A Test of Arbitrability: Does Arbitration Provide Adequate Protection for Aged Employees

Leslie M. Gillin
A TEST OF ARBITRABILITY: DOES ARBITRATION PROVIDE ADEQUATE PROTECTION FOR AGED EMPLOYEES?

I. INTRODUCTION

The growth of litigation in the United States has gone beyond our courts' ability to respond. For this reason arbitration2 has become an indispensable form of dispute resolution in the American system of administering justice. Arbitration exists as a contractual alternative to litigation in that the parties agree to binding arbitration in place of a court decision. In the labor area, arbitration is the predominant method of resolving grievances of employees under collective bargaining agreements. The Federal Arbitration Act (FAA)6 provides for the enforce-
ment of private contractual agreements to arbitrate. Despite this widespread acceptance of arbitration, the Supreme Court of the United States has held that when certain statutory claims are resolved in arbitration, the arbitrator's award is not preclusive, and the claim may also be pursued in a judicial forum.

In a series of recent decisions, however, the Supreme Court has sent a strong message that the FAA establishes a federal policy favoring arbitration. These cases indicate that the Supreme Court is no longer

7. Title 9, § 2 provides that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Id. § 2. The efficacy of arbitration depends on judicial enforcement of arbitration agreements and arbitration awards once they have been issued. The FAA gives courts the power to stay judicial proceedings pending arbitration, compel arbitration and confirm arbitration awards. Id. §§ 3, 4, 9. For a discussion of arbitration under the FAA, see infra notes 62-113 and accompanying text. Arbitration awards are also entitled to preclusive effect. See RESTATEMENT (SECOND) OF JUDGMENTS § 84(1) (1982) (“[A] valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.”).


McDonald, Barrentine and Alexander arose in the context of labor arbitration. In each case, the arbitration award was against the employee's union, and the Court held that this award should not preclude the employee from asserting his statutory rights in court. Although these cases addressed the preclusive effect of an arbitration award, lower courts have applied the same rationale in refusing to order arbitration of statutory claims, despite a predispute agreement to arbitrate. See, e.g., Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) (motion to stay proceedings pending arbitration of employee's Title VII claim denied despite arbitration agreement), cert. denied, 110 S. Ct. 842 (1990); Swenson v. Management Recruiters Int'l, 858 F.2d 1304, 1305-07 (8th Cir. 1988) (refusal to compel arbitration of Title VII claim despite predispute agreement to arbitrate), cert. denied, 110 S. Ct. 143 (1989); Steck v. Smith Barney, Harris Upham & Co., 661 F. Supp. 543, 547 (D.N.J. 1987) (same with respect to claims under Age Discrimination in Employment Act (ADEA)). But see Pihl v. Thomson McKinnon Secs., 48 Fair Empl. Prac. Cas. (BNA) 922, 927 (E.D. Pa. 1988) (granting motion to compel arbitration of ADEA claim); Syracuse Supply Co. v. English, 23 Fair Empl. Prac. Cas. (BNA) 331, 338 (N.D.N.Y. 1979) (Title VII action stayed pursuant to 9 U.S.C. § 3 pending outcome of arbitration proceeding). For a general discussion of the conflict between arbitration and certain statutory policies, see Melzer, Labor Arbitration and Discrimination: The Parties' Process and the Public's Purposes, 43 U. CHI. L. REV. 724, 724 (1976) (“[A]rbitration is primarily an instrument of the parties' private purposes rather than a means for achieving public purposes reflected in the law . . . .”); Sterk, Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense, 2 CARDOZO L. REV. 481, 483 (1981) (public policy defense should be invoked when legislative principles involved in dispute are designed to achieve some external policy rather than foster justice between the parties).

reluctant to compel arbitration of statutory claims once thought to be beyond the scope of arbitration.\textsuperscript{10} In addition to establishing a federal policy favoring arbitration, the Court has developed a "test of arbitrability."\textsuperscript{11} This test provides that a party must abide by the terms of an arbitration agreement unless it can be shown that Congress intended "to preclude a waiver of judicial remedies for the statutory rights at issue."\textsuperscript{12}


\textsuperscript{10} See \textit{Rodriquez}, 109 S. Ct. at 1922 (overruling \textit{Wilko v. Swann}, 346 U.S. 427 (1953), to hold arbitration agreements enforceable with respect to claims arising under § 12(2) of Securities Act of 1933); \textit{McMahon}, 482 U.S. 220 (arbitration agreements enforceable with respect to claims arising under § 10(b) of Securities Exchange Act of 1934 and civil provisions of Racketeer Influenced and Corrupt Organizations Act (RICO)); \textit{Mitsubishi}, 473 U.S. 614 (arbitration agreements enforceable with respect to claims arising under Sherman Act). In each of these cases, the Court noted that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." \textit{Rodriquez}, 109 S. Ct. at 1920; \textit{McMahon}, 482 U.S. at 229-30; \textit{Mitsubishi}, 473 U.S. at 628; see also \textit{Bird v. Shearson Lehman/American Express, Inc.}, 871 F.2d 292 (2d Cir.), \textit{vacated}, 110 S. Ct. 225 (1989) (decision declining to enforce arbitration agreement with respect to Employee Retirement Income Security Act (ERISA) claim vacated for reconsideration after \textit{Rodriquez}).

\textsuperscript{11} The \textit{McMahon} Court outlined the test as follows:

\textsuperscript{12} \textit{McMahon}, 482 U.S. at 226-27.

\textsuperscript{13} 877 F.2d 221 (3d Cir. 1989). In \textit{Nicholson} the plaintiff Nicholson entered into an employment contract with CPC International Inc. (CPC) which contained an agreement to arbitrate any future disputes between the parties. \textit{Id.} at 222-23. Nicholson was terminated and filed an age discrimination claim against CPC. \textit{Id.} at 223. CPC sought to compel arbitration of Nicholson's claim according to the terms of the parties' arbitration agreement. \textit{Id.}

\textsuperscript{14} 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987). The ADEA was enacted in 1967 to prohibit age discrimination in employment and to promote employ-
tion in accordance with the terms of a predispute agreement to arbitrate. This case marked the first time that a federal appellate court applied the "test of arbitrability" in an age discrimination case. Employment discrimination claims have traditionally received preferential treatment from the Supreme Court on the issue of arbitrability, but the Court has never ruled on the arbitrability of an ADEA claim.

Although the Nicholson court applied the test of arbitrability, the court did not follow the mandate of the FAA. Instead, the court held that an employee could not be compelled to arbitrate his ADEA claim, even though he signed an individual employment contract containing an arbitration clause. This Note suggests that the Nicholson court did not properly apply the test of arbitrability. An analysis of the text and legislative history of the ADEA fails to provide the congressional command necessary to override the mandate of the FAA. The ADEA's goal of eliminating age discrimination can be enforced through arbitration, consistent with the strong mandate of the FAA.

This Note traces the history and development of labor arbitration and commercial arbitration under the FAA. In setting forth the Supreme Court's decisions in these two distinct areas of law, this Note provides a framework for analyzing Nicholson, a hybrid case involving both areas. Finally, this Note's analysis of Nicholson concludes with a proposed recommendation for protecting the rights of ADEA claimants in arbitration proceedings under the FAA.

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15. Other federal courts have addressed the issue of the arbitrability of ADEA claims. For a discussion of these decisions, see infra note 118 and accompanying text. The Nicholson court, however, is the first federal appellate court to apply the test of arbitrability to an ADEA claim since the Supreme Court articulated the test in both McMahon and Rodriguez.


17. Nicholson, 877 F.2d at 231.

18. For a discussion of the Nicholson court's application of the test, see infra notes 129-43 and accompanying text. For a proposed correct application of the test, see infra notes 163-202 and accompanying text.

19. For a discussion of the text and legislative history of the ADEA, see infra notes 122, 130-35, 142 & 171-78 and accompanying text.

20. For a discussion of the compatibility of arbitration and the goals of the ADEA, see infra notes 136-40 & 180-202 and accompanying text.

21. See infra notes 24-113 and accompanying text.

22. See infra notes 114-220 and accompanying text.

23. See infra notes 221-37 and accompanying text.
II. BACKGROUND

Arbitration is a creature of contract.\textsuperscript{24} It is a simple process of dispute resolution, voluntarily chosen by the parties, in which an impartial, private judge evaluates evidence and renders an award.\textsuperscript{25} The parties agree in advance to accept this award as final and binding.\textsuperscript{26} The parties also agree upon the rules to be followed in the arbitration procedure.\textsuperscript{27} Arbitration agreements are favored by courts because arbitration relieves congested dockets while still providing justice between the parties.\textsuperscript{28} Generally, arbitration has evolved in two contexts: labor-management arbitration evolved as a substitute for strikes, and commercial arbitration developed as an alternative to litigation.\textsuperscript{29}

A. Labor-Management Arbitration

Labor arbitration is a primary means of resolving grievances in the collective bargaining process.\textsuperscript{30} The collective bargaining process is

\begin{itemize}
\item \textsuperscript{24} H. Perritt, Employee Dismissal Law and Practice § 3.20, at 148 (2d ed. 1987).
\item \textsuperscript{25} See generally F. Elkouri & E. Elkouri, How Arbitration Works 2 (4th ed. 1985).
\item \textsuperscript{26} See id.
\item \textsuperscript{27} See id. at 222. For this reason, arbitration statutes contain little detail regarding the arbitration process from the time the arbitrator is selected until the award is issued. See, e.g., 9 U.S.C. §§ 1-7 (1988). Parties frequently agree to arbitrate under the rules of the AAA. Domke, supra note 3, § 2:02. For a discussion of the application of these rules, see infra notes 120 & 198 and accompanying text.
\item \textsuperscript{28} See Note, Contractual Agreements to Arbitrate Disputes: Waiver of the Right to Compel Arbitration, 52 S. Cal. L. Rev. 1513, 1513 (1979). There are several other advantages of arbitration: (1) arbitrators can be chosen for their expertise; (2) the atmosphere is informal; and (3) the process is less expensive than litigation. See R. Coulson, supra note 4, at 9-10.
\item \textsuperscript{29} See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). Arbitration has been described as an integral part of the labor system of self-government: “[T]he system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government.” Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1024 (1955). For a discussion of the development of commercial arbitration, see infra notes 61-112 and accompanying text.
\item \textsuperscript{30} F. Elkouri & E. Elkouri, supra note 25, at 153. Section 203(d) of the Labor-Management Relations Act (LMRA) states that arbitration is the “desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.” 29 U.S.C. § 175(d) (1982). Generally, a grievance is an assertion by a union member that the collective bargaining agreement between the union and the employer has been violated. F. Elkouri & E. Elkouri, supra note 25, at 155-56. Disputes as to the meaning or application of the collective bargaining agreement are characterized as “rights” disputes. Id. at 98-99, 109-15. In contrast, “interests” disputes relate to the formation of collective agreements. See id. at 98-99, 101-09. This Note’s background discussion focuses on the arbitration of “rights” disputes.
\end{itemize}
controlled by the union on behalf of represented employees, rather than by the individual employee. If the union and the employer are unable to resolve their disputes under the contractual grievance procedure, the dispute proceeds to the final step of arbitration. The labor arbitrator, in deciding the dispute, is controlled by the terms of the collective bargaining agreement.

The enactment of section 301 of the Labor Management Relations Act (LMRA) in 1947 gave federal courts jurisdiction to hear suits for the breach of collective bargaining agreements. Adding to this power, the Supreme Court held in Textile Workers Union v. Lincoln Mills that section 301 conferred jurisdiction on federal courts to create a body of federal law for the enforcement of arbitration provisions in collective bargaining agreements. In a trilogy of cases to follow, the Supreme

For statistics concerning the prevalence of arbitration in the collective bargaining process, see supra note 5 and accompanying text.

31. H. Perritt, supra note 24, § 3.9, at 135-38. Section 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(a) (1982), provides that the union is the exclusive representative of all employees in the bargaining unit. The union, however, has a duty to fairly represent the grievant, and the grievant may ask a court to litigate the grievance upon a showing that this duty has been breached. See Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564, 570-71 (1976) (employee’s representation by union must not be “dishonest, in bad faith or discriminatory”); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953) (union has duty to “make an honest effort to serve the interests of all [its] members, without hostility to any”).

32. See R. Coulson, supra note 5, at 15. In an effective bargaining process, less than 10% of a union’s grievances will be decided in arbitration. Id. Additionally, union officials can screen out many grievances before they reach the arbitration stage. Id.

33. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (“[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.”). Parties may also direct that the decision be consistent with applicable law and arbitrators have fairly wide discretion in applying the law. See F. Elkouri & E. Elkouri, supra note 25, at 366-68. For a discussion of the ongoing debate concerning an arbitrator’s consideration of external law, see infra notes 47 & 197 and accompanying text.


35. Section 301(a) provides that “[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .” 29 U.S.C. § 185(a) (1982).

36. 353 U.S. 448 (1957). In Lincoln Mills, the collective agreement between the union and employer provided for arbitration as the last step in the grievance procedure. Id. at 449. Several grievances reached the arbitration step, and the employer refused the union’s request for arbitration. Id. The union brought suit against the employer to compel arbitration. Id. Ultimately, the Supreme Court held that the district court had properly granted specific performance of the parties’ agreement to arbitrate. Id. at 456.

37. The Court stated that “[t]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.” Id.
Court defined the nature of collective bargaining and the roles of the court and arbitrator in relation to the collective bargaining process.\textsuperscript{38} The \textit{Steelworkers Trilogy} established a national labor policy encouraging labor arbitration as a method of industrial dispute settlement and gave elevated status to arbitration awards.\textsuperscript{39} With the enactment of Title VII of the Civil Rights Act of 1964,\textsuperscript{40} however, a conflict developed between the national policy favoring arbitration of labor disputes and the national policy against employment discrimination embodied in Title VII.\textsuperscript{41} The Supreme Court confronted this conflict in \textit{Alexander v. Gardner-Denver}.  


