

University of Missouri School of Law Scholarship Repository

Faculty Publications

Winter 1994

Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment

Douglas E. Abrams

University of Missouri School of Law, abramsd@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>



Part of the [Civil Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Douglas E. Abrams, Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment, 26 Conn. L. Rev. 521 (1994)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

ARBITRABILITY IN RECENT FEDERAL CIVIL RIGHTS LEGISLATION: THE NEED FOR AMENDMENT

Douglas E. Abrams*

I. INTRODUCTION

With express judicial and congressional imprimatur, commercial arbitration has entered the civil rights sphere.¹ In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*,² the Supreme Court held that a claim under the Age Discrimination in Employment Act of 1967 ("ADEA")³ can be subjected to compulsory arbitration pursuant to a predispute arbitration agreement in a securities registration application.⁴ *Gilmer*

* Associate Professor of Law, University of Missouri-Columbia School of Law. B.A. 1973, Wesleyan University; J.D. 1976, Columbia University School of Law. I am grateful to several of my colleagues for their comments on drafts of this Article: Robert G. Bailey, Peter N. Davis, James R. Devine, William B. Fisch, Timothy J. Heinsz, Michael A. Middleton, Alfred S. Neely IV, Walter E. Oberer and James E. Westbrook. My research was funded by the Lawrence G. Crahan and Linda S. Legg Faculty Research Fellowship at the University of Missouri School of Law.

1. Federal arbitration law derives from three principal sources. "Commercial arbitration," this Article's topic, is grounded in the first source, the Federal Arbitration Act of 1925 § 2, 9 U.S.C. § 2 (1988) ("FAA"). See generally MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION (Gabriel H. Wilner, ed., rev. ed. 1984 & Supp. 1992); IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW (1994). "Labor arbitration," which arises from provisions in collective-bargaining agreements, is grounded in the second and third sources: (1) the Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1988), and the federal common law which courts fashion from the policy of the national labor laws; see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), and (2) the Railway Labor Act, 45 U.S.C. §§ 151-188 (1988), which governs arbitration in the railroad and airline industries. See generally FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985 & Supp. 1985-89); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 540-603 (1976).

2. 111 S. Ct. 1647 (1991), discussed *infra* text accompanying notes 140-58.

3. 29 U.S.C. §§ 621-634 (1988).

4. The arbitration provision at issue in *Gilmer* appeared not in the plaintiff's employment agreement with the defendant, but in an agreement between the plaintiff and the New York Stock Exchange (NYSE). The Court thus held that the exclusionary clause of § 1 of the FAA did not apply to the agreement. 111 S. Ct. at 1651 n.2. Over the dissents of Justices Stevens

was the fourth decision since 1985⁵ in which the Supreme Court specified that, absent contrary congressional intent, arbitration agreements covering claims under congressional statutes are enforceable in accordance with section 2 of the Federal Arbitration Act ("FAA").⁶ None of the previous three decisions, however, concerned the arbitrability of claims under a civil rights statute.

By encouraging arbitration of disputes, the texts of the Americans with Disabilities Act of 1990 ("ADA")⁷ and the Civil Rights Act of 1991⁸ express intent that section 2's mandate ("FAA mandate") operate with respect to claims under any of the four statutes touched by the Acts.⁹ The ADA's text states that "arbitration . . . is encouraged to

and Marshall, the majority declined to otherwise interpret the clause's scope. The clause provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988). In the lower courts, the dominant view is that the clause affects only workers directly involved in the interstate movement of objects. See Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 263, 279.

The bulk of reported individual employee arbitration disputes involve persons like plaintiff Gilmer, who were employed by registered securities brokerage firms. The NYSE and various other securities exchanges require employees of member firms to sign arbitration agreements with the exchange covering disputes between themselves and their firms. Some non-securities employers, however, also may include arbitration provisions in employment agreements with their non-unionized employees. In this latter circumstance, this Article proceeds from the narrow interpretation of § 1 of the FAA which has prevailed for the past several decades.

5. See also *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), overruling *Wilko v. Swan*, 346 U.S. 427 (1953) (Securities Act of 1933 claims), discussed *infra* text accompanying notes 131-33; *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under § 10(b) of the Securities Exchange Act of 1934 and § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act), discussed *infra* text accompanying notes 126-30; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act claims in international context), discussed *infra* text accompanying notes 111-25.

6. 9 U.S.C. § 2 (1988). Section 2's mandate covers both "predispute" and "post-dispute" arbitration agreements:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

See also *id.* § 1 (defining "maritime transaction" and "commerce").

7. 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

8. Pub. L. No. 102-166, 105 Stat. 1071 (codified in various U.S.C. sections). The President signed the Act on November 25, 1991, little more than six months after *Gilmer's* May 13 decision. See *infra* note 182 and accompanying text.

9. See *infra* text accompanying notes 166-67, 186.

resolve disputes" under the Act.¹⁰ The 1991 Civil Rights Act is even more ambitious in its reach. The text of this omnibus legislation states that "arbitration . . . is encouraged to resolve disputes"¹¹ under four statutes—the ADA, Title VII of the Civil Rights Act of 1964,¹² the Civil Rights Act of 1866,¹³ and the ADEA. These textual statements are significant because, before their expression, no congressional civil rights statute had ever explicitly articulated intent that predispute arbitration agreements be enforceable in accordance with the FAA.

This Article discusses the shortcomings inherent in the consideration and enactment of the arbitrability provisions of the ADA and the 1991 Civil Rights Act. As a threshold matter, Part II demonstrates that the latter Act's textual encouragement of arbitration indicates that Congress misapprehended the effect of *Gilmer*, which the Supreme Court had decided barely six months before the Act's passage. Specifically, this Part will argue that after *Gilmer*, textual encouragement of arbitration has little or no greater legal significance than textual silence would have. In the few decades before the decision, textual encouragement would have had significant impact because particular congressional statutes usually did not explicitly address the FAA mandate's effect on claims under the statute. Faced with congressional silence, courts frequently held claims under various statutes inarbitrable due to the importance of the statute's underlying policy goals, the adequacy of arbitral procedure, or the relative bargaining positions parties often occupy when they execute arbitration agreements covering claims under the statute. By disabling courts from weighing any of these three grounds in determining the FAA mandate's effect, *Gilmer* effectively establishes the arbitrability of claims under congressional statutes which are silent concerning that effect.¹⁴

Part III of this Article provides a history and explanation of the arbitration provisions Congress wrote into the ADA and the 1991 Civil Rights Act. This Part discusses both the language of the Acts and the congressional debates which preceded their enactment. When the dust had settled, only the legislative histories of the Acts acknowledged limi-

10. 42 U.S.C. § 12212 (Supp. IV 1992). The ADA's arbitrability provision and the provision's legislative history are discussed *infra* text accompanying notes 159-76.

11. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991). The 1991 Civil Rights Act's arbitrability provision and the provision's legislative history are discussed *infra* text accompanying notes 177-204.

12. 42 U.S.C. §§ 2000e-2000e-17 (1988).

13. *Id.* § 1981.

14. See *infra* text accompanying notes 141-56.

tations on the binding effect arbitral awards would otherwise hold under the FAA. If courts give effect to the committee reports that accompanied the 1990 and 1991 Acts, a claimant would be entitled to a post-arbitral judicial trial *de novo* on claims under two of the four statutes touched by the acts (the ADA and Title VII).¹⁵

Part IV argues that Congress committed serious error by treating the opportunity for post-arbitral trial *de novo* only in the legislative histories of the ADA and the 1991 Civil Rights Act. The lawmakers have invited the disquieting prospect that under rules of statutory interpretation, courts will enforce arbitration agreements under the FAA in accordance with the textual directives without giving effect to the legislative histories.¹⁶ In addition, the legislative histories recited a flawed rationale which would afford the opportunity on claims under only two of the four affected statutes.¹⁷

This Article concludes that Congress should amend the ADA and the 1991 Civil Rights Act to grant claimants a right to a post-arbitral trial *de novo* on claims under all four statutes touched by the acts. Civil rights statutes hold a unique place in our jurisprudence as public mandates to redress historic discrimination against particular classes or groups of persons. The *de novo* trial right is necessary to help insure that arbitral resolution of civil rights claims will be in accordance with applicable law.¹⁸

15. See *infra* text accompanying notes 168-76, 188-204.

16. See *infra* text accompanying notes 235-47.

17. See *infra* text accompanying notes 168-76, 187-204, 248-58.

18. Congressional action should not await developments unrelated to the arbitrability provisions of the ADA and the 1991 Civil Rights Act. A natural opportunity for enacting the recommended amendments, however, may nonetheless appear in the foreseeable future. In *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), the Supreme Court held that in a suit against an employer alleging intentional racial discrimination in violation of Title VII, the trier of fact's rejection of the employer's asserted reasons for its actions does not mandate a finding for the plaintiff. The 5-4 decision is expected to make proof of intentional discrimination more difficult in a significant number of actions under Title VII (or the ADA, which adopts Title VII powers, remedies, and procedures). Some commentators have urged Congress to overrule the decision, in much the same manner as the 1991 Civil Rights Act overruled earlier Supreme Court decisions which had rendered proof of discrimination more difficult. See, e.g., *Of Lies, Bias and Justice*, STAR TRIB., July 2, 1993, at 16A (Congress "has strived before to correct the Rehnquist Court's nagging civil-rights rulings. It must strive again to right the court's wrongs."); *Overburdened; The Supreme Court Has Made It Too Difficult To Prove Bias: The Congress Must Act*, NEWSDAY, July 1, 1993, at 54; *When Lying Pays*, ST. LOUIS POST-DISPATCH, June 29, 1993, at 2C; *Wrong on Civil Rights, Again*, SACRAMENTO BEE, June 29, 1993, at B6 (*Hicks* "added what should quickly become another item to Congress' civil-rights agenda"); *More Burdens From the Rehnquist Court*, N.Y. TIMES, June 27, 1993, § 4, at 14. Congressional consideration of *Hicks* would provide an appropriate scenario for correcting the shortcomings inherent in the

II. THE EFFECT OF CONGRESSIONAL SILENCE: FROM *WILKO* TO *GILMER*

A. Policy Decisions and Congressional Response

The primary impetus behind the FAA's 1925 enactment came from the business and commercial community, which sought to assure judicial enforcement of commercial arbitration agreements.¹⁹ Attention centered on predispute arbitration agreements, which were not specifically enforceable at common law.²⁰ Before the FAA's enactment, only New York and New Jersey had enacted statutes abrogating the common law rule.²¹

Historically, the commercial arbitration model had been grounded in contract-based claims rather than statutory claims. In the years immediately following the FAA's enactment, courts sporadically granted stays pending FAA arbitration of claims under congressional statutes.²² The nascent act's effect on such claims, however, attracted relatively little attention before the Supreme Court decided *Wilko v. Swan* in 1953.²³ For the first time, the Court determined the FAA mandate's effect on arbitration agreements covering claims under a congressional statute.

1. *Wilko*

In a customer's suit against his broker, *Wilko* held that the parties'

arbitrability provisions of the ADA and the 1991 Civil Rights Act.

19. See, e.g., ABA Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153 (1925); Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265-66, 269-70 (1926); Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 249-50 (1928). See also, e.g., *Gilmer*, 111 S. Ct. at 1659 (Stevens, J., dissenting).

20. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 n.4 (1974); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120-22 (1924) (discussing common law doctrine); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-85 (2d Cir. 1942) (same); *Hurst v. Litchfield*, 39 N.Y. 377, 379 (1868) (same). See also, e.g., *Wesley A. Sturges & Irving O. Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 581-82 & n.2 (1952) (same).

21. See Jones, *supra* note 19, at 249 (citing statutes); Sidney P. Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. PA. L. REV. 160, 165-69 & n.78 (1934) (same).

22. See, e.g., *Evans v. Hudson Coal Co.*, 165 F.2d 970, 973 (3d Cir. 1948) (Fair Labor Standards Act claims); *Donahue v. Susquehanna Collieries Co.*, 160 F.2d 661, 664 (3d Cir. 1947) (same); *Watkins v. Hudson Coal Co.*, 151 F.2d 311, 319-21 (3d Cir. 1945) (same), *cert. denied*, 327 U.S. 777 (1946); *Agostini Bros. Bldg. Corp. v. United States ex rel. Virginia-Carolina Elec. Works, Inc.*, 142 F.2d 854, 855 (4th Cir. 1944) (Miller Act claims).

23. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

predispute arbitration agreements were unenforceable with respect to claims under section 12(2) of the Securities Act of 1933 ("1933 Act").²⁴ The dispositive issue concerned interpretation of the antiwaiver provision in section 14 of the 1933 Act: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of [the 1933 Act] . . . shall be void."²⁵

Neither section 14 nor any other 1933 Act provision explicitly addressed arbitrability, and the Act's legislative history was also silent on the matter. In *Wilko*, the Supreme Court held that the parties' arbitration agreements were "stipulations" which purported to "waive compliance with" section 22(a) of the 1933 Act.²⁶ Section 22(a) conferred concurrent subject matter jurisdiction over claims under the Act.²⁷

Wilko fell short of ascertaining congressional intent concerning the opaque section 14's effect on the FAA mandate. The Court first explored the respective purposes of the FAA and the 1933 Act, concluding that the FAA was designed to provide an "alternative to the complications of litigation"²⁸ and that the 1933 Act was designed to protect securities investors.²⁹ From this dual conclusion, the Court determined only that Congress "must have intended" section 14 to preclude enforcement of the predispute arbitration agreements.³⁰ The Court's rationale, developed in a hostile critique of commercial arbitration, was that the protections the 1933 Act accorded investors were "lessened in arbitration as compared to judicial proceedings."³¹

24. 15 U.S.C. § 77l(2) (1988). According to *Wilko*'s majority, the question was whether "an agreement to arbitrate a future controversy" ran afoul of the 1933 Act's antiwaiver provision. 346 U.S. at 430. In concurrence, Justice Robert H. Jackson stated that after the dispute arose, the parties could have agreed to arbitration. *Id.* at 438 (Jackson, J., concurring). Lower courts embraced the Jackson concurrence, uniformly concluding that *Wilko* did not apply to agreements to arbitrate existing disputes. See *infra* note 207.

25. 15 U.S.C. § 77n (1988).

26. 346 U.S. at 434-35, 432-33 & n.16.

27. See 15 U.S.C. § 77v(a) (1988).

28. 346 U.S. at 431.

29. *Id.*

30. *Id.* at 437.

31. *Id.* at 435. The Court explained:

This case requires subjective findings on the purpose and knowledge of an alleged violator of the [1933] Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" . . . cannot be examined.

2. The American Safety Doctrine

Wilko's impact remained confined for more than a decade. Beginning in the late 1960s, however, numerous lower courts took the decision's open hostility toward commercial arbitration as authority to weigh policy considerations and create exceptions to the FAA mandate for claims under a number of congressional statutes whose texts and legislative histories remained silent concerning the mandate's effect. As the policy decisions appeared, Congress abandoned its traditional silence and explicitly approved the arbitrability of claims under various statutes.

The policy approach's leading decision arose in the antitrust arena. In *American Safety Equipment Corp. v. J.P. Maguire & Co.* in 1968,³² licensee American Safety sued Hickok Manufacturing Co., its licensor, and Maguire, the claimed assignee of Hickok's royalty rights under the license agreement. American Safety alleged that the agreement violated

Power to vacate an award is limited.

Id. at 435-36 (footnotes omitted). See also, e.g., *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956) (reiterating *Wilko's* critique). Cf. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (discussing and rejecting *Wilko's* "hostility" to arbitration) (citation omitted); *McMahon v. Shearson/Am. Express, Inc.*, 482 U.S. 220, 233 (1987) (discussing and rejecting "the mistrust of arbitration that formed the basis of . . . *Wilko*"). *Rodriguez* and *McMahon* are discussed *infra* text accompanying notes 126-40.

Like the 1933 Act, the Securities Exchange Act of 1934 did not explicitly address arbitrability. Virtually all circuits extended *Wilko* to preclude predispute waiver of a judicial forum for resolution of claims under section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) (1938), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1993). See, e.g., *Sterne v. Dean Witter Reynolds, Inc.*, 808 F.2d 480, 482-83 (6th Cir. 1987) (citing decisions); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520, 521-27 (9th Cir. 1986), *vacated and remanded*, 482 U.S. 923 (1987) (same), *rev'd on remand*, 837 F.2d 867 (9th Cir. 1988). Only the First and Eighth circuits reached the contrary conclusion. See *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 295-98 & nn.4-5 (1st Cir. 1986); *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1399 (8th Cir. 1986), *cert. denied*, 482 U.S. 931 (1987). The majority decisions' rationale was that the 1933 and 1934 acts shared similar relevant statutory language and functionally indistinguishable investor-protection purposes. See *infra* notes 128-33 and accompanying text.

Most decisions held that *Wilko* did not preclude enforcement of arbitration agreements which covered 1933 Act or 1934 Act claims against securities exchange members, or against municipal securities dealers or municipal securities brokers. These decisions concluded that § 28(b) of the 1934 Act, 15 U.S.C. § 78bb(b) (1988), created an exception to the 1933 and 1934 Acts' antiwaiver provisions. See, e.g., *Halliburton & Assocs. v. Henderson, Few & Co.*, 774 F.2d 441, 444-45 (11th Cir. 1985) (dispute between municipal securities dealers; discussing precedent). But see, e.g., *Allegaert v. Perot*, 548 F.2d 432, 437 (2d Cir.) (refusing to apply this exception in suit involving bankruptcy trustee's claim of "wholesale fraud of institutional dimension"; held that trustee's claim raised broad policy questions that should be resolved by courts rather than arbitrators), *cert. denied*, 432 U.S. 910 (1977).

32. 391 F.2d 821 (2d Cir. 1968).

the Sherman Act by unlawfully extending Hickok's trademark monopoly and by unreasonably restricting American Safety's business. Maguire invoked the agreement's arbitration clause and demanded arbitration of a claim to past due royalties of approximately \$321,000.³³

The Second Circuit reversed orders which had stayed judicial proceedings pending arbitration of the Sherman Act claims. When the court of appeals articulated the dispositive question, it took the unusual step of citing its own *Wilko* decision, which the Supreme Court had reversed.³⁴ The question, according to the *Wilko* and *American Safety* judges, was whether the statutory right at issue was "of a character inappropriate for enforcement by arbitration."³⁵

Citing the Supreme Court's *Wilko* decision, *American Safety* held that FAA enforcement of predispute arbitration agreements covering Sherman Act claims was inappropriate on three grounds.³⁶ The grounds corresponded to the ones *Gilmer* would remove from the judicial calculus twenty-three years later.³⁷

American Safety's first ground for non-enforcement concerned the importance of the Sherman Act's underlying policy goals. The Second Circuit stated that "[a] claim under the antitrust laws is not merely a private matter," but rather serves to "promote the national interest in a competitive economy," with non-government plaintiffs acting as private attorneys general.³⁸ The court of appeals reasoned that some Sherman Act claims might implicate massive misconduct which would have a significant impact on the public interest: "Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage."³⁹ The court concluded that such occasional substantial claims warranted removal from the FAA mandate of all predispute agreements covering claims under the Act.

American Safety's second ground concerned the adequacy of arbitral procedure. The Second Circuit concluded that "the issues in antitrust cases are prone to be complicated, and the evidence extensive and

33. *Id.* at 822-23.

34. *Id.* at 824; see also *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir.), *rev'd*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

35. 391 F.2d at 825 (quoting 201 F.2d at 444).

36. 391 F.2d at 826. The court of appeals reserved decision on the enforceability of agreements to arbitrate existing Sherman Act disputes. *Id.* at 827-28. Concerning judicial treatment of predispute and post-dispute arbitration agreements generally, see *infra* note 207.

37. See *supra* text accompanying note 14, *infra* text accompanying notes 141-56.

38. 391 F.2d at 826.

39. *Id.*

diverse, far better suited to judicial than to arbitration procedures."⁴⁰ In addition, the court of appeals raised the specter that arbitrators would be biased in favor of business interests named as antitrust defendants. The court concluded that "it hardly seems proper" to vest arbitrators drawn from the business community with authority to determine antitrust claims whose magnitude might implicate the public interest.⁴¹

American Safety's third ground concerned the relative bargaining positions parties often occupy when they execute arbitration agreements covering Sherman Act claims. The panel found it "proper to ask" whether an antitrust claim's forum should be determined by "contracts of adhesion between alleged monopolists and their customers."⁴² The panel concluded that "Congress would hardly have intended that."⁴³

Before the Supreme Court upheld the arbitrability of Sherman Act claims in an international context in 1985,⁴⁴ *American Safety's* holding had been adopted by every other court of appeals that had reached the issue of Sherman Act arbitrability.⁴⁵ Indeed, the Second Circuit itself had reaffirmed *American Safety's* Sherman Act holding on numerous occasions.⁴⁶ But the holding also had left a considerably wider mark.

