EMPLOYMENT ARBITRATION—AGE DISCRIMINATION IN EMPLOYMENT ACT—ARBITRABILITY OF CLAIMS UNDER AGE DISCRIMINATION IN EMPLOYMENT ACT UPHELD PURSUANT TO ARBITRATION AGREEMENT—*Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

Once regarded as contrary to public policy, arbitration has been accepted in the United States as a valuable method of resolving disputes.[1] American courts historically believed that arbitration agreements ousted their jurisdiction and, therefore, refused to enforce them.[2] Early in the twentieth century, however, congested court dockets prompted the acceptance of arbitration as a way to expedite claim adjudication.[3] In 1925, Congress passed the Federal Arbitration Act (FAA),[4] which offi-

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[1] *See* John M. Girault, *Shearson/American Express, Inc. v. McMahon: What's Left for the Courts in Securities Litigation?*, 62 TUL. L. REV. 284, 285-86 (1987) (surveying the development of securities law as it relates to the Federal Arbitration Act); Lisa M. Ferri, Note, *Arbitrability of Antitrust Claims Arising From International Commercial Disputes Recognized Under Federal Arbitration Act*—Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 17 SETON HALL L. REV. 448 (1987) (exploring the growing acceptance of arbitration in the United States and internationally); John G. Malcolm & Eric J. Segall, *The Arbitrability of Claims Arising Under Section 10(b) of the Securities Exchange Act: Should Wilko be Extended?*, 50 ALB. L. REV. 725, 728 (1986) (positing that English judges disliked arbitration because it precluded them from obtaining fees on each claim which was then part of their salary; Alison Brooke Overley, *Arbitrability Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1141 (1986) ("[T]he historical judicial hostility to arbitration had disappeared in the federal courts and arbitration is now considered by the judiciary to be an acceptable and encouraged form of dispute resolution.").

[2] *See, e.g.*, American Sugar Refining Co. v. The Anaconda, 138 F.2d 765, 766-67 (5th Cir.) (only federal statute can provide jurisdiction and recognize the right of the parties to enter into agreement to arbitrate disputes), *aff'd*, 322 U.S. 42 (1943).

Common law courts recognized three types of arbitration provisions: arbitration of current disputes, arbitration of future factual disputes and arbitration of future legal disputes. Jean E. Faure, *The Arbitration Alternative: Its Time Has Come*, 46 MONT. L. REV. 199, 201 (1985)(citing Corbett, *Arbitration in Montana and the Need for New Legislation*, 6 MONT. L. REV. 5 (February 1981)). Courts, however, did not uniformly enforce these provisions. *Id.*

[3] *See* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L. REV. 425, 427-28 (1988). Judicial inefficiency has been attributed to the increased number of cases, including expanded discovery and post-trial procedures, poor judicial management and the inability of judges and lawyers to streamline the process. *Id.* at 428 n.5. Stipanowich argued that these shortcomings continue today. *Id.* at 427-28.

Arbitration is frequently described as a quick and economical process. *Id.* at 429. The reasons for this characterization include the specialized experience of arbitration judges (selected in accordance with their knowledge of the particular area of arbitration), a less extensive pre-trial process and the virtual impossibility of a successful appeal. *Id.* at 430.

[4] 9 U.S.C. §§ 1 to 14 (1982). The FAA was initiated by Congress to institute a policy favoring arbitration. *Id. See* Douglas E. Ray, *Court Review of Labor Arbitration*

cially endorsed arbitration and "reversed centuries of judicial hostility to allow parties to avoid 'the costliness and delays of litigation.' "[5] Although the judiciary was reluctant to fully enforce arbitration agreements for almost fifty years after the FAA's passage, the Court has recently begun to accept arbitration as an alternative form of dispute resolution.[6]

Since the judiciary began endorsing arbitration clauses, it has struggled to define the FAA's scope of enforceability because the statute is silent as to which substantive areas are suitable for arbitration.[7] Recently, the United States Supreme Court consid-

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Awards Under the Federal Arbitration Act, 32 VILL. L. REV. 57, 69 (1987) ("the attributes of labor arbitration are speed, flexibility, informality and finality"); Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1064 n.26 (1987) (acknowledging frequency of writings and opinions that address delays in the court system). *See also* Southland Corp. v. Keating, 465 U.S. 1 (1983). In *Keating*, Chief Justice Burger noted that "[t]he purpose of this bill is to make valid and enforceable [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or [sic] admiralty, or which may be the subject of litigation in the federal courts. *Id.* at 112-13 (citing H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924)). In the House Report which accompanied the original bill, Senator Walsh discussed the need for the FAA:

> The need for the law arises from . . . the jealousy of the English courts for their own jurisdiction. . . . This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment.

Id. at 13 (citations omitted).

[5] Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974)(citing H.R. REP. No. 96, 68th Cong., 1st Sess. 1, 2 (1924)).

[6] *See id.* at 511. The Court has recently explained that the FAA was designed to supersede judicial hostility toward arbitral agreements. *Id. See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (upholding international agreements to arbitrate disputes); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-21 (1985)(upholding a Title VII claim despite an agreement to arbitrate employment disputes). Because of such hostility, the Court did not fully endorse the principles of the FAA until 1974. *See Scherk*, 417 U.S. at 510. Specifically, in 1974, the Supreme Court in *Scherk* stated that the FAA was designed to reverse "centuries of judicial hostility to arbitration agreements." *Id.*

[7] *See, e.g.*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (holding arbitration agreement valid and enforceable under Securities Act of 1933); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (upholding arbitration claims under the Securities Exchange Act of 1934 and under RICO); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (upholding international agreement to arbitrate disputes); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) (upholding agreement to arbitrate disputes out of a securities account); Southland Corp. v. Keating, 465 U.S. 1 (1984) (upholding previous agreement to arbitrate disputes).

The Court's failure to comply timely with the principles of the FAA misled lower federal courts which, as a result, often upheld judicial proceedings over arbi-

ered the arbitrability of federal claims that arose under the Age Discrimination in Employment Act (ADEA).[8] In *Gilmer v. Interstate Johnson/Lane Corp.*,[9] the Court enforced an employment agreement that required the arbitration of claims concerning labor disputes arising out of employment or termination of employment, despite the existence of other independent federal claims.[10]

In May of 1981, Robert Gilmer, an employee of the Interstate/Johnson Lane Corporation (Interstate), worked as a financial services manager.[11] As a condition of his employment, Gilmer registered with the New York Stock Exchange (NYSE)[12] as a securities representative.[13] In his NYSE application, Gilmer agreed to arbitrate any disputes that the NYSE specified as arbitrable,[14] including all potential employment disputes between

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tration. *See e.g.*, Alford v. Dean Witter Reynolds, 905 F.2d 104 (5th Cir. 1990) (holding that discharged employee could pursue Title VII claim rather than submit claim for arbitration); Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) (employee not compelled to arbitrate federal civil rights claims after employment was terminated) *cert. denied*, 110 S. Ct. 842 (1990); Nicholson v. CPC Int'l, 877 F.2d 221 (3d Cir. 1989) (arbitration deemed inconsistent with ADEA despite employee agreement to arbitrate disputes); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988) (employment discrimination claims under Title VII not arbitrable), *cert. denied*, 110 S. Ct. 143 (1989); Johnson v. University of Wisconsin-Milwaukee, 783 F.2d 59 (7th Cir. 1986) (refusing to hold compulsory arbitration for labor dispute).

[8] *See* Gilmer v. Interstate/Johnson Land Corp., 111 S. Ct. 1647 (1991). The ADEA provided for the promotion of employment for older employees based on their merits instead of their age. *See* 29 U.S.C. §§ 621 to 634 (1987). The ADEA also furnished ways to limit age discrimination in employment and mandated remedies for potential problems that may arise out of age discrimination. *Gilmer*, 111 S. Ct. at 1651.

[9] 111 S. Ct. 1647 (1991).

[10] *Id.* at 1657.

[11] *Id.* at 1650.

[12] *Id.* Gilmer was required to register with several stock exchanges as a securities representative, one of which was the NYSE. *Id.* The New York Stock Exchange is the largest stock exchange in the United States, providing a forum for the purchase and sale of securities. 2 N.Y.S.E. GUIDE (CCH) ¶1002(a), at 1051 (1991).

[13] *Gilmer*, 111 S. Ct. at 1650. The petitioner agreed to the terms of a registration application entitled "Uniform Application for Securities Industry Registration or Transfer," which provided in part that he "agree to arbitrate any dispute, claim or controversy . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations. . . ." *Id.*

[14] *Id.* The agreement was governed by Rule 347 of the New York Stock Exchange. Rule 347 provided:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration,

Gilmer and Interstate.[15]

After six years of service, Interstate discharged the sixty-two year old Gilmer.[16] Asserting that Interstate terminated him because of his age, Gilmer filed an ADEA discrimination claim with the Equal Employment Opportunity Commission (EEOC).[17] Interstate moved to compel arbitration of the ADEA action.[18] Interstate primarily contended that Gilmer's NYSE agreement to submit any employment disputes to arbitration was enforceable.[19] Interstate further argued that the FAA compelled arbitration of the ADEA claim.[20]

The district court denied Interstate's motion because arbitration proceedings would inadequately enforce ADEA rights and because Congress determined that ADEA claimants were entitled to judicial proceedings.[21] The United States Court of Appeals for the Fourth Circuit reversed, finding that Congress did not express an intent to preclude the arbitration of the ADEA claims.[22] The United States Supreme Court granted certiorari.[23]

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at the instance of any such party, in accordance with the arbitration procedure prescribed in these rules.

Id.