\textsuperscript{39} In \textit{Enterprise Wheel} the Court established a rule of judicial deference to arbitrators' decisions: "It is the arbitrator's construction which was bargained for; ... [T]he courts have no business overruling him because their interpretation of the contract is different from his." 363 U.S. at 599. The National Labor Relations Board (NLRB), which has jurisdiction over unfair labor practices under 29 U.S.C. § 160(a) (1982), has also indicated its preference for the practice of deferring to labor arbitration awards. See Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). In \textit{Collyer} the NLRB set out five factors to consider for deferral purposes: (1) the history of the parties' collective bargaining relationship; (2) the absence of anti-union animus; (3) the willingness of the respondent party to arbitrate; (4) the scope of the arbitration clause; and (5) the suitability of the dispute for arbitration. \textit{Id.} at 842; see also Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955) (NLRB should defer to arbitration award when arbitrator's decision not clearly repugnant to purposes of NLRA); Timken Roller Bearing Co., 70 N.L.R.B. 500, 501 (1946) (not within NLRB's discretion to permit union to seek redress under NLRA after arbitration proceedings resulted in decision on merits). For a further discussion of NLRB deferral, see Ray, \textit{Individual Rights and NLRB Deferral to the Arbitration Process: A Proposal}, 28 B.C.L. Rev. 1 (1986); Note, Alexander v. Gardner-Denver and Deferral to Labor Arbitration, 27 Hastings L.J. 403, 406-11 (1975).  


\textsuperscript{41} The conflict between these two policies has been clearly characterized by the Supreme Court:  

Two aspects of national labor policy are in [conflict] ... The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective-bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights. A tension arises between these policies when the parties to a collective-bargaining agreement make an employee's entitlement to
The Court, in a unanimous decision, held that an employee's statutory right to a trial de novo under Title VII is not foreclosed by the prior submission of his discrimination claim to final arbitration under a collective bargaining agreement.

The Court characterized the Alexander decision as one determining the "proper relationship" between federal courts and the arbitration procedures of collective bargaining in the enforcement of an individual's Title VII rights. The Court determined that federal courts were to have final responsibility for the enforcement of Title VII. Further, the

substantive statutory rights subject to contractual dispute-resolution procedures.


42. 415 U.S. 36 (1974). Alexander, a black employee, had been discharged and filed a grievance under the nondiscrimination clause of a collective bargaining agreement between his union and Gardner-Denver Co. Id. at 38-39. The collective agreement contained an arbitration clause, and binding arbitration was the final stage in the grievance procedure. Id. at 40-42. The arbitrator determined that Alexander had been discharged for just cause. Id. at 42. Prior to arbitration, Alexander had filed a race discrimination charge with the Equal Employment Opportunity Commission (EEOC), and the EEOC had determined that there had been no violation of Title VII. Id. at 42-43. After arbitration, Alexander filed a civil action in federal court alleging that his discharge resulted from racial discrimination in violation of Title VII. Id. The Supreme Court granted certiorari to resolve the conflict in the United States courts of appeals and the conflict in national policies. Compare Oubichon v. North Am. Rockwell Corp., 482 F.2d 569, 574 (9th Cir. 1973) (employee may seek more than one remedy for discrimination, but may not recover twice for same injury) and Hutchings v. United States Indus., 428 F.2d 303, 313 (5th Cir. 1970) (submission of discrimination grievances to arbitration is not election of remedies barring right to Title VII lawsuit) and Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969) (same) with Rios v. Reynolds Metals Co., 467 F.2d 54, 57-58 (5th Cir. 1972) (ultimate authority concerning Title VII rights is with federal courts, but judicial deference to arbitration decision allowed) and Dewey v. Reynolds Metals Co., 429 F.2d 324, 332 (6th Cir.) (plaintiff barred from suing under Title VII after final, binding decision by labor arbitrator), aff'd, 402 U.S. 689 (1970). For an extensive analysis of these conflicting positions, see Comment, Policy Conflict: Should an Arbitration Award Be Allowed to Bar a Suit Under Title VII of the Civil Rights Act of 1964?, 20 UCLA L. REV. 84 (1972); Note, supra note 39, at 411-16.

43. Alexander, 415 U.S. at 59-60.
44. Id. at 38.
45. Id. at 44. Title VII authorizes the EEOC to promote voluntary compliance with the statute, conciliate disputes and institute civil actions. See 42 U.S.C. § 2000e-5(b), -5(f) (1982). Title VII provides for similar handling of Title VII claims by state and local agencies. See id. § 2000e-5(c), -5(d). The Court felt that since the EEOC was not empowered to adjudicate claims, final enforcement power for Title VII rests with the federal courts. Alexander, 415 U.S. at 44-45. Title VII grants courts the power to order injunctive relief, affirmative action, reinstatement or back pay. See 42 U.S.C. § 2000e-5(g) (1982). From this scheme, the Court found a general legislative intent to accord "parallel or overlapping remedies" against discrimination. Alexander, 415 U.S. at 47. Thus, the
Court set forth three reasons for retreating from its former deference to labor arbitration: 1) arbitration procedures are not adequate for the resolution of Title VII claims; 2) an employee's individual statutory rights under Title VII are independent of contractual rights under a collective bargaining agreement; and 3) a union may not provide adequate protection of an employee's Title VII rights.

Court concluded that submission of a claim to one forum does not preclude later submission to another. *Id.* at 47-48, 59-60.

46. For a discussion of the Court's deference to labor arbitration, see supra notes 34-39 and accompanying text.

47. *Alexander*, 415 U.S. at 56. The Court cited several problems concerning the arbitration of discrimination claims. First, the Court was concerned that an arbitrator would not be bound to follow the directives of Title VII in deciding a discrimination claim: "The arbitrator . . . has no general authority to invoke public laws that conflict with the [collective bargaining agreement]." *Id.* at 55. Thus, "[w]here the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement." *Id.* at 57; see United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (arbitrator confined to interpretation and application of collective bargaining agreement). Second, the labor arbitrator has expertise in the "laws of the shop," but is not generally familiar with public law concepts. *Alexander*, 415 U.S. at 57. For this reason, the Court held that the resolution of statutory/constitutional issues is a responsibility for the courts. *Id.* Third, the Court found that arbitral factfinding is not equivalent to judicial factfinding: "The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and . . . discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." *Id.* at 57-58. After pointing out such deficiencies in arbitration, however, the Court reaffirmed its general endorsement of labor arbitration: "This is not to suggest, of course, that arbitrators do not possess a high degree of competence with respect to the vital role in implementing the federal policy favoring arbitration of labor disputes." *Id.* at 57 n.18.


48. *Alexander*, 415 U.S. at 49-50. Article 5, § 2 of Alexander's collective bargaining agreement provided that "there shall be no discrimination against any employee on account of race." *Id.* at 39. The Court, however, found that employees have a nonwaivable, public right under Title VII that is separate and distinct from the rights created through the "majoritarian processes" of collective bargaining. *Id.* at 51. The Court acknowledged the ability of the union to waive statutory rights related to collective activity, such as the right to strike. *Id.* (citing Boys Mks., Inc. v. Retail Clerks Union, 398 U.S. 235 (1970)). The Court held, however, that as an employee's Title VII rights to equal employment are individual rights, they may not be prospectively waived by a union. *Id.*

49. *Id.* at 58 n.19. The Court was concerned that the union had exclusive control over the presentation of an individual's grievance. The Court stated that
The Supreme Court’s refusal to give preclusive effect to a labor arbitration award implicating statutory rights was extended beyond the realm of Title VII in *Barrentine v. Arkansas-Best Freight System*. In *Barrentine* the Court held that an individual’s right to a judicial forum under the Fair Labor Standards Act (FLSA) is not barred by prior submission of his grievance to collective bargaining dispute procedures. Whereas “harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made.” *Id.* (citing Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944)). The Court found it noteworthy that Congress extended the protections of Title VII against unions. *Id.* (citing 42 U.S.C. § 2000e-2(c)). One commentator has argued that the Court’s awareness of the history of union discrimination was a major factor in the *Alexander* decision:

The Court’s willingness to depart from its long pattern of promotion of arbitration makes sense only when one considers the unstated reasons for its decision. Rather than the legislative history, the determinant appears to have been the Court’s distrust, based on a lengthy record of failure to prosecute, of the sincerity of unions in dealing with racial grievances.

... [T]he fundamental reason for [the Court’s] decision[] [is] that the union-controlled arbitral process cannot be counted on to vindicate these rights against discrimination.


50. 450 U.S. 728 (1981). In *Barrentine* truck drivers were required to make pre-trip safety inspections of vehicles assigned to them. *Id.* at 730. The drivers were not compensated for this inspection time and, consequently, filed a claim for wages under the collective bargaining agreement. *Id.* at 730-31. Their grievances were rejected in final and binding arbitration, and the drivers filed suit in federal district court under the minimum wage provisions of the Fair Labor Standards Act (FLSA). *Id.* at 731-32. The district court did not address the FLSA claim. The Court of Appeals for the Eighth Circuit affirmed, emphasizing that because the drivers had submitted their grievances to arbitration, they were barred from asserting an FLSA claim in court. *Barrentine v. Arkansas-Best Freight Sys.*, 615 F.2d 1194, 1199-1200 (8th Cir. 1980), *rev’d*, 450 U.S. 728 (1981).


52. *Barrentine*, 450 U.S. at 745. As in *Alexander*, the Court was faced with resolving a conflict between two contrary policies: one encouraging the negotiation of terms and conditions of employment through arbitration, the other guaranteeing specific substantive rights to covered employees. *Id.* at 734-35. Before *Barrentine*, those few courts considering the relationship between wage claims and arbitration were divided on the issue. See Westerkamp, *Barrentine: Milestone or Detour?*, 34 Lab. L.J. 46, 54 & n.35 (1983). In one significant case, Satterwhite v. United Parcel Serv., Inc., 496 F.2d 448 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974), the court distinguished *Alexander* to hold that “[t]he high priority which Congress has given to protection against racial discrimination has no application to a dispute over rate of pay.” *Id.* at 452.

The *Barrentine* Court ignored the analysis of the Eighth Circuit below and prior FLSA cases, however, and reiterated its holding and rationale in *Alexander*.
Alexander had been a unanimous decision, a strong dissent in Barrentine argued in favor of the national labor policy favoring arbitration. Further, in McDonald v. City of West Branch the Court held that when rights are asserted in a civil action under section 1983, a federal court should not afford preclusive effect to an adverse arbitration award in the collective bargaining process.

Alexander, Barrentine and McDonald established precedent that a labor arbitration award may not be used as a bar to an employee’s assertion of statutory rights in a judicial forum. Despite this precedent, certain that arbitration procedures under a collective bargaining agreement do not adequately protect individual statutory rights. Barrentine, 450 U.S. at 743-44. The Court also looked at the enforcement scheme of the FLSA which grants individuals broad access to the courts. Id. at 740 (citing 29 U.S.C. § 216(b)). The Court found that “[n]o exhaustion requirement or other procedural barriers are set up, and no other forum for enforcement of statutory rights is referred to or created by the statute.” Id. For a comparison of the enforcement schemes of the FLSA, Title VII, and the ADEA, see infra notes 130-33 & 145 and accompanying text.

53. Chief Justice Burger, joined by Justice Rehnquist, dissented, arguing that the Court was moving in “a direction counter to the needs and interests of workers and employers and contrary to the interests of the judicial system.” Barrentine, 450 U.S. at 746 (Burger, C.J., dissenting). The Chief Justice sought to distinguish Alexander on the basis of a “vast difference” between resolving a discrimination claim and settling a typical wage dispute. Id. at 749 (Burger, C.J., dissenting). Whereas unions have a history of discrimination, the union and the employee are “traditional allies” in enforcing wage claims. Id. at 750 (Burger, C.J., dissenting). The Chief Justice was especially concerned with the increased burden on federal courts from such elementary disputes. Id. at 752 (Burger, C.J., dissenting).

54. 466 U.S. 284 (1984). In McDonald petitioner McDonald was discharged from the West Branch police force and filed a grievance pursuant to the collective bargaining agreement between his union and the city. Id. at 285-86. After receiving an unfavorable arbitration award, McDonald filed an action in federal district court alleging that he had been discharged for exercising his first amendment rights. Id. at 286.


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

Id.

56. McDonald, 466 U.S. at 292. The Supreme Court applied its rationale from Alexander and Barrentine to hold that arbitration could not provide an adequate “substitute” for judicial proceedings in adjudicating § 1983 claims. Id. at 290-92. An additional factor in McDonald was the Court’s interpretation of the legislative history behind the statute: “[T]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights . . . .” Id. at 2910 (quoting Mitchum v. Foster, 407 U.S. 225, 242 (1972)).

57. For additional Supreme Court cases in this area, see United States Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 357 (1971) (seamen may assert wage
language in the cases left unresolved questions about the future of labor arbitration of statutory rights. For example, although the Alexander Court rejected the argument that federal courts should "defer" to arbitral decisions on discrimination claims, it recognized that "great weight" could be accorded to an arbitral decision that had given full consideration to Title VII. Additionally, despite its focus on the deficiencies of the arbitral process, the Court encouraged employers and claim in federal court under Seaman's Wage Act despite failure to pursue collectively bargained arbitral remedies; McKinney v. Missouri-Kansas-Texas R.R., 357 U.S. 265, 268 (1958) (employee returning from military service need not pursue arbitration prior to asserting seniority rights in federal court under Universal Military Training and Service Act).

