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Arbitration and the Goals of Employment Discrimination Law

Geraldine Szott Moohr*

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I. Introduction

> [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.[1]

With these words, the Supreme Court assumed that the public goal of ending workplace discrimination is achieved when individual employees arbitrate their claims in a fair and effective manner. This Article examines that assumption and reaches a contrary conclusion: arbitration is not an effective forum in which to satisfy the public policy goals of the employment discrimination statutes, even when employees are accorded a fair hearing.

In *Gilmer v. Interstate/Johnson Lane Corp.*,[2] the Court ruled that an employment discrimination statute does not bar the enforcement of a contractual agreement to arbitrate claims brought under that statute.[3] As a result,

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1. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).

2. 500 U.S. 20 (1991).

3. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (upholding arbitration of claim arising under Age Discrimination in Employment Act).

employees who have agreed to arbitrate workplace disputes may not file employment discrimination suits in court. This decision reallocates jurisdiction over employment discrimination claims from the public judicial system to a private forum.[4] Resolving workplace discrimination claims in a private forum is problematic for at least two reasons. First, employees may find that arbitration is a less congenial forum than litigation in a public court. Second, the public goal of ending workplace discrimination may not be furthered when parties arbitrate these cases. This Article focuses on the second issue.

The public obviously does not realize its interest in ending discrimination if employees cannot enforce their statutory rights in the arbitration forum. The converse presents a more complicated question: Is the public goal met when arbitration vindicates individual rights? The question is of more than theoretical interest because the answer has a bearing on significant issues that *Gilmer* raised or left unanswered.[5] A proper resolution of these and other

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4. *See* Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 678 (noting that *Gilmer* begins "potentially vast reallocation of jurisdiction over employment disputes from civil courts and administrative agencies to privately selected arbitrators"); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1, 2 (1996) (stating that Supreme Court's arbitration decisions have "created the potential for wholesale diversion of employment-related disputes . . . from litigation to arbitration").

5. The Supreme Court has not determined the scope of a statutory exclusion regarding classes of workers in the Federal Arbitration Act (FAA). *See* 9 U.S.C. § 1 (1994) ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."). Some courts have held that the exclusion applies only to employees actually engaged in commerce. *See, e.g.*, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1471 (D.C. Cir. 1997) (stating that "every circuit to consider this issue squarely has found that section 1 of the FAA exempts only the employment contracts of workers actually engaged in the movement of goods in interstate commerce"); Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (7th Cir. 1997) (stating that "it seems to [the court] as it did to the Third Circuit . . . that [the history of § 1] supports rather than undermines limiting 'engaging in Foreign or interstate commerce' to transportation"); Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir. 1996) (stating that court "agree[s] with the majority of other courts which have addressed this issue and conclude[s] that § 1 is to be given a narrow reading"); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 599 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to employment contracts . . . .").

Second, Supreme Court rulings have produced some tension between commercial arbitration of employment discrimination claims and arbitration of these claims in unionized settings. Although the Court recently heard a case that promised to resolve this problem, it failed to reach the issue. *See* Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391, 397 (1998) ("We do not reach the question whether such a waiver [of judicial relief] would be enforceable."); *see also infra* note 72 (discussing *Wright*).

Third, the circuits are split on the import of a provision in the 1991 Civil Rights Act that has been interpreted both to encourage arbitration and to limit arbitration. *Compare* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1196 (9th Cir. 1998) (opining that Congress's

issues is important also because a growing number of employers[6] and busi-

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intent in drafting § 118 was "to codify its position that 'compulsory arbitration' of Title VII claims was not 'authorized by law' and that compelling employees to forego their rights to litigate future Title VII claims as a condition of employment was 'not appropriate'") *with* Seus v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998) (stating that certain remarks in Congressional committee report could not be interpreted to repeal impliedly FAA and disagreeing with result reached in *Duffield*). *See also infra* text accompanying notes 316-18 (discussing § 118).

Fourth, the Ninth Circuit adopted a standard for the waiver of statutory rights that differs from those in other circuits. *Compare* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (holding that employees must "knowingly contract to forego their statutory remedies in favor of arbitration"), *with Seus*, 146 F.3d at 184 ("Nothing short of a showing of fraud, duress, mistake, or some other ground recognized by the law applicable to contracts generally would have excused the district court from enforcing [the plaintiff's] agreement."), EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500, 504 (E.D. Mich. 1997) (calling *Prudential* decision "widely criticized"), Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1453-56 (D. Minn. 1996) (enforcing arbitration agreement against plaintiff who did not read it), Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091, 1096-97 (E.D. Mich. 1996) (criticizing *Prudential* decision), *and* Maye v. Smith Barney, Inc., 897 F. Supp. 100, 107 (S.D.N.Y. 1995) (distinguishing *Prudential*).

6. *See* U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 7-8 (July 1995) (indicating that 10% of companies with more than 100 employees use private arbitration systems and additional 8.4% are considering option); David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823, 824-25 (1990) (finding that 17% of nonunion businesses had arbitration systems for manufacturing employees, 24% used arbitration for clerical employees, 21% for professional and technical employees, and 20% for managers); *see also* Mei Bickner et al., *Developments in Employment Arbitration*, 52 DISP. RESOL. J., Jan. 1997, at 8, 78 (finding that employers implemented 85% of arbitration procedures after *Gilmer*, with 20% of these implemented since 1995); *ADR News: 500 Attend Superconference in Washington*, 52 DISP. RESOL. J., Summer 1997, at 4, 5 (noting that, as of summer 1996, American Arbitration Association administered ADR programs of almost 300 large corporations covering 3.5 million workers).

Commentators conclude that employers will increasingly require employees to sign predispute compulsory arbitration agreements. *See* RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 32 (1997) (suggesting that employers are hesitating until issues *Gilmer* raised are determined); Grodin, *supra* note 4, at 5 n.6 (noting study that reveals numbers of employers requiring arbitration and establishing arbitration procedures); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187, 1188 (1993) (noting that increasing number of employers use arbitration); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 DENV. U. L. REV. 1017, 1043 (1996) (arguing that litigation will diminish in discrimination area as employers channel more and more employees' discrimination complaints into arbitration).

Anecdotal evidence supports commentators' views. *See* E. Patrick McDermott, *Survey of 92 Key Companies: Using ADR to Settle Employment Disputes*, 50 DISP. RESOL. J., Jan. 1995, at 8, 12 (reporting that most companies surveyed were considering use of arbitration); *see also* Janet Novack, *Silver Lining*, FORBES, Nov. 21, 1994, at 124, 125 (reporting that Brown

nesses[7] have signaled their intention to arbitrate, rather than to litigate, statutory claims. Moreover, in considering legislation that would limit arbitration of employment discrimination claims, Congress should be aware that arbitration may not effectively achieve the public goal of eliminating discrimination in the workplace.[8]

This Article considers whether achieving the public policy goal of ending employment discrimination requires a public forum. Part II distinguishes litigation from arbitration and reviews the history of commercial arbitration under the Federal Arbitration Act (FAA). Part III presents Supreme Court precedents that considered whether statutory claims could be arbitrated and provides an analysis of *Gilmer* in the context of those cases. Part IV examines the Supreme Court's assumption that vindication of employees' statutory rights also vindicates the public interest. For the purposes of this analysis, the discussion accepts the Court's premise that individuals may effectively resolve their statutory rights in the arbitration forum.[9] The analysis begins by

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& Root and Hughes Aircraft have adopted arbitration); *Companies Using Arbitration to Avoid Court in Bias Cases*, ATLANTA J. & CONST., Mar. 20, 1994, at R7 (reporting that several large employers have adopted arbitration); *Take This Job and... Promise Not to Sue*, SACRAMENTO BEE, July 7, 1996, at E1 (providing informal survey of 12 Silicon Valley companies that shows over half of them had enacted compulsory arbitration policy).

7. *See* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 268 (1995) ("Financial institutions increasingly are requiring consumers to arbitrate rather than resort to litigation."); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 54-65 (arguing that widespread use of predispute arbitration clause will increase); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996) (noting large companies such as banks, hospitals, and brokerage houses include mandatory binding arbitration clauses in form contracts); Ellie Winninghoff, *In Arbitration, Pitfalls for Consumers*, N.Y. TIMES, Oct. 22, 1994, at 377 (discussing predispute arbitration agreements in contracts with real estate and finance companies, health care providers, and insurers).

8. Congress has introduced several bills that limit arbitration of employment discrimination suits. *See* S. 2012, 103d Cong. (1994) (Protection From Coercive Employment Agreements Act); S. 2405, 103d Cong. (1994); H.R. 4981, 103d Cong. (1994) (Civil Rights Procedures Protection Act of 1994); S. 366, 104th Cong. (1995) (Civil Rights Procedures Protection Act).

9. Significant arguments to the contrary based on structural characteristics of arbitration have yet to be addressed even as arbitration associations promulgate new rules to ensure fair procedures. For instance, less formal adjudication systems may not be as effective as traditional litigation for minorities and the poor. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388 (concluding that formality of adversarial adjudication deters prejudiced decisions). *But see generally* E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999) (advocating arbitration as means to achieve minorities' testamentary instructions).

examining the dual purposes of workplace discrimination laws: to remedy instances of discrimination and to end workplace discrimination. To achieve these purposes, Congress authorized individuals, and later the Equal Employment Opportunity Commission (EEOC), to sue employers in court.

Litigation of employment discrimination claims generates several enforcement mechanisms that are integral to securing the end of workplace discrimination. First, judicial decisions, which speak with the authority of the state, provide general deterrence of future violators. Second, the courts develop and refine the law of employment discrimination, establish precedents, and define a uniform standard. Finally, the judicial process educates the community and forms public values, a crucial undertaking when a law seeks to change public sentiment. Arbitration, because it is a nongovernmental, confidential, and final forum, does not generate these enforcement mechanisms; thus, it is less effective in achieving the public policy objective. The Court's assumption that remediation of individual claims in arbitration will enforce the goals of the statutes does not bear scrutiny.

Notwithstanding that conclusion, the second goal of the statutes, to provide remedial relief, must also be considered. Although inherent characteristics of the private forum generally weigh against arbitrating employ-

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Others suggest that because the parties pay arbitrators for their services they operate under an institutionalized incentive to find for the party who is likely to be a repeat player. In the realm of commercial arbitration, the employer is the repeat player in an employment discrimination suit. *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 452 (1996) ("[T]he arbitral agreement is suspect because the employer, like a merchant or labor union, is a 'repeat player.' The employee, by contrast, is a one-shot player."); Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42, 58-59 (1988) (finding that arbitrators may unconsciously cater to party that may provide repeat business and noting also incentive of reputation that mitigates danger). *See generally* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RIGHTS & EMPL. POL'Y J. 189 (1997) (analyzing arbitration process for repeat player effect and discussing its implications). This concern is not new. *See* Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 928 (1979) (discussing repeat player effect in labor arbitration); *see also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 n.17 (D.C. Cir. 1997) (reviewing debate). The Supreme Court has turned aside such concerns. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) (declining to indulge presumption that arbitral body conducting arbitration will be unable or unwilling to retain competent, conscientious, and impartial arbitrators (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985))).

The demographic characteristics of arbitrators may also cause a perception of bias. *See* SECURITIES ARBITRATION REFORM, REPORT OF THE ARBITRATION POLICY TASK FORCE 117 (Jan. 1996) [hereinafter RUDER REPORT] (noting that 97% of eligible securities arbitrators are white and 89% are male with average age of 60); U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 2 (Mar. 1994) (finding that typical arbitrators in securities industry were older white males).

ment discrimination claims, arbitration is the only viable forum for certain employees because it generally offers affordable and expeditious resolution of claims. Thus, if arbitration affords full procedural and substantive rights, it may be preferable to litigation for vindicating one purpose of the employment discrimination statutes, to secure a remedy for workplace discrimination.

In view of this conflict, Part V considers whether arbitration could be modified so that it effects the public goal. The discussion focuses on instituting judicial review of arbitration awards in claims of employment discrimination. The public interest in employment discrimination suits and the interest of individual aggrieved employees justify the addition of judicial review. Judicial review, however, necessarily includes written, reasoned, and accessible awards that increase the costs of arbitration. These increased costs render the forum less attractive to the very employees who need a less expensive alternative to litigation. Moreover, judicial review may not generate sufficient enforcement mechanisms to secure ultimately the public policy goal of ending workplace discrimination.

Part VI takes a prospective view and notes that the arbitration debate exposes a tension between the statute's two goals, to provide a remedy to individuals who have suffered employment discrimination and to end discrimination in the workplace. The characteristics of litigation and arbitration highlight and exacerbate this tension. This dilemma should encourage discussion of an alternate forum in which both goals of the employment discrimination law may be achieved.

II. Arbitration

Arbitration stands in sharp contrast to litigation. A trial is a public event in which a publicly appointed judge renders a judgment by virtue of the authority of the state.[10] Financed through taxation, the civil justice system derives its authority over civil disputes from the state's power to govern. The judicial branch definitively applies coercive state power to issue judgment in a visible, unbiased, accountable, and rationalized manner.[11] Selected through a process based on public assent and indirect public participation, judges are public agents whose decisions are official acts.[12] The civil judicial system

10. *See* Hazard & Scott, *supra* note 9, at 57.

11. *See id.* (citing attributes of public courts); Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 895 (1993) (citing attributes of coercive state power: open hearings; impartial, unbiased, and rationalized decision-making; accountability because of visibility; and public announcement of decision).

12. *See* Hazard & Scott, *supra* note 9, at 57 (characterizing judge as public agent speaking ex officio).

operates through open hearings, creates public records, and publishes reasoned decisions that explain the bases of judgments.[13] Because their judgments and often the reasons for those decisions are part of a public record, judges are accountable to the public, to higher courts, and to Congress, which may amend court rulings through legislation. For these reasons, "[p]ublic justice is public in the most obvious sense."[14]

Arbitration is a method of resolving disputes by voluntarily deferring to the judgment of third parties who have been engaged by the disputants.[15] Arbitration is thus a substitute, or alternative, for formal, public adjudication.[16] In contrast to the public nature of litigation, the defining characteristic of arbitration is that it is a private system. Arbitration does not depend upon and is not authorized by state power. Arbitrators receive their authority to render a binding decision from the agreement of the parties to abide by that decision, rather than from state authority.[17] Arbitrators are not officials of the state, but are individuals acting in a private capacity who are selected by the parties, commonly because of experience in a particular industry or knowledge of the subject at issue. They work within a privately financed system and are accountable only to the parties.

Arbitration is private in a second sense; arbitration and its outcomes are generally confidential. Members of the public may not attend the hearings, which are open only to the parties and their representatives. The forum does not create a public record of filings, of the hearing, or of the award. In general, the awards are simple statements of the disposition of the claims that do not provide the reason for the award or an explanation of the grounds supporting it.[18] An arbitration award is virtually final because, although recourse to

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13. *See* Robel, *supra* note 11, at 895.

14. *See* Hazard & Scott, *supra* note 9, at 57.

15. M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION 1 (G. Wilmer ed., 1984); *see* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 7 (1992) (defining arbitration).

16. *See* MACNEIL, *supra* note 15, at 4 (pointing out that term "alternative" in "alternative dispute resolution" means alternative to state dispute resolution processes).

17. Once the arbiter renders a decision, arbitration relies on state power to enforce agreements and to convert agreements to an enforceable judgment. *See* Federal Arbitration Act, 9 U.S.C. §§ 4, 16 (1994) (allowing winners in arbitration to enforce judgment in court and to appeal orders rendered in court concerning arbitration).

18. For example, a successful claim for compensatory and punitive damages for securities fraud before the National Association of Securities Dealers (NASD) may have alleged several theories of fraud, such as churning accounts to increase sales commissions, misrepresentation, and failure to supervise. Nevertheless, the award will not indicate why the arbitrators found for the claimant. Although the document states the amount awarded, it does not indicate whether the arbitrators awarded full compensation, partial compensation, or some measure of punitive damages.

the courts is nominally available under the FAA, the statute limits the grounds for setting aside the arbitral award to egregious errors.[19]

Litigation occurs within a unified, hierarchical judicial system that uses past judgments to govern future cases heard by different courts. Under the doctrine of stare decisis, courts do not lightly reverse prior decisions or interpretive rules. This system allows an appellate court to constrain the power of the trial court by reviewing the legal bases of decisions. In contrast, arbitration occurs as a unique, isolated event that is not subject to review. As a result, arbitrators neither create nor apply precedent.

Formal rules of procedure and evidence that protect the rights of both parties govern the resolution of disputes within the official judicial system. As creatures of contract,[20] the choice of provisions in agreements to arbitrate is practically unlimited.[21] The parties adopt their own procedural rules or, more commonly, agree to abide by those of a neutral agency.[22] Procedures of the arbitration forum are generally less formal than those in civil litigation, and as a consequence, the parties may resolve their problems more quickly, and therefore less expensively, than they would in litigation.

Arbitration is one of many methods offered as part of Alternate Dispute Resolution (ADR).[23] In recent years, ADR, and especially arbitration, has become exceedingly popular.[24] Commentators have suggested that the popularity of arbitration may have impeded a full consideration of its capacity and

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19. *See* 9 U.S.C. § 10 (setting forth grounds for vacating arbitration decisions).

20. In the words of Justice Blackmun, the "'liberal federal policy favoring arbitration agreements' . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).

21. *See* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994). Judge Posner emphasized the contractual nature of arbitration: "[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes . . . ." *Id.*

22. *See* BALES, *supra* note 6, at 3 (listing American Arbitration Association and Center for Public Resources). The NASD and the New York Stock Exchange (NYSE) sponsor arbitration for members of the securities industry.

23. Other forms of ADR that are useful in resolving employment disputes are mediation and settlement conferences, final offer arbitration, mixed mediation and arbitration, use of ombudsperson, self-mediation, mini-trial, and contracting for private judging. *See* Stuart Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 69-82 (1997).

24. *See* Pryner v. Tractor Supply Co., 109 F.3d 354, 363 (7th Cir. 1997) (characterizing language in 1991 Civil Rights Act that endorses arbitration as a "polite bow to the popularity of 'alternative dispute resolution'"); *see also* Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1055 (1996) ("Congress, the federal judiciary, administrative agencies, and citizens groups have all boarded the ADR train."); *id.* at 1056 (quoting Judith Resnik: "[The ADR train] has already left the station").

limitations.[25] In any event, the general popularity of commercial arbitration results from a combination of factors: the expense and time involved in litigation, the perceived efficiency of arbitration, the increasing difficulty of scheduling civil cases in the federal courts, and the Supreme Court's supportive imprimatur of arbitration. In addition, some institutional parties prefer arbitration because they believe it is a more favorable forum for them than litigation.[26] Arbitration has come a long way since it achieved Congressional acceptance in 1925 with the passage of the FAA.[27]

A. The Federal Arbitration Act and Commercial Arbitration

Congress passed the Federal Arbitration Act (FAA)[28] in 1925 in order to allow parties to avoid "the costliness and delays of litigation."[29] Its drafters hoped to reverse the common-law rule barring specific performance of arbitration agreements and to secure a less expensive forum than litigation in which to resolve factual disputes.[30] The FAA has remained relatively unchanged since its passage.[31] Authorized by the Commerce Clause, the FAA applies to maritime transactions and transactions involving commerce.[32] Its centerpiece is Section 2, which provides that "[a] written provision . . . to arbitrat[e] . . . shall be valid, irrevocable, and enforceable."[33] The FAA eliminates the federal courts' power to hear a dispute that the parties have agreed to arbitrate, forcing

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25. *See* Harry T. Edwards, *Alternate Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668 (1986) (voicing concern that arbitration "bandwagon may be on a runaway course"); Yamamoto, *supra* note 24, at 1066 (surveying academic sources and wondering whether popularity of ADR has undermined legal discourse critical of it).

26. *See* Schwartz, *supra* note 7, at 60-62 (suggesting that corporate defendants like arbitration because it reduces their costs and liability).

27. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 42 (1991) (Stevens, J., dissenting) (doubting that legislators who enacted FAA expected it to cover statutory claims); MACNEIL, *supra* note 15, at 169 (noting legitimation of arbitration as universal dispute resolution technique probably goes far beyond Congress's original intent).

28. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994).

29. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (quoting H.R. REP. NO. 68-96, at 1-2 (1924) and S. REP. NO. 68-536, at 3 (1924)).

30. American law inherited the English courts' refusal to enforce arbitration agreements because they viewed such agreements as an effort to deprive the courts of jurisdiction. *Scherk*, 417 U.S. at 510 n.4; *see* MACNEIL, *supra* note 15, at 28-30 (recounting goals of early advocates of arbitration).

31. *See* E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS 605 (1996) (noting that this characteristic permits flexibility but "also generates litigation about the meaning and application of the [FAA]").

32. 9 U.S.C. § 1; *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (noting that FAA is based on Congress's power to regulate interstate commerce).

33. 9 U.S.C. § 2.

district courts to stay litigation.[34] The FAA also instructs courts to compel arbitration when one party inappropriately refuses to arbitrate;[35] further, the FAA authorizes interlocutory appeal of a trial court's decision to refuse a stay of litigation.[36] Other provisions of the FAA authorize appointment of arbitrators, hearing procedures, awards, modifications, and appeals.[37] The FAA governs agreements to arbitrate employment disputes that are contained in individual employee contracts. Arbitration clauses are, however, a key feature of the collective bargaining agreements negotiated in unionized workplaces.

B. Federal Labor Law and Labor Arbitration

Parties to a collective bargaining agreement normally agree to arbitrate disputes that arise out of that contract.[38] Labor arbitration is, therefore, also based on private contract, but it is enforced through federal labor laws, not through the FAA.[39] The federal labor laws enable labor and management, as roughly equal entities, to negotiate the terms of their contractual relationship. The resulting collective bargaining agreement establishes a self-governing system[40] in which arbitration is the adjudication component.[41] The agreement

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34. *See id.* § 3 (providing that court, upon finding that issue is referable to arbitration under agreement, shall stay trial until after arbitration); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 885 (1996) (noting valid agreement to arbitrate future disputes effectively ousts court of jurisdiction).

The Act does not confer subject matter jurisdiction and reaches only disputes that are within the court's jurisdiction by virtue of some other statute, such as the diversity statute. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983); Pryner v. Tractor Supply Co., 109 F.3d 354, 359 (7th Cir. 1997).

35. Federal Arbitration Act, 9 U.S.C. § 4 (1994).

36. *Id.* § 16(a)(1)(A). Congress added this provision in 1988. Judicial Improvement and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4671 (1988). Pointedly, the statute does not authorize appeals that would challenge an order that a party must arbitrate.

37. 9 U.S.C. §§ 5-16.

38. *See* Stone, *supra* note 6, at 1020 ("[A]rbitration and collective bargaining are usually assumed to be coterminous, if not synonymous, institutions.").

39. *See* Labor Management Relations Act, 29 U.S.C. §§ 185-188 (1994 & Supp. II 1996); National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994).

40. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960) (observing that collective bargaining agreement is effort to erect system of industrial self-government); *see also* Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137, 1138 (1977) (noting that arbitration is not substitute for judicial adjudication but is part of system of industrial self-governance).

41. *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 759 (1990) [hereinafter Estreicher, *Arbitration Without Unions*] (noting arbitration in context of collective bargaining is adjudicative institution that parties establish in lieu of advance agreements to all details of their ongoing relationship).

to arbitrate, which is given in return for the promise not to strike, is an integral part of a self-regulating system.[42] Playing a central role in the nation's industrial policy, labor arbitration is credited as the mechanism that secures industrial peace.[43] For these reasons, the Supreme Court established arbitration as the favored method for resolving industrial disputes.[44] Not surprisingly, the Court's deference to labor arbitration has influenced the Court's endorsement of commercial arbitration.[45]

III. The Supreme Court and the Arbitration of Statutory Claims

Given the general popularity and the Supreme Court's current embrace of commercial arbitration, it is difficult to imagine a climate in which judges were skeptical of the forum. Nevertheless, from the FAA's passage in 1925 until the mid-1980s, the federal courts viewed arbitration as an inappropriate means to decide claims based on federal statutes.

In the 1980s, the Court changed course in three cases known as the *Mitsubishi* Trilogy.[46] The following discussion traces the Supreme Court arbitration decisions that deal with statutory claims, ending with a discussion of the *Gilmer* decision. The cases concern different statutory claims (securities laws, antitrust laws, and employment discrimination laws), but the basic issue is the same – whether the policy choices embodied in federal statutes

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42. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike.").

43. *See id.* (stating that arbitration is major factor in achieving industrial peace).

44. *See* United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 568 (1960) (requiring court to enforce arbitration agreement); *Warrior & Gulf Navigation Co.*, 363 U.S. at 582 (deciding to resolve doubts regarding questions of applicability of arbitration agreement in favor of coverage); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (finding arbitrators indispensable part of collective bargaining process because of their specialized knowledge); *see also Lincoln Mills*, 353 U.S. at 459 (enforcing, pursuant to § 301 of Labor Management Relations Act, grievance-arbitration provision of collective bargaining agreement).

45. *See* BALES, *supra* note 6, at 19 (noting "profound effect" of Court's strong endorsement of labor arbitration on commercial arbitration); MACNEIL, *supra* note 15, at 57 (noting that strong public policy favoring labor arbitration "rubbed off on commercial arbitration"); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 514 (1990) (noting that courts deciding ERISA claims in commercial arbitration have followed precedent established in labor cases).

Decisions based on the FAA have also influenced labor arbitration. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987) (noting federal courts look to FAA for guidance in labor arbitration cases).

46. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

require judicial resolution. The cases also share a similar structure: plaintiffs who had signed arbitration agreements sought to avoid arbitration. Thus, the ultimate issue in each case was whether the courts should enforce the arbitration agreement.

A. Public Policy Renders Statutory Claims Inarbitrable

In *Wilko v. Swan*[47] and *Alexander v. Gardner-Denver Co.*,[48] the Supreme Court determined that lower courts should not enforce agreements to arbitrate statutory claims of securities fraud and employment discrimination.[49] In both decisions, the Court analyzed the particular public policy goals of the statute, the judicial role in enforcing those goals, and the more traditional judicial task of interpreting public law.

1. Commercial Arbitration of Securities Fraud Claims

In *Wilko*, the Supreme Court held that the Securities Act of 1934 did not limit an investor who alleged securities fraud to the arbitration forum.[50] The Court determined that the policy objectives of the Securities Act barred predispute agreements to arbitrate claims of securities fraud.[51] The majority defined the issue as a choice between two competing public policies – to protect investors or to provide an alternative to litigation.[52]

Noting that the 1934 Act established rights enforced through civil litigation,[53] the Court contrasted the roles of buyer and seller and found that Section 14 of the 1934 Act barred buyers from waiving their right to a judicial forum.[54] The Court determined that arbitration diminished the effectiveness of the 1934

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47. 346 U.S. 427 (1953).

48. 415 U.S. 36 (1974).

49. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974) (holding that agreement to arbitrate contract claim of racial discrimination did not bar Title VII lawsuit); Wilko v. Swan, 346 U.S. 427, 438 (1953) (refusing to enforce arbitration clauses because Congress intended courts to enforce Securities Act), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

50. *See Wilko*, 346 U.S. at 434-35 (finding that Securities Act prohibits investor from waiving right to judicial forum). The plaintiff in *Wilko* was a private investor who alleged that defendants had misrepresented material information concerning an investment. *Id.* at 428-29.

51. *Id.* at 437.

52. *See id.* at 438 (noting that two policies were "not easily reconcilable").

53. *See id.* at 431 (noting that Securities Act confers special right of recovery that differs substantially from common-law actions).

54. *See id.* at 435 (noting that Congress drafted provision to remedy information disadvantages under which buyers labor and adopting argument that Congress intended to prevent sellers from maneuvering buyers into positions that weakened buyers' ability to recover).

Act's protective provisions.[55] The opinion expressed concern that arbitrators, who had no legal training, would make findings of law interpreting the 1934 Act.[56] Further, the fact that arbitral findings were not generally subject to judicial review troubled the Court.[57] Following the decision in *Wilko*, federal courts expanded its rationale and generally concluded that statutory claims embodying significant public policy goals were not subject to arbitration.[58]

2. *Labor Arbitration of Employment Discrimination Claims*

In *Alexander v. Gardner-Denver Co.*,[59] the Supreme Court continued to focus on the public purpose of the particular statute at issue, in this case Title VII, in determining whether to enforce arbitration agreements.[60] The Court found that Congress intended that courts enforce Title VII.[61] The Court therefore concluded that an employee, whose racial discrimination claim

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55. *See id.* at 435-36 (finding arbitration less effective than judicial proceedings in protecting buyers).

56. *See id.* (discussing potential danger of arbitrators incorrectly applying and interpreting Securities Act).

57. *See id.* at 436 (noting extremely limited grounds on which courts have power to vacate award and discussing fact that erroneous interpretations of law by arbitrators are not subject to review). The Court noted that an arbitrator's manifest disregard of law is reviewable. *Id.*

58. For example, in *American Safety Equipment Corp. v. Maguire*, the court relied on public policy to determine that parties should not arbitrate an antitrust claim. *See* American Safety Equip. Corp. v. Maguire, 391 F.2d 821, 827 (2d Cir. 1968). The court emphasized the broad public policy of antitrust law to promote the national interest in a competitive economy. *See id.* at 826 (stating that "[a] claim under the antitrust laws is not merely a private matter" because antitrust violations can affect enormous numbers of individuals and inflict staggering economic damage).

Plaintiffs further this public goal by acting as private attorneys general. *Id.* The court also questioned whether arbitrators were qualified to resolve complex antitrust issues. *Id.* at 827. Because antitrust law regulates the business community, the court found it less than ideal that arbitrators from the business community would decide "issues of great public interest." *Id.* In light of the pervasive public interest in enforcing antitrust law, the court concluded that Congress intended courts to resolve antitrust claims. *Id.* at 827-28.

Succeeding courts relied on *American Safety* to bar other statutory claims. *See* Douglas E. Abrams, *Arbitrability in Recent Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521, 530-31 (1994) (finding *American Safety*'s influence in cases involving patent law, Employee Retirement Income Security Act of 1974 (ERISA), Commodity Exchange Act (CEA), and Racketeer Influenced and Corrupt Organizations Act (RICO)). Congress has since authorized arbitration of patent and CEA claims, *see* Abrams, *supra*, at 534-37, and the Supreme Court has ruled that RICO claims are arbitrable. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987) (finding RICO claims arbitrable under Federal Arbitration Act); *infra* text accompanying notes 87-96 (discussing *McMahon*).

59. 415 U.S. 36 (1974).

60. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-45 (1974) (summarizing Title VII's goals of eliminating and preventing discrimination).

61. *See id.* (stating that final enforcement authority rested with federal courts).

under the collective bargaining agreement had been rejected in a labor arbitration, could pursue a Title VII claim in court.[62] Arbitration of a contractual right to be free from discrimination does not bar litigation of a similar, statutory right.[63] Thus, unionized employees whose contract claims of discrimination have been denied at arbitration are entitled to a de novo trial of their Title VII claims in federal courts.[64]

In resolving the issue, the Court found it dispositive that Congress had assigned "plenary powers" to enforce the antidiscrimination statute to the courts.[65] Moreover, Congress had assigned a public role to plaintiffs. While seeking to redress their injuries, plaintiffs "vindicate[ ] the important congressional policy against discriminatory employment practices."[66] The Court concluded that precluding litigation following arbitration would contravene Title VII's purpose and procedures.[67]

The Court also relied on judicial authority to decide discrimination claims and, therefore, declined to formulate a rule under which courts would defer to prior arbitration of statutory claims.[68] Given the purpose and procedures of Title VII, the majority determined that Congress intended federal courts "to exercise final responsibility" for enforcement of the statute.[69] The Court noted that arbitrators, unlike judges, had no general authority to

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62. The employee in *Alexander* sued his former employer under Title VII. *Id.* at 43. Pursuant to a union contract, he previously had arbitrated and lost a racial discrimination claim in an arbitration proceeding at which he alleged unjust discharge. *Id.* at 38-43. The trial court dismissed the suit. *Id.* at 43. The Supreme Court reversed and directed the lower court to hear the claim de novo. *Id.* at 60.

63. *See id.* at 59-60 (approving employee's right to pursue claims both in arbitration and in court).

64. *See id.* at 60.

65. *See id.* at 44 (noting final enforcement is vested with federal courts, not EEOC); *id.* at 47 (noting that Title VII gives federal courts plenary power to enforce statute); *see also id.* at 53 (noting arbitrator, unlike court, has no authority to invoke public laws); *id.* at 56 (concluding that "Congress intended federal courts to exercise final responsibility for enforcement of Title VII").

66. *Id.* at 45.

67. *See id.* at 48 (noting Title VII provisions that accord parallel remedies against discrimination and noting that Congress designed Title VII to supplement existing laws relating to discrimination).

The Court also relied on distinctions between collective contract rights and individual statutory rights. *Id.* In finding the election of remedies doctrine inapplicable, the Court emphasized the "distinctly separate nature[s]" of contractual rights conferred by agreement and statutory rights conferred by Congress. *Id.* at 50. Although a union may waive rights related to collective activity, it may not waive individual rights. *Id.* at 51.

68. *See id.* at 60 n.21 (concluding that court may admit arbitral decision as evidence and providing various factors to determine weight it should accord this evidence).

69. *See id.* at 56. The Court noted that deferral necessarily assumes that arbitral processes are commensurate with judicial processes. *Id.*

invoke laws that conflict with the labor contract.[70] Indeed, an arbitrator's authority rests on knowledge of the "law of the shop, not the law of the land."[71] Thus, the Court found judicial authority in the traditional role of the federal courts to interpret federal law, and the Court evinced concern that arbitrators might rely on standards other than those of public law to resolve Title VII claims.[72]

In later cases, the Court relied upon the decision and reasoning of *Gardner-Denver* to hold that courts need not enforce agreements to arbitrate in claims involving Section 1983 and the Fair Labor Standards Act.[73] In each

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70. *See id.* at 53 (discussing arbitrator's inability to draw from law outside of agreement).

71. *See id.* at 57 (identifying contract as source of labor arbitrator's authority). Arbitrators' specialized competence does not include knowledge of public law, which is necessary to interpret the broad language of Title VII. *Id.*

The Court also explained that arbitral procedures, while well-suited to contract disputes, make the forum inappropriate for the final resolution of Title VII claims. *See id.* at 56-57 (citing informality of arbitration, lack of legal expertise, and absence of explanatory awards).

72. *Gardner-Denver*, at least for the time being, survives as good law. Relying on the Court's commercial arbitration cases and especially *Gilmer*, *see infra* subparts III.C and III.D, the Fourth Circuit ruled that labor arbitrators should hear the employment discrimination claim of a unionized employee, *see* Wright v. Universal Maritime Serv. Corp., No. 96-2850, 1997 WL 422869, at *2 (4th Cir. July 29, 1997) (unpublished disposition) (relying on Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996)), *vacated and remanded*, 119 S. Ct. 391(1998). The Supreme Court granted certiorari but declined to decide the ultimate issue, whether an employee whose collective bargaining agreement contains an antidiscrimination clause as broad as the statutory right must arbitrate that claim. *See* Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391, 397 (1998) (finding collective bargaining agreement did "not contain a clear and unmistakable waiver of employee's rights to judicial forum for federal claims of employment discrimination").

The *Wright* decision reaffirms the reasoning of *Gardner-Denver*, notably its distinction between contract rights and statutory rights. *See id.* at 396 (noting that plaintiff's cause of action "is distinct from any right conferred by the collective bargaining agreement" and that "ultimate question ... is not what parties agreed to, but what federal law requires"). Given *Gardner-Denver*'s emphasis on the importance of a federal judicial forum, the Court stated that any prospective waiver must be "clear and unmistakable." *See id.* (explaining its reluctance to infer mandatory arbitration without clear waiver).

Thus, there is "obviously some tension" between *Gardner-Denver* and *Gilmer* that awaits resolution. *See id.* at 395 (noting *Gardner-Denver* stated that Title VII rights are not susceptible of prospective waiver but that *Gilmer* held that employee could waive right to federal judicial forum under ADEA). This discrepancy and the interplay between labor arbitration and the FAA and between collective and individual rights requires more thorough treatment than the scope of this Article permits. Nevertheless, the conclusions reached here regarding the role of public policy in the arbitration of employment discrimination claims in commercial arbitration bear directly on arbitration of discrimination claims in the unionized workplace.

73. *See* McDonald v. City of West Branch, 466 U.S. 284, 292 (1984) (stating that federal court should not give res judicata or collateral estoppel effect to arbitration award under collective bargaining agreement that involved § 1983 claims); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981) (concluding that employee alleging violation of

case, the Court emphasized that arbitrators had no authority to interpret public law, by virtue of either the contract or the statute.[74] As in *Gardner-Denver*, the Court found judicial authority in the role Congress assigned to the courts under the statutes and in the traditional judicial function of interpreting public law.

Wilko, *Gardner-Denver*, and their progeny rejected the arbitration of statutory claims in the interest of the public policy objectives of the statutes at issue. Courts reasoned that meeting those objectives required judicial enforcement because Congress had so intended and because arbitrators were not prepared, either through experience or training, to interpret and apply public law. The decisions, however, did not analyze or explain how judicial resolution advanced public policy.[75] This omission left the holdings vulnerable to reinterpretation, and in the cases that followed, the Court moved away from analyzing public policy objectives.

B. The Court Reconsiders the Role of Public Policy

During the 1980s, two broad issues regarding commercial arbitration reached the Supreme Court. In the first series of cases, the Court developed a uniform federal law of arbitration by examining the interplay between the FAA, state courts, and state law.[76] These decisions reflected a new respect for the arbitration forum. In a second set of cases known as the *Mitsubishi*

Fair Labor Standards Act may sue in federal district court following arbitration under collective bargaining agreement).

74. *See McDonald*, 466 U.S. at 290-91 (discussing arbitrator's inability to enforce FLSA and to draw from extra-contractual sources in fashioning relief); *Barrentine*, 450 U.S. at 743-45 (same).

75. *See* Schwartz, *supra* note 7, at 94 (noting failure of courts to "weave . . . coherent rationale for denying enforcement of pre-dispute arbitration clauses").

76. *See* Perry v. Thomas, 482 U.S. 483, 492 (1987) (holding FAA preempted California labor law that limited arbitration); Dean Witter Reynolds v. Byrd, 470 U.S. 213, 213 (1985) (requiring courts to sever arbitrable state law claims and to submit them to arbitration); Southland Corp. v. Keating, 465 U.S. 1, 14-15 (1984) (finding that FAA, not state law, governs state court decision to enforce arbitration); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983) (concluding that when deciding enforceability of arbitration clause under FAA under multifactor analysis, federal courts may refuse to defer to action pending in state court). This line of cases began with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 405 (1967), which held that federal courts must apply federal arbitration law in diversity cases. *See generally* MACNEIL, *supra* note 15; Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985).

Recently, the Court has expanded on its preemption decisions. *See* Doctor's Assocs. v. Casarotto, 517 U.S. 681, 688 (1996) (holding that states may not target arbitration provisions to void state requirement that arbitration provision must appear in capital letters on front page of agreement); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (holding FAA applies to any "contract evidencing a transaction involving commerce" (quoting FAA § 2)).

Trilogy, the Court modified its analysis of the issue and, influenced by its more receptive view of arbitration, reversed its position against arbitration of statutory claims. The following discussion reviews those cases.

1. Antitrust Claims

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[77] an automobile dealer wanted to litigate, rather than arbitrate, an antitrust claim.[78] The Court decided that the dealer had to arbitrate the claim because the arbitration agreement was part of an international transaction.[79] The Court's holding, expressly based on the international context of the commercial contract,[80] can be viewed as an exception to the Court's previous holdings that statutory claims are subject to litigation.

To buttress its decision, the Court soundly critiqued the view that arbitration was an inappropriate forum in which to hear antitrust claims.[81] More significantly, the Court did not find that the public policy underlying antitrust law and its role in regulating democratic capitalism required litigation.[82] To

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77. 473 U.S. 614 (1985).

78. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 621 (1985) (describing First Circuit's rejection of dealer's contention that claim was not arbitrable). Seeking to reship vehicles from Puerto Rico to the United States and Latin America, the dealer argued that defendant's refusal to allow shipment restrained competition in violation of the Sherman Act. *Id.* at 620.

79. *See id.* at 629.

80. *See id.* (concluding "that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require [enforcement]"); *id.* at 636 (stating that international context may "add an element of uncertainty to dispute resolution," therefore prospective litigant may agree in advance to recover antitrust damages through arbitration). The Court also analogized the arbitration agreement to forum selection clauses in international transactions. *Id.* at 629.

A previous decision had created an international exception to the *Wilko* standard. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-17 (1974) (enforcing arbitration to decide disputes under 1934 Securities Act because of international implications of the case).

81. *See Mitsubishi*, 473 U.S. at 633 (noting that courts enforce postdispute arbitration agreements and that "adaptability and access to expertise are hallmarks of arbitration"). The majority discounted the argument that antitrust claims were too complex for untrained arbitrators to decide. *Id.* The Court found the argument that contracts of adhesion presented a viable threat to public policy unconvincing. *Id.* at 632 (noting that party could show that agreement was "affected by fraud, undue influence, or overweening bargaining power;" that "enforcement would be unreasonable and unjust;" or that proceedings would deprive party of day in court (internal quotations omitted)). The Court also rejected the possibility that an arbitration panel chosen from the commercial world would be innately hostile to the constraints on business imposed by antitrust law. *Id.*

82. *See id.* at 637 (concluding that use of arbitration did not affect goals of antitrust law).

reach this conclusion, the Court limited its examination of the purpose of antitrust law to the damages provision of the statute.[83] In view of Congress's authorization of treble damages, the Court conceded that the private cause of action played a central role in enforcing the law by deterring potential violators.[84] Nevertheless, the Court found that the main purpose of the treble damages provision was to provide a remedy for economic injuries.[85] The majority then stated that arbitration met this public goal if plaintiffs could effectively "vindicate [their] statutory cause of action in the arbitral forum."[86]

The *Mitsubishi* critique of the Court's prior cases profoundly affected the analysis and outcome of future cases. In *Mitsubishi*, the Court chose to focus on the purpose of the remedial provision of the statute and to forego an analysis of the broader goals of the law. The decision effectively modified the inquiry from considering public policy to considering the fairness of the arbitration forum in effecting remediation of the statutory injury. In two succeeding cases, the Court applied the new analysis and enforced agreements to arbitrate statutory claims.

2. Securities and Racketeering Claims

In *Shearson/American Express, Inc. v. McMahon*,[87] the Court faced a claim reminiscent of that in *Wilko*.[88] The plaintiff-investors argued that the public policy underlying the Securities Act of 1934 barred enforcement of their arbitration agreement.[89] The Court disagreed and required arbitration of

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83. *See id.* at 635-38.

84. *See id.* at 636 (acknowledging role of individual litigant as private attorney general to protect public interest).

85. *See id.* at 635-36 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977)). The Court did not consider the options for enforcement that Congress had rejected, which ranged from barring offenders from use of the courts or the postal service to forfeiture, limiting transportation of goods, reducing tariff protection, increased taxes, and simple publicity. Congress copied the treble damages provision from a British law, the Statute of Monopolies. *See* ROGER SHERMAN, ANTITRUST POLICIES AND ISSUES 50 (1978) (noting treble damages provision "has not been entirely successful as a remedy").

86. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). The Court noted that individuals may decide whether to bring or to settle a suit, further diminishing the public policy aspect of the private cause of action. *See id.* at 636 (stating that no individual is under obligation to bring suit).

87. 482 U.S. 220 (1987).

88. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); *supra* note 50 (describing plaintiff's Securities Act claim in *Wilko*).

89. *See McMahon*, 482 U.S. at 227 (summarizing plaintiff's argument that Congress intended court to hear claims under Securities Act). The plaintiffs alleged "fraudulent, excessive trading" of their accounts, false statements, and failure to disclose material information. *Id.* at 223.

claims brought under the 1934 Act and the Racketeer Influenced and Corrupt Practices Act (RICO).[90]

The plaintiffs contended that the treble damages available through RICO's civil remedies provision indicated Congress's intent that the judiciary enforce RICO.[91] In rejecting plaintiff's argument, the Court relied on *Mitsubishi*'s emphasis on "the priority of the compensatory function" of treble damages over any "deterrent function."[92] Reasoning that the treble damages provisions in RICO were analogous to those of the antitrust law considered in *Mitsubishi*, the Court reiterated its belief that, so long as litigants could vindicate their statutory rights effectively, arbitration achieved the goals of remediation and deterrence.[93]

In arguing against the arbitration of their securities fraud claims, the plaintiffs relied on *Wilko*'s holding that Congress intended a judicial forum for the resolution of investor disputes.[94] The Court, however, elected not to apply *Wilko*'s methodology of analyzing the statute at issue. Instead, over a dissenting view on this point,[95] the Court characterized the *Wilko* decision as driven by outdated hostility to arbitration and ruled that the claim was subject to arbitration.[96] This holding produced an anomaly in securities law. Plaintiffs could not arbitrate claims arising from the 1934 Act under *Wilko*, while they

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90. *See id.* at 238 (finding no congressional intent to preclude SEC or RICO claims from arbitration). RICO is primarily a criminal statute aimed at organized criminal organizations that infiltrate legitimate business enterprises. *See* 18 U.S.C. § 1962 (1994). Section 1964(c) authorizes "any person injured" by a violation of the Act to maintain a civil cause of action. *See, e.g.*, H.J. Inc. v. Northwestern Bell Tel., 492 U.S. 229, 233 (1989) (stating that person found liable in private civil action must pay treble damages); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985) (stating that § 1964(c) permits private suit by anyone injured under Act). The Private Securities Litigation Reform Act of 1995 excepts actions in securities fraud from the provision. *See* 18 U.S.C. § 1962(a).

91. *See McMahon*, 482 U.S. at 240 (describing plaintiff's contention that arbitrating RICO claim eligible for treble damages contradicted public policy).

92. *See id.* at 239 (finding no irreconcilable conflict between arbitration and underlying purposes of civil RICO).

93. *See id.* at 240 (likening reasons for allowing arbitration of RICO claims to those supporting arbitration of securities fraud claims). The Court surveyed the legislative history of RICO and found that Congress's primary purpose in authorizing civil suits was to provide remedial relief to those injured by racketeering activity. *Id.* at 242. The decision regarding RICO did not draw a dissent.

94. *See id.* at 228 (describing plaintiffs as seeking same interpretation of § 29(a) of 1934 Act as *Wilko* Court had accorded to § 14 in 1933 Act).

95. *See id.* at 251 (Blackmun, J., dissenting) (complaining that majority misconstrued *Wilko* in that *Wilko* turned on Securities Act's text and legislative history, rather than on general problems with arbitration).

96. *See id.* at 233 (rejecting *Wilko* Court's view that arbitration weakened plaintiff's ability to recover). The Court also relied on the Securities and Exchange Commission's oversight authority over securities arbitration. *Id.*

could arbitrate those arising from the Securities Act of 1933 under *McMahon*. Two years later, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[97] the Court eliminated this inconsistency by formally overturning *Wilko*.[98] The *Rodriguez* majority affirmed the Court's confidence in arbitration and again characterized the *Wilko* decision as pervaded by "the old judicial hostility to arbitration."[99]

In *McMahon* and *Rodriguez*, the Court departed from the *Wilko* standard, which effectively required proponents of arbitration to demonstrate that the FAA displaced judicial power authorized by statute. Under the Court's new analysis, opponents of arbitration must demonstrate that the relevant statute bars arbitration.[100] The *Mitsubishi* Trilogy thus limited consideration of the public policy goal of the statutes to remediation and deterrence, changed the focus of the analysis to the fairness of the arbitration forum, and realigned the parties' burdens in litigating the enforceability of arbitration agreements. Two years later, the Court applied this analytic framework to a claim of workplace discrimination brought under the federal law banning age discrimination in employment.

C. Gilmer *and the Arbitration of Workplace Discrimination Claims*

In *Gilmer v. Interstate/Johnson Lane Corp.*,[101] the Court held that the Age Discrimination in Employment Act (ADEA) did not bar binding arbitration.[102] At the outset, the majority signaled that it would rely on its recent

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97. 490 U.S. 477 (1989).

98. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) (stating it is "undesirable for the decisions . . . to continue to exist side by side" because inconsistency undermines essential rationale for harmonious construction of these two statutes).

99. *See id.* at 480-81 (stating that to extent *Wilko* rested on suspicion that arbitration weakened protections afforded by substantive law, "it has fallen far out of step with our current strong endorsement of arbitration" (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942))). Justice Stevens dissented, joined by Justices Brennan, Marshall, and Blackmun. *See id.* at 486 (Stevens, J., dissenting) (stating that none of majority's arguments merited overturning settled interpretation of statute).

100. *See id.* at 483 (indicating that those opposed to arbitration have burden of showing arbitration agreements are not enforceable under relevant Act); *see also* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226-27 (1987) (observing under 9 U.S.C. § 2, party opposing arbitration must show Congress intended to preclude waiver of judicial remedies).

101. 500 U.S. 20 (1991).

102. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24-33 (1991) (reasoning that because ADEA does not preclude arbitration and FAA policy favors arbitration, ADEA claim may be subjected to compulsory arbitration). Gilmer, the former manager of financial services at Interstate/Johnson Lane Corporation, sought to avoid arbitration of an age discrimination claim against his employer. *Id.* at 23. The trial court ruled that litigation could proceed, reasoning that the legislature intended to protect ADEA claimants from waiving judicial

commercial arbitration cases, rather than on *Alexander v. Gardner-Denver Co.*[103] The opinion distinguished *Gardner-Denver* and its progeny.[104] Significantly, in *Gardner-Denver*, unions represented claimants in litigation, so the aggrieved employees did not control the suit.[105] Also, *Gardner-Denver* raised a different issue: whether arbitration of a statutory claim precluded subsequent judicial resolution.[106] Finally, *Gardner-Denver* and its progeny were not decided under the FAA, which favors arbitration.[107]

Given the national policy favoring arbitration, Gilmer had to prove that Congress did not intend the ADEA to allow employees to waive their right to a judicial forum.[108] Gilmer sought to meet this burden by adopting the criteria of the *Gardner-Denver* Court – the public policy goal of the statute and judicial authority to effect that policy.[109] Gilmer argued that arbitration was inconsistent with the statutory framework and purposes of the ADEA.[110] The majority agreed that Congress designed the ADEA to further important social policies, but found no inconsistency between those policies and enforcing agreements to arbitrate.[111] Indeed, according to the majority, both arbitration and judicial resolution advance the broader social purpose of the ADEA.[112]

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proceedings. *Id.* at 23-24. The court of appeals reversed, finding no evidence of congressional intent to preclude arbitration. *Id.* at 24.

As an employee in the securities industry, Gilmer had to register with the New York Stock Exchange as a condition of employment. *Id.* at 23. The registration application included an agreement to arbitrate "any dispute, claim or controversy" between him and his employer that his employer's "rules, constitutions, or by-laws" required to be arbitrated. *Id.* at 24-25.

103. 415 U.S. 36 (1974). The *Gilmer* Court observed that the FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements.'" *See Gilmer*, 500 U.S. at 25 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). The Court stated that recent decisions reflected the liberal federal policy. *Id.* at 26 (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).

104. *See Gilmer*, 500 U.S. at 33-35 (distinguishing *Gardner-Denver* because it involved arbitration of contract-based claims rather than statutory claims).

105. *See id.* at 35 (noting tension between collective representation and individual statutory rights).

106. *See id.*

107. *See id.* at 36.

108. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (noting Gilmer's burden and observing that congressional intent can be determined from text of statute, its legislative history, or inherent conflict between arbitration and ADEA's underlying purposes).

109. *See id.* at 27.

110. *See id.* at 27-29.

111. *See id.* at 28.

112. *See id.* at 28-29 (relying on examples of statutory claims under Sherman Act, Securities Exchange Acts of 1933 and 1934, and RICO).

Reasoning again from *Gardner-Denver*, Gilmer next argued that Congress intended that the judiciary enforce the statute.[113] The Court responded that Congress had authorized a flexible approach, including arbitration, to resolve age discrimination claims.[114] Declining to discuss the public policy arguments further, the Court stated that the touchstone of its inquiry was whether individuals may effectively vindicate claims in the arbitral forum.[115]

Turning to the arguments that arbitration procedures rendered arbitration an inadequate forum in which to pursue an age discrimination claim, the Court disposed of each critique. The majority stated that in the New York Stock Exchange (NYSE) arbitration forum, individuals could effectively vindicate their claims.[116] According to the majority, applicable NYSE arbitration rules regarding the selection of arbitrators adequately protect employees.[117] Additionally, the limited discovery available in arbitration was not inconsistent with the ADEA.[118] The majority also was not convinced that the absence of written opinions would result "in lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law."[119] Noting that the NYSE requires written awards, the Court predicted that judicial decisions addressing ADEA claims would not end and observed that the argument applied equally to settlement, which the ADEA allows.[120] Regarding the "necessarily" limited judicial review, the Court found it sufficient to ensure that arbitrators comply with the requirements of the statute.[121] The majority was not troubled that arbitrators cannot order broad equitable relief or deal with class actions.[122]

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113. *See id.* at 29 (arguing that arbitration deprives injured employees of judicial forum provided by ADEA).

114. *See id.* (observing that EEOC is directed to pursue "informal methods of conciliation, conference, and persuasion" and that "arbitration is consistent with Congress's grant of concurrent jurisdiction over ADEA claims to state and federal courts").

115. *See id.* at 28 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)). The Court also did not think that arbitration would undermine the enforcement role of the EEOC, because the EEOC has independent authority to investigate age discrimination. *Id.* at 29.

116. *See id.* at 30 (stating that generalized attacks on arbitration are "far out of step with our current strong endorsement" of FAA (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989))).

117. *See id.*

118. *See id.* at 31. Conceding that arbitration limits discovery, the Court considered limitation on discovery a fair exchange for the benefits of arbitration.

119. *See id.*

120. *See id.* at 32.

121. *See id.* at 32 n.4 (citing *McMahon*).

122. *See id.* at 32 (observing that fact that arbitration may not go forward as class action did not argue against individual arbitration and stating that "arbitration agreements will not preclude EEOC from bringing actions seeking class-wide and equitable relief").

Noting that contract law provided sufficient protection for the parties, the Court also refused to entertain the argument that the agreements should not be enforced because they were coercive and the product of unequal bargaining power.[123]

D. *The Assumption in* Gilmer

The Court did not entirely abandon a public policy analysis in the *Mitsubishi* Trilogy and did not do so in *Gilmer*. It did, however, redefine the policy. In *Mitsubishi*, the Court shifted the inquiry regarding arbitration from the broad policy goals of the statute to a more narrow goal – to provide a remedy to individuals injured by a statutory violation. The Court followed the same course in *Gilmer*. It did not examine the overall purpose of the ADEA to determine if arbitration could effect that purpose. Instead, the Court evaluated whether individual plaintiffs could secure redress in the arbitration forum.[124] The Court thus subsumed the statute's broader goal, ending workplace age discrimination, into the more limited goal of ensuring that individuals obtain a remedy for a discrimination injury, thus crediting only one public policy.

The Court's reasoning also allowed it to treat all statutory claims as if they were the same.[125] Because the *Gilmer* Court did not distinguish among the statutory claims, the Court was able to rely on prior holdings, making it unnecessary to inquire whether the nature of the claim distinguished *Gilmer* from the commercial cases of the *Mitsubishi* Trilogy.[126] In declining to fully

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The dissent regarded the exclusion of classwide injunctive relief in arbitration proceedings as determinative. Because the discrimination statutes authorize courts to award broad, class-based injunctive relief to achieve their purposes, the absence of such relief in arbitration frustrates an "essential purpose" of the ADEA. *See id.* at 42 (Stevens, J., dissenting) (noting also that majority decision "made the foxes the guardians of the chickens" (quoting Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting))).

123. *See id.* at 33 ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable . . . .").

124. The outcome of the inquiry turned on whether arbitration provides an adequate forum in which to hear employment discrimination claims. *See generally* James Rytting, Arbitrating Discrimination: How the Concept of Individual Rights Undermines the Procedural and Substantive Protections of Title VII (Apr. 28, 1997) (unpublished manuscript, on file with the author) (explaining effect of Supreme Court's jurisprudence in *Gilmer*).

125. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (analogizing ADEA policy to policies of antitrust law, securities law, and civil racketeering).

126. The claims in the *Mitsubishi* Trilogy shared a common ground: all of the plaintiffs alleged injury to economic interests sustained by violations of laws aimed at regulating business dealings. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 478-79 (1989) (describing circumstances giving rise to suit); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 222-25 (1987) (same); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616-20 (1985) (same). The disputes grew out of commercial contracts and the alleged injury was commensurate with the damages requested. The injury in *Gilmer*, while redressed by a monetary award, rests in rights to personal dignity. *See* Ann C.

engage the arguments, however, the *Gilmer* opinion remains unsatisfactory and, ultimately, unconvincing.[127]

Given *Gilmer*'s emphasis on arbitration procedure, commentary on the case tends to center on whether arbitration can vindicate the claims of individual employees. These commentaries reveal significant doubt, shared by this author, that arbitration generally provides a fair forum for employees.[128] On the other hand, it should be noted that the procedural characteristics of arbitration which impair plaintiffs' suits may also result in unjustified awards against defendant-employers.[129]

The following analysis does not repeat the critiques of *Gilmer* that are based on the substantive and procedural rights of employees, but takes a

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McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent Discharge Policy*, 57 OHIO ST. L.J. 1443, 1450-52 (1996) [hereinafter McGinley, *Rethinking Civil Rights*] (noting that injuries are based on rights to employment and personal dignity and law should deal separately with loss of property right and loss of dignity); Shell, *supra* note 45, at 570 ("Title VII claims deal with rights to personal dignity and equal protection, not economic rights such as those embodied in securities laws [and] RICO . . . .").

127. Scholars have noted the dismissive, conclusory tone of the opinion. *See* Thomas E. Carbonneau, *The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1958 (1996) (stating that "quality of the Court's reasoning in these cases detracts from the credibility of the announced doctrine"); Christine Godsil Cooper, *Where Are We Going with* Gilmer? *– Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 204 (1992) [hereinafter Cooper, *Where Are We Going with* Gilmer?] (criticizing opinion for its "unsatisfying superficiality"); Grodin, *supra* note 4, at 12 (noting Court dismissed arguments in manner that reflected certain impatience); McGinley, *Rethinking Civil Rights*, *supra* note 126, at 1475-76 (characterizing Court's approach as "cavalier"); Sternlight, *supra* note 7, at 674 (characterizing Court's interpretation of FAA as based on assertion rather than reason).

128. *See, e.g.*, Carbonneau, *supra* note 127, at 1957-60 (critiquing Court's choice of arbitration over judicial resolution of claims); Cole, *supra* note 9, at 474-79 (concluding that, for both procedural and substantive reasons, arbitration favors employer); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L.J. 77, 95-99 (1996) (noting FAA has limited value in policing procedural fairness of statutory employment discrimination claims); McGinley, *Rethinking Civil Rights*, *supra* note 126, at 1476 (noting problems faced by plaintiffs in securities arbitration); Shell, *supra* note 45, at 572-73 (concluding that arbitration is inappropriate forum in which to decide discrimination claims); Sternlight, *supra* note 7, at 679-80 (describing that binding arbitration produces distributional inequity and injustice and that procedural rules influence substantive rights); Stone, *supra* note 6, at 1036-43 (noting due process deficiencies of arbitration agreements and arbitration procedures); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's – Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 289 (1996) (concluding that adjudicative procedures of arbitration favor employer); *see also supra* note 9 (summarizing arguments against arbitrating employment discrimination claims based on informality of arbitration, institutionalized incentives of arbitrators, and demographic traits of arbitrators).

