers (NASD) itself proposed eliminating the arbitration requirement from its Form U-4, which was approved by the SEC and became effective January 1, 1999. In approving the elimination of the mandatory arbitration requirement, the SEC cited comment letters sent by New York's Attorney General and the chairman of the EEOC, and found that the antidiscrimination statutes raise distinct issues: "The statutory employment anti-discrimination provisions reflect an express intention by legislators that employees receive special protection from discriminatory conduct by employers. . . . It is reasonable for the NASD to determine that in this unique area, it will not, as a self-regulatory organization, require arbitration." It is notable that the SEC reacted to a public perception that mandatory arbitration is unsuitable for employment discrimination claims.
The perception that arbitration of public law rights should not be imposed as a condition to employment is widespread, as evidenced by a 1993 government study. In March 1993, the Secretaries of Labor and Commerce established the Commission on the Future of Worker-Management Relations, also known as the Dunlop Commission, to report on a number of questions pertaining to relations between management and employees, including the use of ADR to resolve workplace disputes. The Dunlop Commission received testimony from 411 witnesses, consulted with the Department of Labor, the NLRB and the EEOC, and reviewed over 160 studies, including statements submitted by the American Civil Liberties Union, the U.S. Department of Labor and the U.S. General Accounting Office. In its final report, the Commission emphasized the importance of public law rights, such as freedom from discrimination in the workplace, and criticized the use of mandatory arbitration agreements. The Commission also advocated the enactment of legislation to clarify that the choice to utilize arbitration to enforce statutory employment rights “should be left to the individual who feels wronged rather than dictated by his or her employment contract.”

Even arbitration organizations have opposed the use of mandatory arbitration to resolve statutory claims. The National Academy of Arbitrators, a prominent association of labor law arbitrators, issued a statement in May 1997, unequivocally opposing mandatory arbitration of statutory claims. In May 1995, representatives of employer, employee, and arbitration organizations formed a Task Force on Alternative Dispute Resolution in Employment with the aim of formulating a Due Process Protocol for resolution of statutory employment disputes. The Task Force, however, was not able to reach
agreement on the appropriateness of mandatory arbitration of statutory claims.\textsuperscript{183} Mandatory arbitration of statutory employment claims has thus proved to be divisive even within the arbitration community.

In light of the groundswell of controversy over mandatory arbitration, a number of Congressmen have called for an outright prohibition on the use of predispute arbitration clauses to resolve discrimination claims. In January 1997, Representative Edward Markey and Senator Russell Feingold introduced proposed legislation, entitled the "Civil Rights Procedures Protection Act of 1997," that would amend Title VII, the ADA, the ADEA, and a number of other statutes protecting employment rights\textsuperscript{184} to eliminate the use of predispute, coerced agreements to arbitrate claims arising under these statutes.\textsuperscript{185}

By taking a position that protects potential victims of employment discrimination, the agencies and organizations discussed in this section considered the arbitrability issue from the "bottom up"—they, unlike many judges, recognize that mandatory arbitration is not consistent with the underlying purpose of the antidiscrimination statutes.

\section*{IV. PROPOSED VOLUNTARINESS STANDARD}

This article proposes that courts should interpret section 118 in a manner that balances Congress's acknowledgment of ADR's benefits—flexibility, speed, and efficiency—with a concern not to compromise the ability of employees to enforce their civil rights.\textsuperscript{186} Considering


\textsuperscript{185} See H.R. 983, 105th Congress §§ 1-10 (1997). Although at least 40 Representatives and three Senators co-sponsored the bill, to date the bill has not been acted upon.

In July 1998, Senator Feingold, testifying before the Senate Committee on Banking, Housing and Urban Affairs on the issue of mandatory arbitration in the securities industry, mentioned the Civil Rights Procedures Act and noted that the following organizations had expressed support for the bill: The Women's Legal Defense Fund, The Mexican American Legal Defense and Education Fund, the National Asian Pacific American Legal Consortium, the National Women's Law Center, the National Council of La Raza, the Coalition of Labor Union Women, the National Employment Lawyers' Association, the American Civil Liberties Union, the D.C. Lawyers' Committee for Civil Rights and Urban Affairs and Women Employed. See Testimony Before the Comm. on Ban4ng Hous. and Urban Affairs, 105th Cong. 5 (1998) (statement of Sen. Russell Feingold).