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

16 *Id.* Interstate did not provide any express reason for the termination of Gilmer's employment at that time. *Id.*

17 *Id.*

18 *Id.* The EEOC was created to "make a full and complete study of the factors that might tend to result in discrimination in employment because of age," and the adverse consequences that such biases may have on both the individuals and the economy. Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 230 (1983). *See* 110 CONG. REC. H2,595-99 (daily ed. Feb. 8, 1964); 110 CONG. REC. S9,911-13 (daily ed. May 4, 1964); 110 CONG. REC. S13,490-92 (daily ed. June 11, 1964). *See also* Equal Employment Opportunity Act of 1972, 86 Stat. 111 at § 10; 42 U.S.C. §§ 2000e-1 to 2000e-17 (providing organized response to unlawful employment practices).

The ADEA is secondary to the EEOC, which is vested with primary enforcement responsibility. Nicholson v. CPC Int'l., Inc., 877 F.2d 221, 224 (3d Cir. 1989). The complainant's right to file a suit for discrimination must be preceded by a complaint with the EEOC. *Id.* at 224-25. The complainant must give the EEOC up to 60 days during which it considers the charge and attempts to remedy the conflict through voluntary compliance. *Id.* at 225.

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

20 *Id.* Interstate argued that the FAA, as well as Gilmer's agreement to arbitrate in his registration application, should compel arbitration. *Id.*

21 *Id.* The district court noted that "Congress intended to protect ADEA claimants from the waiver of a judicial forum." *Id.* The court denied the motion to compel arbitration and asserted that a de novo right to file a Title VII action existed even when the parties agreed to arbitrate all claims pursuant to a collective-bargaining agreement. *Id.* (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)).

22 Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 202 (4th Cir. 1990).

Justice White, writing for the Court,[24] affirmed the appellate court's decision, concluding that Gilmer failed to demonstrate that he was entitled to adjudicate his ADEA claim in a judicial forum.[25] Rather, the Court upheld the arbitration provision and mandated that his federal statutory claim be adjudicated in an arbitral forum.[26]

In 1957, the United States Supreme Court began to clarify the enforceability of arbitration clauses in *Textile Workers Union v. Lincoln Mills*.[27] In *Textile Workers*, a union and its employer executed a collective-bargaining agreement that prohibited either party from engaging in strikes and work stoppages.[28] The agreement also set forth a specific procedure for addressing grievances.[29] As a final measure, the procedure entitled either party

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The United States Court of Appeals for the Fourth Circuit found "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements." *Id. See also* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987) (placing the burden on the party opposed to the arbitration to prove Congress intended "to preclude a waiver of a judicial forum"). The Fourth Circuit also stated that the party opposed to arbitration may try to prove that there is an inherent conflict between the enforcement of arbitration and the underlying purpose of the act. *Gilmer*, 895 F.2d at 202.

23 Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 41 (1990). The Supreme Court granted certiorari "to resolve a conflict among the [c]ourts of [a]ppeals regarding the arbitrability of ADEA claims." Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1651 (1991). In 1989, the United States Court of Appeals for the Third Circuit decided that arbitration agreements should not be enforced under the ADEA because the Supreme Court had not addressed that particular statute and there was no conclusive evidence that Congress intended ADEA claims to be arbitrable. Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989). For discussion of conflicting circuit court decisions, *see supra* note 7.

24 *Gilmer*, 111 S. Ct. at 1650. Justice White delivered the opinion of the Court and was joined by Chief Justice Rehnquist and Justices Blackmun, O'Connor, Scalia, Kennedy and Souter. *Id.* Justice Stevens filed a dissenting opinion and was joined by Justice Marshall. *Id.* at 1650, 1657.

25 *Id.* at 1657.

26 *Id.* The Court also upheld the intent of the Federal Arbitration Act (FAA), which reflected liberal federal enforcement of arbitration. *Id. See* 9 U.S.C. §§ 1-14 (1982). *See also supra* note 4 and accompanying text.

27 353 U.S. 448 (1957).

28 *Id.* at 449. The collective-bargaining agreement was entered into on June 27, 1953, and was to continue until July 3, 1954. Lincoln Mills v. Textile Workers Union, 230 F.2d 82, 83 (5th Cir. 1956). The contract was renewable every year through a specified process. *Id.*

29 Textile Workers Union v. Lincoln Mills (Textile Workers), 353 U.S. 448, 448 (1957). Article IX of the collective-bargaining agreement provided that any grievances arising out of wages, pay rates, hours worked, or other employment conditions be arbitrated if they were not adequately resolved through other means within a specified time period. *Lincoln Mills*, 230 F.2d at 83.

to request binding arbitration.[30] When complaints concerning various assignments and work loads could not be resolved, the union requested arbitration.[31] When the request was denied, the union filed suit to compel arbitration.[32]

Interpreting a provision of the Labor Management Relations Act (LMRA),[33] the Supreme Court held that mandatory arbitration clauses in employer-employee contracts could be specifically enforced.[34] Examining the LMRA, Justice Douglas concluded that Congress intended the LMRA to overturn common law precedent that invalidated executory arbitration agreements.[35] Ad-

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[30] *Textile Workers Union*, 353 U.S. at 448. Written notice of a request for arbitration had to be filed within 10 days after the expiration of the specified time limit. *Lincoln Mills*, 230 F.2d at 83.

[31] *Id.* Seven grievances were filed on June 23, 1954, and three more were filed on June 24, 1954. *Id.* All disputes were of the type provided for in Article IX(F). *Id.* The employer complied with the procedures set forth in the agreement, until it rejected the claims on July 14, 1954. *Id.* The agreement was terminated, in accordance with its duration provisions, on July 3, 1954. *Id.*

[32] *Id.* The union filed suit in the United States District Court for the Northern District of Alabama. *Id.* The complaint requested that the employer be required to submit the grievance to arbitration according to the terms of the agreement. *Id.* The district court ordered that the employer comply with the arbitration of grievances as provided in the collective-bargaining agreement. *Id.* The United States Court of Appeals for the Fifth Circuit held that although it maintained jurisdiction over the suit, it had no authority to enforce an arbitration hearing under either federal or state law. *Id.* at 81.

[33] 29 U.S.C. §§ 141 to 197 (1973). The LMRA provided for the advancement of industrial and labor relations in the interest of labor and management so that commerce may be further promoted. *Id.* § 141. The LMRA further mandated peaceful and orderly procedures that seek to protect the rights of management and labor, and the public health, safety and interest from the burdens imposed upon all citizens during periods of labor-management strife. *Id.*

[34] Textile Workers Union v. Lincoln Mills, 353 U.S. at 448, 455-56 (1957). *See* Ray, *supra* note 4, at 63 n.17. Despite the employer's argument that the LMRA only conferred jurisdiction over labor organizations in the federal courts, the Court held that the LMRA expressly professed a federal policy for federal courts to enforce labor agreements so that industrial peace may be maintained. *Textile Workers*, 353 U.S. at 455.

The union filed suit in the United States District Court for the Northern District of Alabama. *Id.* The complaint requested that the employer be required to submit the grievance for arbitration according to the agreement's terms. *Id.*

[35] *Id.* at 456. The Court did not decide whether executory agreements to arbitrate are enforceable under federal law without express congressional approval. *Id.* at 456 n.7. Section 301 of the Labor Management Relations Act of 1947 provided:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the citizenship of the parties. (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any em-

ditionally, the majority determined that the LMRA provision granting specific performance of arbitration clauses did not violate the Commerce Clause.[36]

Seventeen years later, in *Alexander v. Gardner-Denver Co.*,[37] the Court refused, however, to require mandatory arbitration under a collective-bargaining agreement when the employee maintained an independent statutory right under Title VII of the Civil Rights Act of 1964 (Title VII).[38] In *Gardner-Denver*, Harrell Alex-

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> ployer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization which may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

29 U.S.C. § 185 (1987).

[36] *Textile Workers*, 353 U.S. at 456-57. The Court held that federal interpretation of federal law will preempt state law interpretation of federal law. *Id.* at 457. If state law is in unison with § 301, however, it may be applied if it better effectuates federal policy. *Id.* Because the Court found the LMRA provision constitutional under the Commerce Clause, the majority asserted that any claim arising under LMRA section 301 was within the guise of judicial power as set forth in Article III of the United States Constitution. *Id.* The majority distinguished arbitral relief under the LMRA from that recognized by section 8 of the Norris-LaGuardia Act, which denies injunctive relief to anyone who fails to make reasonable efforts to settle a dispute via mediation, negotiation, or voluntary arbitration. *Id.* at 458. The Norris-LaGuardia Act maintained:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
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> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 185 (1982).

[37] 415 U.S. 36 (1974).

[38] *Gardner-Denver*, 415 U.S. at 38. The Civil Rights Act of 1964 (CRA) empowered the EEOC to prevent unlawful employment practices by recognizing violations

ander, a black man, was discharged from his employment as a drill operator in 1969.[39] Alexander filed a grievance pursuant to his union's collective-bargaining agreement that provided for mediation and arbitration.[40] Alexander also filed a racial discrimination complaint with the Colorado Civil Rights Commission (CCRC).[41] Following a hearing, the arbitration panel concluded that the company fired Alexander for cause.[42] Several months

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and by serving a notice of the charge to the employer. 42 U.S.C. § 2000e (1964). Under the CRA, the EEOC would investigate within 10 days to decide whether reasonable cause of an employer's violation existed. *Id.* If the EEOC believed that reasonable cause did exist, it would then attempt to resolve any conflicts through conciliation, conference and persuasion. *Id.* The investigation would not be publicly disclosed, and all proceedings would be conducted pursuant to state and local law. *Id. See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973) (citing Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971)). The *Green* Court explained:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id.

[39] *Gardner-Denver*, 415 U.S. at 38-39. The employer claimed that Alexander was discharged based on his faulty work which resulted in a large number of defective and unusable products. *Id.* at 38.