129. *See* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1351 (1997) [hereinafter Estreicher, *Predispute Agreements*] ("The limitations of arbitration are reciprocal . . . .").

different course. Specifically, it seeks to determine whether the Court was correct in assuming that the statute "will continue to serve both its remedial and deterrent function" as long as prospective litigants may "effectively vindicate" their claims in arbitration.[130] First, the assumption limits the means of achieving the goal of eliminating discrimination in employment to deterrence. Second, the *Gilmer* majority believed employment discrimination can be deterred as long as the individual has a fair opportunity to obtain redress.

The following discussion examines whether the vindication of individual rights in arbitration generally furthers the public goal of employment discrimination law, as the Court believes. In a sense, the analysis of public policy begins where the pre-*Mitsubishi* Trilogy cases left off. Those cases, although based on considerations of public policy, did not explicitly examine whether and how litigation effects the public purpose of the statutes under consideration. The following analysis considers the relationship between the policy goals of employment discrimination statutes and the method of enforcing those goals.

IV. Public Policy and the Private Cause of Action

Federal employment discrimination law is a network of statutes, each enacted as part of a broad congressional effort to protect employees from discrimination in the workplace.[131] The laws make it illegal for an employer to discriminate on the basis of race, color, sex, national origin, and religion;[132] age;[133] and disabilities.[134] Title VII, passed in 1964 as part of landmark civil rights legislation,[135] is the centerpiece of this web.[136] The statutes that fol-

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130. *Gilmer*, 500 U.S. at 28 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

131. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995) (describing ADEA as part of "ongoing congressional effort to eradicate discrimination in the workplace").

132. *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-7 (1994 & Supp. II 1996) [hereinafter Title VII].

133. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994 & Supp. II 1996).

134. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994 & Supp. II 1996). Earlier legislation protects employees from discrimination on the basis of union activities. *See* National Labor Relations Act, 29 U.S.C. § 158(a) (1994) (listing unfair labor practices).

135. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-7 (1994 & Supp. II 1996)).

136. Title VII defines employment discrimination as follows:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

lowed, the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA), were modeled after Title VII, share its purpose and structure, and are interpreted consistently with Title VII.[137] Consequently, for purposes of analyzing the statutes, the following discussion focuses on Title VII and notes distinctions from the other statutes when appropriate.

The discussion reviews the public policy embodied in Title VII and examines the role of the private cause of action in achieving that policy. In order to determine whether arbitration is an appropriate forum in which to achieve the public policy goals of employment discrimination law, the analysis compares the effectiveness of litigation and arbitration. This discussion also reveals that the interest of the employee and the public are not necessarily congruent.

A. The Public Goal of Employment Discrimination Laws

The broad purpose of Title VII is to "eliminat[e] discrimination in the workplace."[138] Title VII also seeks to make persons whole for injuries resulting from discriminatory treatment.[139] Thus the purpose of Title VII is twofold: the statute seeks to achieve a public purpose, ending workplace discrimination, and to remedy individual injuries of discrimination.[140] The employee who has suffered discrimination hopes to resolve a specific problem, while the public policy goal is to solve the general problem of discrimination.[141] Al-

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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

137. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995); Lorillard v. Pons, 434 U.S. 575, 584 n.12 (1978) (noting that substantive provisions of ADEA were derived *in haec verba* from Title VII).

138. *See McKennon*, 513 U.S. at 358 (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (stating that mandate of Title VII is absolute stricture "that each employee be free from discriminatory practices").

139. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (describing purpose of Title VII).

140. *See id.* at 417 (stating primary purpose of Title VII is "prophylactic"). The term "prophylactic" encompasses both preventing discrimination and remedying discrimination. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1443 (2d ed. 1983) (defining "prophylactic" as adjective meaning "to prevent" and as noun meaning "remedy . . . that prevents disease").

141. *See* Shell, *supra* note 45, at 568 (noting adjudication of Title VII claims provides opportunity to reverse instance of discrimination and to examine discriminating institution); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 483 n.1 (1987) (noting distinction between "dis-

though the two goals are closely related, it is useful for purposes of analysis to consider each goal separately. The achievement of the public goal depends upon the success of individuals in redressing their injury. And the individual's interest in remediation gains legitimacy and support from the public policy goals of the statutes. In the following discussion, the term "public goal" or "public interest" refers to the broad policy objective of ending discrimination; the term "individual goal" or "individual interest" indicates an injured plaintiff's interest in remediation.

The public shares the interest of individuals in fair, equal treatment in the workplace.[142] Ending workplace discrimination confirms a defining value of the Constitution and American society.[143] The landmark 1964 civil rights legislation is based on the proposition that people are "created equal."[144] Workplace discrimination breaches that ideal, a cornerstone of the American moral and legal system.[145] Conversely, ending workplace discrimination reinforces that value. As President Kennedy noted, ending discrimination in America confronts us "with a moral issue."[146]

In addition, the public and the individual continue to share a more pragmatic, instrumental interest in ending one form of workplace discrimination: racial tension. Congress enacted Title VII during the turmoil of racial violence[147] in recognition that legislation was necessary to reduce racial

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pute," an identifiable controversy between identifiable parties, and "problem," which is more pervasive and elusive).

142. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) ("The broad, overriding societal interest 'shared by employer, employee, and consumer . . . is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions.'" (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973))).

143. *See* J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080, 2084-89 (1992) (noting philosophical theories that support regulation of private conduct).

144. John F. Kennedy eloquently expressed this concept:

> It ought to be possible, in short, for every American to enjoy the privileges of being American without regard to his race or his color. In short, every American ought to have the right to be treated as he would wish to be treated, as one would wish his children to be treated.

John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, JOHN F. KENNEDY 1963, at 18 (1964).

145. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-41 (1982) (stating that racial discrimination harms society as whole because it contradicts egalitarian ideal embodied in Civil War amendments, demoralizes those who prefer to live in equal society and makes them unwilling participants in perpetuation of racial inequality, and contributes to class system).

146. *See* Kennedy, *supra* note 144, at 18.

147. *See* David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 670-

hostility.[148] Despite the progress that has been made since 1964, the goal of reducing racial tension remains important.[149] Finally, Congress saw the legislation as a way to remove barriers to economic growth; all of the employment discrimination statutes serve this interest.[150] Legislators agreed that discrimination, which excludes individuals from the workforce for reasons unrelated to their productivity, harms the economy and imposes significant economic costs on the nation.[151] Racial and other discriminatory barriers prevent some individuals from pursuing jobs in which they can be the most productive, and a failure to assign workers to jobs in an effective way can impair economic growth. By providing equal opportunity, workplace discrim-

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72 (1995) (recounting change in public consciousness stemming from Birmingham protests that made legislation possible). On May 2, 1963, Birmingham police broke up a civil rights march led by Martin Luther King, Jr. with billy clubs, police dogs, and fire hoses, a news event that made headlines and was widely televised. Shortly thereafter on June 11, 1993, President Kennedy appeared on television to explain that civil rights legislation was necessary. On June 19, 1963, he submitted the legislation to Congress. *Id.* at 671; Silver, *supra* note 141, at 485.

148. *See* H.R. REP. NO. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393 [hereinafter *1964 House Report*] (noting slow progress of voluntary action and "growing impatience by the victims of discrimination"); Kennedy, *supra* note 144 (stating that "[u]nless the Congress acts, the[ ] only remedy [of African American citizens] is in the street").

149. *See* John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1607 (1992) (finding value in workplace discrimination laws because conscientious efforts to eradicate private discrimination limit likelihood of racial antagonism).

150. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 36 n.* (3d ed. 1994) (noting focus of Title VII was "unabashedly economic"). Congress hoped Title VII would facilitate full economic participation by African Americans. *See id.* (noting protection of national origin and sex similarly rest on solid economic basis); *see also* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1303 (1990) (noting belief that achieving economic parity for minorities and increased productivity for nation was either "hopeful" or "naive").

151. *See* 110 CONG. REC. 13,088 (1964) (statement of Sen. Humphrey) ("There is considerable evidence to demonstrate that permitting people to be hired on the basis of their qualifications not only helps business, but also improves the total national economy."); *see also 1964 House Report, supra* note 148, at 2515 (statement of Rep. McColloch) ("The failure of our society to extend job opportunities to the Negro is an economic waste .... This ... acts as a brake upon potential increases in gross national product.").

Without any increase in unemployment, there is a loss because workers are not employed in the most productive way. To the extent that discrimination causes increased unemployment, welfare costs increase. *See* U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, at 18 (1965), *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16, 35 (1981) (finding that arbitrary age discrimination harms U.S. economy because it deprives nation of productive workers and results in increased unemployment and social security costs).

ination laws encourage individuals to develop their talents and skills and to reach their full potential. When discriminatory barriers do not encumber job assignments and all workers are free to engage in their most productive activities, the same number of people can produce more goods and services. The entire community thus benefits from the removal of constraints on job assignments.[152]

B. The Private Cause of Action

To implement these ambitious public policy objectives, Congress vested the power to enforce the protections of Title VII in private individuals and the courts.[153] Lawsuits brought by individuals are the primary enforcement tool of workplace discrimination statutes.

1. The Enforcement System

Congress chose to vest enforcement of the statute in individuals by authorizing them to bring private suits against employers.[154] The legislation enacted in 1964 limited the role of the Equal Employment Opportunity Commission (EEOC) to investigating complaints of discrimination and to resolving them by "conference, conciliation, and persuasion."[155] It was not until 1972, when Congress recognized the ineffectiveness of the EEOC's conciliation efforts, that Congress authorized the EEOC to sue employers.[156]

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152. William H. Hutt has shown that discriminatory employment practices have negative effects on economic efficiency. *See* WILLIAM H. HUTT, THE ECONOMICS OF THE COLOUR BAR 56-57, 82-86 (1964) (analyzing South African economy).

Although progress has been uneven, there are positive trends in the economic conditions of people of color and women that are linked to antidiscrimination legislation. *See* John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1718-20 (1991).

153. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("The [EEOC] cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts.").

154. Congress considered and rejected a public enforcement scheme modeled after the National Labor Relations Board. *See* Kotkin, *supra* note 150, at 1315-18 (noting role of NLRB is to enforce public, rather than private, rights). Under this plan, the EEOC would have received complaints and prosecuted and decided them, with appeal to the federal courts. *Id.* at 1315.

155. *See* 42 U.S.C. § 2000e-5 (1982). The original statute vested enforcement authority in individuals; the Attorney General, who was authorized to bring cases of national import; and the EEOC's conciliation efforts. *See* Civil Rights Act of 1964 § 706, Pub. L. No. 88-352, 78 Stat. 241, 259 (1964).

156. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e-6(c)-(e) (1972)). The amendment authorized the EEOC to file lawsuits and also transferred to the EEOC the Attorney General's enforcement authority in cases that do not involve government employees.

Individuals may not sue their employers for workplace discrimination without first filing an initial complaint with the EEOC.[157] The agency then investigates the charges and, depending on the evidence of discrimination, either dismisses the claim or attempts to settle it through conciliation. When attempts at settlement fail, the agency may sue the employer. If the EEOC decides not to pursue the case, it issues a right to sue letter to the complaining employee.[158] Only then may the employee take the matter to court. Congress's confidence in the capacity of the individual lawsuit to enforce Title VII is reflected in the fact that the employee may file suit even when the agency investigation does not find evidence of discrimination.[159]

The EEOC takes only a small fraction of cases it has investigated to court.[160] Faced with an increasing number of claims and a rising backlog and budgetary shortfalls, the agency has resorted to a priority system under which it will sue only in certain circumstances.[161] Moreover, because of the decline in the number of class actions and disparate impact claims, individual claims of disparate treatment dominate employment discrimination actions.[162]

2. The Individual Litigant as a Private Attorney General

In pursuing their rights under the employment discrimination statutes, individual claimants serve two masters. First, individual claimants represent their own interests in obtaining redress for injuries resulting from discrimination. Second, they also act for the greater public. Congress recognized that individuals represent the public when it authorized courts to award attorney's

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157. 42 U.S.C. § 2000e-(5)(b). The ADEA and the ADA use the same procedure. *See* 29 U.S.C. § 626 (1994); 42 U.S.C. § 12117 (1994).

158. The EEOC must issue the letter if it fails to file suit within 180 days after the charge is filed with the EEOC. 42 U.S.C. § 2000e-5(f)(1). The EEOC may decide not to file suit because it did not find reasonable cause or, finding reasonable cause, for other reasons. *See infra* text accompanying note 259 (discussing EEOC case selection system).

159. 42 U.S.C. § 2000e-5(f)(1).

160. *See infra* text accompanying notes 252-55 (discussing EEOC caseload).

161. *See* Turner, *supra* note 128, at 281-82 (noting EEOC's inability to process and investigate charges in face of increased case inventory, loss of investigators, and budgetary shortfalls); *infra* text accompanying notes 252-59 (discussing EEOC's problems and new policy).

162. *See* John Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984, 989 (1991) (noting decline of class actions and that only 101 of 7613 employment cases brought in 1989 alleged disparate impact); Kotkin, *supra* note 150, at 1346-47 (discussing various factors that led to dominance of private cause of action); Kirstin Downey Grimsley, *Worker Bias Cases Are Rising Steadily*, WASH. POST, May 12, 1997, at A1 (stating that number of class action lawsuits declined from 1100 in 1976 to 68 in 1996).

fees to the prevailing party.[163] Plaintiffs who expose discriminatory practices help achieve the public goal of decreasing workplace discrimination, and thus the public should bear this litigation expense. The Supreme Court has followed the example of lower courts and characterizes individual litigants in employment discrimination cases as "private attorneys general."[164] Individual plaintiffs are Congress's chosen instrument "to vindicate a policy that Congress considered the highest priority."[165] In the colorful words of one court, an individual plaintiff "takes on the mantle of the sovereign."[166]

Congress chose the private cause of action as the means to achieve Title VII's broad public policy goal of ending workplace discrimination. Although the immediate interest of plaintiffs is to remedy a personal wrong, when they redress that injury they further the broader public goal of ending discrimination. The individual cause of action thus effects both the individual's right to a remedy and the public policy goal of the statute.

C. Achieving the Public Interest Through the Private Cause of Action

The following discussion analyzes how litigation furthers the public goal of ending employment discrimination. Civil litigation accomplishes more than a simple resolution of the dispute. For reasons that are explained below,

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163. *See* 42 U.S.C. § 2000e-5(k) (1994). The corresponding ADEA provision is an even stronger endorsement of the public role played by individual claimants. The ADEA requires courts to award attorney's fees and costs to the prevailing plaintiff and does not authorize fees to prevailing defendants. *See* 29 U.S.C. § 626(b) (1994) (incorporating 29 U.S.C. § 216(b) (1994)). The ADA provisions generally follow the Title VII pattern. *See* 42 U.S.C. § 12205 (1994).

164. *See, e.g.*, Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 759 (1989) (stating that Congress intended plaintiffs to recover attorney's fees because "individuals injured by racial discrimination act as '"private attorney[s] general," vindicating a policy that Congress considered of the highest priority'" (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968))); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (per curiam) (stating that Congress authorized attorney's fees "to encourage individuals injured by racial discrimination to seek judicial relief"); Hutchings v. United States Indus., Inc., 428 F.2d 303, 310 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969).

165. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (noting also that award to prevailing plaintiff is award against violator of federal law (quoting *Piggie Park Enters., Inc.*, 390 U.S. at 402)). Consequently, prevailing plaintiffs in Title VII actions ordinarily receive attorney's fees, while prevailing defendants are not normally entitled to them. *See id.* at 420-21 (prevailing defendant to receive attorney's fees only when plaintiff's action was frivolous, unreasonable, or without foundation); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) ("[The *Piggie Park Enterprises* Court] determined that the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as 'private attorneys general,' were awarded attorneys' fees in all but very unusual circumstances.").

166. *See* Jenkins v. United Gas Corp., 400 F.2d 28, 32-33 (5th Cir. 1968) (noting special responsibility in public interest of trial court to resolve dispute).

judicial adjudication generates specific and general deterrence, educates the public, creates precedent, develops uniform law, and forms public values. In each case, the discussion compares the effectiveness of litigation and arbitration in generating these consequences.

1. Deterrence

As the Court acknowledged in *Gilmer*, deterring employers from discriminatory practices is an important means of achieving the goal of workplace discrimination statutes.[167] Nevertheless, the majority indicated that it viewed damage awards as serving primarily a remedial function.[168] Notwithstanding this view, the prospect of economic redress is an incentive to potential plaintiffs to bring suits in order to recover losses due to workplace discrimination.[169] Damage awards also deter potential defendants because violators must compensate plaintiffs, thereby depriving themselves and/or their shareholders of funds and profits. Thus, economic damages, by providing deterrence and incentive, are a means of enforcing the law.

Title VII utilizes both remediation and deterrence.[170] The original version of Title VII authorized courts to order awards of back pay, instatement, reinstatement, and injunctive relief.[171] Although it was generally

167. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (stating that arbitration serves statute's "remedial and deterrent function" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985))).

168. *See id.* The Court relied on *Mitsubishi*, which had stated that the damages provision in antitrust law was primarily remedial. *Id.*; *see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985); *see also* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 240 (1987) (adopting *Mitsubishi* approach in discussion of RICO damages and noting that *Mitsubishi* had emphasized priority of compensatory function over deterrent function).

169. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 788 (1976) (Powell, J., concurring in part and dissenting in part) (acknowledging importance of incentive, in this case awards of seniority, to achieve primary objective of eradicating discrimination).

170. *See Albemarle Paper Co.*, 422 U.S. at 417-18 (stating that federal court relief under Title VII not only compensates victims but also vindicates broader public interest in deterring future discrimination).

171. *See* 42 U.S.C. § 2000e-5(g) (1994 & Supp. II 1996) (authorizing court to enjoin employer from engaging in unlawful employment practice and order appropriate affirmative action, including reinstatement, hiring, back pay, or other equitable relief). The back pay award includes lost wages, raises, overtime compensation, bonuses, vacation pay, and retirement benefits and is reduced by amounts subsequently earned or that could have been earned. *See* United States v. Burke, 504 U.S. 229, 239 (1992) (stating that "[a]n employee wrongfully discharged . . . may receive only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits such as vacation pay and pension benefits"); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974) (stating that in addition to salary, "[i]nterest, overtime, shift differentials, and fringe benefits such as vacation and sick pay . . . should be included in back pay").

acknowledged that these awards did not fully compensate plaintiffs,[172] the back pay awards served as some incentive and deterrence and thereby facilitated achievement of the statute's goals.[173] According to the Court, financial redress has an "obvious connection" with the primary purpose of Title VII – to achieve equality of employment opportunity.[174] Employers who merely faced injunctive orders to amend their policies had "little incentive to shun practices of dubious legality."[175]

In 1991, Congress strengthened the private enforcement scheme by authorizing courts to award compensatory and punitive damages.[176] In author-

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The ADEA damages provision incorporates provisions of the Fair Labor Standards Act of 1938 and is therefore different from that of Title VII. *See* 29 U.S.C. § 626(b) (1994). Like Title VII, the ADEA authorizes reinstatement, back pay, injunctive relief, declaratory judgment, and attorney's fees. *Id.* Unlike Title VII, the ADEA authorizes an award of liquidated damages equal to the back pay award in cases of willful violations. *Id.* Liquidated damages have a punitive purpose. *See* Commissioner v. Schleier, 515 U.S. 323, 331-32 (1995) (concluding that "the liquidated damages provisions of the ADEA were a significant departure from those in the FLSA . . . [and] 'Congress intended for liquidated damages to be punitive in nature'" (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985))).

172. The back pay award did not fully compensate victims of discrimination because it did not include many of the expenses that victims of discrimination incurred. The scheme especially failed lower-paid employees, for whom the expenses of litigation exceeded potential back pay awards. *See* Kotkin, *supra* note 150, at 1306-07. *See generally* Christine Godsil Cooper, *Employment Discrimination Law and the Need for Reform*, 16 VT. L. REV. 183 (1991) [hereinafter Cooper, *Need for Reform*] (describing difficulties of minorities in litigating discrimination cases).