40. *Id.* at 827.

41. *Id.*

42. *Id.*

43. *Id.*

44. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), discussed *infra* text accompanying notes 111-25.

45. See *Mitsubishi*, 473 U.S. at 620-21. See also, e.g., *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473, 1479 (9th Cir. 1984) (citing decisions); *Lee v. Ply°Gem Indus., Inc.*, 593 F.2d 1266, 1274-75 & n.67 (D.C. Cir.) (same), *cert. denied*, 441 U.S. 967 (1979). Cf. *In re Arbitration between Aimcee Wholesale Corp. and Tomar Prods., Inc.*, 237 N.E.2d 223 (N.Y. 1968) (claims under N.Y. state antitrust law not arbitrable).

46. See, e.g., *NPS Communications, Inc. v. Continental Group, Inc.*, 760 F.2d 463, 466 (2d Cir. 1985); *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974); *Bradford v. New York Times Co.*, 501 F.2d 51, 61 (2d Cir. 1974); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972). See also, e.g., *Allegaert v. Perot*, 548 F.2d 432, 436 (2d Cir.) (refusing to compel the bankruptcy trustee, pursuant to predispute agreements, to arbitrate his claims under the former bankruptcy act arising from an alleged scheme to defraud the bankrupt; reiterating that under *American Safety*, a statutory claim's appropriateness for arbitration under the FAA mandate depended on "the public interest in the dispute, the degree to which the nature of the evidence made the judicial forum preferable to arbitration and the extent to which the agreement to arbitrate was a product of free choice"), *cert. denied*, 432 U.S. 910 (1977). In the few years before the Supreme Court articulated the congressional intent standard that now prevails, several lower courts took *Allegaert* to preclude FAA enforcement of predispute arbitration agreements covering claims by bankruptcy trustees. See, e.g., *Dickinson v. Heinold Secs., Inc.*, 661 F.2d 638, 644 n.11 (7th Cir. 1981); *Corcoran v. Shearson/Am. Express Inc.*, 596 F. Supp. 1113, 1115 (N.D.

By mid-decade, numerous lower courts had applied *American Safety's* rationale in decisions under the patent laws,⁴⁷ the Employee Retirement Income Security Act of 1974 ("ERISA"),⁴⁸ the Commodity Exchange Act ("CEA"),⁴⁹ and the Racketeer Influenced and Corrupt Or-

Ga. 1984); *Hagstrom v. Breutman*, 572 F. Supp. 692, 699-700 (N.D. Ill. 1983); *Breyer v. First Nat'l Monetary Corp.*, 548 F. Supp. 955, 959 (D. N.J. 1982).

47. See *Diematic Mfg. Corp. v. Packaging Indus., Inc.*, 381 F. Supp. 1057, 1061-62 & nn.9-13 (S.D.N.Y. 1974), *appeal dismissed*, 516 F.2d 975 (2d Cir.), *cert. denied*, 423 U.S. 913 (1975). See also, e.g., *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874, 876 (2d Cir. 1976) (claims relating to validity of United States patents not arbitrable); *Beckman Instruments, Inc. v. Technical Dev. Corp.*, 433 F.2d 55, 63 (7th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971) (patent validity claims not arbitrable); *Foster Wheeler Corp. v. Babcock & Wilcox Co.*, 440 F. Supp. 897, 901 (S.D.N.Y. 1977) (patent validity or infringement claims not arbitrable). But cf. *Kamakazi Music Corp.*, 684 F.2d at 231 (in absence of precedent concerning arbitrability of copyright claims, held that arbitrator may decide claim for infringement of a copyright whose validity had already been judicially determined).

The patent law holdings had scattered roots predating *American Safety*. See, e.g., *Leesona Corp. v. Cotwool Mfg. Corp.*, 204 F. Supp. 141, 143 (W.D.S.C. 1962) (arbitration of patent infringement claims stayed until conclusion of related lawsuit; dictum stated that such claims were "inherently unsuited" to arbitration), *aff'd on other grounds*, 315 F.2d 538, 542 (4th Cir. 1963) ("If after [the lawsuit, plaintiff] still desires arbitration, it remains available."); *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184, 185-86 (D. Del. 1930) (held that claims relating to patent validity or infringement did not involve commerce and thus were not within the FAA mandate; dictum stated that such claims were "inherently unsuited" to arbitration).

Congress has overruled the holdings that had created exceptions to the FAA mandate for patent validity or infringement claims. See *infra* text accompanying notes 78-86.

48. 29 U.S.C. §§ 1001-1461 (1988). See *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271, 276-77 (E.D. Pa. 1977). *Contra Fox v. Merrill Lynch & Co.*, 453 F. Supp. 561, 565-66 (S.D.N.Y. 1978) (arbitrator may decide ERISA claim to enforce rights under terms of employee benefit plan). The Supreme Court has not decided the question whether ERISA claims are within the FAA mandate. Recent lower court authority answers in the affirmative. See, e.g., *Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993); *Bird v. Shearson Lehman/Am. Express, Inc.*, 871 F.2d 292 (2d Cir.) (Congress intended to preclude waiver of judicial remedies for statutory ERISA claims, but not for contractual claims involving ERISA-covered plans), *vacated*, 493 U.S. 884 (1989), *remanded*, 926 F.2d 116 (2d Cir.) (Congress did not intend to preclude waiver of judicial forum for claims arising under ERISA), *cert. denied*, 111 S. Ct. 2891 (1991); *Weston v. ITT-CFC*, No. 3:92-CV-2045-H, 1992 U.S. Dist. LEXIS 21200 (N.D. Tex. Dec. 3, 1992); *Fabian Fin. Servs. v. Kurt H. Volk, Inc.*, Profit Sharing Plan, 768 F. Supp. 718, 730-34 (C.D. Cal. 1991).

49. 7 U.S.C. §§ 1-26 (1988). In the Commodity Futures Trading Commission Act of 1974, Congress authorized arbitration of CEA claims below enumerated ceiling amounts by customers against commodities professionals. The Futures Trading Act of 1982 removed the ceilings. See *infra* text accompanying notes 64-71.

In actions brought before the 1982 Act's effective date, several lower courts invoked *American Safety* and precluded arbitration of CEA claims whose requested recovery exceeded the ceilings. See, e.g., *Breyer*, 548 F. Supp. at 959-61; *Bache Halsey Stuart, Inc. v. French*, 425 F. Supp. 1231, 1232-34 (D.D.C. 1977); *Milani v. ContiCommodity Servs., Inc.*, 462 F. Supp. 405, 406-07 (N.D. Cal. 1976). But see, e.g., *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 720 F.2d 1446, 1449 (5th Cir. 1983) (refusing to create an exception to

ganizations Act ("RICO").⁵⁰ Faced with congressional silence concerning the FAA mandate's effect on claims under these statutes, the lower courts cited *American Safety* and held arbitration agreements unenforceable based on considerations relating to policy importance,⁵¹ procedural adequacy,⁵² or relative bargaining position.⁵³ Some lower courts even went so far as to identify a judicially created "protective legislation exception" to the mandate.⁵⁴

the FAA mandate for CEA claims because the exception "would require a judicial policy decision that Congress has not made"); *Ingbar v. Drexel Burnham Lambert Inc.*, 633 F.2d 603, 604-06 (1st Cir. 1982) (refusing to create exception to FAA mandate for CEA claims); *Romnes v. Bache & Co.*, 439 F. Supp. 833, 838 (W.D. Wis. 1977) ("no national policy reason exists for precluding arbitration" of CEA claims).

50. 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992). See, e.g., *Weizman v. Adornato*, 625 F. Supp. 1101, 1102 (E.D.N.Y. 1985); *McMahon v. Shearson/Am. Express, Inc.*, 618 F. Supp. 384, 387 (S.D.N.Y. 1985), *aff'd in part and rev'd in part*, 788 F.2d 94 (2d Cir. 1986), *rev'd on this ground*, 482 U.S. 220 (1987); *Witt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 602 F. Supp. 867, 870 (W.D. Pa. 1985); *Universal Marine Ins. Co. v. Beacon Ins. Co.*, 588 F. Supp. 735, 738 (W.D.N.C. 1984); *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 567 (N.D. Cal. 1984); *S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc.*, 576 F. Supp. 566, 575 (S.D.N.Y. 1983), *amended*, 579 F. Supp. 1049 (S.D.N.Y.), *aff'd*, 745 F.2d 190 (2d Cir. 1984).

51. See, e.g., *Weizman*, 625 F. Supp. at 1102 (citing *S.A. Mineracao da Trindade-Samitri*); *Universal Marine Ins. Co.*, 588 F. Supp. at 738 (same); *Wilcox*, 586 F. Supp. at 567 (same); *S.A. Mineracao da Trindade-Samitri*, 576 F. Supp. at 574 (discussing "the general public interest in the enforcement of RICO"); *Breyer*, 548 F. Supp. at 959 ("the arbitral forum is not adequate to effectuate the policies underlying protective legislation"); *French*, 425 F. Supp. at 1234 ("a public forum [is] the means best calculated for resolving private disputes [under the Commodity Exchange Act] in a manner that protects the marketplace"); *Diematic Mfg. Corp.*, 381 F. Supp. at 1061 ("the grave public interest in [patent and infringement] questions . . . renders them inappropriate for determination in arbitration proceedings"). See also, e.g., *N.V. Maatschappij Voor Industriële Waarden*, 532 F.2d at 876 (citing *Diematic*); *Beckman Instruments, Inc.*, 433 F.2d at 63 (patent validity claims require court to make decisions "crucial not only to the parties involved, but of vital importance to the public generally") (citation omitted); *Foster Wheeler Corp.*, 440 F. Supp. at 901 (citing *Diematic*).

52. See, e.g., *Breyer*, 548 F. Supp. at 961 (discussing "[t]he shortcomings of the arbitral forum compared to a judicial forum"); *Milani*, 462 F. Supp. at 407 ("Judicial direction, at the trial level, is essential to assure that [the Commodity Exchange Act] is properly applied"); *Lewis*, 431 F. Supp. at 275 (citing and quoting *Wilko* critique).

53. See, e.g., *Breyer*, 548 F. Supp. at 959 (discussing the "inferior bargaining position" of commodities investors) (citation omitted); *Lewis*, 431 F. Supp. at 275 (discussing the "superior bargaining position" of pension plan sponsors and administrators).

54. See, e.g., *Corcoran v. Shearson/Am. Express Inc.*, 596 F. Supp. 1113, 1115 (N.D. Ga. 1984); *Hagstrom v. Breutman*, 572 F. Supp. 692, 699 (N.D. Ill. 1983); *Breyer*, 548 F. Supp. at 959; *Lewis*, 431 F. Supp. at 277. See also *French*, 425 F. Supp. at 1233 (discussing "judicial exception[s]" to FAA).

3. Congressional Response to the *American Safety* Doctrine

When Congress created a private right of action before the early 1970s, the lawmakers ordinarily did not explicitly address the FAA mandate's effect on claims asserting the right.⁵⁵ From *Wilko* to *Gilmer*, absence of explicit congressional definition was the foundation of every Supreme Court decision that determined the mandate's effect on private rights Congress had created before the close of the 1960s.⁵⁶

Shortly after *American Safety*, however, Congress began to depart from tradition and to explicitly approve the arbitrability of claims under various statutes. It is difficult to say with certainty what motivated this

55. Because a later particular statute controls over an earlier general one on the same subject, see 2B J.B. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.02, at 121 (5th ed. 1992 rev. by Norman J. Singer), Congress retained authority to define the mandate's effect each time it created a private right likely to be the subject of arbitration agreements.

At least in some part, Congress's traditional silence may have been a product of timing. In the FAA's earliest years, drafters may not even have fully recognized the mandate's amenability to claims under congressional statutes. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1661 (1991) (Stevens, J., dissenting) ("When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims . . ."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646-47 & n.11 (1985) (Stevens, J., dissenting). In later years, Congress occasionally authorized private consensual arbitration of disputes which raised contract-based claims. Statutes would explicitly provide for arbitration by an administrative agency, but with arbitral awards becoming final only on the agency's approval. See, e.g., 7 U.S.C. § 671 (1988) (authorizing arbitration, on consent of all parties, by Secretary of Agriculture or a designee of bona fide disputes concerning the terms and conditions of the sale of milk or its products between a producer cooperative and purchasers, handlers, processors or distributors; arbitral award not effective until approved by the Secretary or designee); 41 U.S.C. § 113(f) (1988) (war contractor and subcontractor may agree to submit dispute to a contracting agency for arbitration when authorized by the agency; arbitral award is conclusive as to the parties and shall not be questioned by the United States except for fraud or collusion). In 1953, *Wilko* addressed the FAA mandate's amenability to statutory claims. 346 U.S. at 431-32 ("practice under [the FAA's] terms raises hope for its usefulness . . . in controversies based on statutes").

56. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (ADEA claims), discussed *infra* text accompanying notes 140-55; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), *overruling Wilko v. Swan*, 346 U.S. 427 (1953) (1933 Act claims), discussed *infra* text accompanying notes 131-33; *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under § 10(b) of the Securities Exchange Act of 1934 or the Racketeer Influenced and Corrupt Organizations Act (RICO)), 18 U.S.C. § 1964(c)), discussed *infra* text accompanying notes 126-30; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act claims in international context), discussed *infra* text accompanying notes 109-21; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (claims under § 10(b) of Securities Exchange Act of 1934 and Rule 10b-5 in international context), discussed *infra* text accompanying notes 94-104; *Wilko v. Swan*, 346 U.S. 427 (1953) (1933 Act claims), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (1933 Act claims), discussed *supra* text accompanying notes 23-31.

change in approach. After all, reading lawmakers' minds is no easier than reading anyone else's. Still, it seems plausible that Congress recognized that its silence invited courts to apply the increasingly expansive *American Safety* doctrine and to hold various statutory causes inarbitrable. The explicit approvals of arbitration, then, would be attempts to preclude such holdings.⁵⁷

Two overarching themes emerge from the explicit congressional approvals. First, where the lawmakers intended to approve the FAA's operation without qualification, the statutory texts used only the words "arbitration" or "binding arbitration," without naming the seminal act or tracking its language. Second, Congress accompanied the explicit approvals with recurrent praise for arbitration as a dispute resolution method marked by fair procedure.⁵⁸

a. *Approving the FAA's Operation*

Beginning in the early 1970s, several acts reflected Congress' new determination to provide explicitly for arbitration in the statutory text. The subjects of these acts ranged from environmental protection to business law to intellectual property.

For example, five years after *American Safety*, the Trans-Alaska Pipeline Authorization Act of 1973⁵⁹ sought to protect the environment from risks created by the Pipeline, and to protect persons suffering injury related to these risks.⁶⁰ Among other things, the Act imposed civil liability on holders of oil pipeline rights-of-way along the Trans-Alaska Pipeline System.⁶¹ Private parties could recover for damages suffered in connection with or resulting from the holder's activities along the right-of-way or in its vicinity.⁶² The Act specified that dam-

57. Congress remained silent concerning arbitrability when it enacted RICO in 1970, two years after *American Safety*. See *McMahon*, 482 U.S. at 238. Extrapolating from a silent legislative record carries inherent risk, but the most plausible explanation for RICO's silence is that arbitrability never occurred to any lawmaker who considered the statute's enactment. The lawmakers did not expect RICO's private remedy to enjoy the general applicability it has enjoyed since the early 1980s. Congress expected private RICO suits to be directed at organized-crime and racketeer defendants, who would not ordinarily be parties to arbitration agreements. See *infra* note 145.

58. Both themes are reflected in the ADA and the 1991 Civil Rights Act. See *infra* text accompanying notes 166-68, 183-86.

59. Pub. L. No. 93-153, tit. II, 87 Stat. 576, 584 (codified at 43 U.S.C. §§ 1651-1655 (1988 & Supp. IV 1992)).

60. See *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 863, 873 (9th Cir. 1981).

61. 43 U.S.C. § 1653(a) (1988).

62. *Id.* § 1653(a)(1). The holder's liability was in proportion to its ownership interest in the

age claims "may be determined by arbitration or judicial proceedings."⁶³

The Commodity Futures Trading Commission Act of 1974⁶⁴ was similarly explicit in its approval of arbitration. This Act required each board of trade designated as a commodities contract market to "provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof."⁶⁵ The Act also authorized the newly created Commodity Futures Trading Commission ("CFTC") to register an association as a futures association where, among other things, the association's rules provided for such an arbitration procedure.⁶⁶ The Act, however, created ceilings that limited the procedure's application to claims not exceeding \$15,000 in the case of contract markets,⁶⁷ and to claims not exceeding \$5,000 in the case of futures associations.⁶⁸ The Futures Trading Act of 1982⁶⁹ removed the ceilings⁷⁰ and clarified that com-

right-of-way. *Id.* § 1653(a)(2). Holders were strictly liable for a maximum of 50 million dollars in damages for any one incident, *id.* § 1653(a)(1), (2), but a holder had a complete defense where it proved the damage was caused by the negligence of the United States or other government entity, or of the injured party. *Id.* § 1653(a)(1). Liability for damages exceeding 50 million dollars would be determined in accordance with ordinary rules of negligence. *Id.* § 1653(a)(2). In 1990 Congress raised the strict liability limit to 350 million dollars. Oil Pollution Act of 1990, Pub. L. No. 101-380, § 8101(b), 104 Stat. 484, 565 (1990) (codified at 43 U.S.C. § 1653(a)(1) (Supp. IV 1992)).

63. 43 U.S.C. § 1653(a)(1) (1988). In 1990 Congress amended the Act but left the earlier specification untouched. *Id.* § 1001-20, 104 Stat. at 486-506.

64. Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified in scattered sections of 7 U.S.C.).

65. § 209, 88 Stat. at 1401 (adding § 5a(11) of the Commodity Exchange Act, codified as amended at 7 U.S.C. § 7a(11) (1988)). See also 7 U.S.C. § 7a(11) (defining "customer"); *id.* § 7 (governing designation of board of trade as "contract market"). See generally M. Van Smith, *Breaking the Chains that Bind: Arbitration Agreements Versus Forum Rights Under the Commodity Futures Trading Commission Act of 1974*, 16 SAN DIEGO L. REV. 749, 753-61 (1979) (discussing commodities arbitration before CFTC Act).

66. § 301, 88 Stat. at 1406-11 (codified as amended at 7 U.S.C. § 21(b) (1988)). With respect to both contracts markets and futures associations, the Act provided that the procedure's use by a customer must be voluntary. 7 U.S.C. § 7a(11)(i) (contracts markets); *id.* § 21(b)(10)(i) (futures associations).

67. § 209, 88 Stat. at 1401 (codified as amended at 7 U.S.C. § 7a(11) (1988)).

68. § 301, 88 Stat. at 1406-11 (codified as amended at 7 U.S.C. § 21(b) (1988)). The Futures Trading Act of 1978 raised the \$5,000 ceiling to \$15,000. Pub. L. No. 95-405, § 22(2), 92 Stat. 865, 876 (1978) (codified in scattered sections of 5 & 7 U.S.C.).

69. Pub. L. No. 97-444, 96 Stat. 2294 (codified in scattered sections of 7 U.S.C.). See also H.R. REP. No. 565, 97th Cong., 2d Sess., pt. 1, at 56 (1982), reprinted in 1982 U.S.C.C.A.N. 3871, 3905 (Act sought to "enhance the attractiveness of arbitration" of commodities disputes); 128 CONG. REC. H7483 (1982) (remarks of Rep. de la Garza) (bill would "make arbitration more attractive and effective"); *id.* at H7487 (remarks of Rep. Wampler) (bill would "provide for broadened power for individuals to request arbitration"); *id.* at S14,816 (remarks of Sen.

modities customers may bind themselves by predispute arbitration agreements.⁷¹

The Semiconductor Chip Protection Act of 1984⁷² created a *sui generis* intellectual property right similar in many respects to existing copyright law.⁷³ A "semiconductor chip" is a multi-layer product of metal, semiconductor or insulating material on a semi-conductor substrate; the product is intended to perform electronic circuitry functions.⁷⁴ The Act provides that where an innocent purchaser resells a

Huddleston) (bill "broadens the right of individuals to request arbitration of claims against commodity brokers"). The Act broadened the definitions of "customer" in the provisions relating to contracts markets and futures associations. *See* Pub. L. No. 97-444, § 217(a), 96 Stat. 2294, 2307 (codified at 7 U.S.C. § 7a(11) (1988)) (contract markets); Pub. L. No. 97-444, § 217(b), 96 Stat. 2294, 2307 (codified at 7 U.S.C. § 21(b)(10) (1988)) (futures associations). *See generally* H.R. REP. No. 565, 97th Cong., 2d Sess., pt. 1, at 56 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3941 (explaining the breadth of the amended definitions).