[40] *Id.* at 40. Section 5 of Article 23 of the employment agreement provided in pertinent part:

> Should differences arise between the Company and the Union as to the meaning and application of the provisions of this Agreement, or should any trouble arise in the plant, there shall be no suspension of work, but an earnest effort shall be made by both the Company and the Union to settle such differences promptly. Grievances must be presented within five working days after the date of the occurrence giving rise to the grievance or they shall be considered waived.

Id. at 39 n.1. Alexander stated in his grievance that he felt that he had been unjustly discharged and desired reinstatement with full pay and seniority. *Id.* at 39. The procedure included a four-step negotiation process between the union and the employer. *Id.* at 41. If those steps failed, the grievance would be submitted for binding arbitration. *Id.* The agreement further provided that the arbitrator shall abide by the terms of the agreement, and his decision was to be "final and binding upon the company, the union and the employee or employees involved." *Id.* at 41-42. This was apparently the first time that Alexander had raised the issue of racial discrimination. *Id.* at 43-44.

[41] *Id.* The complaint was filed with the Colorado Civil Rights Commission before the date of the arbitration. *Id.*

[42] *Id.* at 42. The union submitted a letter Alexander had previously written to the arbitrator. *Id.* The letter stated that Alexander knew of others who had the

later, the Equal Employment Opportunity Commission (EEOC) reviewed the CCRC complaint and determined that the employer had not violated Alexander's Title VII rights.[43]

Subsequently, Alexander filed a racial discrimination complaint in the United States District Court for the District of Colorado.[44] Concluding that the employee voluntarily agreed to pursue his grievance through an arbitral process and thereby was bound by the arbitration panel's decision, the district court dismissed the action.[45] The United States Court of Appeals for the Tenth Circuit affirmed.[46]

Writing for a unanimous Supreme Court of the United States, Justice Powell posited that the arbitration panel's ruling did not prevent a de novo[47] hearing under Title VII.[48] The Court acknowledged that Congress intended Title VII actions to

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same amount of defective or "scrapped" materials at the company, but they were all sent back to their previous positions in accordance with the company's usual practice. *Id.* Alexander believed that he had been a specific target of discrimination and should have been transferred back to his former position. *Id.* The arbitrator held that the union did not prove that the ordinary practice of the company was to relocate those employees who accumulated excessive scrap. *Id.* at 43. Article 4 of the collective-bargaining agreement provided that the company had "the right to hire, suspend or discharge for proper cause." *Id.* at 39. In addition, Article 5, § 2 stated that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.* at 39 n.2.

[43] *Id.* at 42. The Colorado Civil Rights Commission referred the matter to the EEOC on November 5, 1969. *Id.* The EEOC notified Alexander that he had 30 days in which to file a civil action in federal district court. *Id.* at 43. The EEOC found no reason to believe a Title VII violation had occurred. *Id.*

[44] *Gardner-Denver*, 415 U.S. at 39. The motion was filed pursuant to the arbitrator's decision that "the union failed to produce evidence of a practice of transferring rather than discharging trainee drill operators who accumulated excessive scrap. . . ." *Id.* at 43. Alexander maintained that his termination was the result of a racially discriminatory practice by his employer in violation of section 703 (a)(1) of the Civil Rights Act of 1964. *Id. See* 42 U.S.C. § 2000e-2(a)(1)(1964).

[45] *Gardner-Denver*, 415 U.S. at 43. The district court held that the arbitrator resolved the conflict adversely to Alexander. *Id.*

[46] Alexander v. Gardner-Denver Co., 466 F.2d 1299 (10th Cir. 1972) (per curiam). The decision was affirmed by the Court of Appeals per curiam. *Id.*

[47] Reck v. Reck, 46 N.E. 2d 429 (Ohio 1942). In a de novo hearing, the reviewing court makes its determination as if it originated in that court. *Id.* at 430. The court is not supposed to give recognition to the findings and judgment of the lower court(s) unless it is helpful in the court's reasoning. *Id.* A de novo hearing is further defined as "the fullest scope of review . . . for errors of law. . . ." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.4, at 600 (1985).

[48] *Gardner-Denver*, 415 U.S. at 59-60. Justice Powell asserted: "[i]t is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights." *Id.* at 59. The Court qualified its holding in *Gardner-Denver* by noting that no standards were adopted as to the weight of the holding. *Id.* at 60 n.21. The majority continued that each case should be determined in accordance with the specific facts and circumstances contained therein. *Id.*

be independent of the arbitral process.[49] The majority further asserted that, while an employee may relinquish a Title VII cause of action through a voluntary settlement, the inclusion of an arbitration clause in a collective bargaining agreement did not similarly effectuate a waiver.[50] Therefore, Justice Powell held that only Alexander's contract claims were subject to arbitration.[51]

In 1981, the Court in *Barrentine v. Arkansas-Best Freight System, Inc.*,[52] refused to abandon the *Gardner-Denver* principle even when the dispute was particularly suited to both collective-bargaining and arbitration procedures.[53] In *Barrentine*, several truck drivers submitted wage compensation claims to a grievance committee pursuant to a collective-bargaining agreement.[54] The arbitrators

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[49] *Id.* at 54.

[50] *Id.* at 52 (citing J.I. Case Co. v. NLRB, 321 U.S. 332, 338-39 (1944)). The *J.I. Case* Court held that individual contracts that may be advantageous to either party interfere with the purpose of collective-bargaining efforts by organized labor. *Id.* (citation omitted). Specifically, the Court asserted:

> We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by the appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

Id. at 339. The Court stated that the petitioner and respondent did not enter into an agreement specifically to arbitrate Title VII claims, and that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." *Gardner-Denver*, 415 U.S. at 52 n.15. The Court noted that federal courts are explicitly given the power to enforce Title VII actions, and deference to an arbitral forum would be inconsistent with its purpose. *Gardner-Denver*, 415 U.S. at 56.

[51] *Id.* at 55. The Court noted the importance of the provision in the collective-bargaining agreement regarding non-discrimination. *Id.* In some circumstances, arbitration of these disputes may adequately resolve the grievance. *Id.* The Court, however, implicitly rejected any contention that the non-discrimination clause should trump Alexander's right to seek a judicial remedy under Title VII. *Id.* at 55-56.

[52] 450 U.S. 728 (1981).

[53] *Id.* at 745 (quoting *Gardner-Denver*, 415 U.S. at 49-50). The Court proclaimed:

> In submitting his grievances to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under (the statute), an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Id.

[54] *Id.* at 730. The drivers alleged that Arkansas-Best was required to compensate them for time spent performing a pre-trip inspection for safety. *Id.* If a truck

dismissed the matter as without justification.[55] The truck drivers subsequently filed suit, alleging that the employer violated the Fair Labor Standards Act (FLSA)[56] and that the union breached its duty to provide fair representation.[57]

Justice Brennan, writing for a divided Court, held that wage claims under the FLSA cannot be barred by an arbitration proceeding brought under a collective-bargaining agreement.[58] While acknowledging that courts should generally uphold arbitration procedures under collective-bargaining agreements, the

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failed the safety test, its driver would have to drive the vehicle back to a repair facility. *Id.* While the drivers were compensated for their time waiting for their vehicles to pass inspection, they were not paid for the time spent driving the 15 to 30 minutes each to the repair facility. *Id.* The drivers claimed that under their collective-bargaining agreement and the federal minimum wage laws, they were entitled to compensation for their time. *Id.* The drivers alleged that Article 50 of their collective-bargaining agreement entitled them to compensation. *Id.* at 730-31. *See also* Thomas L. Barrette, *Contractual Waiver of Federal Action in Favor of Arbitration: Barrentine v. Arkansas-Best Freight System, Inc.*, 23 B.C. L. REV. 225, 228 (1981). *See also* 29 U.S.C. § 206(a) (1976) (upholding penalties for failure of employer to conform with minimum wage laws).

[55] *Id.* at 731. The drivers alleged that Arkansas-Best failed to comply with Article 50 of the collective-bargaining agreement, requiring the employer to compensate drivers "for all time spent in [its] service." *Id.* at 730-31. The Article stated, in pertinent part:

> All employees covered by this agreement shall be paid for all time spent in the service of the Employer. Rates of pay provided for by this Agreement shall be minimums. Time shall be computed from the time that the employee is ordered to report for work and registers in and until the time he is effectively released from duty. Such payment for employee's time when not driving shall be the hourly rate.

Id. at 731 n.3. The arbitration panel was composed of three representatives from both the union and the employer. *Id.* at 731.

[56] 29 U.S.C. §§ 101 to 633 (1982). The FLSA of 1938 was enacted to protect workers from oppressive working conditions (excessive hours, substandard wages, poor labor conditions) which may be detrimental to the maintenance a minimum level of "health, efficiency, and general well-being of workers." *Id.* § 202(a). *See Barrentine*, 450 U.S. at 739.

[57] *Id.* at 732-33, 739. Specifically, Section 6 (a) of the FLSA provided: "every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . wages at the following rates." 29 U.S.C. § 206(a) (1976). The district court ruled on whether the union breached its duty to provide fair representation and held in favor of the union. *Barrentine*, 450 U.S. at 733. The district court held that although there was evidence that the union may have entered into a "side agreement," such an agreement did not give rise to a claim for breach of fair representation. *Id.* The United States Court of Appeals for the Eighth Circuit affirmed, holding that labor policy encourages arbitration and that the employees voluntarily submitted their claims for arbitral resolution. *Id.* at 733-34. The United States Supreme Court subsequently granted certiorari and reversed. *Id.* at 734.