58. Alexander, 415 U.S. at 60 & n.21. Respondent Gardner-Denver contended that federal courts should defer to arbitral decisions where (1) the discrimination claim was before the arbitrator; (2) the collective bargaining agreement prohibited the form of discrimination charged in the Title VII suit; and (3) the arbitrator has the authority to rule on the claim and fashion a remedy. Id. at 55-56. This deferral proposal is analogous to the NLRB's policy of deferring to arbitration awards on certain statutory issues. For a discussion of NLRB deferral, see supra note 39 and accompanying text. The Court rejected this proposal and a stricter deferral standard set forth by the Fifth Circuit in Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972). Alexander, 415 U.S. at 58 & n.20. For a discussion of the Rios standard, see Note, Judicial Deference to Arbitrators' Decisions in Title VII Cases, 26 Stan. L. Rev. 421 (1974).

59. Alexander, 415 U.S. at 60 & n.21. The "great weight" standard is set forth in the Court's famous footnote 21:

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, 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.

Id. The Court also cited to this footnote in Barrentine, 450 U.S. at 743 n.22, and McDonald, 466 U.S. at 292 n.13. This footnote continues to cause interpretation problems in the lower courts. See Aksen, supra note 47, at 27 ("[W]hile unconvinced of the soundness of the five-point Rios deferral standards, [the Court] has nonetheless transposed them into a five-point 'great weight' rule of evidence."); Edwards, Arbitration of Employment Discrimination Cases: An Empirical Study, Arbitration—1975, Proceedings of the Twenty-Eighth Annual Meeting National Academy of Arbitrators 64-70 (1975) (judicial decisions since Alexander have increased possibility that courts will defer to arbitrators' opinions in Title VII cases); Note, Disarray in the Circuits After Alexander v. Gardner-Denver Co., 9 U. Haw. L. Rev. 605, 641 (1987) (Congress or Supreme Court must set clearer guidelines).
employees to arbitrate grievances. It appears that the Court, although retreating from its former deferential posture, has not caused great harm to the federal policy favoring arbitration of labor disputes.

B. Arbitration in the Commercial Context

Congress enacted the Federal Arbitration Act (FAA) to counter judicial hostility to arbitration. This hostility eventually disappeared.

60. Alexander, 415 U.S. at 55. The Court outlined several reasons why employers and employees have a strong incentive to arbitrate grievances. For example, the consequences of a strike may make arbitration essential. Id. The Court also noted the benefits of arbitration as an “inexpensive and expeditious means” for resolving disputes. Id. The Court stated that “[w]here the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee.” Id.

The Court also left open the question of whether an employee could voluntarily waive his cause of action under Title VII as part of a voluntary settlement. Id. at 52 & n.15. For a further discussion of this waiver issue, see infra note 182 and accompanying text.

61. In fact, studies since Alexander have concluded that few arbitration awards involving statutory issues are overturned. See Hoyman & Stallworth, Arbitrating Discrimination Grievances in the Wake of Gardner-Denver, MONTHLY LAB. REV., Oct. 1983, at 3, 6 (17% of arbitral decisions were reviewed by courts; only 1.2% were reversed); see also J. Steiner, supra note 5, at 258 n.44 (courts have only occasionally used their authority to review arbitrated discrimination grievances). With this hindsight, it is arguable that the Supreme Court may have recognized that arbitration is effective in protecting Title VII rights.

Additionally, in contrast to Alexander, Barrentine and McDonald, the Supreme Court has favored labor arbitration in other cases. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43-44 (1987) (reviewing court's refusal to enforce arbitrator's interpretation of collective bargaining agreement limited to situations where interpretation violates well defined public policy); W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 764 (1983) (federal court may not overrule arbitrator's decision simply because court believes its interpretation of collective agreement is better one); Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 70 (1975) (Alexander policy favoring de novo review of Title VII claims does not mean that minority employees may bypass grievance and arbitration procedure when racial grievance involved).

in the federal courts and, with the exponential growth of litigation, arbitration under the FAA is now an encouraged form of dispute resolution. As recently noted by the Supreme Court, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration." The primary objective of the FAA is to enforce arbitration provisions in commercial contracts. The scope of the FAA has also been extended beyond commercial transactions to enforce the arbitration of disputes in many areas. The FAA provides two enforcement procedures. Section 3 provides for the stay of judicial proceedings on "any

1986, 45 states had adopted statutes enforcing agreements to arbitrate. Note, supra, at 1139-40 & n.32.

64. For a discussion of the expansion of federal docket and encouragement of arbitration, see supra note 1 and accompanying text.


67. Courts have liberally interpreted the FAA's requirement that the contract evidence a "transaction involving commerce." See Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1068-69 (2d Cir. 1972) (contract between professional basketball player and club is "contract evidencing a transaction involving commerce" within meaning of 9 U.S.C. § 2); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 n.7 (1967) (refusing to limit FAA to "contracts between merchants for the interstate shipment of goods"). The FAA has been used to decide disputes arising under individual employment contracts, insurance agreements, license agreements and medical malpractice suits. See generally Domke, supra note 3, § 13:00.

One court has held that the FAA is intended to apply in as wide an area as is within the constitutional reach of Congress and federal law is to prevail as to all matters arising under the statute.

... [F]ederal policy regarding the enforceability of contracts to arbitrate is so pervasive that arbitration should be decreed in any case where federal standards are met. Associated Metals & Minerals Corp. v. The S.S. Mihalis Angelos, 234 F. Supp. 236, 237-38 (S.D.N.Y. 1964) (citations omitted).

The extent to which the FAA is applicable to labor arbitration is a debated issue. Section 1 of the FAA provides: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988). Courts are divided on whether collective bargaining agreements are "contracts of employment" within the meaning of § 1. See Ray, supra note 38, at 64-66. Courts are also divided on whether the legislative history of the FAA, which reveals that Congress was concerned with commercial, and not labor arbitration, is conclusive on the issue. See id. at 75-81. In any event, the FAA has been used to expand federal labor law. See generally H. Perritt, supra note 24, § 3.22, at 152 & n.49 (discussion of use of FAA by federal courts to supply substantive law in labor arbitration cases).
issue referable to arbitration" pending that arbitration, and section 4 establishes a procedure for compelling a party to submit to arbitration. The FAA also provides for judicial enforcement, vacation, or modification of an arbitration award. When confronted with enforcement of an arbitration agreement, a federal court can decide issues regarding the making and the scope of performance of the arbitration agreement, but cannot decide on the merits of the dispute. A major limitation on the parties' ability to compel arbitration under the FAA can arise, however, when public or statutory policy demands that the dispute be resolved in a judicial forum.

The Supreme Court was first confronted with reconciling the policy

69. Id. § 4.
70. Id. § 13. Section 13 provides in relevant part that [t]he judgment . . . entered [on the arbitration award] shall have the same force and effect . . . as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.
71. Id. § 10. Section 10 sets forth the following grounds for vacation:
(a) Where the award was procured by corruption, fraud, or undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) 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.
(d) 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.
(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
72. Id. § 11.
73. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967). While parties to an arbitration agreement cannot be compelled to arbitrate a dispute that is not within the scope of the agreement, federal courts have applied a lenient standard in determining this scope. See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); Sharon Steel Corp. v. Jewell Coal & Coke Co., 735 F.2d 775, 778 (3d Cir. 1984) (court must only determine if claim of arbitrability is "plausible"). For a detailed discussion of the approach of federal courts in determining the issue of arbitrability, see Note, supra note 63, at 1147-52.
behind the FAA and a contrary statutory policy in Wilko v. Swan.\textsuperscript{75} In Wilko a customer had signed an agreement to arbitrate any future controversies with his broker.\textsuperscript{76} Despite this agreement, the customer brought suit against the broker under the Securities Act of 1933 (1933 Act).\textsuperscript{77} Contrary to the judicial attitude favoring arbitration and the policies of the FAA, the Court held that the statutory right under the 1933 Act to select a judicial forum could not be waived by a predispute agreement to arbitrate.\textsuperscript{78} The Court found that the policy behind the 1933 Act was to protect investors, and this policy could not be adequately enforced in the arbitration process.\textsuperscript{79}

Over the years the Wilko doctrine has gone through a process of erosion.\textsuperscript{80} The scope of arbitration has been extended in piecemeal

\textsuperscript{76} Id. at 432 & n.15.
\textsuperscript{77} Id. at 428. Wilko sued his broker and brokerage firm under the 1933 Act for misrepresenting material facts in the sale of a security. Id. at 428-29. The 1933 Act, codified as amended at 15 U.S.C. §§ 77a-77aa (1988), created a regulatory scheme governing the conduct of all securities issuers, underwriters, dealers and brokers. In § 12(2) of the Act, Congress gave purchasers of securities a remedy for misrepresentation by a seller. 15 U.S.C. § 77l(2) (1988). Section 22 of the 1933 Act gave the purchaser broad access to federal or state courts. Id. § 77v. This and other provisions of the 1933 Act were supported by § 14 thereof which states that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [SEC] shall be void." Id. § 77n.

\textsuperscript{78} Wilko, 346 U.S. at 438. The Court determined that an agreement to arbitrate is a stipulation to waive the securities purchaser's right of forum selection under the 1933 Act. Id. at 434-35. The Court found that § 14 of the 1933 Act (voiding waivers) was designed to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the 1933 Act. Id. at 435. The Court noted that "[w]hen the security buyer...waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him..." Id.

\textsuperscript{79} Id. at 435-36. The Court set forth two criticisms of the arbitration process: (1) arbitrators are "without judicial instruction on the law," and, as no complete record of the proceedings is required, their statutory analysis cannot be examined; and (2) the power to vacate an award and the opportunity for judicial determination of legal issues are limited. Id. at 436. In contrast, Justice Frankfurter noted in his dissenting opinion that the majority's opinion did not rest on any evidence in the facts or record "of which [it could] take judicial notice...that the arbitral system...would not afford the plaintiff the rights to which he is entitled." Id. at 439 (Frankfurter, J., dissenting).

fashion to many areas of federal statutory concern. This erosion process has culminated in recent decisions by the Supreme Court which have strengthened and expanded the FAA.

The decline of Wilko began in Scherk v. Alberto-Culver Co. The Scherk Court refused to extend the Wilko doctrine to a claim under the Securities Exchange Act of 1934 (1934 Act). The Court held that the parties' agreement to arbitrate should be enforced in accordance with the provisions of the FAA. Furthermore, in three decisions following


82. For a discussion of these recent decisions, see infra notes 83-113 and accompanying text. One commentator has accurately summarized the expanded state of the FAA:

(1) [It] requires arbitration of statutory disputes in both international and domestic contexts, (2) creates a body of substantive federal law that is preemptive and binding on the states, (3) mandates arbitration of pendent arbitrable state law claims in federal statutory cases, and (4) mandates the arbitration of federal statutory claims absent a clear Congressional intent to the contrary.


83. 417 U.S. 506 (1974). In Scherk an American company, Alberto-Culver, purchased several business enterprises and trademark rights from a German citizen. Id. at 508. The contract of sale contained a clause providing for arbitration of any disputes in Paris under the rules of the International Chamber of Commerce. Id.


85. Scherk, 417 U.S. at 519-20. The Scherk Court observed in dicta that Wilko was not controlling in a case under § 10(b) of the 1934 Act: "[A] colorable argument could be made that even the semantic reasoning of the Wilko opinion does not control the case before us. . . . There is no statutory counterpart of § 12(2) [of the 1933 Act] in the [1934 Act]." Id. at 513. For a discussion of the differences between the 1933 Act and the 1934 Act, see McCauliff & Tyms, supra note 77, at 33-36. Despite the Court's discussion of the differences between the 1933 Act and the 1934 Act, the Court based its decision on "crucial differences" between the arbitration agreement in Wilko and in the present case. Scherk, 417 U.S. at 515. In Wilko, there was no question that United States securities laws would apply. Id. In Scherk the Court was primarily concerned with conflict-of-law problems arising in an international context and held that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to
Scherk, the Court gave strength to the FAA by granting it preemptive status. Finally, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. achievement of the orderliness and predictability essential to any international business transaction.” Id. at 516. The Scherk Court also noted that its conclusion was confirmed by international developments and domestic legislation subsequent to Wilko. Id. at 520 n.15. For example, in 1970 the United States adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 3 U.S.T. 2517, T.I.A.S. No. 6997. Chapter 2 of the FAA, 9 U.S.C. § 201, provides for enforcement of the Convention. Scherk, 417 U.S. at 520 n.15.


87. In these three cases, the Supreme Court established the FAA, through federal preemption, as the governing law in state courts. The Court first addressed the issue of preemption in Moses H. Cone and concluded that, as a matter of substantive federal law, the FAA established “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” Moses H. Cone, 460 U.S. at 24. The Court ruled that a federal court must compel arbitration under the FAA, even when a prior state action was pending for a declaratory judgment that the dispute was not arbitrable. Id. at 25-27. In Southland Corp. the Court held that § 2 of the FAA is not procedural, but substantive federal law enacted under Congress’ commerce power. Southland Corp., 465 U.S. at 11. Thus, the FAA preempts any state law that undermines the FAA’s policy of enforcing arbitration awards. Id. at 16; see, e.g., Perry v. Thomas, 482 U.S. 483, 492 (1987) (FAA preempted provision of state labor code which allowed wage collection suit despite existence of arbitration agreement); see generally Comment, Commercial Arbitration: Section 2 of the Federal Arbitration Act Preempts State Law in the Field of Commercial Arbitration, 10 J. Corp. L. 767 (1985). In Dean Witter the Court extended the mandate of the FAA to state claims. Dean Witter, 470 U.S. at 216-17. The Court rejected the “doctrine of intertwining” which holds that when arbitrable and nonarbitrable claims arising out of the same transaction are sufficiently intertwined, a district court may use its discretion and try all of the claims in federal court. Id. The Court held that district courts are required under the FAA to compel arbitration of arbitrable pendent state law claims despite any intertwining of those claims with nonarbitrable federal claims. Id. at 217. The Court noted that “[t]he preeminent concern of Congress in [enacting the FAA] was to enforce private agreements [to arbitrate] . . . and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is ‘piece-meal’ litigation.” Id. at 221.