70. § 217, 96 Stat. at 2307. *See* H.R. REP. No. 565, 97th Cong., 2d Sess., pt. 1, at 56 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3905. The lawmakers rejected a more modest General Accounting Office proposal to raise the arbitral ceilings to \$25,000, and to authorize the CFTC to raise the ceilings to \$50,000 to reflect future Consumer Price Index changes. H.R. REP. No. 565, 97th Cong., 2d Sess., pt. 1, at 56 (1982) *reprinted in* 1982 U.S.C.C.A.N. 3871, 3992. Between 1974 and 1982, lower courts had disagreed concerning the enforceability of arbitration agreements with respect to CEA claims that exceeded the ceilings. *See supra* note 49.

71. The 1982 Act created an express private right of action for recovery of actual damages against violators of the CFTC Act; the right specifically did not "limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims . . . , including arbitration." Pub. L. No. 97-444, § 235, 96 Stat. 2294, 2322-23 (codified at 7 U.S.C. § 25 (1988)). *See* 17 C.F.R. § 180.3 (1993) (CFTC rules concerning enforceability of predispute arbitration agreements). A few months before enactment of the 1982 Act, the Supreme Court had held that an implied private right of action existed for damages caused by CEA violations. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-95 (1982). Before this decision, lower courts had "routinely and consistently" recognized such an implied right. *Id.* at 379.

Before the 1982 legislation, CFTC regulations had provided for enforcement of predispute arbitration agreements, subject to procedural safeguards specified in the regulations. *See* 17 C.F.R. § 180.3(b) (1981) (contract markets); *id.* § 170.8 (futures associations). *See also* 17 C.F.R. § 180.3 (1993) (contract markets); *id.* § 170.8 (futures associations). The predispute agreement may work a waiver of the right to sue in court, but does not work a waiver of the right to proceed under the CFTC reparations program if the customer elects to proceed under the program within forty-five days after a demand for arbitration is made. *Id.* §§ 180.3(3), (6) (contract markets); 170.8 (futures associations). The reparations program provides for CFTC adjudication of customer claims against commodity professionals and firms. *See generally* 1 PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, *COMMODITIES REGULATION* § 2.45 (2d ed. 1989 & Supp. 1991).

72. Pub. L. No. 98-620, 98 Stat. 3347 (codified at 17 U.S.C. §§ 901-914 (1988 & Supp. IV 1992)).

73. *See* H.R. REP. No. 781, 98th Cong., 2d Sess. 16 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5708, 5765.

74. 17 U.S.C. § 901(a)(1) (1988) (definition section).

unit of an infringing product (for example, as part of a machine it manufactures and sells) before having notice that the Act protects the product, the purchaser incurs no liability to the product's owner.⁷⁵ Where an innocent purchaser resells such a unit after having notice of protection, however, the Act imposes liability on the purchaser for a reasonable royalty on the unit.⁷⁶ The Act provides for determination of the royalty in a civil infringement action "unless the parties resolve the issue by voluntary negotiation, mediation, or binding arbitration."⁷⁷

In 1982 Congress enacted 35 U.S.C. § 294,⁷⁸ which approved the arbitrability of patent validity or infringement claims, but with qualifications on the effect of arbitral awards.⁷⁹ Tracking the FAA mandate's language, § 294(a) provides that predispute and post-dispute arbitration agreements are "valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract."⁸⁰ Section 294(b) provides that the FAA governs the arbitral proceeding as well as its award and confirmation.⁸¹ Section 294(c) specifies, however, that an award binds only the parties to the arbitration.⁸²

The Patent Law Amendments Act of 1984⁸³ paralleled the 1982 legislation by authorizing parties to a patent interference to arbitrate their dispute or any aspect of it.⁸⁴ The 1984 Act provides that the FAA governs the arbitration.⁸⁵ Again, Congress qualified the effect of arbitral awards. An award binds the parties but does not preclude the

75. *Id.* § 907(a)(1). *See also id.* § 901(7) (defining "innocent purchaser" as "a person who purchases a semiconductor chip product in good faith and without having notice of protection with respect to the semiconductor chip product").

76. *Id.* § 907(a)(2).

77. *Id.* § 907(b).

78. Pub. L. No. 97-242, § 17(b)(1), 96 Stat. 322 (1982).

79. *Id.* The section overruled decisions that, amid silence in the patent law's text and legislative history, had created exceptions to the FAA mandate for such claims. *See* authorities cited *supra* note 47.

80. 35 U.S.C. § 294(a) (1988). The FAA mandate, 9 U.S.C. § 2 (1988), is quoted *supra* note 6.

81. 35 U.S.C. § 294(b).

82. *Id.* § 294(c).

83. Pub. L. No. 98-622, 98 Stat. 3383.

84. § 105, 98 Stat. at 3385 (codified at 35 U.S.C. § 135(d) (1988)). *See also* 130 CONG. REC. 28,071-73 (1984) (remarks of Rep. Kastenmeier) (bill authorizing arbitration of interference disputes "parallels" 1982 legislation authorizing arbitration of validity and infringement disputes); *id.* at 32,275 (remarks of Rep. Kastenmeier) (same).

85. 35 U.S.C. § 135(d).

Commissioner of Patents and Trademarks from determining the patentability of the invention involved in the interference.⁸⁶

b. *Congressional Praise for Arbitral Fairness*

Congress did more than simply express approval of arbitration as an alternative to judicial resolution of disputes. In most cases, the lawmakers accompanied their expressions with praise for the fairness of arbitral resolution.

The 1974 commodities legislation directed the CFTC to police the fairness and equity of commodities arbitration.⁸⁷ When the 1982 commodities legislation removed the eight-year-old ceilings, Congress concluded that the agency's regulations had accomplished the mission: "[A]rbitration is an equally viable forum for resolving customer claims in excess of \$15,000."⁸⁸

Reporting favorably on the 1982 patent bill, the House Judiciary Committee concluded that arbitration of validity and infringement disputes "would benefit both the parties . . . and the public"⁸⁹ because parties "could avail themselves of the numerous advantages of arbitration without the possibility of having to reargue the dispute in court."⁹⁰ In particular, the committee praised the speed and flexibility of arbitration and the specialized knowledge of arbitrators.⁹¹ Congress also based the 1984 patent interference legislation on this perception of

86. *Id.*

87. *See supra* text accompanying notes 64-65.

88. H.R. REP. No. 565, 97th Cong., 2d Sess., pt. 1, at 56 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3905.

89. H.R. REP. No. 542, 97th Cong., 2d Sess. 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777.

90. *Id.*

91. In the Committee's own words:

The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices; and, arbitrators are frequently better versed than judges and juries in the area of trade customs and the technologies involved in these disputes.

Id. The public interest would be served because arbitration would "enhance the patent system and thus . . . encourage innovation," and "could relieve some of the burdens on the overworked Federal courts." *Id.* *See also* Statement on Signing the Patent and Trademark Office Appropriations Bill, *reprinted in* PUB. PAPERS, Ronald Reagan 1982, pt. II, at 1037 ("This bill authorizes voluntary arbitration of patent validity and infringement disputes. This will not only improve the patent system and encourage innovation but will help relieve the burden on the Federal courts.")

arbitral fairness.⁹² The lawmakers accompanied the Semiconductor Chip Protection Act with similar sentiment, stating that "alternatives to litigation will work well here, ultimately achieving equitable results."⁹³

B. *The Decline of Policy Decisions*

1. *The Roots of the Decline: Scherk v. Alberto-Culver Co.*

While Congress was beginning to make explicit its approval of arbitration as an alternative to judicial resolution of claims under particular statutes, the Supreme Court was also moving toward explicit approval. In *Scherk v. Alberto-Culver Co.*⁹⁴ in 1974, the Court signaled a departure from *Wilko*'s evident hostility toward commercial arbitration.⁹⁵

Pursuant to a predispute agreement with the American corporate plaintiff, the German defendant Scherk sought to compel arbitration of claims under section 10(b) of the Securities Exchange Act of 1934 ("1934 Act")⁹⁶ and Securities and Exchange Commission Rule

92. See *supra* note 84.

93. H.R. REP. No. 781, 98th Cong., 2d Sess. 23 (1984), reprinted in 1984 U.S.C.A.N. 5750, 5772.

94. 417 U.S. 506 (1974).

95. Judicial attitudes toward commercial arbitration and labor arbitration have not developed along parallel paths. The Supreme Court has long recognized that the Railway Labor Act of 1926 ("RLA") seeks to "encourag[e] the amicable adjustment of labor disputes by their voluntary submission to arbitration . . ." *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 542-43 (1937). See also, e.g., *Brotherhood of R.R. Trainmen v. Toledo, Peoria & W. R.R.*, 321 U.S. 50, 58 (1944); *Texas & New Orleans R.R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 567 (1930). When the federal courts' commercial arbitration jurisprudence was generally marked by *Wilko*'s evident hostility, the Court also lauded arbitration under the Labor Management Relations Act of 1947 ("LMRA"). See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

Typical of the Court's *Wilko*-era approach to labor arbitration was *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). *Warrior & Gulf* concerned a labor union's suit under § 301(a) of the LMRA to compel arbitration pursuant to a collective-bargaining agreement. The Court held *Wilko* and other commercial arbitration decisions "irrelevant" to the suit's disposition: "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife." *Id.* at 578.

The Court's approach to labor arbitration reflected express congressional approval of arbitral resolution of disputes arising from collective-bargaining agreements. See RLA, 45 U.S.C. §§ 151, 151a (1988); LMRA §§ 201(b), 203(d), 29 U.S.C. §§ 171(b), 173(d) (1988). See also, e.g., *AT & T Tech., Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986) (discussing "reliance on arbitration . . . as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement").

96. See 15 U.S.C. § 78j(b) (1988).

10b-5.⁹⁷ The Court assumed, without deciding, that the 1934 Act's antiwaiver and other operative provisions were sufficiently similar to their 1933 Act counterparts to invite a *Wilko*-type holding precluding enforcement of the agreement's arbitration provision.⁹³

Nonetheless, *Scherk* upheld the FAA mandate's enforcement because the parties' "truly international agreement"⁹⁹ implicated "considerations and policies significantly different from those found controlling in *Wilko*."¹⁰⁰ Calling a forum-selection clause "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction,"¹⁰¹ the Court said that "such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved."¹⁰²

By merely distinguishing *Wilko* before basing its decision on policy considerations, *Scherk* did not stimulate lower courts to abandon the *American Safety* doctrine's policy-oriented approach.¹⁰³ Indeed, in decisions on claims under various congressional statutes which did not explicitly address the FAA mandate's effect, several lower courts continued to cite *American Safety* to support holdings of inarbitrability.¹⁰⁴ In light of *American Safety*'s continued vitality, *Scherk* did not provide

97. 17 C.F.R. § 240.10b-5 (1993).

98. 417 U.S. at 514 n.7, 515.

99. *Id.* at 515. The parties conducted negotiations in the United States, England and Germany before signing the agreement in Austria and conducting the closing in Switzerland. The agreement concerned the sale of business enterprises organized under the laws of, and primarily situated in, European nations. The enterprises' activities were largely, if not entirely, directed to European markets. The agreement provided for arbitration before the International Chamber of Commerce in Paris, France, and for application of Illinois law. *Id.* at 503.

100. *Id.* at 515.

101. *Id.* at 516.

102. *Id.* In the Court's words, "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Id.* at 516-17 (footnote omitted).

In the context of an agreement with international underpinnings similar to *Scherk*'s, the Court recently had upheld the general enforceability of specialized forum selection clauses in United States courts. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), discussed in *Scherk*, 417 U.S. at 518.

103. Decisions viewing *Scherk* as grounded in policy considerations included *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 163 (1st Cir. 1983), *aff'd in part, rev'd in part on other grounds and remanded*, 473 U.S. 614 (1985); *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 828 (10th Cir. 1978); *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975).

104. See authorities cited *supra* notes 45-54.

Congress with reason to reevaluate its emerging practice of explicitly approving the arbitrability of claims under particular statutes.

2. Establishing the Congressional Intent Standard

In a number of decisions in the early 1980s, the Supreme Court abandoned *Wilko's* hostility and articulated unmistakable approval for commercial arbitration. Foundations for the Court's evolving approach were two propositions articulated in *Scherk*. Without citing *Wilko's* critique, *Scherk* had stressed that Congress intended the FAA to "revers[e] centuries of judicial hostility to arbitration agreements,"¹⁰⁵ and to "place arbitration agreements 'upon the same footing as other contracts'"¹⁰⁶

Even as the Supreme Court reiterated *Scherk's* two propositions early in the decade,¹⁰⁷ however, some lower courts continued to cite *American Safety* and find exceptions to the FAA mandate for claims under various congressional statutes which did not explicitly address the

105. 417 U.S. at 510, citing H.R. REP. No. 96, 68th Cong., 1st Sess. 1, 2 (1924). *See Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1651 (1991) (restating this proposition); *McMahon v. Shearson/Am. Express, Inc.*, 482 U.S. 220, 225 (1987) (quoting same). *See also* *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 474 (1989) (FAA was designed to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate") (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)); *Mitsubishi*, 473 U.S. at 625 n.14 (same).

106. 417 U.S. at 511, quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 1, 2 (1924). *See Gilmer*, 111 S. Ct. at 1651, 1656 (restating this proposition); *Volt*, 489 U.S. at 474, 478 (same); *McMahon*, 482 U.S. at 225-26 (same); *Byrd*, 470 U.S. at 219 (same).

107. *See Byrd*, 470 U.S. 213, 216-21 & n.6 (rejecting "doctrine of intertwining" and holding that when a complaint raises both arbitrable and nonarbitrable claims, district court must grant motion to compel arbitration of arbitrable claims; because the FAA's "preeminent concern" is to enforce private arbitration agreements, courts must "rigorously enforce agreements to arbitrate, . . . at least absent a countervailing policy manifested in another federal statute"). *See also* *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984) (holding that § 2 of FAA preempted state statutory provision that state supreme court had interpreted to require judicial consideration of claims under the statute); *id.* at 10 (stating that § 2 of the FAA had "declared a national policy favoring arbitration"); *id.* at 10-11 (discerning "only two limitations" on the enforceability of arbitration agreements governed by the FAA mandate: such an agreement must be part of a written maritime contract or contract "evidencing a transaction involving commerce," and the agreement may be revoked on "grounds as exist at law or in equity for the revocation of any contract"). *Cf. Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) (holding that district court abused its discretion in staying action pending parallel state court suit's resolution); *id.* at 24 (describing § 2 of the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements" and instructing that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *id.* at 24-25 (specifying that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability").

mandate's effect.¹⁰⁸ Such citation and findings continued even after the Court, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* in 1985,¹⁰⁹ undercut *American Safety's* doctrinal bases and stated that the mandate's effect on federal statutory claims depends on congressional intent.¹¹⁰ The lower courts' approach left Congress with continuing reason to articulate its own intent to approve the arbitrability of claims under various statutes.

a. *Mitsubishi*

Mitsubishi's principal question concerned the arbitrability of an American automobile dealer's Sherman Act counterclaims. The dealer alleged that two major automobile companies were parties to an international cartel that had restrained competition in the American market by preventing it from transshipping surplus vehicles from Puerto Rico to other dealers in the American market.

Mitsubishi discussed congressional intent at an unusual point in the opinion. The Court held that under general principles of contract interpretation, the American dealer had agreed to arbitrate the Sherman Act counterclaims.¹¹¹ Where a claim derives from statute, the Court instructed, these principles control unless Congress has expressed intent to remove the claim from the FAA mandate:

Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable¹¹²

The Court specified two sources of congressional meaning: "[The] intention will be deducible from text or legislative history"¹¹³

Mitsubishi proceeded to hold the American dealer's Sherman Act counterclaims arbitrable in accordance with the FAA mandate. The

108. See authorities cited *supra* notes 45-54.

109. 473 U.S. 614 (1985).

110. See authorities cited *supra* notes 48, 50; see also *infra* notes 122-25 and accompanying text.

111. 473 U.S. at 624-25.

112. *Id.* at 627.

113. *Id.* at 627-28 (citations omitted).

holding, however, turned on *Scherk* rather than on further discussion of congressional intent underlying the Sherman Act. Writing for the Court, Justice Harry A. Blackmun concluded that enforcement of the arbitration agreement was required by concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the international commercial system's need for predictability in dispute resolution.¹¹⁴

Because *Mitsubishi* based its holding on policy considerations relating to the arbitration agreement's international context, the Court found it "unnecessary"¹¹⁵ to decide the continued validity of *American Safety*, whose Sherman Act holding had arisen from a domestic dispute. In dicta, however, *Mitsubishi* spent six pages expressing "skepticism"¹¹⁶ about that validity.

After undermining *American Safety's* procedural-adequacy¹¹⁷ and relative-bargaining-position prongs,¹¹⁸ *Mitsubishi* questioned the validity of the earlier decision's policy-importance prong.¹¹⁹ *Mitsubishi* linked policy importance to both procedural adequacy and relative bargaining position: "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."¹²⁰

Several lower courts concluded that Justice Blackmun's discussion of congressional intent had "signaled a new approach to the arbitrability of statutory claims."¹²¹ As matters soon developed, however, *Mitsubishi's* dicta did not kill the *American Safety* doctrine in the lower courts. In 1986, in *McMahon v. Shearson/American Express, Inc.*,¹²²

114. *Id.* at 629 (citing *Scherk*).

115. *Id.*

116. *Id.* at 632.

117. *Id.* at 633, 634 ("[A]daptability and access to expertise are hallmarks of arbitration"; declining to presume that arbitrators would necessarily be biased in favor of alleged antitrust violators).

118. *Id.* at 632-33 (declining to presume that arbitration agreements covering antitrust claims would be contracts of adhesion).

119. *Id.* at 634-37.

120. *Id.* at 637. See also *id.* at 635 (Congress intended private antitrust suits primarily to compensate injured claimants, and only incidentally to serve a policing function).

121. *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 848 (2d Cir. 1987). See also, e.g., *Mayaja, Inc. v. Bodkin*, 803 F.2d 157, 161, 163 n.6 (5th Cir. 1986), vacated on other grounds and remanded for further consideration in light of *McMahon*, 482 U.S. 923 (1987), rev'd on remand, 824 F.2d 439 (5th Cir.), cert. denied, 482 U.S. 927 (1987); *Steinberg v. Illinois Co.*, 635 F. Supp. 615, 619 (N.D. Ill. 1986); *Bob Ladd, Inc. v. Adcock*, 633 F. Supp. 241, 243-44 (E.D. Ark. 1986); *Brener v. Becker Paribas Inc.*, 628 F. Supp. 442, 450 (S.D.N.Y. 1985).

122. 788 F.2d 94 (2d Cir. 1986), rev'd, 482 U.S. 220 (1987).

the Second Circuit held unenforceable predispute arbitration agreements covering claims under section 10(b) of the 1934 Act or under RICO. The section 10(b) holding reaffirmed the circuit's settled law.¹²³ The RICO holding, however, was unencumbered by binding precedent. The court of appeals cited *American Safety* to support the conclusion that "[e]nforcement of the RICO statute is particularly appropriate in a judicial forum because of strong policy concerns."¹²⁴ Before the Supreme Court reversed the RICO holding fourteen months later, several lower courts had adopted it and the court of appeals' rationale.¹²⁵

b. *McMahon and Rodriguez*

In *Shearson/American Express, Inc. v. McMahon* in 1987,¹²⁶ the Supreme Court reversed the Second Circuit's section 10(b) and RICO holdings. Not only did the Supreme Court's *McMahon* decision articulate the emergent congressional intent standard with a directness *Mitsubishi* may have lacked; the decision also refashioned *Mitsubishi's* formulation by identifying a third source of intent:

The Arbitration Act, standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," . . . or from an inherent conflict between arbitration and the statute's underlying purposes.¹²⁷

123. See 788 F.2d at 96-98 (citing decisions). Unenforceability was also the settled § 10(b) law in most other circuits. See *supra* note 31 and accompanying text.

124. 788 F.2d at 98-99.

125. See, e.g., *Page v. Moseley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291, 293-300 (1st Cir. 1986); *Preston v. Kruezer*, 641 F. Supp. 1163, 1178 (N.D. Ill. 1986); *Fisher v. Prudential-Bache Sec., Inc.*, 635 F. Supp. 234, 237 (D. Md. 1986), *aff'd in part and rev'd in part without opinion*, 831 F.2d 290 (4th Cir. 1987); *Douglas v. Dean Witter Reynolds, Inc.*, No. 86-2280-S, 1986 U.S. Dist. LEXIS (D. Kan. Sept. 26, 1986).

126. 482 U.S. 220 (1987).

127. *Id.* at 226-27 (emphasis supplied) (citations omitted) (brackets by the Court).