[58] *Id.* at 745. The Court concluded that Congress, in the FLSA, intended to provide workers' relief in a judicial rather than an arbitral forum. *Id.*

majority posited that Congress intended the FLSA to provide minimum working standards for individual employees and that these rights should override any conflicting provision in a collective-bargaining agreement.[59] Therefore, Justice Brennan refused to specifically enforce the mandatory arbitration clause and allowed the truck drivers to pursue the FLSA claims judicially.[60]

Two years later, however, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[61] the Court returned to its position of favoring the FAA's express intent when an independent statutory right was not at stake.[62] In *Moses H. Cone*, a North Carolina hospital hired Mercury Construction (Mercury) to build an addi-

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59 *Id.* at 740-41 (citing Martino v. Michigan Window Cleaning Co., 327 U.S. 173, 177-78 (1946) (upholding right of employees to recover under provisions of FLSA, even though labor agreement provided for greater number of maximum working hours per week than FLSA provided); Walling v. Harnischfeger Corp., 325 U.S. 427, 430-32 (1945) (holding that attempts by employer to manipulate statistics of wages and hours of employees constituted artificial compliance with Section 7 of FLSA); Jewell Ridge Coal Corp. v. Mine Workers, 325 U.S. 161, 166-67, 170 (1945) (holding that even employees represented by strong bargaining agents may still thrive from benefits of the Act)).

The Court has stated that the FLSA was designed to "achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." Tennessee Coal, Iron & R. Co. v. Muscada Local No. 123, 321 U.S. 590, 602-03 (1944). In *Tennessee Coal*, the Court also maintained that the FLSA provided that no customs or contracts may prevent the policy from guaranteeing at least minimum wage payments and certain minimum statutory rights. *Id. See also* Barrette, *supra* note 54, at 229. In addition, the *Tennessee Coal* Court noted that congressionally granted FLSA rights trump any conflicting provision of a collective-bargaining agreement. *Id.*

In *Barrentine*, the Court first noted that an employee's union may not reasonably support the claim of arbitration because a union has an objective to maximize the effects of its policies for all employees, not only one individual. *Barrentine*, 450 U.S. at 742. Second, the Court posited that even if the union had adequately represented the employee in an arbitration proceeding, the employee's FLSA claim may not have been properly addressed because an arbitrator's knowledge usually pertains to the law of the shop, not to the public law considerations of a federal statute, such as the FLSA. *Id.* at 743. An arbitrator's decision may be further tainted because he is bound by the collective-bargaining agreement and cannot recognize public laws that conflict with the provisions of the agreement. *Id.* at 744. Justice Brennan also maintained that arbitrators are often not empowered to grant broad relief because they are bound to effectuate only the intent of the parties throughout the agreement. *Id.* at 744-45. By contrast, the Justice mentioned that under the FLSA, a court can grant broader relief in its rulings concerning the rights of individuals. *Id.* Hence, it is unlikely that a collective-bargaining agreement would permit a party to receive liquidated and actual damages, attorney's fees and costs. *Id.*

60 *Id.* at 745. The Justice noted that the FLSA rights were independent of the rights granted pursuant to the collective-bargaining agreement. *Id.*

61 460 U.S. 1 (1983).

62 *Id.* at 24-25.

tion to its facilities.[63] The construction contract provided that any disputes must be submitted first to the architect for review and then, if not resolved, to a binding arbitration panel.[64] Mercury presented several matters to the architect that were never resolved and, accordingly, attempted to submit the claims to arbitration.[65] Subsequently, the hospital sought[66] and obtained a declaratory judgment from a North Carolina state court preventing Mercury from forcing arbitration.[67] Mercury then filed a subsequent claim in federal court to compel arbitration under the FAA.[68]

The United States Supreme Court, in dicta, posited that a

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[63] *Id.* at 4. The contract between the North Carolina hospital and the Alabama-based construction company was entered into in July, 1975. *Id.*

[64] *Id.* at 5. The arbitration clause in the contract stated:

> All claims, disputes and other matters in question arising out of, or relating to, this [c]ontract or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered in any court having jurisdiction thereof.

Id. An independent architect, J. N. Pease Associates, was hired to design and oversee the project. *Id.*

[65] *Id.* at 6. Specifically, these claims addressed delay and impact costs of the construction company that were caused by the delay of the petitioner hospital. *Id.* After several months of discussion over such costs, Mercury and the architect managed to reduce the amount of the claims. *Id.*

[66] *Id.* at 7. On October 8, 1980, the hospital filed a declaratory judgment action in the Superior Court of Guilford County, North Carolina. *Id.* A few days earlier, the hospital's counsel notified Mercury's counsel that nothing would be paid on Mercury's claim and that the hospital intended to seek a declaratory judgment in state court. *Id.* at 6.

[67] *Id.* at 7. The petitioner named Mercury Construction Corp. and the architect as defendants, claiming that respondent's claim was "without legal basis" and barred by the statute of limitations. *Id.* The petitioner also claimed that the arbitration was barred by the doctrines of laches, estoppel, and waiver. *Id.* Further, the complaint alleged several delinquencies by the architect. *Id.*

[68] *Id.* Mercury's claim was filed under Section 4 of the FAA. *Id.* Section 4 stated in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.

9 U.S.C. § 4 (1982). After the district court stayed Mercury's federal claim, the

stay of a mandatory arbitration proceeding violated FAA principles.[69] Justice Brennan emphasized that Congress intended that the FAA create a liberal policy in favor of arbitration.[70] The majority further noted that any doubts regarding the scope of arbitration should be resolved in favor of arbitration.[71] Finally, the majority acknowledged that the FAA provided expedient measures for courts petitioned with an arbitrable issue.[72]

The following year in *McDonald v. City of West Branch, Michigan*,[73] the Court unanimously held that a successful party in an arbitration proceeding could not assert the doctrines of res judicata and collateral estoppel in a subsequent judicial proceeding against the opposing party.[74] In *McDonald*, a police officer filed an unjust termination grievance with the City of West Branch (City) pursuant to a collective-bargaining agreement.[75] The grievance was arbitrated according to the agreement and the arbitrator found just cause for the termination.[76] Without appeal-

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United States Court of Appeals for the Fourth Circuit reversed the stay order and required that the case be submitted for arbitration. *Moses H. Cone*, 460 U.S. at 8.

69 *Id.* at 29. The Court also addressed whether a party was induced to sign the contract through fraudulent means. *Id. See also* Prima Paint Corp. v. Flood and Conklin Mfg. Corp., 388 U.S. 395 (1967). In *Prima Paint*, the Court upheld an agreement to arbitrate because, although there may have been fraud in the inducement of the contract, there was no fraud in the performance or making of the arbitration agreement. *Id.* at 402-04. Thus, there was no violation of § 3 of the FAA. *Id.* at 406-07.

The primary holding of the *Moses H. Cone* Court was that the district court abused its power in granting the stay of the federal claim. *Moses H. Cone*, 460 U.S. at 14. A stay in this case would effectively prevent Mercury from presenting its case in federal court. *Id.* at 10. For a stay to preside over a federal claim, a court must initially balance the following four factors: 1) the inconvenience of a federal forum; 2) which court initially assumed jurisdiction over the property in issue; 3) the avoidance of piecemeal litigation; and 4) the order in which each court obtained jurisdiction. *Id.* at 15-19. In the present case, the Court found that an application of the balancing test did not support the district court's decision to grant the stay. *Id.* at 19.

70 *Id.* at 24. *See* 9 U.S.C. § 2 (1982). The Justice noted that the FAA provided for federal law that compelled courts to favor arbitration as a means of dispute resolution. *Moses H. Cone*, 460 U.S. at 24-25.

71 *Id.* at 24.

72 *Id.* at 24-25. Arbitration should be enforced "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 25.

73 466 U.S. 284 (1984).

74 *Id.* at 290.

75 *Id.* at 285-86. McDonald was discharged on November 26, 1976. *Id.* at 285. The collective-bargaining agreement was between West Branch and the United Steel Workers of America. *Id.* The grievance alleged that there was no proper cause for his discharge. *Id.* at 286.

76 *Id.* at 286. Preliminary steps in the grievance procedure had been fruitless. *Id.*

ing the arbitrator's decision, the officer filed a claim in federal court alleging that he was terminated for exercising his First Amendment rights.[77] The United States Court of Appeals for the Sixth Circuit held that the officer's action was barred by the res judicata[78] and collateral estoppel[79] effects of arbitration.[80]

Writing for the Court, Justice Brennan held that federal courts should not allow res judicata and collateral estoppel to bar a statutory claim.[81] The Justice examined the statute's legislative intent and concluded that Congress intended that such claims be enforced in a judicial forum.[82] While recognizing that arbitration

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[77] *Id.* The claim was filed pursuant to 42 U.S.C. § 1983 (1988) which provided in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. Specifically, petitioner claimed he was properly exercising his freedoms of speech, association and the right to petition the government for redress of grievances. *McDonald*, 466 U.S. at 286. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

[78] *Id.* at 287 n.5. The Court "utilized the term 'res judicata' to refer to the effect of a judgment on the merits in barring a subsequent suit between the same parties or their privies that is based on the same claim." *Id.* Res judicata has also been defined as preventing "a plaintiff from suing on a claim that already has been decided and also prevents a defendant from raising any new defense to defeat the enforcement of an earlier judgment." *See* FRIEDENTHAL, *supra* note 47, § 14, at 607.

[79] *McDonald*, 466 U.S. at 287. The doctrine of collateral estoppel applies "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.* Collateral estoppel has also been defined as precluding "relitigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action." *See* FRIEDENTHAL, *supra* note 47, § 14, at 607.

[80] *McDonald*, 466 U.S. at 287. The jury returned a verdict in favor of all defendants except the Chief of Police of the City of West Branch, Paul Longstreet. *Id.* The Court explained that the agreement of the parties to settle their disputes, combined with the fair consideration of an arbitrator's discharge, denied any subsequent statutory action. *Id.* at 286-87.