173. In *Albemarle Paper Co. v. Moody*, the Court limited judicial discretion in the award of back pay because of the importance of the deterrence effected by damages. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (holding back pay should be denied only if reasons for doing so would not frustrate central purposes of statute).

174. *See id.* at 417.

175. *See id.* More recently, the Court relied on and reaffirmed the importance of deterrence. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (pointing out in ADEA case that antidiscrimination statutes share common purpose and stating "[d]eterrence is one object of these statutes"). The Court concluded that the possibility of compensation encourages claimants to bring suit and thereby vindicates the deterrence objective of the ADEA. *Id.*

176. *See* Civil Rights Act of 1991 § 1977A, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981(a)). The damages provision also applies to ADA claims of disparate treatment discrimination. *See* 42 U.S.C. § 1981a(a)(2) (1994).

Congress passed the damages provision to increase the remedies available to those who had suffered discrimination at work. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 254-55 (1994) (noting Act effects major expansion of relief available to victims of employment discrimination in order to further "Title VII's 'central statutory purpose' of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination" (quoting *Albemarle Paper Co.*, 422 U.S. at 421)).

The 1991 Act also responded to several Supreme Court decisions that "rather drastically changed discrimination law to the disadvantage of employees and the advantage of employers."

izing traditional tort damages, the 1991 Civil Rights Act provides an incentive for individuals to file claims and thus to effect the public policy goals of the statutes. The addition of compensatory damages makes it possible for injured employees to obtain full remediation of their injury and encourages more employees to take legal action. The prospect of increased compensatory awards further deters employers from violating the statute.[177]

Congress's provision of punitive damages is particularly telling.[178] The purpose of punitive damages in civil cases is, as the term implies, to punish.[179]

Cooper, *Need for Reform, supra* note 172, at 184; *see infra* text accompanying notes 196-98, 201 (discussing symbiotic relation between courts and Congress in developing law).

177. *See Landgraf*, 511 U.S. at 282 n.35 (stating that addition of compensatory and punitive damages "can be expected to give managers an added incentive to take preventive measures to ward off discriminatory conduct by subordinates before it occurs").

178. The effect of the increased damages award, however, should not be exaggerated. The 1991 Act limits the combined amount of compensatory and punitive damages according to a sliding scale that depends on the size of the employer. The maximum award is $300,000 for an entity with 500 or more employees. This monetary cap excludes awards of back pay and interest on back pay. *See* 42 U.S.C. § 1981a(b).

The Act limits the damage award in other ways. It authorizes recovery of compensatory and punitive damages only for disparate treatment claims that are not cognizable under 42 U.S.C. § 1981. *See id.* § 1981(a). It also specifically limits recovery of punitive damages to those cases in which the defendant acted with malice or with reckless indifference to the individual's federal rights. *See id.* § 1981a(b).

179. *See* United States v. Halper, 490 U.S. 435, 448 n.8 (1989) ("[P]unitive damages, available in civil cases, serve punitive goals."); *see also* Commissioner v. Schleier, 515 U.S. 323, 331-32 (1995) (stating that Congress intended ADEA liquidated damages provision to be punitive); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) (same); Smith v. Wade, 461 U.S. 30, 54 (1983) (stating that § 1983 punitive damages punish outrageous conduct).

The aim of punishment is reflected in the standards for awarding punitive damages in civil actions. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 617 (1993) (reaffirming that "the *Thurston* definition of 'willful' – that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute – applies to all disparate treatment cases under the ADEA"); *Wade*, 461 U.S. at 56 (stating that punitive damages are allowed in § 1983 action when conduct is motivated by evil motive or intent or involves reckless or callous indifference to federally protected rights of others); Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 207 (1st Cir. 1987) (stating that in instant § 1981 action, jury should consider "the grievousness of the conduct, the solvency of the guilty party, and the potential for deterrence of the verdict" when determining punitive damages award).

The punishment function is also demonstrated by a key feature of punitive damages – they are never awarded as of right. *See Wade*, 461 U.S. at 52 (stating that jury decides whether and how much to punish defendant).

Recognizing the punishment function of punitive damages, the Supreme Court has held that excessive punitive awards may violate due process. *See* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 454-55 (1993) (stating that Due Process Clause of Fourteenth Amendment "imposes a substantive limit on the amount of a punitive damages award"). The Court has been less successful in articulating a standard to determine a due process violation.

One of the purposes of punishment is to deter both the violator and a general class of potential violators from engaging in future, similar conduct.[180] Criminal theory, which provides insight into deterrence, justifies state-imposed punishment on the ground that it specifically deters the offender.[181] The lesson is harsh: if the offender repeats the conduct, more punishment will follow.[182] Thus, the punishment specifically deters an employer who has violated the statute. An employer forced to pay punitive damages is unlikely to repeat the discriminatory practice. Moreover, the employer is likely to evaluate its other procedures and policies to ensure that they are acceptable.

More significantly, the imposition of punitive damages also deters potential violators.[183] The example of a sanctioned employer discourages others from engaging in similar practices.[184] General deterrence more effec-

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See BMW of North Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (stating that violation of due process occurs when punitive damage award is grossly excessive in relation to state's interests in punishment and deterrence).

180. It is generally agreed that all statutory relief must be available in arbitration. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1483 n.11 (D.C. Cir. 1997). As a threshold issue, the Court has approved the practice of arbitrators awarding damages. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995) (enforcing arbitral award of punitive damages). *See generally* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1 (1997) (discussing concerns regarding punitive damage awards in arbitration).

181. Deterrence is one of several justifications for criminal punishment. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 844 (1995) (discussing theories of punishment); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS 115 (6th ed. 1995) (noting that "deterrence theories," under which punishment is designed to deter commission of future offenses, "furnish a widely accepted rationale of . . . punishment"); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5, at 24-25 (2d ed. 1986) (describing deterrence as theory of punishment); PAUL H. ROBINSON, CRIMINAL LAW § 1.2 (1997) (discussing reasons to punish those guilty of crimes, including deterrence); Kent Greenawalt, *Punishment*, *in* 4 ENCYCLOPEDIA OF CRIME & JUSTICE 1336, 1340-41 (Sanford H. Kadish ed., 1983) (discussing utilitarian goals of punishment, general and individual deterrence, incapacitation, and reform); *see also* Jeremy Bentham, *Principles of Penal Law*, *in* THE WORKS OF JEREMY BENTHAM 367, 402 (J. Bowring ed., 1843) (finding that amount of punishment must be sufficient to outweigh desire to commit same offense again); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1247-59 (1985) (discussing criminal law principles under theory of optimal deterrence). *See generally* Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

182. *See* ROBINSON, *supra* note 181, at 12-13 (noting specific deterrence has more direct effect than general deterrence); Greenawalt, *supra* note 181, at 1340 (noting that imposing punishment teaches offender that repeating conduct will result in more punishment).

183. *See* Greenawalt, *supra* note 181, at 1340 (stating that knowledge that punishment will follow crime deters people from committing crimes and reduces future violations).

184. *See* Smith v. Wade, 461 U.S. 30, 54 (1983) (stating purpose of punitive damages is "to deter defendant *and others like him* from similar conduct in the future" (emphasis added)

tively induces compliance with the law than specific deterrence. First, it reaches a broad class of potential offenders. It also creates spill-over effects: punishment of one violation has a generalized deterrent effect on other, related violations.[185] The example of an employer sanctioned through public adjudication for racial discrimination in hiring may deter another employer from gender discrimination in hiring or, indeed, in promotions. Second, the imposition of punishment stigmatizes the violator, and this deters other employers who seek to avoid that same stigma.[186] A positive public perception is an incentive for the firm to obey the antidiscrimination laws because the views of potential employees and consumers may influence profitability. Stigmatizing violators also reaffirms legal employment practices and motivates law-abiding employers to continue to comply with the law.

General deterrence requires public knowledge of disputes and their disposition. Potential violators can appreciate the threat of sanctions only when they learn that similarly situated actors have been punished. This knowledge enables them to "calculate the costs and benefits of engaging in the prohibited conduct."[187] The public forum of litigation makes this information available to the parties, to entities similar to the parties, and to the general public. Thus, litigation of workplace discrimination claims furthers the public policy goal of the statutes by generally deterring and educating prospective violators.

In contrast, the private and confidential nature of arbitration creates an environment in which only the parties know about the claim and its disposition.[188] Even when arbitrators discover that an employer has willfully disre-

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(quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1977))); *see also* Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 206 (1st Cir. 1987) (upholding jury instruction in § 1981 action that explained punitive damages are awarded "for the purpose of punishment . . . *and as a deterrent to others*" (emphasis added)).

The Eighth Circuit has explained that remedial awards "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973).

185. *See* ROBINSON, *supra* note 181, at 12 (noting that contemplated violations similar to conduct that was punished makes deterrent effect of punishment more likely).

186. *See id.*

187. *See id.*

188. For example, the National Association of Securities Dealers (NASD), which sponsors arbitrations in the securities industry, does not publish the awards or make a database freely available to the public. Telephone Interview with NASD Administrative Office (Sept. 8, 1998). Awards are filed at the Administrative Office by case number. *Id.* The public can obtain a copy of an award by completing a form, specifying the case-identification number, and paying a five dollar fee. *Id.* The awards are available for a fee from private sources such as Westlaw and the Securities Arbitration Commentator, which furnish access and search capabilities to fee-paying clients. *Id.*

garded the law and is subject to punitive damages, only industry insiders with access to informal channels of information are likely to learn about it. Consequently, arbitration forgoes general deterrence as a means of effecting Title VII and utilizes only specific deterrence of the party to the suit. Arbitration effectively forfeits the enforcement mechanisms of spill-over deterrence and stigmatization because neither similar entities nor the public learns that an employer has violated the statute.[189] Moreover, the specific deterrence that does occur is not as "authoritative" because the ultimate decision is the opinion of a private entity, the arbitration panel.

The Supreme Court, therefore, misjudged the effectiveness of arbitration in vindicating the public policy goals of the statute. The Court also erred by limiting the enforcement mechanism to deterrence. While it is important, deterrence is not the only mechanism for achieving the goals of employment discrimination law. The following discussion analyzes two additional enforcement mechanisms generated by litigation.

2. *Development of the Law, Precedent, and Uniformity*

Litigating the private cause of action furthers the public policy goal of employment discrimination law by developing and refining the law.[190] In order to resolve a dispute, judges invariably formulate standards, articulate general principles, and issue interpretive guidelines.[191] The judicial process thereby produces precedent and rules that influence the outcome of similar future disputes.[192] Notwithstanding the debate about the extent of judicial authority to make law, the nature of lawmaking inevitably requires some

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189. *See* ROBINSON, *supra* note 181, at 13 (noting that deterrence by stigmatization requires communication of results of trials to public); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 77-87 (1973) (discussing threat of punishment as teacher of right and wrong).

190. The majority in *Gilmer* apparently accepted the proposition that legal development is an important adjudicative function. The Court did not directly respond to the argument that an absence of written opinions stifles the development of the law. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31-32 (1991) (noting that NYSE arbitration forum provided written awards, that judicial decisions will continue, and that settlements do not result in written awards).

191. *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979) (noting that any court system produces these services); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995) (recognizing arguments supporting normative value of adjudication); Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 2 (1990) (noting frank recognition that judicial evolution of common law and constitutional doctrine is distinct form of lawmaking).

192. *See* Luban, *supra* note 191, at 2623-25 (noting civil adjudication creates other public goods such as advocacy skills of litigators, discovery and publicizing of facts, and authority of courts).

degree of judicial rulemaking.[193]

Laws are often a product of conflict and compromise among interest groups. Consequently, lawmakers may produce laws phrased in ambiguous language designed to give no group a decisive victory.[194] Moreover, legislators cannot anticipate specific problems to which a statute will apply and, consequently, cannot write laws that cover every possible situation.[195] Therefore, disputes arise that highlight a statute's ambiguities or involve situations that lawmakers did not anticipate. In order to resolve these problems and ambiguities, courts must interpret statutes.[196] Judges and lawmakers act in concert[197] as the judicial process augments and amplifies statutory law.[198]

These notions of judicial and legislative interaction are particularly relevant in the context of employment discrimination statutes.[199] Employ-

193. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 6 (1982) (describing dilemma of common-law courts in age of statutes); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-84 (1976) (distinguishing judges' role in shaping public law from traditional conception of civil adjudication); *see also* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13-19 (1921) (describing many elements that inform application of law by judges); KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 24, 263 (1960) (noting development of law is affected by pressures of legal doctrine, temperament, occasion, epoch, and sequence of cases).

194. *See* Chayes, *supra* note 193, at 1314 (noting Congress is often unwilling or unable to do more than express general policy objective); Luban, *supra* note 191, at 2637 (finding dynamics of lawmaking captured in formula of contestation, compromise, and codification).

195. *See* CARDOZO, *supra* note 193, at 120 (noting that legislature "regulates in a manner altogether abstract"); Wachtler, *supra* note 191, at 15 (noting legislative acts are essentially prognostication; they are not direct applications of law upon people, but are estimates of rule's effect).

196. *See* CARDOZO, *supra* note 193, at 16-17, 113-15, 129 (describing process as interstitial lawmaking that fills in legislative gaps and forms cohesive structure).

197. *See* Wachtler, *supra* note 191, at 7 (characterizing process as "intimate law-making partnership" between legislature and courts).

198. In addition to being necessary, the process may often produce better results. Consideration of concrete situations results in rules that are more relevant than those Congress writes in the abstract. *See* Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 12-13 (1997) (noting courts, in contrast to Congress, interpret statutes and make law in course of deciding actual cases). In dealing with concrete problems, judges see how statutes apply to real-world circumstances and how they interact with other statutes. In light of this insight, judges fashion rules that fully implement legislative goals and avoid unforeseen conflicts with other values and policies. *See id.* (noting manner in which courts apply statutes). *See generally* CARDOZO, *supra* note 193; Wachtler, *supra* note 191.

Moreover, judicial development of the law may be more efficient than returning the issue to the legislature because courts can often respond more quickly to new situations than can Congress. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) (noting time constraints limit legislative output); Kahan, *supra*, at 9-10 (noting time constraints on Congress in face of reelection campaigns and demands of special interest groups).

199. *See* Wachtler, *supra* note 191, at 9-10 (noting that judicial consideration of discrimination now focuses largely on statutory interpretation).

ment discrimination laws are phrased in terms of broad principles, standards rather than rules, that courts must apply to specific situations.[200] In addition, Congress occasionally fails to forge a consensus in the particularly politically contentious law regulating employment and prefers to leave certain issues to the courts.[201] Finally, ending workplace discrimination has become more problematic as the face of discrimination changes and new problems appear.[202]

The history of Title VII offers abundant examples of the judiciary's explication of the law and its response to changing patterns of discrimination. To effect the purpose of the statute and to give meaning to the spare language of Title VII, the Supreme Court has developed methods of proving discrimination[203] and continues to refine them.[204] In the face of new and more subtle

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200. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993) (Scalia, J., concurring) (noting Court's standard to determine whether harassment has violated statute provides little guidance).

201. *See generally* George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972) (providing history of legislative compromise necessary to enact Civil Rights Acts of 1964 and 1972).

Congress failed to achieve consensus in 1991 when it amended Title VII to codify the disparate impact theory. Legislators were unable to agree on definitions of the key concepts, "job related" and "consistent with business necessity." *See* 42 U.S.C. § 2000e-2(k)(1)(A) (1994). Congress took the unusual step of restricting the legislative history the courts could use to ascertain the meaning of those concepts. *See* ZIMMER ET AL., *supra* note 150, at 427 (noting that "Section 105(b) of the Act restricts the relevant legislative history to one specific memorandum placed in the Congressional Record").

202. A cynic might suspect that employers who support arbitration of employment discrimination claims are motivated by a desire to freeze the status quo and end the development of the ways in which discrimination may be proven. *See* Edwards, *supra* note 25, at 679 (expressing concern lest ADR become tool for diminishing judicial development of legal rights for disadvantaged). The issue is not that simple, given that judicial decisions also work to the advantage of employers. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

203. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988) (approving application of disparate impact analysis to subjective hiring practices); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977) (explaining why statistical evidence is persuasive); International Bhd. of Teamsters v. United States, 431 U.S. 324, 334-40 (1977) (approving use of statistical proof in systemic disparate treatment cases); Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971) (barring employment practices that have disparate impact upon protected classes unless practices are related to job performance).

204. *See* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998) (finding employer not liable for sexual harassment by supervisors if it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and employee unreasonably failed to take advantage of opportunity); *Hicks*, 509 U.S. at 511 (holding fact-finder is not obligated to find employer intended to discriminate when plaintiff proves that employer's proffered justification was pretextual); *Biggins*, 507 U.S. at 611-12 (holding that adverse employment action taken because employee pension was to vest does not necessarily establish age discrimination).

forms of discrimination, the courts have been and are instrumental in providing redress to individuals.[205]

The authority of the courts to interpret and to apply the statutes comes from Congress.[206] Judges gain additional authority to develop the law from their training, experience, and ability,[207] as well as from institutional considerations.[208] The task of developing the law, which requires a sound understanding of law in general and of current societal standards, is a delicate one.[209] When a court missteps, however, its mistake and the reasons for it are manifest in public records and written opinions. Appellate courts may then review the decision, and Congress may correct it through legislation.[210] Thus, judges are accountable to Congress and, ultimately, to the people.

Congress has not authorized arbitrators to develop the law. Arbitrators derive their authority to settle disputes from the parties' agreement to abide by the decision. They are not accountable to Congress or the public, nor do they formulate legal rules that are applicable to other parties or the general public under the imprimatur of state authority. Arbitrators also lack the authority that emanates from legal experience and training. Without legal expertise, arbitrators may unconsciously use nonlegal values, such as industry

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205. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998) (holding Title VII prohibits same sex harassment); *Harris*, 510 U.S. at 22 (defining hostile environment sexual harassment); Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (finding mixed-motive discrimination violates Title VII); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (holding Title VII prohibits hostile environment sexual harassment).

206. *See* Chayes, *supra* note 193, at 1314 (noting legitimacy of judicial action rests on delegation of authority from Congress). *See generally* Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996) (discussing delegation of lawmaking function).

207. *See* CALABRESI, *supra* note 193, at 97 (stating "those who by training and selection are relatively good at exploring and mapping the legal landscape can appropriately be given the task of evolving the law").

208. *See* Chayes, *supra* note 193, at 1307-08 (stating that judicial process tailors solution, ensures participation by those affected by decision, furnishes strong incentives for producing information and argument, responds to grievances effectively, and is not bureaucratic).

209. *See* Wachtler, *supra* note 191, at 16 (noting that knowledge necessary for lawmaking is understanding of "legal landscape," mix of common, statutory, and constitutional law, together with present societal beliefs, understandings, and relationships not yet formally articulated by government body (citing CALABRESI, *supra* note 193, at 96)).

210. For example, following the decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), Congress passed the Pregnancy Discrimination Act, which defined discrimination on the basis of pregnancy as sex discrimination. *See* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978). Similarly, the Civil Rights Act of 1991 responded to several Supreme Court decisions. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 250-51 & n.3 (1994) (noting sections of 1991 Act that were drafted with "recent decisions of the Supreme Court in mind").

practice, to resolve an issue.[211] Moreover, arbitrators may further stifle the development of the law if they are overly cautious and slavishly follow, rather than distinguish, precedents.

Not only are arbitrators without authority to develop the law, they also have little incentive to do so. Because their decisions are final and limited to the purpose of resolving the immediate dispute, arbitrators have little motivation to explain their awards in a way that makes them useful to future litigants or the general public.[212] Once precedent, which is composed of both judgment and rules, is created, it becomes a public good.[213] That is, many potential users have access to this good, but no mechanism exists to compensate its creator for its use.[214] As a private provider of dispute resolution services, arbitration will not produce precedent because there is no way to generate income from it.[215] The formation of precedent and interpretive rules requires nonmarket incentives, such as those present in civil judicial systems.[216]

In contrast, litigation occurs within a hierarchical institution that is designed to produce a single, unitary law. Operating within this system, courts create law that has precedential value and that can be applied to succeeding cases. Reliance on precedent is efficient in this system because succeeding courts need not revisit issues that another court has already considered. Judicial rulemaking also leads to a body of uniform law whose application produces consistent results.[217] A uniform law, consisting of statute,

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211. When arbitrators use industry practices as a standard, those whom the law seeks to regulate define public rights and duties under the particular regulation. *See* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting) ("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."); Edwards, *supra* note 25, at 679 (imagining result had all race discrimination cases in sixties and seventies been mediated rather than adjudicated).

212. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 259 (1987) (Blackmun, J., dissenting) (noting that arbitrators are discouraged by their associations from giving reason for their decision).

213. *See* Luban, *supra* note 191, at 2623 (noting precedent and legal rules are public goods).

214. Once provided, a public good, such as a lighthouse, can be accessed by large numbers of users. Because it is difficult for the entity that creates it to collect revenues from its use and thereby recoup its investment, a single entity has no incentive to create the good. *See generally* Landes & Posner, *supra* note 191 (examining problems of private production of public good).

215. *See id.* at 240 (examining problems of private production of public good).

216. *See* Hazard & Scott, *supra* note 9, at 43 (noting system of public justice is public good in that every potential user would prefer that someone else pay to keep it ready for use); Landes & Posner, *supra* note 191, at 240 (concluding that private market will systematically underproduce rules and precedents); Luban, *supra* note 191, at 2623 (noting that adjudication but not arbitration creates rules and precedents).

217. *See* Malin & Ladenson, *supra* note 6, at 1231 (stating that uniform law requires

precedent, and interpretive rules, ensures that courts treat similarly situated parties alike.[218] Uniformity ensures that responsible employers are not subject to competitive pressure from employers who are not held to the same standard.[219] Consistency between cases is especially important when statutory claims are at issue because the *raison d'etre* of federal law is to achieve a uniform standard on which the public may rely.[220]

In contrast, arbitrators decide claims within a system in which each arbitrator is independent and in which no correcting hierarchy exists. Consequently, arbitration does not produce a uniform or consistent law. Should an arbitration result in a new interpretive rule, it applies only to the case at hand. Even if other arbitrators know about a prior arbitral decision, they have no obligation to follow it.[221]

3. Education and Formation of Public Values

Litigation of a private cause of action educates the community in a straightforward manner. The publicity that accompanies a trial educates the public as to the distinctions between legal and illegal employment practices.[222] In this way, a public dispute informs employees and employers that certain employment practices violate the law or do not bespeak discrimination.

Less obviously, the process of litigation is inherently valuable to the community. Litigating specific issues gives concrete meaning and expression

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single, socially binding interpretation of law); Stone, *supra* note 6, at 1043 (noting outcomes of arbitration are variable, unpredictable, and invisible).

218. The need for uniformity can be quite basic. For example, until recently firms considered to be employers in one circuit may not have been so considered in others. *See* Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202, 206-07 (1997) (noting circuit split on determining who is employer). The Supreme Court has only recently determined the proper method of counting the number of employees, a calculation important when small firms are involved because employment discrimination statutes exempt small employers. *See id.* at 212 (deciding method for determining number of employees).

219. *See* S. REP. NO. 103-3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7 (accompanying Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 U.S.C. and 29 U.S.C.)) (stating labor standards are necessary to relieve competitive pressure placed on responsible employers by unscrupulous employers).

220. *See* Malin & Ladenson, *supra* note 6, at 1231 (noting employment statutes are congressional determinations that uniform standard is preferable to private arrangements that are subject to market pressure).

221. In fact, arbitrators are free to ignore legal precedent. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 259 (1987) (noting that arbitrators have no obligation to follow precedent). In this sense, arbitration is less efficient than litigation because arbitrators consider each case without reference to similar cases.

222. *See* LAFAVE & SCOTT, *supra* note 181, § 1.5, at 25 (noting criminal law justifies punishment in part because it serves educative function).

to the public values embodied in a statute.[223] An alleged statutory violation tests the values that gave rise to the law. Deciding these challenges in a public forum imparts a sense of right and wrong, of acceptable and unacceptable conduct.[224] In articulating the standard of acceptable conduct, an adjudication reaffirms these values and forms community standards.[225] The standards then govern future conduct.[226]

The function of forming public values is especially significant when the majority embarks upon an ambitious program, such as removing workplace discrimination.[227] The task of forming, and indeed changing, public values so that they conform to the law is particularly difficult when the law is misunderstood or is inconsistent with current standards.[228] For example, an employer may believe it did not discriminate against an employee if it made the adverse employment decision without racial animus. The law, however, does not require a hateful motive. Recognizing that the action may have been a result of unconscious discrimination, courts focus on the effect of the employer's conduct.[229] Ending unconscious discrimination requires decision-makers that are aware of their own predilection for acting on the basis of stereotypes.[230]

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223. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) [hereinafter Fiss, *Against Settlement*] (noting adjudication explicates and gives force to public values); Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1672-73 (1985) (stating adjudication is social process that uses state power to require reluctant to talk and to listen); Luban, *supra* note 191, at 2635 (explaining that judicial involvement is essential good).

224. *See* Stone, *supra* note 6, at 1043. A judgment that a law has been violated expresses the community's disapproval of the conduct. In the context of criminal law, conviction and punishment help to form and to strengthen the public's moral code and create conscious and unconscious inhibitions against committing the conduct. *See* Johannes Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L. & CRIMINOLOGY 176, 179-80 (1952) (explaining that judgment has moralizing effect that strengthens inhibitions and stimulates habits of law-abiding conduct and stressing that achievement of inhibition and habit is of greater value than mere deterrence).

225. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358-59 (1995) (stating litigation may disclose patterns of noncompliance resulting from misappreciation of Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance).

226. *See* ROBINSON, *supra* note 181, at 21 (noting law is relevant to networks of interpersonal relationships and shared social norms and prohibitions).

227. *See* Chayes, *supra* note 193, at 1302 (noting public law litigation is not dispute between private individuals but grievance about operation of public policy).

228. *See* LAFAVE & SCOTT, *supra* note 181, § 1.5, at 25 (noting problem in context of criminal law).

229. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation.").

230. *See* Linda Hamilton Krieger, *Content of Our Categories: A Cognitive Bias Approach*

Continual affirmation of public values through the civil judicial system encourages employers to evaluate the reasons for taking employment decisions. Because employment discrimination suits often involve sharply contrasting views about fundamental public values, they merit authoritative resolution by the courts, which represent state power.[231] The need for and benefit of judicial affirmation of public values is heightened when, as here, the law is based on a defining attribute of the larger community, that all people deserve equal treatment.

In sum, litigation is more effective than arbitration in achieving the long-term public policy goal of ending workplace discrimination. The public forum more fully utilizes the tools of deterrence and incentive that Congress provided to achieve that goal. Litigation allows the courts to develop the laws in a way that maintains their effectiveness in identifying and preventing workplace discrimination. Judicial resolution of suits develops precedent that ultimately creates a consistent interpretation of the law. As a single, unified interpreter of public law, the judicial forum reinforces the public value that workplace discrimination is wrong.

The *Gilmer* Court assumed that arbitration is as effective a forum as litigation in which to achieve public policy goals.[232] But, because arbitration is confidential, private, and final, it forgoes effective mechanisms – general deterrence, education, development of law, precedent, uniformity, and the formation and affirmation of public values – for enforcing the public policy. The Supreme Court effectively limited the mechanisms for enforcing the goal of ending discrimination to only one method, specific deterrence. Accordingly, the Supreme Court erred in its assumption that the arbitration forum would achieve the public goal of nondiscrimination as long as employees could effectively vindicate their claims of workplace discrimination. Employment discrimination laws encompass two goals – to end discrimination and to provide redress for discrimination – and arbitration is not an effective means to secure one of them.

D. The Interest of the Employee

When Congress placed enforcement of employment discrimination law in the hands of individual litigants, it indicated a preference for achieving

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to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1188 (1995) (noting cognitive mechanism of stereotyping influences and intergroup judgment and decision-making).

231. *See* Edwards, *supra* note 25, at 678 (noting some disputes may not be resolved by good faith and mutual agreement).

232. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

social policy through individual self-interest.[233] Accordingly, the interests of the individual litigant in choosing the forum and controlling the suit may have influenced the Court's inclination not to distinguish between the individual's and the community's interests. The following section summarizes the reasons for supporting arbitration that are based on individual autonomy and control. The discussion also assesses whether the effect of arbitration on public knowledge and development of the law is insignificant because some parties will continue to litigate their claims. The second section of this discussion considers whether all employees may achieve their interest in remediation through litigation. The analysis reveals tensions between the individual's interest in achieving redress for an injury and the public goal of ending discrimination.

1. Responses to the Public Policy Argument

The Supreme Court in *Gilmer* found it significant that parties may settle a dispute during litigation.[234] The Court apparently believed that agreements to settle and to arbitrate are largely analogous. Settlement does resemble arbitration in that both are agreements between parties to end litigation upon privately negotiated terms. Settlement is fundamentally different, however, because the parties decide on the terms of resolution, whereas in an arbitration the parties submit to the external judgment of a third party.[235] Thus, settlement is not an alternative to litigation; it is an alternative to third-party judgment. Also, the decision to settle is not analogous to the decision to waive prospectively the litigation forum.[236] Settlement occurs after the dispute has arisen, and the aggrieved individual understands the nature of the claim and has access to legal advice. Moreover, settlement depends upon and is thus an inherent part of litigation.[237] Rather than opting out of litigation, the party that

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233. *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996) (noting cultural value of "preference for private ordering over public control"); Schwartz, *supra* note 7, at 115 (noting advantages of private cause of action over government enforcement: low cost, avoidance of difficult choices of whose rights to enforce, containment of government power, and grant of autonomy and control to aggrieved individuals).

234. *See Gilmer*, 500 U.S. at 32 (observing that "settlements of [claims at issue] are clearly allowed").

235. *See* Estreicher, *Arbitration Without Unions*, *supra* note 41, at 777 (commenting on distinction between arbitration and settlement).

236. *See* Schwartz, *supra* note 7, at 117-18 (discussing difference between prospective waiver and settlement in terms of deterrent and compensatory effects of remedies).

237. *See* Cooper, *Where Are We Going with* Gilmer*?*, *supra* note 127, at 222 (noting that settlement is based on prediction of outcome of litigation; arbitration is based on avoidance of outcome of litigation); Yamamoto, *supra* note 24, at 1059 n.20 (distinguishing settlement from ADR because settlement is "internal" to adjudication).

settles has actually used the litigation process.[238]

Finally, settlement is subject to the same critique as that leveled against arbitration. Like arbitration, settlement allows the parties to avoid public scrutiny, reduces accountability, and fails to create precedent.[239] Most settlements do not further the public goal of ending discrimination because private agreements, especially confidential ones, do not generate deterrence, development of the law, precedent, uniformity, education, or formation of public values. Private settlements do not provide either the assurance that legislatively-mandated standards have been followed or a satisfactory explanation of any variance from the law.[240] Although settlement is consistent with individual control over a suit, it does not produce effective mechanisms to achieve the end of employment discrimination. Settlement, like arbitration, may not be in the public interest.[241]

Postdispute agreements to arbitrate claims present similar concerns because they also remove employment discrimination claims from the public realm. A postdispute agreement shares characteristics of both predispute agreements to arbitrate and agreements to settle. Although postdispute agreements to arbitrate resemble predispute agreements to arbitrate because they also forfeit the enforcement mechanisms provided by litigation, they are also like settlements because they occur after the merits of a dispute have been weighed. Thus, courts and those who oppose predispute agreements generally accept postdispute agreements, which are not viewed as coercive, involuntary, and unknowing agreements.[242] In contrast to predispute agreements, employ-

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238. The decision to settle is made after the dispute has arisen and, by definition, after litigation has begun. The degree of reliance on the litigation process varies according to the point at which settlement is achieved. Parties who settle after assessing the factual strength of their cases following discovery have used litigation procedure. Parties who settle after evaluating the strength of their respective legal positions based on the court's disposition of pretrial motions have been accorded judicial determinations. The assessment preceding a settlement is also based on an evaluation of the facts of the particular case in light of controlling precedent, again utilizing litigation in the form of prior cases. Settlements that occur after summary judgment can fairly be said to have been litigated.

239. *See generally* Fiss, *Against Settlement*, *supra* note 223 (questioning enthusiasm for settlement and viewing it as problematic).

240. *See* Edwards, *supra* note 25, at 678 ("The mere resolution of a dispute is not proof that the public interest has been served.").

241. *See* Fiss, *Against Settlement*, *supra* note 223, at 1075 ("Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

242. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (noting that petitioner could waive right to Title VII action as part of voluntary settlement); Wilko v. Swan, 346 U.S. 427, 438 (1953) (stating waiver of judicial forum in advance of controversy was not enforceable and leaving open prospect that postdispute waivers might be arbitrable), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); *id.* at 438

ees who sign postdispute agreements are in a position to evaluate the advantages and disadvantages of their choice.[243] After a dispute materializes, the employee knows that the dispute concerns a statutory right and has an opportunity to assess with counsel the likelihood of obtaining a remedy. Thus, a closer fit exists between the public and private interests at stake;[244] if the evidence supports a finding of discrimination, the case is more likely to go to litigation, keeping the matter in the public realm.

The Court in *Gilmer* again revealed a preference for individual control when it noted that Congress had instituted a flexible approach for resolving employment discrimination disputes.[245] As the Court noted, employees may sue in either federal or state court and may rely on either federal or state agencies. These forums differ significantly from arbitration, however, because their authority to resolve the dispute rests on the state's power, rather than on private agreement. In addition, the provision of multiple forums encourages claims by giving employees a wide variety of options. Predispute arbitration agreements limit the employee to a single option and, by eliminating all the other choices that Congress provided, diminish plaintiffs' incentive to enforce the statute.[246]

Finally, in *Gilmer*, the Court acknowledged petitioner's argument that arbitration did not provide public knowledge and stifled development of the law. In responding to those points, the Court noted that not all employees would be subject to arbitration agreements, implying that sufficient judicial adjudications would achieve those ends.[247] The argument from numbers,

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(Jackson, J., concurring) (expressly stating that present, as opposed to future, controversies were arbitrable).

Notably, the recent legislative proposals would bar predispute agreements to arbitrate but allow postdispute agreements. *See supra* note 8 (listing proposed statutes).

243. *See* Estreicher, *Predispute Agreements*, *supra* note 129, at 1346 (noting that premise of voluntary postdispute arbitrations is that claims can be traded for money and therefore parties may negotiate postdispute adjudicative process).

244. *See* Schwartz, *supra* note 7, at 115-19 (noting postdispute agreements do not produce same externalities as predispute waivers). Schwartz notes that prospective waivers create externalities by undermining public goals inherent in private actions and by affecting others similarly situated. *Id.* at 115. He also notes that prospective waivers interfere with the traditional legal process by asking an individual to waive rights at a time when deterrent value to the public is greater than compensatory value to the individual. *Id.* at 118.

245. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991) (noting EEOC's statutory mandate under 29 U.S.C. § 626(b) to pursue informal methods and likening arbitration to provision of concurrent jurisdiction of ADEA claims that evinces Congress's intent to allow plaintiff to select forum).

246. *See* Shell, *supra* note 45, at 568-69 (noting that provision of multiple forums argues against mandatory predispute arbitration because such agreements nullify statutory options).

247. *See Gilmer*, 500 U.S. at 32 (predicting that courts would continue to render judicial

however, is not convincing. First, it concedes the point that arbitration produces private law. As developed in the preceding discussion, private law and private adjudication are less effective than litigation in achieving the public goal of the statutes. Second, the number justification does not explain why the rest of the community should be satisfied with a less effective forum. Third, the response does not address the wisdom of resolving some claims through a private law system of arbitration and others through a public law system of litigation.[248] Finally, the *Gilmer* Court's reliance on a sufficient number of litigated claims to achieve public policy is speculative and may now be out of date given the popularity of arbitration and evidence of its increased use.[249]

The arguments based on the analogy to settlement, postdispute agreements to arbitrate, and Congress's provision of multiple forums share a common element. While they are ultimately not determinative, each model is grounded on the proposition that individual litigants should control and manage their suits. This proposition creates a tension between the objectives of the individual and the objectives of the public. The individual litigant may settle, or indeed not file a suit; in these cases the litigant does not further the public goal of ending discrimination. The following inquiry into the individual's interest in a remedy, the second goal of the statute, continues to develop this theme of tension between private and public goals.

2. *Effecting the Individual's Remedial Goal Through Litigation*

The employment discrimination statutes provide a remedy to individuals who are subject to discriminatory policies or practices at work; those injured by discriminatory decisions or policies may file individual lawsuits seeking damages. Unfortunately, employees who turn to the EEOC and to the civil justice system face a problematic endeavor because neither the EEOC nor the civil justice system resolves employment disputes in a timely or cost-effective manner.[250]

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decisions because it was unlikely that all or even most ADEA claimants would be subject to arbitration agreements).

248. *See* Estreicher, *Predispute Agreements*, *supra* note 129, at 1356 (distinguishing "private law" from "public law").

249. *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 199 n.12 (D. Mass. 1998) (noting that developments since *Gilmer* may have "overtaken" Court's premise).

250. Because Congress has not provided the EEOC with the financial resources necessary to cope with the increased number of employment discrimination claims, the EEOC and the civil justice system face significant problems. *See* Susan A. FitzGibbon, *Reflections on* Gilmer *and* Cole, 1 EMPLOYEE RTS. & EMPL. POL'Y J. 221, 245 (1997) (noting lack of additional funding to address increasing numbers of claims); McGinley, *Rethinking Civil Rights*, *supra*

Employment discrimination suits begin when an aggrieved worker files a claim with the EEOC.[251] In fiscal year 1994, the EEOC received 91,189 new claims.[252] It brought 71,563 to conclusion,[253] resulting in the addition of nearly 20,000 claims to the agency's backlog of unresolved claims.[254] In the third quarter of fiscal year 1995, the pending backlog of claims numbered 111,345,[255] and the EEOC took 328 days to process a claim in 1994.[256] Moreover, the EEOC discharged approximately one-half of these claims by issuing right-to-sue letters.[257]

More recently, the agency has adopted policies that use its resources more effectively and appears to have reduced its backlog.[258] The EEOC now carefully chooses the cases it will bring to court, selecting only those that involve claims of egregious violations, novel questions of law, or areas of the law that the EEOC wants to develop.[259] Under these new policies, the agency

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note 126, at 1453 (noting devastating effect of ever-growing backlog, new enforcement responsibilities from ADA, and fiscal restraint on EEOC); Turner, *supra* note 128, at 282 (noting EEOC's $5 million budgetary shortfall in 1994). The civil justice system suffers from similar problems. *See* Hazard & Scott, *supra* note 9, at 44 (noting Americans' predilection to aspire to higher standard of judicial service than they are willing to pay for).

251. *See supra* text accompanying notes 154-62 (explaining enforcement system).

252. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ANNUAL REPORT 8, tbl. 1 (1994) [hereinafter ANNUAL REPORT] (reporting number of EEOC charge receipts in fiscal years 1993 and 1994).

253. *See id.* at 11, tbl. 5 (listing number of charges resolved by year).

254. *See id.* at 12, tbl. 7 (reporting number of charges awaiting resolution at year's end).

255. *See EEOC: Commissioners Question General Counsel About Drop in Number of Cases Litigated*, Daily Lab. Rep. (BNA) No. 205, at A-14 (Oct. 23, 1996) (relating size of agency's backlog in 1995 and 1996).

256. *See Statement of EEOC Chairman Casellas Before Senate Labor and Human Resources Committee May 23, 1995*, Daily Lab. Rep. (BNA) No. 100, at E-6 (May 24, 1995) [hereinafter *Casellas Statement*].

257. Approximately 50% of the 1994 discharge claims were based on no-cause determinations, and those claimants received right-to-sue letters. *See* ANNUAL REPORT, *supra* note 252, at 11-12, tbl. 5.