Judicial analysis is fundamentally different where the claim arises under a state statute rather than a congressional statute. The FAA does not contain an express preemption provision, but the Supreme Court has held state law preempted to the extent it conflicts with the federal Act. In *Southland Corp. v. Keating*, 465 U.S. 1, 11-12 (1984), the Court held that § 2 of the FAA preempted a California Franchise Investment Law provision which the state supreme court had interpreted to require judicial consideration of claims under that law. *Keating* concluded that in enacting § 2, "Congress declared a national policy favoring arbitration and withdrew the

By enforcing the FAA mandate with respect to section 10(b) claims in the face of *Wilko's* 1933 Act holding, *McMahon* introduced an anomaly into the law.¹²⁸ The 1933 and 1934 Acts carry functionally indistinguishable investor-protection purposes,¹²⁹ with the 1933 Act primarily regulating the initial distribution of securities and the 1934 Act primarily regulating trading in previously distributed securities on national exchanges and in the over-the-counter markets.¹³⁰

power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10.

A year earlier, the Supreme Court had determined that § 2 is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). *See also, e.g., Perry v. Thomas*, 482 U.S. 483, 484, 489-91 (1987) (§ 2 of FAA preempted California Labor Code provision which provided that actions to collect wages may be maintained "without regard to the existence of any private agreement to arbitrate"). *But see Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 470 (1989) (where the parties agreed that their arbitration agreement would be governed by California law, FAA did not preempt California Arbitration Act provision which allowed court to stay arbitration pending resolution of related litigation). *Cf. Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) (§ 2 of FAA preempted state administrative regulations that sought to restrict enforceability of predispute arbitration clauses in securities brokerage agreements).

128. The 1934 Act's antiwaiver and jurisdictional provisions closely resemble their 1933 Act counterparts. *See* 15 U.S.C. § 78cc(a) (1988); 15 U.S.C. § 78aa (1988); 15 U.S.C. § 77n (1988); 15 U.S.C. § 77v(a) (1988). The 1934 Act's antiwaiver provision voids "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]." Compare the 1933 Act antiwaiver provision, *supra* text accompanying note 25. The 1934 Act's jurisdictional provision differs from the 1933 Act's chiefly insofar as the former confers exclusive subject matter jurisdiction on the federal courts. *See generally* Thomas L. Hazen, *Allocation of Jurisdiction Between the State and Federal Courts For Private Remedies Under the Federal Securities Law*, 60 N.C. L. REV. 707, 709 (1982) (differences among the various federal securities statutes in allocating judicial jurisdiction over private actions "may be nothing more than the result of unfortunate legislative apathy or inattention").

129. *See* 48 Stat. 74 (1933 Act); *id.* at 881 (1934 Act).

130. *See, e.g.,* 1 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 227-28 (1989). Indeed, the historical record justifies the conclusion that the two acts are "as closely related as two nominally separate statutes could be." 6 LOUIS LOSS, *SECURITIES REGULATION* 3915 (Supp. 1969). After an early fruitless effort to draft a securities bill that would have regulated both distribution and trading, President Roosevelt settled on separate bills that together served as the foundation of a unified regulatory program. *See, e.g.,* ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 440 (1959); JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* 50-53 (1982). The President stressed this unity in both of his messages to Congress recommending enactment of the Acts. *See* H.R. DOC. No. 12, 73d Cong., 1st Sess., *reprinted in* 77 CONG. REC. 937 (1933); 78 CONG. REC. 2264 (1934). The two Acts were enacted by the same Congress. *See* 1934 Act, ch. 404, 48 Stat. 881 (1934) (73d Cong.); 1933 Act, ch. 38, 48 Stat. 74 (1933) (same). Lawmakers in 1933 knew that the securities bill primarily regulating initial distribution would be followed swiftly by one primarily regulating later trading; in turn, lawmakers in 1934 knew of the close relationship of that year's securities bill to the 1933 Act. *See* Doug-

In view of this intimate relationship, *Wilko* and *McMahon* could not coexist logically. In 1989, the Supreme Court overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*¹³¹ *Rodriguez* concluded that *Wilko*'s critique of arbitration was "pervaded by . . . 'the old judicial hostility to arbitration,'"¹³² and thus was "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."¹³³

When Congress enacted the ADA shortly after *Rodriguez*, however, the lawmakers still had significant reason to articulate their own intent to approve the FAA mandate's operation.¹³⁴ Where a federal statute remained silent concerning that effect, the congressional intent standard's "inherent conflict" prong presumably required a showing of profound incompatibility between arbitration and the statute's underlying purposes.¹³⁵ Lower courts nonetheless continued to invoke considerations relating to policy importance, procedural adequacy and relative bargaining position as grounds for satisfying that prong.¹³⁶ Indeed, on-

las E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877, 906 nn. 156-57 (1987). The 1934 Act amended the 1933 Act in significant respects. See 1934 Act, ch. 404, §§ 201-210, 48 Stat. 905-09 (1934). Finally, as enacted and as amended for more than a half century, the 1934 Act refers to 1933 Act provisions and thus helps cement the intimate relationship between the two statutes. See Abrams, *supra* at 907 n.159.

131. 490 U.S. 477 (1989). *Rodriguez* was decided by a five-four majority. The dissenters concluded that the Court had a "duty" to adhere to *Wilko*'s holding because Congress had left the holding undisturbed for three and a half decades. *Id.* at 486 (Stevens, J., dissenting).

132. *Id.* at 480 (citation omitted).

133. *Id.* at 481.

134. The ADA expressed this intent in § 513, which is discussed *infra* text accompanying notes 164-67.

135. Webster's New Collegiate Dictionary defines the adjective "inherent" as "involved in the constitution or essential character of something." WEBSTER'S NEW COLLEGIATE DICTIONARY 622 (1985) (also as "belonging by nature or settled habit" or "intrinsic"). The Supreme Court frequently interprets congressional statutes according to the dictionary definitions of language the lawmakers employ. See, e.g., *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169-70 (1993); *United States v. Eichman*, 496 U.S. 310, 317 & n.7 (1990); *United States Dept. of Justice v. Reporters Comm.*, 489 U.S. 749, 763-64 & n.16 (1989). The Court's own standards thus may be interpreted in similar fashion.

136. See, e.g., *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1306-07 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989) (discussing "an inherent conflict between arbitration and the underlying purposes of Title VII" because of "the lack of expertise of arbitrators, the inferior factfinding process, and the inability of arbitration to judicially construe Title VII by reference to public law concepts"; concluding that "in the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII") (citations omitted); *Borenstein v. Tucker*, 757 F. Supp. 3, 4-5 (D. Conn. 1991) (agreeing with decision in *Nicholson V. CPC Int'l Inc.*, 877 F.2d 221 (3d Cir. 1989); *Bierdeman v. Shearson Lehman Hutton, Inc.*, 744 F. Supp. 211, 213-14 (N.D.

ly three weeks after *Rodriguez*, the Third Circuit held that "the ADEA is one of the statutory schemes that present . . . 'inherent conflict [with] arbitration.'"¹³⁷ The court of appeals stressed not only "the inadequacy of arbitration in many cases to enforce the [ADEA] effectively,"¹³⁸ but also "[t]he disparity in bargaining power between an employer and an individual employee."¹³⁹

Gilmer reached the Supreme Court after the Fourth Circuit created a conflict among the circuits by holding ADEA claims arbitrable in accordance with the FAA mandate.¹⁴⁰ The Supreme Court's *Gilmer* decision disabled courts from considering any of the three traditional grounds in determining inherent conflict between arbitration and the purposes underlying federal statutes which, like the ADEA, remained silent concerning the mandate's effect.

3. *Gilmer*

a. *Policy Importance*

Gilmer rejected the contention that arbitration inherently conflicted with the underlying purposes of the Age Discrimination in Employment Act of 1967 because the statute is "designed . . . to further important social policies."¹⁴¹ The Court acknowledged that Congress intended the ADEA to articulate a national interest in eradicating age discrimina-

Cal. 1990), *rev'd without opinion*, 963 F.2d 378 (9th Cir.), *cert. denied*, 113 S. Ct. 328 (1992) (policy importance); *Alford v. Dean Witter Reynolds, Inc.*, 712 F. Supp. 547, 548 (S.D. Tex. 1989) (finding "inherent conflict between arbitration and the congressional purpose of Title VII" for reasons of procedural adequacy) (citation omitted), *aff'd*, 905 F.2d 104, 106 (5th Cir. 1990) ("The purpose . . . of Title VII indicate[s] that Congress intended federal courts to exercise final responsibility for enforcement of Title VII") (citation omitted), *vacated and remanded for further consideration in light of Gilmer*, 111 S. Ct. 1647 (1991), *rev'd and remanded on remand*, 939 F.2d 229 (5th Cir. 1991), *dismissal aff'd*, 975 F.2d 1161 (5th Cir. 1992). *See also*, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 204 (4th Cir. 1990) (Widener, J., dissenting) (dissenting from holding that ADEA claims are arbitrable under the FAA mandate; discussing "many reasons a remedy by way of arbitration is not as effective as a judgment of a court . . . : a different fact-finding process; not as complete a record; the usual rules of evidence do not apply; . . . lack of compulsory process" and lack of jury trial) (citation omitted), *aff'd*, 111 S. Ct. 1647 (1991); *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 227 (3d Cir. 1989), discussed *infra* text accompanying notes 137-39.

137. *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 227 (3d Cir. 1989) (brackets by the court).

138. *Id.* at 228.

139. *Id.* at 229.

140. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196 n.1 (4th Cir. 1990), *aff'd*, 111 S. Ct. 1647 (1991).

141. 111 S. Ct. at 1653.

tion.¹⁴² The Court, however, "[did] not perceive any inherent inconsistency" between arbitration and this important policy goal.¹⁴³

Two sentences of the *Gilmer* opinion were crucial to disposition of this contention:

The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but . . . claims under those statutes are appropriate for arbitration. "[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."¹⁴⁴

The first sentence cited *Mitsubishi*, *McMahon* and *Rodriguez*. Taken alone, the sentence indicates that courts may not lightly find congressional intent to override the FAA mandate based on the asserted importance of a statute's underlying policy goals. RICO's private cause of action ("civil RICO") has never served, and does not now serve, the limited policy goals for which Congress enacted RICO more than two decades ago.¹⁴⁵ It would be difficult, however, to cite a business or

142. *Id.* at 1652-53.

143. *Id.* at 1653.

144. *Id.* (brackets by the Court) (citations omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

145. Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in various sections of 18, 28 U.S.C. (1988 & Supp. IV 1992)). The OCCA's purpose was to "seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." See Statement of Findings and Purpose, 84 Stat. at 922-23 (1970). RICO's narrower purpose was to "eliminat[e] . . . the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969). In turn, Congress intended civil RICO to provide compensation to persons suffering business or property injury proximately caused by RICO violations. See, e.g., *Hearings on S. 30 and Related Proposals before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess. 520 (1970) (remarks of Rep. Steiger); 116 CONG. REC. 35,346-47 (1970) (remarks of Rep. Steiger). See also *Holmes v. SIPC*, 112 S. Ct. 1311, 1316-18 (1992) (finding congressional intent to limit civil RICO recovery to persons whose injury was proximately caused by the RICO violation).

RICO's enactors held a limited conception of "organized crime" and "racketeering." In the debates that produced the OCCA and RICO, the lawmakers variously described the targets as (1) "the Cosa Nostra," see, e.g., 116 CONG. REC. 585-86, 592-95 (1970) (remarks of Sen. McClellan); *id.* at 607 (remarks of Sen. Byrd); *id.* at 846 (remarks of Sen. McClellan); *id.* at 952-53 (remarks of Sen. Thurmond); *id.* at 956 (remarks of Sen. Hruska); *id.* at 963 (remarks of Sen. McClellan), (2) "the Mafia," see, e.g., *id.* at 586, 589, 592, 593, 600 (remarks of Sen. McClellan); *id.* at 832 (remarks of Sen. Case); *id.* at 846 (remarks of Sen. McClellan); *id.* at

commercial statute which Congress designed to serve policy goals more important than those of the antitrust or securities acts at issue in the three earlier decisions.¹⁴⁶

953 (remarks of Sen. Thurmond); *id.* at 957 (remarks of Sen. Hruska); 115 CONG. REC. 35,215 (1969) (remarks of Rep. Bennett); *id.* at 35,311 (remarks of Rep. Fountain), (3) "mobsters," *see, e.g., id.* at 35,309 (remarks of Rep. Brozman); *id.* at 35,311 (remarks of Rep. Fountain); *id.* (remarks of Rep. Broomfield); *id.* at 35,321 (remarks of Rep. Price), (4) "the mob," *see, e.g., id.* at 35,311 (remarks of Rep. Broomfield), (5) "gangsters," *see, e.g., id.* at 35,311 (remarks of Rep. Fountain); *id.* (remarks of Rep. Broomfield), (6) "the underworld," *see* 116 CONG. REC. 602 (1970) (remarks of Sen. Hruska), (7) "families," *see, e.g., id.* at 593 (remarks of Sen. McClellan); *id.* at 35,200 (remarks of Rep. St Germain); 115 CONG. REC. 35,328 (1969) (remarks of Rep. Meskill), or (8) "syndicates," *see, e.g., id.* at 35,201 (remarks of Rep. Poff); *id.* at 35,205 (remarks of Rep. Mikva); *id.* at 35,215 (remarks of Rep. Fascell); *id.* at 35,290 (remarks of Rep. Poff); *id.* at 35,305 (remarks of Rep. Hogan); *id.* at 35,307 (remarks of Rep. Scheuer); *id.* at 35,309 (remarks of Rep. Brozman); *id.* (remarks of Rep. Minshall); *id.* at 35,319 (remarks of Rep. Roth); *id.* at 35,327 (remarks of Rep. Randall); *id.* at 35,362 (remarks of Rep. Pepper); *id.* at 36,294 (remarks of Sen. Hruska) (quoting testimony of Attorney General); *id.* at 36,296 (remarks of Sen. Dole). Reinforcing their limited conception of organized crime and racketeering, the lawmakers stressed the involvement of the legislation's targets in such activities as gambling, prostitution, loansharking and bootlegging. *See, e.g.,* 116 CONG. REC. 586 (1970) (remarks of Sen. McClellan); *id.* at 590-91 (remarks of Sen. McClellan); *id.* at 603-05 (remarks of Sen. Allott); *id.* at 606 (remarks of Sen. Byrd); *id.* at 844 (remarks of Sen. Kennedy); *id.* at 952 (remarks of Sen. Thurmond).

Virtually no civil RICO claims have ever named defendants engaged in organized crime or racketeering as RICO's enactors understood those terms. At the same time, RICO's expansive language reaches much conduct (particularly fraudulent conduct) engaged in by ordinary defendants. Since the early 1980s, this expansiveness has enabled civil RICO to operate across the broad range of American law, regardless of the defendant's status or other circumstance. RICO's enactors were not unaware that civil RICO might reach an occasional non-racketeer defendant. *See, e.g.,* 115 CONG. REC. 18,940 (1969) (remarks of Sen. McClellan). In light of the debates, however, the lawmakers cannot fairly be said to have anticipated the breadth of civil RICO's ultimate operation. Concerning RICO's language and legislative history generally and civil RICO's unanticipated evolution, *see* DOUGLAS E. ABRAMS, *THE LAW OF CIVIL RICO* §§ 1.1-1.5 (1991 & Supp. 1992). *See also, e.g.,* *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1022 (7th Cir. 1992) (discussing the "widespread attempts to turn routine commercial disputes into civil RICO actions"); *River City Mkts., Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1465 (9th Cir. 1992) (civil RICO's "possibility of treble damages and attorneys fees provides a powerful incentive to plead every commercial disappointment in terms of victimization by racketeers").

146. The Court itself has lauded the Sherman Act as "the Magna Carta of free enterprise," *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972), and as a "charter of freedom." *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 600 (1936); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933) (same). *See also Topco Assocs.*, 405 U.S. at 610 ("Antitrust laws in general, and the Sherman Act in particular, are . . . as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963) (discussing the "magnitude" of the "value choice" made by Sherman Act); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958) (calling Sherman Act a "comprehensive charter of economic liberty"); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955) (discussing "the public interest in vigilant enforcement of the antitrust laws" through private actions).

The second sentence of *Gilmer*'s crucial language quoted *Mitsubishi*.¹⁴⁷ This sentence overshadows the first by concluding that the importance of a congressional statute's underlying policy goals has no effect at all on judicial measurement of inherent conflict with arbitration. The second sentence links policy importance to the two other traditional factors, procedural adequacy and relative bargaining position. The Court's linkage makes judicial resolution of challenges to arbitration based on policy importance depend on resolution of challenges to arbitration based on the two other factors. The Court proceeded to state that challenges grounded in the two other factors do not bear on inherent conflict, but rather are to be resolved on a case-by-case basis in judicial proceedings to vacate arbitral awards under the FAA.¹⁴⁸

b. *Procedural Adequacy of Arbitration*

Plaintiff *Gilmer* mounted a broad assault on arbitration's procedural adequacy. He contended that arbitration inherently conflicted with the ADEA's underlying purposes because arbitration panels will be biased; because discovery in arbitration is much more limited than in the federal courts; because arbitrators often do not issue written opinions; and because arbitration assertedly does not provide for broad equitable relief and class actions.¹⁴⁹

The Court rejected the plaintiff's assault as inconsistent with the "strong endorsement" of arbitration expressed in *Rodriguez*.¹⁵⁰ The opinion distinguished *Alexander v. Gardner-Denver Co.* and two other decisions which arose from arbitration pursuant to collective-bargaining agreements (the "*Alexander* trio").¹⁵¹ Among other issues, the *Alexan-*

The Court similarly has perceived the two seminal securities acts as foundations of our national economic order, enacted in the face of the 1929 stock market crash and the ensuing depression to prevent fraud and to achieve a high standard of business ethics. *See, e.g.,* *United States v. Naftalin*, 441 U.S. 768, 775 (1979); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727-28 (1975); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963).

147. 473 U.S. at 637. *See supra* text accompanying notes 117-20.

148. 111 S. Ct. at 1653-55, discussed *infra* text accompanying notes 149-56. Concerning the FAA's limited grounds for judicial vacatur, *see infra* note 227 and accompanying text.

149. 111 S. Ct. at 1654-55.

150. *Id.* at 1654 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 417, 481 (1989)).

151. 111 S. Ct. at 1656. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (employee's right to a judicial trial *de novo* under Title VII of Civil Rights Act of 1964 is not foreclosed by the employee's prior submission of the discrimination claim to final arbitration under a collective-bargaining agreement), discussed *infra* text accompanying notes 248-58. *See*

der trio questioned the capacity of arbitral procedure to permit vindication of the statutory rights at issue.¹⁵² *Gilmer* concluded that challenges to FAA arbitration grounded in procedural adequacy are "best left for resolution in specific cases" in judicial proceedings to vacate arbitral awards.¹⁵³

c. *Relative Bargaining Position*

Gilmer rejected the contention that arbitration inherently conflicted with the ADEA's underlying purposes because employers and employees often occupy unequal bargaining positions.¹⁵⁴ The Court first noted that *McMahon* and *Rodriguez* had upheld the FAA mandate's enforcement despite the unequal bargaining positions that securities dealers and investors may occupy.¹⁵⁵ *Gilmer* then concluded that contentions of unequal bargaining position, like contentions of procedural inadequacy, are "best left for resolution in specific cases."¹⁵⁶

also *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (in action under 42 U.S.C. § 1983, a federal court should not accord res judicata or collateral estoppel effect to an award in an arbitration pursuant to a collective-bargaining agreement); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (employee is not barred from suing in federal district court, alleging violation of the Fair Labor Standards Act's minimum wage provisions, after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of the union's collective-bargaining agreement).

Gilmer distinguished the *Alexander* trio on the grounds that they were not decided under the FAA; that they did not concern enforceability of agreements to arbitrate statutory claims, but rather "the quite different issue" whether arbitration of contract-based claims precluded later judicial resolution of statutory claims; and that they concerned arbitration under collective-bargaining agreements and thus implicated a tension between collective representation and individual statutory rights, a tension not present when parties represent themselves in the arbitral proceedings. 111 S. Ct. at 1657. This tension, and *Alexander's* influence on the legislative histories of the ADA and the 1991 Civil Rights Act, are discussed *infra* text accompanying notes 248-58.

152. The trio's broad language did not explicitly distinguish between labor arbitration and commercial arbitration. See, e.g., *Alexander*, 415 U.S. at 56 ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."); *Barrentine*, 450 U.S. at 744 ("[A]rbitral procedures [are] less protective of individual statutory rights than are judicial procedures."); *McDonald*, 466 U.S. at 288-92 (quoting from *Alexander* and *Barrentine*).

153. Concerning the FAA's grounds for judicial vacatur, see *infra* note 227 and accompanying text.

154. 111 S. Ct. at 1655.