[81] *Id.* at 292. The City alleged that the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982), applied in the case at hand and required that the arbitration award be given preclusive effect. *Id.* at 287. The Court, however, held that this statute was not applicable because it only applied to judicial proceedings. *Id.* at 288.

[82] *Id.* at 289. *See* Young, *Arbitration Can't Bar Section 1983 Suit*, 70 A.B.A. J. 113 (1984). The article noted:

adequately resolved contractual disputes, the Court posited that a judicial proceeding provided better protection of individual rights.[83]

One year later, however, the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[84] appeared to change its view on the enforceability of arbitration clauses.[85] In *Mitsubishi*, a Japanese corporation (Mitsubishi) entered into a sales contract with Soler Chrysler-Plymouth (Soler).[86] The agreement provided that all employer-employee disputes be settled according to the Japan Commercial Arbitration Association (JCAA) rules.[87] When a dispute between Soler and Mitsubishi regarding the shipment of automobiles could not be resolved,[88] Mitsubishi filed suit in federal court.[89] Soler counterclaimed that Mitsubishi violated federal antitrust laws and asserted that these counterclaims were inappropriate for arbitration.[90]

> An arbitrator's authority . . . comes from the law of the shop, not the law of the land, and even when provisions of a collective agreement conflict with rights guaranteed by Section 1983, the arbitrator must enforce the agreement. From this it is apparent . . . that an arbitration proceeding cannot provide an adequate substitute for a judicial trial in a civil rights suit.

Id. The *McDonald* Court held that preclusion of the claim due to an arbitration award would undermine the statutory intent. *McDonald*, 466 U.S. at 289.

83 *Id.* at 289-91. The Court recited those reasons specified in *Gardner-Denver* and *Barrentine* for the inadequacies of arbitration. *Id. See supra* notes 58-59.

84 473 U.S. 614 (1985).

85 *See id.*

86 *Id.* at 617. The parties engaged in an agreement to sell vehicles manufactured by Mitsubishi. *Id.* The Sales Procedure Agreement was entered into on October 31, 1979. *Id.*

87 *Id.* The agreement also provided that all arbitration should take place in Japan. *Id.*

88 *Id.* The dispute began in 1981 when a reduction in the amount of car sales resulted in a decline in Soler's sales volume. *Id.* Consequently, Soler asked Mitsubishi to cancel and delay several shipments. *Id.* Soler attempted to resolve the conflict by arranging for transshipment of some of its vehicles for sale in Latin America and the continental United States. *Id.* at 618. Mitsubishi refused to abide by such a request, and withheld an order for the shipment of 966 vehicles between May and July of 1981. *Id.*

89 *Id.* An action was filed in the United States District Court for the District of Puerto Rico to compel arbitration pursuant to the terms of the agreement. *Id.* Shortly thereafter, Mitsubishi filed to arbitrate with the JCAA. *Id.* at 619.

90 *Id.* at 619-21 (citing American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968)). The *American Safety* court held that antitrust laws were "of a character inappropriate for enforcement by arbitration." *American Safety*, 391 F.2d at 825. One of the statutes alleged to have been violated by Mitsubishi was the Sherman Act, 15 U.S.C. §§ 1 to 7 (1982). *Id.* at 619-20. Section 1 of the Sherman Act provided:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or

Justice Blackmun held that the FAA did not require an arbitration clause to specifically name all the statutes the clause was intended to cover.[91] The Justice observed that the era of judicial hostility toward arbitration was over and that arbitration was now a welcome means of dispute resolution.[92] Recognizing that the agreement intended to arbitrate all claims, the Court noted that absent fraud, Congress intended to uphold arbitration agreements unless specifically exempted.[93]

In the 1987 decision of *Shearson/American Express, Inc. v. McMahon*,[94] the Court clarified that all claims based upon an independent statutory right were not necessarily non-arbitrable.[95]

> with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982). Other Acts alleged to have been violated in the complaint include the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221 to 1225 (1988), the Puerto Rico Competition Statute, P.R. LAWS ANN. tit. 10, §§ 257 to 276 (1976), and the Puerto Rico Dealers Contracts Act, P.R. LAWS ANN. tit. 10, §§ 278 to 278(d) (1976 & Supp. 1983). *Id.* at 620. The United States District Court for the District of Puerto Rico enforced the arbitration agreement including the submission of federal antitrust claims. *Id.* The United States Court of Appeals for the First Circuit reversed the district court's decision to arbitrate the antitrust claims. *Id.* at 621-22.

91 *Id.* at 625. The Court noted that the policy behind the FAA was to create federal substantive law which would establish and regulate one's duty to abide by an agreement to arbitrate. *Id.*

92 *Id.* at 626-27. Justice Blackmun posited: "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 627.

93 *Id.* at 628. The Court articulated that the agreement should be enforced unless Congress intended to preclude waiver of a judicial forum within the statute or within its intent. *Id.* The Court further asserted that it must "rigorously enforce agreements to arbitrate." *Id.* at 625-26 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)). The Court also advanced that United States foreign policy interests demand that courts uphold dispute resolution via international arbitration agreements. *Id.* at 626. In rejecting the claim that parties would not expect a foreign arbitrator to address a federal court claim, Justice Blackmun observed that national courts may refuse to enforce an award if considered contrary to public policy. *Id.* at 627. *See generally* Joan S. Amon, Note, *Arbitration-Antitrust Claims-Enforceability of Arbitration Agreements on International Claims*, 10 SUFFOLK TRANSNAT'L L.J. 213 (1988). *See also* Note, *supra* note 1, at 469; Jill A. Pietrowski, Comment, *Enforcing International Commercial Agreements Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 36 AM. U. L. REV. 57, 85 (1986).

94 482 U.S. 220 (1987).

95 *Id.* at 238.

After suffering losses in several securities accounts,[96] the McMahons filed an action against their securities representative and Shearson/American Express, Inc. (Shearson).[97] The suit alleged violations of the Securities Exchange Act of 1934,[98] the Racketeer Influenced and Corrupt Organizations Act (RICO),[99] and several state laws.[100] In reliance on a customer agreement contract, both the representative and Shearson moved to compel arbitration pursuant to the FAA.[101]

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96 *See* Girault, *supra* note 1, at 284. Eugene and Julia McMahon, between 1980 and 1982, were customers of Shearson/American Express, Inc. *McMahon*, 482 U.S. at 233. Together and individually, the McMahons acted as trustees for various profit-sharing and pension plans. *Id.*

97 *Id.* at 223. The McMahons alleged that Shearson had knowledge of violations by one of its registered representatives mishandling the McMahon account, which included "engaging in fraudulent, excessive trading on respondent's [McMahon's] accounts and . . . making false statements and omitting material facts from the advice given to respondents." *Id.*

98 17 C.F.R. §§ 240.0-1 to 450.5 (1987). Section 10(b) of the Securities Exchange Act of 1934 provided that it shall be unlawful for any person:

> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive or other fraudulent device or contrivance."

17 C.F.R. § 240.10b-3 (1987). Rule 10b-5 provided:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (1) To employ any device, scheme, or artifice to defraud,
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

99 18 U.S.C. § 1961 to 1968 (1982). The statute provided, in pertinent part: "any offense involving . . . fraud in the sale of securities. . ." shall be considered a "racketeering activity." *Id.* § 1961. RICO further mandated that any person who receives income, either directly or indirectly, through any method that may constitute racketeering activity, shall be liable for criminal penalties consisting of fines up to $25,000 or imprisonment of up to 20 years, and/or civil remedies through the United States district courts. *See id.* §§ 1963, 1968.

100 *McMahon*, 482 U.S. at 223. The state law claims alleged fraud and breach of fiduciary duties. *Id.*

101 *Id.* at 223. The United States District Court for the Southern District of New York held that the McMahons' claims were arbitrable under the Securities Exchange Act of 1934, but the United States Court of Appeals for the Second Circuit reversed. *Id.* at 223-24. The district court rejected the McMahons' argument that upholding the arbitration was supportive of a contract of adhesion. *Id.* The district court reaffirmed its support for a "strong national policy favoring the enforcement

The Court held that the FAA controlled unless expressly overridden by the statute under which the independent right was claimed.[102] Justice O'Connor acknowledged that the burden

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of arbitration agreements." *Id.* at 224 (citing Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985)). The court of appeals held that the RICO claims were inappropriate for arbitration because a RICO plaintiff assumes the role of a "private attorney general" who protects the public interest. *Id.* Thus, the court of appeals asserted that it was only appropriate that such claims be adjudicated in a public judicial forum rather than in a private arbitral forum. *Id.*

[102] *McMahon*, 482 U.S. at 226-27. In so holding, the Court effectively overruled the case of Wilko v. Swan, 346 U.S. 427 (1953). *See id.* at 228-29. In *Wilko*, the Court resolved opposing positions of the FAA and the Federal Securities Act of 1933 (FSA), holding that the FSA trumped the provisions of the FAA and, thus, an arbitration agreement formulated pursuant to the provisions of the FAA would be deemed invalid. *Id.* at 428-38. Subsequently, the Court attempted to clarify the inconsistent holdings of *McMahon* and *Wilko*. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)). In *Rodriguez*, securities investors signed an agreement which included the settlement of disputes through arbitration. *Id.* at 478. The petitioners invested approximately $400,000 in securities and signed a standardized customer agreement which provided that the parties agreed to settle any disputes "relating to accounts" through binding arbitration. *Id.* The agreement to arbitrate was unqualified, unless violative of federal or state law. *Id.* The investors filed suit in federal district court, alleging fraud and violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. *Id.* at 478-89. Specifically, petitioners filed claims under section 12(2) of the Securities Act of 1933 and the Securities Exchange Act of 1934. *Id.* The district court ordered most claims to be submitted for arbitration, but the court of appeals reversed. *Id.*