\textsuperscript{186} At least one circuit court judge has written about the need to critically assess the validity of such arbitration clauses. In a recent article, Judge Cabranes of the United States Court of Appeals for the Second Circuit referred to the "acute" risks associated with unequal bargaining power in the context of standard form arbitration clauses in employment contracts. See Josué A. Cabranes, Arbitration and U.S. Courts: Balancing Their Strengths, N.Y. ST. B.J. 22, 24 (Mar./Apr. 1998). He noted that employers enjoy the
the fundamental nature of the rights at issue, a heightened standard of voluntariness is necessary to prevent an employer, who is, after all, the intended target of the discrimination statutes, from diluting its exposure to liability by fashioning an arbitral forum and then forcing the employee to agree to it.

Notwithstanding the controversy surrounding the passage of the 1991 Act, even if one failed to consider the conference reports cited in *Duffeld* but looked only to the statements of the Republican congressmen and President Bush, who initially vetoed the 1991 Act, even these expressly limited the language of section 118 to encourage only "voluntary" agreements to arbitrate discrimination claims. In other words, the understanding among legislators that section 118 does not endorse nonconsensual arbitration appears to have been virtually unanimous.

A heightened voluntariness standard for agreements to arbitrate discrimination claims makes sense from a policy perspective. As a general matter, the judiciary's embrace of arbitration is understandable. Even those who oppose mandatory arbitration agree that voluntary, post-dispute arbitration nonetheless should be encouraged to resolve employment disputes. This article does not address how arbitration compares with the courts in resolving statutory claims. The issue emphasized here, rather, is one of bargaining power. The relationship, for example, between a corporate employer and a disabled employee is one in which the need to protect against an adhesive agreement to arbitrate is manifest.

As neither the FAA, nor the antidiscrimination statutes, expressly limit the content of arbitration agreements, employers, in an effort to advantage of being a "repeat player," and therefore suggested a need to give such clauses a "more rigorous level of judicial scrutiny." *Id.*

187. President Bush vetoed the first version of the Act passed by Congress in 1990. The legislative history of the 1991 Act for the part of the statute that redefines the test for proving disparate impact is so contradictory that a section was added to the 1991 Act, expressly limiting the legislative history on this issue to an agreed-upon interpretive memorandum. See 1991 Act § 105(b), Pub. L. No. 102-166, 105 Stat. 1071, 1075 (1991)

188. See supra note 144 and accompanying text.

189. See, e.g., Maltby, supra note 81, at 2 (arguing that arbitration—where "knowing and voluntary" and subject to certain due process standards—"could be a blessing" for providing individuals the possibility of reasonably inexpensive access to justice); Dunlop Commission Report, supra note 178, § IV(3) (finding that "high-quality alternatives to litigation hold the promise of expanding access to public law rights for lower-wage workers" and may also allow disputes to be resolved "without permanently fracturing the employee's working relationship with the employer"); *EEOC Policy Statement*, supra note 167, pt. VI (affirming the EEOC's "strong support" of voluntary ADR programs that are entered into after a dispute has arisen).

190. The FAA's only requirement, other than the requirements for any enforceable contract, is that the agreement to arbitrate be in writing. See 9 U.S.C. § 2 (1994).
limit potential liability under the antidiscrimination statutes, draft arbitration clauses that have the effect of diluting the rights and remedies available to plaintiffs under these statutes. A glaring example of this practice is illustrated in the recent case *Hooters of America, Inc. v. Annette Phillips*. In 1994, Hooters management developed a so-called “open door policy” pursuant to which each employee was requested, as a condition to receiving future promotion within the company, to sign an arbitration agreement pursuant to Hooters’s in-house “Rules.” The company Rules, among other things, allow for only Hooters to draw up the list of potential arbitrators, impose limits on any backpay or frontpay to be awarded to claimants, limit punitive damages to less than five percent of what is allowed under Title VII, allow for attorneys’ fees to be awarded only upon a showing of “frivolity or bad faith” of the unsuccessful litigant, and alter the burden of proof provided for under Title VII. Although in *Hooters*, the terms of the arbitration clause were egregious enough for the court to invalidate the agreement, there are more subtle forms of unfairness that exist in the drafting and execution of the arbitration clause that may be difficult for the employee to prove, particularly under a common law contract test. Rather than presuming consent to arbitrate, a stricter standard is necessary—one that will have the effect of shifting the burden of proving voluntariness to, or at least towards, the employer.