155. *Id.*

156. *Id.* at 1656. The volume of ADEA claims, including ones covered by arbitration agreements, is likely to rise as employers lay off older employees in the current economic climate. See Thomas J. Lueck, *Job Loss Anger: Age Bias Cases Soar in Region*, N.Y. TIMES, Dec. 12, 1993, at 1.

d. Outlook

In determining inherent conflict under the *Mitsubishi-McMahon* congressional intent standard, courts may no longer weigh considerations relating to policy importance, procedural adequacy or relative bargaining position. By disabling courts from weighing the three grounds that had produced *American Safety* and its progeny, *Gilmer* effectively inters the policy-oriented analysis that marked the *American Safety* doctrine.¹⁵⁷ *Mitsubishi* had foreshadowed the interment process with lengthy dictum that expressed "skepticism" about each of the three grounds.¹⁵⁸ In *Gilmer*, however, removal of the grounds from the judicial calculus provided the bases for rejecting central contentions of the plaintiff.

Gilmer makes it virtually impossible, as a practical matter, to establish inherent conflict under the congressional intent standard. Unless a congressional statute's text or legislative history establishes an exception to the FAA mandate, claims under the statute will almost inevitably be arbitrable in accordance with the mandate. Because congressional silence is thus tantamount to arbitrability, the 1991 Civil Rights Act's textual "encouragement" of arbitration has little or no greater legal significance than textual silence would have.

III. ARBITRABILITY IN THE ADA AND THE 1991 CIVIL RIGHTS ACT

With textual expressions of encouragement, the ADA and the 1991

157. Some lower courts had questioned *American Safety's* vitality even before *Gilmer*. See, e.g., *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 173 (7th Cir. 1988) (determining arbitrability of antitrust claims); *Mayaja, Inc. v. Bodkin*, 803 F.2d 157, 163 n.6 (5th Cir. 1986), vacated on other grounds and remanded for further consideration in light of *McMahon*, rev'd on remand, 824 F.2d 439 (5th Cir.), cert. denied, 482 U.S. 927 (1987) (determining arbitrability of civil RICO claims); *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F. Supp. 283, 286 (S.D.N.Y.), aff'd without opinion, 946 F.2d 883 (2d Cir. 1991) (determining arbitrability of antitrust claims); *GKG Caribe, Inc. v. Nokia-Mobira, Inc.*, 725 F. Supp. 109, 111-13 (D.P.R. 1989) (same); *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 671 F. Supp. 972, 979 (S.D.N.Y. 1987), on reconsideration, 685 F. Supp. 400 (S.D.N.Y. 1988) (same); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 650 F. Supp. 220, 222 (W.D. Tex.), aff'd, 805 F.2d 1221 (5th Cir. 1986), cert. denied, 482 U.S. 928 (1987) (determining arbitrability of civil RICO claims); *Stendig Int'l, Inc. v. B. & B. Italia, S.p.A.*, 633 F. Supp. 27, 28 (S.D.N.Y. 1986) (determining arbitrability of antitrust claims).

But see, e.g., *Page v. Moseley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291, 299 (1st Cir. 1986) (determining arbitrability of civil RICO claims; *American Safety's* policy-importance ground "remains alive after *Mitsubishi*, which only criticized the private attorney general concept in the context of an international dispute"); *McMahon v. Shearson/Am. Express, Inc.*, 788 F.2d 94, 98 (2d Cir. 1986), rev'd on other grounds, 482 U.S. 220 (1987) (same).

158. See *supra* text accompanying notes 115-20.

Civil Rights Act approved enforcement of arbitration agreements. Only the Acts' legislative histories suggest protective qualifications on the otherwise binding effect of arbitral awards. If the Acts' committee reports are given effect, a claimant would be entitled to a post-arbitral judicial trial *de novo* on claims under two of the four statutes touched by the acts.

A. *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act of 1990¹⁵⁹ seeks to protect disabled persons from "various forms of discrimination"¹⁶⁰ that had created "an inferior status in our society,"¹⁶¹ and had denied them the "opportunity to compete on an equal basis."¹⁶² The Act seeks to provide a "clear and comprehensive mandate" for eliminating discrimination through "clear, strong, consistent, enforceable standards."¹⁶³

Section 513 of the ADA provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes" arising under the Act.¹⁶⁴ The section thus draws no distinction between commercial arbitration and labor arbitration,¹⁶⁵ or between arbitration pursuant to predispute or post-dispute agreement.

"Encouragement" connotes "permission." By encouraging arbitration of ADA claims, section 513 expresses congressional intent to permit resolution of such claims in accordance with the FAA mandate. The section is consistent with congressional statutes which, since the early 1970s, have used only the word "arbitration" to express intent that claims be subject to the mandate without qualification.¹⁶⁶ For its part, the mandate "authorizes" arbitration, and thus establishes arbitration's "appropriateness," when an arbitration agreement covers a claim under general principles of contract interpretation.¹⁶⁷ Accordingly, section

159. Pub. L. No. 101-336, 104 Stat. 327 (1990).

160. 42 U.S.C. § 12101(a)(5) (Supp. IV 1992).

161. *Id.* § 12101(a)(6).

162. *Id.* § 12101(a)(9).

163. *Id.* § 12101(b)(1)(2).

164. *Id.* § 12212.

165. Section 513's legislative history affirms that the section reaches commercial arbitration: "whether in the context of a collective bargaining agreement or in an employment contract." H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 76 (1990), reprinted in 1990 U.S.C.A.N. 445, 499.

166. See *supra* text accompanying notes 59-86.

167. Concerning the role of these principles in the interpretation of arbitration agreements, see,

513 would require rejection of contentions that Congress intended to exclude ADA claims from the mandate.

Only in the ADA's legislative history did Congress acknowledge qualifications on the otherwise binding effect of arbitration awards on claims under the Act. The House Judiciary Committee Report reiterated section 513's expression of encouragement.¹⁶⁸ But the Report also stated that "use of alternative dispute mechanisms is intended to supplement, not supplant, the remedies provided by this Act."¹⁶⁹ This sentence suggests intent to authorize only a form of non-binding arbitral award. Whether arbitration is pursuant to predispute or post-dispute agreement, an award would not "supplant" the claimant's right thereafter to seek judicial redress of ADA claims arising from the circumstances that were the subject of the arbitration.

The Judiciary Committee Report drew particular attention to predispute arbitration agreements, noting that Title I of the ADA incorporates by reference the remedial provisions of Title VII of the Civil Rights Act of 1964.¹⁷⁰ The Report cited *Alexander v. Gardner-Denver Co.*,¹⁷¹ which held that an employee's right to a judicial trial *de novo* under Title VII is not foreclosed by the employee's prior submission of a discrimination claim to final arbitration under a collective-bargaining agreement.¹⁷² Concluding that "the approach . . . in *Alexander v. Gardner-Denver Co.* applies equally to the ADA,"¹⁷³ the Committee imported that decision's rationale into commercial arbitration of ADA claims pursuant to predispute agreements. The Committee stated that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment con-

e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624-28 (1985), discussed *supra* text accompanying notes 111-25.

168. See H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 76-77 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 499-500. See also 136 CONG. REC. H2616 (1990) (remarks of Rep. Glickman) (ADA bill "establishes an important principle that we ought to try to avoid litigation . . . , if possible, and that encouraging dispute resolution between the parties is a positive idea").

169. H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 76 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 499.

170. 1990 U.S.C.C.A.N. at 500.

171. 415 U.S. 36 (1974), discussed *infra* text accompanying notes 248-58.

172. *Id.*

173. H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 77 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 500. The Committee concluded that section 513 does not "preclude rights and remedies that would otherwise be available to persons with disabilities." *Id.*

tract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act."¹⁷⁴

The Conference Report proceeded to adopt by reference the Judiciary Committee Report's statement concerning section 513.¹⁷⁵ In particular, the conferees concurred that in arbitration pursuant to predispute agreements, the section preserves the exception grounded in *Alexander* and the ADA's Title VII pedigree. The conferees stated that "[u]nder no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA."¹⁷⁶

B. *Civil Rights Act of 1991*

The Civil Rights Act of 1991¹⁷⁷ endured a lengthy gestation period which began while Congress was still considering the ADA. After President Bush vetoed civil rights legislation in 1990,¹⁷⁸ Congress renewed consideration with House passage of H.R. 1 on June 5, 1991.¹⁷⁹ The Senate passed its own version of the legislation (S. 1745) on October 30, 1991.¹⁸⁰ The House passed S. 1745 on November 7, 1991.¹⁸¹ The President signed the 1991 Civil Rights Act on November 25, 1991.¹⁸²

The 1991 Act continues the ADA's approach of textually encouraging arbitration, subject to protective qualifications acknowledged only in the legislative history. Section 118 of the 1991 Act mirrors section 513

174. See H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 76-77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500.

175. H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 136 CONG. REC. H4582, H4606 (1990) and 1990 U.S.C.C.A.N. 565, 598.

176. *Id.*

177. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in various U.S.C. sections).

178. See President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, II PUB. PAPERS, George Bush 1990, at 1437 (Oct. 22, 1990).

179. See 137 CONG. REC. H3958-59 (1991).

180. See *id.* at S15,503.

181. See *id.* at H9557-58.

182. See President's Statement on Signing the Civil Rights Act of 1991, II PUB. PAPERS, George Bush 1990, at 1504-05 (Nov. 21, 1991), *reprinted in* 1991 U.S.C.C.A.N. 768, 769. President Bush explained:

[T]he Act encourages voluntary agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in the effort to conserve the scarce resources of the Federal judiciary for those matters as to which no alternative forum would be possible or appropriate.

of the ADA: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by" Title I of the 1991 Act.¹⁸³ Like its ADA counterpart, section 118 draws no distinction between commercial arbitration and labor arbitration,¹⁸⁴ or between arbitration pursuant to predispute or post-dispute agreement. The acts and provisions Title I amended are the ADA, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, and the ADEA.¹⁸⁵

Once again, "encouragement" connotes "permission."¹⁸⁶ By encouraging arbitral resolution of claims under any of the four amended acts and provisions, section 118 expresses congressional intent to permit resolution of these claims in accordance with the FAA mandate. Where a person contends that Congress intended to exclude from the mandate claims under any of the four acts or provisions, section 118 thus would require rejection of the contention.

The 1991 Civil Rights Act's legislative history evinces an effort to modify section 118's text with respect to claims under Title VII (and perhaps also claims under the ADA, which adopts by reference Title VII's remedial provisions). In any event, claims under the other two amended acts and provisions (the Civil Rights Act of 1866 and the ADEA) remain unaffected by the legislative history.¹⁸⁷

183. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1031 (1991) (codified at various sections of 29 & 42 U.S.C.). See also *supra* note 164 and accompanying text.

184. Section 118's legislative history affirms that the Section reaches commercial arbitration "whether in the context of a collective bargaining agreement or in an employment contract." H.R. REP. NO. 40(I), 102d Cong., 1st Sess. (1991); H.R. REP. NO. 40(II), 102d Cong., 1st Sess. (1991), reprinted in 1991 U.S.C.C.A.N. 635, 735.

185. See Pub. L. No. 102-166, § 109(a),(b)(2), 105 Stat. 1071, 1077 (1991) (amending the ADA); §§ 104, 105(a), 106-108, 109(a), (b)(1), 110-112, 113(b), 114, 105 Stat. 1071, 1074-79 (1991) (amending Title VII); § 101, 105 Stat. 1071, 1071-72 (1991) (amending the Civil Rights Act of 1866); § 115, 105 Stat. 1071, 1079 (1991) (amending the ADEA). See also 42 U.S.C.A. § 1981 (1981 & Supp. 1992).

186. See *supra* text accompanying notes 166-67.

187. The arbitrability of ADEA claims also remains untouched by the Older Workers Benefit Protection Act of 1990 ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified at 29 U.S.C. §§ 621-634 (Supp. IV 1992)), which amended the ADEA. Among other things, the OWBPA provides that individuals may not waive "any right or claim under" the ADEA unless the waiver is "knowing and voluntary." 29 U.S.C. § 626(f) (Supp. IV 1992). The OWBPA provides that an individual's purported waiver is not knowing and voluntary unless, at a minimum, (1) the waiver is part of a written agreement calculated to be understood by the individual, (2) the waiver specifically refers to rights or claims arising under the ADEA, (3) the individual does not waive rights or claims that may arise after the waiver is executed, (4) the individual waives rights or claims in exchange for consideration in addition to anything of value to

The modification effort was marked by persistent rancor, which contrasts sharply with the absence of articulated dispute during congressional consideration of ADA arbitrability a year earlier. In their two-part Report on H.R. 1, the House Education and Labor Committee and the House Judiciary Committee each addressed the provision that encouraged arbitration.¹⁸⁸ The Report's two parts each reaffirmed the provision's expression of encouragement.¹⁸⁹ In language closely resembling that of the House Judiciary Committee Report which had

which the individual is already entitled, (5) the individual is advised in writing to consult with an attorney before executing the agreement, (6) the individual is given a reasonable period within which to consider the agreement, and (7) the individual may revoke the agreement within seven days after executing it, and the agreement does not become effective until the revocation period has expired. *Id.*

It has been suggested that the OWBPA's waiver provision might reach the FAA mandate's effect on arbitration agreements covering ADEA claims. *See, e.g.,* Martha S. Weisel, *Effectiveness of Arbitration Clauses In Employment Contracts*, 47 ARB. J. 19, 24 (June 1992). In particular, if the waiver provision enjoys such reach, the third proviso would preclude enforcement of predispute arbitration agreements covering such claims. The issue of the provision's reach was not decided in *Gilmer*, whose underlying dispute had arisen before the OWBPA's effective date.

It seems apparent that Congress did not intend the OWBPA's waiver provision to affect the FAA mandate's operation with respect to either post-dispute or predispute arbitration agreements. Neither the OWBPA's text nor its legislative history makes any mention of arbitration or the mandate. This omission stands in stark contrast to legislation which, for nearly two decades, had referred specifically to arbitration when the lawmakers intended to reach the mandate's effect on agreements covering claims under a particular statute. *See supra* text accompanying notes 59-86. Indeed, only two months before enacting the OWBPA, Congress referred specifically to arbitration when it enacted the ADA. *See supra* text accompanying note 162.

The OWBPA's legislative history indicates that Congress intended to regulate only an individual's waiver of substantive rights and claims under the ADEA when the individual considers whether to accept forced early retirement: "At a minimum, the waiving party must have genuinely intended to release ADEA claims and must have understood that he was accomplishing this goal." *See* S. REP. NO. 263, 101st Cong., 2d Sess. 31-32, (1990) *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537. In the absence of affirmative indication of congressional intent to affect the FAA mandate's operation, any decision concerning the OWBPA's reach would likely depend on the Supreme Court's admonition that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *See* *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), *quoted in* *Gilmer*, 111 S. Ct. 1647, 1652. Consistent with this admonition, courts resolve doubts about such questions in favor of arbitrability. Where the issue is the enforceability of an arbitration agreement which otherwise satisfies the FAA mandate, courts would likely find that the various determinants of congressional intent do not demonstrate that the OWBPA created an exception to the mandate.

188. *See* H.R. REP. NO. 40(I), 102d Cong., 1st Sess. (1991) ("H.R. REP. I"); H.R. REP. NO. 40(II), 102d Cong., 1st Sess. (1991) ("H.R. REP. II"). The reports are reprinted in 1991 U.S.C.C.A.N. 549, 694 respectively. No Senate Report was submitted with the legislation.

189. *See* H.R. REP. I, *supra* note 188, at 97; H.R. REP. II, *supra* note 188, at 41, *reprinted in* 1991 U.S.C.C.A.N. 635, 735 (citation omitted).

accompanied the ADA,¹⁹⁰ each part then imported *Alexander's* Title VII holding:

[T]he use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII [T]he Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co* The Committee does not intend for the inclusion of this section to be used to preclude rights and remedies that would otherwise be available.¹⁹¹

The two-part Committee Report, however, was not the legislative history's only word concerning arbitrability. As part of his remarks during Senate consideration of S. 1745 on October 30, 1991, Senator Robert Dole of Kansas placed in the record an interpretive memorandum expressing the administration's views on the proposed legislation.¹⁹² As part of his remarks during House consideration of S. 1745 on November 7, 1991, Representative Henry J. Hyde also placed in the record an interpretive memorandum concerning the proposed legislation.¹⁹³ The Dole and Hyde memoranda cited the recent *Gilmer* decision with approval.¹⁹⁴ In identical language, the memoranda then said this concerning the provision ultimately enacted as section 118:

This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.

In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.¹⁹⁵

190. See *supra* text accompanying notes 168-76.

191. See H.R. REP. I, *supra* note 188, at 97; H.R. REP. II, *supra* note 188, at 41, reprinted in 1991 U.S.C.C.A.N. 635, 735 respectively (citation omitted). *Alexander* is discussed *supra* text accompanying note 171, *infra* text accompanying notes 248-58.

192. See 137 CONG. REC. S15,472 (1991) (remarks of Sen. Dole).

193. See *id.* at H9542-43 (remarks of Rep. Hyde). The Dole and Hyde memoranda appeared more than five months after the two-part Committee Report. See *supra* note 188.

194. See 137 CONG. REC. S15,478, H9548 (1991).

195. *Id.*

As part of his remarks during House consideration of S. 1745 on November 7, 1991, Representative Don Edwards also placed in the record an interpretive memorandum.¹⁹⁶ The memorandum reaffirmed section 118's expression of encouragement, then explained that the section "is intended to supplement, not supplant, remedies provided by Title VII, and is not to be used to preclude rights and remedies that would otherwise be available."¹⁹⁷ The memorandum continued that the section

is intended to be consistent with decisions such as *Alexander v. Gardner-Denver Co.* . . . , which protect employees from being required to agree in advance to arbitrate disputes under Title VII and to refrain from exercising their right to seek relief under Title VII itself. This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court's recent decision in [*Gilmer*], or any application or extension of it to Title VII.¹⁹⁸

The two-part Committee Report's treatment of Title VII remedies departs from section 118's unqualified expression of encouragement, and hence of permission, for arbitration. The Report reaffirms the enforceability of arbitration agreements covering claims under any of the four Acts and provisions amended by the 1991 Civil Rights Act.¹⁹⁹ But the first quoted sentence suggests intent to authorize only a form of non-binding award in arbitration pursuant to predispute and post-dispute agreements alike; the claimant would retain a post-arbitral right to sue under Title VII (and perhaps also under the ADA) based on the circumstances that were the subject of the arbitration. By importing *Alexander* into commercial arbitration, the Report's remaining quoted sentences reinforce this suggestion of intent with respect to arbitration pursuant to predispute agreements.

The Dole and Hyde memoranda are inconsistent with the two-part Committee Report because they specify "binding arbitration" and admit of no Title VII exception.²⁰⁰ The Edwards memorandum (which was

196. *Id.* at H9526 (remarks of Rep. Edwards).

197. *Id.* at H9530.

198. *Id.*

199. *See supra* note 188.

200. Because general principles of contract interpretation determine the meaning of arbitration

not before the Senate when it considered and passed S. 1745 a week earlier) is inconsistent with section 118, the two-part Committee Report, and the Dole and Hyde memoranda. Congressman Edwards suggests that section 118 reaches only post-dispute arbitration agreements.²⁰¹ The section's text, however, yields no evidence of such a limit.²⁰² By specifying "agreement[s] . . . in the context of a collective bargaining agreement or in an employment contract," the two-part Committee Report similarly supports no such limit.²⁰³ Finally, Congressman Edwards' disavowal of *Gilmer* contradicts the Dole and Hyde memoranda, which had cited *Gilmer* with approval.²⁰⁴

C. Analysis of the Recent Legislation's Arbitration Provisions

Where Congress grants a right to a judicial trial *de novo* following arbitral resolution, the lawmakers would create an explicit exception to the claim preclusion doctrine. To work this extraordinary result,²⁰⁵

agreements, *see, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-28 (1985), particular arbitration agreements would be enforceable only when (in the memoranda's words) parties enter into them "knowingly and voluntarily." *See supra* note 194. The knowing and voluntary nature of a particular arbitration agreement's execution would be an issue, if at all, only where the underlying claim is otherwise within the FAA mandate as a general matter.

201. 137 CONG. REC. H9530 (1991).

202. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991).

203. *See* H.R. REP. I at 97, H.R. REP. II at 41, *reprinted in* 1991 U.S.C.C.A.N. 635, 735.

204. *See* 137 CONG. REC. at S15,478, H9548 (1991).

205. Under claim preclusion rules, a valid and final arbitral award has the same effects, subject to the same exceptions and qualifications, as a judicial judgment. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1982). The general standard, however, does not apply where, as in *Alexander*, a "scheme of remedies" permits relitigation of the subject claim. *See id.* at § 84(2) & cmt. g (stating fact pattern similar to *Alexander*). Because preclusion is a common law doctrine, Congress may create exceptions to the doctrine. *See, e.g.*, *Benjamin v. Traffic Exec. Ass'n E. R.R.*, 869 F.2d 107, 113 n.9 (2d Cir. 1989); *North Carolina v. United States*, 210 F. Supp. 675, 679 (M.D.N.C. 1962), *rev'd on other grounds*, 376 U.S. 93 (1964). Explicit congressionally created exceptions appear rare indeed. *See* 18 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4403 n.20 (1981 & Supp. 1993).