In addition to granting preemptive status to the FAA, the Dean Witter decision is significant in that Justice White’s concurring opinion furthered the erosion of Wilko. In Dean Witter Byrd brought suit alleging violation of § 10(b) of the 1934 Act, and the Court decided that the § 10(b) issue was not properly before it. Id. Justice White, however, elaborated on the issue of the arbitrability of § 10(b) claims, stating that “Wilko’s reasoning cannot be mechanically transplanted to the 1934 Act,” and the premise that 1934 Act claims are not arbitrable “is a matter of substantial doubt.” Id. at 224 (White, J., concurring).

88. 473 U.S. 614 (1985). Mitsubishi involved a dispute arising under an in-
the Supreme Court set forth a strong policy that the FAA mandates enforcement of predispute arbitration agreements, even when statutory claims are involved.\(^8\) The Court found "no warrant in the [FAA] for implying in every contract within its ken a presumption against arbitration of statutory claims."\(^9\)

In *Mitsubishi* the Court set forth a test of arbitrability for statutory claims whereby a party must abide by the terms of an arbitration agreement unless it can be shown that Congress intended to preclude waiver of a judicial forum for the statutory rights at issue.\(^1\) Finding no such congressional intent in the Sherman Act,\(^2\) the Court uprooted a well-supported antitrust policy exception to the FAA.\(^3\) The Court ordered
arbitration pursuant to the terms of the parties' arbitration agreement and the FAA. 94

Less than five years after striking down the antitrust exception to arbitration in Mitsubishi, the Court had to weigh the FAA policy favoring arbitration against the policies of the 1933 Act, the 1934 Act and the Racketeer Influenced and Corrupt Organizations Act (RICO). 95 In Shearson/American Express, Inc. v. McMahon 96 the Court was faced with reconciling Mitsubishi's overwhelming support for arbitration with Wilko's hostility toward the arbitration of securities disputes. The McMahon Court added force to the federal policy favoring arbitration and declined to extend the Wilko rationale to claims under the 1934 Act and RICO. 97

94. Id. at 640. The Court concluded that "concerns of international com-

ity," and the "need of the international commercial system for predictability in the resolution of disputes" required enforcement of the parties' agreement to arbitrate. Id. at 629. The Court directed national courts to "shake off the old judicial hostility to arbitration." Id. at 638.


96. 482 U.S. 220 (1987). Eugene and Julia McMahon filed suit against Shearson and its registered representative, alleging state law fraud claims of fraudulent trading on their account in violation of § 10(b) of the 1934 Act and RICO. Id. at 223. Shearson moved to compel arbitration under § 3 of the FAA pursuant to an arbitration clause in the McMahan's customer agreements. Id.


97. McMahon, 482 U.S. at 228, 242.
McMahon was an influential decision for several reasons. First, it resolved a substantial split among the circuits as to the arbitrability of 1934 Act claims.\(^9\) Second, the Court addressed the arbitrability of civil RICO claims for the first time.\(^9\) But most significantly, the Court clarified the Mitsubishi test, establishing strict guidelines for courts to apply when balancing the competing policies behind the FAA and a federal statute.\(^10\) Under the McMahon test of arbitrability, congressional intent "to preclude waiver of judicial remedies for the statutory rights at issue" must be demonstrated (1) in the text or legislative history of the statute or (2) from an "inherent conflict" between arbitration and the statute's purposes.\(^10\)

The McMahon Court applied this test to the 1934 Act and RICO and found no text or legislative history indicating Congress' intent to preclude waiver of a judicial forum,\(^10\) nor any inherent conflict between arbitration and the statutes' purposes.\(^10\) Accordingly, the Court or-
dered arbitration of all the claims. In establishing a mandate that agreements to arbitrate be enforced with respect to statutory claims, the Court gave enduring strength to the FAA and gave contracting parties a strong incentive to arbitrate.

As a result of McMahon, investors attempted to avoid arbitration by gaining access to the federal courts under section 12(2) of the 1933 Act and Wilko. In Rodriguez de Quijas v. Shearson/American Express, Inc. decisions involving the FAA. Id. at 231-32. For a discussion of the Court's rejection of these criticisms in Mitsubishi, see supra note 93 and accompanying text.

The Court noted that Wilko's mistrust of the arbitration process was also misplaced in light of changes in the regulatory structure of the securities laws. McMahon, 482 U.S. at 233. Since the 1975 amendments to § 19 of the 1934 Act, 15 U.S.C. § 78s, the SEC now has expansive power to ensure the adequacy of the arbitration procedures employed by self-regulatory organizations (SROs), i.e., the national securities exchanges and registered securities associations. Id. Under these amendments, no change in SRO rules can be made without SEC approval and the SEC has broad power to modify any SRO rules. See 15 U.S.C. § 78s(b)(2)-(c) (1988). For a further discussion of the 1975 amendments and the current rules employed in securities arbitration, see McCauliff & Tyms, supra note 77, at 46-50.

With respect to the McMahons' RICO claim, the Court found no "irreconcilable conflict" between arbitration and RICO's underlying purposes. McMahon, 482 U.S. at 242. The Court, noting that antitrust matters are just as complex as RICO claims, reaffirmed its statement in Mitsubishi that "potential complexity should not suffice to ward off arbitration." Id. at 239 (quoting Mitsubishi, 473 U.S. at 633). The Court also addressed the argument, which it had previously rejected in Mitsubishi, that the public interest in enforcement of RICO and the deterrent nature of the statute's treble damages provision precludes submission of RICO claims to arbitration. Id. at 240-41. The Court again emphasized that the treble damages provision served more of a remedial than a policing function. Id. Finally, the Court noted that because civil RICO is more typically used against legitimate enterprises, instead of against organized crime as intended, "[t]he private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff, and does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute." Id. at 242.

104. Id. at 238, 242.

105. Id. at 226. "The Arbitration Act thus establishes a 'federal policy favoring arbitration,' . . . [and the] duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." Id. (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).


107. 109 S. Ct. 1917 (1989). In Rodriguez the petitioners brought an action against Shearson/American Express alleging violations of the 1933 Act and the 1934 Act. The district court ordered arbitration of the 1934 Act claims, but followed Wilko in denying arbitration of the 1933 Act claims. Id. at 1919. The Fifth Circuit reversed, ordering arbitration of all the claims because the Supreme Court's subsequent decisions had rendered the Wilko doctrine obsolete. Rodriguez de Quijas v. Shearson/Lehman Bros., 845 F.2d 1296, 1299 (5th Cir. 1988), aff'd, 109 S. Ct. 1917 (1989).
the Court finally and expressly overruled Wilko and held that a predispute arbitration agreement is enforceable with respect to claims under the 1933 Act.\textsuperscript{108} The Court found that Wilko was pervaded by "the old judicial hostility to arbitration,"\textsuperscript{109} a hostility that had gone through a process of "erosion."\textsuperscript{110} Rodriguez ended any confusion with respect to arbitration of securities disputes and furthered the FAA's policy of enforcing all contractual agreements to arbitrate.\textsuperscript{111}

The FAA has come a long way since its enactment in 1925. It is now definitively established as a substantive federal law requiring "rigorous enforcement" of arbitration agreements.\textsuperscript{112} The Supreme Court's favorable view of arbitration of statutory claims is most adequately summarized by its statement in Mitsubishi: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."\textsuperscript{113} As this background discussion has demonstrated, however, the right of a party to enforce a predispute arbitration agreement with respect to statutory claims may depend on distinctions between labor and commercial arbitration, and the nature of the rights at issue.

### III. DISCUSSION

In Nicholson v. CPC International Inc.\textsuperscript{114} the United States Court of Appeals for the Third Circuit considered the arbitrability of a claim under the Age Discrimination in Employment Act (ADEA).\textsuperscript{115} Nicholson

\begin{itemize}
  \item 108. Rodriguez, 109 S. Ct. at 1922. The Court found that it would be "undesirable for the decisions in Wilko and McMahon to continue to exist side by side," and therefore overruled Wilko. \textit{Id.}
  \item 109. \textit{Id.} at 1920 (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).
  \item 110. \textit{Id.} For a discussion of this erosion process, see \textit{supra} notes 80-105 and accompanying text. The Court also noted that the broad venue and jurisdictional provisions of the 1933 Act which the Wilko Court found to be non-waivable are present in other federal statutes which have not been interpreted to prohibit enforcement of predispute arbitration agreements. Rodriguez, 109 S. Ct. at 1920-21 (citing McMahon (construing § 27 of 1934 Act and RICO) and Mitsubishi (construing antitrust laws)).
  \item 111. Rodriguez, 109 S. Ct. at 1921.
  \item 112. \textit{Id.} at 1920 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).
  \item 113. Mitsubishi, 473 U.S. at 628.
  \item 114. 877 F.2d 221 (3d Cir. 1989). Circuit Judge Sloviter wrote the opinion of the court. Circuit Judge Becker filed an opinion dissenting in part.
  \item 115. 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987). The ADEA prohibits employment discrimination based on age by certain employers, employment agencies and labor organizations. \textit{Id.} § 623(a)-(c). The purposes of the ADEA are to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age employment." \textit{Id.} § 621(b).
\end{itemize}
marked the first time that a federal appellate court applied the test of 'arbitrability' to an age discrimination claim since the Supreme Court's declaration in *Rodriguez*, *McMahon* and *Mitsubishi* (the "Third Trilogy") that the mandate of the FAA extends to statutory claims. The Supreme Court has never ruled on the arbitrability of an ADEA claim.

A. Overview of the Decision

The plaintiff Nicholson was employed by CPC International Inc. (CPC) pursuant to an individual employment contract. This contract


117. See *Rodriguez*, 109 S. Ct. at 1920; *McMahon*, 482 U.S. at 226; *Mitsubishi*, 473 U.S. at 625. It is suggested that the term "Third Trilogy" is an appropriate recognition of the Supreme Court's recent overwhelming support for the arbitration of statutory claims. For a discussion of the "First Trilogy" (the Steelworkers Trilogy) and the "Second Trilogy," see supra notes 38-39 & 86-87 and accompanying text.


119. *Nicholson*, 877 F.2d at 222. Nicholson was hired as an attorney by CPC in 1957 and became Vice-President for Corporate Financial Services in 1981. *Id.* In 1986, in anticipation of a possible takeover, Nicholson and other corporate officers signed executive employment agreements which defined compensation, benefits, job title and termination procedures. *Id.* at 222-23.

The issue whether the FAA applies to employment contracts was not raised in this case. It is noted that several state statutes providing for enforcement of agreements to arbitrate future disputes have specifically excluded employer-employee disputes from their coverage. See, e.g., Md. CTS. & JUD. PROC. CODE ANN. § 3-206 (1984) (excluding employer-employee agreements unless expressly provided for in agreement). In light of the Supreme Court's decisions, however, that the FAA preempts any state law that undermines the enforcement of arbitration agreements, such exclusions may have little effect. See Southland Corp. v. Keating, 465 U.S. 1 (1984). For a discussion of the application of the FAA beyond commercial contracts, see supra note 67 and accompanying text.
contained an arbitration clause. After having worked for CPC for thirty years, Nicholson was informed that his position was being eliminated in a corporate restructuring. Nicholson then filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC). The charge was terminated at Nicholson’s re-

120. The arbitration clause provided:
Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration, conducted before a panel of three arbitrators in New York City in accordance with the rules of the American Arbitration Association then in effect. Judgment may be entered on the arbitrators’ award in any court having jurisdiction. The expense of such arbitration shall be borne by the company.

Nicholson, 877 F.2d at 223. Although not decided in the case, the majority and dissenting opinions expressed different views concerning application of the AAA Rules. The Nicholson majority argued that the AAA Commercial Arbitration Rules should be applied. Id. at 228 n.7; see Commercial Arbitration Rules of the American Arbitration Association, reprinted in R. COULSON, supra note 4, at 33-40 (hereinafter Commercial Rules). The dissent was of the opinion that the AAA Employment Dispute Arbitration Rules were applicable. Nicholson, 877 F.2d at 234 n.4, 240 n.10 (Becker, J., dissenting); see Employment Dispute Arbitration Rules of the American Arbitration Association, reprinted in Coulson, Fair Treatment—Voluntary Arbitration of Employee Claims, Arb. J., Sept. 1978, at 23, 27-29 (hereinafter Employment Rules). The Employment Rules were created in response to concerns with delays in government employment antidiscrimination agencies and the federal courts. Id. at 25. It has also been suggested that the Employment Rules were issued in response to Alexander’s criticisms of the adequacy of the arbitral forum for determination of discrimination claims. See Nicholson, 877 F.2d at 234 n.4 (Becker, J., dissenting). The Employment Rules provide for discovery, formal rules of evidence and other procedural safeguards which are usually lacking in labor arbitration, and under the Commercial Rules. See Coulson, supra, at 24-25, 28. For a proposal applying the Employment Rules, see infra notes 225-37 and accompanying text.