A state statute that attempted to set any limitations on arbitration would most likely be held to be preempted by the FAA. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (invalidating a Montana statutory requirement that any arbitration clause be written in capital letters, underlined and placed on the first page of the contract).

191. In its policy statement announcing the EEOC policy on mandatory arbitration, the EEOC noted that employers have included clauses that, among other things, (i) impose filing deadlines shorter than those allowed under the statute; (ii) limit damages to “out of pocket” expenses; (iii) deny attorneys’ fees to a prevailing claimant; (iv) prohibit the award of punitive damages; (v) deny the right to discovery; and (vi) require the employee to pay one-half of the arbitrators’ fees or, in the event that the employer prevails, all of the fees. *See EEOC Policy Statement, supra note 167, pt. V.B n.18.*


193. According to a Hooters employee, a Hooters executive instructed managers to “find a reason to get rid of” any employee who refused to sign the arbitration agreement. *Id.* at *39. In effect, therefore, the agreement was imposed as a condition to employment.

194. *See id.* at *37.

195. *See id.* at *39.

196. *See id.* at *40. The Hooters Rules cap punitive damages at $13,000, whereas Title VII, pursuant to the 1991 Act amendments, caps punitive damages at $300,000. *See id.*

197. *Id.* In contrast, Title VII allows any successful plaintiff to be awarded attorneys’ fees. *See id.* Thus, the Rules apparently not only limit employees’ right to attorneys’ fees, but the Rules also allow an arbitrator to impose them on an unsuccessful claimant that has made a “frivolous” claim.

198. The Rules provide that the arbitrator, in determining whether an employee has prevailed on a claim, shall take into account extraneous factors such as “management directives.” *See id.* at *42-43.

199. The district court in *Hooters* followed this approach by finding that Hooters bore the burden of demonstrating that the plaintiffs’ assent to the terms of the arbitration clause was “knowing and voluntary.”
A. Defining Voluntariness

Although the term "voluntary" could be interpreted to mean "voluntary, pursuant to ordinary contract principles," it would be inappropriate to interpret a statute whose purpose is to protect civil rights in this manner. As Cass Sunstein has argued, when a public law statute alters the background common law rule, common law principles do not provide an appropriate context within which to interpret the statute. The Supreme Court's recent decision in *Oubre v. Entergy Operations, Inc.*, illustrates this idea. The Court in *Oubre* rejected the argument that the Older Workers Benefit Protection Act (OWBPA), which sets forth specific and demanding requirements for waivers of claims under the ADEA, should be interpreted as incorporating a common-law "tender back" requirement. Similarly, applying this principle to section 118, Congress endorsed the use of arbitration to resolve discrimination claims if the agreement to arbitrate is "appropriate," which at a minimum should be construed as referring only to truly voluntary agreements. In determining whether an employee's agreement to arbitrate discrimination claims is voluntary, courts should use a more demanding standard of voluntariness than that assumed by common law contract principles. As typically, the employee has either signed an agreement containing an arbitration clause or assented to a clause inserted in an employee handbook, most agreements to arbitrate discrimination claims survive a common law assent test.

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200. See *Sunstein, supra* note 124, at 480-81. To illustrate this idea, Sunstein suggests that the Supreme Court erred when it interpreted the fee-shifting provision of Title VII as precluding a prevailing plaintiff from recovering attorneys' fees from an intervening party. See id. at 481 n.305 (citing Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989)). The majority of the Court found that the provision was subject to the equities of allowing an intervenor to participate in the suit without being held liable for fees. Sunstein reasoned that Title VII's fee-shifting provision should have been viewed as a rejection of the common law approach of equitable balancing. See id. at 482 n.305 (citing *Zipes*, 491 U.S. at 771-78 (Marshall, J., dissenting)).