On certiorari, the Supreme Court reaffirmed that arbitration agreements are valid and enforceable under the Securities Act of 1933. *Id.* at 485. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (upholding arbitration of claims asserted pursuant to the Securities Exchange Act of 1934). *Cf.* Wilko v. Swan, 346 U.S. 427 (1953) (rejecting arbitration of claims asserted pursuant to the Securities Act of 1933). The Court asserted that the Securities Act of 1933 protected the rights of investors, and precluded a waiver of those rights. *Id.* (citing Wilko v. Swan, 346 U.S. 427, 437 (1953)). *See also Generating Precedent in Securities Industry Arbitration*, 19 SEC. REG. L.J. 26, 27 n.3. (1991). Moreover, the Court noted that the congressional grant of concurrent jurisdiction in the Securities Act of 1933 authorized the right to waive a judicial forum in favor of arbitration. *See Rodriguez*, 490 U.S. at 481. The *Rodriguez* Court asserted that the investors failed to prove that a waiver of judicial proceedings conflicted with the purpose of the statute. *Id.* at 485-86. In *Rodriguez*, Justice Steven's dissent chastised the judicial activism of the majority in overruling *Wilko*, and protested that in over 30 years since that decision, Congress had made no attempt to correct the alleged improper judicial interpretation of the 1933 Act. *Id.* at 486 (Stevens, J., dissenting). The Justice agreed that under the 1933 Act, the party opposed to arbitration maintains the burden of proving that Congress intended to show that either a different statute intended "to preclude a waiver of judicial remedies" or that enforcing the agreement for arbitration would conflict with the purpose of another statute. *Id. See* 9 U.S.C. § 2 (1982).

The dissent maintained that when a matter is non-constitutional in nature, the Court should be less inclined to change the law under public policy considerations and should leave any amendments to Congress. *Id.* Justice Stevens noted that "after a statute has been construed . . . by this Court . . . it acquires a meaning that

rests on the party opposing the arbitration to prove either that Congress intended judicial enforcement or that arbitration conflicted with the statute's purpose.[103] Applying that standard to the facts, Justice O'Connor concluded that neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 evidenced a congressional intent to enforce such claims solely through judicial proceedings.[104] In addition, the Justice could not find a legislative intention to exclude RICO claims from arbitration.[105]

Against this background, the United States Supreme Court addressed whether an arbitration agreement in a securities registration application governed a claim brought under the ADEA in the 1991 decision, *Gilmer v. Interstate/Johnson Lane Corp.*[106] Justice White began by characterizing the purpose of the FAA.[107] The Court endorsed the applicability of the FAA and its purpose of enforcing arbitration agreements as the equivalent of other contracts.[108] Further, the Court indicated that the FAA liberally stayed other claims in the federal courts when an issue was referable to arbitration.[109] In addition, the majority noted that orders to compel arbitration were issued pursuant to the FAA when a party refused, neglected or failed to submit to the terms of the arbitration agreement.[110] Justice White recognized that such

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should be as clear as if the judicial gloss had been drafted by the Congress itself." *Id.* at 487 n.2. The Justice advocated that, due to the lack of interest by Congress to overturn years of precedent, the Court should not uphold arbitration agreements under the Securities Act of 1933. *Id.* at 487 (Stevens, J., dissenting) (citing Boyle v. United Technologies Corp., 487 U.S. 500 (1988)).

See also Jean Rowley Robertson, Note, *Rodriguez de Quijas v. Shearson/American-Express, Inc.: The Enforceability of Predispute Arbitration Clauses in Brokerage Firm Contracts*, 5 OHIO ST. J. ON DISP. RESOL. 159, 182 (1989)(arguing that the dissent lost the arbitration battle on policy grounds).

103 *McMahon*, 482 U.S. at 227. Justice O'Connor noted that such intent would be evident through the text of the statute or in the legislative history. *Id.*

104 *Id.* at 223. The McMahons alleged that legislative intent to determine Section 10(b) questions judicially could be deduced from Section 29(a) of the Exchange Act. *Id. See also* 15 U.S.C. § 77cc(a). That section declared void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]." *Id.* The Court held that this section prohibits waiver of any substantive obligations of the 1934 Exchange Act. *McMahon*, 482 U.S. at 228.

105 *McMahon*, 482 U.S. at 238. The McMahons argued that RICO claims were too complex for arbitration. *Id.* The Court noted, however, that in *Mitsubishi*, it upheld arbitration of federal antitrust claims that were equally complex. *Id.* at 239.

106 111 S. Ct. 1647 (1991).

107 *Id.* The Court noted that the FAA was enacted to reverse the trend of judicial hostility toward arbitration which had originated at English common law. *Id.*

108 *Id.* at 1651 (citing Dean Witter Reynolds v. Byrd, 470 U.S. 213, 219-20 n.6 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974)).

109 *Id.*

110 *Id.*

measures to compel arbitration displayed a congressional attempt to strengthen and expand FAA application.[111]

The Court then asserted that the FAA was applicable to the present case.[112] Justice White acknowledged that the Court received several amicus briefs that addressed the coverage of the FAA but emphasized that Gilmer's petition for certiorari never questioned specifically whether his claim fell within the FAA's scope.[113] Thus, the Justice noted that the Court would not consider this issue and that Gilmer could raise it at another time.[114] Justice White asserted that the arbitration agreement was not an employment contract because the clause appeared in a securities agreement and not a written agreement with Gilmer's employer.[115] Further supporting this position, Justice White recalled that the Court previously applied the FAA to an arbitration clause in a securities application.[116] The majority asserted that it would not depart from this precedent and maintained that the FAA similarly applied to the arbitration clause in Gilmer's NYSE application.[117]

After finding that the FAA applied, Justice White asserted that pursuant to the terms of the FAA, statutory claims were subject to arbitration.[118] The Court, however, noted that not all statutory claims were appropriate for arbitration.[119] The Justice reasoned that unless Congress intended the issue to be addressed in a judicial forum, a contract to arbitrate should be upheld.[120] Therefore, the majority placed the burden upon Gilmer to prove that Congress intended to "preclude a waiver of a judi-

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111 *Id.* Justice White also noted that such FAA measures served to enhance a "liberal federal policy favoring arbitration agreements." *Id.* (citing Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

112 *Id.* at 1651-52 n.2.

113 *Id.* at 1651 n.2.

114 *Id.* at 1652 n.2.

115 *Id.* at 1651-52 n.2. The Court posited that Gilmer did not assert that the arbitration clause was contained within the employment agreement with Interstate. *Id.*

116 *Id.* at 1652. *See* Perry v. Thomas, 482 U.S. 483, 491 (1987).

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

118 *Id.* at 1652. Justice White asserted that the Court has recently upheld agreements to arbitrate claims arising out of the Sherman Act, Section 10(b) of the Securities Exchange Act of 1934, Section 12(2) of the Securities Act of 1933, and provisions of the RICO statute. *Id.*

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

120 *Id.* (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

cial forum for ADEA claims."[121] The Court maintained that any such congressional intention would be discoverable either in the ADEA's text or legislative history or in any possible conflicts between the ADEA's purpose and an arbitration proceeding.[122]

Because the ADEA's text and legislative history were not at issue, Justice White focused on whether the ADEA's underlying policies would be subverted by permitting arbitration.[123] Accordingly, the majority set forth the ADEA's goals — foster the employment of older persons, prohibit age-based employment discrimination and encourage the resolution of age-related problems that arise between employers and employees in the workplace.[124] Justice White refuted Gilmer's assertions that these important goals would be sacrificed if his ADEA claim was arbitrated.[125]

The Court first dismissed Gilmer's contention that the ADEA's social policy would not be achieved through arbitration.[126] Instead, Justice White maintained that arbitration could advance public policy as effectively as judicial determinations.[127] The Justice further posited that an effective arbitration would both remedy the immediate harm and deter future improper conduct.[128]

Further, the Court dismissed Gilmer's argument that arbitration would compromise the EEOC's role in implementing the ADEA's policies.[129] Rather, the Justice explained that a claimant

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121 *Id.* (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987)).

122 *Id.* The Court stated that throughout its inquiry, "questions of arbitrability must be addressed with a healthy regard for arbitration." *Id.*

123 *Id.*

124 *Id.* (citing the ADEA, 29 U.S.C. § 621(b) (1982)). The ADEA provided: "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1982).

125 *Gilmer*, 111 S. Ct. at 1653.

126 *Id.* Gilmer maintained that the ADEA was created not only to protect individual claims, but also to advance public policy. *See e.g.*, EEOC v. Wyoming, 460 U.S. 226, 231 (1983) (holding that Tenth Amendment does not preclude the power of Congress under the commerce clause to extend provisions of the ADEA to cover both state and local governments).

127 *Gilmer*, 111 S. Ct. at 1653 (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

128 *Id.* Justice White stated: "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* (quoting Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985)).