121. Nicholson, 877 F.2d at 223. Studies have found that the majority of ADEA claimants, like Mr. Nicholson, are upper-middle class professional employees. See, e.g., Schuster & Miller, An Empirical Assessment of the Age Discrimination in Employment Act, 38 INDUS. & LAB. REL. REV. 64, 68 (1984) (study of 153 federal court cases indicated that majority of ADEA suits brought by well paid professional/managerial employees over age of 50). Because these individuals are rarely union members, they are not covered by seniority provisions in collective bargaining agreements. Id. at 68-69; see generally Inside Views of Corporate Age Discrimination: Hearing Before the House Select Comm. on Aging, 97th Cong., 2d Sess. (1982).


The initial procedural requirement under the ADEA is that a charge alleging unlawful discrimination be filed with the EEOC. Id. § 626(d). This charge must be filed within 180 days following the alleged discrimination. Id. § 626(d)(1). If the individual resides in a state that has a statute prohibiting age discrimination in employment and an agency empowered to grant relief under the statute, the individual must file a charge with both the state agency and the
quest, and Nicholson filed an ADEA suit against CPC. The district court CPC moved for an order compelling arbitration of Nicholson’s claims, but was denied. The Third Circuit granted CPC’s petition for leave to appeal.

The Third Circuit commenced its analysis of Nicholson with an acknowledgement that the Supreme Court is no longer “reluctant” to compel arbitration of statutory claims. In its recognition of the Third Trilogy, the court applied the McMahon “test of arbitrability.”

EEOC within 300 days of the alleged discrimination. Id. § 626(d)(2). For a more detailed discussion of the procedures and remedies of the ADEA, see infra notes 123, 132 & 173-76 and accompanying text.

Nicholson, 877 F.2d at 223. After filing a charge, the aggrieved individual must wait 60 days before filing a lawsuit. 29 U.S.C. § 626(d) (1982). The purpose of this period is to allow time for the EEOC to attempt to “effect voluntary compliance with the [ADEA] through informal methods of conciliation, conference, and persuasion.” Id. § 626(b). The lawsuit must be brought within a two-year statute of limitations, unless the cause of action arises out of a willful violation, in which case the statute of limitations is three years. Id. § 626(e). For a detailed discussion of the procedural complexities of the ADEA, see Procedures—Age Discrimination in Employment Act, 29 C.F.R. § 1626.1-.19 (1989); 2 H. EGLIT, AGE DISCRIMINATION § 17 (1988); A. Ruzich, L. Jacobs & L. Thrasher, EMPLOYMENT DISCRIMINATION LITIGATION §§ 2.27-.33 (1989).

Nicholson v. CPC Int’l Inc., 46 Fair Empl. Prac. Cas. 1019, 1023 (D.N.J. 1988), aff’d, 877 F.2d 221 (3d Cir. 1989). In denying CPC’s motion to compel arbitration of the ADEA claim, the district court relied on its previous opinion in Steck v. Smith Barney, Harris Upham & Co., 661 F. Supp. 543 (D.N.J. 1987) which held that ADEA claims were nonarbitrable. Nicholson, 46 Fair Empl. Prac. Cas. at 1021. The district court rejected CPC’s argument that Steck, which was decided before the Supreme Court’s decision in McMahon, must be reassessed. Id. at 1023. The court found that the McMahon test had been adequately applied in Steck because the Steck court found a “Congressional intent to preclude waiver of judicial remedies under the ADEA.” Id. at 1022. The Steck court relied on the Supreme Court’s decisions in Alexander and Barrentine and the “analogous statutory schemes” of Title VII and the FLSA. Steck, 661 F. Supp. at 545-46. For a discussion of the Nicholson court’s reliance on the reasoning in Alexander and Barrentine, see infra notes 151-61 and accompanying text.

Nicholson, 877 F.2d at 223. CPC had requested the district court to certify its order denying arbitration for interlocutory appeal under 28 U.S.C. § 1292(b). Id.

The court cited the “federal policy favoring arbitration” expressed in Rodriguez, McMahon and Mitsubishi. Id. at 223-24. For a discussion of the federal policy favoring arbitration, see supra notes 86-113 and accompanying text.

McMahon, 482 U.S. at 226. For a discussion of the application of this test in McMahon and Rodriguez, see supra notes 100-11 and accompanying text. Under this test, Nicholson had the burden of showing that Congress intended that there be an exception to the FAA for arbitration of ADEA claims. This intent can be shown in the ADEA’s text or legislative history or by an inherent conflict between arbitration and the purposes of the ADEA. Nicholson, 877 F.2d at 224.

One commentator has stated that three primary issues exist with regard to the effect of arbitration on claims arising under the ADEA: (1) Can a grievant who loses an age discrimination complaint at arbitration pursue judicial relief under the ADEA or does the arbitrator’s decision have preclusive effect?; (2) If an ADEA suit may be pursued subsequent to an adverse arbitration award, how
Third Circuit affirmed the district court’s decision and held that Congress did not intend that the right to a judicial forum under the ADEA could be displaced by a predispute agreement to arbitrate.\textsuperscript{128}

B. Application of The Test of Arbitrability

In its application of the \textit{McMahon} test of arbitrability, the court first examined the text of the ADEA and found no reference to arbitration.\textsuperscript{129} The court next examined the legislative history of the ADEA and noted a careful structuring by Congress of the ADEA’s enforcement procedures.\textsuperscript{130} Congress chose to incorporate the enforcement provisions of the Fair Labor Standards Act (FLSA) into the ADEA.\textsuperscript{131} The FLSA provisions permit suits by either the Secretary of Labor or the injured individual.\textsuperscript{132} From this scheme, the majority concluded that “Congress made a deliberate policy choice in favor of enforcement of ADEA claims in court proceedings.”\textsuperscript{133}
Notwithstanding this conclusion, the majority found that the legislative history of the ADEA was not "conclusive" regarding arbitration of ADEA claims.\textsuperscript{134} The Nicholson majority proceeded to the second element of the McMahon test to determine whether there was an "inherent conflict" between arbitration and the purposes of the ADEA.\textsuperscript{135} The majority found a clear congressional intent that the EEOC oversee compliance with the ADEA.\textsuperscript{136} The EEOC's oversight and investigatory powers are triggered by the filing of a charge under the ADEA.\textsuperscript{137} The majority reasoned that because the filing of a charge with the EEOC is a prerequisite to court action under the ADEA, employees will have little incentive to file charges if they must resolve their claims in arbitration.\textsuperscript{138} Thus, the majority concluded that arbitration detracts from the EEOC charge process and undermines Congress' design of the ADEA.\textsuperscript{139} The majority also concluded that arbitrators lack the power to award appropriate relief under the ADEA.\textsuperscript{140} of limitations for filing suit under the ADEA for up to one year pending completion of EEOC conciliation efforts. See 29 U.S.C. § 626(e)(2) (1982). The majority concluded that this tolling provision suggests an intent that "extrajudicial methods of seeking resolution [i.e., conciliation] of age discrimination claims should not impede ultimate resolution of those claims in a judicial forum when extrajudicial methods prove[] inadequate." Nicholson, 877 F.2d at 226.\textsuperscript{134} Id. at 227. The majority also conceded that the explicit right to a jury trial under the ADEA, see 29 U.S.C. § 626(c)(2) (1982), was not a factor in determining congressional intent to preclude waiver of a judicial forum. Nicholson, 877 F.2d at 226 n.5. The Supreme Court ignored the effect of such a provision under RICO in McMahon and the Sherman Act in Mitsubishi.\textsuperscript{135} Nicholson, 877 F.2d at 227.\textsuperscript{136} Id. The court outlined the EEOC's obligation and powers to enforce the ADEA. See 29 U.S.C. § 626(a) (1982) (EEOC has power to investigate in accordance with § 9 and § 11 of FLSA); id. § 626(c) (power to effectuate voluntary compliance with statute through informal methods); id. § 628 (power to issue rules and guidelines); id. § 632 (submission of annual report to Congress); see also 29 C.F.R. § 1626.15(a) (1989) (EEOC may investigate, gather data, inspect records, interview employees); id. § 1626.16 (authority to issue subpoenas); id. § 1626.4 (EEOC may receive information concerning alleged ADEA violations "from any source" and conduct investigations "on its own initiatives"); id. § 1626.13 (EEOC has independent investigative authority despite request by charging party to withdraw charge).\textsuperscript{137} Nicholson, 877 F.2d at 227. For a discussion of the charge requirement, see supra notes 122-23 and accompanying text.\textsuperscript{138} Nicholson, 877 F.2d at 227. The majority stated that "of course, aggrieved parties can go to the EEOC in any event, as the dissent argues, but they are not likely to do so." Id. (emphasis in original). The majority, however, gave no support for this conclusion.\textsuperscript{139} Id. "Any procedure that detracts from [this] requirement would undermine Congress' design, since the charge not only informs the EEOC of the particular discrimination but also may identify other unlawful practices." Id.\textsuperscript{140} Id. at 228. The majority cited two reasons for this conclusion: (1) arbitrators do not have the same power as courts to award broad equitable relief under the ADEA; and (2) arbitration cannot proceed as a class action. Id. at 228-29. For a further discussion of the majority's arguments, see infra notes 194-201 and accompanying text.
The Nicholson majority found that this inherent conflict between arbitration and the ADEA was sufficient to override the mandate of the FAA and allow the plaintiff to pursue a judicial remedy. Judge Becker, in his dissent, made an in-depth application of the test of arbitrability and found nothing in the legislative history of the ADEA to indicate an intent by Congress to preclude waiver of a judicial forum. Further, he found no "inherent conflict" between arbitration and the purposes of the ADEA. Thus, Judge Becker found that neither element of the McMahon test was satisfied, mandating "rigorous" enforcement of Nicholson's arbitration agreement under the FAA.

IV. Analysis

The Nicholson court was faced with resolving the policies behind the ADEA and the FAA. Additionally, the court was faced with two "hybrid" problems: (1) the ADEA has been termed a "hybrid" statute because it incorporates provisions of both Title VII and the FLSA, and

141. Nicholson, 877 F.2d at 227, 231.

142. Id. at 236 (Becker, J., dissenting). The dissent rejected the majority's argument that a 1978 amendment to the ADEA tolling the statute of limitations, 29 U.S.C. § 626(e)(2), indicated legislative preference for a judicial forum. Id. (Becker, J., dissenting). The dissent pointed out that Congress passed the tolling amendment in response to fears that employers were improperly stalling conciliation attempts beyond the statute of limitations. Id. at 236 (Becker, J., dissenting).

143. Nicholson, 877 F.2d at 244 (Becker, J., dissenting). Judge Becker disagreed with the majority's contention that Congress intended for the EEOC to oversee all enforcement of the ADEA. Id. at 237 (Becker, J., dissenting). He found it significant that the EEOC had made a formal proposal that courts enforce voluntary settlement waivers of ADEA rights without EEOC supervision. Id. (Becker, J., dissenting). See 29 C.F.R. § 1627.16(c) (1989) (proposed rule allowing unsupervised waiver of ADEA rights). For a further discussion of this proposal, see infra note 182 and accompanying text.

144. Nicholson, 877 F.2d at 244 (Becker, J., dissenting).

145. Lorillard v. Pons, 434 U.S. 575, 578 (1978); compare Lorillard (FLSA case law should guide interpretation of ADEA remedial and procedural provisions) with Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-56 (1979) (Title VII case law guides interpretation of certain ADEA provisions). The ADEA incorporates the enforcement procedures of the FLSA. See supra notes 130-32 and accompanying text. Although Congress did not include age under Title VII, the substantive and procedural provisions of Title VII and the ADEA are similar. Compare 29 U.S.C. §§ 623, 630 (1982) (ADEA substantive provisions) with 42 U.S.C. §§ 2000e, e-2, e-3 (1982) (Title VII provisions). For a further comparison, see Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380 (1976). It is noted that despite the incorporation of FLSA provisions in the ADEA, the EEOC has stated that "one purpose of the ADEA is to encourage the voluntary and expeditious resolution of disputes. Thus, the ADEA is analogous to Title VII in this respect . . . ." Administrative Exemption Allowing for Waivers Under the ADEA, 50 Fed. Reg. 40,870, 40,871 (1985). This hybrid nature of the ADEA has caused much confusion to litigants. See Lake, ADEA: A Review of the Substantive Requirements, in AGE DISCRIMINATION IN EMPLOYMENT ACT, A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS 3, 8-10 (M. Lake ed. 1982) [hereinafter COMPLIANCE MANUAL].
Nicholson is a hybrid case. On the one hand, Nicholson’s employment discrimination claim invokes the history of labor arbitration and the non-arbitrability of claims under Title VII and the FLSA.146 On the other hand, the arbitration clause in Nicholson’s individual employment contract invokes the policy and history of arbitration under the FAA.147

The McMahon test of arbitrability provided clear guidelines for the court to resolve this hybrid case. It is submitted, however, that the Nicholson majority did not properly apply this test. Instead, the majority relied on several broad assumptions to support its decision: (1) Mitsubishi, McMahon and Rodriguez stand for the enforceability of arbitration agreements in “business” transactions only; (2) the Supreme Court’s analysis in Barrentine concerning the arbitrability of FLSA claims under a collective bargaining agreement provides guidance in this case; and (3) Congress intended that the ADEA be enforced in court proceedings. Due to such reliance, the holding of the Nicholson court exhibits the “old judicial hostility to arbitration”148 and a failure to heed the mandate of the FAA.149

A. Business or Employment Case?

Although the Nicholson court appeared to follow the mandate of the FAA in its application of the test of arbitrability, it characterized the Third Trilogy as “[a] line of cases enforcing arbitration agreements in the setting of business transactions.”150 The court stated that nothing in these “business” decisions suggested that the Supreme Court overruled its prior precedent in Barrentine, Alexander and McDonald (the “labor arbitration cases”) that an arbitration award does not preclude access to a judicial forum for the resolution of statutory claims.151 Instead of addressing the hybrid nature of this case, the court chose to rely solely on the policy and history of the labor arbitration cases.