203. The defendant employer argued that a contract tainted by fraud or duress is voidable at the option of the injured party only if the injured party first "tenders back" the benefits received under the contract. See *Oubre*, 118 S. Ct. at 841. The Court refused to apply this principle to a release that failed to comply with the requirements of the OWBPA, reasoning that a tender back requirement "might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing that it will be difficult to repay the monies." *Id.* at 842. Thus the Court recognized that the strict waiver requirements set forth in the OWBPA, an antidiscrimination statute, displaced the common law contract doctrine of "tender back." See *id.*

204. In *Gilmer*, the Supreme Court noted that there was no basis for invalidating the arbitration
A suitable standard to look to in defining the type of arbitration agreement that would be "appropriate" under section 118 is the "knowing and voluntary" standard required by a number of circuit courts, and codified by Congress in amendments to the ADEA, for valid releases of substantive discrimination claims. When an employer lays off an employee and offers a severance package, for example, it is common for the employer to require the employee to sign a release waiving any claims it may have against the employer. If the claims waived in such a release are statutory discrimination claims, *Gardner-Denver* provides in dictum that the employee's waiver of such claims must be "knowing and voluntary." 205

A number of circuit courts have relied on this language in *Gardner-Denver* to require that employee releases are knowingly and voluntarily entered into, considering a number of factors relating to the circumstances under which the agreement was made. 206 A leading case is the Seventh Circuit's holding in *Pierce v. Atchison, Topeka and Santa Fe Railway Co.* 207 In *Pierce*, the Seventh Circuit found that, in certain situations, such as where the employee is not represented by counsel and the employer prepares a standard form release, a court should consider the "totality of the circumstances" under which the agreement was executed in assessing its validity. 208 Factors that courts have considered in viewing agreement on grounds of contract law. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1990) (finding no evidence that Mr. Gilmer was "coerced or defrauded" into signing the Form U-4). In one district court case involving a Form U-4, the judge upheld the arbitration clause notwithstanding its mandatory nature. The judge acknowledged that, even if the employer had explained the meaning of the clause to the employee, the employee would have had little choice but to sign, since the Form U-4 is an industry-wide requirement for securities personnel. See Stone, *supra* note 43, at 1038.

In another case, the judge applied ordinary principles of offer and acceptance and found that a Title VII claimant's signature on an "Agreement of Hire" containing an arbitration clause manifested "positive and unequivocal" intent to enter into the contract. See *Johnson v. Hubbard Broad.*, Inc., 940 F. Supp. 1447, 1454 (D. Minn. 1996). Although the plaintiff had not read the arbitration clause, the judge nonetheless upheld the contract, citing the familiar maxim that "[f]ailing to read or understand the language of a contract serves as no defense under the law." Id.; see also Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 106 (1992) (finding that few courts invalidate arbitration agreements for lack of assent or under an adhesion contract analysis). *Cf. Hooters*, 1998 U.S. Dist. LEXIS 3962, at *83 (finding that, although plaintiff's agreement to arbitrate Title VII claims would be found to be "knowing" under ordinary contract principles, under more demanding statutory requirements, the employer bore the burden of demonstrating that plaintiff's agreement was knowing and voluntary).


206. See Bormann v. AT&T Communications, Inc., 875 F.2d 399 (2d Cir. 1989); Stroman v. West Coast Grocery Co., 884 F.2d 458 (9th Cir. 1989); O'Hare v. Global Natural Resources, Inc., 895 F.2d 1015, 1017 (5th Cir. 1990); Torrez v. Public Serv. Co., 908 F.2d 687 (10th Cir. 1990); Coventry v. United States Steel Corp., 856 F.2d 514 (3d Cir. 1988).

207. 65 F.3d 562 (7th Cir. 1995).

208. The court reasoned that the inquiry into voluntariness must go beyond the requirements of contract law to fulfill the purpose of the discrimination statutes. According to the court, "[t]o assume that, notwithstanding strong evidence to the contrary, a signature implies understanding is to allow a rule of
the totality of the circumstances include the employee's education and experience, the employee's input in negotiating the terms of the settlement, whether the employee actually read and considered the release before signing, whether the employee was represented by counsel, whether the consideration given for the waiver exceeded the benefits to which the employee was already entitled, and whether the employer acted improperly in obtaining the release. Because releases of employer liability occur at the time of termination, the totality approach naturally does not take into account whether the waiver was imposed as a condition to employment. Certainly if such a heightened standard were applied to arbitration agreements, an agreement imposed as a condition to employment would not pass a voluntary and knowing test.