A handful of congressional statutes grant the right to a judicial "trial *de novo*." These statutes do not implicate claim preclusion rules, however, because they define only the method by which aggrieved persons may secure otherwise available judicial review of administrative determinations. *See, e.g.*, 5 U.S.C. § 7703(c) (1988) (judicial review of Merit Systems Protection Board decisions); 7 U.S.C. § 499g(c) (1988 & Supp. IV 1992) (judicial review of reparation order); 7 U.S.C. § 2023 (1988) (judicial review of denial of application of retail food store or wholesale food concern to participate in federal food stamp program); 42 U.S.C. § 300e-9(e)(3) (1988) (judicial review of assessment of civil penalty against employer which fails to comply with statutory requirements for employee health benefit plans).

Congress should speak forthrightly through textual directive rather than obliquely through legislative history. Moreover, Congress should support the result with a sound rationale grounded in relevant legal doctrine. The ADA and the 1991 Civil Rights Act fail on both scores.

1. Post-Dispute Arbitration Agreements

Insofar as the texts of the ADA and the 1991 Civil Rights Act provide for FAA enforcement of post-dispute arbitration agreements,²⁰⁶ Congress acted prudently and in accordance with doctrine developed over more than a generation.²⁰⁷ In the aggregate, approximately ninety

Nor are claim preclusion rules implicated by the "trial *de novo*" granted in the experimental court-annexed arbitration project enacted by Title IX of the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4659 (1988), *codified at* 28 U.S.C. §§ 651-658 (1988 & Supp. IV 1992). Title IX operates outside the FAA and is subject to a five-year sunset provision. *See id.* § 651(b). Title IX authorizes ten districts to order arbitration of some actions without the parties' consent. 28 U.S.C. §§ 651(a), 652(a), 658(1). The Title authorizes ten other districts to experiment with consensual arbitration only. *Id.* §§ 651(a), 652(a)(1)(A), 658(2). Following an award in non-consensual or consensual arbitration, any party may demand a trial *de novo* in the district court. *Id.* § 655. The arbitral award is entered as a judgment of the court, however, only after expiration of the time for making the demand. *Id.* § 654(a).

206. *See supra* notes 159-67, 183-86 and accompanying text.

207. The FAA mandate creates a unitary standard for determining the enforceability of particular predispute or post-dispute arbitration agreements. 9 U.S.C. § 2 (1988) (agreements of either category "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). In determining whether claims under particular federal statutes were within the mandate in the first place, however, *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Sherson/Am. Express*, 490 U.S. 477 (1989), and later decisions distinguished between predispute or post-dispute arbitration agreements.

The *Wilko* majority held that "an agreement to arbitrate a future controversy" ran afoul of the antiwaiver provision of the Securities Act of 1933. 346 U.S. at 430. *See also* *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 479 n.* (*Wilko* "carefully limited its holding" to predispute arbitration agreements). In one sentence that did not cite authority, Justice Robert H. Jackson's brief concurrence proceeded a step further, stating that the parties could have agreed to arbitration after their dispute arose. 346 U.S. at 438 (Jackson, J., concurring).

Justice Jackson's statement came to enjoy broad application. In decisions denying enforcement of predispute arbitration agreements covering claims under the 1933 Act and various other federal statutes, courts left post-dispute arbitration agreements unaffected. *See, e.g.*, *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 233 (1987) (citing decisions); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968) (antitrust claims; reserving decision on enforceability of agreements to arbitrate existing disputes); *Reader v. Hirsch & Co.*, 197 F. Supp. 111, 117 (S.D.N.Y. 1961) (1934 Act claims; same).

From the dual premises that a person is not required to sue and that it may agree to settle an existing claim, lower courts treated agreements to arbitrate an existing dispute as enforceable agreements to have the dispute settled by a third party. *See, e.g.*, *Cobb v. Lewis*, 488 F.2d 41, 47-49 (5th Cir. 1974) (antitrust claims); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972) (same); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980, 984 & n.8 (9th Cir. 1970) (same); *Moran v. Paine Webber, Jack-*

percent of filed civil actions result in settlement rather than final judicial adjudication.²⁰³ The right to settle one's existing private claims extends to claims under statutes touched by the ADA and the 1991 Civil Rights Act.²⁰⁹ In a system that permits persons generally to settle disputes without filing suit (or to settle suits without final judicial resolution), no general policy reason exists for withdrawing the power to agree to binding arbitration after a dispute arises. A post-dispute arbitration agreement is tantamount to an agreement to allow a neutral to play a role in settling the dispute. And despite imbalances in bargaining position that might exist between the parties, Congress should not withhold FAA enforcement of agreements to employ binding arbitration in the otherwise available settlement process.²¹⁰

son & Curtis, 389 F.2d 242, 246 (3d Cir. 1968) (1934 Act claims). Courts also reasoned that where the question is whether to agree to arbitrate an existing dispute, parties may act after opportunity to assess the strengths of their respective positions, much as they otherwise would in the settlement process. See, e.g., *Coenen*, 453 F.2d at 1215; *Power Replacements, Inc.*, 426 F.2d at 984 & n.8.

208. See, e.g., JOHN J. COUND ET AL., *CIVIL PROCEDURE* 1320 (6th ed. 1993); GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 1 (1983); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 5 (1985); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27-28 (1983); Carrie L. Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905, 905 & n.5 (1983).

209. See, e.g., *Alexander*, 415 U.S. at 52 n.15 ("In determining the effectiveness of [a] waiver [of Title VII claims], a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing."); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 460-63 (9th Cir. 1989), cert. denied, 498 U.S. 854 (1990) ("public policy favors voluntary settlement of" Title VII claims, but courts "must closely scrutinize a waiver of rights under Title VII because of their remedial nature"); *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 521-25 (3d Cir. 1988) (person may settle ADEA claims provided that, under the totality of the circumstances, the person makes the settlement agreement knowingly and voluntarily); *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1033 (8th Cir. 1986) (ADEA claims); *Rogers v. General Elec. Co.*, 781 F.2d 452, 454-56 (5th Cir. 1986) (Title VII claims; citing decisions); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1041-45 & n.10 (6th Cir.) (en banc), cert. denied, 479 U.S. 850 (1986) (person may waive ADEA claims provided waiver is knowing and voluntary under ordinary contract principles); *Pilon v. University of Minn.*, 710 F.2d 466 (8th Cir. 1983) (Title VII claims); 42 U.S.C. § 12117 (Supp. IV 1992) (powers, remedies, and procedures set forth in Title VII are the powers, remedies, and procedures granted to persons alleging ADA violation). The right to settle ADEA claims is now subject to the Older Workers Benefit Protection Act of 1990, whose waiver provisions are discussed *supra* note 187.

210. Where parties execute a post-dispute arbitration agreement as part of an administrative agency's alternative dispute resolution process, constitutional constraints may permit only a form of non-binding award. The constitutional issue may arise in connection with the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3601-3619 (1988)), which amended Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified at 42 U.S.C. §§ 3601-3631 (1988 & Supp. IV 1992)). As

amended, the 1968 Act authorizes aggrieved persons, within a year after an alleged discriminatory housing practice has occurred or terminated, to file a complaint with the Secretary of Housing and Urban Development (HUD) alleging the practice. 42 U.S.C. § 3610(a)(1)(A)(i) (1988). *See also id.* § 3602(f) (defining "discriminatory housing practice"). The Act also authorizes the Secretary to file such a complaint on his or her own initiative. *Id.* The Act reaches practices in the sale or rental of housing, in residential real-estate related transactions, and in the provision of brokerage services. *Id.* §§ 3604-3606. The Act prohibits discrimination because of race, color, religion, sex, handicap, familial status or national origin. *Id.*

Before filing a charge or dismissing a complaint following investigation, the Secretary must, to the extent feasible, seek to resolve the complaint through conciliation. *Id.* § 3610(b)(1). If conciliation is successful, the complainant and respondent execute a written conciliation agreement. *See id.* § 3610(b)(2); 24 C.F.R. § 103.310 (1992). The conciliation agreement precludes the aggrieved person from filing a civil action alleging the discriminatory housing practice that formed the basis of the complaint, except to enforce the agreement itself. 42 U.S.C. § 3613(a)(2) (1988). The conciliation agreement "may provide for binding arbitration of the dispute arising from the complaint." *Id.* § 3610(b)(3). Regardless of any prior agreement the parties might have had, any such arbitration agreement would obviously qualify as a post-dispute agreement. In an arbitration that "results from" a conciliation agreement, *id.* § 3610(b)(3), the arbitrator may award "appropriate relief, including monetary relief." *Id.* The Act specifies that the conciliation agreement, including the arbitration agreement, is subject to the Secretary's approval. *Id.* § 3610(b)(2).

By its terms, the 1988 Act does not require the Secretary's approval of the arbitral award. Neither the Act's legislative history, nor HUD's implementing rules, amplifies on the nature of fair-housing arbitration awards. *See* H.R. REP. NO. 711, 100th Cong., 2d Sess. 34 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2195 (discussing HUD fair-housing arbitration process); 24 C.F.R. §§ 103.310, 103.315 (1992).

Shortly after the 1988 Act authorized fair-housing arbitration, Congress enacted the Administrative Dispute Resolution Act of 1990. Pub. L. No. 101-552, 104 Stat. 2736 (1990). Among other things, the 1990 Act authorizes federal agencies to resolve disputes by arbitration and other alternative means, and establishes a framework for agency exercise of this authority. *See* S. REP. NO. 543, 101st Cong., 2d Sess. 1-2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3931-32. The 1990 Act does not impose requirements on HUD's fair-housing arbitration because the authorization and framework do not replace or limit alternative dispute resolution mechanisms an agency previously employed. *See* 5 U.S.C. § 582(c) (1988 & Supp. IV 1992); S. REP. NO. 543, 101st Cong., 2d Sess. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3931. Section 590 of the 1990 Act, however, reflects concerns about whether binding arbitration in the administrative context would pass muster under the Federal Constitution.

During deliberations that produced the 1990 Act, the House Judiciary Committee pinpointed four constitutional concerns with binding administrative arbitration—that Article II's Appointments Clause might be offended by appointment of arbitrators who are not federal employees, that the separation of powers doctrine might be offended by congressional authorization of private persons to perform agency decisionmaking powers, that Article III might be offended by removing responsibility and authority from the federal courts, and that due process might be offended by binding arbitration in the administrative context. *See* S. REP. NO. 543, 101st Cong., 2d Sess. 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3931, 3935. *See generally* Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441 (1989).

In an effort to satisfy constitutional constraints, § 590 of the 1990 Act limits the binding effect of arbitral awards made under its procedures. The section provides that an award does not become final until thirty days after its service on the parties, and authorizes the agency to vacate the award before it becomes final. 5 U.S.C. § 590(b), (c) (1988 & Supp. IV 1992). By

Under the statutes touched by the ADA and the 1991 Civil Rights Act, however, some claims might implicate the public interest in a manner that makes judicial resolution desirable. To this end, Congress has created an administrative process which protects the public interest while also preserving the general enforceability of post-dispute arbitration agreements. Arbitration (like private settlement) does not diminish a party's right to file with the Equal Employment Opportunity Commission (EEOC) a charge which, based on the circumstances that are the subject of the arbitration, alleges violation of one or more of the statutes.²¹¹ Nor does arbitration diminish the EEOC's authority, under the statutes, to bring an enforcement action on a filed charge or on its own initiative.²¹²

2. Predispute Arbitration Agreements

Insofar as the texts of the ADA and the 1991 Civil Rights Act provide for FAA enforcement of predispute arbitration agreements,²¹³ Congress advanced the policy goals underlying the four statutes touched by the Acts. The lingering difficulty lies not in this provision, but in the fact that Congress left the job unfinished. While approving FAA enforcement, the lawmakers avoided textual treatment of protective qualifi-

thus providing that arbitral awards are "in effect, 'non-binding'" for the thirty-day period, Congress sought to insure that federal officers, and not outside parties, would be ultimately responsible for such awards. See S. REP. NO. 543, 101st Cong., 2d Sess. 6-7 (1990), *reprinted* in 1990 U.S.C.A.N. 3931, 3936-37. HUD's statutory authorization provides for no such postponement of finality in fair-housing arbitration.

211. See, e.g., *Alexander*, 415 U.S. at 42-43 (following arbitral award, claimant filed charge with EEOC, which found lack of reasonable cause to believe a Title VII violation had occurred and notified claimant of his right to institute a civil action); *Gilmer*, 111 S. Ct. 1647, 1653 ("An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action."); 42 U.S.C.A. § 12117 (Supp. 1993) (Title VII powers, remedies, and procedures are powers, remedies, and procedures for enforcing ADA).

212. Concerning Title VII, see 42 U.S.C.A. § 2000e-5(b), (f) (1981 & Supp. 1993); *EEOC v. Quick Shop Mkts., Inc.*, 396 F. Supp. 133, 136 (E.D. Mo.) (dictum), *aff'd on other grounds*, 526 F.2d 802 (8th Cir. 1975). Concerning the ADA, see 42 U.S.C.A. § 12117 (Supp. 1993) (Title VII powers, remedies and procedures are powers, remedies and procedures for enforcing ADA). Concerning the ADEA, see 29 U.S.C. § 626(c)(1) (1988); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1371 (C.D. Ill. 1991).

Outside the civil rights context, maintenance of agency jurisdiction underlay the 1934 legislation which provides for FAA enforcement of arbitration agreements covering patent interference claims. The legislation preserved the authority of the Commissioner of Patents and Trademarks to determine the patentability of inventions involved in particular arbitrated interference claims. See *supra* text accompanying notes 83-86.

213. See *supra* notes 159-67, 183-85 and accompanying text.

cations on the otherwise binding effect of arbitral awards on claims under the statutes. The lawmakers' avoidance requires amendment of both the ADA and the 1991 Civil Rights Act.

Where the FAA mandate remains applicable to post-dispute arbitration agreements covering claims under a particular statute, Congress should not preclude FAA enforcement of predispute arbitration agreements based on the first ground raised in *Gilmer*, the importance of the statute's underlying policy goals.²¹⁴ Arbitration's effect on these goals remains constant regardless of the timing of the arbitration agreement's execution. As in circumstances marked by enforcement of post-dispute agreements, the administrative process safeguards the public interest in resolution of particular disputes under the statutes touched by the ADA and the 1991 Civil Rights Act.²¹⁵

With respect to claims under a particular statute, Congress might consider precluding FAA enforcement of predispute arbitration agreements based on another ground raised in *Gilmer*, the relative bargaining positions parties often occupy.²¹⁶ Predispute arbitration agreements are sometimes seen to hold potential for unfairness because they frequently result from relationships marked by unequal bargaining power at a time when neither party enjoys the alternative of commencing a judicial action. The party in the stronger position (for example, a securities brokerage firm or an employer) can effectively insist on an arbitration agreement that waives a judicial forum. The agreement may appear in a form contract presented by that party. The party in the weaker position (for example, a prospective securities customer or a prospective employee) may feel unable to negotiate the agreement's removal without jeopardizing the incipient relationship. Indeed, in the absence of an actual dispute, the weaker party may be inexperienced and thus unable to appreciate the agreement's potential effect.

When a dispute implicating statutory claims does arise, the stronger party frequently is also a "regulated person," a member of the class whose alleged conduct the statute proscribes. The weaker party frequently is also a "protected person," a member of the class granted the private right of action. Enforcement of predispute arbitration agreements thus may enable regulated persons to deprive protected persons of opportunity for judicial redress of claims under remedial statutes.

214. See *supra* text accompanying notes 141-48.

215. See *supra* notes 211-12 and accompanying text.

216. See *supra* text accompanying notes 154-56.

Gilmer reaffirmed that courts may not withhold FAA enforcement of predispute arbitration agreements for mere inequality of bargaining power. The Court observed that *McMahon* and *Rodriguez* had upheld the general enforceability of such agreements in the securities brokerage context notwithstanding the unequal bargaining positions which would normally characterize the relationship between customer and brokerage firm.²¹⁷ To vitiate a particular arbitration agreement based on relative bargaining position, a court must find "such grounds as exist at law or in equity for the revocation of any contract."²¹⁸ One such ground is the unconscionability doctrine.²¹⁹ Because courts regularly uphold enforcement of predispute arbitration agreements in form contracts between parties of apparently unequal bargaining power,²²⁰ however, the doctrine offers relief from the FAA mandate only in extraordinary circumstances.

The relative-bargaining-position coin has a second side which helps explain why, in the absence of unconscionability, FAA enforcement of predispute arbitration agreements is consistent with the policy goals of the four statutes touched by the ADA and the 1991 Civil Rights Act. Provided that extant arbitral procedures otherwise afford opportunity for a fair hearing, a predispute arbitration agreement affords prospective protection to the weaker party by assuring access to a neutral forum designed to diminish the influence of delay and expense. Because of

217. 111 S. Ct. 1647, 1655.

218. 9 U.S.C. § 2 (1988), *quoted supra* note 6. *See also Gilmer*, 111 S. Ct. 1647, 1656 ("Of course, courts should remain attuned to well supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'") (quoting *Mitsubishi*, 473 U.S. at 627).

219. *See* RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981).

220. *See, e.g., Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154-55 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1046 (1993) (enforcing predispute arbitration provision in securities brokerage agreement between individual investor and securities brokerage firm); *Adams v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 888 F.2d 696, 700-01 (10th Cir. 1989) (same); *Driscoll v. Smith Barney, Harris, Upham & Co.*, 815 F.2d 655, 658-59 (11th Cir.), *vacated and remanded for further consideration in light of McMahon*, 484 U.S. 909 (1987), *aff'd on remand sub nom. Adrian v. Smith Barney, Harris, Upham & Co.*, 841 F.2d 1059 (11th Cir. 1988) (same; provision did not demonstrate lack of meaningful choice and was not inherently unfair or oppressive); *Webb v. R. Rowland & Co.*, 800 F.2d 803, 807 (8th Cir. 1986) (same; "The use of a standard form contract between two parties of admittedly unequal bargaining power does not invalidate an otherwise valid contractual provision. To be invalid, the provision at issue must be unconscionable.").

If unconscionability is asserted with respect to the arbitration provision itself, the issue is for the court to resolve; if unconscionability is asserted with respect to the contract as a whole, the issue is resolved in arbitration. *See Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395, 403-04 (1967).

persistent docket delays, final judicial decision in a civil action may take several years.²²¹ In the absence of a predispute arbitration agree-

221. Title VII instructs the court "to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." 42 U.S.C. § 2000e-5(f)(5) (1988). Judges and commentators, however, have consistently reported the delays inherent in final judicial resolution of Title VII claims. *See, e.g.,* Betty B. Fletcher, *Arbitration of Title VII Claims: Some Judicial Perceptions in Arbitration Issues for the 1980s*: PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 218, 220 (1982) ("A litigated Title VII action frequently consumes three years or more, first in the EEOC's efforts to conciliate, then in the process of discovery and trial . . . [O]ur court (the Ninth Circuit) is currently considering acts of discrimination which occurred many years ago."); Lewis B. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 284 (1980) (discussing "the outrageous delays . . . of title VII procedures"); Winn Newman, *Post Gardner-Denver Developments in the Arbitration of Discrimination Claims*, in ARBITRATION—1975: PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 36, 41 (1976) (discussing "the delay of three or four years from the date of filing an EEOC charge before trial date is set in most federal courts").

Because of growing pressures on federal dockets, delays in judicial resolution of Title VII and other civil claims are likely to persist and lengthen in the foreseeable future. A significant reason is that in the past few years, the federal courts have been inundated with criminal cases charging drug-related violations. *See, e.g.,* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 6, 36, 160 (1990) ("the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog," providing statistics; "Rapid expansion of the federal criminal caseload caused by drug prosecutions threatens to overwhelm the resources of the federal courts."). *See also, e.g.,* Stephen Labaton, *U.S. Judges Refuse To Add Civil Cases, Citing Gap in Funds*, N.Y. TIMES, Apr. 9, 1993, at A1; Michael deCourcy Hinds, *Bush's Aides Push Gun-Related Cases on Federal Courts*, N.Y. TIMES, May 17, 1991, at A1, B16 ("Federal judges . . . are alarmed that their dockets are increasingly filled by cases involving drugs and guns, while important constitutional issues like civil rights . . . actions await hearings for months or years"; "civil cases are slipping farther and farther down the Federal court docket" and federal courts' "backlogs are growing," in significant part because the number of drug cases increased five-fold from 1980 to 1990, while the number of district judges increased by only about 10%); Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. TIMES, Dec. 29, 1989, at A1 ("Drug cases are dominating already overcrowded dockets, and . . . tens of thousands of civil lawsuits . . . are being pushed aside and subjected to enormous delays as a result"; surge in drug-related prosecutions is "leading to unprecedented delays in Federal courts for civil litigants who are seeking to resolve . . . civil rights actions . . ."). The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1988 & Supp. IV 1992), produces delays in commencement of civil trials by requiring that a criminal defendant in federal court be given a trial within seventy days of indictment or information. *See, e.g.,* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* at 6, 36 (discussing Speedy Trial Act's effect on federal civil docket).