146. For a discussion of the history and status of labor arbitration, see supra notes 30-61 and accompanying text.

147. For a discussion of the policy and history behind the FAA, see supra notes 62-112 and accompanying text.


149. For a discussion of the mandate of the FAA as set forth in the Third Trilogy, see supra notes 88-113 and accompanying text.

150. Nicholson, 877 F.2d at 224.

151. Id. The dissent noted that “[t]he Court has never evinced an interpretation of the FAA that would limit its application to commercial settings . . . . Under the Court’s analysis, the FAA mandates enforcement of private agreements to arbitrate unless contrary congressional intent is shown; whether the agreement is in a business setting is irrelevant.” Id. at 233 n.3 (Becker, J., dissenting). The dissent also suggested that there is little difference between a securities investor’s agreement to arbitrate, as in McMahon, and an arbitration agreement between a business executive (i.e., Nicholson) and his employer. Id. (Becker, J., dissenting).
The court attempted to distinguish *Nicholson* from the "business" cases by characterizing it as a labor arbitration case.\textsuperscript{152} *Nicholson* cannot be characterized as a labor arbitration case, however, because one key element is missing: the collective bargaining agreement.\textsuperscript{153} The labor arbitration cases were decided on the Supreme Court's belief that an individual's statutory rights are independent of the collective bargaining process.\textsuperscript{154}

A major concern expressed by the Supreme Court in the labor arbitration cases was that the union had exclusive control over the presentation of a grievant's claim in arbitration proceedings.\textsuperscript{155} For example, a union as collective bargaining agent may waive certain rights to obtain benefits for all employees of the bargaining unit.\textsuperscript{156} This "majoritarian" process is not present, however, in the context of an individual employment contract as in *Nicholson*.\textsuperscript{157} As aptly characterized by the dissent,

152. See id. at 225. The majority stated that "[o]ur consideration of the effect of the statutory scheme [of the FLSA] on the arbitrability of ADEA claims is, therefore, informed by the [Barrentine] decision." Id. The majority's sole response to CPC's argument that *Barrentine* is distinguishable from the present case was to "agree that further inquiry into the arbitrability of ADEA claims is warranted, although we must give due regard to the authority provided by Barrentine." Id.


155. In *McDonald* the Court stated that "when . . . the union has exclusive control over the 'manner and extent to which an individual grievance is presented' . . . [t]he union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously . . . ." *McDonald*, 466 U.S. at 291 (citing *Alexander*, 415 U.S. at 58 n.19, and *Barrentine*, 450 U.S. at 742). For a discussion of the *Alexander* Court's additional concerns of racial discrimination by the union, see supra note 49 and accompanying text.

156. See *Alexander*, 415 U.S. at 51, 58 & n.19.

157. *Nicholson*, 877 F.2d at 235 (Becker, J., dissenting). Again, instead of addressing the argument that the labor arbitration cases are distinguishable
the task of the Supreme Court in the labor arbitration cases was to decide "how best an individual's rights can be accommodated by the machinery of the collective bargaining process." The Nicholson court was not faced with such a task.

The labor arbitration cases relied upon by the majority were also based on a "general suspicion of the desirability of arbitration and the competence of arbitral tribunals." Such suspicions have clearly been rejected by the Supreme Court in the Third Trilogy. In light of these from Nicholson, the majority stated that "it does not follow, as CPC argues, that the arbitration requirement in individually negotiated employment contracts is therefore comparable to that contained in a contract entered into in a commercial context. The disparity in bargaining power between an employer and an individual employee is well known." Id. at 229. This argument lacks merit, however, because the employer is not representing the employee in the arbitration process. Furthermore, in the Third Trilogy, the Court pointed to the language of the FAA, 9 U.S.C. § 2, that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." See, e.g., Mitsubishi, 473 U.S. at 627. As the dissent in Nicholson points out, any problematic disparity in bargaining power could be used to attack the validity of the arbitration agreement. Nicholson, 877 F.2d at 241-43 (Becker, J., dissenting). Likewise, in Rodriguez, the Court found that this type of contractual relief served as an adequate protection for securities' buyers in their dealings with sellers. Rodriguez, 109 S. Ct. at 1921.

158. Nicholson, 877 F.2d at 232 (Becker, J., dissenting); see Alexander, 415 U.S. at 59-60 (Court characterized its task as one of "accommodation"); Note, supra note 39, at 403 (Alexander Court's "accommodation" viewed as refusal to extend policy favoring labor arbitration into conflict with antidiscrimination policy).

159. Nicholson, 877 F.2d at 234 (Becker, J., dissenting) (quoting McMahon, 482 U.S. at 231).

160. Id. (Becker, J., dissenting). In McDonald v. City of West Branch, 466 U.S. 284 (1984), the Supreme Court laid out four justifications for its decisions in Alexander and Barrentine: (1) an arbitrator is unable to resolve complex statutory issues; (2) arbitral factfinding is not equivalent to judicial factfinding; (3) an arbitrator must enforce the collective bargaining agreement, even if it is in conflict with public law; and (4) the interests of the union and the employee are not always compatible. Id. at 290-91. For a further discussion of these criticisms of arbitration, see supra notes 47-49 and accompanying text.

The Nicholson majority conceded that the first two justifications were rejected by the Supreme Court in the Third Trilogy. Nicholson, 877 F.2d at 229. In the Third Trilogy, the Court found that "arbitral tribunals are readily capable of handling the factual and legal complexities of [antitrust and securities] claims, notwithstanding the absence of judicial instruction and supervision." McMahon, 482 U.S. at 232; see Mitsubishi, 473 U.S. at 633-34. The third justification was also rejected in the Third Trilogy: "[T]here is no reason to assume at the outset that arbitrator will not follow the law." McMahon, 482 U.S. at 232 (citing Mitsubishi, 473 U.S. at 656-57 & n.19). As indicated above, the fourth justification is not applicable to this case. See supra notes 153-58 and accompanying text.

One commentator has carried the analysis of arbitrator expertise, evidentiary complexity and absence of discovery a step further. See Allison, Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies, 64 N.C.L. Rev. 219 (1986). Allison argues that decisions which criticize commercial, as opposed to labor, arbitration on these grounds evidence a "total unawareness of the varieties of arbitration procedure that are currently
distinguishing factors, it is arguable that the majority's reliance on the labor arbitration cases, specifically *Barrentine*, was misplaced.

It is further contended that the *Nicholson* court incorrectly concluded that the reasoning of the so-called "business cases" was inapplicable. The issue in *Nicholson* was whether the mandate of the FAA required enforcement of Nicholson's agreement to arbitrate.\(^{161}\) To override this mandate, the "business cases" required the plaintiff in *Nicholson* to show a contrary congressional command in the text, history or purposes of the ADEA.\(^{162}\) A complete application of the test of arbitrability reveals that arbitration is compatible with the history and purposes of the ADEA.

**B. A Complete Application of the Test of Arbitrability**

The test of arbitrability requires an examination of the text, legislative history and purposes of the ADEA.\(^{163}\) Although the ADEA is similar in content to both Title VII and the FLSA,\(^{164}\) the test requires an analysis of the singular scheme of the ADEA,\(^{165}\) without reliance on case law interpreting Title VII and the FLSA.\(^{166}\) The purposes of the ADEA employed to avoid litigation," and [an obsolete] conception of commercial arbitration solely as a 'businessman's remedy to resolve commercial-type disputes'."

*Id.* at 244 (quoting Aksen, *Arbitration and Antitrust—Are They Comparable?,* 44 N.Y.U. L. Rev. 1097, 1105 (1969)). Allison concludes that the inherent flexibility in the arbitrator selection process allows for greater arbitrator expertise. *Id.* Allison also points out that limited discovery is available in arbitration proceedings under the FAA. *Id.* at 248; see 9 U.S.C. § 7 (1988) (providing arbitrator with complete subpoena power). With this power, for example, the arbitrator could subpoena evidence and conduct discovery at a prehearing conference. Allison, *supra*, at 248. Additionally, there is potential for court-ordered discovery in aid of arbitration. *Id.* at 250; see, e.g., Conn. Gen. Stat. § 52-412 (1982 & Supp. 1989); N.Y. Civ. Prac. L. & R. 3102(c) (McKinney 1970); 42 Pa. Cons. Stat. Ann. § 7309(a) (Purdon 1981). Courts are becoming less reluctant to order such discovery. Allison, *supra*, at 250; see generally Domke, *supra* note 3, § 27:00 (court assistance in arbitration discovery proceedings).

162. *Id.* (citing *McMahon*, 482 U.S. at 227).
164. For a discussion of the "hybrid" nature of the ADEA, see *supra* note 145 and accompanying text.
165. *Nicholson*, 877 F.2d at 224. Although the *Nicholson* majority acknowledged this point, it stated that it would be guided by the labor arbitration cases and the Third Trilogy. *Id.* It is contended, however, that the court allowed itself to be guided primarily by the labor arbitration decisions and did not apply a discrete analysis of the ADEA scheme.
166. See Coventry v. United States Steel Corp., 856 F.2d 514, 521 n.8 (3d Cir. 1988) (rejecting notion that ADEA should be interpreted as consistent with FLSA in every instance). Courts often choose to interpret the ADEA in accordance with Title VII or FLSA case law, depending on which position is being supported. See Note, *Waiver of Rights Under the Age Discrimination in Employment Act of 1967*, 86 Colum. L. Rev. 1067, 1070 (1986) (outcome in ADEA waiver cases turns on whether court views FLSA or Title VII precedent as controlling).
are unique and distinguishable from those of Title VII and the FLSA.\textsuperscript{167} Furthermore, it is contended that an analysis of Nicholson is not dependent on any distinction between Title VII and the FLSA, but on the distinction between arbitration under a private contract and under a collective bargaining agreement.\textsuperscript{168}

1. Legislative History

The Nicholson majority, while not finding it conclusive, determined that the legislative history of the ADEA established a congressional intent “in favor of enforcement of ADEA claims in court proceedings.”\textsuperscript{169} The majority based its conclusion on Congress’ incorporation of the FLSA enforcement scheme into the ADEA.\textsuperscript{170} An analysis of the legislative history of the ADEA, however, reveals that Congress adopted the FLSA enforcement scheme for reasons of expediency and not because of a preference for court proceedings.\textsuperscript{171}

It is further contended that a proper analysis of the legislative history of the ADEA would have included the role of conciliation in ADEA enforcement.\textsuperscript{172} The ADEA vests primary enforcement power with the EEOC, and the individual’s right of action under the ADEA is “secon-

\textsuperscript{167} Note, supra note 166, at 1077-79; see House Hearings on ADEA, supra note 130 at 449 (remarks of Sen. Burke) (“Age discrimination is not the same as the invidious discrimination based on race or creed prejudices and bigotry.”); Note, supra note 145, at 395-98 (Title VII serves comprehensive social functions of ameliorating widespread effects of past discrimination and providing positive role models; same cannot be said of ADEA).

\textsuperscript{168} For a discussion of the distinctions between arbitration under an individual contract and a collective bargaining agreement, see supra notes 153-58 & infra notes 205-14 and accompanying text.

\textsuperscript{169} Nicholson, 877 F.2d at 226. For a complete discussion of the grounds supporting the majority’s conclusion, see supra notes 130-33 and accompanying text.

\textsuperscript{170} Nicholson, 877 F.2d at 226.

\textsuperscript{171} Congress chose the FLSA enforcement scheme, with the Department of Labor as primary enforcer, because of a consensus that the EEOC, which was originally created to process Title VII complaints, was overburdened. See Senate Hearings on ADEA, supra note 130, at 24-25 (statement of Sen. Javitz). Congress felt that ADEA complaints would be handled more efficiently by the Wage and Hour Division of the Department of Labor. Id. Since the incorporation of the FLSA enforcement scheme, responsibility for ADEA enforcement has been transferred from the Department of Labor to the EEOC. See Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321 (1979), reprinted in 5 U.S.C. app. at 1366 (1988) and in 92 Stat. 3781 (1978). It is further noted that when the EEOC took over this responsibility, it officially stated that regulations pertaining to ADEA enforcement should “be interpreted in a manner which is consistent with Title VII of the Civil Rights Act of 1964,” not the FLSA. 44 Fed. Reg. 68,858 (1979).

\textsuperscript{172} See H.R. REP. No. 805, 90th Cong., 1st Sess. 5-6 (1967), reprinted in 1967 U.S. CODE CONG. & ADMIN. NEWS 2218 (“It is intended that the responsibility for enforcement vested in the [EEOC] . . . be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense.”).
The ADEA directs that the EEOC effect enforcement primarily through “informal methods of conciliation, conference, and persuasion.” Only if this informal approach fails to result in voluntary compliance can a formal court action be commenced. In addition to conciliation by the EEOC, the ADEA requires resort to available state remedies before a federal action is permitted.

The Nicholson majority analyzed the conciliatory role of the EEOC in its discussion of “inherent incompatibility.” The majority stated that “[t]he EEOC’s role in conciliation . . . is another significant indicator of Congress’ intent as to the procedure it preferred to be followed for age discrimination claims.” It is ironic that this aspect of Congress’ intent was not mentioned in the majority’s “legislative history” analysis. The majority’s discussion of Congress’ preference for conciliation is incompatible with its conclusion that Congress intended for enforcement of ADEA claims in court proceedings.