Additional guidance as to what constitutes a "voluntary and knowing" waiver can be gleaned from the statutory requirements contained in the OWBPA. Section 201 of the OWBPA, enacted in 1990, amends the ADEA to require that specific conditions be met in order for the waiver of "any right or claim" under the ADEA to be valid. The amendment requires that any such waiver be "knowing and voluntary" and then sets forth in detail what constitutes a knowing and voluntary waiver, including requirements that the waiver use language "calculated to be understood" by the employee, refer specifically to claims arising under the ADEA, advise the employee to consult with an attorney, and provide a waiting period within which the employee is free to consider whether to execute the agreement, as well as a period within which the employee is free to revoke the agreement after its execution. Although the amendment does not speak to the validity of a waiver imposed as a condition to employment, the statutory language goes even further to expressly invalidate any prospective waiver.
Of course, an employee's release of all statutory discrimination claims is distinguishable from an employee's waiver of access to a judicial forum in which to adjudicate such claims. Although some, including the EEOC, have taken the position that the OWBPA's reference to "any right or claim" should be construed as applying to the right to a judicial forum, what is suggested here is a different point—that the heightened standards applied in cases like *Pierce* and codified in the OWBPA are useful precedents for defining what is "appropriate" arbitration under section 118. Otherwise, to define voluntariness according to ordinary contract principles renders the "where appropriate" language meaningless and ignores completely the legislative history of the 1991 Act. In addition, it undermines the purpose of the 1991 Act to deem standard-form, compulsory clauses valid contracts even if courts have adopted this legal fiction as a matter of contract law.

To summarize, section 118 should be interpreted, consistent with the history and purpose of the 1991 Act, to permit arbitration when the agreement to arbitrate is truly voluntary. In addition, voluntariness should not be defined in terms of ordinary contract principles but according to the more stringent "voluntary and knowing" standard applied in release cases.

**B. "Public Good" Concerns against a Voluntariness Requirement**

Samuel Estreicher, a respected authority on labor law, raises an interesting policy argument against a heightened voluntariness requirement for agreements to arbitrate statutory employment claims. He argues that an in-house dispute resolution program, like a pension plan, is a "public good:"

[A dispute resolution system] is efficiently provided, if at all, on a collective basis. This is because the costs of such a program (an in-house claims processing office, ombudsmen, possible mediators, etc.), even when justified by the collective benefits to the affected employees, typically exceed the benefits to individual employees. Estreicher suggests, therefore, that a heightened voluntariness requirement would not only introduce uncertainty into the law, but would threaten to "unravel" the benefits of an ADR program for employees as

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218. See EEOC Brief, supra note 171, at 13-18. Cf. Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 660-61 (5th Cir. 1995) (holding that "knowing and voluntary" requirement for waivers under the OWBPA was not intended to extend an agreement to arbitrate discrimination claims).

In other words, if a company’s employees were truly free to choose between an arbitral and a judicial forum, a number of those employees would choose a judicial forum, thus threatening the availability of in-house ADR programs. The argument thus suggests that it is socially desirable to impose in-house arbitration of civil rights claims on employees because providing arbitration is in the employees' collective best interest.221

The "public good" argument against a voluntariness requirement has several flaws. First, as those who challenge mandatory arbitration are typically employees,222 it is inappropriate to lump mandatory arbitration together with voluntary ombudsmen and pension plans as "public goods." There is a fundamental difference, for example, between encouraging programs such as the Federal Express "open door" policy described in the Introduction,223 and imposing arbitration on employees in an effort to limit potential exposure under the civil rights laws.

Second, the "public good" argument assumes that employers who offer in-house mediation and open door complaint policies would not do so if mandatory arbitration were banned. Yet Federal Express, as well as other companies that developed in-house programs to provide "justice on the job," did so at a time when mandatory arbitration of statutory claims was impermissible.224 For years, companies such as Federal Express offered employees the option of utilizing in-house ADR programs—notwithstanding the fact that employees were still free to pursue lawsuits against the company—in order to boost employee morale, foster loyalty, avoid unionization, and give employees a voice in company management.225 Even within the securities industry, seven years after Gilmer was decided, Merrill Lynch & Co. agreed to abolish

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220. See id.

221. By suggesting that employees would "unravel" the system if given the choice to do so, Estreicher's argument also effectively concedes that these agreements are adhesive and not the product of mutual assent. See supra notes 40-45 and accompanying text (describing these agreements as contracts of adhesion).