129 *Id.* The Court then posited that Gilmer himself did, in fact, file a claim with

would still be able to file an EEOC claim even if the claimant was not entitled to a private judicial proceeding.[130] Moreover, Justice White remarked that arbitration should not be precluded just because an administrative agency was involved in statutory enforcement.[131]

The majority then rejected Gilmer's argument that compulsory arbitration was flawed because it deprived petitioners of their ADEA rights to access a judicial forum.[132] The Court acknowledged that the ADEA's language did not specifically preclude arbitration.[133] Further, the Court maintained that if Congress intended claimants to be deprived of an arbitral remedy, it would have been expressly stated in the recent ADEA amendments.[134] The Court reasoned that the ADEA provisions were subject to flexible interpretation and may include the right to an arbitral remedy.[135] Justice White also maintained that such an interpretation was consistent with the congressional grant of concurrent jurisdiction over ADEA claims to both federal and state courts.[136]

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the EEOC. *Id.* Justice White also noted that the EEOC has been granted statutory power to become involved in the investigation of such charges. *Id.*

130 *Id. See* 29 C.F.R. §§ 1626.4, 1626.13 (1990). The statute provided:

> The [EEOC] may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations, in accordance with the powers vested in it pursuant to § 5 and 7 of the Act. The [EEOC] shall also receive information concerning alleged violations of the Act, including charges and complaints, from any source. Where the information discloses a possible violation, the appropriate [EEOC] office may render assistance in the filing of a charge. The identity of a complaint, confidential witness, or aggrieved person on whose behalf a charge was filed will ordinarily not be disclosed without prior written consent, unless necessary in a court proceeding.

Id. See also supra note 18.

131 *Gilmer*, 111 S. Ct. at 1653.

132 *Id.* at 1653-54.

133 *Id.* Specifically, the Court stated that "[i]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deductible from text or legislative history." *Id.* (quoting Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

134 *Id.*

135 *Id.*

136 *Id.* (citing ADEA, 29 U.S.C. § 626(c)(1)(1987)). The ADEA provided:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid

Justice White then repudiated Gilmer's contention that arbitration was generally an inadequate means of resolving disputes.[137] Specifically, the Court rejected the argument that arbitration panels were biased and referred to the NYSE arbitration rules that required disclosure of arbitrators' employment histories and any other relevant information that may interfere with an arbitrator's ability to reach an objective and impartial result.[138] The majority set forth additional safeguards against potential bias, such as the allowance of one peremptory challenge

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> overtime compensation for purposes of sections 216 and 217 of this title: Provided, that liquidated damages shall be payable only in cases of wilful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the EEOC shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Id. 19 U.S.C. § 626(c)(1)(1987).

137 *Gilmer*, 111 S. Ct. at 1654. The Court noted that it had previously declared that arbitration was an inferior method of dispute resolution compared to the judicial process. *Id.* at 1656. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

The Court justified its growing acceptance of arbitral forums by noting that "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 1656 n.5 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27 (1985)).

138 *Id. See* 2 N.Y.S.E. GUIDE (CCH) ¶ 2608, at 4314 (1991). The Rule declared:

> The Director of Arbitration shall inform the parties of the names and employment histories of the arbitrators for the past 10 years, as well as information disclosed pursuant to Rule 610, at least 8 business days prior to the date fixed for the initial hearing session. A party may make further inquiry of the Director of Arbitration concerning an arbitrator's background. In the event that any arbitrator, after appointment and prior to the first hearing session, should resign, die, withdraw, be disqualified or otherwise be unable to perform as an arbitrator, the Director of Arbitration shall appoint a new member to the panel to fill any vacancy. The Director of Arbitration shall inform the parties of the name and employment history of the replacement arbitrator for the past 10 years, as well as information disclosed pursuant to Rule 610, as soon as possible. A party may make further inquiry of the Director of Arbitration concerning the background of the replacement arbitrator and within the time remaining prior to the first hearing session or the 5-day period provided under Rule 609, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Rule 609.

Id.

per party and a limited number of challenges for cause.[139]

The Court next determined that although the arbitral process allowed for relatively limited discovery compared to judicial proceedings, the amount of permissible discovery was not inadequate to resolve an age discrimination claim.[140] Justice White noted that no more discovery was needed to prove this type of claim than to resolve other claims that the Court previously held as arbitrable.[141] Further, the Justice asserted that Gilmer made an inadequate showing that the specific scope of discovery allowed under the NYSE rules precluded a justifiable resolution.[142] Moreover, Justice White asserted that a party automatically relinquished its entitlement to full discovery and a formal courtroom setting when it agreed to arbitrate.[143]

Additionally, the Court dismissed Gilmer's complaint that he would not have the benefit of obtaining a written opinion of the arbitrator's decision.[144] Justice White noted that Gilmer claimed that the absence of a written opinion would not only harm his chances for appellate review, but also deprived the public of the knowledge of his employer's discriminatory practices.[145] The majority responded, however, that NYSE rules required all arbitration decisions to be in writing and publicly disclosed.[146]

Justice White next addressed Gilmer's argument that arbitration proceedings did not further the principles of the ADEA because they did not provide for equitable relief and class

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139 *Gilmer*, 111 S. Ct. at 1654. *See* 2 N.Y.S.E. GUIDE ¶ 2609, at 4314 (1984). A challenge for cause is a request to a judge that a prospective juror not be allowed to serve on the jury for some specific cause or reason, such as the juror's disqualification under the provisions of the statute. Sellers v. Great Southern Life Ins. Co., 118 S.W. 612 (1938). A peremptory challenge is one which may be made without any specific reason or cause. Swain v. Alabama, 380 U.S. 202 (1965).

140 *Gilmer*, 111 S. Ct. at 1654-55.

141 *Id.* at 1655.

142 *Id.* (citing 2 N.Y.S.E. GUIDE (CCH) ¶ 2620, at 4320 (1989)). The Rule provided: "arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence." 2 N.Y.S.E GUIDE (CCH) ¶ 2620, at 4320 (1989).

143 *Gilmer*, 111 S. Ct. at 1655 (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

144 *Id.*

145 *Id.* Gilmer also advanced that the deprivation of written opinions would hinder the law's development. *Id.*

146 *Id. See also* 2 N.Y.S.E. GUIDE (CCH) ¶ 2627(a), at 4321 (1989). The Rule maintained: "all awards shall be in writing and signed by a majority of the arbitrators or in such a manner as is required by law. Such awards may be entered as a judgment in any court of competent jurisdiction." 2 N.Y.S.E. GUIDE (CCH) ¶ 2627(a), at 4321 (1989).

actions.[147] The Justice rejected this contention and noted that, in fact, arbitrators may propose equitable relief.[148] The majority also acknowledged that the NYSE rules provided for class actions.[149] Further, the Court asserted that the EEOC was not precluded from suing for equitable and class-wide relief.[150]

In addition, the Court opined that unequal bargaining power between employees and employers would not render arbitration agreements unenforceable in employment disputes.[151] Justice White reasoned that the FAA was created to place arbitration agreements and contracts on equal ground unless there was evidence of coercion or fraud.[152] Noting Gilmer's extensive experience and savvy in conducting business, the Court found that Gilmer was not defrauded, coerced or otherwise disadvantaged in the bargaining arrangement.[153]

Next, the Court considered Gilmer's contention that Supreme Court precedent in employment discrimination favored adjudication of such claims through a judicial proceeding.[154] In these cases, the Court held that the Fair Labor Standards Act and the First Amendment claims arising under the guise of a collective-bargaining agreement were not arbitrable.[155]

Justice White explained that these cases were distinguishable

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147 *Gilmer*, 111 S. Ct. at 1655.

148 *Id.* (citing 2 N.Y.S.E. GUIDE (CCH) ¶ 2627(e), at 4321 (1989)). The Rule provided:

> The award shall contain the names of the parties, a summary of the issues in controversy, the damages and/or other relief requested, the damage and/or relief award, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearing, and the signatures of the arbitrators concurring in the award.

2 N.Y.S.E. GUIDE (CCH) ¶ 2627(e), at 4321 (1989).

149 *Gilmer*, 111 S. Ct. at 1655 (citing 2 N.Y.S.E. GUIDE (CCH) ¶ 2612(d), at 4317 (1989)). That provision maintained that questions as to multiple parties shall be addressed by the arbitration panel. 2 N.Y.S.E. GUIDE (CCH) ¶ 2612(d), at 4317 (1989).

150 *See id.*

151 *Gilmer*, 111 S. Ct. at 1655.

152 *Id.* at 1655-56 (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)). Justice White noted that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract. . . ." *Id.*

153 *Gilmer*, 111 S. Ct. at 1656.

154 *Id. See* McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981).

155 *Gilmer*, 111 S. Ct. at 1656.

for three different reasons.[156] First, Justice White noted that the prior cases involved the agreement to arbitrate contract-based claims, not statutory claims.[157] Second, Justice White emphasized that the context of the earlier cases differed because they concerned collective-bargaining agreements between labor unions and management[158] and not between individual employees and their employers.[159] Finally, Justice White posited that the prior cases were not decided within the context of the FAA, which favored arbitration agreements.[160] Accordingly, the Court concluded that Gilmer failed to demonstrate a congressional intention to prevent arbitration of ADEA claims.[161]

In a spirited dissent, Justice Stevens, joined by Justice Marshall, renounced the majority's enforcement of the arbitration agreement against Gilmer for primarily two reasons.[162] Justice Stevens forcefully contended that the agreement was not enforceable under the FAA because it was a condition of Gilmer's employment and, thus, specifically excluded from FAA coverage as an employment contract.[163] Further, the Justice advised that enforcement of the agreement contradicted the ADEA's legislative principles.[164]

The dissent began by accusing the majority of evading the

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156 *Id.* (citing McDonald v. West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)).

157 *Id.* Justice White explained the distinction by acknowledging that "since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Id.*

158 *Id.*

159 *Id.*

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

161 *Id.*

162 *Id.* (Stevens, J., dissenting).

163 *Id.* The "FAA's General Provisions" section specifically exempts both "maritime transactions" and "commerce" from Title 9. *See* 9 U.S.C. § 1 (1982). The statute provided, in pertinent part:

> '[C]ommerce', as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any state or foreign nation, or between the District of Columbia and any state or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Id.