As a result of the Nicholson majority’s misreading of Congress’ incorporation of the FLSA into the ADEA and its failure to properly consider the ADEA’s conciliation process in its examination of the statute’s legislative history, the first element of the test of arbitrability was not satisfied. Thus, the legislative history of the ADEA is conclusive regarding the arbitration of ADEA claims—Congress showed no intent to preclude

173. Nicholson, 877 F.2d at 224. Prior to filing suit, an individual must file a charge with the EEOC and wait 60 days before filing suit while the EEOC attempts to effect “voluntary compliance.” 29 U.S.C. § 626(d) (1982). This conciliation provision is not incorporated from the FLSA. See Rogers v. Exxon Research & Eng’g Co., 550 F.2d 834, 841 (3d Cir. 1977) (Congress preferred conciliation and mediation as the “most favored method of enforcement” of ADEA), cert. denied, 434 U.S. 1022 (1978). The right of an individual to bring suit terminates upon commencement of an action by the EEOC. 29 U.S.C. § 626(c) (1982).


175. Id. § 626(d). When the EEOC brings suit, courts will ensure that prior EEOC conciliation attempts were adequate. See Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974) (EEOC must use “exhaustive” attempts to conciliate before legal action begun); Note, Age Discrimination in Employment: Available Federal Relief, 11 Colum. J.L. & Soc. Probs. 281, 291 (1975) (“Because the ADEA emphasizes compliance through conciliation rather than court action, the courts have properly asked not only whether there was an attempt at conciliation, but also whether the attempt made was adequate.”).


177. Nicholson, 877 F.2d at 227. For a discussion of the majority’s argument that there is an inherent conflict between arbitration and the purposes of the ADEA, see supra notes 135-41 and accompanying text.

178. Nicholson, 877 F.2d at 228. The majority also cited “Congress’ clear intent that compliance with the ADEA be overseen by [the EEOC].” Id. at 227 (emphasis added). Although the court was attempting to establish the role of the charge process in the EEOC enforcement scheme and that arbitration interferes with the process, it is submitted that the court was in fact outlining congressional intent. A proper analysis of the legislative history of the ADEA should have included the role of the conciliation process.
2. **Inherent Conflict**

With regard to the second element of the test of arbitrability, the majority made several attempts to establish an inherent conflict between arbitration and the purposes of the ADEA. The majority's central argument was that Congress intended for the EEOC to oversee enforcement of the ADEA, and private arbitration of ADEA claims interferes with this scheme. The dissent disagreed with the majority's position, noting that the EEOC has made a formal proposal that courts enforce voluntary waivers of ADEA rights without EEOC supervision. Thus, the EEOC itself does not support the majority's conclusion that the EEOC must oversee all enforcement of the ADEA. In fact, due to the incredible backlog in EEOC investigations, it is now impossible for the

179. See id. at 236 (Becker, J., dissenting).
180. Id. at 227-29. The majority set forth the following reasons: (1) arbitration interferes with the EEOC's oversight authority; (2) arbitration detracts from the EEOC charge requirement; and (3) arbitrators lack the power to award appropriate equitable or class relief under the ADEA. Id. See supra notes 135-41 and accompanying text.
181. Nicholson, 877 F.2d at 227. For a discussion of the EEOC's oversight and investigatory powers, see supra note 136 & infra notes 191-92 and accompanying text.
182. Nicholson, 877 F.2d at 237 (Becker, J., dissenting); see Note, Waivers Under the Age Discrimination in Employment Act: Putting the Fair Labor Standards Act Criteria to Rest, 55 Geo. Wash. L. Rev. 382, 384 (1987) ("waiver" refers to a contractual waiver of rights made in exchange for valuable consideration). There is a general consensus in the courts that private waiver of ADEA claims is not inconsistent with the ADEA. See Bormann v. AT & T Communs., Inc., 875 F.2d 399, 403 (2d Cir.), cert. denied, 110 S. Ct. 292 (1989) (release of ADEA claims in private settlement without EEOC supervision is permissible); Coventry v. United States Steel Corp., 856 F.2d 514, 518 (3d Cir. 1988) (employee may execute knowing and willful waiver of ADEA claim); Runyan v. National Cash Register Corp., 787 F.2d 1039, 1045 (6th Cir. 1986) (private, unsupervised waiver of employee's claim is valid means of settlement), cert. denied, 479 U.S. 850 (1986); see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 & n.15 (1974) (setting forth possibility of knowing and voluntary waiver of rights under Title VII).


EEOC to be so involved.\textsuperscript{184}

In enforcing the ADEA, the EEOC must encourage resolution of disputes through "informal" methods of conciliation and mediation.\textsuperscript{185} Arbitration, another informal method of dispute resolution, is thus consistent, rather than in conflict with the purposes of the ADEA.\textsuperscript{186} The majority even recognized that an employee's voluntary submission of his or her ADEA claim to arbitration was consistent with the purposes of the ADEA.\textsuperscript{187} As the dissent pointed out, the majority failed to explain why parties should be permitted to bypass the oversight of the EEOC voluntarily but not through enforcement of an arbitration agreement.\textsuperscript{188} Thus, parties should not be precluded from bypassing the EEOC through enforcement of a voluntarily executed arbitration agreement.

The majority also found that arbitration interferes with the ADEA charge requirement.\textsuperscript{189} The dissent found that the facts of this case run counter to such a conclusion.\textsuperscript{190} As previously noted, the EEOC has

\textsuperscript{184} See generally The EEOC’s Performance in Enforcing the Age Discrimination in Employment Act: Hearing Before the Senate Special Comm. on Aging, 100th Cong., 2d Sess. 2 (1988) (since 1984, EEOC delay has caused upwards of 7,500 ADEA charges to exceed statute of limitations for filing suit); EEOC Delays in Processing Age Discrimination Charges: Hearing Before Subcomm. of the House Comm. on Gov’t Operations, 100th Cong., 2d Sess. 44 (1988) (total number of lawsuits filed by EEOC has increased by 100% from 1982-1987 while congressional appropriations have decreased); see also Age Discrimination Claims Assistance Act of 1988, P.L. 100-283, 102 Stat. 78 (1988) (allowing for parties to bring civil action when EEOC delay causes running of statute of limitations).

\textsuperscript{185} See 29 U.S.C. § 626(b) (1982).

\textsuperscript{186} The dissent also noted legislative history of Congress’ intent that the ends of the ADEA be achieved by bargaining between employee and employer without supervision by any neutral arbiter: "[T]he Act should allow the employee to ‘resolve the dispute himself or work out a compromise with an employer.’ " Nicholson, 877 F.2d at 241 n.13 (Becker, J., dissenting) (quoting 123 CONG. REC. S17275 (daily ed. Oct. 19, 1977) (remarks of Sen. Williams)). Further, it has been suggested that the EEOC may arbitrate a claim under its authority to seek "voluntary compliance." See Morgan v. Washington Mfg. Co., 660 F.2d 710, 711 (6th Cir. 1981) (Congress created EEOC to encourage reconciliation and arbitration of employee grievances prior to litigation).

\textsuperscript{187} Nicholson, 877 F.2d at 229 n.9.

\textsuperscript{188} Id. at 241 n.13 (Becker, J., dissenting). The majority’s approval of voluntary arbitration after a dispute arises is also inconsistent with its conclusion that the disparity of bargaining power between an employer and older employees affects an employee’s decision to sign a standard predispute arbitration agreement. Id. at 229. The majority fails to point out any difference in bargaining power in the two situations.

\textsuperscript{189} Id. at 227. For a discussion of the majority’s argument, see supra notes 136-41 and accompanying text.

\textsuperscript{190} Nicholson, 877 F.2d at 238 (Becker, J., dissenting). Nicholson filed a charge with the EEOC and then withdrew the charge in order to file suit. Id. (Becker, J., dissenting). Thus, the EEOC had an opportunity to investigate, conciliate or file suit, and its involvement was not lessened because of Nicholson’s arbitration agreement. Id. (Becker, J., dissenting).
investigative authority that is independent of the charge process. Thus, the plaintiff in Nicholson, by signing an agreement to arbitrate, did not sign away the EEOC's power to investigate or bring suit under the ADEA. Rather, Nicholson had only signed away his individual right to bring suit, "a right which is secondary to the enforcement powers of the EEOC."

In its "inherent conflict" analysis, the majority also tried to show that arbitration is not an adequate forum for enforcement of the ADEA. The majority found the arbitration process inadequate because arbitral tribunals do not possess the power of courts to award "broad equitable relief." It is suggested that the majority's concern stems from a concept in labor arbitration that an arbitrator is limited to the terms of the bargain and must enforce the bargain over the public law. A private agreement to arbitrate, such as that involved in Nicholson, however, differs greatly from a collective bargaining agreement.

191. For a discussion of the EEOC's investigatory power, see supra note 136 and accompanying text.
192. Nicholson, 877 F.2d at 238 (Becker, J., dissenting). The charge mechanism is only a prerequisite to an individual's right to bring suit and does not affect the primary investigative role of the EEOC. Investigations may be initiated by any information available, such as a confidential complaint, news stories or employer advertisements. See Williams, EEOC's ADEA Enforcement Policies and Procedures, in Compliance Manual, supra note 145, at 256, 264.
193. Nicholson, 877 F.2d at 238 (Becker, J., dissenting) (citing Rogers v. Exxon Research & Eng'g Co., 550 F.2d 834, 841 (3d Cir. 1977) (private lawsuits secondary to conciliation and suits by EEOC), cert. denied, 434 U.S. 1022 (1978)). The majority found that employees will have little incentive to file charges if they must arbitrate their claims and cannot thereafter proceed to a judicial forum. Id. at 227. The dissent noted that an arbitration agreement may not preclude an aggrieved party from filing a charge with the EEOC. Id. at 239 (Becker, J., dissenting) (citing EEOC v. Cosmair, Inc., 821 F.2d 1085, 1089-90 (5th Cir. 1987) (waiver of right to file charge with EEOC void as against public policy)). The dissent further noted that an employee who must proceed to arbitration may have an incentive to file an ADEA charge in order to seek investigatory assistance from the EEOC. Id. at 238 (Becker, J., dissenting).
194. Id. at 228-29.
195. Id. at 228; see 29 U.S.C. § 626(b) (1982) (court shall grant legal or equitable relief necessary to effectuate purposes of ADEA).
196. For a discussion of this concept, see supra notes 33, 47 & infra note 197 and accompanying text. This argument has been rejected by the Supreme Court in the Third Trilogy: "[T]here is not reason to assume at the outset that arbitrators will not follow the law . . . ." McMahon, 482 U.S. at 232.
197. See Nicholson, 877 F.2d at 235 (Becker, J., dissenting). The scope of the arbitration agreement and the power of the arbitrator in Nicholson's individual employment contract were very broad. For the text of this provision, see supra note 120 and accompanying text. Because of the broad arbitration provisions in commercial contracts, arbitrators are free to apply the applicable law. See generally Domke, supra note 3, §§ 25-00-04. In contrast, arbitration clauses in collective bargaining agreements are very limiting on the arbitrator. See, e.g., Alexander, 415 U.S. at 40 n.3 ("The arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agree-
Additionally, although the ADEA does not provide for arbitration, the American Arbitration Association (AAA) Rules provide for broad equitable remedies by an arbitrator. 198 Thus, the AAA Rules applicable to this case provide ample authority to protect and enforce an individual's rights under the ADEA.

As a final point, the majority found arbitration procedures inadequate because an arbitrator could not provide class relief. 199 Courts currently are not in agreement on whether arbitration can proceed as a class action. 200 However, as the dissent argued, even if Nicholson were...
forced to arbitrate his ADEA claim, this would in no way prevent the EEOC from investigating other incidents of age discrimination at CPC.\textsuperscript{201} If attempts at voluntary compliance failed, the EEOC could then bring an action on behalf of a class. Thus, the fact that the ADEA provides for the possibility of a class action does not mean that ADEA claims cannot be enforced in arbitration proceedings.

In conclusion, the plaintiff in Nicholson failed to demonstrate an inherent conflict between arbitration and the purposes of the ADEA. Thus, the second element of the McMahon test of arbitrability was not satisfied. In fact, arbitration could work to ease the backlog of the EEOC and is thus compatible with the purposes of the ADEA.\textsuperscript{202} This Note supports Judge Becker's dissenting opinion in Nicholson that nothing in the text, history or purpose of the ADEA provides a "contrary congressional command" to override the mandate of the FAA.\textsuperscript{203}

C. Beyond the Test

Because of the hybrid nature of Nicholson, it is important to look beyond the test of arbitrability and consider the concerns expressed in the labor arbitration cases that arbitration cannot adequately protect an individual's statutory rights.\textsuperscript{204}

One concern expressed by the Court in the labor arbitration cases is common to the arbitrations. Domke, supra note 3, § 27:02. However, the role of consolidation is left to the courts and not provided for in the AAA Rules. Id. Consolidation is arguably similar in purpose to the class action. See Keating v. Superior Court, 31 Cal. 3d 584, 611-12, 645 P.2d 1192, 1208-09, 183 Cal. Rptr. 360, 376-77 (1982), appeal dismissed in part, rev'd in part, sub nom. Southland Corp. v. Keating, 465 U.S. 1 (1984). The Supreme Court of California has found no legal bar to arbitration by a class. See id. The California view, however, has not been embraced in the small number of courts considering this issue. See, e.g., Harris v. Shearson Hayden Stone, Inc., 82 A.D.2d 87, 441 N.Y.S.2d 70 (1981) (ordering arbitration of claims individually, not as class), aff'd, 56 N.Y.2d 627, 453 N.E.2d 482 (1982); see generally Note, Classwide Arbitration: Efficient Adjudication or Procedural Quagmire, 67 V. L. REV. 789 (1981).