222. For example, David Schwartz suggests that the "clearest indication" that mandatory arbitration is more beneficial to employers than employees is the fact that pre-dispute agreements to arbitrate are insisted upon by the employers themselves. David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. Rev. 33, 62. In a survey Schwartz conducted of federal cases involving the arbitration of employment disputes, the employer moved to compel arbitration in 40 out of 40 cases. Id. at 62 n.88 (conducting a LEXIS search using the terms "Federal Arbitration Act and (employment or Title VII) and compel arbitration and date (after 1993)").

223. See supra notes 3-9 and accompanying text.

224. See supra notes 2-9 and accompanying text (discussing David Ewing's observations concerning in-house dispute resolution programs). Ewing's book was published in 1989, two years prior to the Supreme Court's decision in Gilmer. See Ewing, supra note 2.

225. See generally Ewing, supra note 2, at 21-34 (discussing the reasons that companies have instituted "corporate due process" systems).
mandatory arbitration. As of July 1998, Merrill Lynch has allowed aggrieved employees to “opt out” of the established arbitration system to adjudicate discrimination and harassment claims.\(^2\) Thus it does not necessarily follow that companies will refuse to offer in-house ADR programs simply because employee agreements to arbitrate civil rights claims are subject to a heightened voluntariness standard.

In short, the “public good” argument is based on three questionable assumptions: (1) that all ADR is beneficial for employees, (2) that employers will not offer in-house ADR programs if employees are allowed to opt out of the system, and (3) that the benefits of ADR outweigh the importance of allowing employees the choice of a judicial forum to enforce their civil rights. Even if one accepts that ADR, including arbitration, is a “good” to be promoted, it is not socially desirable to allow employers to force the forum on employees who are victims of discrimination.

C. Uniqueness of Discrimination

Imposing a heightened voluntariness requirement to an agreement to arbitrate discrimination claims would depart from prior cases, such as *Mitsubishi* and *McMahon*, in which the Supreme Court upheld agreements to arbitrate statutory claims without scrutinizing the voluntariness of the arbitration agreements. But unlike the securities and antitrust statutes, statutes such as the ADA, ADEA, and Title VII are unique in that they protect what is arguably a more fundamental right: the right against discrimination in employment. Arbitration of discrimination claims raises unique issues, not only because the right at issue is fundamental, but because of the history of private discrimination in this country, and the perception that private, less formal processes are less likely than formal ones to minimize prejudice in resolving disputes. Therefore, it is reasonable to treat discrimination claims differently by requiring a heightened standard of consent to arbitrate such claims.

The fundamental nature of the right against discrimination has been recognized by academics, courts, U.S. Presidents, and the EEOC. In its recent policy statement on mandatory arbitration, the EEOC argues that the laws protecting against discrimination in employment, like other Federal civil rights laws, “flow directly from core Constitutional

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226. Merrill Lynch & Co. recently changed its company policy to abolish all mandatory arbitration. As of July 1998, Merrill Lynch employees have the option of either utilizing in-house mediation or arbitration, or resolving claims in court. See Kathy Bishop, *Merrill Lynch: The Real Deal; Smith Barney's Settlement of a Sex Discrimination Suit Puts Next to This One*, *N.Y. POST*, May 7, 1998, at 35.
principles.” To emphasize the fundamental nature of the antidiscrimination laws, the EEOC quotes from a public address that President John F. Kennedy delivered in 1963, just prior to introducing a civil rights bill:

We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution.

The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.228

Although the antidiscrimination laws are not identical to the Equal Protection Clause of the Constitution, the statutes flow from the same purpose of eradicating discrimination.

In determining the scope of Title VII in other contexts, courts have recognized that the statute’s purpose is to protect fundamental rights. For example, employer dress code and grooming restrictions, even if more often adopted by members of one sex or race (such as prohibitions on long hair or “corn rows”) have been found to involve matters relatively trivial compared to the “constitutional interests protected by the Fourteenth Amendment and Title VII.”229 In determining which restrictions do not fall within Title VII, courts have defined the rights that Title VII protects as being essential.