In the civil rights context, analogy to securities arbitration may have limits. Still, a 1992 United States General Accounting Office empirical study of securities arbitration indicates arbitration's relative swiftness. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, SECURITIES ARBITRATION: HOW INVESTORS FARE (1992) ("GAO Study"), discussed *infra* text accompanying notes 228-34. The GAO Study found that the average time to process a decided case at arbitration forums sponsored by the securities industry was 383 days, compared to 378 days for a settled case. The average processing time for a decided case at American Arbitration Association

ment, the parties could agree to arbitration after the dispute arises, or could otherwise settle the dispute at that time. But the stronger party might also use its presumably superior position to insist on litigation. Through such tactical maneuvering as motion practice and extensive discovery, that party might then make judicial resolution so expensive that the weaker party would be faced with the prospect of capitulating or reaching a disadvantageous settlement regardless of its perceptions of the merits.

Where Congress contemplates creating an exception to the FAA mandate, then, the determinative question is whether arbitration provides a fair process for resolving claims under the statute in question. Procedural adequacy, the third ground raised in *Gilmer*, remains a matter debated by courts and commentators alike. On and off the bench, voices throughout the past several decades have lauded arbitration's general capacity to resolve disputes with relative swiftness and economy that assertedly eludes civil litigation.²²² Similar voices, however, correctly

was 349 days, compared to 334 days for a settled case. *Id.* at 44. "Processing time" began when the forum received the investor's claim; it ended when the forum sent the arbitrators' decision to the investor or when the forum received notice of settlement terms. *Id.*

Other empirical studies indicate that except perhaps in some particularly large or complex cases, arbitration is indeed generally swifter and more economical than litigation. See, e.g., Herbert M. Kritzer & Jill K. Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUST. SYS. J. 6, 18 (1983); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 453-54, 460-62, 473-77 (1988) (discussing empirical studies).

222. The Senate and House reports accompanying the FAA emphasized arbitration's capacity for producing relatively swift, economical dispute resolution. See H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924); S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924). Similar emphasis came from other contemporary voices, including ones which helped influence the FAA's enactment. See, e.g., ABA Committee, *supra* note 19, at 155 (arbitration seeks to avoid the "delay incident to a proceeding in our courts, which, in centers of commercial activity . . . , frequently amounts to several years"); Cohen & Dayton, *supra* note 19, at 265-66 (1926) (discussing "the unfortunate congestion of the courts and . . . the delay, expense and technicality of litigation"; arbitration statutes are "the direct outcome of . . . the necessity for some remedy which will cut the Gordian knot of the law's delay"); Richard C. Curtis, *A Comparison of the Recent Arbitration Statutes*, 13 A.B.A. J. 567-68 (1927) ("the greatest advantage of commercial arbitration over a law suit is speed"); see also *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 747 (1981) (Burger, C.J., dissenting) ("The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming . . ."); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 558 F.2d 831, 833 (7th Cir. 1977) (discussing "strong national policy favoring" arbitration "as a means of resolving private conflicts short of the more costly and disruptive avenue of litigation"); *Federal Commerce & Navigation Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 389 (2d Cir. 1972) (discussing "the basic purposes of arbitration: to resolve disputes speedily and to avoid the expense and delay of extended court proceedings"); *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir.) (discussing the "speedy remedy of arbitration" and the "long delayed remedy of trial in the courts"), *rev'd on other grounds*, 346 U.S. 427, 431

assert that expedition is not the sole virtue. At least where arbitration is contemplated pursuant to predispute agreement, these voices question arbitration's capacity to serve as a substitute for the judicial process in vindicating the rights of persons within a statute's protected class.²²³

A particular concern is the general inability of courts to police the potential for arbitrator bias against such protected persons. Arbitrators are encouraged to adhere to a Code of Ethics designed to produce honesty and impartiality.²²⁴ Arbitration rules enable parties to object to proposed neutral arbitrators whose circumstances appear likely to affect impartiality, including bias, financial or personal interest, or any past or present relationship with a party or its representatives.²²⁵ Commercial arbitrators, however, normally do not write opinions or otherwise reveal the findings and conclusions that produced the award.²²⁶ In the absence of a written opinion, awards ordinarily evade meaningful judicial review because the FAA permits vacatur only when the arbitrator has engaged in gross impropriety or where the award, on its face, demonstrates manifest disregard of the applicable law.²²⁷ In the pre-

(1953) (FAA establishes "desirability of arbitration as an alternative to the complications of litigation"), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477 (1989); Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Warren E. Burger, *Reflections on the Adversary System*, 27 VAL. U. L. REV. 309, 310-11 (1993); Talbot D'Alemberte, *ABA Officer: ADR Has Come Into Its Own*, ARB. J., Mar. 1991, at 3, 60; Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 465 (1985); Sandra Torrey, *Quayle and Bush Administration Take on Civil Justice Reform*, WASH. POST, Feb. 3, 1992, at F5.

223. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1660-61 (1991) (Stevens, J., dissenting) (discussing arbitration's effect on persons protected by the ADEA; majority "clearly eviscerates the important role played by an independent judiciary in eradicating employment discrimination"); *McMahon v. Shearson/Am. Express, Inc.*, 482 U.S. 220, 251 (1987) (Blackmun, J., concurring in part and dissenting in part) (discussing 1933 Act policies; Act "had as its main goal investor protection, which took the form of an effort to place investors on an equal footing with those in the securities industry . . ."); Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 205-06 (1989).

224. See AMERICAN BAR ASS'N - AM. ARB. ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977). The Code's use is not limited to AAA arbitrations or to arbitrators who are lawyers, but rather seeks to "provide guidance in all types of commercial arbitration." See *id.* at 4; see also AMERICAN ARB. ASS'N, CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES (1974).

225. See, e.g., AAA COMMERCIAL ARB. RULE 19 (eff. May 1, 1992); AAA EMPLOYMENT DISPUTE RESOLUTION RULES 8, 9 (eff. Jan. 1, 1993).

226. See, e.g., AAA COMMERCIAL ARB. RULE 42 (eff. May 1, 1992); AAA EMPLOYMENT DISPUTE RESOLUTION RULE 29(b) (eff. Jan. 1, 1993).

227. Section 10(a) of the FAA, 9 U.S.C. § 10(a) (1988 & Supp. IV 1992), provides that the court may vacate a final arbitral award:

ponderance of cases, the arbitrator is effectively the final decisionmaker, shielded from close judicial scrutiny.

Recent empirical data demonstrates support for the proposition that extant arbitral procedures do afford opportunity for a fair hearing. In a study of the securities arbitration process²²⁸ by the United States Gen-

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

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

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

Dictum in *Wilko* discussed judicial vacatur of final arbitral awards which are in "manifest disregard" of the applicable law. 346 U.S. at 436-37 ("In unrestricted submissions, . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.") (citations omitted). Most circuits have recognized the judicially created manifest-disregard ground for vacatur. Recognition has survived *Wilko*'s overruling in *Rodriguez*. See, e.g., *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 112 (2d Cir. 1993) (to vacate for manifest disregard, court must find that arbitrators knew of a governing legal principle, yet refused to apply it or ignored it altogether; the principle must be well defined, explicit, and clearly applicable); *Lee v. Chica*, 983 F.2d 883, 885 (8th Cir. 1993); *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 970 (1993); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178-79, 1182 (D.C. Cir. 1991); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8-11 & n.5 (1st Cir. 1990); *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990). A few circuits have declined to apply *Wilko*'s dictum. See, e.g., *Mellroy v. Paine Webber, Inc.*, 939 F.2d 817, 820 & n.2 (5th Cir. 1993); *Robbins v. Day*, 954 F.2d 679, 684 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 201 (1992).

The various grounds for judicial vacatur of final arbitral awards have aptly been described as "severely limited." Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 86-87 (1992).

228. In at least one significant respect, securities arbitration provides a particularly instructive setting for empirical study of arbitral fairness. Ever since *McMahon* and *Rodriguez*, most customer-broker securities disputes have gone to arbitration pursuant to predispute arbitration agreements in brokerage contracts. These agreements normally require arbitration under the auspices of a securities industry forum (usually the New York Stock Exchange or the National Association of Securities Dealers), rather than under the auspices of an independent organization such as the American Arbitration Association. See GAO Study, *supra* note 221, at 15, 31-32. In 1990 the NYSE and NASD together processed 94% of disputes filed for arbitration in securities industry forums. *Id.* at 23. The securities industry faced strident criticism that arbitration at industry-sponsored forums was infected with pro-industry bias. See, e.g., Mary Kuntz, *Ruling: You Can't Take Broker to Court*, NEWSDAY, May 16, 1989, at 45 ("the deck is still stacked in favor of the brokerage"); Beth M. Gilbert et al., *How Investors Can Avoid the Bind of Binding Arbitration*, MONEY, Sept. 1988, at 27 ("Imagine buying a car, having engine trouble and then reading in your sales contract that you are forced to go to the Car Dealers Association of America to resolve your grievance.") (quoting Rep. Edward J. Markey).

eral Accounting Office ("GAO"),²²⁹ researchers found "no indication of a pro-industry bias in decisions at industry-sponsored forums."²³⁰ Indeed, the GAO reported that in cases in which individual investors filed claims against broker-dealers, arbitrators decided in favor of the investor in a combined average of about 59 percent of the cases heard under securities industry auspices and in about 60 percent of the cases heard under American Arbitration Association auspices.²³¹ The amounts awarded averaged about 60 percent of the amount claimed.²³²

The GAO did not attempt to evaluate the substantive outcomes reached in the particular arbitrations studied, that is, to analyze and judge the merits of the facts presented and the reasoning that produced the award.²³³ The GAO concluded that it could not compare litigation and arbitration results during the subject period because of "the limited number of retail investor cases decided through litigation and the inherent differences between the processes."²³⁴ Nonetheless, the sizeable percentages of arbitrations won by individual investors offer persuasive basis for alleviating fears that ordinarily weaker parties suffer bias in arbitrations pursuant to predispute agreement.

In the context of claims under civil rights statutes such as the ADA and the 1991 Civil Rights Act, however, analysis does not end with conclusions about protections that predispute arbitration agreements afford to members of the statute's protected class. Nor does analysis end with conclusions relating to the fairness of arbitral procedure. Because of the unique protective purposes of civil rights legislation, Congress must place qualifications on the otherwise binding effect of FAA awards on statutory civil rights claims. In both the ADA and the 1991 Civil Rights Act, the existing statutory arbitration provisions fail to provide adequate protection to potential claimants.

229. See GAO Study, *supra* note 221. The GAO released its study in May of 1992. The study analyzed nearly 4,000 disputes between individual investors and broker-dealers which were decided in arbitration between January 1, 1989 and June 30, 1990. GAO Study, *supra* note 221, at 23-25. The GAO designed procedures to provide a 95% confidence level that the results would represent industrywide practice with a sampling error of plus or minus 5%. *Id.* at 21.

230. GAO Study, *supra* note 221, at 6.

231. GAO Study, *supra* note 221, at 38. In arbitrations initiated by broker-dealers, the arbitrators' decisions usually favored the broker-dealer because the arbitration usually involved "well-documented investors' debt to the broker-dealer." *Id.* at 35, 41.

232. GAO Study, *supra* note 221, at 7.

233. GAO Study, *supra* note 221, at 6.

234. GAO Study, *supra* note 221, at 6, 26, 35.

IV. THE NEED FOR AMENDMENT

The ADA and the 1991 Civil Rights Act authorize arbitration in the statutory texts but suggest qualifications on the binding effect of arbitral awards only in the legislative histories. The reasoning found in the legislative histories themselves is seriously flawed. By assuming this approach, Congress has damaged the causes of civil rights legislation and of arbitration.

This Part explores the sources of Congress' error and concludes with suggestions about how Congress should amend the Acts to remedy the deficiencies.

A. *The Sources of the Error*

1. Congress's Unfortunate Reliance on Legislative History

As a threshold matter, the committee reports accompanying the ADA and the 1991 Civil Rights Act discuss qualifications in virtually identical passages.²³⁵ The similarity of the passages suggests that in determining the arbitrability of civil rights causes, Congress has grown satisfied with the use of boilerplate. Because of the protective purposes underlying the four statutes touched by the acts, any such satisfaction would be disquieting. Resort to boilerplate in legislative history diminishes respect for arbitration by suggesting a congressional style marked by inability or unwillingness to articulate fundamental policy choices. Boilerplate leaves the unfortunate impression that Congress has not analyzed tensions that may exist between binding arbitration and the goals and purposes of the affected civil rights statutes.

In three respects, however, the likely damage transcends matters of style. First, the ADA and the 1991 Civil Rights Act invite judicial enforcement of arbitration agreements without enforcement of qualifications which, if the legislative histories serve as any barometer at all, many lawmakers evidently considered important indicia of fairness. Second, Congress has invited the unseemly prospect that two apparently identical textual expressions of "encouragement" for binding arbitration, enacted only one year apart, might receive disparate judicial treatment

235. See H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 76 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 499 (ADA); H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 97 (1991) (1991 Civil Rights Act); H.R. REP. NO. 40(II), 102d Cong., 1st Sess. 41 (1991) (same). The discussions of qualifications in the 1991 Civil Rights Act reports are reprinted in 1991 U.S.C.C.A.N. 635, 735 respectively. See also *supra* text accompanying notes 168-76, 187-91.

because of the largely fortuitous courses of debate and consideration. Finally, the legal effect of the would-be qualifications is likely to be the subject of contentious litigation even though Congress could have resolved the issue by forthright consideration and textual treatment.

"In determining the scope of a statute," the Supreme Court states, "we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'"²³⁶ Because the Judiciary Committee and Conference reports speak in unison concerning the meaning of section 513 of the ADA,²³⁷ the reports might well qualify as a clear expression of intent contrary to the section's unqualified expression of encouragement (and hence of permission) for binding arbitration. The claimant's right to a judicial trial *de novo*, addressed in the reports,²³⁸ thus might survive otherwise binding arbitral awards on ADA claims.

However, because the legislative history of section 118 of the 1991 Civil Rights Act lacks any semblance of the unison that characterized the legislative history of section 513,²³⁹ courts might accord section 118's textual expression of encouragement an effect markedly different from the effect accorded the ADA counterpart. Whatever else might be said about the 1991 Civil Rights Act's legislative history concerning arbitrability, that history cannot be said to constitute a "clearly expressed" congressional intent.

In light of the discordance that marks consideration of arbitrability in the 1991 Civil Rights Act's legislative history, the most sensible interpretation may be that section 118 expresses uncontradicted congressional intent to permit binding arbitration of claims under the ADA, Title VII, the Civil Rights Act of 1866, and the ADEA. The section appears unambiguous in authorizing binding arbitration, and the legislative history is ineffective in expressing an enforceable contrary intent.²⁴⁰

Because of the uncertainty that inevitably attends judicial interpretation of legislative history, confusion about the effects of the respective legislative histories will likely persist pending case law development

236. See, e.g., *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993) (citing decisions).

237. See *supra* notes 168-76 and accompanying text.

238. See *supra* notes 170-76.

239. See *supra* notes 187-204 and accompanying text.

240. In decisions handed down after the 1991 Civil Rights Act's effective date, courts have found Title VII claims arbitrable. See *infra* note 247.

under the ADA and the 1991 Civil Rights Act.²⁴¹ The need for judicial resolution would produce uncertainty, delay and expense which are inconsistent with arbitration's mission to provide relatively swift, efficient dispute resolution.

Unless Congress clarifies its own intent by textual amendments to the ADA and the 1991 Civil Rights Act, the need for judicial resolution also invites a spate of bad law, which may already have begun. In *Hilding v. McDonnell Douglas Helicopter Co.*,²⁴² the terminated female employee agreed to arbitration by an ad hoc committee of five persons chosen by her and the employer. The committee unanimously upheld the termination.

The federal district court held that the arbitral award did not bar the plaintiff from filing suit alleging that the defendant employer had engaged in gender discrimination in violation of Title VII. The court correctly stated that *Gilmer* had concerned only the arbitrability of particular statutory claims under the FAA, and not the preclusive effect of final arbitral awards. But the court then held that because the ad hoc committee's decision was "essentially a contractual one," *Alexander v. Gardner-Denver Co.* and its progeny assured an opportunity to seek judicial redress of the Title VII claims.²⁴³

The difficulty is that *Gilmer* had distinguished the *Alexander* trio on grounds which apply not only to arbitrability but also to claim preclusion. First, *Gilmer* stated that the trio concerned not the enforceability of arbitration agreements covering statutory claims, but the "quite different issue" whether arbitration of contract-based claims precluded later

241. The confusion has been compounded. At least three Justices have been critical of the Court's current approach to statutory interpretation, arguing that legislative history should not affect the interpretation of statutes whose textual meaning appears clear. See, e.g., *Darby v. Cisneros*, 113 S. Ct. 2539, 2540 n.* (1993) (Rehnquist, C.J., Scalia and Thomas, J.J., joining majority opinion, except part which concluded that legislative history supported meaning which majority had earlier found plain in the statutory text); *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1572 (1993) (Scalia, J., concurring) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it. We should not pretend to care about legislative intent (as opposed to the meaning of the law)"); *id.* at 1563 n.*, 1566 n.12 (Justice Thomas not joining in majority's footnote that criticized Justice Scalia's rejection of legislative history); *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1166 n.1 (1993) (Scalia and Thomas, J.J., joining majority opinion, except part which concluded that legislative history supported meaning which majority had earlier found in the statutory text). See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990) (discussing Justice Scalia's criticism and citing his opinions in which the criticism appears).

242. No. CIV 91-1079, 1992 U.S. Dist. LEXIS 17216 (D. Ariz. June 9, 1992).

243. *Id.* at *8.

judicial resolution of statutory claims.²⁴⁴ Second, *Gilmer* stated that in *Alexander* and its progeny, the arbitration was pursuant to collective-bargaining agreements with claimants represented by their unions; the Court reasoned that the "tension" between collective representation and individual statutory rights is absent in FAA arbitration, where claimants conduct their own individual representation.²⁴⁵ Finally, *Gilmer* stated that the *Alexander* trio were not decided under the FAA.²⁴⁶

Hillding concerned the preclusive effect of a final award in an FAA arbitration in which the plaintiff raised, or could have raised, the Title VII claims when she conducted her own individual representation. Because of *Gilmer's* distinctions, then, *Alexander* does not provide support for the result the district court reached on the claim preclusion issue. Perhaps *Hillding* strained to afford the plaintiff an opportunity to pursue her Title VII claims in court. The opportunity would have a firmer foundation if Congress, rather than tantalize claimants and courts in legislative history, would amend the ADA and the 1991 Civil Rights Act to guarantee such opportunities in the statutory texts.²⁴⁷

244. 111 S. Ct. at 1657.

245. *Id.*

246. *Id.*

247. In other decisions handed down after enactment of the 1991 Civil Rights Act, courts have found Title VII claims arbitrable, but without discussing a right to file a post-arbitral suit on such claims. *See, e.g.,* *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699-700 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Lockhart v. A.G. Edwards & Sons, Inc.*, No. 93-2418, 1994 U.S. Dist. LEXIS 1201 (D. Kan. Jan. 25, 1994); *Williams v. Katten, Muchin & Zavis*, No. 92-C5654, 1993 U.S. Dist. LEXIS 13890 (N.D. Ill. Sept. 30, 1993) (magistrate judge's report and recommendation); *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76 (D. Mass. 1993); *Hull v. NCR Corp.*, 826 F. Supp. 303, 304-06 (E.D. Mo. 1993); *DiCrisci v. Lyndon Guar. Bank of New York*, 807 F. Supp. 947, 951-53 (W.D.N.Y. 1992); *Bender v. Smith Barney, Harris Upham & Co.*, 789 F. Supp. 155, 160 (D.N.J. 1992); *King v. First Boston Corp.*, No. 90 Civ. 4319, 1992 U.S. Dist. LEXIS 4745 (S.D.N.Y. Apr. 8, 1992); *Sacks v. Richardson Greenshield Secs., Inc.*, 781 F. Supp. 1475, 1482-83 (E.D. Cal. 1991); *see also* *Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 89 Civ. 3749, 1992 U.S. Dist. LEXIS 13749 (S.D.N.Y. Sept. 10, 1992) (citing § 118); *Bachus & Stratton, Inc. v. Mann*, No. 92-1399, 1993 Fla. App. LEXIS 5484 (Fla. Dist. Ct. App. May 19, 1993); *cf. Prudential Ins. Co. v. Shammas*, No. 1:93:CV:395, 1993 U.S. Dist. LEXIS 15835 (W.D. Mich. Sept. 13, 1993) (holding arbitrable claims of natural origin, religion, race, and gender discrimination in employment in violation of state law); *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, *cert. denied*, 114 S. Ct. 554 (1993) (holding arbitrable claims of racial and gender discrimination in employment in violation of state law); *Spellman v. Securities, Annuities and Ins. Servs., Inc.*, 10 Cal. Rptr. 2d 427 (1992) (holding arbitrable claims of racial discrimination in employment in violation of state law).