According to data supplied by the federal courts, the agency filed 410 lawsuits in 1995. Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1431 (1998). The EEOC's reports disclose that the agency received a total of 87,529 charges in fiscal year 1995. *See* U.S. Equal Employment Opportunity Commission, *All Statutes: FY 1992 - FY 1998* <http://www.eeoc.gov/stats/notable/all.html> (visited Apr. 1, 1999).

258. *See* U.S. Equal Employment Opportunity Commission, *EEOC Pending Inventory Drops Below 58,000 in Third Quarter FY 1998* <http://www.eeoc.gov/press/8-12-98.html> (visited Apr. 1, 1999) (discussing new charge handling procedures that agency credits with dramatically decreasing backlog).

259. *See Casellas Statement*, *supra* note 256, at E-7 – E-8 (reporting EEOC explanation of policy); *EEOC Adopts Charge-Priority System*, 149 Lab. Rel. Rep. (Analysis/News and

will undoubtedly issue more right-to-sue letters, returning cases that do not fit the EEOC's priority system to the individual litigant. The cumulative effect of the increased number of claims, funding deficiencies, and new policies propels more employees into private litigation. Litigation, however, presents considerable obstacles.

One commission has described litigation as a "less-than-ideal method" of resolving some employee's claims.[260] Employment discrimination suits can be extremely expensive. Most employees base their discrimination claims on allegations of intentional discrimination that require extensive, expensive discovery.[261] Pretrial motion practice adds another significant expense.[262] Mid- and lower-wage workers are often unable to finance litigation or otherwise surmount these financial barriers.[263] Lower-wage workers, and to a lesser extent mid-wage workers, are less likely than higher-paid professionals to receive a large monetary award, so initiating a case may be hard for them to justify.[264] The cost of litigation remains fairly constant across cases, while the rewards for success are, in part, a function of lost wages.[265] This fact complicates the employee's problem of obtaining counsel willing to litigate the case for a contingent fee. Because attorneys only receive payment when the plaintiff prevails, lawyers cannot risk cases involving employment practices that are not clearly discriminatory or based on egregious facts.[266] Some employees, therefore, may find themselves unable to file a lawsuit.[267] In these

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Background Information) (BNA) 13-14 (May 1, 1995) (explaining that agency will categorize cases by levels of priority, encourage settlement, and give greater authority and discretion to regional attorneys). In addition, the agency has rescinded its "full remedies" approach, as well as its policy that recommended litigation of all "cause" cases in which conciliation failed. *See Casellas Statement*, *supra* note 256, at E-7.

260. REPORT AND RECOMMENDATIONS, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 30 (Dec. 1994) [hereinafter DUNLOP REPORT].

261. *See* McGinley, *Rethinking Civil Rights*, *supra* note 126, at 1454 (observing that costs of discovery in discrimination cases create substantial barriers to "all but the wealthiest litigants").

262. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1488 (D.C. Cir. 1997) (noting "relatively few employees survive the procedural hurdles necessary to take a case to trial in federal courts").

263. *See* DUNLOP REPORT, *supra* note 260, at 30 (commenting that "lower-wage workers are less able to afford the time required to pursue a court complaint").

264. *See id.*

265. *See* Donohue & Siegelman, *supra* note 162, at 1006-11 (noting that litigation is cost-effective alternative for highly paid employees because they receive higher damages).

266. *See* Theodore St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 7 (1998) (reporting that "good" plaintiffs' attorneys accept 1 in 100 claimants as clients).

267. *See* FitzGibbon, *supra* note 250, at 255 (great number of employees "have no forum because the EEOC cannot pursue their claims and because of the obstacles in getting to court").

situations, one of the goals of the statute, to provide a remedy for discriminatory employment practices, is not met.[268]

In addition, all parties in civil suits face long waiting periods because of scheduling problems on overcrowded civil dockets, and the delay may discourage suits.[269] Deferral of resolution is especially problematic for those employees who hope to keep their jobs because the delays of litigation make reinstatement less likely.[270] Arbitration, which may avoid the twin perils of time and money, provides an alternative for employees left stranded by the failings of the EEOC and the judicial system.[271]

In sum, arguments alluding to the right to settle and the provision of multiple forums reflect a deference to individual autonomy and control over lawsuits. Those individual interests and Title VII's goal of providing remediation for injury also point to the need of many employees for a less expensive forum such as arbitration. Nevertheless, as explained earlier, arbitration is not as effective as litigation in achieving the public goal of ending discrimination.[272] A possible resolution is to modify arbitration so that it generates the

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268. Because vindication of the public interest in ending discrimination is largely a function of the number of individual claims, barriers to litigation may also prevent achievement of the public policy goals. *See* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669 n.32 (1995) (noting that if employees cannot get what they want from civil justice system, they will simply not file claims).

This criticism of litigation rests on the presumption articulated by the Supreme Court in *Gilmer* and accepted for purposes of argument that arbitration is an effective forum for resolving individual workplace discrimination claims. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)). To the extent that arbitration is not effective, however, this assumption is flawed because an increased number of ineffective arbitrations will not serve public or individual interests.

269. In 1994, the median time from case filing to trial in the federal courts was nineteen months. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. C-5 (1994).

270. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1488 (D.C. Cir. 1997) (noting litigation is less useful for employees who wish to remain in their jobs (quoting DUNLOP REPORT, *supra* note 260, at 30)); FitzGibbon, *supra* note 250, at 249 (noting that adversarial nature of litigation fosters hostility between parties that makes reinstatement impossible).

Even in discharge cases, a worker may prefer the remedy of a reinstatement that offers a job and future wages over a monetary award. *See* Theodore St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 375 (1994) (noting benefits of reinstatement include restored opportunity to exercise acquired skills).

271. *See* Turner, *supra* note 128, at 280-84 (concluding that prompt and less expensive access to forum in light of backlog of courts and EEOC supports arbitration of employment discrimination claims).

272. *See supra* Parts IV.A, IV.B, & IV.C.

enforcement mechanisms of litigation. One way to accomplish this is to institute judicial review of arbitration awards involving employment discrimination claims.

V. Reintroducing Public Policy into the Arbitration Debate

Several commentators, who offer varying justifications for the proposal, have advocated judicial review of employment discrimination claims.[273] In addition, Judge Harry T. Edwards, writing for the United States Court of Appeals for the District of Columbia Circuit, recently indicated that judicial review is a necessary component of the arbitration of employment discrimination claims.[274] Evaluating the possibility of judicial review provides an opportunity to discuss whether the addition of a public component into arbitration can mitigate its private, confidential nature to effect an end to workplace discrimination. It is also an opportunity to inject considerations of public policy into a debate regarding arbitration of employment discrimination claims.

A. Implementing Public Policy Objectives Through Meaningful Judicial Review

Any proposal to add judicial review to the arbitration process is multidimensional. In addition to broadening the existing grounds for reviewing an award, adding judicial review of arbitration decisions requires arbitrators to issue written, reasoned opinions and to preserve a record of the arbitration proceeding. These changes are likely to increase the cost of arbitration. Nevertheless, judicial review may be warranted if it makes arbitration more effective in achieving the long-term objective of ending discrimination.

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273. Some commentators offer judicial review as a way to ensure fairness to individual employees. *See* Gorman, *supra* note 4, at 669 (stating that review should "assure that arbitral decisions will comport with the law"); Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 119 (1997) (recommending that parties include option of judicial review when arbitration agreement is condition of employment); C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 KY. L.J. 347, 356-67 (1990-91) (noting that current standard of review does not guarantee that parties' substantive rights will be fairly heard and properly adjudged and that in securities law, a broadened right of appeal is necessary to protect complex substantive rights, to ensure that absolute defenses to suit are upheld, and to prevent impermissible damage recoveries).

Others believe that judicial review will respond to concerns regarding public policy. *See* Malin & Ladenson, *supra* note 6, at 1237-40 (concluding that nature of task of judging requires judicial review); Malin, *supra* note 128, at 101-02 (commenting that meaningful judicial review of interpretations of law is necessary to remove competitive advantage gained by some parties when law is not enforced uniformly).

274. *See Cole*, 105 F.3d at 1487 (noting that "the [United States Supreme] Court has insisted that, by 'agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute'" (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (1991))).

Litigation is an effective means to secure an end to employment discrimination in part because judicial resolution is public and official.[275] By adding the participation of public judges to the arbitration process, meaningful judicial review would incorporate some measure of the enforcement mechanisms of litigation into arbitration. Final resolution by the judiciary, speaking with state authority in a public forum, would integrate reviewed arbitration awards into the body of judicial precedent. Judicial review creates a public record so that a court's review of an arbitration award furthers general deterrence as well as specific deterrence. Because judicial decisions are public, accessible records, reviewed arbitration awards would inform the community about the standards for nondiscriminatory employment practices. Federal court review would also foster consistent decisions and uniform law. An ancillary benefit is that the prospect of meaningful judicial review provides arbitrators with an incentive to know and to follow the law and to accord parties a fair hearing.[276] Judicial review of arbitral awards creates some measure of public knowledge, which generates general deterrence and education; promotes the development of the law, precedent, and uniformity; and facilitates the formation of public values.

The prospect of using judicial review of employment discrimination arbitrations to introduce a public component into arbitration is not as drastic as may first appear. Litigation in the civil justice system is not entirely public, and arbitration outside that system is not entirely private.[277] Arbitration already has a public cast in that it depends upon the civil judicial system to enforce agreements to arbitrate and to convert awards into enforceable judgments.[278] In addition, the organizations that sponsor arbitration have adopted

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275. *See supra* text accompanying notes 10-14 (discussing characteristics of judicial forum).

276. Ensuring that the law is correctly and consistently applied furthers the public interest in ending discrimination. *See* Estreicher, *Arbitration Without Unions*, *supra* note 41, at 777 (noting tension between finality of arbitration and independent public interest in ensuring correct, consistent decisions in which policies are neither under-enforced nor over-enforced).

277. *See* Robel, *supra* note 11, at 894 (stating models of litigation and arbitration occupy opposite poles of continuum that ranges from purely public to purely private). *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) (criticizing managerial role increasingly assumed by judges).

278. Similarly, the civil judicial system bears earmarks of a private system. Faced with burgeoning dockets, courts encourage settlement and the submission of the dispute to dispute resolution. *See* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 262-63 (1995) (observing that in case of state-imposed arbitration, arbitration process resembles adjudication); Robel, *supra* note 11, at 896 (noting that as they limit public access and accountability by actively encouraging settlement and other forms of "court-annexed" dispute resolution, courts move away from public model and come to resemble private model).

new rules to meet concerns regarding procedural fairness,[279] thereby moving arbitration toward the litigation model.[280]

Proposals to provide judicial review of arbitration decisions are also limited to cases that involve employment discrimination statutes. When parties contract to arbitrate claims of employment discrimination, the arbitrator's work has public implications. In enforcing arbitration agreements, the Supreme Court has allowed parties to assign the public responsibility of interpreting statutory law to arbitrators. It is not unreasonable to suggest that arbitration of these cases be reviewed so that the forum can better perform that function.[281] In essence, while adding judicial review to the arbitration process

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279. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1483 n.11 (D.C. Cir. 1997) (discussing recommended procedural standards and noting those adopted by arbitration group); Estreicher, *Predispute Agreements*, *supra* note 129, at 1349-52 (outlining American Arbitration Association's adoption of procedural safeguards). *See, e.g.*, DUNLOP REPORT, *supra* note 260, at 30-31 (endorsing employer-employee consensus providing for neutral arbitrator, discovery, cost-sharing fairness, independent representation, range of remedies equivalent to those available through litigation, written opinions that explain rationale for results, and sufficient judicial review to ensure result is consistent with governing laws); Mark L. Goldstein & Andrae H. Stempel, *Mandatory Arbitration Clauses in Employment Contracts*, N.Y. L.J., Oct. 29, 1996, at 1, 4 (noting that JAMS/Endispute, for-profit arbitration and mediation organization, will not accept arbitration assignments in employment cases unless agreement provides same rights and remedies available under applicable law; permits employees to participate in selection of neutral arbitrator; allows independent representation by counsel; allows reasonable discovery; and ensures employees have right to present proof though testimony, documentary evidence, and cross-examination).

In endorsing the NYSE's arbitration procedures, the Supreme Court in *Gilmer* indicated that the NYSE standard of procedural fairness is a condition of enforcing an arbitration agreement of a statutory claim. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30-32 (1991) (noting NYSE rules include procedures for joint selection of arbitrators; disclosure of possible arbitrator bias; discovery that includes document production, depositions, information requests, and subpoenas; and statement of awards required to be in writing and available to public); *see also* Gorman, *supra* note 4, at 639 (expressing view that *Gilmer* set standard for procedural fairness).

280. *See* Stewart, *supra* note 273, at 349 n.9 (observing that "[a]rbitration now resembles the civil litigation it was designed to replace").

An interesting development that illustrates the permeable boundary between private and public adjudication are recent holdings that parties to arbitration agreements may specify the scope of judicial review. *See* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997) (holding that courts must honor arbitration provisions in which parties have agreed to judicial scrutiny exceeding standard of review in FAA); *see also* Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996 (5th Cir. 1995) (upholding agreement that extended judicial review to errors of law). *But see* Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (stating that parties "cannot contract for *judicial* review of [an arbitrator's] award; federal jurisdiction cannot be created by contract").

281. In this vein, the addition of meaningful judicial review may ultimately enhance the legitimacy of the arbitration forum, thereby increasing its attractiveness. *See* Gorman, *supra*

may constrain the parties' freedom to structure a method of reaching resolution, it is similar to other regulations, undertaken to further the public welfare, that limit private choice.

B. Prerequisites to Meaningful Judicial Review

The addition of judicial review significantly alters the arbitration of claims of employment discrimination. It forfeits one of the key characteristics of arbitration, finality, and requires two further changes in arbitration procedures: the provision of written, reasoned opinions and a record of the proceedings.

One reason that arbitration awards are virtually final is that the current standards for reviewing awards are quite narrow, making it difficult for either party to obtain judicial review.[282] In order to enforce its arbitration award, the winning party must request a federal district court to confirm the award, converting it into a judgment.[283] The party opposing enforcement may request the court to vacate or modify the award.[284] The FAA confines the reviewing court's authority to vacate an award to circumstances in which a party procured the award by corruption, fraud, or undue means; in which evident partiality or corruption existed; in which a party committed instances of specified misconduct; and in which arbitrators exceeded their powers.[285] Recognizing these limitations, but noting that the FAA grounds are not exclusive, the courts created a second standard, manifest disregard of the law.[286] This additional standard, however, is sharply circumscribed; the courts may vacate an award only upon a showing that the arbitrator under-

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note 4, at 674 (predicting that judicial review which results in published opinions will "give some assurance to the skeptics that important statutory objectives will not be jeopardized through any all-embracing confidentiality of case law"); Malin, *supra* note 128, at 105 (observing that lack of meaningful judicial review discourages parties from arbitrating cases and that adopting such standard may encourage arbitration).

282. *See* Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990) (describing FAA standard of review as "extraordinarily narrow").

283. *See* 9 U.S.C. § 9 (1994) (stating that parties have one year to seek confirmation of award by federal district court in jurisdiction that made award).

284. *See id.* §§ 10-11.

285. *See id.* § 10 (stating circumstances in which district court may vacate arbitration award). The courts interpret FAA standards to require that an arbitration hearing must be fundamentally fair. A hearing is fundamentally fair if it includes notice, an opportunity to be heard and to present evidence, and an impartial decision free from errors of law. *See* BALES, *supra* note 6, at 135.

286. *See* Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (suggesting courts may overturn arbitration awards when arbitrators manifestly disregard law), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

stood and correctly stated the law but ignored the law or applied the law incorrectly.[287]

Thus, relaxing the standard of review is the first step toward providing meaningful judicial review of employment discrimination claims. The reasons for providing the review should guide the determination of a new standard.[288] Judicial review would make arbitration less private, in both the official and confidential sense, by integrating arbitral awards into the public realm. Judicial review adds state authority to the arbitration process and removes the confidential shield of arbitration. Achieving those objectives, however, requires the appeal of a significant number of awards. This preliminary analysis suggests that a generous standard of review is warranted in order to obtain a critical mass of appeals that would incorporate a public component into arbitration. Thus, the courts should apply a de novo standard of review for arbitral interpretations and applications of law.[289] While the reviewing

287. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933-37 (2d Cir. 1986) (applying manifest disregard standard to hold that award that contravened SEC rule did not manifestly disregard law); *see also* BALES, *supra* note 6, at 136 (noting that no arbitration award has ever been vacated on this ground).

288. A threshold issue is whether the standards of review that apply to labor arbitration are relevant to the review of statutory rights. The standards for reviewing a labor arbitration award are not pertinent to claims of employment discrimination because labor arbitration is grounded in a federal policy favoring arbitration that requires the judiciary to defer to decisions taken under collective bargaining agreements. *See* Estreicher, *Arbitration Without Unions*, *supra* note 41, at 757-58 (justifying deference to labor arbitration because contract reflects likely assumptions or because substantive policy favors labor arbitration). In turn, this policy rests on a belief that arbitration contributes to industrial peace or that it is the *raison d'etre* of the National Labor Relations Act. *Id.*; *see supra* text accompanying notes 38-45 (discussing labor arbitration).

The courts accord a virtually all-embracive presumption of arbitrability to labor disputes. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (finding order to arbitrate will not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"). The courts sharply limit their role in reviewing arbitral awards. *See* United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 (1960) (stating that so long as award draws its essence from collective bargaining agreement, courts should not review its merits). The arbitrator is said to act as the parties' "contract reader," and those decisions become part of the contract. *See Warrior & Gulf Navigation Co.*, 363 U.S. at 581 (acknowledging that grievance machinery, heart of industrial self-government, molds system of private law); *see also* St. Antoine, *supra* note 40, at 1138-44 (discussing role of labor arbitrator).

289. *See* Robert N. Covington, *Employment Arbitration After* Gilmer*: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMPL. L.J. 345, 409-10 (1998) (concluding that de novo review is appropriate only when arbitration award infringes protection of public law to those who are not parties; when error of law affects only those who are parties, manifest disregard standard is appropriate); Malin & Ladenson, *supra* note 6, at 1237 (suggesting de novo judicial or administrative review of arbitral legal conclusions on grounds of judicial legitimacy); *see also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1487 (D.C. Cir. 1997) (recommending

court should not generally disturb the arbitrator's factual determinations,[290] it should analyze the substance of the claim and the arbitrator's application of the law and should not be confined to procedural form.[291]

The second set of changes required by the addition of judicial review to the arbitration process involves written, reasoned opinions and an accessible record of the proceedings. In order to provide meaningful judicial review, courts must be able to understand, analyze, and evaluate the reasons for the arbitral award.[292] Indeed, the Court in *Gilmer* conceded that written awards

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standard of review "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law"); BALES, *supra* note 6, at 137 (suggesting manifest disregard of law standard "will ensure that the most egregious errors of law are corrected while avoiding a post-arbitration stampede to the courthouse"); Estreicher, *Predispute Agreements*, *supra* note 129, at 1351 n.22 (noting that manifest disregard standard may be too deferential for arbitration of employment law claims); Gorman, *supra* note 4, at 673 (predicting that courts are "empowered to overturn . . . awards that construe or apply public law in a manifestly unreasonable manner").

290. It is, however, not easy to separate issues of fact and law. *See* Covington, *supra* note 289, at 385 (noting difficulty of distinguishing among questions of procedure, fact finding, and interpretation and application of law).

291. An ancillary issue is whether the courts or Congress should decide the appropriate standard of review. Because the modification should be confined to employment discrimination statutes, it is preferable that Congress act. As the discussion indicates, further alterations to arbitration in the form of published, written, and reasoned opinions are necessary. *See infra* notes 292-98 and accompanying text. The scope of these changes support legislative, rather than judicial, action.