In a recent opinion addressing mandatory arbitration,230 Federal
District Judge Constance Baker-Motley proposed that the right to a judicial forum to adjudicate Title VII claims is not only fundamental, but may be inalienable. Citing to a number of respected scholars\textsuperscript{231} for the proposition that some federally-granted rights are inalienable, Judge Motley suggested that, particularly in settings of unequal bargaining power, waivers of Title VII rights are not socially desirable as they defeat the societal goals the statute aims to protect and produce windfalls for those in superior bargaining positions.\textsuperscript{232} Judge Motley relied in part on this reasoning to hold that the plaintiffs, a class of former investment bank employees, could meet their burden of demonstrating that the 1991 Act evinced an intent to prohibit prospective arbitration agreements, such as the Form U-4, to resolve Title VII claims.\textsuperscript{233} Judge Motley's analysis suggests that the right against discrimination in employment is so basic a right that it should never be the subject of bargaining. This would suggest that any predispute agreement to arbitrate discrimination claims should be invalid.

Another problem with arbitration that is especially troubling in the discrimination context is that it may not be as effective as formal, adjudicative processes in minimizing the very prejudice that statutes such as Title VII are designed to eliminate. The American judicial system has incorporated "norms of fairness and even-handedness" into its institutional psyche and procedure.\textsuperscript{234} The formalities and rituals of a courtroom trial, the Code of Judicial Conduct, life tenure of federal judges, and the doctrine of \textit{stare decisis} operate together to reduce the potential for prejudice in several ways. The formalities and rituals hold prejudice in check by reminding those present of the "higher" ideals

\begin{thebibliography}{9}
\bibitem{232} See Martens, 1998 U.S. Dist. LEXIS 9226, at *16-17. On the notion that certain rights are inalienable, consider also the opinion of constitutional law scholar Bruce Ackerman:
\begin{quote}
[W]e believe that there are some things workers shouldn't be forced to bargain about—like an employer's demand that he or she endure racial or sexual subordination . . . . Most of us don't think that employers should be allowed to put such humiliating demands on the bargaining table. We support legal guarantees to workers of certain basic rights before they can bargain in a self-respecting way on other conditions of employment.
\end{quote}
\bibitem{1} BRUCE ACKERMAN, \textit{WE THE PEOPLE} 64 (1991).
\bibitem{233} See Martens, 1998 U.S. Dist. LEXIS 9226, at *34.
\bibitem{234} Richard Delgado et al., \textit{Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution}, 1985 WIS. L. REV. 1359, 1387-38.
\end{thebibliography}
represented by notions of justice and the “American Creed.” The constraints of the adjudicative process reduce decisionmaker bias by minimizing the opportunity to decide issues on the basis of unlawful factors. Finally, members of disadvantaged groups are more likely to utilize a formal forum to the extent that it is perceived as being subject to greater “rational control” than an informal procedure. The potential for bias in informal dispute resolution is exacerbated when, as in the employment discrimination context, the arbitrator is a member of the dominant group and the issue to be adjudicated “touches a sensitive or intimate area of life.”

The notion that formal, public institutions better protect against prejudice than informal, private ones is further supported by an observation made by Lani Guinier in the civil rights context. Guinier points out that, when it comes to protecting civil rights, traditionally it has been the experience in this country that discrimination has come, not from the federal government, but from the private sector:

Throughout American history, the national government has been the saviour, intervening to protect blacks from wanton cruelty at the hands of private individuals or local authorities. . . . Slavery and its sharecropping aftermath were private economic systems that were politically approved but not politically initiated. . . . [P]rogress for many blacks was symbolized by President Lincoln’s Emancipation Proclamation, the Supreme Court’s Brown decision, and Congress’s 1965 Voting Rights Act.

Given this historical perception of the private sector as the source of racism in the United States and the federal government as the “savior,” it is not unreasonable to expect that, if potential victims of discrimination were given a free and informed choice, they would choose a judicial over a privately-controlled forum in which to enforce their rights.

The basic point of this article is not that arbitration is inherently incapable of resolving statutory employment discrimination claims. The basic issue rather is that arbitration tends to be one-sided and, therefore, encouraging mandatory arbitration threatens to undermine the purpose of the 1991 Act. In addition, there is both scholarly and legal support

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235. See id. at 1388.
236. See id. at 1389.
237. See id. at 1390-91. Indeed, Delgado and his colleagues cite studies demonstrating that adversarial processes are generally perceived as being more fair and less partial to bias than informal processes. See infra notes 241-43 and accompanying text (discussing “veil of ignorance” studies).
238. See Delgado, supra note 234, at 1402-03.
for the proposition that discrimination is different. The fundamental importance of the right against discrimination, plus the unique role the federal judiciary has traditionally played in protecting individuals against private discrimination, distinguishes the antidiscrimination statutes from other public law statutes. Private agreements to arbitrate should be carefully scrutinized to ensure that employers do not evade their responsibilities under the law by forcing employees to “choose between their jobs and their civil rights.”