2. Congressional Misunderstanding and Misapplication of *Alexander*

Not only did Congress err by relegating treatment of the *de novo* trial right to the legislative histories of the ADA and the 1991 Civil Rights Act; the lawmakers compounded the error by supporting the right with a seriously flawed rationale. Congress relied by analogy on *Alexander v. Gardner-Denver Co.*,²⁴⁸ failing to recognize that *Alexander's* doctrinal underpinnings have no necessary application in commercial arbitration.

Congressional misunderstanding threatens to produce an unduly restrictive grant of the right to a post-arbitral judicial trial *de novo*. If courts give effect to the committee reports accompanying the ADA and the 1991 Civil Rights Act, the claimant's right would extend only to claims under Title VII (the statutory right at issue in *Alexander*) and the ADA (because of its adoption by reference of Title VII's remedial provisions).²⁴⁹ With this artificial restriction based on the strained analogy to *Alexander*, Congress has placed itself in the awkward position of suggesting an unseemingly hierarchy among the four civil rights causes touched by the acts.

Alexander arose from an arbitration pursuant to a collective-bargaining agreement. The defendant company had discharged Alexander, a black employee, from his trainee position as a drill operator. Contending that the discharge was racially motivated, Alexander requested his union to pursue the collective-bargaining agreement's grievance and arbitration procedure. The union complied, and the arbitrator found that the company had discharged him for just cause.

Alexander then sued in federal district court under Title VII. The Supreme Court unanimously held that the employee's right to a trial *de novo* on his Title VII claims was not foreclosed by his prior submission of the discrimination claim to final arbitration under the collective-bargaining agreement's nondiscrimination clause.

The Court concluded that Alexander's "contractual right" to arbitration under the collective-bargaining agreement, and his individual "statutory right" under Title VII, had "legally independent origins."²⁵⁰ The contractual right is "conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits

248. 415 U.S. 36 (1974). See *supra* text accompanying notes 170-76, 197-98.

249. See *supra* text accompanying notes 168-75, 188-204.

250. 415 U.S. at 52.

for union members.”²⁵¹ The statutory right “concerns not majoritarian processes, but an individual’s right to equal employment opportunities.”²⁵²

An evident policy concern underlies the Court’s legal distinction. In an arbitration pursuant to a collective-bargaining agreement, the union holds exclusive control over the manner and extent to which the individual’s grievance is presented. Only in the judicial proceeding would the individual grievant conduct his or her own representation. In light of what Chief Justice Warren E. Burger later described as “[t]he long history of union discrimination against minorities and women,”²⁵³ *Alexander* appeared unwilling to assume that union representation in the arbitral proceeding would necessarily permit vindication of Title VII rights. Because “the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit,”²⁵⁴ *Alexander* concluded that “harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made.”²⁵⁵ The union would have a duty of fair representation in the arbitration, but the Court stated that breach of the duty “may prove difficult to establish.”²⁵⁶

251. *Id.*

252. *Id.* at 51.

253. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 749-50 (1981) (Burger, C.J., dissenting) (discussing *Alexander*). See also, Newman *supra* note 221, at 40-41 (discussing the history’s probable effect on *Alexander*).

254. 415 U.S. at 58 n.19.

255. *Id.*

256. *Id.* A union breaches the duty of fair representation when its conduct toward a member of the collective-bargaining unit is “arbitrary, discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Decisions demonstrating the standard’s difficulties of proof include (in addition to *Vaca* itself) *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67 (1991) (*Vaca* standard applies to all union activity; union’s actions are arbitrary only where, in light of the factual and legal landscape at the time of the actions, the union’s conduct is so far outside a wide range of reasonableness as to be irrational) (citation omitted); *United Steelworkers v. Rawson*, 495 U.S. 362, 372-74 (1990) (union’s mere negligence, even in a collective-bargaining agreement’s enforcement, does not state claim for breach of the duty of fair representation; because the union is allowed a wide range of reasonableness in determining the manner in which it represents the collective-bargaining unit’s members, the duty is a “purposefully limited check” on union conduct).

The *Vaca* standard gives the union a considerable measure of discretion in determining whether to process an individual grievance to arbitration, and then in conducting the representation before the arbitrator. See, e.g., 2 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1442-64 (Patrick Hardin et al. eds., 3d ed., 1992). The union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, but the employee does not have an absolute right to have the grievance taken to arbi-

Alexander determined that in the later judicial trial, a deferral rule can best accommodate the federal policy favoring labor arbitration and the federal policy against discriminatory employment practices. The trial court would consider the employee's Title VII claims *de novo*, and the arbitral decision "may be admitted as evidence and accorded such weight as the court deems appropriate."²⁵⁷ According to the Court:

the weight to be accorded an arbitral decision . . . must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include . . . the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.²⁵⁸

Commercial arbitration presents circumstances fundamentally different from labor arbitration because the commercial claimant conducts his or her own representation before the arbitrator. The claimant may assert the individual statutory right in arbitration, free from concerns that may attend union representation in the collective-bargaining context. In the judicial trial *de novo*, then, the commercial claimant would have a second opportunity to assert the individual statutory right, an outcome presently having no policy basis other than blind deference to *Alexander*. Congress must articulate an independent policy rationale for the claimant's right to a judicial trial *de novo* following commercial arbitration awards on claims under the statutes touched by the ADA and the 1991 Civil Rights Act.

tration or processed to award without settlement between the union and the employer. *See, e.g., Vaca*, 386 U.S. at 191.

257. 415 U.S. at 60.

258. *Id.* at 60 n.21. *See also Barrentine*, 450 U.S. at 743 n.22 (reaffirming *Alexander*).

B. *Repairing the Damage*

Congress should amend both the ADA and the Civil Rights Act of 1991 to add textual provisions guaranteeing the right to a post-arbitral judicial trial *de novo* at the request of the party within the protected class of any of the four statutes touched by the acts. The right would extend to claims under any of the statutes. The scope of the *de novo* trial right would be defined by the distinction between post-dispute and predispute arbitration agreements.

Because post-dispute arbitration agreements are tantamount to private settlements once the parties have had opportunity to assess the strengths and weaknesses of their relative positions,²⁵⁹ the right to a trial *de novo* should not attach following awards in arbitration conducted pursuant to such agreements. Insofar as the legislative histories of the ADA and the 1991 Civil Rights Act suggest to the contrary,²⁶⁰ Congress should now explicitly reject the suggestions. When the protected party has the opportunity to assess his or her position in the context of an existing dispute, the party may determine whether to accept the outcome of arbitration rather than pursue private settlement or judicial relief. Despite imbalances of bargaining power that might exist between the disputants, Congress should not grant the protected party greater protection than the party would enjoy in the event of private settlement. Because arbitration is designed to provide a decision based on evidence adduced before a neutral decisionmaker, protected parties fare no worse under post-dispute arbitration agreements than under such settlements.

The right to a judicial trial *de novo* should attach, however, following final award in FAA arbitrations conducted pursuant to predispute arbitration agreements. Because of the fundamental distinctions between the claimant's position in labor arbitration and commercial arbitration,²⁶¹ however, Congress should reevaluate the *Alexander* analogy.

Congress should base the *de novo* trial right on recognition that civil rights statutes hold a unique place in our jurisprudence as public mandates to redress historic discrimination against particular classes or groups of persons. As remedial legislation designed to produce equality before the law, civil rights legislation is imbued with particularly strong

259. See *supra* text accompanying notes 206-12.

260. See *supra* text accompanying notes 168-76, 187-204.

261. See *supra* text accompanying note 258.

protective purposes grounded in ideals fundamental to our polity. Because of these purposes, Congress may appropriately enact added measures to help insure that where arbitration is conducted outside the settlement analogy (that is, pursuant to predispute agreement), resolution of protected persons' statutory civil rights claims will be in accordance with applicable law. The added measures are not grounded in concern that arbitral procedure is necessarily unfair to persons within a statute's protected class, or that arbitration is necessarily prone to awards at odds with that law.²⁶² Rather, the post-arbitral right to assert the statutory civil rights claim in court helps ensure in particular cases that a public forum remains available to help determine that the outcome is in accordance with law as applied to the facts.

Because the member of the statute's protected class would enjoy a second opportunity to advance the statutory right in the name of fidelity to law,²⁶³ question might be raised about whether Congress should also grant the regulated person the right to a post-arbitral judicial trial *de novo*. Courts then could play an even greater role by exercising jurisdiction at the behest of whichever party was disappointed by the award.

The *de novo* trial right, however, should not extend to regulated persons. The right is a critical adjunct of statutes designed to remedy historic discrimination suffered by particular classes or groups of persons. Members of the protected class will normally be the weaker party to the predispute arbitration agreement.²⁶⁴ Indeed, the predispute arbitration agreement's enforcement serves the statutes' protective purposes because this party frequently cannot easily meet the burdens and expense of litigation.²⁶⁵ If the regulated (or normally stronger) party could invoke judicial jurisdiction following the arbitral award, that party could frequently undo the protected party's arbitral victory based not on the merits, but on the weaker party's inability to maintain the later litigation. Because the regulated party will ordinarily be the one who presented the predispute arbitration agreement in the first instance, that

262. The measures, however, would meet concerns expressed by some commentators that the relative informality of alternative dispute resolution, including arbitration, may expose women and minority group members to enhanced risk of prejudice. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

263. See *supra* text accompanying notes 248-58.

264. See *supra* text accompanying note 216.

265. See *supra* text accompanying note 221.

party may fairly be held to the award, subject to the FAA's ordinary grounds for judicial vacatur.²⁶⁶

Yet another concern might be raised. The *de novo* trial right would expose the regulated party to the burden and expense of proceedings in dual forums at the protected party's option. For two reasons, this exposure may be cast consistent with the protective purposes of the statutes touched by the ADA and the 1991 Civil Rights Act.

First, to the extent the *de novo* trial right is otherwise appropriate, the ultimate choice is between either denying the right or exposing the regulated party to the prospect of dual proceedings. The burden is better cast on the regulated party, not only because of civil rights legislation's unique protective purposes, but also because the regulated person will normally be the stronger party in the bargaining process. As the stronger party, the regulated person will normally be the one who created the prospect of dual forums by advancing the predispute arbitration agreement in the first instance.

Second, experience suggests that in most cases the burden of dual proceedings would be more apparent than real. In the most pervasive study of *Alexander's* effects on the courts, two researchers found that of more than 1,700 labor arbitrations involving discrimination grievances, only 17% produced filings for judicial trial *de novo*.²⁶⁷ Experience thus indicates that despite the opportunity for judicial redress, arbitration is the forum of last resort for the large percentage of Title VII claimants who begin in that forum.²⁶⁸ One may expect that a similar result would obtain with respect to commercial arbitration of claims under Title VII and the other statutes touched by the ADA and the 1991 Civil Rights Act. In some cases, arbitration may serve as an instructive exposition of the relative strengths of the parties' positions. Where the claimant loses in arbitration, the loss may diminish incentive to sue on

266. 9 U.S.C. § 10 (1988), discussed *supra* note 227.

267. Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, ARB. J., Sept. 1984, at 49, 54-55; see also Elkouri & Elkouri, *supra* note 1, at 14 n.92 (Supp. 1985-89) (discussing the Hoyman-Stallworth study).

268. See, e.g., Fletcher, *supra* note 221, at 222 ("the time, expense, and aggravation of a court suit may in fact, if not in law, make arbitration the forum of last resort for many").

the same facts.²⁶⁹ In other cases, the burdens and expense of litigation may have eliminated judicial filing as a viable option at the outset.

Imposing the potential burden of dual proceedings might be counter-productive if the burden deterred regulated persons from continued use of predispute arbitration agreements. Many protected persons would lose the protection of such agreements and, in the absence of EEOC action, would face the prospect of settlement or of trial conducted at personal expense or under contingency-fee agreement. The relatively low rate of post-arbitral judicial filings under *Alexander*, however, suggests that a post-arbitral *de novo* trial right would not significantly diminish use of predispute arbitration agreements. To the extent regulated persons favor predispute arbitration agreements as a cost-saving measure, the desired result would be achieved in the significant percentage of cases.

As Congress reevaluates the *Alexander* analogy, it should discard the cachet of Title VII that accompanied the decision's invocation in the legislative histories of both the ADA and the 1991 Civil Rights Act.²⁷⁰ If courts give effect to the Acts' respective committee reports, a claimant would hold the right to a post-arbitral judicial trial *de novo* on claims under Title VII or the ADA, but not on claims under the ADEA or the Civil Rights Act of 1866.²⁷¹ By creating a wooden distinction based on *Alexander*, Congress thus has placed itself in the awkward position of stating that some forms of discrimination warrant

269. Where the arbitration reveals particular weakness in the claimant's case, the claimant and counsel may perceive the judicial proceeding as placing the defendant in position to recover attorneys' fees. See, e.g., *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (under § 706(k) of the Civil Rights Act of 1964, district court may award attorneys' fees to a prevailing Title VII defendant on a finding that the action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); 42 U.S.C. § 12117 (Supp. IV 1992) (Title VII powers, remedies, and procedures are powers, remedies, and procedures for enforcing ADA); *Hoover v. Armco, Inc.*, 915 F.2d 355, 357 (8th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991) (ADEA does not provide for award of attorneys' fees to a prevailing defendant, but district court may award such fees under the bad-faith exception to the American Rule that each litigant pays its own attorneys' fees; under the exception, the trial court may award attorneys' fees to a prevailing party when "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'" (citations omitted); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 962 (8th Cir. 1978) (same); cf. *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam) (applying 42 U.S.C. § 1988, which authorizes district court to award attorneys' fees to the prevailing party in suits under 42 U.S.C. §§ 1981 and 1983; in suit under § 1983, held that district court should not award attorneys' fees to a prevailing defendant according a standard less stringent than the *Christiansburg* standard; the § 1983 action must be "meritless in the sense that it is groundless or without foundation").

270. See *supra* text accompanying notes 168-76, 187-204.

271. See *supra* text accompanying notes 168-76, 187-204.

greater public sanction than others, and that some classes or groups of protected persons deserve greater protection than others. By distinguishing between claims under Title VII and those under the Civil Rights Act of 1866, the 1991 Civil Rights Act's legislative history even distinguishes between various forms of racial discrimination. Congress should base the *de novo* trial right on the evil of discrimination rather than on the circumstance that *Alexander* happened to concern Title VII claims.

Congress, however, should maintain *Alexander's* deferral rule, which strikes the appropriate balance in commercial arbitration. The rule avoids two extremes, either of which would disserve the protective purposes underlying the four statutes touched by the ADA and the 1991 Civil Rights Act. One extreme would deprive the trier of fact of all authority to consider the arbitral proceeding's outcome. The other extreme would authorize the court to give res judicata or collateral-estoppel effect to the arbitral award.

By depriving regulated parties of the right to introduce the arbitral decision into evidence, the first extreme would grant claimants a greater opportunity for judicial reversal after commercial arbitration than after labor arbitration. Such a grant would ignore the circumstance that the commercial claimant, but not the labor claimant, conducts his or her individual representation before the arbitrator. Insofar as the commercial claimant could render the arbitrator's exercise of judgment nugatory by maintaining suit, this extreme would also run counter to Congress's frequently articulated perception of arbitration as a mechanism marked by fair procedure.²⁷² This perception would suggest that Congress should invest the trier with authority to give appropriate weight to the award, which would ordinarily be based on the arbitrator's perceptions of evidence similar to the evidence later adduced in court.²⁷³

At the other extreme, preclusion would also be inconsistent with the protective purposes of the statutes touched by the ADA and the 1991

272. See *supra* notes 87-93 and accompanying text.

273. In trials following awards in arbitration pursuant to collective-bargaining agreements, *Alexander's* deferral rule applies in jury trials and bench trials alike. *Alexander* announced the rule in a bench trial on Title VII claims. See 415 U.S. at 60 & n.21. The Court reiterated the rule in two later labor arbitration decisions. See *McDonald v. City of West Branch*, 466 U.S. 284, 292 n.13 (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 n.22 (1981). *Barrentine* was a bench trial of Fair Labor Labor Standards Act claims. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 615 F.2d 1194, 1196 (8th Cir. 1980), *rev'd*, 450 U.S. 728 (1981). *McDonald* was a jury trial of claims under 42 U.S.C. § 1983 (1988). See 466 U.S. at 286.

Civil Rights Act.²⁷⁴ The judicial trial *de novo* is designed to help insure that arbitral resolution of the statutory civil rights claims will be in accordance with applicable law. Claim preclusion and issue preclusion would undermine this purpose because the court applying preclusion ordinarily examines the prior result without exercising independent judgment about the correctness of the factual or legal determinations that produced it.²⁷⁵

Alexander's deferral rule authorizes the flexible exercise of judgment in post-arbitral actions brought before the courts. Many statutory civil rights claims turn heavily on factual issues whose analysis under settled law lies well within arbitrators' competence. Other statutory civil rights claims turn on relatively straightforward application of less settled legal principles, a task that may also lie within the competence of expert arbitrators. In either event, judicial participation in the resolution of

274. Cf. *McDonald*, 466 U.S. 284 (in action under 42 U.S.C. § 1983, a federal court should not accord res judicata or collateral estoppel effect to an award in an arbitration pursuant to a collective-bargaining agreement).

275. Under the claim preclusion doctrine, a final judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. See *Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Under claim preclusion rules, a valid and final arbitral award has the same effects as a judicial judgment. See RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1932). An exception exists where, as in *Alexander*, a "scheme of remedies" permits relitigation of the subject claim. See *id.* at § 84(2) & cmt. g (stating fact pattern similar to *Alexander*). The doctrine precludes a person from relitigating any claim or cause of action which was litigated, or which could have been litigated, in the prior suit.

Under the issue preclusion doctrine, the second suit is on a different cause of action. When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination precludes relitigation of the issue. See *Montana*, 440 U.S. at 153; *Parklane Hosiery Co.*, 439 U.S. at 326 n.5; RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Collateral estoppel rules may apply following a final arbitral award. See *id.* § 84.

Following an arbitral award, application of claim preclusion generally presents less difficulty than application of issue preclusion. Because arbitration ordinarily begins with a demand or other written submission, the court may have relatively little difficulty determining whether a particular claim or cause of action was litigated before the arbitrator, or whether it could have been litigated. Because commercial arbitrators ordinarily do not write opinions explaining their awards, however, the court may be unable to determine whether the arbitrator actually decided a particular issue. Where this latter determination is evident from the award, courts invoke issue preclusion where the party suffering preclusion had full and fair opportunity to present its case before the arbitrator. See, e.g., *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352 (11th Cir. 1985).

Narrow exceptions to claim preclusion and issue preclusion, some of which involve the court's exercise of independent judgment about the earlier result, appear in RESTATEMENT (SECOND) OF JUDGMENTS § 26 (exceptions to the general rule concerning splitting), § 28 (exceptions to the general rule of issue preclusion) (1982).

the civil rights claims may have minimal effect. Still other civil rights claims, however, require thoughtful development of existing legal doctrine once the facts are determined; here the federal judiciary's ultimate oversight remains particularly critical.

V. CONCLUSION

The ADA and the 1991 Civil Rights Act indicate a new direction in the ongoing development of commercial arbitration law. Unfortunately, the Acts do not command respect for Congress's capacity to resolve the thorny issues that attend arbitrability of claims under the four statutes they touch. In the Acts' texts (the only sources assured of judicial effectuation), the lawmakers provided for enforcement of arbitration agreements. Only the Acts' respective legislative histories acknowledge qualifications on the binding effect arbitral awards would otherwise hold under the FAA.

Congress should amend the ADA and the 1991 Civil Rights Act to qualify the binding effect of arbitral awards by granting a right to a post-arbitral trial *de novo* on claims under any of the four statutes touched by the Acts. The right would extend only to members of the statutes' protected classes, and would apply only where arbitration is conducted pursuant to predispute agreement. The arbitral decision would be admissible in evidence at trial, to be given such weight as the trier of fact deems appropriate.

Congress should base the *de novo* trial right not on invocation of *Alexander v. Gardner-Denver Co.*, but on the role of civil rights legislation as public mandates designed to produce equality before the law. The right should be guaranteed in the texts of the Acts so that congressional intent may be effectuated without the uncertainties that invariably attend case-by-case extrapolation of legislative history.