201. Nicholson, 877 F.2d at 238 (Becker, J., dissenting).

202. For a discussion of the present EEOC backlog, see supra note 184 and accompanying text. There is no indication that this backlog will improve. See EEOC Enforcement of the ADEA: Hearing Before the House Select Comm. on Aging, 96th Cong., 2d Sess. 68 (1980) (EEOC reported backlog of 4,000 unprocessed ADEA cases in first year of administration of ADEA). It is estimated that the number of employees subject to the ADEA's protection will increase to 60 million by the year 2000 as the working population ages. See Age Bias Claims Mount as Demographic, Legal, Economic Pressures Increase, DAILY LAB. REP. (BNA) No. 53, at c-1 (Mar. 19, 1985). The EEOC's power is thus greatly diminished by this backlog. For the discussion of a proposal to ease this backlog, while protecting ADEA claimants, see infra notes 225-37 and accompanying text.

203. See Nicholson, 877 F.2d at 244; see also Misunderstood Labor Cases, supra note 153, at 3, col. 1 (anticipating that Judge Becker's dissenting views will be upheld by Supreme Court).

204. For a discussion of these concerns, see supra notes 47-49, 155 & 160 and accompanying text.
was the constraint on arbitrators to apply the terms of the collective bargaining agreement, rather than external law. In *Alexander v. Gardner-Denver* the Court was concerned that an arbitrator would not be bound to follow the directives of Title VII in deciding a discrimination grievance because “[w]here the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement.”205 In contrast, arbitration agreements in individual employment contracts are usually broad, creating no conflicts for the arbitrator in choosing to enforce the law or the terms of the agreement.206 There is presently a debate in labor arbitration circles as to what extent the arbitrator may apply public law concepts.207 The concerns in this debate, however, are inapplicable to arbitration under the FAA.208 Further, the FAA provision for judicial review of arbitration awards helps to ensure that arbitrators are complying with statutory purposes and remedies.209

In the labor arbitration cases the Court was also concerned that the union’s control of the arbitration process might result in inadequate representation of an employee’s individual statutory rights.210 Although that concern was not an issue in *Nicholson* which involved an individual employment contract, the *Nicholson* majority expressed that a similar type of disparity of bargaining power exists between the employer and older employees.211 While the majority’s concern deserves

205. *Alexander*, 415 U.S. at 57. For a further discussion of this concern, see *supra* note 47 and accompanying text.

206. For a discussion of this difference in the scope of arbitration agreements, see *supra* note 197 and accompanying text.

207. For a discussion of this debate, see *supra* note 197 and accompanying text.

208. See *supra* notes 197-98 and accompanying text. Under the AAA Rules, the arbitrator is generally not limited in his or her application of external law in arbitration proceedings. See *supra* note 198 and accompanying text. The Employment Rules were drafted so that arbitrators, well versed in legal concepts, could determine statutory rights. See Coulson, *supra* note 120, at 24.

209. See 9 U.S.C. § 10 (1988). The FAA provides the following grounds for review of an arbitration award: (1) procural of award by fraud or corruption, id. § 10(a); (2) evident partiality of the arbitrator, id. § 10(b); (3) arbitrator misconduct, id. § 10(c); and (4) arbitrator’s abuse of powers, id. § 10(d). For the full text of this provision, see *supra* note 71 and accompanying text. Under 9 U.S.C. § 10(d), a court may consider the appropriateness or ambiguity of the award. See Ray, *supra* note 38, at 88. In many cases, this section has provided the basis for a court to remand a matter to the arbitrator for clarification of the scope of an award or to clarify its application. See id. Although the “abuse” standard is difficult to meet, the Court in *Shearson/American Express*, Inc. v. *McMahon*, 482 U.S. 220 (1987), found that judicial review under § 10 of the FAA is “sufficient to ensure that arbitrators comply with the requirements of the [securities] statute. Id. at 232.

210. For a discussion of the Court’s reasoning, see *supra* note 49 and accompanying text.

211. *Nicholson*, 877 F.2d at 229. The court stated:
Older employees who have invested many years of their career with a particular employer may lack any realistic option to refuse to sign a standard form arbitration agreement presented to them by their em-

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consideration, procedural safeguards already exist which protect elderly employees from such disparity of bargaining power: (1) the FAA provides that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract;” 212 (2) the aged employee can choose counsel and the procedures to be followed in an arbitration proceeding; 213 and (3) despite an agreement to arbitrate, an individual may still file a charge with the EEOC to protect his or her rights and those of similarly situated employees. 214

Finally, in addition to the concerns expressed in the labor arbitration cases, the Nicholson majority was troubled by the EEOC’s lack of supervisory authority over private arbitration procedures. 215 The majority contrasted this absence of regulatory power with the power of the Securities and Exchange Commission (SEC) to ensure the adequacy of arbitration procedures employed in securities disputes. 216 However, as noted by the dissent, the power of an administrative agency to regulate arbitration cannot be dispositive of whether the FAA will be enforced. 217 While no agency issues regulations with respect to arbitration of RICO or antitrust claims, the Supreme Court upheld the arbitrability of such claims in Rodriguez and McMahon. 218 Additionally, the ADEA provides the EEOC with broad power to implement regulations in enforcing the ADEA. 219 Thus, the EEOC could use this power

players .... Although this may not constitute the type of duress which renders a contract voidable, we cannot close our eyes to the realities of the workplace.

Id.

212. See 9 U.S.C. § 2 (1988). The majority appears to be arguing that this provision of the FAA is not an adequate protection. As the dissent points out, however, the relative bargaining power of the parties is a relevant consideration for a court in determining whether to enforce a contract to arbitrate. Nicholson, 877 F.2d at 242 (Becker, J., dissenting).

213. If, as in Nicholson, the AAA Rules apply, the parties themselves have the power to formulate the arbitration procedure. For a discussion of these rules, see supra notes 120 & 198 and accompanying text. Both the Employment and Commercial Arbitration Rules provide for representation by counsel. See Rule 9, Employment Rules, and Rule 22, Commercial Rules, supra note 120.

214. For a discussion of the individual’s right to file a charge and the EEOC’s broad investigatory powers, see supra notes 136 & 193 and accompanying text.

215. Nicholson, 877 F.2d at 228 (“[N]o statutory provision gives the EEOC the power to affect the arbitration procedure.”).

216. Id. In McMahon the Supreme Court emphasized that the 1975 amendments to § 19 of the Securities Exchange Act of 1934 gave the SEC broad power to regulate the arbitration procedures used by self-regulatory organizations (SROs). McMahon, 482 U.S. at 223. Under these rules, no proposed SRO arbitration rule change may take effect without SEC approval. See 15 U.S.C. § 78s(b) (1988). The SEC has the power to “abrogate, add to, and delete from” any SRO rule. See id. § 78s(c). For a further discussion of these provisions, see supra note 103 and accompanying text.

217. Nicholson, 877 F.2d at 239 (Becker, J., dissenting).

218. Id. (Becker J., dissenting).

219. See 29 U.S.C. § 628 (1982) (EEOC “may issue such rules and regula-
V. RECOMMENDATION AND CONCLUSION

"[D]elay is always unfortunate, but it is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left." Due to excessive delays by the EEOC and in the courts, arbitration is an appropriate alternative to a judicial forum for protecting individual's rights under the ADEA. The Supreme Court has recognized the need for a strong federal policy favoring arbitration. A proposal of specific procedural requirements for arbitration of ADEA claims is the best response to the needs of ADEA claimants and the mandate of the FAA.

A. A Proposal

A proposal for final and binding arbitration of ADEA claims should include the following provisions:

220. The EEOC already uses this power to define EEOC enforcement authority. See, e.g., 29 C.F.R. § 1626.15 (1989). The EEOC has also used this power to propose a procedure for settlement of ADEA claims through private waivers of ADEA rights without EEOC supervision. See 29 C.F.R. § 1627.16(c) (1989). For a further discussion of this proposed regulation, see supra note 182 and accompanying text.

221. Senate Hearings on ADEA, supra note 130, at 24 (statement of Sen. Javitz).

222. For a discussion of the backlog in EEOC investigations and in the federal courts, see supra notes 1, 184 & 202 and accompanying text.

223. For a discussion of this policy, see supra notes 9-12 & 82-113 and accompanying text.

224. This proposal could take the form of an EEOC regulation, an amendment to the ADEA or an amendment to the FAA. A proposed EEOC regulation is particularly vulnerable to challenges in court or from subsequent EEOC administrators. In contrast, a congressional statement that final arbitration of ADEA claims is a legitimate means of carrying out the purposes of the ADEA would eliminate inconsistent court decisions. See Note, supra note 182, at 405 (discussing inconsistent interpretation of waiver proposal). For an example of the courts' inconsistency in determining arbitrability of ADEA claims, see supra note 118 and accompanying text.

Additionally, the Nicholson majority stated that if Congress desires to "[shift] enforcement of the ADEA away from the courts to arbitration," Congress should explicitly so state. Nicholson, 877 F.2d at 231. Congress has already responded to the incredible EEOC backlog by enacting legislation to allow ADEA claimants to bring suit after the expiration of the statute of limitations due to EEOC delay. See Age Discrimination Claims Assistance Act of 1988, Pub. L. No. 100-283, 102 Stat. 78 (1988). A similar amendment to the ADEA providing procedures for final and binding arbitration would be the most effective method for carrying out this proposal.
(1) **Waiver of the Procedural Forum**

(a) A predispute agreement to arbitrate ADEA claims arising under an employment contract is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."\(^{225}\)

(b) Such agreement is enforceable under the Federal Arbitration Act.\(^{226}\)

(2) **Rules for Arbitration Procedures**

(a) It is recommended that such arbitration agreements provide for arbitration according to the Rules of the American Arbitration Association (AAA), as amended from time to time.\(^{227}\)

(b) If the agreement provides for arbitration under the AAA Rules, the AAA Employment Dispute Arbitration Rules should be followed, as amended from time to time.\(^{228}\)

(c) If the agreement does not provide for the use of such rules, the arbitration procedures must meet the requirements of section (3).

(3) **Alternate Rules**

An arbitration award shall be considered valid and final if the arbitration proceeding contains the following essential elements:\(^{229}\)

(a) Adequate notice to persons who are to be bound by the proceeding;

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportu-

\(^{225}\) This heading embodies the standard set forth by Judge Becker's dissent in *Nicholson*. See 877 F.2d at 241 (Becker, J., dissenting). The dissent believed that waiver of the judicial forum is not precluded by the ADEA, yet remained sensitive to the possibility that the agreement to arbitrate resulted from fraud or "overwhelming economic power." *Id.* (Becker, J., dissenting). Judge Becker emphasized that "careful attention would have to be paid . . . to these basic contract principles." *Id.* at 242 (Becker, J., dissenting).

\(^{226}\) This standard is copied from § 2 of the FAA. See 9 U.S.C. § 2 (1988).

\(^{227}\) This provision incorporates Chapter 1 of the FAA. See id. §§ 1-15. The FAA provisions are essential for the enforcement of arbitration agreements and judicial review of arbitration awards. For a discussion of these provisions, see *supra* notes 66-73 and accompanying text.

\(^{228}\) This provision attempts to respond to criticisms that arbitral procedures are inadequate to protect employee rights. For a discussion of these criticisms, see *supra* notes 46-49 & 205-15 and accompanying text.

\(^{229}\) For a discussion of the AAA Rules, see *supra* notes 2, 120 & 198 and accompanying text. The AAA has the capacity to supervise arbitration proceedings and could be instrumental in carrying out a proposal for final and binding arbitration of ADEA claims.

\(^{230}\) *See id.* The Employment Rules provide for discovery, formal rules of evidence, and other procedural safeguards which are usually lacking in labor arbitration and under the Commercial Rules.

\(^{231}\) These provisions are taken from *Restatement (Second) of Judgments* § 84 (1982). Section 84(3)(b) states that arbitration proceedings which provide the essential elements of adjudication outlined in § 83(2) are entitled to preclusive effect.

\(^{232}\) *See id.* § 83(2)(a).
nity to rebut evidence and argument by opposing parties; 233

(c) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; 234 and

(d) Such other procedural elements as may be necessary to make the proceeding sufficient to determine the matter in question conclusively, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions. 235

(4) Arbitration under these rules shall in no way effect the EEOC’s rights and responsibilities to enforce the ADEA. 236

B. Conclusion

The majority opinion in Nicholson does not demonstrate the requisite “contrary congressional command” in the ADEA to override the mandate of the FAA. As demonstrated above, the concerns of the labor arbitration cases are inapplicable to the present case and arguably outdated given the Supreme Court’s present overwhelming support for arbitration. Furthermore, the procedural safeguards provided by the FAA, the EEOC investigative process and the AAA Rules can provide adequate protection of employee rights under the ADEA. Therefore, agreements to arbitrate ADEA claims must be enforced.

The above proposal would remove any criticisms or inadequacies of arbitration that may remain, despite the Supreme Court’s declaration of the mandate of the FAA. The present enforcement structure of the ADEA has proven inadequate. 237 If the proposed recommendation is implemented, arbitration can be used as an adequate alternative for the protection of the rights of ADEA claimants. The proposal should cause courts and arbitrators to focus on the formation of the arbitration agreement, the proper application of the provisions and remedies of the ADEA and the adequacy of the arbitration procedure. ADEA claimants will be given the rights and protections traditionally accorded to contracting parties under the FAA, and additional safeguards required by their “employee” status.

Leslie M. Gillin

233. See id. § 83(2)(b).
234. See id. § 83(2)(d).
235. See id. § 83(2)(e).
236. This provision is adopted from 29 C.F.R. § 1627.16(c) (1989) (EEOC proposal for unsupervised waivers). For a discussion of this proposal, see supra note 182 and accompanying text.
237. For a discussion of the EEOC backlog, see supra notes 184 & 202 and accompanying text.