IV. CONCLUSION

The liberal philosopher John Rawls devised an intuitively sensible mechanism for evaluating the fairness of a legal system. His basic premise is that just principles are those that a free and rational person would select if positioned behind a “veil of ignorance.” In other words, a fair rule is one that a hypothetical rulemaker would select when ignorant of what his position in society would be and therefore of how the choice of rule would affect him. By this measure, one could argue that the validity of a standard form agreement to arbitrate discrimination claims, imposed as a condition of employment, is not fair. It is at best questionable that a free and rational person would choose to uphold such an agreement if that person did not know at the time whether his position in society would end up being that of employer or victim.

As the Federal Express example illustrates, arbitration and other forms of ADR are attractive ways to reduce risk for businesses, provide a benefit to employees, and alleviate the judiciary. Thus it makes sense

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240. The idea that discrimination is different is also supported by G. Richard Shell, who argues that securities arbitration (i.e., industry-sponsored arbitration of the sort at issue in Gilmer, Duffield, and Seus) is not suitable for resolving Title VII claims. Because commercial arbitration is transactional in focus, it is not suitable for addressing the societal ills that Title VII is intended to eradicate. See Shell, supra note 15, at 568.

241. JOHN RAWLS, A THEORY OF JUSTICE 11 (1971); see also id. at 137-44 (discussing “veil of ignorance” idea).

242. To illustrate the related idea of pure procedural justice, Rawls gives the example of dividing a cake: the procedure that would best ensure a fair outcome is to have one man divide the cake and receive the last piece, allowing the others to select before him. By forcing the man who cuts up the cake to receive the last piece, an objective gauge of a fair division is assured. See RAWLS, supra note 241, at 85.

243. Indeed, the assumption that individuals would choose formal methods of dispute resolution over informal methods has been tested. In one study, laboratory subjects were placed behind a “veil of ignorance” and asked to choose among a range of procedures for resolving disputes. The vast majority of subjects in the study selected the adversarial system over other methods of dispute resolution. See Delgado, supra note 234, at 1388 (citing John Thibaut et al., Procedural Justice vs. Fairness, 26 STAN. L. REV. 1271, 1288 (1974)).

244. See supra notes 3-9 and accompanying text.
that Congress would encourage the use of voluntary ADR in the 1991 Act, just as these methods have become more popular.

Yet arbitration of statutory employment discrimination claims, notwithstanding its potential benefits, should not be imposed as a condition of employment. This conclusion follows both as a matter of interpreting the 1991 Act as well as a matter of policy. If we ignore the spirit of the 1991 Act, and find Congressional intent to encourage all types of arbitration, an employer could legally fire any female or minority employee who refused to sign an arbitration clause in an employment agreement. Such a result contradicts an express purpose of the 1991 Act—to expand Title VII remedies, including the right to a jury trial, available to victims of discrimination. It is also unjust to the extent that the benefits of an arbitration system accrue disproportionately to those who "own the stacked deck." Although arbitration may in some cases benefit both employees and employers, the system will not produce just results—as Auerbach put it, there will be no possibility for "justice without law"—unless arbitration is premised on a mutual, voluntary recognition that avoidance of the courts is in both parties' best interests. This requirement is particularly compelling when the issue to be resolved implicates civil rights.


246. See, e.g., Desiderio v. NASD, 2 F. Supp. 2d 516 (S.D.N.Y. 1998). In Desiderio, the plaintiff, Susan Desiderio, applied for a position as securities representative with SunTrust Bank. When registering with the NASD as required by the terms of her employment, Ms. Desiderio struck out the clause in the Form U-4 requiring her to arbitrate any dispute with SunTrust. Because of her refusal to submit to arbitration, the NASD denied Ms. Desiderio's application for registration, and SunTrust revoked its offer of employment. See id. at 520. The court nonetheless upheld the arbitration clause, citing Gîmer and the circuit court opinions that have followed Gîmer. See id. at 522-25.