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

important threshold issue whether the FAA applied to employment contracts.[165] Justice Stevens acknowledged that Gilmer did not question the FAA's applicability at any point in the proceedings below,[166] but insisted that the Court should still address the issue.[167] In support of Gilmer's position, the Justice pointed out that the merits of the issue appeared in amici curiae briefs for each side[168] and argued by both parties at oral argument.[169] Moreover, Justice Stevens viewed the issue as a threshold question requiring resolution before discussing the remaining issues in the case.[170] The Justice argued that a determination on the FAA's applicability was "clearly antecedent" to a ruling that the FAA required arbitration of ADEA claims.[171] Thus, Justice Stevens criticized the Court for not first addressing the FAA's applicability.[172]

Justice Stevens then concluded that the FAA was not applicable to employment contracts.[173] The Justice first maintained that

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165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.* (citations omitted). Specifically, the rule stated:

> A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae in the oral argument will be granted only for extraordinary cause.

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

170 *Id.* at 1657-58 (Stevens, J., dissenting).

171 *Id.* at 1658 (Stevens, J., dissenting).

172 *Id.* The dissent noted that in the present term, the Court has twice taken sua sponte consideration of claims not addressed either in lower courts or in petitions for certiorari. *Id.* (citing Arcadia v. Ohio Power Co., 111 S. Ct. 415 (1990); McCleskey v. Zant, 111 S. Ct. 1454 (1991)). In *McCleskey*, the Court decided the case on an issue that was not before the Court either from below or even anticipated as an issue. *McCleskey*, 111 S. Ct. at 1477 (Marshall, J., dissenting). In *Arcadia*, the Court decided an issue that was neither raised below nor addressed in papers to the Court or during oral argument. *Arcadia*, 111 S. Ct. at 419. The Court justified its action by stating that the question was "antecedent to these [issues presented] and ultimately dispositive of the present dispute." *Id.*

173 *Gilmer*, 111 S. Ct. at 1658-59 (Stevens, J., dissenting).

the FAA expressly stated that employment contracts for seamen, railroad personnel, or any other employees involved in foreign or interstate commerce were exempt from FAA coverage.[174] Consequently,[175] Justice Stevens advanced that Congress intended arbitration agreements in all employment contracts to be exempt from FAA coverage.[176] The Justice further contended that the FAA's legislative history clearly stated that the statute did not apply to labor disputes.[177]

Thus, Justice Stevens asserted that the FAA did not apply to Gilmer's arbitration agreement which arose in the context of an employer-employee relationship.[178] The Justice adamantly rejected the majority's position that Gilmer's arbitration agreement was not technically a "contract of employment" within the FAA's meaning because it arose in a NYSE agreement rather than in one with his employer, Interstate.[179] Justice Stevens advocated that because Gilmer signed the agreement as a condition of his employment, the agreement should be liberally interpreted as a "contract of employment," and thus exempted from the purview of the FAA.[180] Therefore, the dissent declared that Gilmer's agreement to arbitrate disputes with his employer was unenforceable under FAA mandates.[181]

Moreover, the dissent denounced compulsory arbitration of Gilmer's claim because arbitration undermined the congressional purpose behind the ADEA.[182] Justice Stevens framed the ADEA's fundamental goal as the elimination of discrimination from society.[183] The Justice perceived the need for broad, class-wide injunctive relief to adequately further this goal.[184] Thus, the Justice concluded that arbitration conflicted with the ADEA's purposes because arbitration centered on specific disputes and generally did not provide a pervasive remedy.[185]

Justice Stevens then analogized the ADEA to Title VII and advocated that both acts authorized courts to grant broad injunc-

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174 *Id.* at 1659 (Stevens, J., dissenting) (citing 9 U.S.C. § 1 (1982)).
175 *See supra* note 163 for full text of 9 U.S.C. § 1 (1982).
176 *Gilmer*, 111 S. Ct. at 1659.
177 *Id.* (citation omitted).
178 *Gilmer*, 111 S. Ct. at 1659.
179 *Id.*
180 *Id.*
181 *Id.* at 1660 (Stevens, J., dissenting).
182 *Id.*
183 *Id.*
184 *Id.* (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975)).
185 *Id.*

tive relief to eliminate discrimination.[186] The Justice cautioned that the majority's holding would create dangerous precedent by granting discriminating employers the right to contract away an employee's right to the judicial process.[187] Justice Stevens alleged that the majority overlooked the crucial role that an independent judiciary plays in abolishing employment discrimination.[188]

Finally, Justice Stevens expressed concern that the parties' unequal bargaining power tainted the arbitration agreement.[189] The dissent characterized the majority's FAA interpretation and the Court's interpretation in prior cases as a gradual judicial rewriting of the statute.[190] Justice Stevens admonished the Court for extending the FAA beyond its intended boundaries and concluded that Gilmer's ADEA claim should not be subjected to compulsory arbitration.[191]

It is difficult to find recent case law that does not praise the virtues of arbitration.[192] The benefits of judicial and fiscal efficiency, however, should not derive greater consideration than the grave consequences a party may suffer when forced to submit to an arbitration proceeding.[193] Although Congress acted in the early twentieth century to promote the arbitration process, the Court's current extension of such dispute resolution mechanisms goes far beyond the limits Congress originally envisioned.[194]

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186 *Id.*

187 *Id.* Specifically, Justice Stevens asserted:

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

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

188 *Gilmer*, 111 S. Ct. at 1660-61 (Stevens, J., dissenting).

189 *Id.* at 1661 (Stevens, J., dissenting).

190 *Id.* (citing Perry v. Thomas, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting).

191 *Id.* (Stevens, J., dissenting). The dissent also asserted that not until *Gilmer* did the Court broadly interpret section 2 of the FAA to encompass disputes arising out of employer-employee relationships. *Id.*

192 *See generally*, Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 429-30 (1988)(noting current enthusiasm for procedural substitutes such as consensual arbitration).

193 *See* Kenneth R. Dolin & Brian W. Bulger, *Termination of Grievance Proceedings When Employees File Discrimination Charges*, 13 EMPLOYEE RELATIONS L.J. 249, 250 (1987).

194 *See supra* note 4.

The *Gilmer* Court first erred by refusing to initially address whether Gilmer's agreement fell within the FAA's scope.[195] The Court also wrongfully determined that Gilmer's arbitration agreement was not an employment contract.[196] The *Gilmer* majority disregarded precedent and narrowly interpreted section 1 of the FAA to exclude only certain employment contracts.[197] Thus, the Court improperly dismissed the possibility that Gilmer's securities agreement was an employment contract because Gilmer had to comply with the NYSE as an employment condition.[198] Instead of viewing the agreement as a completely separate entity from an employment contract, the Court should have considered the possibility that Gilmer's agreement could have been viewed as part of an employment contract.

Perhaps the Court would not have strictly interpreted the FAA if it had more fully examined the legislative intent behind the FAA.[199] It is quite possible that, with labor unions just coming of age in the mid-1920s when the FAA was enacted, Congress did not envision the complex employment issues we face today. Thus, all agreements relative to the creation of an employment contract should fall within the FAA's exemption provision.[200]

The *Gilmer* holding, nonethess, was appropriate as applied to its facts. The Court properly dismissed Gilmer's criticisms of the arbitral process because these allegations were resolved according to NYSE rules.[201] The specific NYSE rules ensured that arbitration, in this case, would be fair. To some extent, the Court's expansion of the FAA was justified.

Unfortunately, however, future employees may suffer the burden of unequal bargaining power that may be further exacerbated by the possibility that employees may fall victim to contracts of adhesion.[202] These employment contracts, or agreements pursuant to employment obligations, require em-

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195 *See supra* notes 165-72 and accompanying text.

196 *See* Barbara R. Arnwine, Thomas J. Henderson & Richard T. Seymour, *Brief for the Lawyer's Committee for Civil Rights under Law as Amicus Curiae in Support of the Petitioner*, Gilmer v. Interstate/Johnson Lane Corp., No. 90-18 (Nov. 15, 1990)(arguing that Fourth Circuit incorrectly ignored FAA's exclusion of employment contracts from arbitration and Congress's general insistence to necessitate court remedies for civil rights violations pursuant to Title VII).

197 *See supra* notes 114, 163.

198 Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1650 (1991).

199 *See supra* note 4.

200 *Gilmer*, 111 S. Ct. at 1659 (Stevens, J., dissenting).

201 *See supra* notes 132-53 and accompanying text.

202 *See supra* notes 189-91 and accompanying text.

ployees to rely heavily upon organized labor to equalize their disparaged bargaining strength. In a period of suppressed labor strength, the *Gilmer* holding creates a void in future labor-management relations. Further, if the Court denounced mandatory arbitration provisions in the areas of labor, civil and First Amendment rights,[203] why should employment discrimination be treated differently and not benefit from the protection of judicial proceedings?

Individuals must not be led to believe that a simple deviation from equal bargaining strength is grounds for non-enforcement of an agreement to arbitrate a claim. It would be inefficient to encourage more suits based upon unequal bargaining power because the employee is almost always in an inferior bargaining position. The Court should weigh these arguments on a case-by-case basis. In circumstances with potentially valid claims, the *Gilmer* decision is a dangerous precedent if courts choose to ignore these claims by stating that the FAA does not apply.

While both Congress and the United States Supreme Court can determine how far the FAA should reach in the future, it appears that only Congress now has the power to reverse the trend of the Court. Congress, however, has remained inactive in recent decades and the Court has manipulated the FAA by increasing the scope of arbitrations without defined limits. This current trend may provide for the efficiency and economy originally intended by Congress, but also has the potential to thwart employees in their attempts to resolve employment-related disputes.

Michael T. Sweeney

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[203] *See* McDonald v. City of West Branch, 466 U.S. 284 (1984) (claims under 42 U.S.C. § 1983; Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) (FLSA claims); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)(Title VII action).