It would appear, however, that courts have authority to devise a broader standard of review. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (1991) (noting that while judicial scrutiny is necessarily limited, it is "sufficient to ensure that arbitrators comply with the requirements of the statute at issue" (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987))); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (noting that reviewing courts can ensure that "legitimate interest in the enforcement of the antitrust laws [are] addressed" but recognizing minimal standard of "ascertain[ing] that the tribunal took cognizance of the antitrust claims and actually decided them"); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1486-87 (D.C. Cir. 1997) (concluding that Court endorsed effective standard of judicial review); *see also* Covington, *supra* note 289, at 383 (noting it is "obvious" that FAA does not require "courts to roll over and play dead"); Gorman, *supra* note 4, at 672 (concluding courts possess powers of judicial review sufficient to assure satisfaction of statutory requirements and correction of arbitral misinterpretations).

Precedent from labor arbitration supports the authority of the courts to institute meaningful judicial review. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987) (acknowledging that conflict with public policy justifies vacating labor arbitration award); *see also* Gorman, *supra* note 4, at 671 (noting that public policy is stronger argument for vacating award in commercial arbitration cases than in labor arbitration cases because they interpret public law rather than private collective bargaining agreements).

292. *See* Wilko v. Swan, 346 U.S. 427, 436 (1953) (noting that before judicial review can proceed, error of decision-maker "would need to be made clearly to appear"), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); *id.* at 440 (Frankfurter, J., dissenting) (requiring appropriate means for judicial scrutiny).

are necessary to ensure, among other goals, judicial review.[293] To provide a basis for meaningful judicial review, arbitration awards must be reduced to writing and include the factual and legal reasons for the award.[294] At a minimum, the awards must make explicit the arbitrator's findings of fact and conclusions of law.[295] The rationale for the decision should be clear, and the opinion should include a discussion of legal authority when appropriate. In addition, the parties and reviewing courts must have available an accessible record of the proceeding.

In addition to being a prerequisite to judicial review, written, reasoned opinions further the employee's interest in obtaining a remedy. Such opinions ensure that arbitral decisions conform to the statutory norm and provide another incentive for arbitrators to function impartially.[296] Individual employees would also benefit if all arbitration awards were available to the public.[297] Publication allows public scrutiny of awards and offers employees access to information about arbitration and to facts about specific employers and arbitrators. Thus, arbitrators become accountable to the public and to Congress.[298]

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293. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31-32 (1991) (noting that NYSE required arbitrators to provide written awards detailing names of parties, summary of issues in controversy, and issues in controversy). Nonetheless, NYSE awards do not provide a reason for the decision or even state which of the claims, if any, were successful. *See supra* text accompanying note 18 (noting that arbitral awards do not include reasons for decision). Consequently, the summary notices mandated by the NYSE rules are not a sufficient basis for review. *See* BALES, *supra* note 6, at 133 (noting that arbitrator need not give reasons for award); Gorman, *supra* note 4, at 667 (expressing hope that "Court has not said the last word about the matter").

294. Courts have resisted requiring arbitrators to provide a statement that includes reasons for the award. *See* Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1990) (noting that arbitrators were never required to state reasons for award); Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990) (finding arbitration rules do not require statement of reasons for award).

295. *See* Gorman, *supra* note 4, at 667.

296. *See* BALES, *supra* note 6, at 134 (suggesting also that written awards will expose incompetent arbitrators).

297. *See* Adriaan Lanni, Note, *Protecting Public Rights in Private Arbitration*, 107 YALE L.J. 1157, 1160-61 (1998) (arguing that public awards are necessary to deter employers and to warn employees); *see also* Cooper, *Where Are We Going with* Gilmer*?*, *supra* note 127, at 214-15 (noting that confidential decisions hinder creation of precedent and development of law); Sternlight, *supra* note 7, at 686 (arguing that published awards bring company's alleged wrong under public scrutiny); Stone, *supra* note 6, at 1047 (observing that public awards deter employers).

Given the development of Internet publishing, this suggestion may not be as burdensome as it would have been in the past. The entity that sponsors the particular arbitration, the AAA, NASD, or NYSE, might be made responsible for posting awards on the Internet.

298. Some concerns about publication exist, however, and they illustrate the distinction between judicial judgment and arbitration awards. The arbitrator's decision, while enforceable,

C. *Increased Costs and Achievement of the Public Goals*

Judicial review of arbitration awards, along with the concomitant addition of written, reasoned opinions and accessible records of the proceedings, will inevitably make arbitration more expensive.[299] Arbitrators will necessarily spend more time on an employment discrimination case. Therefore, those arbitrators willing and capable of writing reasoned opinions may command higher fees. Providing a procedural record requires a textual transcription of the hearing, an additional expense. In addition, the cost of the appeal itself will increase the expense of ultimate resolution.[300]

The increased costs are justified because judicial review serves the remedial goal of the statutes by ensuring that an arbitration decision has correctly interpreted and applied the law. On the other hand, increased costs make arbitration less attractive to all parties involved and may be especially problematic for lower-paid employees. While arbitration may not be the most effective means to achieve Title VII's public policy goal, its use may still be justified if it offers an accessible process for accomplishing Title VII's remedial purpose. If added costs make arbitration inaccessible to many employees, the reason for providing it disappears.[301] Moreover, increasing the

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does not speak with the authority of the state. Moreover, arbitral awards that have not been accorded judicial review possess no precedential value. Thus, the awards may mislead the public. This may explain the different judicial conclusions regarding publication. *See* Hazard & Scott, *supra* note 9, at 58 (noting that private dispositions may limit damage to public norms because they are not available to public). *Compare Gilmer*, 500 U.S. at 31-32 (approving NYSE awards that are made available to public) *with* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997) (failing to require publication of awards).

299. *But see Cole*, 105 F.3d at 1487 (concluding that "in the vast majority of cases, judicial review of legal determinations to ensure compliance with public law should have no adverse impact on the arbitration process").

300. Meaningful judicial review of arbitration awards may also increase the costs of operating the federal judicial system as the district courts and courts of appeals review the awards. On the other hand, channeling cases out of litigation into arbitration reduces costs, and the net cost may not increase.

301. One appellate court has indicated it will not enforce arbitration agreements that require employees to pay their own fees, reasoning that this would discourage claims. *See Cole*, 105 F.3d at 1468 (stating that when employer chooses forum it cannot also impose costs that discourage its use). Fees may discourage employees from utilizing procedures such as prehearing conferences to resolve discovery issues. *Id.* at 1477; *see also id.* at 1489 (Henderson, J., dissenting) (chastising majority for reaching issue not required by facts of case).

One view in support of payment by the employer is that the employer can, at least to some extent, spread the costs by increasing its prices. *See* Gorman, *supra* note 4, at 679-80 (noting that employer who instigated and benefitted from arbitration process can bear cost as business expense).

On the other hand, if each party pays its own fees, it may reduce the perception and reality of arbitrator bias. *But see Cole*, 105 F.3d at 1485 (rejecting argument on ground that more likely reason for arbitrator bias is promise of future work for repeat player, the employer).

fixed costs of arbitration is not justified if parties appeal only a small number of awards.

The broader public goal of ending workplace discrimination also justifies judicial review.[302] In this context, the issue is whether judicial review of arbitration awards would generate sufficient enforcement mechanisms that work to end discrimination. This result depends upon an efficacious balance between costs and the number of appeals. One can only speculate as to whether a significant number of awards would be reviewed.[303] We do not know how many employment discrimination cases would be arbitrated or how many losing parties would choose to incur the added costs of appeal.[304]

Every arbitration also represents a missed opportunity for litigation. Because arbitration does not generate general deterrence, its use forfeits that advantage of litigation. On the other hand, judicial review of arbitration decisions could develop discrimination law. But in order to develop the law through judicial review of arbitration awards, parties must appeal a sufficient number of decisions. Indeed, to accomplish the present level of legal development, roughly the same proportion of cases would have to go to appeal from arbitration as presently go to appeal from litigation.[305]

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302. *See supra* text accompanying notes 275-76 (providing reasons for instituting judicial review).

303. From October 1, 1996 to September 30, 1997, 3091 "employment cases" were filed in the federal appellate courts. The figure may include claims based on nondiscrimination employment laws such as the Fair Labor Standards Act. *See* Table B-1A, *U.S. Court of Appeals – Appeals Commenced, Terminated, and Pending, by Nature of Suit or Offense, in Appeals Arising from the U.S. District Courts During the Twelve Month Period Ended September 30, 1997* <http://www.uscourts.gov/judicial_business/contents.html> (visited Jan. 29, 1999).

For comparison, the employment discrimination cases filed in United States district courts ranged from 10,771 in 1992 to 23,000 in 1996. *See* Grimsley, *supra* note 162, at A1 (relying on data supplied by Administrative Office of United States Courts).

304. It has been suggested that a large number of employment discrimination cases turn on factual issues rather than on interpretations of law. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1487 (D.C. Cir. 1997) ("Most employment discrimination claims are entirely factual in nature and involve well-settled legal principles."); Gorman, *supra* note 4, at 667-68 (suggesting that many public law claims concern factual findings and thus only few cases would be reviewed because they do not involve complex examinations of precedent that could result in error).

To the extent this is correct, fewer employment discrimination cases may be subject to appeal than other claims. *But see* Covington, *supra* note 289, at 408 (noting that even when decision turns more on fact than on law, debatable legal points may require briefing and argument). Professor Covington's view is borne out by the development of discrimination law that shows discrimination cases depend upon the application of a developing, rather than a fixed, law to a wide range of factual situations.

305. It is difficult, if not impossible, to quantify and measure these effects because the roles of trial and appellate courts in establishing a particular enforcement mechanism vary. Trial courts also develop the law, and appellate court decisions contribute to deterrence, although the

Moreover, judicial review is not a panacea. While serving as a safety valve to ensure a just result in some cases, judicial review will not address the structural problems inherent in arbitrating employment discrimination claims, such as the incentive of arbitrators to find for the repeat player and the disadvantages of informal dispute resolution for minorities and the poor.[306] Nor will judicial review address the problem that the agreement to arbitrate is often based on unequal bargaining power. Finally, although the prospect of judicial review and the review itself may mitigate or prevent arbitral error, *Gilmer* suggests that some arbitration procedures, such as limited discovery, are simply not subject to appeal.[307]

In sum, judicial review of arbitration awards will help to enforce the public goal of employment discrimination statutes. Judicial review renders arbitration a more effective forum in which to further both goals of employment discrimination law: to end employment discrimination and to provide a remedy for employees who suffer discriminatory practices at work. However, judicial review may not add a public component that is robust enough to compensate for the number of lost trials to justify its added expense. Finally, the added expense would reduce access to the forum by those who need it the most.

VI. The Problem and the Prospects

Individual claimants, empowered by Congress and by tradition to choose the forum and made responsible for enforcing the public objectives of the law, may either litigate or arbitrate their claims. They may litigate in the public courts, which offer an effective forum for achieving the public goal of ending discrimination and for redressing their injury, but which are expensive and time-consuming. Or they may choose arbitration, a forum that offers an accessible resolution process because it is generally less expensive and faster. This discussion has assumed that arbitration is equally effective as litigation in achieving employees' remedial purposes. The discussion has revealed, however, that arbitration is less effective in furthering the public goal of ending discrimination.

The effectiveness of litigation in achieving the public policy goal of ending workplace discrimination is largely a function of resolution by a

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public trial at the local level may have a more immediate deterrent effect. It would seem that both trial and appellate courts help form public values.

306. *See supra* note 9 (noting structural limitations of arbitration).

307. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (viewing agreement to arbitrate as trade of trial procedures for simplicity, informality, and expedition of arbitration). The Court's reasoning and language would seem to foreclose appeal of discovery issues.

public, state-authorized decision-maker. Litigation produces enforcement mechanisms, which further achievement of the public goal. The public litigation process deters potential violators, develops the law, helps evolve consistent and uniform law, and forms public values. When deciding whether and to what extent employment discrimination claims may be arbitrated, decision-makers should consider whether arbitration furthers the long-term policy objective of ending employment discrimination. Discussions regarding arbitration of employment discrimination claims that ignore the effectiveness of the forum in achieving the public objectives of the statute are necessarily incomplete.[308]

These conclusions may also apply to the arbitration of other statutory claims that embody significant public policy goals. However, a general conclusion that statutory claims should not be arbitrated which is based on a blanket distinction between private and public law is not warranted. Rather, each cause of action requires a particularized inquiry to determine whether arbitration furthers the policy objective of the statute at issue.[309] Although it is possible that claims alleging securities fraud or antitrust violations further public policy goals only when plaintiffs litigate them in court, one should examine the goals of each statute to determine if their achievement requires the enforcement mechanisms produced by public adjudication.[310]

Arbitration fails the public because it does not further the basic objective of the statute. Conversely, litigation fails the individual employee because it is expensive and lengthy. The tension between the public goal of ending discrimination and the private goal of remediation, together with the ineffectiveness of present enforcement methods, indicate that alternatives to the present enforcement system should be considered.

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308. *See, e.g., Gilmer*, 500 U.S. 20.

309. *See* Edwards, *supra* note 25, at 672 (advocating analysis of specific public law issues rather than attempting to formulate general principles regarding public law); Hazard & Scott, *supra* note 9, at 58 (noting that "acceptability of the private system depends, in part, on the substance of underlying claims"; for example, claim of race discrimination in employment may invoke different values than those in mercantile disputes); *see also* Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 354-55 (1990) (arguing for substantial contraction of public policy exception to arbitration).

310. For instance, the law governing antitrust and securities claims may be more certain or may be determined through application of rules, rather than standards. Employment discrimination claims are defined through standards that require judicial determination. *See supra* notes 203-05 and accompanying text. Employment discrimination is also a relatively new cause of action, and courts have only recently determined basic issues such as who is an employer and who is an employee. *See* Robinson v. Shell Oil Co., 117 S. Ct. 843, 849 (1997) (holding former employees included within § 709(a) of Title VII); Walters v. Metropolitan Educ. Enters., Inc., 117 S. Ct. 660, 666 (1997) (finding that worker is employee under Title VII for every day between time beginning employment and date ending employment).

When Congress enacted Title VII in 1964, it split enforcement authority between individual employees acting as private attorneys general and the conciliation efforts of the EEOC. In 1972, reacting to the failure of EEOC conciliation efforts, Congress reevaluated its earlier decision and authorized the agency to file individual and group suits.[311] The EEOC suits, in combination with private class actions, provided a means for furthering the public goal of ending discrimination.[312] The situation, however, has changed significantly in recent years. Struggling to maintain its credibility in the face of a caseload that exceeds its resources, the EEOC files fewer suits.[313] EEOC and group suits are less significant today, and the private litigant's individual cause of action is now the main vehicle to pursue the public goal.[314] As this analysis demonstrates, when individuals litigate claims, it is an effective method to secure the public goal. Yet litigation, which costs a significant amount of time and money, excludes some claimants.[315] The burden of costly litigation falls on private parties who prefer low-cost solutions such as arbitration, which is less likely to vindicate the public goal.

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311. *See supra* text accompanying notes 155-59 (discussing role of EEOC).

312. *See generally* Kotkin, *supra* note 150, at 1338-45.

313. *See supra* text accompanying notes 160-62 (discussing current caseload of EEOC and its new criteria for deciding which claims to take to court).

314. *See supra* text accompanying notes 251-59 (discussing increased responsibility of private litigant).

315. The crowded dockets of federal courts are also a factor in the problem of vindicating individual and public interests in employment discrimination claims. Concerns about the federal judicial caseload form an undercurrent in the commentary on employment discrimination arbitration. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Blackmun, J., dissenting) (stating Court's decision favoring arbitration of securities claims was "no doubt animated by its desire to rid the federal courts of these suits"); *see also* MACNEIL, *supra* note 15, at 172 (concluding "that a major force driving the Court is docket-clearing pure and simple"); Carbonneau, *supra* note 127, at 1957 ("The Court views alternative remedies, arbitration in particular, as a means of alleviating the congestion in the federal court docket."); Cooper, *Where Are We Going with* Gilmer*?*, *supra* note 127, at 204 (suggesting Court less interested in principle than in reducing workload of federal judiciary); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 207 (1993) (noting pressure on courts to dispose of employment discrimination cases).

The heavy caseload of the federal judiciary is a worthy subject of concern. *See* JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 9-11 (1995) (describing increase in civil and criminal filings); Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 757 (1992) (discussing employment discrimination suits' effect on dockets). Nevertheless, one should consider other methods of managing the federal caseload before concluding that the federal docket problem justifies arbitrating claims of employment discrimination. *See* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1168-74 (1997) (reviewing proposals of Federal Judicial Conference regarding disposition of criminal cases).

Congress appears to have recognized that a problem exists. Rather than increase funding of the EEOC, however, Congress added a provision to the Civil Rights Act that "encourages" arbitration of employment discrimination suits.[316] Courts have reached different conclusions regarding Congress's intention in enacting the clause.[317] Notwithstanding that debate, Congress's apparent, albeit perhaps limited, endorsement of arbitration focuses only on one aspect of a dual problem. While supporting an alternate forum may mitigate the problem of securing remediation through costly litigation, greater use of arbitration makes it harder to achieve the public goal.

This dilemma calls for commentators, courts, and Congress to explore alternative forums in which employees may enforce their individual rights and achieve the broader public policy goal of ending discrimination.[318] As this analysis indicates, the evaluation of any solution should include the effectiveness of the forum in implementing the public goal of ending discrimination. Thus, proposals for reform should maintain a public, state authorized component while reducing the cost of enforcing individual claims.

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316. The provision, added by the 1991 Civil Rights Act, provides: "Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA]." Pub. L. No. 102-166, § 118, 105 Stat. 1072, 1081 (1991) (reprinted in notes to 42 U.S.C. § 1981).

317. Two recent courts have held that the provision does not evidence a congressional intent to endorse arbitration over litigation because the purposes and legislative history of § 118 indicate Congress intended to preclude compulsory arbitration of Title VII claims. *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1185 (9th Cir. 1998) (holding compulsory arbitration clause covering statutory rights and made as condition of employment is unenforceable), *cert. denied*, 119 S. Ct. 445 (1998); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 203 (D. Mass. 1998) (finding that 1991 Act precludes compulsory arbitration of Title VII claims).

Other courts have interpreted the provision and its legislative history as endorsing arbitration. *See* Suess v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998) (noting congressional intent to encourage arbitration); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881-82 (4th Cir. 1996) (stating that Congress encouraged arbitration); Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 53 n.4 (7th Cir. 1995) (noting that 1991 Act encouraged arbitration of ADEA claims); EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500, 503 (E.D. Mich. 1997) (finding Congress's expressed intent to encourage arbitration); Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1457-58 (D. Minn. 1996) (acknowledging congressional approval of arbitration of Title VII claims); *see also* Abrams, *supra* note 58, at 552-59 (finding legislative history of § 118 inconclusive); Estreicher, *Predispute Agreements*, *supra* note 129, at 1361 n.54 (same).

318. One way to maintain state authority in employment discrimination cases is to increase the EEOC's resources and responsibility so that it can take more cases to court. Another way to streamline the process is to provide either specialized Article I courts or administrative tribunals that speak with official authority. *See* Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989) (suggesting Congress consider strengthened EEOC enforcement or administrative remedies); Tschappat v. Reich, 957 F. Supp. 297, 299 (D.D.C. 1997) (recommending creation of new Article I court to hear employment discrimination cases).

VII. Conclusion

A painting by Jacob Lawrence hangs in the small museum of Hampton University. It depicts a dramatic confrontation that occurred in 1965 between civil rights marchers and local law enforcement officials and townsmen during the peace march from Selma, Alabama to Montgomery, Alabama.[319] When asked why he painted the scene, Lawrence replied: "I thought it was part of the history of the country, part of the history of our progress, not just of Black progress, but of the progress of the people."[320] His response reflects the belief that workplace discrimination claims are too important to be left to the litigant. Just as the confrontation on the Edmond Pettus Bridge belongs to the people as well as to the participants, a confrontation between employer and employee belongs to the public as well as to the parties. For this reason, workplace discrimination suits should be resolved in a forum that can achieve both short-term individual claims of redress and the long-term public goal of ending discrimination.

319. CONFRONTATION ON A BRIDGE, 1975 seriograph, at Hampton University Art Museum, Hampton, Virginia.

320. *See id.* (providing text of interview with Jacob Lawrence).